



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR809/14

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL:

POLICE, ROADS & TRANSPORT

(FREE STATE GOVERNMENT)

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

VM MOROBANE N.O

Second Respondent

MONNAPULE HENRY NTAMO

Third Respondent

Heard: 19 November 2015

Delivered: 30 January 2017

JUDGMENT

BALOYI, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ for the review and setting aside of an arbitration award issued under the auspices of the first respondent dated 11 March 2013 under case number GPBC228/2013. The application is opposed by the third respondent, Monnapule Henry Ntamo (Ntamo).
- [2] Ntamo was employed by the Department of Police Roads and Transport, Free State until his dismissal following a disciplinary hearing. Following his dismissal, Ntamo referred a dispute to the first respondent in which he contended that his dismissal was substantively and procedurally unfair. The second respondent is the commissioner appointed by the first respondent to arbitrate the dispute after conciliation failed. In his arbitration award, the commissioner found that the dismissal was substantively unfair and ordered reinstatement.

Summary of relevant facts

- [3] Ntamo was employed as Director: Organisational and Human Resources Development (OHRD) until his dismissal on 7 December 2012 on the following charges of misconduct –

“Charge One

Gross Misconduct: Breach or contravention of the department’s supply chain management policy and/or treasury regulations and/or supply chain management practice notes and/or public finance management Act 1 of 1999

1.1 You are charged with gross misconduct, to wit, breach or contravention of the department’s Supply Chain Management Policy and/or treasury regulations and/or supply chain management practice notes and/or public finance

¹ Act 66 of 1995

management Act 1 of 1999 in one or more or all of the following counts or instances:

- 1.1.1 *On or about 28 November 2011 you did, whilst occupying the position of a Director:OHRD in the department, wilfully or negligently appoint or cause to be appointed an entity called Ntsu Trading 628 to provide catering for breakfast and decorations to the department for an amount of R39 710.00 without complying with and/or ensuring that the department's normal procurement procedures and policies had been complied with prior to the appointment of the aforesaid service provider; and/or*
- 1.1.2 *On or about 28 November 2011 or prior to this date you did wilfully or negligently fail to ensure or satisfy yourself that the department's accounting officer had approved the deviation from the department's normal procurement procedures prior to the appointment of Ntsu Trading 628 to provide catering for breakfast and decorations to the department. Consequently, on 31 January 2012 you prepared a submission wherein you sought or requested the accounting officer's approval of deviation ex post facto when you well knew or ought reasonably to have known that the accounting officer's approval of deviation ought to have been sought and obtained prior to the appointment of the service provider.*
- 1.2 *As the result of your aforementioned conduct or omission, the department suffered prejudice in that the amountt paid by the department to Ntsu Trading 628 constitutes an irregular expenditure which occurred in circumstances whereby a reasonable official occupying the position of a Director:OHRD in the public service and therefore part of the department's senior management would, by exercise of reasonable care, due diligence and acting in the best interest of the department, have avoided and/or prevented the irregular expenditure.*
- 1.3 *Your aforementioned conduct or omission is prejudicial to the administration, discipline and efficiency of the department and constitutes an act of financial misconduct as provided in section 81 read with section 45 of the PFMA.*

Charge Two

Gross Misconduct: Gross neglect or dereliction of duties, functions and responsibilities

