Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 1334/14

In the matter between:

NDINANNYI NEVEHETHALU	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER MATJI (*NO*)	**Second Respondent**
PRASA CORPORATE REAL ESTATE SOLUTIONS SOC LTD	**Third Respondent**

Heard: 22 February 2018

Delivered: 13 March 2018

Summary: (Review – dismissal – procurement irregularities – reasonableness review – nit picking approach to charges particularly inappropriate given the scale of irregularities involved – arbitrator would have committed a reviewable irregularity had he preferred the highly improbable version of the applicant – no material errors in evaluation of the evidence)

JUDGMENT

LAGRANGE J

Background

[1] This is a review application. The arbitrator found that the dismissal of the applicant on various charges of misconduct relating to contraventions or non-compliance with supply chain management policies and practices of the applicant was substantively and procedurally fair. All in all the irregular expenditure incurred amount to approximately R 2, 5 million.

The arbitration award

[2] The charges were grouped into three categories by the arbitrator:

2.1 The first category concerned variation orders. These were variations of previously approved orders, which exceeded 10% of the amount of the original order without the variation being taken to the regional tender procurement committee (RTPC) for approval. The variations in question were very significant. The lowest escalation on the original approved quote was nearly double the original and in other cases the escalation was nearly five times the original quote. In the most extreme case the escalation was nearly six times the original quote.

2.2 The second type of misconduct concerned purchases made in excess of R 350,000 without being submitted for the invitation of tender bids as required by 11.3.2 of the Supply Chain Management policy.

2.3 The last category concerned the applicant's failure, in his capacity as a supply chain manager to advise end-users and the regional manager about acceptable procurement policies and processes and failure to exercise due care.

Variation orders in excess of the 10% limit

[3] The arbitrator found it highly improbable that the applicant was unaware of the limit on variation orders especially given the fact that even one of the witnesses who was not an expert on procurement processes knew about it. The arbitrator acknowledged that it was not mentioned in the written policies but was implicit in the delegation of authority as evidenced by Mr G Matampi, the former General Manager of Real Estate Management ('Matampi'). Moreover, the policies and delegations were on the company's intranet and there was no valid excuse why a person in the applicant's position would not have knowledge of them. He noted also that evidence that supply chain management practitioners ought to be aware of the delegation of authority for their unit managers was unchallenged. He also found it implausible that the applicant could have thought that initial quotes for work which had to go through an approval could thereafter be varied without limit and without going through the same approval process.

[4] The arbitrator also dismissed another of the applicant's defences, namely that he merely was required to append his signature to memorandums from facility managers without verifying their correctness. The arbitrator held this was disingenuous and mischievous, given evidence that the purpose of submitting requisitions for purchase orders via an SCM practitioner like the applicant was specifically for monitoring and control purposes to ensure compliance with the policy and delegations of authority.

Specific findings

[5] In addition, the arbitrator made certain specific findings, namely:

5.1 The applicant authorized payment of an invoice of more than R 900,000 for Limpopo stations without approval of the RTPC which was in breach of paragraph 9.6.3 of the SCM policy.

5.2 The applicant signed an application for the approval of payment in circumstances where the facility manager who ought to have signed the application would not approve a variation because it had not been properly obtained and the applicant must have known that he was not entitled to sign the document because he had no authority to authorise expenditure on the departmental budget.

[6] The arbitrator concluded that the applicant's dismissal was both substantively and procedurally fair.

Grounds of review and evaluation

[7] I will concern myself only with grounds of review raised in the founding papers. It was suggested in argument that I could also entertain new grounds raised for the first time in heads of argument, but the constitutional court decision in ***Commercial Workers Union of SA v Tao Ying Metal Industries & others***[1] has made it clear that the court is confined to what is raised in the review application itself, except in limited exceptional circumstances such as the existence of a jurisdictional issue neither party had identified:

> "[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.
>
> [68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the commissioner's jurisdiction

[1] (2008) 29 *ILJ* 2461 (CC)

> and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play."[2]
>
> (emphasis added)

