(1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

____________ ______________
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR249/22

In the matter between:

MOLEFI DAVID NKHUBU	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION ARBITRATION	**First Respondent**
COMMISSIONER JOSEPH WILSON THEE NO	**Second Respondent**
ESKOM HOLDINGS SOC LTD	**Third Respondent**

Heard: **16 October 2025**

Delivered: **26 February 2026**

This judgment was handed down electronically by emailing a copy to the parties. The (date) is deemed to be the date of delivery of this judgment.

JUDGMENT

MAMABOLO, AJ

<u>Introduction</u>

[1] This is an application to review and set aside the arbitration award issued by the second Respondent on 5 January 2022. The Second Respondent found the dismissal of the Applicant to have been both procedurally and substantively fair.

[2] The Applicant was employed as a senior General Manager: Assurance and Forensic. He was dismissed on allegations of gross negligence. He was accused amongst others of failing to independently review or verify information presented to him by Mr Singh pertaining shareholders' certificate, failing to confirm non-compliance with the directive of the then Acting Chief Financial Officer which insisted on compliance with the provisions of Treasury Note 1 (2013/2014), failure to satisfy himself that permission had been obtained from National Treasury as required by the National Treasury Instruction Note 1 (2013/2014) and section 79 of Public Finance Management Act, failure to identify the irregular appointment of Mckinsey for the Top Engineering Program through the sole source procurement procedure and, declaring in the advance payment review dated 14 September 2016 that there exists security from Tegeta for advance payment in line with the contracts when such security did not exist.

[3] The Second Respondent found the testimony of the Respondent's witnesses to be more probable than that of the Applicant. He further found the version of the Respondent's witnesses to be credible. On the contrary, the testimony of the Applicant was found to be riddled with contradictions.

[4] Having found as he did, the Second Respondent proceeded to find that the Applicant was negligent in the review of Tegeta contract and further that the recommendations that led to the appointment of Mckinsey as the sole source provider were not credible.

[5] Furthermore, the Second Respondent found that the Applicant failed to obtain approval from the National Treasury as is required by National Treasury Note 1 (2013/2014) and lastly, that it was highly improbable that security existed

more especially when the shares were not valued at the time of conclusion of the contract.

[6] The grounds for review as enunciated in the Applicant's founding papers are that the Second Respondent failed to apply his mind properly to the evidence that was before him, in that:

6.1. he failed to appreciate the distinction between existence and valuation of shares that is placed by international standards,

6.2. he failed to appreciate that the Applicant was not instructed to evaluate the shares,

6.3. he failed to appreciate the fact that the Tegeta contract was cancelled at the time the shares were assessed and thus posed no risk to the Respondent,

6.4. he failed to take into consideration the fact that the Applicant had no access and neither did he have sight of the memorandum that was issued by the then Chief Executive Officer pertaining to compliance with the provisions of National Treasury Note 1 (2013/2014),

6.5. he failed to appreciate that the 2003 Guidelines which the Applicant relied on, allowed for an alternative contracting method which is not rate-based, and which rendered approval from the National Treasury inconsequential,

6.6. he failed to appreciate that, in terms of the client's request, Applicant was only required to perform a limited assurance review as opposed to a reasonable assurance review in respect of the appointment of McKinsey.

[7] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] the Court held that *"the reasonableness standard should suffuse s 145 of the LRA, and the threshold test for the reasonableness of an award was… Is the decision reached by the commissioner one that a reasonable decision-maker*

[1] (2007) 28 ILJ 2405 (CC) at para 110.

could not reach?". This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness. In conducting this test, it is necessary for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.

[8] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2] the Court said, *"A result will only be unreasonable if it is one that a reasonable arbitrator could not reach based on the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable…".*

[9] It is also trite that not all the defects in an arbitration award have the effect of rendering the award reviewable. Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[3] *(Gold Fields)* cautioned against the approach to the review of an arbitration award on a fragmented basis, otherwise, this may take the form of an appeal in the guise of a review. The following was said:

> 'Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where the 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 minimum 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

[2] (2013) 34 ILJ 2795 (SCA) at para 25.
[3] [2014] 1 BLLR 20 (LAC) at para 20.