- 2.1 *You are charged with gross misconduct, to wit, gross neglect or dereliction of your duties, functions and responsibilities in that as a Director:HRM of the department, you wilfully or negligently failed to ensure that the applications for the 52 (fifty two) provincial inspector positions were properly and fairly short-listed in terms of the minimum requirements as advertised for the position, that the interview panels only consisted of persons duly appointed, substituted or replaced by the Head of Department and that each of the appointed members of the interview panels properly evaluated the candidates and awarded them points in terms of their performance in the interviews.*
- 2.2 *As the result of your aforementioned willful (sic) or negligent failure to discharge your duties, functions and responsibilities as aforesaid, some of the candidates were interviewed by interview panels that had not been duly appointed by the head of department, some of the candidates were not properly evaluated and awarded points for their performance in the interviews by all panel members and some of the candidates were shortlisted, interviewed and recommended for appointments and eventually appointed even though they did not meet some of the important minimum requirements as advertised for the position of provincial inspector.*
- 2.3 *Your conduct or omission as set out in paragraphs 1.1 and 1.2 above took place in circumstances whereby a reasonable Director:OHRD and Acting Director:HRM of the department in your position and therefore a senior manager in the public service would, by exercise of reasonable care, due diligence and acting in the best interest of the department as his employer, have taken appropriate and necessary steps to avoid or prevent prejudice or potential prejudice to the department.*
- 2.4 *Furthermore, your conduct or omission as set out under this Charge is in breach of items 6 and 14 of Annexure "A" to Chapter 7 of the Senior Management Service Handbook which provide that an employee will be guilty of misconduct if he/she prejudices the administration, discipline and efficiency of a department, office or institution of the State and if he/she performs poorly or inadequately for reasons other than incapacity. Your conduct or omission as set out under this Charge is also in breach of Clauses C3.6 and C4.4 of the Code of Conduct in the Public Service which provide inter alia that an employee must deal fairly, professionally and equitably with other employees*

and that an employees (sic) must execute his/her duties in a professional and competent manner”.

For convenience, I refer to charge 1 as breach of SCM procedures and to charge 2 as dereliction of duties.

- [4] The commissioner found on both charges that Ntamo is not guilty for the misconduct charged. He accordingly, concluded that the dismissal is substantively unfair and ordered – reinstatement on same or similar terms and conditions as existed before dismissal; payment of 16 months’ salary from 10 December 2012 to March 2014; that Ntamo report for duty on 1 April 2014. I note that the award is curiously silent on why the applicant is required to pay a salary for March 2014 when the award is dated 14 February 2014 and the employee is required to report for duty only on 1 April 2014.

Is the award liable to be set aside?

- [5] The applicant relies on the follows grounds for the review and setting aside of the award – (i) gross irregularity; (ii) misconduct; (iii) bias; (iv) gross unreasonableness; and/or (v) lack of rationality in the following respects –
- 5.1. by finding that the deviation from SCM Policy complied with clause 14.1.4 and 14.2 of the department’s SCM Policy when the evidence and documents before him showed that there was no compliance with the policy and there was no prior approval of the deviation. The commissioner misconstrued the evidence and showed bias in the consideration and evaluation of the evidence.
 - 5.2. He misconstrued the evidence about the extension of the scope of Ntsu in that he found that Ms Modiselle extended the scope whereas the submission of Ntamo for *ex post facto* authorisation of deviation states that he (Ntamo) extended the scope of Ntsu. The commissioner misconstrued the evidence in order to exculpate Ntamo.
 - 5.3. By finding that the SCM Policy does not indicate that deviation be approved before procurement of services or goods, the commissioner

failed to apply his mind to all the facts and evidence and/or misconstrued the evidence.

- 5.4. By finding that Ntamo was not guilty of a breach of the SCM policy in the light of the evidence, the commissioner failed to properly apply his mind to all the facts and evidence in an unbiased and fair manner.
- 5.5. By finding that the department has applied the SCM policy inconsistently and discipline selectively, without providing any reason for the conclusion, the commissioner failed to determine the dispute in a fair and unbiased manner.
- 5.6. The commissioner misconstrued the evidence of witnesses Messrs Selai and Mogaecho as hearsay evidence when the witnesses testified to what they allegedly saw notwithstanding that Mr Selai testified that according to records he saw at the department, Ntamo was responsible to oversee the process even though he was only formally appointed Acting Director: HRM in January 2012.
- 5.7. By finding that Ms Macala was evasive in her testimony, without identifying the evidence in respect of which he found that she was evasive
- 5.8. The commissioner failed to apply his mind to the evidence about Ntamo's involvement and role in the process that resulted in the impugned appointment of provincial inspectors and did not deal with the evidence in a fair and unbiased manner.
- 5.9. The commissioner misconstrued the evidence of Ms Macala that Ms Wolff prepared the list of short-listed candidates and Ntamo prepared the list of candidates to be appointed.

