



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR849/22

In the matter between:

SYLVANIA METALS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

PIETER GREYLING *N.O.*

Second Respondent

RONNY MOGAPI

Third Respondent

Heard: 7 November 2024

Delivered: 24 February 2025

This judgment was handed down electronically by emailing a copy to the parties. The 24th of February 2025 is deemed to be the date of delivery of this judgment.

JUDGMENT

ITZKIN, AJIntroduction

[1] The applicant, Sylvania, seeks an order reviewing an arbitration award and setting it aside, as well as an order substituting the award with a decision that the dismissal of the third respondent, Mr Mogapi, was fair. In the alternative, it seeks the remittal of the matter to the CCMA.

[2] Mr Mogapi was employed by Sylvania as a community liaison officer. He was dismissed for allegedly attempting to solicit a bribe of R50 000 from Mal Mowers, a contractor to Sylvania.

[3] In the award, the Commissioner found that Mr Mogapi's dismissal was substantively unfair. Sylvania was ordered to reinstate him retrospectively.

[4] The review application was opposed (by way of an answering affidavit and heads of argument delivered on behalf of Mr Mogapi).

[5] In a somewhat unusual turn of events, at the hearing of the review application, Mr Mogapi's counsel conveyed that Mr Mogapi no longer wished to be reinstated. Consequently, his stance was that the arbitration award ought to be reviewed and set aside, and should be substituted with an order of 12 months' compensation.

[6] Does the fact that both parties now seek an order setting the award aside mean that it ought, automatically or necessarily, to be set aside?

[7] The answer to this question is "no". Mr Mogapi did not concede that the award is reviewable on its merits, and even if he did, it would remain necessary for the court to be satisfied that this is the case.

[8] This is so because the arbitration award constitutes administrative action. In keeping with this, Rule 47(4) of the Labour Court Rules¹ provides that *“the court may not grant any order which has the effect of reviewing and setting aside any administrative act, award or ruling, only on the basis of the consent of the parties”*.

Analysis

[9] On the evidence presented at the arbitration, it was uncontested that Mr Mogapi encountered Mr Maluleke, a director of Mal Mowers, at Sylvania’s plant on 24 March 2021.

[10] The key controversy pertains to whether Mr Mogapi attempted to solicit a bribe from Mr Maluleke during their encounter.

[11] Mr Maluleke testified that this occurred. In particular, he testified that Mr Mogapi approached him and informed him of a pending paving contract (for the walkway at Sylvania’s premises) and that he would ensure that Mal Mowers gets the contract against payment to Mr Mogapi of R50 000.00. Mr Maluleke later reported the incident to Mr Eben Louw, Sylvania’s Plant Manager.

[12] Mr Gomane, an employee of Mal Mowers, testified that he had been present on 24 March 2021 and had overheard the interaction, which he described in similar terms to Mr Maluleke.

[13] Mr Louw also testified. He confirmed that he received a report from Mr Maluleke regarding the alleged solicitation of the bribe and that he was aware of the possible tender that may be issued for a paving contract.

[14] Mr Mogapi denied that he had solicited a bribe from Mr Maluleke. He testified that the paving project was not a community project, that he had no access to the planning of operational issues, and that he had no influence over the project.

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[15] In the award, the Commissioner referred to the distinction between the categories of tenders issued, and to Mr Mogapi's lack of involvement in engineering and operational issues (which included the paving project).

[16] He also referred to the fact that the paving project was not ultimately put out to tender and was 'stillborn', as a result of which (according to the Commissioner), Mr Mogapi would not have known the value of the tender and a price to attach to a bribe. He also stated that to solicit a bribe, *"there must be certainty that the tender will be put out and that he will be in a position to manipulate and influence the tender"*, which he found not to be the case.

[17] He also found that it was unlikely that Mr Mogapi would attempt to solicit a bribe in the presence of unknown persons, and that the version of Mr Mogapi was more probable than that advanced by Mr Maluleke and Mr Gomane.

[18] During oral argument, Mr Van As (on behalf of Sylvania) focused his submissions on two points.

[19] The first was that Mr Maluleke could only conceivably have known about the paving contract if it was discussed with him, and it was argued that this was a strong indicator that Mr Maluleke's version was true (i.e. that the paving contract was mentioned by Mr Mogapi, who sought to solicit a bribe).

[20] The second was that there was no evidence of any motive on the part of Mr Maluleke to falsely accuse Mr Mogapi of attempting to solicit a bribe.

[21] The Commissioner's reasoning in the award appears problematic in certain respects.

[22] Although Mr Mogapi's role (and portfolio) was a relevant consideration, the fact that engineering and operational issues were outside of his portfolio did not necessarily mean that the outcome thereof could not be illicitly influenced (for instance, though the assistance of other complicit role-players).

[23] If the project had directly fallen within Mr Mogapi's portfolio or if he otherwise had a direct influence over the tender award, this would have been a factor strongly weighing the probabilities in favour of a finding that the bribe was solicited. However, the fact that Mr Mogapi holds a different portfolio does not (in and of itself) exclude the possibility that he sought to solicit the bribe.

