IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1436/15

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION o.b.o. MICHAEL MOGOROSI	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER WILLEM KOEKEMOER *N.O.*	**Second Respondent**
ROAD TRAFFIC MANAGEMENT CORPORATION	**Third Respondent**

Heard: **8 February 2017**

Delivered: **18 April 2018**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction

[1] The applicant, the National Education and Allied Workers Union ('NEHAWU') approached this Court on behalf of its member Mr Michael Mogorosi ('Mogorosi') to review and set aside the arbitration award issued by Commissioner W. Koekemoer ('Commissioner'). The Commissioner in his arbitration award found that the dismissal of Mogorosi by the third respondent

Road Traffic Management Corporation ('RTMC') on the grounds of misconduct was substantively and procedurally fair.

[2] RTMC opposed the review application, and at the commencement of these proceedings, it was submitted on its behalf that other than the merits of the review application, there were other preliminary points that were raised by it in its papers which needed to be dealt with prior to the merits of the review application.

[3] It was maintained on behalf of the applicants that all preliminary issues were heard and disposed of during the pre-enrolment proceedings before van Niekerk J on 10 August 2016. To the extent that there was a dispute in this regard, I had then directed the parties to file the record of the pre-enrolment proceedings to verify whether the preliminary issues still needed to be determined.

[4] Upon a reading of the transcribed record of proceedings before Van Niekerk J, it became apparent that indeed all the preliminary points had been dealt with at the pre-enrolment hearing, and there was clearly no merit in RTMC's contentions that those issues were still outstanding.

Background

[5] RTMC is a state-owned entity established in terms of the Road Traffic Management Act (RTMA).[1] It is a schedule 3A entity in terms of the Public Finance Management Act (PFMA)[2], and is thus classified as a 'government department'. Its objective is to *inter alia* effect the pooling of road traffic powers of the Minister and every provincial MEC and the resources of national and provincial spheres of government responsible for road traffic management, in support of enhanced co-operative and co-ordinated road traffic strategic planning, regulation, facilitation and law enforcement.[3] It commenced its operations in April 2005.

[1] Section 3 of Act 20 of 1999, as amended
[2] Act 1 of 1999, as amended
[3] Section 2 of the RTMA

[6] Mogorosi was prior to his dismissal employed as the Deputy Chief Financial Officer. It was common cause that from time to time, Mogorosi would act in the position of Chief Financial Officer. The allegations leading to Mogorosi's dismissal are that during his employment, he had on several occasions contravened the provisions of RTMC's Supply Chain Management Policy; the provisions of the PMFA; section 217 of the Constitution of the Republic, and those of the RTMA.

[7] On 14 July 2014, the Chief Executive Officer (CEO) of RTMC advised Mogorosi of an intention to pursue charges of misconduct against him. He was invited to make representations on why he ought not to be placed on precautionary suspension pending investigations into his conduct. He was further invited to make representations in respect of the contemplated charges of misconduct.

[8] Despite his response and undertakings on 15 July 2014 that he posed no threats to any investigations, Mogorosi was placed on precautionary suspension with full pay on 17 July 2014. A notice to attend a disciplinary enquiry was issued on 28 July 2014, advising Mogorosi that the disciplinary hearing was to be scheduled for 5 and 7 August 2014.

[9] The charges of misconduct preferred against Mogorosi were as follows:

> "**Charge 1: (Gross Negligence)**
>
> On the 27 February 2017 and at your workplace, you did wrongly act with gross negligence in that you did cancel an order of, but failed and/or ignored to issue or cause to be issued a letter of cancellation to a supplier named, Readmore Brandtrend CC ("Brandtrend"), which had been issued with a purchase (order No: PO 1359), whist knowing and/or you would reasonably by virtue of your position, have been expected to know such failure would possible have placed the RTMC at a financial and/or legal risk. Your conduct thus fell within the misconduct contemplated in item 1 of category 2 of Annexure B of the Code.
>
> **Charge 2: (failure to observe the Corporation's rule and regulations)**

On or about 5 March 2014 and at your workplace, you did wrongfully and without prior written motivation to the Chief Executive Officer of the RTMC, and in contravention of clause 6.2 of the RTMC policy on Supply Chain Management, 2012, cancel the purchase order (PO 1359) issued to Brandtrend and issued a new order to another supplier namely, CF Mathabatha Consulting and General Services CC ("CF Mathabatha").

First alternative to Charge 2 (Contravention of Public Finance Management Act 1 of 1999)

On or about 05 March 2014 and at your workplace, you did contravene the provisions of section 57 of the PFMA by issuing a new order for CF Mathabatha without ensuring that effective, efficient and transparent procurement measures were implemented during the procurement of 1000 notebooks under RFQ 02599.

Charge 3: (Disruptive and insolent behaviour)

In that during 2013 and at/or near the premises of the employer, you did contravene the Disciplinary Code and Procedure of the employer, in that you unlawfully and intentionally obstructed alternatively, attempted to obstruct a forensic investigation conducted by Nkonki, into transactions on nine bank accounts of RTMC by not co-operating with Nkonki investigation team and/or instigating other employees and witnesses not [to] co-operate with the investigation. "

[10] In a letter dated 14 August 2014, additional charges to include:

ADDITIONAL CHARGE: 1A

On or about 5 March 2014 and at your workplace, you did wrongfully and without prior written motivation to the Chief Executive Officer of the RTMC, and in contravention of clause 6.2 of the RTMC policy on Supply Chain Management, 2012, cancelled the purchase order (PO:02654) issued to Sekati Marketing and Business Development Consultants CC and issued a new order to another supplier namely, Shereno Printers CC ("Shereno").