[6] With respect to the test for review on the grounds of misconduct, gross irregularity and/or excess of power, the court in *Gold Fields Mining South Africa*

*(Pty) Ltd (Kloof Gold Mine) v CCMA*² said that the proper questions to ask in relation to the conduct of arbitration proceedings or “process-related” issues, are the following:

- 6.1. In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?
- 6.2. Did the arbitrator identify the dispute he or she was required to arbitrate? (this may in certain cases only become clear after both parties have led their evidence).
- 6.3. Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- 6.4. Did he or she deal with the substantial merits of the dispute?
- 6.5. Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?³

[7] I accordingly take guidance from the above and proceed to consider the award and the evidence that was before the commissioner.

Breach of SCM Procedures

[8] The relevant evidence that was before the commissioner is that -

- 8.1. Ntamo was part of a co-ordinating team with Mr M Sebeela, SCM Practitioner and Ms M Modiselle, Deputy Director: Social Crime Prevention for the event Symposium on Gender Based Violence for Law Enforcement to be held on 28 November 2011. Mr Sebeela and

² [2014] 1 BLLR 20 LAC

³ At para 2. See also *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para 110

Ms Modiselle were both subordinate to Ntamo. On a date before 28 November 2011, the company Ntsu Trading 628 (Ntsu) was appointed to supply lunch at the event.

- 8.2. On 28 November 2011, Ntsu was given authority to also supply breakfast and decorations at the same event for the amount of R39 710.00 which it did (this authorisation to Ntsu is referred to as “*extension of scope*”). No quotations were obtained from other suppliers for the service in the extension of scope and the accounting officer did not authorise the extension of scope before the service was procured from Ntsu. Neither did the accounting officer authorise the extension of scope without obtaining quotations from other suppliers. According to Ntamo, Modiselle was the person that instructed Ntsu to provide breakfast and decorations and that he only sought authorisation of payment with his submission of 31 January 2012.
- 8.3. On 31 January 2012, Ntamo submitted a written request to the accounting officer in which he sought “to obtain *ex post facto* approval to pay ...”. The submission is in the name of Ntamo and signed by the Acting CFO, Ms A Botes, who indicates that she concurs and Modiselle, Deputy Director, Social Crime Prevention, Mr F Maleba, Director SCM (both of whom do not indicate whether or not they recommend or concur in the submission. The submission is also signed by the Head of Department who signed and indicated “not approved”. I refer only to the parts of the submission relevant for present purposes. The heading of the submission is “*Ex Post Facto for approval to Ntsu Trading 628 from SCM Procurement Processes in sourcing quotations above R30 000.00 for catering and decorations for 500 people attending symposium on gender based violence for law enforcement from 28 November 2011 for social crime prevention ...*”. Under the heading “*Purpose*”, the purpose of the submission is recorded as “to obtain *ex post facto* approval to pay Ntsu ...”. Under the heading “*Motivation*”, the following is stated - “*After consultation with Mr Sebeela (SCM) who was on site at the time, and failed attempt to reach*

the director SCM a request was made to the provider to extend his scope to the latter by myself and Mr Sebeela. This matter was further communicated to the CFO and Chief Director Crime Prevention” (my underlining)⁴. The submission also explains that “The office of the Chief Director Crime Prevention was to provide funding on behalf of the department omission was committed from their site (sic) with regard to the provision of the decoration and breakfast respectively as they were responsible for preparing a request to SCM”. It is common cause that at the time that the submission was made, Ntsu had already rendered the service in question.

