



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 42/2016

In the matter between:

**ARMAMENTS CORPORATION OF
SOUTH AFRICA (SOC) LTD**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

L DEKKER N.O

Second Respondent

SOLIDARITY

Third Respondent

KRIGE GERHARDUS BREEDT

Fourth Respondent

Heard: 23 November 2017

Delivered: 30 October 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The applicant (Armcor), seeks an order reviewing and setting aside the arbitration award dated 11 December 2015 issued by the second respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the arbitration award, which followed upon a referral of an alleged unfair dismissal

dispute by the third respondent (Solidarity) on behalf of the fourth respondent (Breedt), the Commissioner found that the dismissal of Breedt by Armscor was procedurally fair but substantively unfair.

- [2] The Commissioner ordered that Breedt be reinstated effective from 22 October 2014 with backpay in the amount of R720 000.00, and that he be issued with a final written warning effective for 12 months. Breedt's claim of a performance bonus for the financial year 2013/2014 was dismissed. The review application is opposed.
- [3] Armscor is a public entity created in terms of the Armaments Corporation of South Africa Limited Act¹ and Schedule 2 of the Public Finance Management Act² (The PFMA), and is mandated to *inter alia*, service the National Department of Defence with regard to programme management and acquisition of goods and services for the South African National Defence Force (SANDF).
- [4] Breedt was employed with effect from January 1989 and had 25 years of service at the time of his dismissal. He was based at Armscor's premises in Erasmuskloof, Pretoria and had occupied the position of Technical Manager/Armscor Programme Manager (APM). He was effectively the Project Manager responsible for the management and technical aspects of procurements contracts on behalf of Armscor. In accordance with his position, it was expected of Breedt to conduct prescribed tender evaluation procedures in a professional, fair, equitable, transparent, competitive and cost effective manner, and to strictly observe protocol and demonstrate ethical and professional conduct from the moment the Request for Offer (RFO) was issued, until a contract was awarded to a successful bidder.
- [5] Armscor has in place, policies, practices, procurement structures and procedures that ought to be observed and followed in ensuring that procurement processes were at all times fair and transparent. The relevant rules and practices forming the basis upon which Breedt was charged and

¹ Act 51 of 2003

² Act 1 of 1999

dismissed are the Disciplinary Practice; the Practice for the Selection of Contractual Sources; the Contract Management Practice; the Rules Applicable to Prospective Contractors, and the BBBEE Practice.

- [6] Breedt was dismissed on 22 October 2014 following upon a disciplinary enquiry into allegations of misconduct. According to Armscor, the incidents alleged essentially boiled down to a manipulation of its tender-evaluation processes by Breedt in favour of a bidder. The allegations against him were;

Charge 1: You conducted yourself in a grossly irregular, improper and unethical manner by directly communicating with Fire Raiders (Pty) Ltd, an offeror for a RFO-ESPV/2013/392 during the tender process. Your inappropriate communication was about the significant aspects of the tendering process. Your conduct was in breach of clause 5.5.1.3 of the Armscor Practice for the Selection of Contractual Sources, A-Prac 1034, Issue 002 and A-Pac 1020 clause 4.5 and 4.7, Issue 001. In terms of the clause, which you are aware of, you were required to demonstrate ethical and professional conduct by avoiding communicating with the offerors you were obliged to do so through a bidders conference or via the Procurement Secretariat. Your conduct was in breach of Armscor's standard procedure and is viewed as a serious offence.

Charge 2: You conducted yourself in a grossly irregular, improper and unacceptable manner in that you deliberately deviated from Armscor's standard practice by soliciting the BEE Certificate from Fire Raiders (Pty) Ltd outside the tender process and inserted the same in the tender documents and you used the same certificate to compile the BEE score card and gave an incorrect impression that the new BBBEE Certificate was duly submitted with the offer by inserting such certificate in the tender file.

Charge 3: You conducted yourself in a grossly irregular, improper and unacceptable manner by manipulating the tendering process in favour of Fire Raiders (Pty) Ltd in that you;

- a) Communicated directly with Fire Raiders (Pty) Ltd to obtain reference details while the evaluation process was in

progress, consequently misleading the evaluation team about the information on references hence Fire Raiders (Pty) Ltd was successfully evaluated to comply with the critical criteria;

- b) Extended the closing date without sound factual reasons but at the request of the offeror;
- c) Delaying the BBBEE balanced score sign off for about six weeks pending the finalisation of an inappropriately obtained certificate by Fire Raiders (Pty) Ltd and,
- d) Used the inappropriately obtained certificate to compile the BBBEE balanced score card on behalf of the BEE Division

[7] The charges originated in April 2014 when the Black Economic Empowerment Division of Armscor embarked on a process of considering and evaluating offers for compliance with the BEE requirements in respect of Tender 392 that Fire Raiders had submitted its bid. The BEE division had reason to believe that the official tender documents in respect of that tender may have been tampered with after its closing date. Armscor's Internal Audit Division was then requested to investigate the matter, and it had made certain findings and issued a report which had led to the above-mentioned charges against Breedt.

[8] It was common cause that Breedt had at the internal disciplinary enquiry, which took place over nine days, partially pleaded guilty to charge 3(a) related to communicating with Fire Raiders (Pty) Ltd to obtain reference details whilst the evaluation of the tender in question was in progress. He had nonetheless disputed the other part of that charge and all the others. The chairperson of the enquiry had not made a ruling in respect of charge 1 as a stand-alone charge, as it was bound up with the other charges. Breedt was however found guilty on charges 2 and 3.

[9] The matter having been referred to the CCMA, the arbitration proceedings took place over 8 days between June and November 2015. The record of the arbitration proceedings contains some 3 500 pages and the Commissioner's arbitration award is some 72 pages long. Other than the extensive record of

the disciplinary proceedings which the parties had agreed constituted a correct reflection of what had transpired in those proceedings, evidence was also led at the arbitration proceedings, which was followed by equally extensive written heads of arguments submitted at the conclusion of those proceedings.

