**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD IN JOHANNESBURG**



**Not Reportable**

**CASE NO: JR 1875/14**

In the matter between:

**MOADIRA MATSHEDISHO MOSES** Applicant

And

**VAN ECK, BERNARD N. O.** First Respondent

**COMMISSION FOR CONCIALTION, MEDIATION AND ARBITRATION** Second Respondent

**CITY OF MATLOSANA LOCAL MUNICIPALITY** Third Respondent

**Heard**: 6 May 2016

**Delivered**: 12 January2017

**Summary: Review application – multiplicity of charges – application successful in respect of numerical superiority of the number of the charges – question to be asked is whether dismissal is a fair sanction for the remaining charges - seriousness of misconduct is decisive – remaining charges are serious – dismissal is a fair sanction – award reviewed and corrected.**

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**JUDGMENT**

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**CELE J**

## Introduction

[1] This application, in terms of section 145 of the Labour Relations Act[1], is for the review, correcting and/or setting aside of the arbitration award dated 30 July 2014, issued in this matter by the First Respondent. The Third Respondent belatedly opposed this application by contending that the grounds for review are completely without foundation and that the Applicant has scraped the bottom to come up with an attack of a valid and legally sound arbitration award.

## Factual Background

[2] The Applicant was employed by the first respondent as a Municipal Manager on a fixed term contract from 1 November 2006 until October 2011. He was appointed in terms of the municipal Systems Act.[2] He was appointed as a so-called section 57 employee.

[3] As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council and is accountable for:[3]

(a) The formation and development of an economical, effective, efficient and accountable administration -

[1] Act Number 66 of 1995, hereafter referred to as the Act.
[2] Number 32 of 2000
[3] See Section 55 of the Municipal Systems Act Number 32 of 2000, hereafter referred to as the Municipal Act.

(i) Equipped to carry out the task of implementing the Municipality's integrated development plan in accordance with Chapter 5;

(ii) Operating in accordance with the municipality's performance management system in accordance with Chapter 6 and

(iii) Responsive to the needs of the local community to participate in the affairs of the municipality.

(b) The management of the municipality's administration in accordance with this act and other legislation applicable to the municipality.

(c) The implementation of the municipality's integrated development plan and monitoring of progress with the implementation of the plan.

(d) The management of provision of services to the local community in sustainable and equitable manner.

(e) The appointment of stuff other than those referred to in section 56 (a) subjects to the Employment Equity Act Number 55 of 1998...

(f) The management effective utilization and training of staff.

(g) The maintenance and discipline of staff.

(h) The promotion of sound labour relations and compliance by the municipality with applicable labour legislation.

……..

(m) The exercise of any powers and the performance of any duties delegated by municipal council, or sub-delegated by other delegating authorities of the municipality, to the municipal manager in terms of section 59.”

[4] A municipality administered procurement processes through which service providers could be appointed by means of a tender system to render important services to the municipality due to their expertise in various fields. To this end, two committees, the Bid Evaluating Committee (BEC) and the Bid Adjudicating Committee (BAC) were responsible for the bidding process which culminated in the appointment of the service provider by the Municipal Manager, who acted on the recommendation of the BAC. Managers and Assistant Managers, who are often Directors, sit in the BAC. These Managers run different departments of the Municipality.

[5] The Municipal Manager is entitled to rely on the Managers and in the execution of their duties they have a direct reporting line to the Municipal Manager. The recommendation must be submitted with documentation indicating that all the bidders met the relevant and requisite requirements and that their tax clearance certificates were in place. Therefore, the responsibility to conduct a risk analysis vests

in the requesting department or in the supply chain management department or in the BEC. Ordinarily, the Municipal Manager does not get involved in the supply chain management or tender process[4]. The documentation submitted to the Municipal Manager consists of the draft report, the evaluation report, the adjudication report, the draft resolution and the minutes.

[6] Following investigations by two committees into alleged irregularities the Applicant was suspended from his employment. The suspension was implemented after two reports had been tabled from these committees. The Applicant attended the disciplinary hearing on a number of charges and was dismissed after he was found guilty on 13 charges. He lodged an internal appeal against the dismissal. His appeal was not successful as his dismissal was confirmed on 30 June 2011. He then lodged an unfair dismissal dispute to the South African Local Government Bargaining Council (SALGBC) but it could not be amicably resolved and it was then transferred to the Commission for Conciliation, Mediation and Arbitration, (CCMA) where it was arbitrated by the first respondent.