- 8.4. Clause 3.3.3 of the department’s Supply Chain Management prescribes that procurement of goods and service above R10 000 but below R500 000 must be done by procuring at least 3 written quotations from suppliers registered on the list of accredited prospective suppliers and clause 3.6.4 prescribes that if it is not possible to obtain 3 written quotations, the reason should be recorded and approved by the accounting officer or his delegate (this is referred to as a deviation).
- 8.5. In addition to the department’s SCM policy, Treasury Regulations and Practice Notes clauses 3.3.1 and 3.3.3 of the SCM Practice Note No.8 of 2007/2008 require that procurement up to the value of R500 000 is done by obtaining written quotations from as many suppliers as possible that are registered on the list of prospective suppliers and that if it is not possible to obtain 3 written quotations, the reasons should be recorded and approved by the accounting officer/authority or his/her delegate; the department’s SCM Policy and the National Treasury SCM Practice Note are based on Treasury Regulation 16A.6.4 which prescribes that

“16A.6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for

⁴ Record p69

deviating from inviting competitive bids must be recorded and approved by the accounting officer.”

8.6. Clause 14.1. and 14.2 of the SCM Policy read

“14.1 The accounting Officer may dispense with the official procurement process established by the policy to procure any required goods or services through any convenient process, which may include direct negotiations, but only

4.1.1 In an emergency;

4.1.2 In any other exceptional case where it is impractical to follow the official procurement process”.

“14.2 Such reasons must be recorded and approved by the Accounting Officer or his/her delegate”.

8.7. The procurement policy and procedures does not provide for authorisation of deviation after a supplier is appointed – Ntamo conceded this much in evidence but contended that the practice in the department allows *ex post facto* authorisation. He also testified that he extended Ntsu’s scope without first seeking 3 quotations because the matter had become urgent and did not afford the opportunity to seek quotations.

[9] The commissioner found, at paragraph 5.7 of the award, that *“in the light of all the evidence and documents provided, I find that there was deviation from the normal process of procurement. The extension of scope of work was made by the leader of the team/project manager Ms Modiselle in consultation with Mr Ntamo and Sebeela. Such a deviation falls within the ambit of the SCM Policy Items 14.1.4 and 14.2”* and at paragraph 5.11 concluded that *“the applicant is not guilty of the alleged breach of the SCM policy especially where similar deviation requests were made and granted. The department’s inconsistent application of its SCM policy and the selective disciplinary action against applicant is unfair”*.

[10] Clause 14.1.2 and 14.2 referred to by the commissioner read

“14.1 The accounting Officer may dispense with the official procurement process established by the policy to procure any required goods or services through any convenient process, which may include direct negotiations, but only

4.1.2 In an emergency;

4.1.2 In any other exceptional case where it is impractical to follow the official procurement process”.

“14.2 Such reasons must be recorded and approved by the Accounting Officer or his/her delegate”.

- [11] There is no evidence that the accounting officer acted in terms of clause 4.1 or indeed 14.2 and Ntamo did not contend so in his evidence. If such was Ntamo’s contention, his written submission of 31 January 2012 would otherwise not have been necessary or make any sense. Ntamo’s own oral evidence is that Ntsu’s scope was extended without first obtaining the approval of the Head of Department. Indeed, Ntamo seeks ex post facto approval of the extension of scope for precisely that reason. The commissioner clearly understood that the accounting officer did not take any action as contemplated in clause 4.1, hence he states in the award that there is no reason that the accounting officer did not approve the deviation⁵.
- [12] Ntamo’s evidence that he only sought approval of payment after he found that the service had already been rendered on Modiselle’s instruction is not supported by or consistent with his written submission which records that he, Ntamo, after discussion with Sebeela, extended the scope of Ntsu. The evidence of Ntamo which seeks to implicate Modiselle as the person that extended the scope of Ntsu is nonsensical in the face of his written submission and obviously an outright lie.
- [13] The commissioner’s conclusion that the deviation complied with clauses 14.1 and 14.2 is not supported by the evidence that was before him and is in fact contradictory. It is frankly incomprehensible how and on what basis the