[24] The same applies to the fact that the paving project was not ultimately put out to tender (for a definitive quantified value). It does not follow from this that a bribe could not be solicited. A bribe amount is not necessarily based on an arithmetic calculation using the total contract value. In a tender for a significant project, there would be a general sense of the market value thereof, and it is conceivable that a bribe may be sought for a project in the pipeline without a definitive price being finalised as yet.

[25] The fact that Mr Gomane was present when the bribe was allegedly solicited also does not exclude the possibility that the bribe was solicited. If a bribe was solicited from Mal Mowers, it is conceivable that it could have been solicited in the presence of two of its personnel (Mr Maluleke and Mr Gomane), and that one of them (Mr Gomane) overheard the discussion with Mr Maluleke.

[26] In my assessment, the fact that Mr Maluleke was aware of the existence of the paving project, which was not public knowledge, is a weighty factor in evaluating the probabilities. It also conceivable that Mr Mogapi was likely aware of the project despite it not falling within his portfolio. This is so because the project does not appear to have been a secret/confidential project internally (i.e. at Sylvania), and it is likely that there would have been an awareness of its existence among internal staff.

[27] During Mr Mogapi's cross-examination of Mr Maluleke (and during Mr Mogapi's evidence), he did not advance a version to the effect that Mr Maluleke had any motive to falsely implicate him. The absence of evidence of a motive or conspiracy to falsely implicate Mr Mogapi is a significant factor.

[28] Concerning the issue of motive, the Labour Appeal Court (LAC) held as follows in *Gaga v Anglo Platinum Ltd and others (Gaga)*:²

[36] The complainant had no discernible reason to be dishonest about the pattern of behaviour and her discomfort. Both she and the appellant confirmed that in all other respects they had a good working relationship. At the time she testified before the CCMA, the complainant had already re-located and was unlikely to have anything further to do with either party in the future. For the court to accept the appellant's total denials as truthful, we would be required to believe that the complainant and Ms Mogaki, with unknown motives, had conspired to falsely accuse the appellant of serious misconduct. Neither witness displayed bias against the appellant of that order.' (Own emphasis)

[29] It is also relevant that Mr Gomane corroborated Mr Maluleke's evidence.

[30] In *Gaga*, the LAC held as follows:

[35] The appellant's bare denials of the allegations against him are unconvincing in the face of the complainant's evidence, its partial corroboration by the other witnesses and the manner and circumstances in which the complaint arose. The probabilities overwhelmingly support a finding that the complainant was the more credible witness.' (Own emphasis.)

[31] Importantly, during Mr Mogapi's cross-examination of Mr Gomane, the following exchange occurred:

'MR MOGAPI: Are you sure that I was asking for R50 000 or I was saying the tender is worth R50 000?

MR GOMANE: He must give R50 000, I was there.'

[32] The proposition advanced by Mr Mogapi during this exchange, appears to include an acknowledgement that he mentioned the tender and the amount of R50 000 to Mr Maluleke (albeit that he suggested that it was the tender value that he mentioned, and not the bribe amount). This further weighs the probabilities in favour of a finding that he indeed solicited the bribe.

² [2012] 3 BLLR 285 (LAC); (2012) 33 ILJ 329 (LAC) at para 36.

[33] Taking these factors into account, in my assessment, the probabilities strongly weigh in favour of a finding that a bribe was solicited by Mr Mogapi (and thus that he was guilty of the alleged misconduct). In these circumstances, the Commissioner's finding to the contrary is unsustainable on an overall consideration of the evidence.

[34] Given the seriousness of the alleged misconduct (which entailed an element of dishonesty), dismissal would be the only appropriate sanction in the event that Mr Mogapi was guilty. This was correctly accepted by the Commissioner in the award.

[35] In light of the above, in my view, the Commissioner's decision fell outside a band of reasonable decisions, from which it follows that the award falls to be reviewed and set aside.

[36] Given that the court has the benefit of the record, and given that a remittal of the matter to the CCMA would be inimical to the imperative of expedition in labour matters, the appropriate course of action would be to substitute the award with a finding that the dismissal of Mr Mogapi was substantively fair.

[37] Regarding costs, it would not be appropriate to saddle Mr Mogapi with a costs order. Aside from the fact that he (through his counsel) adopted the position (in oral argument) that the award should be reviewed and set aside, his original opposition to the review application occurred in circumstances where he sought to defend an award in his favour.

[38] In the result, the following order is made:

Order

1. The arbitration award of the second respondent under CCMA case number NWRB2433-21 dated 27 March 2022 is reviewed and set aside and is substituted with an order that the dismissal of the third respondent by the applicant was substantively fair.
2. There is no order as to costs.

R. Itzkin

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: M.J. Van As
Instructed by: Cliffe Dekker Hofmeyr

For the Third Respondent: N. Ali
Instructed by: Makuta Attorneys Inc