[7] As a Commissioner, the First Respondent found justification for a guilty verdict on charges numbered: 2, 3, 4, 5, 6, 7, 8, 10, 11 and 13. He found the Applicant not guilty on charges: 1, 9 and 12.He then confirmed the dismissal of the Applicant.

<u>The chief findings of the Commissioner.</u>

[4] See Respondent's evidence through Mr Motileni pages 485/6.

[8] An outline of the chief findings of the Commissioner in this matter reveals the manure of the charges. To obviate repetitiveness the grounds for review and opposition thereto shall then be dealt with. Those charges in respect of which the Applicant was acquitted need no further mention. In making his findings the Commissioner commenced by remarking that he found witnesses of the respondent to have presented a clear, consistent and a reliable version of the events which precipitated in the dismissal of the Applicant. He said that those witnesses provided clear and consistent answers to questions put to them. He found that the same could not be said of the Applicant who was said to have attempted to distance himself from all wrongdoing. The Commissioner found that the testimony of witnesses for the Applicant could not be relied on.

<u>Counts 2 and 3</u>

[9] The Applicant was alleged to have failed to act in the best interest of the employer when, on 31 August 2007 he appointed a service provider, Bohlale Risk Solutions (BRS) for the provision of insurance cover, without conducting or causing to be conducted a risk analysis on BRS, which was liquidated some six months later, thus exposing the employer to possible uninsured claims. At the time of such appointment BRS tax matters were not cleared by the South African Revenue Services (SARS), a breach of the Supply Chain Management (SCM) policy.

[10] The Applicant, inter alia, relied on the evidence of Mr Motileni to submit that the Commissioner failed to apply his mind on the evidence before him and thus produced an unreasonable outcome.

[11] Mr Motileni's evidence on this aspect has become part of the common cause evidential material in that:

- It remained the duty of the BEC and the BAC to conducting or causing to be conducted a risk analysis on BRS;

- The tax certificate was not part of the bidding documents submitted to the Municipal Manager for a consideration to appoint a service provider;

- There had to be something suspicious in the bidding documentation for the Municipal Manager to call for further documentation;

- The Applicant was entitled to rely on the Managers sitting in the BEC and BAC in assuming that proper investigations were conducted in support of the recommendation sent to him.

[12] For the Applicant to have to investigate the two issues, there had to be something suspicious in the documents given to him. No such evidence was ever led. The only basis on which the Applicant could be found guilty on the two charges would be a reliance on the principle of strict liability, by imputing wrongdoing of one to the other. Strict liability between the supervisor and his incumbent is not part of labour law jurisprudence. Otherwise many senior personnel would have lost their jobs for the misconduct of their junior staff. Without much ado, I find that the Commissioner ignored very material evidence adduced by the Third Respondent in favour of the

Applicant in this regard with the result that an unreasonable decision was reached by the Commissioner.

Count 4

[13] The allegation was that the Applicant interfered with the SCM processes by instructing Mr Makhetha, a Manager, to deliver to him all bid documents related to a tender prior to such documents being evaluated by relevant bid committees and before reports thereon being prepared. It remained common cause that there was a shortage of employees with knowledge for the technical proposal of the tender that was being dealt with. The Applicant's intervention was clearly directed at curing that deficiency. Whether he saw the provisional report by Mr Motileni was irrelevant. He gave an instruction of who was to do what. He never saw the final draft report, at that stage of the tender process. Neither did he instruct the people on which service provider to prefer. He was after all the ultimate responsible personnel on work performance. Provided he acted objectively, he was entitled to intervene. The Commissioner grossly misconstrued the evidence before him and in this respect reached an unreasonable decision.

Count 5

[14] The allegation was that the Applicant failed or neglected to comply with the employer's condition of appointment in that he appointed an entity known as Business Help-Line Close Corporation (Helpline) for the provision of services, whereas at the time Helpline was already contracted to the employer for the preparation of the financials, as a consultant, in the same department.

[15] The guilt of the Applicant on this charge depended on him knowing factually or acting negligently in the acquisition of such knowledge. Helpline was involved in a Service Level Agreement as a consultant with Ms Matthews' department by rendering the Work Skills Programme. Ms Matthews had signed that Service Level Agreement. She owed a fiduciary duty to the Applicant and to the Municipality to point out that Helpline was already a consultant and should not have been appointed for the same department. The municipality was contracted to numerous service providers at any given time. No evidence of actual knowledge by the Applicant was ever proved for this charge. That left the Third Respondent having to prove that the Applicant acted negligently and to demonstrate how. No such evidence was ever forthcoming. The Commissioner did not even indicate the basis for the finding of negligence, mind being had to the fact that not all bid documents were passed on to the Applicant. Something about the bid documents given to the Applicant should have aroused suspicion so that he could call for more documents. No such evidence was led. The Commissioner missed the proper enquiry he was to conduct for this count and, as a consequence reached an unreasonable decision.