- [10] In these proceedings, Armscor took issue with the manner with which the Commissioner's arbitration award was crafted. This was in circumstances where it was agreed between the parties at the conclusion of the arbitration proceedings that written heads of argument were to be submitted in editable word format, to enable the Commissioner to cut and paste from. I share Armscor's concerns that the award is indeed unusually crafted, and it must be added that it is definitely not meant for easy reading. The Commissioner had merely cut and pasted large portions of the parties' written heads of argument rather than summarising them. By way of example, Armscor also made reference to paragraph 26 of the arbitration award consisting of ten pages made up of 9½ pages cut and pasted from the heads of argument, and from which half a page consisted of the Commissioner's findings. A further example is that in some instances, the cut and pasted portion in the award would refer to certain paragraphs which the Commissioner had omitted to restate, leading to a position where this cross-referencing did not make sense to the reader³.
- [11] One appreciates the voluminous nature of the record and the evidence the Commissioner was expected to sift through in an attempt to make sense of the merits of the matter. At the most though, it would have been expected of him to make an attempt in the award, to enable the reader to distinguish between what his own summary and assessment of the evidence and the arguments were, from the copied and pasted portions. Reading through the 72 paged award in order to make sense of the Commissioner's reasoning at most times proved to be a challenge because of that omission, and these concerns cannot simply be dismissed as clutching at straws as argued on behalf of Breedts and Solidarity.

³ See paragraph 25.2.3 of the award

[12] To put the allegations against Breedt into context, the relevant procurement structures and processes at Armscor are that;

- a) The Procurement Secretariat compiles, despatches and receives feedback from the Request for Offer (RFO) according to specific strictly controlled tender procedures.
- b) Upon receipt of tenders by the Procurement Secretariat, the tenders are opened, registered and forwarded to the APM (Breedt).
- c) The APM would be responsible for compiling a schedule comparing the tenders in order to facilitate their evaluation.
- d) The APM is also responsible for compiling a BEE scorecard (which is based on the BEE certificate submitted with the tender).
- e) The BEE Division is responsible for verifying those scores.
- f) The collated information would then be presented before the evaluation committee, which in turn undertakes the evaluation and thereafter recommends a successful bidder/contractor.
- g) The recommendation guides the APM's submissions, which would then be authorised by the Authorisation Committee. Upon that authorisation, a contract would then be concluded with the successful bidder.

[13] From the charges as they were preferred, the Commissioner captured their essence as being that Breedt was accused of having conducted himself in a grossly irregular, improper and unacceptable manner by manipulating Tender 392 process in favour of Fire Raiders, in respect of three aspects, viz;

- i. Extension of the closing date of the tender
- ii. Direct communication with Fire Raiders, and
- iii. Obtaining (solicitation) and use of BEE Certificate

[14] It is accepted that all the charges emanate from the events surrounding Tender 392. Flowing from the award, Armscor relies on four main grounds in seeking that it be reviewed and set aside, viz:

- a) That the Commissioner misconstrued the charges;
- b) Misconstrued the inquiry and the evidence;
- c) His conduct gave rise to a reasonable apprehension of bias; and
- d) Had committed various factual errors and misdirections in his assessment of the evidence, the distorting effect of which was the production of an unreasonable result.

[15] Submissions made on behalf of Breedts and Solidarity were to the effect that Armscor's grounds of review are akin to an appeal; that Armscor could not simply attempt to dissect the arbitration award and try and make out a case; that this Court will not approach the review application on a piecemeal basis⁴; and that no case had been made out to support the review application.

[16] The test on review is trite. It is whether the Commissioner's decision was one to which no reasonable arbitrator could come⁵. In the light of the opposing contentions in this case, specifically where an allegation is made that the commissioner failed to have regard to, or had ignored certain material evidence, the principles stated in *Gold Fields Mining South Africa (Pty) Ltd v CCMA (Gold Fields)* remains apposite, i.e.;

'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome. But again, this is considered on the totality of the evidence not on a fragmented piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It

⁴ *Herholdt v Nedbank Limited* 2013 (6) SA 224 SCA; *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* 2014 (1) BLLR 15 LAC

⁵ *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC).

follows that an argument to the failure to have regard to material facts have potential result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitution imperative that the award must be rational and reasonable – there is no room for conjecture and guess work.⁶

- [17] In *Belloord 28 CC v CCMA Johannesburg and Another*⁷, Van Niekerk J having considered the review test as restated in *Head of the Department of Education v Mofokeng and Others*,⁸ further summarised the test as follows;

“[10] What this analysis requires is that the review court determine first whether the arbitrator perpetrated any ‘defect’ or irregularity contemplated by s 145 (2). Secondly, the court must have regard to the distorting effect that the error may have had on the outcome of the arbitrator’s award. Thirdly, if it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then the award is *prima facie* an unreasonable award. Finally, the court must have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test. Put more plainly, the review court must ask whether but for the defect, a reasonable decision-maker could have come to the conclusion reached in the award on the same material.”

- [18] Armscor has identified various aspects of the evidence placed before the Commissioner which it contends he had ignored or failed to evaluate, thus leading to an unreasonable outcome. The essence of Armscor’s pleaded complaint is that the Commissioner construed in particular, charge 3 against Breedts too narrowly by focusing on its paragraphs (a) to (d) and ignored the substance of the charge, which was that Breedts had engaged in manipulating the tendering process in favour of Fire Raiders. To the extent that the Commissioner had done so, it was submitted that he had effectively

⁶ (2014) 35 ILJ 943 (LAC) at para 21.

⁷ (JR1499/17) [2018] ZALCJHB 112 (15 March 2018)

⁸ [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC)

misconstrued the nature of the enquiry and watered down the severity of the charges, both of which constitute reviewable irregularities.

The evidence, the Commissioner's conclusions and evaluation:

- [19] For the sake of expedience, I will deal with the evidence presented at the arbitration proceedings in respect of each individual charge, the Commissioner's conclusions, the parties' submissions, and evaluate these accordingly. This approach bears in mind that to a large extent, the principal complaint remains that that Breedt had manipulated the tendering process in favour of Fire Raiders. In addition, I will refer to the evidence led at the arbitration proceedings and the disciplinary enquiry in general terms, and where necessary, and to the extent that there were material disputes of fact, I will specifically refer to witnesses' testimony.