commissioner could reasonably have arrived at his finding and conclusion in the light of the evidence. In particular: (i) the common cause evidence that the accounting officer was not requested and did not approve the extension of scope before the service was rendered by Ntsu; (ii) in the submission of 31 January 2013, Ntamo records that he and Sebeela authorised the extension of scope; (iii) the accounting officer did not approve the extension of scope when requested to do so after the event; (iv) on its terms, the SCM policy and procedures gives the accounting officer the discretion whether or not to approve a deviation in the specifically circumscribed circumstances. The commissioner's reliance on – Ntamo's testimony that "they acted as a team and only prepared the submission afterwards, when the service provider was not paid"; a letter from Mr MM Sebeela, an SCM Practitioner who confirms that the scope of Ntsu Trading was extended to provide breakfast and decorations, which extension was done after consultation with Ms Modiselle, the project manager; the affidavit of Merriam Hlangu of Ntsu Trading 628 (in which she confirms that Ms Modiselle requested her to add breakfast and decorations since the Honourable MEC Mr B Kompela confirmed his attendance"; that Ms A Botes, concurred with the submission of 31 January 2012 for *ex post facto* approval and had previously approved a request from Sebeela to deviate from SCM process; (iii) *that Ms Botes, as the CFO is specifically delegated in terms of Supply Chain Management Delegation Powers to approve certain procurements or delegations*"; that he saw no reason why the accounting officer did not ratify this deviation, alternatively why all employees involved in the service provider's extension of scope of work were not simultaneously charges; and that the SCM policy does not indicate whether the request for deviation should be ratified before or after the provision of services, to arrive at the conclusion that Ntamo is not guilty of the misconduct charged is a forced misdirection which and has no basis whatsoever on the evidence that was before him. It follows that the conclusion of the commissioner that the deviation complied with clauses 14.1.2 and 14.2 is unreasonable on the facts that were before him and cannot stand.

- [14] The commissioner also found that there was no reason that the accounting officer did not ratify the deviation *ex post facto*. It is not apparent from the

award why the commissioner came to this conclusion or indeed why he deemed it appropriate to make this a factor in the light of the charge⁶. Whilst it should suffice to state that it was not in the province of the commissioner to prescribe how the accounting officer should have dealt with Ntamo's request for *ex post facto* approval or ratification of the deviation, and that therefore the commissioner misdirected himself as to the nature of the inquiry, it is appropriate to point out that this is obviously a matter which, by prescript of policy, falls entirely within the discretion of the accounting officer, who is also the sole person accountable for the exercise of that discretion and who must make the determination whether the breach is minor and of a "*purely technical nature*". There is no evidence that the accounting officer had such duty as the commissioner appears to impose upon him.

- [15] In the event, the decision of the commissioner that Ntamo is not guilty of the charge of breach of SCM Procedures stands to be set aside.

Dereliction of duties

- [16] The relevant evidence that was before the commissioner may be summarised as follows -

16.1. Ntamo was formally appointed Acting Director: HRM on 2 February 2012. Prior to his appointment, he became responsible for co-ordinating and overseeing the process of selecting and appointing 52 (fifty two) provincial inspectors⁷. There is disagreement between Ntamo and the department whether before his appointment on 2 February 2013, Ntamo was Director, HRM, which Ntamo denies. I do not consider that much of significance turns on this because Ntamo accepts that as co-ordinator and overseer of the selection process, he supervised the work of Ms MA Wolff and Ms MA Macala⁸, both human resource practitioners subordinate to him and who were responsible for the administration aspect of the selection process. According to Macala, she and Wolff were responsible to take minutes, to

⁶ Clause 14.4 reads "14.4 The accounting officer may ratify any minor breaches of the procurement process by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature".

⁷ Transcript p132-133

⁸ Transcript p82

compile advertisement, to prepare long-list and short list and submit to the short-listing and interviewing panel for approval, to arrange for short-listed candidates to attend interviews, to prepare the submission, recommending candidate to be appointed and presenting for signature.