ADDITIONAL CHARGE: 5

> On or about 22 October 2013 and at your workplace, you did wrongfully and without just cause, fall to compile, sign-off a draft declaration of and request for retention of surplus of funds totalling R269 292 865 (**Two Hundred and Ninety-Six Million Two Hundred Ninety-Two Thousand and Eight Hundred and Sixty-Five Rand**) for the financial year 2012/2013, and you failed and/ [or] ignored to deliver the said draft, and/or a written memorandum in respect thereof for the approval of the CEO to enable him to comply with his obligation as contemplated in terms of section 24(3) of the RTMC Act, 1999. Consequently, the National Treasury registered an irregularity of the expenditure emanating from the undeclared retained surplus. You have contravened the provisions of the RTMC and therefore liable to be found guilty of gross negligence.

[11] At the end of the disciplinary proceedings, Mogorosi was found guilty of charges 1, 2, 3 and 5, and a sanction of dismissal was imposed. Aggrieved with the outcome and sanction, Mogorosi referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation Mediation and Arbitration ('CCMA'). Attempts at conciliation were unsuccessful, and the dispute was referred for arbitration.

<u>Arbitration proceedings and the award:</u>

[12] At the arbitration proceedings, Mogorosi challenged both the procedural and substantive fairness of his dismissal. The challenge on procedural fairness pertained to the alleged failure by the chairperson to give him an opportunity to plead in mitigation. RTMC led the evidence of no less than six witnesses.

[13] The first of the witnesses was Ms Melanie Fryer ('Fryer') who was previously appointed as the Senior Manager: Supply Chain Management and who at the time of the arbitration proceedings was the Divisional Head: Training. Her evidence in respect of the charges against Mogorosi centred around the procurement processes within RTMC and its statutory obligations. In this regard, she testified that;

13.1. The Chief Financial Officer (CFO) was responsible for the reporting of surplus funds for a specific financial year to the National Treasury. Moreover, the PFMA and the Regulations specifically assigned that function to the CFO. Surplus funds could not be rolled over to the next financial year without the express permission of National Treasury.

13.2. RTMC had in July 2014, received correspondence from National Treasury re-emphasising that it could not budget for a deficit or accumulate surpluses unless there was prior written approval. National Treasury had also pointed out that in the audited financial statement of 2012/2013, RTMC had recorded a cash surplus of R296.3 million with an accumulated surplus of R418.4 million as at 31 March 2013. It was pointed out that National Treasury had not as at that date, received any requests from RTMA for approval to retain the surplus.

13.3. Fryer testified that if a department for whatever reason required to utilise funds classified as a surplus, there was an obligation to request and obtain permission from the National Treasury. Failure to obtain such permission had serious consequences as that would be viewed as non-compliance with the PFMA and Treasury Regulations. If the National Treasury withheld permission, any subsequent utilisation of the surplus funds would be regarded as unauthorised expenditure.

13.4. In respect of any tender process, it was a requirement that the cheapest tender should be accepted, and where this was not the case or there was a need for deviation, both the CEO and CFO in terms of RTMC policies and PFMA regulations were required to sign off that deviation, explaining the reasons there was a need for the deviation.

13.5. Furthermore, in the event of a purchase order having been issued, and where the appointed services provider was unable to deliver a service for whatever reason, that purchase order was to be withdrawn to avoid any potential risk to RTMC. The CEO and the CFO were obliged to reach an agreement on the withdrawal of the purchase order and once withdrawn, the procurement process was to be re-initiated afresh.

13.6. If the RTMC failed to cancel the order, this could result in a real risk in that, another officer could unknowingly pay the service provider as per the purchase order, which ought to have been cancelled. The service provider might as well issue an invoice in its favour if the cancellation is not effected. In simple terms it may lead to a double payment.

13.7. RTMC is not at liberty to re-award the purchase order to the "second best" service provider because of the cancellation and/or withdrawal. The CEO was vested with the authority for approval for the re-advertisement of the bid or for RTMC to source further quotations for the service or product being sought.

[14] Mr Tebogo Kgwedi (Kgwedi), the Supply Chain Manager's testimony centred around the tender process from the submission of bid documents; the consideration of the bid and its supporting documents; the qualification and/or disqualification of bidders and the selection of the preferred bidder. He testified that the CFO was the ultimate decision maker in respect of selection of the preferred bidder. Once a preferred bidder was approved, the RTMC would then formulate a purchase order for the preferred bidder, who would in turn be expected to deliver the goods or services in terms of that purchase order.

[15] In regard to the first allegation of misconduct against Mogorosi, an invitation was issued to bidders to deliver notebooks. Amongst the bidders were entities known as Cancri, CF Mathabatha, and Readmate who had submitted their respective quotations together with all the necessary relevant documentation. Once verifications were done, the matter was left to the CFO for approval, and once approval was obtained, the successful bidder was to be issued with a purchase order.

