



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA59/2016

In the matter between:

CENTRAL UNIVERSITY OF TECHNOLOGY

Appellant

and

E J CHANNER

First Respondent

PEHELO MOTAKE NO

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION (FREE STATE)

Third Respondent

Heard: 17 August 2017

Delivered: 01 November 2017

Summary: Review of arbitration award – employee dismissed for flouting quotation processes and disobeying a lawful instruction from his superior – held that holistically, the evidence evinces a scheme of quotation rigging perpetrated by the employee to ensure that a certain service provider gets the contract. To attain that objective, the employee deliberately manipulated the quotation processes to secure the services of his preferred service provider. Such conduct is dishonest and fosters corrupt practice that enervates the effectiveness, and destroys the fundamental requisite fairness, of the procurement processes of public bodies conducted by means of obtaining quotations. The sanction of dismissal was appropriate. The failure of the Commissioner and of the court *a quo* to find accordingly, is regrettable. A

reasonable commissioner would have concluded differently. Appeal upheld and judgment *a quo* set aside.

Coram: Tlaetsi DJP, Coppin and Sutherland JJA.

JUDGMENT

COPPIN JA

- [1] This is an appeal against the order of the Labour Court (Coetzee AJ), dismissing an application brought by the appellant (the university) to review an award made by the second respondent (the Commissioner), acting under the auspices of the third respondent (CCMA), in terms of which the first respondent (employee) was reinstated in his employment at the university and the latter was ordered to pay the employee back pay. Leave to appeal was granted on petition to this Court.
- [2] There was no appearance by or for the employee in this Court, and neither were heads of argument filed by or on his behalf.
- [3] At the time of the employee's dismissal, he had been employed by the university for a period in excess of 20 years. He was essentially engaged in the Maintenance Department. His dismissal resulted from his work in assisting the facilities management section to obtain quotations from service providers for the painting of a devil's fork fence (fence) of the university before the Soccer World Cup of 2010.
- [4] The following is not in issue. The employee was instructed by his senior, Mr Britz to obtain the requisite quotations from three specific service providers (registered contractors) whose names were provided by Mrs Prinsloo of the Procurement Department at the university. They were F van den Heever Dekoratief (represented by Mr Van den Heever), Keorebotshe Trading Enterprises (represented by Mr Seboloa) and Marang Projects (represented by Mr Motshumi).

- [5] The employee invited all those service providers to attend an official site meeting at the university. That meeting was only attended by Mr Seboloa and Mr Motshumi. Mr Van den Heever indicated that he was not able to attend the site meeting. However, later on the same day a representative of Van den Heever Dekoratief, on his own, attended a site meeting with the employee.
- [6] On 26 May 2010 at about 11h00, the employee approached Ms Prinsloo requesting that the quotation box be opened. There were two quotations in sealed envelopes inside the box, namely, those submitted by Keorebotshe Trading Enterprises and Marang Projects. Those quotations were then opened. At the time the employee informed Ms Prinsloo that there was supposed to be a third quote and that it was probably in Mr Britz's office.
- [7] Later that day, at approximately 16h30, the employee approached Ms Prinsloo with a quote from F van den Heever Dekoratief. Ms Prinsloo then stamped the envelope containing the quote, indicating that the quote was late.
- [8] The employee took the three quotes to Mr Britz and after he had a discussion with Mr Britz about them, Van den Heever Dekoratief was informed that its quote had been accepted. Consequently, that service provider started the work of painting the fence.
- [9] In the interim, Mr Seboloa, who had returned to the site later in the afternoon of the day on which he and Mr Motshumi had been there for the official site meeting, became suspicious when he found the employee with the representative of F van den Heever Dekoratief doing an inspection of the site. Mr Seboloa had informed Mr Motshumi about this. The two of them had monitored the situation after neither of their quotes was accepted, but that of F van den Heever Dekoratief had been accepted instead, and they decided to complain to the management of the university.
- [10] On his way to the administrative offices to complain, Mr Motshumi encountered the employee, who, on becoming aware of Mr Motshumi's grievance, asked Mr Motshumi not to say anything about it and had assured Mr Motshumi that he (i.e. the employee) would "look after" Mr Motshumi.

[11] In the meantime, Ms Prinsloo had also become aware that F van den Heever Dekoratief's quote had been accepted after seeing them busy on the site. She was concerned because, according to her recollection, that service provider's quotation had been late and ought to have been discarded. She raised the matter with *inter alia* Mr Britz, and his superior Mr Van Wyk.