The allegations pertaining to the extension of the closing date of the tender:

- [20] The conclusions of the Commissioner in regard to this charge are not seriously challenged by Armscor. However, by way of further background, it was common cause that in 2011, Fire Raiders was awarded a three-year contract (Tender KT026) related to the repair of SANDF's fire and rescue vehicles. That contract was supervised by Breedt, who had also authorised its payments. On 12 December 2013, the same contract, valued at R45m over three years, was put out to tender (EVSPV/2013/329, Referred to as 'Tender 329'). The closing date was set as 20 January 2014. On 20 December 2013, Fire Raiders had requested a copy of the tender, which was sent to it on 23 December 2013.
- [21] On 7 January 2014, Fire Raiders sent an email to Procurement Secretariat requesting an extension of the closing date from 20 January 2014 to 14 February 2014 due to the company having closed during the Christmas season. Breedt had on 8 January 2014, approved the extension of the closing date to 14 February 2014.
- [22] On 14 February 2014, Fire Raiders had then submitted its bid for tender documents. The required BEE Certificate accompanying the bid had expired

on 28 January 2014. Attached to the bid however was a BEE Audit Request confirming that a request for a new BEE Certificate was in progress. Upon its submission, this tender was perforated, to ensure that new documents could not be added to the file once the tender was received and closed.

- [23] On the same date that the tender was received, Fire Raiders' 2011 contract came to an end, and Breedt had authorised payments in respect of the final invoice submitted. Fire Raiders followed their original bid for the new tender with further correspondence on 18 February 2014, and submitted a BEE verification certificate issued on 14 February 2014, which was valid until 13 February 2015.
- [24] At the arbitration proceedings, it was not in dispute that Breedt had the necessary authority to grant the extension of the closing date. Armscor however questioned whether Breedt had applied his mind prior to granting the extension, as it was not clear whether he had interrogated the reasons the extension was sought. Armscor further pointed out that Breedt in granting the extension had not sought the consent of the client (SANDF), and had not considered or determined a reasonable duration of the extension in view of the client having regarded the matter as urgent. According to Armscor, and further based on the conclusions reached by the chairperson of the disciplinary enquiry, the real reason that Fire Raiders sought an extension was that its BEE certificate had expired at the closing date of the tender, and it was therefore merely buying time.
- [25] The Commissioner's conclusions in regard to the transgression was that it could not be found that the granting of an extension to Fire Raiders was part of a manipulation of the tender process in respect of Tender 239 on the grounds *inter alia* that Breedt had the authority to consider the request.
- [26] In opposing the this review application, Breedt contends that the Commissioner's conclusions and reasoning in regards to the charge in question cannot be faulted. Armscor, as it was correctly pointed out on behalf of Breedt, does not in its pleadings or submissions, appear to contest the Commissioner's conclusions with any vigour or at all.

Allegations pertaining to Direct Communication with Fire Raiders:

- [27] Armscor further contested the Commissioner's findings in regards to the allegation that Breedt had directly communicated with Fire Raiders during the tender process, which conduct it regarded as improper and contrary to standing rules and procedures⁹. The specific rules in this regard are Paragraph 4.7 of Armscor Contract Management Practice in this regard provides that;

"Conduct Pre-Contract Negotiations/Discussions

In terms of proper business ethics Armscor personnel are not allowed to have any discussions with any contractor in a multi-source situation, from the time the RFO has been issued until the committee has authorised the order."

- [28] A further provision is clause 5.3.1.3 of the BBBEE Practice, which states that;

"Companies with active orders must be monitored on a quarterly basis to ensure that they have valid verification certificates and that they hold on to or improve their level of compliance. A supplier must be reminded to submit new certificate at least three months before the expiry of the current one. Companies whose certificates have expired must be notified and requested to remedy the situation within a period of 60 days, failing which payments could be withheld until breach is certified"

- [29] Two sets of facts are related to this alleged transgression. The first is that Fire Raiders and another entity (Marce Projects) had submitted their bids for the same Tender 392. One of the critical requirements was that the bidder must submit written proof of how long it had serviced the fire fighting vehicle maintenance/repair business. A reference list with contact details of clients serviced should be provided for Armscor to contact, and written proof must be submitted in that regard.

- [30] Fire Raiders had submitted a list of previous clients without their contact details. Outstanding information in regard to Marce Projects pertained to

⁹ Paragraph 5.5.1.3 of the Practice for the Selection of Contractual Sources

confirmation of previous work done with its other clients. The Critical Criteria Evaluation Committee held its meeting on 17 March 2014, and Breedt's task flowing from that meeting was to obtain the outstanding information (references) from the bidders *via* the Procurement Secretariat. Breedt had however directly contacted the Director of Fire Raiders, Mr. Hans Muller by telephone to seek the outstanding information. Muller had responded in an email on the same date confirming the telephonic communication with Breedt and had provided the information. Breedt had in turn forwarded the information to the Procurement Secretariat, further stating in his email that the information was urgent and that an urgent response would be appreciated.

- [31] Armscor's case was that the telephonic communication with Fire Raiders was in breach of the no contact rule, and that the provision of references was a 'critical criteria', the absence of which ought to technically have excluded/disqualified Fire Raiders from the bidding process. It was further pointed out that despite the outstanding information, Breedt had curiously on 12 March 2014, compiled his functionality criteria scoring sheet, indicating that Fire Raiders had complied with that criteria, when that was not the case. Armscor had contended that Breedt had a propensity to break the rules when it came to Fire Raiders, and had a cosy relationship with that entity.
- [32] Breedt had acknowledged that he was in the wrong by directly contacting Muller, contending that he did so in order to save time. He had apologised for his conduct and pointed out that in the past, two other employees were issued with final written warnings for similar misconduct. He had denied that he had misled the panel with the submission that Fire Raiders complied with the functionality criteria when that was not the case. His contention was that he had given Fire Raiders the benefit of the doubt as it had executed similar work for SANDF *via* Armscor in the previous six years. This he had contended, was permissible under the provisions of Practice for the Selection of Contractual Sources.