[16] Readmate was chosen as a successful bidder and a purchase order was then issued to it. At some point, Readmate indicated that it could not deliver the notebooks required, and the purchase order initially issued to it was then cancelled. Readmate had also sent an e-mail confirming that it could not supply the notebooks. CF Mathabatha, which had amongst the three bidders

submitted the highest quotation was then awarded the contract, and it was issued with a purchase order. This according to Kgwedi was done without re-advertising for the tender, or Readmate not being informed of the cancelation of the purchase order previously issued to it. A Ms. Annie Seroka was responsible for ensuring that Readmate was informed of the cancelation of the purchase order but had not. This entire process was however to be overseen by Mogorosi as the then acting CFO.

[17] Under cross-examination, Kgwedi conceded that if a product or service required by RTMC was below a threshold of R500 000.00, the best supply chain process would simply be to call for a minimum of three quotations, and that CF Mathabatha was one of the suppliers that were called for quotations amongst five. He conceded that this was in compliance with clause 6.8 of the Supply Chain Management Policy. In this regard, Fryer had also confirmed that there was nothing that prevented RTCM from choosing the second highest bidder for services in circumstances where the preferred bidder was unable to deliver the service or product required. In respect of the same bid, Kgwedi further conceded that Readmate was unable to supply the goods required whilst Cancri did not have the notebooks required. This left CF Mathabatha as the only supplier able to meet the demand.

[18] A further invitation for tender was issued for the supply of NTP Notebooks. Several quotations were received from bidders including Sekati Marketing (R8 000.00), Shereno Printers (R53 000.00), Rampolokeng Trading Enterprises (59 300.00) and others. Sekati with the lowest quotation and more scoring would ordinarily have been the successful bidder. A purchase order was nonetheless issued and signed off by Mogorosi to Shereno Printers which had the second highest quotation

[19] Ms Moolman, RTMC’s current CFO’s testimony was as follows:

At the time of the allegations against Mogorosi, she was the Senior Manager, Revenue. At some point she had received an instruction from Mogorosi, who was then the acting CFO to draft a letter declaring RTMC’s surplus revenue. She had drafted the letter with some blanks to be filled in by him. Mogorosi was to thereafter forward the letter to the CEO, who would have in turn submitted it to National Treasury.

[20] Upon receipt of a letter of July 2014 from National Treasury in relation to RTCM's surplus, Moolman was of the view that the letter she had drafted and sent to Mogorosi never went through to the CEO or National Treasury, and any funds utilised from the surplus fund would thus have constituted irregular expenditure. Even if the funds had not been utilised, there was still an obligation to declare them in terms of the provisions of section 53 of the PMFA.

[21] Under cross-examination, Moolman conceded that because of the financial statements presented to the Auditor General on or about 31 July 2013, that office was made aware of the surplus in RTMC, and that in any event, any surplus belonged to RTMC and its shareholders, including the Minister of Transport. Under re-examination, she contended that there was still a duty to report and declare that surplus. She confirmed that the National Treasury had registered an irregular expenditure by RTMC, even though no irregular expenditure was registered for 2012/2013 and 2013/2014 financial year.

[22] Gilberto Martins, is the current RTMC's COO. At the time of events leading to Mogorosi's disciplinary enquiry, he was appointed as acting CEO around August 2013. He confirmed the position in regard to surplus funds and the need to inform National Treasury of those amounts. From the letter received from National Treasury, RTMC had not reported or declared its surplus funds. He contended that even if National Treasury was somehow aware of the surplus, there was still a need to declare or report it as it was to be audited.

[23] Martins further testified in regard to allegations that Mogorosi had made misrepresentations when applying for a position in the RTMC. He testified that Mogorosi had not indicated in his *curriculum vitae* that he was dismissed for financial misconduct from his position as CFO in the Department of Education in Mpumalanga Province, and had misrepresented that he had resigned instead. According to Martins, Mogorosi was employed by the previous CEO, Collins Letswalo. When he (Martins) took over as COO, he was unaware of

the circumstances under which Mogorosi was employed and had simply confirmed his appointment based on a letter purportedly signed by Letswalo. Only Mogorosi had a copy of the letter of appointment. He testified that had he known of that misrepresentation, he would not have confirmed his appointment, and he was of the view that an employment relationship with Mogorosi had irretrievably broken down.

[24] Under cross-examination, Martins conceded that he was unaware of the events that transpired at the CCMA after Mogorosi had referred a dispute following his dismissal by the Department of Education in Mpumalanga.

[25] Tamara Mtimkulu, a Senior Consultant in Fraud Risk Management employed by Nkonki Incorporated testified in relation to investigations into nine bank accounts of RTMC and allegations of a fraudulent invoice and stop order that was issued in the name of RTMC. Her evidence was that Mogorosi interrupted or hampered those investigations by instigating other employees not to cooperate in respect of obtaining a court order needed to assist with the investigations. The then CFO, Portia Mngomezulu had issued specific instructions to all staff members to cooperate fully with the investigations. When Mogorosi acted as CFO upon Mngomezulu taking maternity leave, those investigations stalled as new rules were put in place in terms of securing certain files necessary for the investigation or setting up meetings with staff members to be interviewed. The delays meant that investigations were concluded without some information having been obtained. A court application could not be pursued as certain documents pertaining to a variation were not signed. Mtimkulu also attributed the abrupt termination of the investigations to Mogorosi.