16.2. For his part, Ntamo oversaw the shortlisting and interviewing process but did not shortlist or interview candidates but attended, at least some, of the interviews as an observer.⁹

16.3. In a written submission bearing the name of Ms MA Wolff with the heading “*SHORTLISTING REPORT: ADVERTISED POSTS OF (52) X PROVINCIAL INSPECTOR: TRAFFIC MANAGEMENT*”, dated 14 November 2011, approval of the shortlist of candidates to be interviewed is sought as follows “upon the approval of the approved shortlist, it is envisaged that the interviews will be held within two weeks by the committee approved as follow ...” (my underlining). It is common cause that the request for approval of the shortlist was made by Wolff.

16.4. The selection process resulted in the appointment of 55 candidates, instead of the advertised 52, two of whom did not meet the advertised minimum requirements for appointment. With respect to the shortlisting of candidates who did not meet the advertised minimum requirements for appointment, Macala testified that sometimes the department does shortlist candidates who do not meet the minimum advertised requirements if there are not enough candidates that meet the advertised requirements¹⁰. There is no evidence whether or not this was the case in the present matter.

[17] In a submission dated 12 December 2011, bearing Ntamo’s name as the person making the submission in the capacity of Director: Human Resource Development, with the heading “*FILLING OF THE VACANT POSTS OF PROVINCIAL INSPECTOR: TRAFFIC – MANAGEMENT: DIRECTORATE*”, approval was sought for the appointment of 55 candidates, including 2 who did not meet the requirements for appointment. Ntamo did not deny that the

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¹⁰ Transcript p85-87

submission was his. According to Macala, the submission to appoint was made after letters of appointment were issued to the candidates¹¹.

- [18] Ntamo testified that Wolff and Macala were responsible for the selection process and that the submission of Wolff of 14 November 2014 was the cause of the appointment of the 55 provincial inspectors. Macala, on the other hand testified that Ntamo was responsible to make sure that the submission requesting appointment of the recommended candidates contained 52 and not 55 candidates¹² and that the candidates recommended for approval met the requirements for appointment. She also testified that Ntamo's role was to oversee that everything was done in accordance with policy, that the interview panel asked candidates the same questions and to sit in the interviews¹³. She also testified that Ntamo was involved with the shortlisting of candidates¹⁴.
- [19] The commissioner concluded that Ntamo was not responsible for the appointment process and was thus not guilty of the charge. The commissioner arrived at this conclusion on the basis that the submission of Wolff of 14 November 2011 sought that the candidates listed in the report be appointed and was the cause of the error in the appointment of the 55 candidates.
- [20] The conclusion of the commissioner is not supported by the evidence and at best, he misunderstood the evidence regarding the submission of Wolff and its consequence. The submission, on its terms, did no more than seek approval of the list of candidates to be interviewed. This is apparent where it records that "*upon the approval of the approved shortlist, it is envisaged that the interviews will be held within two weeks by the committee approved as follow ...*". This leaves no doubt about the purpose of the report and specifically what it sought to be approved, viz. the shortlist of candidates recommended to be interviewed. There is therefore no reasonable basis on which the commissioner could have concluded that the submission of Wolff was the cause of the appointment of the 55 candidates. This alone renders the decision of the commissioner to be set aside.