[33] The Commissioner in regard to this charge concluded that a final written warning in accordance with Armscor's Disciplinary Practice¹⁰ was the appropriate sanction for the following reasons;

- a) Breedt had acknowledged that he had directly contacted Fire Raiders to obtain further information required, in circumstances where he as acting secretary of the Critical Evaluation Committee, had recorded that the bidder should be contacted via the Procurement Secretariat. Breedt had however disregarded his own instruction and Armscor's policies.
- b) Breedt's explanation that he had contacted the bidder in order to save time was not acceptable.
- c) There was however no evidence to suggest that Breedt had misled the Critical Evaluation Committee when he indicated that Fire Raider's bid complied with critical criteria, as the same information was still outstanding from Marce, which was bidding for the same contract.

[34] Again, from Armscor's pleaded case and heads of arguments, it does not appear that the Commissioner's conclusions in regard to this charge are contested.

[35] Central to Armscor's complaints is the second set of facts in regard to direct communication with Fire Raiders, which pertained to Breedt's exchange of various emails with Muller between 10 February 2014 and 26 March 2014. Armscor viewed the conduct as highly irregular and contrary to standing rules and practices, as the exchange of emails was part of the attempts to solicit a BEE Certificate from Fire Raiders outside of the tender process, and thus constituting a manipulation of the process.

[36] It is not necessary to re-state the full contents of the emails, other than to point out that the exchanges made references to one 'Prince', an employee of Fire Raiders who was responsible for obtaining BEE certificates through Cenfed (A Sanas registered BEE verification agency that produces BEE

¹⁰ Paragraph 18, which deals with Willful disregard (serious) of company policy and procedures.

certificates); the fact that Breedt had not heard from Prince; Breedt enquiring about the progress in that regard; and Muller's invitation to Breedt to have coffee/tea.

- [37] To recap, Fire Raiders had submitted the first BEE verification certificate on 14 February 2014 which had expired. A second BEE certificate was submitted on 18 February 2014. A third certificate dated 1 April 2014 was hand delivered to Armscor on 2 April 2014 in an envelope marked for the attention of Breedt and Van Zyl.
- [38] Armscor's case was that the exchange of emails with Muller was highly irregular, as information from bidders could not be solicited outside of the tender process, nor could there be communication with bidders during that process. Breedt's explanation however was that the communication was merely in regard to obtaining a valid BEE certificate from Fire Raiders in order to close down the old contract (KT542026) and effect any outstanding payments as was required by Armscor's policies. He had testified that due to Armscor's slow administrative processes, the closing down of the old contract was delayed for several months after the final delivery date in February 2014. He had referred to the email of 24 March 2014 he had sent to Muller, which made reference to *'IV for Samil 50 that was delivered'*, which were code names for Issue Voucher and a type of military vehicle, which all related to the old contract. His contention was that the communication was permissible within the context of Armscor's BEE Practice, and further that he had displayed discretion and avoided communication with one Mr. Trevor Fiford, Fire Raiders' Managing Director, who was responsible for signing the new tender documents on its behalf.
- [39] Armscor however contended that the emails could not have been related to the 2011 contract as it had expired on 14 February 2014, and since its last payment was authorised by Breedt on 17 February 2014. In that regard, evidence was led to demonstrate that Fire Raiders presented its last invoice for the 2011 contract, which had indicated an overspending on that contract. That overspending was cleared through credit notes issued by Fire Raiders

on 14 February 2014 and passed the following day, resulting in payment being authorised and made on 17 February 2014.

- [40] It had further been argued on behalf of Armscor that during the arbitration proceedings, Breedt's contention was that he had solicited the BEE Certificate for the purposes of the old contract to ensure payment, but had in the same vein, conceded under cross-examination that the certificate received on 2 April 2014 was eventually not used to process the payment of the old contract. It was further pointed out that undisputed evidence led by Mr Motha on behalf of Armscor was that the certificate in question was not found in the old contract file, which implied that it was not used in that respect.
- [41] Armscor's view was that the BEE certificates which were the subject of the emails was for the new contract/bid, and that the certificate submitted on 2 April 2014 BEE was solicited in order to populate the BBBEE scorecards for the purposes of the new bid, as it had now reflected a black ownership of 27.94%, whilst the certificate issued earlier and handed in as part of the initial bid reflected black ownership of 26%.
- [42] In regard to the above alleged transgression, the Commissioner concluded that Breedt could not be found guilty in that;
- a) The email he sent to Muller on 24 March 2014, which made reference to Armscor's financial system closing down in the first week of April to obtain funds for payments in respect of work done in terms of existing contracts, supported his version;
 - b) On the face of it, reference by Breedt to Cenfed in his emails dealt with the execution and closing down of the existing contract;
 - c) The BEE certificate dated 1 April 2014 was used to populate the scorecard for the new tender as it was no longer needed for the old contract. The email exchange however dealt simultaneously with the old contract and its closing down, but not with the new bid.

- d) Muller was responsible for dealing with the execution of the old contract, and his correspondence and communication with Breedt did not relate to the new bid. On the other hand, Fire Raiders' Mr. Fiford's communication was in respect of the new bid and the certificate required. This was evident from his correspondence of 18 February 2014 in terms of which he had submitted the new certificate. Fiford thus had no communication whatsoever with Breedt.

[43] It was submitted on behalf of Breedt that the Commissioner's conclusions as above could not be faulted as the email communication was clearly in reference to the old contract, and despite it being common cause that the contract had come to an end on 14 February 2014, payment took time to be effected, and thus Breedt acted within the rules as they required that where a BEE certificate had expired, a service provider like Fire Raiders must first obtain a new one failing which outstanding payment may be withheld, as further conceded by Motha on behalf of Armscor.