[12] An investigation followed which resulted in the employee being charged with the following counts of misconduct:

12.1 Charge 1 – gross insubordination in that on 26 May 2010, the employee failed to carry out a lawful instruction from his supervisor in that he failed to provide the registered contractors with documents (i.e. projects scope and attendance registers) to attach to the contractors' quotations and he subsequently failed to submit these documents to Ms Prinsloo;

12.2 Charge 2 – dishonest/fraudulent conduct in that the employee submitted a quote for an approval from F van den Heever Dekoratief, knowing that the quotation was submitted late and was therefore irregular. It was further alleged that the employee misrepresented the true facts by informing Mr Britz that the same quote had been approved by Ms Prinsloo because it was much lesser or cheaper than the other two quotes received;

12.3 Charge 3 – dishonest/fraudulent conduct in that on or around April/May 2010 the employee attempted to influence Ms Prinsloo to accept the tender of Tau Construction for which a tax clearance certificate, BBBEE certificate and CK documents were outstanding after the tender closed at 11h00;

12.4 Charge 4 – dishonest/fraudulent conduct in that the employee misled Mr Van den Heever to believe that Mr Werner had no objection to him touring the site the next day on 19 May 2010;

12.5 Charge 5 – gross dereliction of duty in that the employee acted remissibly in the execution of his duties when he informed two service

providers who attended the site inspection meeting on 18 May 2010 that they are the only bidding service providers who submitted quotations for the painting of the fence at the university;

12.6 Charge 6 – gross dereliction of duty in that the employee acted remissibly in the execution of his duties when he conducted a site inspection with one service provider (F van den Heever Dekoratief) on 19 May 2010;

12.7 Charge 7 – dishonest/fraudulent conduct in that the employee informed Mr Tim Motshumi, a service provider of CUT when he enquired about the outcome of the bidding for the painting of the fence that he should not worry as the employee would look after him.

[13] The following witnesses testified for the employer at the internal disciplinary inquiry: Ms Prinsloo, Mr Seboloa, Mr Britz, Mr Motshumi and Mr Van den Heever. The employee testified in defence of the charges. At the conclusion of the internal disciplinary hearing, the employee was found guilty of charges 1, 2, 4 and 6 and his dismissal was recommended as a sanction. The university, acting on that recommendation, dismissed the employee.

[14] The employee referred an unfair dismissal dispute to the CCMA and the matter duly proceeded to arbitration before the Commissioner. The substantive fairness of the employee's dismissal was in issue. The same witnesses that had testified at the internal disciplinary hearing also testified at the arbitration, except that the employer called an additional witness, Mr Dube, Head of Facilities at the university, and the employee also called Dr Smith as a witness.

[15] In an award, dated 10 September 2011, the Commissioner concluded that the employee could only be disciplined in terms of an existing rule and found that such a rule does not exist and *"that should actually be the end of the enquiry"*, because if there was no rule that could have been breached, there was no misconduct whatsoever.

- [16] However, the Commissioner went on to find that even if a rule of policy existed, it was not applied at all, or applied consistently to every case, or quotation. The arbitrator concluded, accordingly, that the employee's dismissal was substantively unfair and that the employee was entitled to be reinstated on or before 10 September 2011, and to be paid back pay in the amount of R146 000,00 subject to legitimate deductions such as tax, before that date. The amount awarded to the employee was also to attract interest at the rate of 15,5% from the date of the award to the date of payment.

Labour Court

- [17] The university brought an application in the Labour Court in terms of section 145 of the Labour Relations Act No 66 of 1995 (*"the LRA"*) to review and set aside the arbitrator's award and asked *"that it be determined that the employee was dismissed in a substantively unfair manner"*. In the alternative, the university sought an order remitting the matter to the CCMA to be dealt with afresh before a different Commissioner. The university further sought a costs order against the employee and any other party that opposed its application.
- [18] The ultimate ground relied upon by the university was that the award was *"so irrational that no reasonable decision-maker would have come to the conclusion eventually reached by the Commissioner"*. Particular grounds relied on were: firstly, that the Commissioner never addressed charge 1 at all, which related purely to whether the employee had failed to comply with an instruction of his superior, Mr Britz, that he invited service providers, who intended quoting for the painting of the fence, with project scope and attendance register documents. Secondly, that the rule, that the Commissioner concerned himself about, was not relevant to that charge and, conceivably, could only have related tangentially to the other charges which the employee had been found guilty of, namely charges 2, 4, 6 and 7. Thirdly, the Commissioner erred in finding that no rule existed, when it was part of the employee's case that the rule indeed existed, because the employee contended that there was inconsistency in the application of the rule, and the Commissioner found accordingly.