¹¹ p162

¹² p100

¹³ p104,p121

¹⁴ p124-125

- [21] In addition, the commissioner disregarded the following evidence about the role of Ntamo in the selection process – (i) he oversaw the selection process; the work of Macala and Wolff; and the work of the shortlisting and interviewing panels; (ii) he was aware that the advertisement required the filling of 52 positions with candidates who met the advertised minimum requirements; (iii) the submission of Wolff of 14 November 2011 sought approval of the list of candidates shortlisted to be interviewed; (iv) the submission of Wolff predates the interviews and selection of candidates recommended for appointment; (v) the submission to the MEC to approve the appointment of the 55 candidates recommended for appointment bore the name and signature of Ntamo where indicated for the name of the person making the submission. It is common cause that Ntamo made this submission and recommended, (at paragraph 7.1), “*That approval be granted for the appropriate filling of the vacant posts ...*” and that the recommendation was approved by, *inter alia*, the Head of Department and the applicant. This submission does not bear the name of Wolff. It follows that the conclusion of the commissioner that Wolff and not Ntamo was the cause of the appointment is not reasonable and his decision that Ntamo is not guilty on this erroneous basis cannot stand.
- [22] In the light of the conclusion to which I have arrived, I do not consider it necessary to deal with the further grounds for review relied upon by the applicant.
- [23] The commissioner also found that the employer applied selective discipline in that it did not subject all the employees involved with the impugned conduct to disciplinary processes. It is my view that with this finding, the commissioner lost sight of the nature of the charge against Ntamo – (i) that he authorised procurement without following prescribed procedure; and (ii) he failed to ensure that the submission to the MEC and therefore the appointment of provincial inspectors complied with the requirements of the advertisement. Both the submission for *ex post facto* approval of the deviation and the submission to appoint provincial inspectors were made by Ntamo, with him stating in the former that he authorised the deviation without approval of the Head of Department and in the latter, recommending the appointment of the

55 candidates. In any event, that others may well have contributed to the impugned conduct does not insulate Ntamo from disciplinary action for his own conduct which is distinct from that of the other persons he seeks to implicate. For that reason, I find that the issue of consistency in disciplinary action does not arise in this matter and the commissioner misdirected himself.

Remedy

- [24] The applicant seeks as primary relief that the Court substitute the award of the commissioner, and in the alternative, remit the matter to the CCMA for a hearing afresh.
- [25] The record in this matter is quite extensive comprising at least 4 arch lever files. The parties have had a full and comprehensive airing of the merits of the dispute before the commissioner and Ntamo does not contend, in his answer to the applicant's prayer for substitution of the commissioner's decision, that there is a need to hear further evidence. In the result, I am satisfied that on the record before me, I am placed in a position to determine the merits of the dispute. A remittal of this aspect in the circumstances will only serve to unnecessarily prolong the finalisation of the matter and would not be fair to the parties. I accordingly intend to deal with the merits.
- [26] I have already found that on the charge of breach of SCM Procedures - (i) the accounting officer did not make a decision or authorise the extension of the scope of Ntsu to provide breakfast and decorations; (ii) the accounting officer did not authorise the extension of scope without compliance with the requirement to obtain 3 quotations; (iii) Ntamo extended the scope of Ntsu to provide breakfast and decorations and did so without the approval of the accounting officer; (iv) the accounting officer did not approve the deviation as requested by Ntamo in his submission of 31 January 2012, which the accounting officer could do if he/she considered the breach minor and only of a technical nature. It is irrelevant that the employee, or the Court for that matter, may consider the breach minor and only of a technical nature. The determination is purely of the accounting officer and in this case, the accounting officer exercised his/her discretion against approval; (v) the

request for approval was made by Ntamo after Ntsu had been appointed and rendered the service in issue.