[26] Under cross-examination, Mtimkulu conceded that Mogorosi had at some point in her presence, telephonically informed employees to cooperate fully with the investigation. She nonetheless contended that he had instigated another employee, one Refilwe, who was the then acting CEO not to cooperate in respect of the signing of court papers. She further complained that the final report of the investigation was submitted to the RTMC but that the then CEO (Mngomezulu) had not signed it as she was implicated in it.

[27] Mogorosi's testimony was as follows;

27.1 He was appointed as Deputy CFO in February 2013 when the then CEO was Collins Letswalo. In respect of the first charge pertaining to the cancellation of the Readmate purchase order and the failure to notify it of the cancellation, he testified that three quotations were received in respect of services under R500 000.00. The preferred supplier could not deliver, and the policy allowed one to go for the next highest bidder, and there was nothing in the policy that compelled RTMC to re-advertise the tender.

27.2 The purchase order initially issued to Readmate was cancelled by him. Readmate had also sent an e-mail to Annie Seroka and telephonically confirmed that it was unable to deliver what was requested, whilst Cancri could also not meet the demand. He disputed that there was any need for him as acting CFO at the time to inform Readmate of the cancellation under the circumstances.

27.3 In regard to charge two which related to awarding a contract to CF Mathabatha without ensuring that effective, efficient and transparent procurement measures were implemented, he denied the allegations, contending that the process adopted was above board as five requests for a proposal had already gone out. When the two other bidders could not meet the supply requirements, CF Mathabatha had to be appointed.

27.4 Mogorosi denied any allegations pertaining to the third charge that he did not cooperate with the Nkonki investigations or that he had instigated other employees not to cooperate with those investigations. His main concern with the investigations was that its costs had escalated and despite the payment of R490.000.00, little progress had been made. When Nkonki sought to carry out further investigations at escalated costs, this would have entailed a deviation in an additional amount of R1.4 million, and he had raised his concerns.

27.5 According to Mogorosi, the investigators sought to expand the investigations by inspecting telephone records of staff members, and this was not within the scope of their mandate. His view was that the investigation was a waste of money and if the CEO did not agree with his views, the investigations could have continued as he did not have a final say on the matter.

27.6 In regard to the alleged failure to declare surplus to National Treasury for 2012/2013, Mogorosi's attitude was that he had no obligation under the provisions of section 24 (3) of the RTMC as Acting CFO to report the surplus to National Treasury. He testified that the only obligation on him was to inform the Shareholders Committee and the Minister, who was also the chairperson of that Committee. The Committee was then to decide what was to be done with the surplus. If the surplus was utilised for whatever reason, it was only thereafter that National Treasury was to be informed. He contended that the PFMA did not come into consideration in regard to the surplus, and in any event, there no surplus to be declared in the 2012/2013 financial year.

27.7 Regarding the alleged misrepresentation made in his CV, Mogorosi testified that after he had referred a dispute to the CCMA in respect of his dismissal by the Department of Education in Mpumalanga, the Commissioner ruled in his favour but awarded him six months. He testified that the Commissioner had also in his award stated that he (Mogorosi) was free to market himself, and that his previous employer must change his dismissal to resignation so that he could have a clean record. It was on that basis that he had indicated in his CV that he had resigned rather than dismissed.

[28] Under cross-examination, and in regard to Mogorosi's contentions that his dismissal was changed to a resignation by a CCMA Commissioner, he was referred to a copy of that award at the arbitration proceedings, and it was pointed out to him that nowhere in the award was there a mention of resignation. It was further pointed out to him that all the Commissioner did

was to find that his dismissal was unfair, but that only compensation was appropriate. His response was that the award other than declaring his dismissal unfair, also indicated that his dismissal ought to be removed from the persal system so that his name was cleared to enable him to market himself with a clean record. It was nonetheless put to him that there was no reference to a resignation in the award; that there was no resignation letter submitted, and that he had misrepresented in his CV that he had resigned when that was not the case.

[29] Mogorosi conceded that the PFMA regulates the functions of the RTMC as far as finance matters were concerned. Reference was also made to section 53 (3) of the PFMA in terms of which public entities may not budget for a deficit and accumulate surplus unless with prior written approval of National Treasury. His response was that the RTMC Act superseded the PFMA, and there was no need to report any surplus to National Treasury. He conceded that the surplus was not declared but contended that the shareholders committee was informed of it, and it was not his responsibility to declare that surplus to National Treasury.

[30] Mogorosi further denied that he had obstructed the Nkonki investigations and/or instigated other employees not to cooperate with the investigation. His concerns with the investigation were that it had not produced results and its costs were escalating.

[31] In regard to the alleged failure to cancel the purchase order, his contention was that Anne Seroka had called the unsuccessful bidder and there was no need for him to do so as he had also cancelled that order on the system. He contended that there was no risk to RTMC.

[32] He further testified that upon the other two bidders being unable to deliver, there was no need for the tender to be re-advertised, as there was no such provision in the policies. He contended that the purchase order issued to CF Mathabatha was transparent, and that even though there was a minor error in the comparative schedule pertaining to the scores allocated to the bidders

which favoured CF Mathabatha, this was a small 'oversight amounting to pettiness'.

