

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1403/15

In the matter between:

FREE STATE DEVELOPMENT CORPORATION

Applicant

and

**PUBLIC SERVANT ASSOCIATION OF SOUTH
AFRICA OBO MR MORAKE KITH KGOKOTLI**

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

MINNETTE VAN DER MERWE N.O

Third Respondent

Heard: 15 October 2019

Delivered: 29 October 2019

Summary: Review application – misconduct for causing appointment of incorrect service providers and contrary to the board resolution – failure to discover the audio recording of the Board meeting was fatal to the applicant's case.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an application in terms of section 145(1)(a) of the Labour Relations Act¹ (LRA). The applicant, the Free State Development Corporation (FDC),

¹Act 66 of 1995, as amended. Section 145(1) (a) of the LRA provides that '[a]ny party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may

seeks an order reviewing and setting aside the arbitration award dated 29 June 2015 with case number FSBF481-15, issued under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The third respondent, Ms Minnette Van der Merwe (commissioner), found that the dismissal of Mr Morake Kith Kgokotli (Mr Kgokotli), a member of the first respondent, Public Servant Association of South Africa (PSA), was substantively unfair.

[2] The PSA is the only respondent opposing the application.

Background facts

[3] Mr Kgokotli was employed by the FDC as a Chief Financial Officer (CFO). On 5 February 2014, the Board of Directors of the FDC (Board) held a meeting which dealt, *inter alia*, with the appointment of the two services providers consequent to an open tender process. The first company is 1@Consulting and was appointed to conduct valuations on investment properties. The second company is Equity Property Professionals (Equity) which was appointed to conduct valuations on equities and securities. Mr Kgokotli was directed to draft the appointment letters as per the Board resolutions.

[4] On 6 February 2014, Mr Kgokotli presented the appointment letters to Mr Ikhraam Osman (Mr Osman), the Chief Executive Officer (CEO) for his signature, which he did. The service providers were appointed accordingly.

[5] It later transpired that the appointment did not accord with the Board resolutions. The mandates and scope of work for the two service providers were transposed. 1@consulting was appointed to value equities and securities, whilst Equity was appointed to value investment properties. This error was picked up by the internal auditors.

[6] Mr Kgokotli was charged as follows:

‘During February 2014 you unlawfully, wrongfully and contrary to the Board resolution presented incorrect appointment letters for the CEO’s signature or

apply to the Labour Court for an order setting aside the arbitration award... within six weeks of the date that the award was served on the applicant...’

cause the CEO's incorrect signatures, resulting in wrongfully appointments of 1@Consulting and Equity Property Professionals'.

- [7] Mr Osman testified that the Board never resolved to swap the service providers. He conceded, however, that he did sign the erroneous appointment letters, but he did not check the contents. He had trusted Mr Kgokotli's *bona fides* and expected him to exercise diligence in his work as the CFO. During the disciplinary enquiry, Mr Osman testified that his overall impression of Mr Kgokotli was that he was professional, committed to his job, and applied himself diligently to his tasks. He would not have been opposed to keeping him within the FDC if the air was cleared and matters were resolved. This evidence was confirmed during the arbitration proceedings.
- [8] Mr David Nkaiseng (Mr Nkaiseng), the Company Secretary, testified that he was the one who prepared the Board resolutions and that they are a true reflection of what was resolved. The Board never resolved to swap the service providers. He conceded that the PSA did request the audio recording of the Board meeting during the disciplinary enquiry. Also, it was possible that Mr Osman could have instructed his office to give the audio recording to the PSA. However, he did not deem it necessary to do so because the audio recording contained all the Board's deliberations and resolutions on many other issues that were on the agenda which had nothing to do with the appointment of the service providers. Had the PSA requested to listen to the audio recording, he would have been amenable.
- [9] Mr Kgokotli testified that the appointment letters were drafted in accordance with the Board resolution to swap the services providers. The appointment letters were drafted on the morning after the Board meeting, using his own personal notes taken during the Board meeting. At that time, he had not received to the extract from the minutes of the Board. He was under pressure to prepare the appointment letters hence he could not wait for the minutes of the Board.
- [10] Mr Kgokotli's evidence during the disciplinary enquiry was that: 'In this meeting to my recollection, it was resolved that we appoint 1@Consulting for

securities and Equity Professionals for investment property'.² He was adamant during cross-examination that the appointment letters were prepared as per the resolution of the Board; and until proven otherwise, he was not prepared to accept that he made a mistake.

[11] Mr Kgokotli denied that the appointment of service providers was an irregular expenditure or could have given the FDC a qualified opinion by the Auditor General (AG). That is so because the FDC did not disclose the transaction as an irregular expenditure in the financial statement and the AG did not pronounce on this transaction. Also, since there was value for money, it could not have been a fruitless expenditure. In any event, there was no prejudice to the service providers because they tendered for both projects and each was appointed for the amount they tendered for, so he further testified.

[12] Mr Kgokotli was found guilty and dismissed on 30 June 2014, a decision he only became aware of on 24 July 2014.