[8] In addition, the LAC held in ***Comtech (Pty) Ltd v Molony NO and Others***[3] that Rule 7A(2)(c) of the Labour Court Rules requires an applicant in a review to set out the factual and legal grounds of the review in the founding papers.[4]

[9] The grounds of review are based on unreasonableness relating to the arbitrator's evaluation of the evidence. The threshold for succeeding on this ground is high. In *Head of Department of Education v Mofokeng & Others* [5]it was expressed thus:

> "[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) and this court in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others6 have held that <u>before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome</u>."[6]

First ground

[10] The applicant contends that the arbitrator overlooked his evidence that he was charged with breaching the SCM policy practice at Prasa. In effect, that policy permitted variations on invoiced quotes, but Prasa relied instead on a policy of Intersite Property Management, a subsidiary of Prasa, which was not applicable to him. However, he eventually conceded under cross- examination that there was no material difference between the two policies, so it is difficult to understand why this is a material issue

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[2] At 2483-4

[3] (DA12/05) [2007] ZALAC 40 (21 December 2007)

[4] At paras [15] – [19].

[5] (2015) 36 *ILJ* 2802 (LAC)

[6] At 2811-2

on review. In any event as the discussion below indicates, the applicant's interpretation of the policy and his responsibilities was nothing short of perverse.

[11] Another ground raised is that, the arbitrator allegedly failed to take account certain aspects of the applicable disciplinary procedure. Firstly, the fact that there was no rule in the SCM policy that he could be held to have breached, which was contrary to Prasa's own disciplinary and grievance procedure which required a rule to be known to employees. It is true that the disciplinary code and grievance procedure of Prasa purports to state the tests for substantive fairness for misconduct dismissals set out in Schedule 8 of the LRA, but in fact it somewhat misstates it. Item 7 of Schedule 8 states:

> 7. Guidelines in cases of dismissal for misconduct
>
> Any person who is determining whether a dismissal for misconduct is unfair should consider-
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not-
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, <u>or could reasonably be expected to have been aware,</u> of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

(emphasis added)

Clause 5.1 of the Prasa disciplinary code, while purportedly rephrasing what is in item 7 distorts it in an important respect:

> "5.1 Substantive Fairness: Schedule 8 of the LRA 66 of 1995
>
> 5.1.1 There must be a rule
>
> 5.1.2 The employer should notify the employer allegations using a form of language that the employee can reasonably understand.

5.1.3 The employee <u>must have knowledge of the rule</u>

5.1.4 The employee must have breached the rule

5.1.5 The rule or standard must be consistently applied

5.1.6 The sanction must be appropriate for the contravention"

(emphasis added)

Clearly, the code as paraphrased by Prasa left out the alternative possibility pertaining to knowledge of the standard or rule. From the perspective of the arbitrator, determining whether a dismissal is fair or not, the arbitrator was entitled to rely on the test set out in item 7. Whether an internal code prescribes a more stringent test or not does not alter the standard of fairness an arbitrator must apply under item 7 read with section 188 (2) of the LRA. Consequently, it cannot be said that the arbitrator could only determine that the applicant's dismissal was fair if the employer proved that he actually knew of the rules and standards applicable to the procurement decisions he made.

[12] The second point raised procedurally, concerns the status of the chairperson of the enquiry. Clause 5.7.2 of the Prasa code states that a disciplinary enquiry against the manager had to be held by someone in a higher position. The arbitrator concluded that there was no evidence that the chairperson did not satisfy this requirement and the applicant alleges that there was no evidence to justify his conclusion. Whether or not there was evidence, the error in my view was not a material as it is not a matter having any demonstrable bearing on the fairness of the enquiry. The applicant does not explain what prejudice this caused him apart from the fact that he complained there was not compliance with the code itself and it is a trite principle that mere non-compliance with the disciplinary code does not necessarily result in unfairness.

Second ground

[13] The arbitrator also supposedly ignored the fact that clause 11.3.2 of the SCM policy only requires a competitive bidding process when the estimated value of the requirements is more than R 350 million, not R 350,000. Under cross-examination, Mr Mbatha of the security department

which conducted the initial investigation commented that the figure of R 350 million was clearly a typographical error and even the CEO did not have authority to authorise a contract of more than 100 million. He affirmed that at a regional level any procurement of work above R 350,000 in value had to go to the RTPC.