- [19] The university contended, essentially, in its original founding affidavit in support of the review application, that this latter finding by the Commissioner vitiated the entire award. According to the university, the evidence, in any event, was clearly to the effect that a rule existed, albeit not in writing.
- [20] In its supplementary affidavit, the appellant dealt with the relevant detail of the various relevant witnesses' evidence in order to illustrate that the existence of the rule (i.e. as to how to deal with quotations) was never seriously disputed. According to the university, the employee's evidence that the rule did not exist, was not only equivocal and contradicted by the employee himself, but was countered with credible evidence.
- [21] In his opposing affidavit the employee, basically, attempted to defend the award. He, *inter alia*, contends that the Commissioner had concluded that there was no rule in place, because if it had been, then all of the employee's superiors ought to have been disciplined for breaching it, but that did not occur. The employee contends further, that in view thereof the Commissioner's award cannot be faulted and should "stand". He also avers that there was "*no rule which was implemented or fully implemented*" which had resulted in confusion and in mistakes being made of the kind that occurred in this matter. He mentions that he apologised at the arbitration for those mistakes. The employee further contends that in view of the length of his employment with the appellant, his dismissal was "*exceptionally harsh*" and that a warning would have been appropriate. He disputes, in general, that there were any irregularities in the Commissioner's award.

The Labour Court's judgment

- [22] In an *ex tempore* judgment, the court *a quo* held that the findings of the Commissioner were not above criticism; that he had "*clearly misconceived some of the evidence*"; and that he "*clearly arrived at conclusions that were doubtful having regard to the evidence*". The court *a quo*, nevertheless, gave weight to the fact that there was no evidence that the topic of scope had been discussed with the employee or that the employee had received training in that regard. It also accorded weight to the evidence of Mr Britz, to the effect

that although he had lost a lot of trust in the employee, he could still work with him. The employee's long and clean service record was another factor taken into account. The court *a quo* also expressed doubt about whether the allegations of dishonesty had been proven and found that, in the absence of a finding of dishonesty, dismissal was inappropriate.

[23] Having traversed various aspects, the court *a quo* concluded as follows: "On my assessment, therefore, the outcome of the matter is such that a reasonable Commissioner could have arrived at the conclusion that whatever Mr Channer did, did not warrant a dismissal; and that, therefore, substantively the dismissal was unfair."

[24] The court *a quo* went on to dismiss the application for review.

Discussion

[25] There is merit in the submission that the court *a quo* had misdirected itself in a number of respects. Before dealing with the individual charges, of which the employee had been found guilty, it is noteworthy that the totality of the evidence, important aspects of which seem to have been overlooked, glaringly evinces deliberate manipulation of the quotation process by the employee to secure the services of F van den Heever Dekoratief, i.e. "quotation rigging" - a dishonest and corrupt practice that enervates the effectiveness, and destroys the fundamental requisite fairness, of the procurement processes of public bodies conducted by means of obtaining quotations.

[26] By generalising that the matter was essentially about whether the employee contravened a rule, the Commissioner failed to heed the true nature of the individual charges, what was required to be proved in respect of each of them and the evidence presented in discharge of the *onus* in respect of those charges. The Commissioner's reasoning was not merely "*not above criticism*", but materially irregular in a number of respects and does not fall within the bounds of reasonableness.

- [27] The court *a quo*'s ultimate finding that, notwithstanding criticism of the Commissioner's reasoning, the sanction was reasonable, also overlooked the exact nature of the charges and the cogent evidence presented as proof of them. A reasonable commissioner would not have come to the same conclusions as the Commissioner in this matter.
- [28] It was never the employee's case, and no evidence was tendered, that the employee did not understand the policy applicable to procurement by means of obtaining quotations, or that he did not have sufficient training in that regard. Consequently, the court *a quo* misdirected itself in finding for the employee on such grounds.
- [29] In considering the individual charges, it is apparent that charge 1 has nothing to do with the rule which the Commissioner had in mind, but relates squarely to whether the employee wilfully disobeyed a lawful instruction given to him by his superior, Mr Britz, to provide the participating contractors with project scope and attendance register documents, in order for them to submit those documents with their quotations.
- [30] It was not disputed that the employee never gave those documents to the participating contractors, and that they were never submitted by him. It was further not in issue that he had been given the instruction by Mr Britz and that he did not comply with the instruction. He only gave the representative of F van den Heever Dekoratief an attendance register. The employee's justification for not complying with the instruction, which he only raised when he gave evidence, was that it made "*no sense*", and he, therefore, disregarded the instruction, without seeking any clarification from Mr Britz.
- [31] On the probabilities, the rationale for completing those documents and furnishing them to participating service providers, in order for them to submit those documents with their quotes, must have been clear to the employee. It is essential to ensure fairness of the quotation process. The service providers have to quote for the same scope of work (including any specifications) and it enables the assessors of those quotes to compare "*like with like*", or "*apples with apples*". The absence of complete, uniform scope documents could

conceivably undermine all of those objectives and facilitate under-quoting, or over-quoting, which could serve the purposes of rigging.