<u>Counts 6, 7 , 8,10 and 11</u>

[16] Counts 6, 7 and 8 pertain to the Applicant having instituted disciplinary proceedings against Mr Motlatsi Makhetha and Mrs Matlakala Matthews and having failed to stay the disciplinary hearing of Mr Makhetha in line with the council resolution. The Applicant is the executing authority for the implementation of the resolutions of council to discipline any Managers appointed in terms of sections 56 and 57 of the Municipal Systems Act. These employees are

appointed by the council after a consultation with the Municipal Manager. In *Tsotetsi v Mohapi and Another, Mohapi v Motho District Municipality and Another,*[5] the court held:

> "In my judgment, in the absence of any contrary provision, a municipal manager, acting municipal manager or manager if accountable to the municipal manager, may, by necessary implication, only be suspended or removed from office by the municipal council or person(s) to whom the municipal council has properly delegated these powers."

[17] Somehow the Applicant assumed that he had unfettered discretion to discipline these employees. This class of employees was excluded in the operative collective agreement. In respect of Mr Makhetha council passed a resolution to stay the disciplinary hearing. Somehow the Applicant assumed that the resolution had lapsed and thus did not take heed of it. There was no room for such an assumption as the council resolved to stay the disciplinary action with immediate effect and until after the investigation Committee had made its report to the council. It was then that the council would make a resolution on the matter. In *Manana v King Sabata Dalindyebo Municipality*[6] the court held that:

> "A municipal council acts through its resolutions. No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of

[5] (3444/2004, 3446/2004) [2004] ZAFSHC 130 (11 November 2004) at para 10.
[6] ([2011] 3 BLLR 215 (SCA); (2011) 32 ILJ 581 (SCA)

> the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review."[7]

[18] The Third Respondent acted through its resolutions and it was entitled to rescind or alter its resolutions. Once a council resolution was adopted its officials, including the Applicant, were bound to execute it. Even if the probe by the Commissioner is brief in this respect, it is supported by the evidence, is straight to the point and has not been shown to be misdirected. The decision reached is not only reasonable but is also sound in law.

[19] In terms of charge 10, the Applicant failed or refused to take appropriate disciplinary action on information provided and to institute disciplinary action to completion against an employee of the Third Respondent, Mr Nteu, after a report on allegations of corruption had been received from Mr T F Malongoa, a Director of Business Help-Line. It was alleged that Mr Nteu solicited a bribe of R50 000.00 and refused to refund a R10 000.00 loan. The Applicant instructed both Mr Makhetha and Ms Matthews to investigate the matter. Mr Makhetha instructed Mr Motileni to investigate the complaint and write a report. Ms Matthews began investigations. Her undisputed evidence was that the Applicant refused to sign a letter she had written, calling on the complainant to attend to her. She said that the Applicant instructed her to stop the investigations as she had by then been charged for misconduct. While the Applicant was still in charge these investigations and the charging of Mr Nteu were never carried to completion. Mr Makhetha testified that the underlying reason was that the Applicant and Mr Nteu were friends and that the Applicant turned a blind eye to the allegations. Mr Nteu

[7] At para 22.

was only charged after the dismissal of the Applicant. The Applicant testified that he never stopped the investigations and the charging but left it to the relevant Managers. There was overwhelming and irrefutable evidence that the Applicant was remiss in supervising the finality of this very serious matter. The Commissioner's brief enquiry and his findings on this charge are not assailable.

[20] On count 11, it was alleged that the Applicant acted in bad faith by issuing an instruction directing other employees to discontinue attending courses or training offered by the Wits Business School in respect of which advanced payment by the employer had been made, resulting in wasteful and fruitless expenditure being incurred by the employer. The Applicant was confronted with strong evidence of the employer in this respect. His version was that he told the staff that his prior approval was necessary for the attendance and he denied the total prohibition. His version could not be sustainable for reasons given by the Commissioner. In addition, payment had already been made for such attendance and therefore his permission would be more academic than real. Another consideration is that Ms Zalele Mojahi, the secretary who took the minutes of the meeting where this was said, understood it to be an unconditional prohibition and wrote that understanding in her minutes. Any subsequent correction of the minutes would be *ex post facto* the understanding of the secretary. The probabilities are that the subsequent alteration of the minutes was a cover up attempt by the Applicant. Ms Mojahi was senior personnel and could easily see the difference in the typing font and correct it. A proper enquiry was conducted and a reasonable decision was reached.