[14] It is true that there was ineptness on the part of Prasa in allowing the numerical error to persist. However, if the arbitrator had accepted the error as correct, that would plainly have been irrational on his part, both on account of the preponderance of the evidence about the true figure and on the grounds of simple common sense. That the applicant can seriously advance this as a material error on the arbitrator's part is astonishing. The sheer improbability of such a limit being applicable to anyone in Prasa's procurement hierarchy also has a bearing on whether or not the applicant's belief that he had not exceeded any limits was credible. The arbitrator's failure to treat the figure of R 350 million as incorrect and the figure of R 350,000 as correct was the most reasonable inference anyone could have made.

Third ground

[15] The applicant claims the arbitrator ignored relevant evidence in concluding that he must have been aware of the 10% variation limit on variation because he ignored the fact that the SCM policy did not make provision for a 10% variation limit, by contrast with the allegedly inapplicable Intersite policies which did contain such a provision. During the course of the arbitration, the respondent had argued that procurement policy set a framework and the procurement practices emanated from that framework, one of which concerned the variation of orders. Matampi also testified on the delegation of authority which specified the 10 % variation restriction. Moreover clause 23.1 of the Prasa supply chain management policy required users to comply with the controls and delegations of authority.

[16] What the arbitrator was faced with was an employee who had accepted an appointment as a procurement manager, but apparently did not bother to familiarise himself with the ambit of his authority to authorise expenditure and who fully understood and accepted that a procedure had to be

followed before a quote could be accepted, but claims, in effect, to be so naive that he believed that it was not necessary to obtain quotes for the additional work required even when the amount he approved eclipsed the original value of the approved quote by multiples of 100% and more. On the evidence before the arbitrator, his interpretation that a reasonable limit applied to varying or extending original quotations is eminently more plausible than the applicant’s version that there was no applicable limit, or that it was not something he could be expected to know as a procurement manager. It is interesting to note that his knowledge of procedures was selective: he was well aware of the existence of emergency procurement procedures, but conveniently was unaware anything that might have limited his discretion.

Fourth ground

[17] The last ground raised is that the arbitrator apparently failed to appreciate that he was not charged for breaching the Intersite policies but Prasa policies. Matampi testified that the policies applied by PRASA were the policies applied by Intersite a subsidiary of Prasa which managed facilities and the property portfolio of Prasa. In the light of the discussion above, and the applicant’s own concession that there was no material difference between the policies, this ground rests on a very technical and literal approach to the charges. The real thrust of the charges against the applicant was that he approved vast expenditure to the value of approximately R 2.4 million in a matter of a few months, which was irregularly authorised by him and that he should have been aware of the limits of his authority. To the extent that he relies on the failure to stipulate the 10% variation limit in the Prasa policy itself when authorising the amounts he did, it is implausible that he would not have sought clarity on his authority to clear such vast escalations, and would not have enquired about the extent of his authority as determined by the delegations. The value of those escalations was such that it is a perfectly reasonable inference to draw that he could not have had a *bona fide* belief that there was nothing untoward in endorsing them, without some independent confirmation of the scope of his authority. Had the irregular expenditure he

authorised only marginally exceeded the limits of his authority, his case might have been a bit more plausible. In the circumstances, it cannot be said that even if the Prasa policy was the applicable one, that the arbitrator's overall conclusion was one that no reasonable arbitrator could have reached.

<u>Costs</u>

[18] *Mr Short,* who appeared for the applicant did so *pro bono* and put the applicant's case in the strongest light. The court is indebted to him for his efforts. On account of the applicant having been found to warrant *pro bono* representation, I am disinclined to make the cost award I would otherwise have made against him.

<u>Order</u>

[1] The review application is dismissed.

[2] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	D Short of Fairbridges Wertheim Becker
RESPONDENT:	D Norton of Mkhabela Huntley & Adekeye Inc