The Commissioner's findings:

[33] The Commissioner having had regard to the Code of Good Practice: Dismissal proceeded to determine whether the dismissal of Mogorosi was fair. Regarding the failure to cancel the purchase order issued to Readmate and the awarding of the tender to CF Mathabatha, the Commissioner concluded that Mogorosi indeed failed to formally cancel the purchase order issued to Readmate, and this constituted negligence, as the failure exposed RTMC to risk. The Commissioner however accepted the explanation proffered by Mogorosi as to the reason he had not cancelled the purchase order, but nonetheless held that a formal cancelation was a safer option.

[34] The Commissioner took issue with the allocation of the tender to CF Mathabatha and Mogorosi's explanation in regard to the incorrect allocation of scores to that entity. He rejected his explanation in regard to the incorrect allocation of scores as being opportunistic.

[35] Regarding the failure to declare the surplus to National Treasury, the Commissioner accepted RTMC's evidence that there was indeed an obligation on Mogorosi to declare the surplus in view of his position. He rejected his explanation in that regard and held that his reliance on a mere legal opinion in not declaring the surplus was not a justifiable excuse.

[36] The Commissioner also accepted that Mogorosi had requested Moolman to draft a letter to enable him to declare the surplus, and he had not explained how the draft letter was left unattended, and accordingly the omission amounted to gross negligence. The Commissioner found that Mogorosi had failed to apply the standard of care expected of him given his position and had continued to deny any wrong doing.

[37] Regarding the charge relating to disruptive or insolent behaviour, the Commissioner viewed the charge as serious and found that on the probabilities, Mogorosi had made himself guilty of that charge. The

Commissioner reasoned that Mogorosi on his own version was not in agreement with the continued investigation. This was against a decision already taken by RTMC that the investigations were important, and that the issue of costs and time associated with the investigation were not as important as the investigation itself.

[38] Regarding the sanction of dismissal, the Commissioner concluded that Mogorosi actions were grossly negligent and that a trust relationship was non-existent.

The grounds of review and evaluation:

[39] RTMC takes issue with the founding affidavit, which was deposed to by a Mr Stuart Leslie Marshall, NEHAWU's National Legal Co-ordinator, whom RTMC contended was not even in attendance at the arbitration proceedings. It was submitted that in the absence of Mogorosi's confirmatory affidavit, the averments in the founding affidavit remained hearsay for the purposes of this review application. It was further pointed out that the founding affidavit made no reference to the transcribed record of proceedings; that no supplementary or replying affidavits were filed, and further that the founding affidavit should be ignored.

[40] It was submitted on behalf of Mogorosi that even if he was not the deponent to the founding affidavit, there was no basis for the court to disregard it, and further that there was no rule for the purposes of review proceedings that reference should be made to the record of arbitration proceedings.

[41] It is my view that even if there is no rule requiring applicants to refer to a transcribed record in a review application, to the extent that such reference was instead made in the heads of argument, it is trite that a case cannot be made out in such heads of argument as they are not in any event pleadings. To that end, where such reference to the record had the effect of raising new issues that were not raised in the founding affidavit, such reference in my view should carry no weight, especially in circumstances where the applicants elected not to file a supplementary affidavit. As it was correctly submitted on behalf of RTMC, an applicant must make out its case in the founding papers.

[42] The test on review if trite. The enquiry is not whether the Commissioner was correct or not, but whether his or her decision is one that a reasonable decision-maker could not have made in the light of the material presented at the arbitration proceedings[4].

[43] The applicants contend that the award was reviewable under the provisions of section 145 (2) of the LRA. Central to the grounds of review was that the Commissioner ignored evidence, misdirected himself, and committed an irregularity and/or misconduct in respect of his duties as trier of facts. To the extent that this is the essence of the review application, in *Head of the Department of Education v Mofokeng*,[5] it was held that;

> '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* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* and others have held that 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.'

And,

> 'The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act[8] ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must

[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Another* [2007] 12 BLLR 1097 (CC) para [110].
[5] [2015] 1 BLLR 50 (LAC) at paragraphs 30 - 31

nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.' (Citations omitted)

[44] Further to the extent that Mogorosi's complaint was that the Commissioner failed to consider or ignored certain material, in *Goldfields*[6], it was held that;

> 'In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

And,

> 'Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) 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? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the

[6] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) at para 18

> arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[7]

[45] In this case, I did not understand Mogorosi's case to be that he was denied an opportunity to have his say in respect of the dispute, or that the Commissioner failed to identify the issues he was required to determine or misunderstood those issues. Furthermore, I did not understand his case to be that the Commissioner had not dealt with the substantive merits of the matter. What remains to be determined therefore is whether the decision reached by the Commissioner is one that another Commissioner could not have arrived at based on the evidence presented.

[46] In respect of the first charge, Mogorosi's contention was that the Commissioner committed a misconduct and/or irregularity in that he ignored or disregarded Kgwedi's relevant testimony that Seroka had actually contacted Readmate to inform it that the purchase order had been cancelled. It was contended that no other evidence was placed before the Commissioner that Mogorosi was personally obliged to cancel the purchase order and further that since Seroka as his subordinate had done so, it should be inferred that he had complied with his duties.