<u>Count 13</u>

[21] The allegation was that the Applicant represented to his employer that a variation in excess of 20% of the original order of the contract was lawful and properly sanctioned whereas he very well knew or ought reasonably to have known that such representation was false. The expenditure involved here was for a project Number CEB/2/2009 for the paving of taxi routes and storm water drainage. An estimated allocation of R6m was made available on the Municipal Infrastructure Grant (MIG). The lowest biding company appointed to do the work, Gasa JV, had submitted an offer R8 106 342. 73. This amount was reduced to R6m in conformity with the amount approved within the MIG and some roads were removed from the project so as to contain the expenditure to R6m.

[22] According to the Applicant's version, supported by his witness Mr K Masisi, R6m made available to the MIG was subject to a possible increase of R2m, if such could be found to be available as unspent from any projects so as to complete work earlier removed from the same project. This evidence does not appear to have been contradicted by any of the witnesses of the Third Respondent. It was clearly on the basis of this prior approval that the Applicant approached council to authorise the increase of the project expenditure from R6m to R8m. That being the case, it is very difficult to conceive how the Commissioner was able to reject this version, as he must have, to find the Applicant guilty on this charge. At the very least, he should have found that the Third Respondent failed to discharge the onus resting on it to prove the guilt of the Applicant. In this respect the Commissioner failed to apply his mind to the material evidence before him and he consequently reached an unreasonable decision.

[23] In conclusion on the charges, the Applicant succeeded in demonstrating that he ought never to have been found guilty on the following charges: 2, 3, 4, 5 and 13. He failed on the following counts: 6, 7, 8, 10 and 11. After exonerating the Applicant on only three charges, being counts 1, 9 and 12, the Commissioner, in confirming the dismissal of the Applicant, had the following to say:

> "The allegations that Mr Moadira has been found guilty of are extremely serious and would most certainly warrant a sanction of dismissal. The Applicant had acted with impunity and without due consideration to the best interests of the Respondent."

[24] In the light of the numerical superiority of the number of the charges in respect of which the Applicant has been found not guilty, the question is whether dismissal is a fair sanction. What the Commissioner considered was not just the multiplicity of charges the Applicant was found guilty of but the seriousness of such charges. He did not delve into the enquiry of which charges were more serious than others to justify a dismissal. In this application the Applicant has submitted that, in the instance where he is found guilty such charges are not so serious as to justify his dismissal.

[25] The charges in respect of which the Applicant has not been successful, relate to him subjecting two employees to disciplinary measures. Also, there is the charge where he prohibited his staff from attending training sessions. By subjecting the two employees to disciplinary measures, the Applicant exposed these employees to the possibility of a dismissal, in the event each was found guilty. To

any employee a dismissal is the worst sanction an employer may impose.

[26] By his hasty actions the Applicant has caused the Third Respondent to be saddled with employees, it might have wanted to be rid of, albeit in a fair manner. This would be the case if the charges to be preferred against these employees were of a serious nature. The Applicant wanted them subjected to disciplinary actions and therefore he must have suspected them of serious misdemeanour. There is a probability that the Third Respondent abandoned its disciplinary measures initiated by the Applicant on the basis that, in the event they were found guilty, a sanction imposed and the guilty verdict could later be found to have been unfair, with serious consequences on the Third Respondent, as the employer. By their nature and possible consequences therefore these charges are indeed serious. Count 13 involves an act of dishonesty where minutes of a meeting were fraudulently altered to change what the Applicant told his staff, as a cover-up measure. It is also serious particularly when the seniority of the Applicant is considered. In my view, the dismissal of the Applicant is still justified as a fair sanction, the gains he achieved in this application notwithstanding.



Order:

1. The arbitration award issued by the first respondent in this matter is reviewed and corrected to read that the Applicant is found guilty of the charges: 6, 7, 8, 10 and 11.

2. The dismissal of the Applicant by the Third Respondent is substantively fair.

3. No costs order is made.

Cele J.

Judger of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Adv. F Venter

INSTRUCTED BY Cowan – Harper Attorneys

FOR THE THIRD RESPONDENT: Adv. J F A Nel

INSTRUCTED BY Setshedi, Makgale & Matlapeng Attorneys.