[44] There are obvious inherent difficulties with the contentions made on behalf of Breedt for reasons which I agree with as outlined by Armscor. Any conclusion that the email communication was merely meant to facilitate the closure of the old contract is unsustainable and falls outside the bounds of reasonableness. The only reasonable conclusion that could have been reached given the facts and timeline of the events, is that indeed a third certificate was solicited purely for the purposes of enhancing Fire Raiders' bid. In this regard;

- a) It was common cause that Fire Raider's initial bid submitted on 14 February 2014 was accompanied by an expired BEE certificate and a letter from Cenfed indicating that a BEE audit was in progress. Furthermore, Breedt had directly communicated with Muller in respect of outstanding information in respect of the new contract, a transgression for which the Commissioner had found that a final written warning was appropriate.
- b) In the same token however, it escaped the Commissioner's attention when addressing the charges in relation to the second aspect of

communication, that it was always Breedt's contention that he had at all material times avoided direct communication with Muller in respect of the new contract, and that he had only communicated with Fiford. This contention is nonetheless belied by that very first telephonic communication with Muller when enquiring about outstanding information in respect of the new bid.

- c) On 18 February 2014, a new BEE certificate was submitted by Fire Raiders, which reflected a BEE ownership of 26%, down from the previous certificate which reflected 27.92%.
- d) In my view, even if there was a need for a new certificate for the purposes of closing the old contract as Breedt had alleged, that second certificate had already been submitted, and there could not have been any need for a further certificate. As it was correctly pointed out on behalf of Armscor, the probabilities that this second certificate could not have come to Breedt's attention are nil, more particularly since Muller said nothing about it in the email exchange. The probabilities that this second certificate could have been sent to the Procurement Secretariat which had in turn said nothing about it to Breedt are equally remote. In the absence of an explanation as to how the second certificate reached the Procurement Secretariat, I did not understand it to be Breedt's case that the certificate was not valid or sent by Fire Raiders. In fact, the chairperson of the disciplinary enquiry had found that Breedt's denial of knowledge of that certificate was merely bare, as evidence led at that enquiry revealed that upon its receipt, the Procurement Secretariat had forwarded it to him.
- e) The third certificate could not merely have been solicited for the purposes of closing down the old contract. That contract in any event had been closed down and payments authorised in that regard as far back as February 2014. Even if payments took long to be finalised, any suggestion that the new certificate was required to make final payments is belied by the fact that Breedt had already authorized its payment, credit notes had been issued; the account sat at zero

balance, and there was no evidence to suggest that Armscor's finance department needed that certificate. Further on the uncontested version of Motha, there was no evidence that could be gleaned from the file in respect of the old contract that the third certificate had been filed or used at all in respect of that contract.

- f) It was common cause that following the email communication, a third BEE certificate was submitted on 1 April 2014 indicating a BEE ownership of 27.94%, and was promptly forwarded by Breedts to the Procurement Secretariat with a specific request for the matter to be urgently attended to. In other words, for the tender documents to now be forwarded to the BEE division for evaluation.
- g) The urgency with which Breedts sought the matter to be attended to in the light of previous delays clearly had to raise alarm bells. The obvious concern was that in accordance with the rules and practice, once tender documents had been received and perforated upon the closure of the tender, no further documents would be permissible in respect of that bid.
- h) In the end, no other reasonable conclusion could have been reached other than that Breedts indeed solicited the submission of the third certificate in his direct email communication with Fire Raiders, in clear contravention of standing rules and policies.

The use of inappropriately obtained BEE Certificate to compile the BEE scorecards on behalf of the BEE Division:

- [45] Armscor's BBBEE Practice requires that all companies must submit valid certified verification certificates or auditor's/accounting officers' letter in terms of the BBBEE Codes of Practice with their tenders, and any supplier who fails to do so would be disqualified.
- [46] Armscor contends that significant events pointing to Breedts' manipulation of the tender process in favour of Fire Raiders took place upon the receipt of the third certificate that he had solicited from Fire Raiders. The certificate as

hand delivered to Armscor was marked for the attention of Breedt and Van Zyl. Breedt upon its receipt had forwarded it to Van Zyl for processing. There was a dispute as to what had happened after the certificate reached Van Zyl in view of the tender documents having been perforated, and whether Fire Raiders' bid ought to be disqualified.

- [47] Upon the BEE scorecard being completed with the new certificate, it was then according to Breedt, sent to the BEE office to seek advice. It was common cause that such advice was not sought in writing as would have been the norm, and ordinarily, it would have been expected of the scorecard to have been populated based on the perforated certificate, which it was expected would have been valid.
- [48] What was further common cause was that Breedt had upon the scorecard having been completed, taken the file to the BEE office for Manyoni to process and sign off. Manyoni had upon perusing the file, accidentally spilt coffee on the scorecard which was placed on top of the file and had requested a clean copy from Breedt. The significance of this piece of evidence is that Breedt delivered a clean copy to Manyoni, without raising with him, any concerns about the use of the third BEE certificate to populate the scorecard or use in the new tender.
- [49] Evidence led on behalf of Armscor by Motha and Manyoni, and as further confirmed by Van Zyl was that documents received outside of the tender process could not be used for evaluation of a tender. In this regard, it was improper for Breedt to have used Fire Raiders' certificate submitted on 2 April 2014, which he had handed over to Van Zyl to populate a BBEE scorecard, which was then forwarded to the BEE Division on the same date for the purposes of evaluating the BEE requirements for the tender in question.
- [50] A further significant factor in this case pertains to the evidence of Van Zyl who had not testified at the disciplinary enquiry, but was subpoenaed by Breedt at the arbitration proceedings. The Fire Raider's file was given to Van Zyl on 12 March 2014 to prepare the BEE scorecard pending outstanding

information. After the third certificate was brought to him on 2 April 2014, the instruction from Breedt was to compile the scorecard.