- [32] The evidence further established that the failure to give all the service providers an attendance register was probably deliberate. The unsuccessful providers were told that they were the only ones attending the site meeting and were led to believe that they would be the only contenders for the job. Unbeknown to them, the employee allowed another provider a separate site visit. There is no evidence that the scope of work, as communicated by the employee to the unsuccessful providers, and that communicated by him to F van den Heever Dekoratief, were identical in all material respects.
- [33] The first charge was proved on the evidence and the failure of the Commissioner to find accordingly was a material irregularity. The court's failure to conclude accordingly was, similarly, a misdirection.
- [34] The second charge was also proven. Ms Prinsloo's evidence to the effect that the late quotation was not to be accepted and was to be discarded was not contested. When she subsequently discovered that F van den Heever Dekoratief had been appointed, she queried it, because that provider's quote was supposed to have been discarded, or disallowed, for being late. Mr Britz testified that the employee told him that Ms Prinsloo had no difficulty with the late quotation and that it was acceptable because it was the lowest quote. But that was a lie. The employee had dishonestly misrepresented the true facts and had deliberately misled Mr Britz into accepting the late quote.
- [35] Charge 4 was proven. Mr Britz gave uncontested evidence that he would not have allowed F van den Heever Dekoratief to attend a separate site inspection. The employee was not authorised by any of his superiors to allow F van den Heever Dekoratief a separate site visit.
- [36] Charge 6 was also proven. The employee did not seek permission from his superiors to allow F van den Heever Dekoratief to conduct a separate site visit, and the rationale for not allowing a separate site visit must have been known to the employee. That he must have appreciated the impropriety of such a visit, is evident *inter alia* from the fact that he did not inform the other

two service providers of the indulgence which he was to afford F van den Heever Dekoratief, instead he made them believe that they were the only parties competing for the job.

[37] Similarly, charge 7 was proven. The explanation the employee advanced for the promise which he made to Mr Motshumi, when he realised that Mr Motshumi was going to complain about the separate site visits, is not credible. The employee was clearly aware of Mr Motshumi's grievance and the promise was made in order to prevent Mr Motshumi from bringing those irregularities, which he observed, to the attention of the university authorities. The employee promised that he would "*look after*" Mr Motshumi. In its context, it was a promise of (an) implied, unmerited favour(s) that he would in future do for Mr Motshumi, in return for Mr Motshumi's silence about the irregularities.

[38] As stated at the outset of this discussion, viewed in its totality, the evidence evinces a scheme of "*quotation rigging*" perpetrated by the employee to ensure that F van den Heever Dekoratief got the contract to paint the fence. To attain that objective, the employee not only told lies, which were the subject of certain of the charges, but also lied to Ms Prinsloo, for example, about the existence of the third quote which he alleged was probably in the office of Mr Britz, while he knew full well that he had told Mr Van den Heever to put the quote under the door of his office and not in the quotation box.

[39] In light of the seriously dishonest conduct of the employee, the sanction of dismissal was appropriate. The failure of the Commissioner and of the court *a quo* to find accordingly is regrettable. A reasonable commissioner would have found differently. In light of the fact that there was no opposition to the appeal there should be no costs order.

[40] In the result:

40.1 The appeal succeeds.

40.2 The order of the court *a quo*, dismissing the appellant's review application, is set aside and is replaced with the following order:

- '1. *The arbitration award issued by the second respondent under case number F51237/11, on 10 September 2011, is reviewed and set aside;*
2. *The dismissal of the first respondent (Mr E J Channer) was substantively fair;*
3. *The first respondent is to pay the costs of the application.'*

P Coppin Judge of Appeal

Tlaetsi DJP and Sutherland JA concur.

APPEARANCES:

FOR THE APPELLANT:

S Grobler

Instructed by Phatshoane Henney Inc

FOR THE FIRST RESPONDENT:

No Appearance