[47] Central to this charge is whether the failure by Mogorosi to cancel the purchase order issued to Readmate constituted gross negligence in the sense that such a failure placed RTMC at a financial risk and or legal risk. It was common cause that Readmate had sent an e-mail cancelling the purchase order as it could not provide the good required. Seroka had telephonically confirmed the cancellation, and Mogorosi had confirmed the cancellation of that order on 29 February 2014. In these circumstances, I fail to appreciate what possible financial or legal harm could have been caused by Mogorosi further having to confirm Readmate's cancellation when there was already such confirmation between Readmate and Seroka.

[48] To the extent that it was not in dispute that Readmate had confirmed that it was unable to deliver the product required, I fail to appreciate the reason it

[7] At para 20

can be said that Mogorosi's failure to confirm a known fact could have placed RTMC at a risk. It would not have made sense for Readmate to litigate in respect of a loss of a contract in circumstances where on its own version, it could not have met RTMC's requirements.

[49] There is nothing in the Supply Chain Management Policy that further placed such an obligation on Mogorosi to cancel an already cancelled contract. Clause 10.8 (Cancellation of Contracts) of the Policy places no such obligation on the CFO, and any risk alleged by RTMC on the basis that if the cancellation was not done by Mogorosi could have ended up with double payments or a payment to a supplier that did not deliver is in my view far-fetched. To this end, there is merit in Mogorosi's contentions that the Commissioner's conclusions in respect to this charge are a misdirection.

[50] The second allegation of misconduct pertained to the issuing of a purchase order to CF Mathabatha without ensuring that effective, efficient and transparent procurement measures were implemented. This was in circumstances where Mogorosi had awarded the contract to CF Mathabatha where the other two bidders, i.e Readmate and Canri were unable to deliver the products required. Mogorosi's contention was that he had merely exercised his professional discretion to award the contract to CF Mathabatha, as the failure to do so would have exposed RTMC to a law suit. He further contended that there was no specific rule or policy requiring him to re-advertise the request for quotations if there was a vast price difference between quotations received, and that the difference in calculations was inconsequential as other bidders had excluded themselves. Mogorosi further contended that the Commissioner placed undue evidentiary weight on the fact that there were obvious errors on the score sheets but had ignored that the other bidders had excluded themselves in any event.

[51] RTMC had however correctly pointed out that Mogorosi had conceded that he had allocated the points incorrectly to the various bidders, and this constituted a serious offence as his gross negligence could have resulted in a loss to it and irregular expenditure. The Commissioner had agreed with this contention and found that Mogorosi's conduct amounted to gross negligence.

[52] A worrying factor in respect of this charge is that Mogorosi did not appear to appreciate the magnitude and consequences of his conduct. The Policy provides that supply chain of goods and services must be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. This is in line with the provisions of section 38 of the PFMA, as the consequences of non-compliance would result in unauthorised, irregular, fruitless and wasteful expenditure, which may be considered financial misconduct and subject to disciplinary process[8].

[53] To the extent that Mogorosi had simply dismissed the incorrect calculations as an error which was inconsequential, I have no reason to believe that the Commissioner's conclusions that Mogorosi's explanation was opportunistic can be faulted. An incorrect calculation of points in a bidding process had the consequences of eroding any fairness, transparency or competitiveness in that bidding process, which is the antithesis of the values and principles enshrined in the PFMA or RTMC's own policies.

[54] That 'error' as claimed by Mogorosi cannot simply be acknowledged and yet be dismissed as inconsequential. To the extent that there was this incorrect calculation, this gave credence to the contention that it was necessary to re-advertise the bidding process. Mogorosi had however simply dismissed the re-advertisement of the bidding process as unnecessary as the other bidders had cancelled themselves out of the equation. This however was not the point. The issue was whether in the first place, a fair, transparent, and competitive bidding process had taken place. Furthermore, to the extent that CF Mathabatha's quotation was higher than the other bidders, and even if it was the only quotation to be considered, there was still a need to comply with the provisions of clause 6.2 of the SCMP. This would have enabled Mogorosi to justify the appointment of a bidder which had a higher quotation, and to explain the reasons why the entire process was not re-advertised. Accordingly, the Commissioner's conclusions in regard to the second charge cannot be faulted.

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[8] Clause 4 of the SCMP

[55] In regard to the third allegation that Mogorosi had disrupted the Nkonki investigations or that he had instigated other employees not to cooperate with that investigation, it was submitted on his behalf that the Commissioner ignored certain facts such as that his duties included advising the CEO, and that he had raised concerns with the fact that the costs of the investigation were escalating without any results. He had conceded that he indeed wanted the investigations to be stopped, but that he was punished for exercising his professional discretion.

[56] Nkonki was mandated to conduct investigations into the RTMC's 9 bank accounts for the period 2009 to March 2012, and to review and verify that all deposits and payments were valid, accurate and complete; that all transactions were properly authorised, and whether these transactions were valid. This was indeed an important investigation that would have revealed any alleged malfeasance within RTMC.

[57] In the end, the investigations revealed that RTMC was vulnerable to fraudulent activities. Certain staff members including the CFO, Portia Mngomezulu were implicated for not reporting incidents to the police. Mogorosi was accused of having interrupted the investigations and instigating others not to cooperate at a crucial point when a court order variation application agreed on previously, urgently needed to be signed to assist with the investigations to obtain certain information.