- [51] Van Zyl's testimony was that Breedt upon receipt of the certificate on 2 April 2014, handed it over to him and instructed him to compile the BBBEE scorecards, which he did. Van Zyl was however uncertain whether the new certificate received on 2 April 2014 could be used to populate the BBBEE scorecard in the tender. In accordance with normal practice, Van Zyl wrote a note on a yellow sticker to Manyoni, to seek his advice in the matter. The yellow sticker with the note was placed on the file. Having compiled the scorecard, and prior to the file reaching Manyoni, Van Zyl handed the file with the yellow sticker to Breedt, to take to the BEE office. Van Zyl had specifically drawn Breedt's attention to the yellow sticker and made him aware of what was noted on it. According to Van Zyl, if no yellow stickers with notes were placed on a file when taken to the BEE office, everything would be assumed to be above board with the bid.
- [52] It was not in dispute that when the file reached the BEE office, the yellow sticker had mysteriously disappeared. Armscor contends that the only inference to be drawn was that Breedt had removed it, as he wanted the BEE office to assume that everything with the BBBEE scorecard and Fire Raiders' tender bid was above board. It was contended that Breedt had effectively tampered with the tender documents *en route* to the BEE office by removing the yellow sticker from the file, thus misrepresenting that the BBBEE scorecard was populated with a valid certificate submitted on 14 February 2014, when that was not the case.
- [53] It was submitted on behalf of Breedt that neither he nor Van Zyl could give an explanation as to what had happened to the yellow sticker, and that furthermore, the BEE office would have picked up any problems with the tender and sent it back to Breedt or Van Zyl, prior to it being signed off. It was further submitted that rather than Manyoni escalating the matter to his superiors, he should have returned the file to Breedt, as there was nothing untoward regarding his or Van Zyl's actions, and that at best, they could only

be accused of having committed procedural errors and/or minor transgression of Armscor's policies and procedures.

- [54] Breedt's further responses to these allegations at the arbitration proceedings was that they were a mere duplication of elements of charge 2, and an attempt by Armscor to create new charges, or to amend the original charges that were not in the notice of enquiry. He had contended that there was no basis for a conclusion to be reached that he had manipulated the tender process in favour of Fire Raiders.
- [55] The Commissioner's conclusions in regard to these specific transgressions are incoherent and at worst extraordinary. His starting point was to refer to the December 2011 Preferential Procurement Regulations issued by the Minister of Finance¹¹, which are applicable to Armscor as a public entity listed in Schedule 2, 3A-3D of the PFMA. He also referred to Paragraph 4 of the Implementation Guide pertaining to the 2011 Regulations, which deals with BBBEE status level certificates, and which provides that bidders are required to submit original and valid B-BBEE Status Level Verification Certificates or certified copies together with their bids to substantiate their B-BBEE rating claims, and that bidders who do not submit such certificates or who are non-compliant contributors to B-BBEE do not qualify for preference points, but should nonetheless not be disqualified from the bidding process, and be allocated points out of 90 or 80 for price only, and zero points out of 20 for BBBEE.
- [56] In the light of these provisions, the Commissioner concluded that the Armscor's Practice should have been amended/updated to be in line with the 2011 Regulations. The Commissioner took into account that Armscor's witness, Mgwaya, the Divisional Manager of the BEE Division, had confirmed that the update or amendment had not been effected as at 2014.
- [57] To the extent that one may make sense of the Commissioner's other or ultimate conclusions on this charge, the following can be gleaned¹²;

¹¹ In terms section 5 of the Preferential Procurement Policy Framework Act 5 of 2000

¹² Paragraph 25.2.5 of the award

- a) The allegation that Breedt had used an inappropriately obtained BEE certificate overlapped with the charge related to direct communication with a bidder via emails between February and March 2014, and to that end, the factual findings made were that those emails related to the closing down of the old contract, and further that the communication was in line with Armscor's policies and practices, to ensure that Fire Raiders was BEE compliant;
- b) Breedt had not in any event inappropriately obtained the third BEE certificate on 2 April 2014, nor had he compiled the BEE scorecard.
- c) Since both the expired and perforated BEE certificate that was submitted on 14 February 2014 and the 1 April 2014 non-perforated certificate were on file, it would have been clear to any qualified Armscor official that only the perforated BEE certificate was submitted together with the tender documents on 14 February 2014, and Manyoni upon receipt of the unperforated certificate had disqualified Fire Raiders' bid. (It is not clear what the Commissioner was attempting to convey);
- d) Had Armscor updated its policy to bring it in line with the 2011 Regulations, the decision to disqualify Fire Raiders' bid on 5 May 2014 should not have been taken, at it (Fire Raiders), ought to have been but allocated zero points for BEE preferential points out of 20.
- e) The Commissioner found it to be ironic that Armscor prosecuted Breedt for allegedly not complying with its BEE Practice, whilst it (Armscor) as a Major Public Entity had not complied with the Preferential Procurement Regulations 2011, which it was required to comply with.
- f) Since Breedt did not inappropriately obtain a BEE certificate on 2 April 2014; had not compiled the BEE scorecard, and further since the scorecard was not compiled on behalf of the BEE Division, but for the consideration/evaluation of the BEE Division, it had not been proven that Breedt was guilty of the charges.

- [58] It is apparent from the conclusions reached by the Commissioner in regard to this charge that he had clearly misconstrued the nature of the enquiry or had gone about the enquiry in a wrong manner. He had further failed or ignored material evidence that was placed before him, and the distorting effect thereof was clearly to arrive at an unreasonable conclusion. The submissions further made on behalf of Breedt also completely miss the point.
- [59] An obvious misdirection is the Commissioner's reference to National Treasury Implementation Guide and the Regulations, and I fail to appreciate the reliance placed thereon when the charges preferred against Breedt mainly pertained to non-compliance with Armscor's own practices, policies and rules. Whether those rules and policies were not in line with the Regulations was not an issue before him.
- [60] Armscor's BBBEE Practice Code is clear as well known to Breedt. It was abundantly clear to him that he and Van Zyl had acted contrary to standing rules and practices by completing the BEE scorecard utilising the third certificate which was not part of the original tender documents. For Breedt to therefor seek to shift the blame to the BEE office as the ultimate decision maker is disingenuous.
- [61] The consequences of the transgression ought to be considered within the context of the overall allegation that Breedt was intent on manipulating the tender process in favour of Fire Raiders. In this regard, the contention that the email communication between Breedt and Muller was merely for the purposes of closing the old contract, or that Breedt had avoided any communication with Muller in respect of the new contract had been found to be without merit. It follows that the Commissioner's conclusions that there was an overlap between the complaint surrounding Breedt's communication on the two different occasions or that this particular charge was a duplication as argued on behalf of Breedt cannot be sustainable. The first communication with Muller pertained to the extension of the closing date of the tender or enquiry surrounding outstanding information, whilst the second set of communication via the emails related to the solicitation of the third BEE certificate, in circumstances where there was already a second certificate.