Review test and application

[13] It is well accepted that the line between a review and an appeal must be maintained. In the context of labour law, the drafters of the LRA deliberately preferred a review process as they thought that it would be a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals in accordance with the objectives of the LRA.³ Consequently, mere errors of fact or law may not be enough to vitiate the award. The authoritative pronouncement in this regard remains the Labour Appeal Court's (LAC) decision in *Head of the Department of Education v Mofokeng*,⁴ where it was stated that:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v*

² See: Transcript page 475, lines 7-9.

³ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.

⁴ [2015] 1 BLLR 50 (LAC) at paras 30-33; see also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

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...

- [32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

- [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be

unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.' (Emphasis added)

- [14] In the present case, the whole matter turned on the audio recording of the Board meeting. Mr Kgokotli was willing to accept an error on his part had the audio recording proved that the Board never resolved that the service providers be swapped. The reason provided by Mr Nkaiseng for his refusal to avail the audio recording is untenable. Indeed, the Board must have deliberated on other matters that did not concern Mr Kgokotli. However, the request was limited to the deliberations on the appointment of the service providers and that extract should have been made available, especially, since the correctness of the unsigned minutes and the resolutions as drafted by Mr Nkaiseng were disputed.
- [15] Mr Osman clearly had no problem with availing the audio recording of the Board meeting to Mr Kgokotli. In fact, it was his evidence that he had no problem with Mr Kgokotli's work ethics as he diligently attended to his tasks; and they had a cordial professional relationship. It also was his evidence during the disciplinary enquiry that he would be able to work with Mr Kgokotli if issues were resolved.
- [16] Clearly, the audio recording of the Board meeting could have easily and conclusively put this issue to rest as soon as the discrepancy was picked up by the internal auditors. It is not correct that Mr Kgokotli's version of defence that the Board had resolved to swap the services providers only emerged during arbitration as submitted by counsel for the FDC. The applicant was adamant throughout the disciplinary enquiry and arbitration proceedings that he drafted the letters as per the resolution of the Board to swap the service providers.

- [17] Nothing much turns on the applicability of the *caveat subscriptor* principle. The essence of the commissioner's finding is that Mr Osman ought to have satisfied himself that the appointment letters were in line with the resolution of the Board before appending his signature. That is so because Mr Nkaiseng testified that he had communicated the extract from the minutes of the Board meeting to him. The commissioner opined that, unlike Mr Kgokotli who did not have the copy of the extract from the minutes of the Board meeting, Mr Osman ought to have been more circumspect.
- [18] Notwithstanding, I still maintain that the audio recording of the Board meeting could have disposed of this issue on the spot and spared everyone the agony of going through all the legal processes undertaken to date. Therefore, the FDC's failure to discover the audio recording of the Board meeting was fatal to its case since it had the burden of proof.
- [19] It is disquieting that no regard was had to the career of Mr Kgokotli, a second senior employee in the FDC. There was no evidence that he was negligent in his duties. Clearly, there was an element of error in either the drafting of appointment letters or the minutes of the Board meeting. Even though the FDC wanted to exaggerate the extent of the error in order to justify a sanction of dismissal, it did not succeed. Mr Kgokotli was clear in his evidence that the swapping of service providers by the Board was not atypical.
- [20] In this instance, both service providers had tendered for both tasks. Despite the swapping of the scope of work, the amount they tendered for was never changed. There was no complaint lodged by the service providers and both performed as per the appointment letters. Also, it was his evidence that the FDC never reported the incident to the AG as an irregular expenditure and there was no pronouncement as such by the AG. Since there was value for money, the swapping of the service providers could not have been a fruitless expenditure. Ultimately, it remained an internal issue that had no adverse implications on the FDC. This evidence was not earnestly challenged.
- [21] In the absence of an allegation of dishonesty, the commissioner was spot on in her finding that, even if Mr Kgokotli was guilty as charged, the

circumstances of this matter support the application of progressive discipline rather than dismissal. There was no evidence that the employment relationship was intolerable as submitted by counsel for the FDC. Conversely, as stated above, Mr Osman was not opposed to reinstatement as he had a cordial and professional relationship with Mr Kgokotli. The same applies to Mr Nkaiseng, who was in any event, new at the FDC when the whole incident happened.

[22] To my mind, the commissioner carefully considered the evidence that was before her and properly applied her mind to the substantive issues and, alternatively, the question of the appropriateness of the sanction.

Conclusion

[23] In all the circumstances, I am satisfied that the commissioner properly conceived the enquiry and rendered a reasonable outcome. Clearly, there is no basis to interfere with the award.

Costs

[24] This is a typical case where it accords with the requirements of the law and fairness that costs should follow the result. The PSA has incurred costs not only in opposing the application, but also in prodding the applicant to take further steps in prosecuting the matter. In any event, the FDC ought to have been advised about the prospects of challenging the award.

[25] In the circumstances, I make the following order:

Order

1. The review application is dismissed.
 2. The applicant is ordered to pay the first respondent's costs.
-

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate R Tulk

Instructed by: Khirshen Naidoo and Company Inc.

For the Respondents: Advocate P Venter

Instructed by: Adrie Hechter Attorneys