[58] It was common cause that the then CFO, Portia Mngomezulu had given an undertaking to cooperate with the investigation, and when she went on maternity leave, Mogorosi acted as the CFO. The allegation was that when Mogorosi took over, the investigation met a dead-end as he had refused to cooperate. Mtimkhulu's evidence under cross-examination was that upon the complaints being raised by investigators that staff members were not cooperating, Mogorosi had in her presence, telephonically contacted staff members to cooperate with the investigation. Mogorosi however on his own version was displeased with the investigations on the grounds of the escalation in costs and lack of progress.

[59] To the extent that the decision of whether the investigations continued or not was a matter for the CEO or the Shareholders Committee to decide on, it is my view that in the absence of any evidence indicating how Mogorosi had actively disrupted those investigations or instigated other employees not to cooperate, I fail to appreciate how it can be said that he was the stumbling block to those investigations. There was no evidence placed before the Commissioner to suggest that Mogorosi had effectively ended the investigation. No evidence was placed before the Commissioner by any of the employees allegedly instigated not to cooperate with the investigations, and worst still, no evidence was placed before the Commissioner as to what the role of the then CEO or the Shareholder Committee was in the ending of those investigations.

[60] It is therefore my view that contrary to the Commissioner's conclusions, the probabilities are that as Mogorosi had suggested, and irrespective of his negative stance towards those investigations, his role was merely that of advisor to the CEO in respect of the continuation of the investigations, and it was for the CEO to take a final decision on whether they continued or not. Accordingly, the probabilities favoured a finding of not guilty on that charge.

[61] The charge pertaining to the failure to declare the surplus amount to National Treasury is however more serious, and it is a matter that requires an interpretation of various applicable legal prescripts and the legal framework within which the RTMC operates.

[62] As a Schedule 3 entity in terms of the PFMA, RTMC is governed by the Road Traffic Management Act (RTMA) and must comply with the provisions of the Supply Chain Management and the Reporting By Public Entities Act[9]. Sections 40 (1)(a) of the PFMA read with section 17.2 of National Treasury Regulations require accounting officers to keep a full record of the financial affairs of a department in accordance with prescribed norms and standards.

[63] Section 24 (**Finance**) of the RTMA, which it was said that Mogorosi had failed to comply with provides that;

[9] Act No. 93 of 1992

> '(3) At the end of each financial year the chief executive officer must report to the Shareholders Committee on any surplus funds of the Corporation, as may be determined by the Minister and every MEC with the concurrence of the Minister of Finance and every MEC responsible for finance in each province.
>
> (4) The Shareholders Committee may direct that payments be made from the surplus funds to a province, but such payments must be proportionate to the relative contribution to the profits generated through the provision of road traffic services in the province or received by an agent acting on behalf of the Corporation within the geographical area of the province.

[64] Mogorosi's contention in light of the above provisions was that he was only required to advise the Shareholder Committee of the surplus in terms of section 24 (3) of the RTMA, for it to decide what it wanted to do with that surplus in terms of subsection (4). He further contended that it was thereafter for the Committee and the CEO TO declare such surplus to National Treasury.

[65] Section 53 of the PFMA, upon which RTMC sought to rely in pursuing the charge against Mogorosi provides that;

> **Annual budgets by non-business Schedule 3 public entities**-
>
> (1) The accounting authority for a public entity listed in Schedule 3 which is not a government business enterprise must submit to the executive authority responsible for that public entity, at least six months before the start of the financial year of the department designated in terms of subsection or another period agreed to between the executive authority and the public entity, a budget of estimated revenue and expenditure for that financial year, for approval by the executive authority.
>
> (2) The budget must be submitted to the executive authority through the accounting officer for a department designated by the executive authority, who may make recommendations to

the executive authority with regard to the approval or amendment of the budget.

(3) A public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained.

(4) The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget.

(5) The National Treasury may regulate the application of this section by regulation or instruction in terms of section 76.

[66] It is common cause that National Treasury on 15 July 2014 registered its concerns in regard to the failure to declare surplus funds in the amount of R296.4 million with an accumulated surplus of R418.8 million as at 31 March 2013. In accordance with the provisions of section 24 (3) of RTMA, at the end of each financial year the Chief Executive Officer was required to report to the Shareholders Committee on any surplus funds of RMTC.

[67] Mogorosi on his own version conceded that he had not reported the surplus in question. This was in circumstances where it was not disputed that he had requested Moolman to prepare a draft letter to National Treasury in that regard, with the purpose of clearly complying with RTMC's statutory obligations under section 53 (3) of the PFMA. Mogorosi therefore knew that there was an obligation to declare the surplus. That obligation was on the CEO. However, for the CEO to comply with that obligation, it was required of Mogorosi to finalise the draft letter which was meant to be passed on to the CEO, and thereafter for it to be passed on to National Treasury.

[68] For Mogorosi to now claim that he had no obligation to declare the surplus or that he had merely relied upon some legal opinion for not doing so is not only convenient but also disingenuous in the extreme. It was only as a consequence of his omission to finalise the draft letter declaring the surplus that a complaint was registered by National Treasury, as the CEO had not

met his or her obligations. The debates surrounding whether the PFMA or RTMA was applicable is neither here nor there, as the obligation to declare the surplus arises from both. Mogorosi's obligations were in regard to compliance with the provisions of section 24 (3) of the RTMA, and on Moolman's uncontested evidence, the draft letter sent to Mogorosi for the purposes of compliance with section 53 (3) of the PFMA was never finalised. That omission as correctly pointed out by the Commissioner was serious and constituted gross negligence.