- [62] Breedts, upon the receipt of the third certificate, which incidentally now had a higher BEE ownership percentage, and which was clearly the subject of the email exchange, had taken every means to expedite the processing of the tender, and went out of his way to present that the tender was above board when that was not the case. Thus once the scorecard was populated with the third certificate which was unperforated and contrary to rules and policies, Breedts on the face of it, deliberately failed to enquire with Manyoni as to whether the use of that certificate was permissible when he had the opportunity to do so. For reasons that remain inexplicable, the yellow sticker in terms of which Van Zyl sought advice from Manyoni went missing, and the invariable impression created would have been that the file was above board and ready for processing.
- [63] It is not for Breedts to suggest that in any event, the BEE office would have picked up the problems as it had the final say as to accept the populated BEE scorecard in its then current form or not. Both Breedts and Van Zyl knew that it was impermissible in accordance with the known rules and policies, to populate the BEE scorecard with an unperforated BEE certificate. Van Zyl was clearly concerned and had raised the issue with Breedts, who it cannot be doubted, knew that what they were doing was not permissible. The fact of the matter remains that in accordance with his obligations and mandate as AMP, Breedts was tasked with ensuring that such procedural lapses did not occur, and on the face of it, he appeared to have been prepared to overlook, if not conceal them.
- [64] In the absence of any explanation as to what had happened to the critical yellow sticker placed on the file by Van Zyl for the attention of Manyoni, the only probable inference to be drawn from his consistent conduct was that Breedts had removed it, as further fortified by his omission to enquire from Manyoni whether the use of the third certificate was permissible, when clearly that was a critical issue in ensuring that all procedures, policies and rules were complied with. These were not ordinary or innocuous procedural lapses. They were deliberate and had clearly impacted on the need for transparency, integrity and fairness of the tender process. They can also not simply be

wished away where they reveal a bias and unusual indulgence in favour of a bidder to the prejudice of other bidders.

- [65] It follows from the above that the Commissioner failed to apply his mind to the obvious facts that revealed that Breedt had contrary to established rules and policies, communicated with Fire Raiders for the purposes of soliciting a more favourable BEE certificate with a higher BEE ownership score to advance its tender bid, and further failed to disclose or bring it to the attention of the BEE office that an incorrect certificate was utilised to support the bid. The Commissioner's conclusions in this regard, cannot therefore be said to be falling within a band of reasonableness.

The charge pertaining to Manipulation of the tender process in favour of Fire Raiders by delaying the BBEE balanced score sign off for six weeks pending the finalisation of an inappropriately obtained BEE certificate by Fire Raiders:

- [66] Armscor alleged that Breedt took a period of six weeks between 14 February 2014 when the tender was received, until 2 April 2014 when it was submitted to the BEE office, to undertake the BEE scorecard process. The Commissioner had appreciated that tender processes must be fair, equitable and transparent. Further in the light of the urgency of the repair and maintenance work to be done to SANDF's military vehicles, the tender process was to be dealt with expeditiously as possible. The Commissioner referred to the timelines, being 14 February 2014 when the closing date was extended; 12 March 2014 when the Critical Criteria Evaluation Committee sat and required further information; 17, 30, and 31 March 2014 when some or all of the information was received, and 2 April 2014 when the BEE certificate was received and processed. In support of the allegation that the tender process was manipulated, the Commissioner referred to incidents identified by Armscor in accordance with the timelines.
- [67] Breedt's contention was that there was no rule or policy that regulated the timeline for the finalisation of the tender process or for the signing off of the balanced score card, and that such timelines varied according to the complexities of the specific tender, administrative processes and his workload. His evidence was further that at the time that tender in question

was being processed, he was also given other tasks such as 'Project Bandsman' and the procurement of aviation refuelers to prioritise by his superiors, Messrs Griesel and Magagula. He had contended that his version was corroborated Van Zyl.

[68] Breedt had further denied that he had delayed the process in that upon receipt of the new tender on 17 February 2014, he had scheduled the Critical Criteria Evaluating Panel meeting on 5 March 2014. Despite the Procurement Secretariat having received the second BEE certificate from Fire Raiders on 18 February 2014, it was only brought to his attention on 7 March 2014, and he could not be held responsible for that delay. The Critical Criteria Evaluating Panel meeting took place on 12 March 2014, and he had requested further information from the Procurement Secretariat on 17 March 2014, but it was given to him on 31 March 2014. Further delays in the scheduling of the evaluation panel was occasioned by the non-availability of panel members. He had also disputed that he was responsible for completing the BBEE score card.

[69] The Commissioner accepted that on the facts, and the documentation presented;

- a) it had not been proven that Breedt had deliberately postponed the processing of Tender 329 in order to wait for Fire Raiders to obtain the BEE Certificate, and that the delay in processing the tender was due to a variety of factors including further delays in the processing of the second phase of the tender evaluation; the Project Bandsman which had to be given priority due to its value (R550m); further information requested on 12 March 2014 which was only received at the end of March 2014, and the receipt of the third BEE certificate from Fire Raiders on 2 April 2014.
- b) The Commissioner further took into account that the outstanding information from the other bidder, Marce, was also only obtained at the end of March 2014.