- [27] Whilst it was put to Mr Lehasa Mazibuko, a witness for the applicant, that Ntamo found that the services had already been rendered and all that he did was to seek authorisation for payment, this is not borne out by his submission of 31 January 2012, which expressly states that Ntamo extended the scope of Ntsu. This evidence, without more, renders Ntamo guilty of the charge of breach of SCM procedures as formulated in charge 1. It is appropriate to point out that even if the Accounting Officer had chosen to approve or ratify the breach *ex post facto* in accordance with the applicant's submission, it does not follow that Ntamo would have avoided any censure for his failure to comply with prescribed procedures and policy. This is a matter that was entirely within the discretion of his superiors to decide, which they did by instituting disciplinary proceedings.
- [28] I am satisfied that the applicant has shown that Ntamo is guilty of the misconduct alleged in charge 1.
- [29] With respect to charge 2, I am satisfied that Ntamo, by making the submission to the MEC to appoint 55 candidates, 2 of whom lacked the necessary qualification, contrary to the advertisement, was the effective cause of the appointments and was grossly derelict of his duties. His failure to act diligently caused the department to incur irregular expenditure in respect of the excess candidates who were appointed. It also caused the department to appoint candidates who did not meet the requirements for appointment. This is manifestly unfair to other candidates who did not derive the same benefit as the 2 candidates who did not qualify.
- [30] On his own account, Ntamo oversaw and supervised the selection process. I make nothing of whether or not he did so in an acting capacity or not. The process that he oversaw resulted in him making a written submission which recommended the appointment of 55 candidates, 2 of whom lacked the advertised minimum requirements, when only 52 candidates who met the advertised requirements were to be appointed. As the person responsible for

the act that resulted in the MEC making the impugned appointments, Ntamo must accept responsibility for this serious failure by government to follow fair process. Whilst it is evident from the evidence that other role players contributed to the error, Wolff, Macala and at least the chairperson of the interviewing panel Mr Leeto, their work was subject to oversight by Ntamo who was the last and responsible person to ensure compliance with process and the requirements. This he dismissally failed to do.

[31] Whilst charge 2 includes failure to ensure that – (i) candidates were asked the same questions; (ii) that they were evaluated properly and awarded points in accordance with their performance; and (iii) that the interview panels comprised persons appointed by the Head of Department, no evidence was presented to support this charge. Accordingly, the department did not show that Ntamo was guilty of these acts. Notwithstanding, I am satisfied that Ntamo failed to ensure that the approved number of candidates, who met the prescribed minimum requirements were appointed – he dismissally failed to exercise reasonable care and due diligence to ensure that the correct appointments were made. It follows that I find that Ntamo is guilty of the charge of dereliction of duty in that he caused that persons were appointed who should not have been appointed. His failure prejudiced the administration, discipline and efficiency of the department.

[32] Having found that Ntamo is guilty of charges 1 and 2, the question of the appropriate sanction must be determined. This is a matter that the commissioner must consider and exercise his discretion as to the appropriate sanction. I accept the applicant's contention that matters of procurement by the state in a fair, transparent and equitable manner are not trivial. The failure to comply therewith is a serious matter that must carry consequence. The circumstances that resulted in his non-compliance with prescribed procurement procedures and policy may well mitigate Ntamo's conduct in the circumstances. The gravity of the misconduct, including that relating to the appointment of the 55 provincial inspectors are matters that must be considered when determining an appropriate sanction, and taking into account any mitigating or aggravating factors.

[33] In the light of the conclusion to which the commissioner arrived, he understandably did not consider whether the sanction of dismissal is appropriate. As a result, there is no evidence before me of factors that are relevant to the consideration of the appropriate sanction. As a result, I am unable to make any finding as to what would constitute the appropriate sanction in the circumstances. I accordingly intend to make an order remitting the matter to the first respondent **only** for the determination of an appropriate sanction in respect of both charges.

Costs

[34] The parties argued and submitted that costs should follow the cause. The applicant has been successful with its claim and should accordingly be awarded costs. I see no reason to order otherwise.

Order

[35] In the result, I make the following order

- (a) The award of the commissioner is reviewed and set aside and substituted with the following
- (b) The third respondent is guilty of misconduct in charge 1.
- (c) The third respondent is guilty of misconduct in charge 2.
- (d) The matter is remitted to the first respondent **only** for determination of the appropriate sanction by a commissioner other than the second respondent, such commissioner to determine the appropriate sanction after receiving and considering evidence on mitigating and/or aggravating factors and any legal argument that the parties may wish to present on sanction.
- (e) The third respondent is to pay costs.

S Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : MH Marcus

Instructed by : Lebea Associates

For the Respondent: M Khang

Instructed by: Mphafi Khang Inc