[69] In respect of the other charges against Mogorosi, it is trite that a Commissioner is only required to determine whether the reason for a dismissal was fair[10]. In this case, it was common cause that Mogorosi was not found guilty on the fourth charge in the internal disciplinary enquiry, and there was no reason for the Commissioner to entertain it.

[70] In regard to the issue of the alleged misrepresentation in Mogorosi's CV, that also was not a charge that was preferred against him at his internal disciplinary hearing. It was not a reason for his dismissal and there was equally no obligation on the Commissioner to have regard to it.

[71] Mogorosi's contentions that the dismissal was procedurally unfair were also reasonably dealt with and rejected by the Commissioner. It was found that based on the internal chairperson's evidence which was not refuted in the arbitration proceedings, there was no merit to those contentions as the chairperson of the internal enquiry had granted him an opportunity to plead in mitigation but that he and his representative had failed to do so. In any event, the issue surrounding the alleged procedural unfairness of the dismissal was not pursued with any vigour in these review proceedings.

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[10] Section 188 of the Labour Relations Act provides that;

188. Other unfair dismissals

(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove -

(a) that the reason for *dismissal* is a fair reason -

(i) related to the *employee's conduct or capacity; or*

(ii) based on the employer's *operational requirements*; and

(b) that the *dismissal* was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*

[72] The only issue left for determination in the light of the findings in respect of the other two principal charges is whether the conclusion of the Commissioner that a sanction of dismissal was appropriate was reasonable. Central to the two charges was that Mogorosi's conduct amounted to gross negligence. It is trite that gross negligence *per se* does not automatically translate to dismissal as a sanction. It remains the duty of the Commissioner (taking all relevant factors into consideration) to decide on a fair sanction[11].

[73] Negligence denotes a failure to comply with the standard of care that would ordinarily be exercised in the circumstances by a reasonable person. In addressing what constitutes gross negligence, this court in *Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and Another v Seopela N.O and Others*[12] referred to *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*[13], where it was held that;

> '…. it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. …. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. …. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence …. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross …. *Dicta* in modern judgments, although sometimes more appropriate in respect of *dolus eventualis*, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (Central South African Railways v Adlington & Co 1906 TS 964 at 973); 'a total disregard of

[11] *Solid Doors (Pty) Ltd v Commissioner JP Hanekom NO*. CA19/2012) [2014] ZALAC 19 (30 April 2014) at para 13
[12] (JR 226 / 2012) [2015] ZALCJHB 22 (4 February 2015) at para 40
[13] 2003 (2) SA 473 (SCA) at para 7

> duty' (Rosenthal v Marks 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (S v Smith en Andere 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (Bickle v Joint Ministers of Law and Order 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (S v Dhlamini 1988 (2) SA 302 (A) at 308D)." It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care….'

[74] In this case, it can safely be concluded that on a consideration of all the facts, particularly in respect of the two instances of omission mentioned in my evaluation, there was cause to believe that Mogorosi's omissions involved a departure from the standard of a reasonable person to such an extent that it may properly be categorised as gross. The importance of a public entity complying with applicable prescripts cannot be emphasised, and the fact that section 38 of the PFMA spells out the consequences of non-compliance with its prescripts is instructive. Mogorosi knew that there was a need to declare the surplus and the mere fact that he had instructed Moolman to kick-start a process of reporting the surplus, and yet failed ultimately to see that process through by finalising the draft letter and forwarding it to the CEO is indicative of his conscious risk-taking, and total failure to take care. A conscious decision not to comply with applicable legal prescripts pertaining to finances within a public entity should in my view be considered as a serious form of misconduct, and the Commissioner's conclusions that such conduct was appropriately met with a sanction of dismissal cannot be faulted.

[75] In circumstances where it was apparent that incorrect scores had been allocated to a successful bidder, and where there was a clear and conscious decision not to re-advertise the bidding process, this also involved a complete disregard of the principles of transparency, fairness and fair competition

espoused in applicable prescripts, which conduct in my view is deserving of the ultimate sanction.

[76] In the end, even if there was some merit in Mogorosi's contentions that the Commissioner had ignored some or other material in coming to his conclusions, those have been dealt with to the extent that he should not have been found guilty on some of the charges that led to his dismissal. On the whole however, and given the facts placed before the Commissioner and the conclusions made in respect of the other charges, it cannot be said that any such irregularity can result in the setting aside of the award. This is so in that such any irregularities to the extent that there was any merit in them, have not revealed a misconception of the true enquiry or resulted in an unreasonable outcome. To that end, it should be concluded that the Commissioner's outcome falls within a band of reasonableness.

[77] I have had regard to the considerations of law and fairness, and despite RTMC's contentions that a cost order should follow, I do not share that view.

Order

Accordingly, the following order is made;

1. The application to review and set aside the award issued by the Second Respondent is dismissed;

2. There is no order as to costs.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr Tsietsi Majang of Majang Incorporated attorneys
For the Respondent:	Adv. F. Verveen
Instructed by:	Nishlan Moodley Attorneys