[70] Armscor criticises the Commissioner's conclusions as above on the grounds that:

- a) Breedts' contention that he was busy with other projects or that he had forgotten about the Fire Raiders' tender was contrived, as he had left the tender file with Van Zyl on 12 March 2014 on the basis that the BEE information was outstanding;
- b) It takes about twenty minutes to compile the BEE scorecard, and it would have taken no time to enter a no-return on the basis that Fire Raiders had not submitted a valid certificate at the time that the tender was closed;
- c) Despite having acted leisurely between 14 February 2014 and 2 April 2014, Breedt had acted with speed upon receipt of the third certificate on 2 April 2014, indicating that the delay had nothing to do with other work alleged by Breedt, and that he had deliberately held off on the BEE evaluation pending the receipt of the new certificate, and thus assisting Fire Raiders' bid;
- d) The only reasonable conclusion to be drawn was that Breedt had engaged in manipulating the tender evaluation process in favour of Fire raiders, by delaying the BEE scorecard process to ensure that the bid was not disqualified before submitting a valid certificate.

[71] In defending the Commissioner's conclusions, it was submitted on behalf of Breedt that the allegations in charge 3(c) were in any event framed in a problematic fashion as the BEE scorecard was never 'inappropriately obtained' by Fire Raiders. This submission has merit in that on the face of it, the allegation appears to be that Fire Raiders inappropriately obtained the certificate. In my view however, the argument is more about form than substance.

[72] It was further submitted that it had not been proven that Breedt had deliberately postponed the processing of the tender to wait for Fire Raiders' certificate, particularly since as late as 31 March 2014, certain information regarding the functionality of the other bidder was only received by email.

- [73] The argument that it might have been inappropriate on the part of Fire Raiders to have submitted the certificate after the close of the tender, but that it was not Breedt's doing that Fire Raiders had decided to procure a fresh BEE certificate loses sight of the fact that whether the certificate was obtained inappropriately or not is clearly not the issue. The issue as per the charge, *albeit* framed in a problematic fashion, is that Breedt delayed the BBBEE balanced score sign in for about six weeks whilst waiting for that certificate. This much is clear from Van Zyl's evidence that upon the file being handed over to him, he was informed that there was outstanding information. That outstanding information could only have been the new certificate, which upon its receipt, Breedt had requested the Procurement Secretariat to attend to it urgently. For Breedt therefore to simply wash his hands off the matter by contending that it was not his doing that Fire Raiders decided to procure that certificate cannot be correct. As already pointed out elsewhere in this judgment, he had indeed solicited that certificate, despite the tender having closed on 14 February 2014.
- [74] Ordinarily, and in accordance with the strict application of Armscor's policies and practices, once the tender documents were received, perforated, and the tender had closed, any other documentation ought not to have been accepted. This means that the second and third certificates submitted by Fire Raiders ought not to have been accepted. By implication, since the initial BEE certificate submitted with the tender had expired, Fire Raiders' bid as it was common cause, ought to have been disqualified. In my view, that ought to have been the end of the matter. In the light of these conclusions, it follows that all the other excuses as to the reason it took long to process the tender are indeed secondary if not superfluous, as the tender bid was not in compliance with the rules and requirements in the first instance.
- [75] The other conclusions reached by the Commissioner related to the overall allegation that Breedt had a motive to tamper with the tender process in favour of Fire Raiders, and was willing to bend all the practices and rules in its favour. The Commissioner found that Armscor's contentions in that regard had no merit, as no evidence was led to demonstrate that Breedt would have

gained anything personally from Fire Raiders' bid being successful, and thus no motive was proven.

- [76] Again, the Commissioner sadly missed the point. The issue of whether Breedt had gained anything or would have gained anything from Fire Raiders' bid being successful was not the primary enquiry. Even if no such motive was established, for the purposes of sanction in the light of the conclusions reached, what remained the focus of the charges was whether Breedt's conduct evinced a manipulation of the tendering process in favour of Fire Raiders.

Conclusions:

- [77] In the light of the findings made in this judgment in regards to factors such as Breedt's email communication with Muller between February and March 2014 contrary to standing rules, practices and procedures; the prohibited communication with Muller during the tendering process for which the Commissioner found that a final written warning was appropriate; the conclusion reached in regards to the deliberate delay in processing the BEE scorecard; the use of the third BEE certificate to compile the scorecard, and the failure to bring that fact to the attention of the BEE office knowing well that such use was impermissible, it follows that the nature of these transgressions clearly pointed to an overall manipulation of the tendering process in favour of Fire Raiders. These transgressions were patently gross enough to warrant a sanction of dismissal. Thus, all the other factors surrounding Breedt's personal circumstances paled into insignificance.
- [78] It therefore ought to be concluded that the Commissioner's decision in regards to all these factors, cannot for reasons further advanced on behalf of Armscor, be said to be capable of being sustained on the *Sidumo* test. On a totality of the issues and the evidence, it is apparent that the Commissioner failed have regard to material facts, which failure invariably defeated the constitutional imperative that the arbitration award must be rational and reasonable. But for these defects, a reasonable decision-maker could not have come to the conclusion reached in the award on the same material.

[79] As it was correctly pointed out on behalf of Armscor, this matter has gone through two extensive processes as is evident from the voluminous nature of the record. In the light of my conclusions on all aspects of the charges that led to Breedts dismissal, no purpose would be served by remitting the matter to the CCMA. The Court is therefore placed in a position to substitute the Commissioner's award.

[80] In regards to costs, the facts and circumstances of this case are such that it cannot be said that there was no basis for Solidarity and Breedts to defend an award that was in their favour. Accordingly, the requirements of law and fairness dictate that no order as to cost should be made.

[81] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the Second Respondent under case number GATW1448/14 dated 20 November 2015 is reviewed and set aside.
2. The above arbitration award is substituted with an order that the dismissal of Krige Gerhardus Breedts was substantively fair.
3. There is no order as to costs.

E Tlhotlhlalemaje

Judge of the Labour Court of South Africa

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LABOUR COURT