> the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

[10] In *Bestel v Astral Operations Ltd & Others*[4] the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficient to justify the decision, or if it was in ignorance of evidence that was uncontradicted. The court held that:

> '… the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court, that is whatever this court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[11] The court in *Gold Fields*[5] held that the concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

[12] It is uncontroverted that Applicant was requested to review *inter alia* the procurement process that was followed in awarding the coal supply contract to Tegeta Exploration & Resources (Pty) Ltd ("Tegeta") and the advance payment that was made to Tegeta. In terms of the memorandum dated 14 September 2016, the objective and scope of the mandate was to determine *"(1) The robustness of the procurement process followed in awarding the Tegeta contract relating to the advance payment, (2) whether the advance payment made was in line with the government processes contract terms and, (3) whether the recoveries are in terms of the contract*[6]*"*.

[4] [2011] 2 BLLR 129 (LAC) at para 18.
[5] [2014] 35 ILJ 943(LAC) at para 14.
[6] See Record volume 7 pages 107 – 112.

[13] The Applicant argues that it was not part of the scope to conduct a valuation of shares. He cited five reasons explaining why, as auditors, they do not value shares. Amongst those reasons is that the auditors do not perform management's work and further that valuation of shares for security purposes cannot be conducted after the fact. I.e. after the advance payment had been repaid in full.

[14] He referred the court to clause 4.3 of the Agreement which reads thus *"As security for the performance of its obligations, Tegeta pledges to Eskom with effect from the date of signature of this Agreement, the pledged shares and cedes in securitatem debiti to Eskom all its present rights and interests, as continuing general covering collateral security for all the due, proper, and punctual performance in full of all the obligations in terms of this Agreement read together with Addendum 2 to the Coal Supply Agreement, which pledge and cession Eskom accepts"*.

[15] It is apparent from the objectives of the review that more is required. The Applicant was required to ascertain, *inter alia* whether the process that resulted in the advancement of payment in an amount of R659 million in April 2016 to Tegeta was in line with governance processes and contract terms. The envisaged robust process would undoubtedly entail an enquiry by the Applicant on whether or not there existed, at the time the loan was advanced, sufficient security to satisfy the debt.

[16] In his examination in chief, the Applicant testified that if an auditor is presented with a set of audits and no supporting documentation, the auditor is required to issue a disclaimer. Evidence established that the Applicant was presented with share certificates. Further evidence established that these shares were not valued prior to the advancement of payment. Thus, presentation of share certificates was accepted at face value to constitute security. In summary, an enquiry into the value of the shares and whether such value would be sufficient to cover the advanced payment of R659 million was never conducted.

[17] Based on this evidence alone, it is safe to deduce that a vigorous enquiry as requested in the memorandum of 14 September 2016 was not conducted. The share certificate is proof that some shares are held by Tegeta Exploration & Resources (Pty) Ltd. However, this is not the end of the enquiry. The contract involved a huge amount of money, which made it imperative for the shares presented to be valued. This exercise would have assisted in establishing whether Tegeta had sufficient shares to satisfy the debt. The exercise would have established whether security indeed exists.

[18] In the absence of a valuation of shares, the Applicant was not in a position to make a finding that security exists. It is common cause that at the time of the review, the Applicant did not know the value of the security.

[19] The Applicant wants this court to believe that the existence of a share certificate is proof that there is sufficient security. If this was indeed the case, then why would the Respondent, who was in possession of the share certificates, call for a robust enquiry. This confirms the Respondent's argument that a mere presentation of share certificates does not serve to prove the existence of security. The value thereof must first be ascertained in order to establish the existence of security.

[20] In addition to the above, he argues that he was not requested to value the shares and, in any event, so goes his argument, valuation cannot be carried out after the fact. The Applicant's testimony established that the client did not evaluate the shares but relied on available information. With this in mind, more should have been done. The Applicant was required to identify the risk which he failed to do.

[21] The valuation of shares should have taken place at the time the contract was concluded to ensure that the value of the shares that are pledged as security is equal to or exceeds the amount advanced. The fact that the amount advanced was already repaid in full at the time the review was conducted is inconsequential. The truth of the matter is that the Respondent was exposed to risk in April 2016 when an advance payment in the amount of R659m was made.

[22] It was put to the Respondent's witness during cross-examination that determining the value of the shares at that late (review) stage would have amounted to a wasteful expenditure. This version implies that Applicant was aware of the need to value the share certificates but failed to do so, as full repayment had been made and coal delivered in terms of the contract. Essentially, this means that he did not perform his duties in a diligent manner but relied solely on the share certificates that had been presented.

[23] The Applicant further argues that the valuation of shares is management's job and therefore does not fall within his scope of work. This being the case and equipped only with share certificates, it was incumbent on the Applicant to issue a disclaimer.

[24] Much emphasis was placed on whether the Applicant performed a limited assurance or reasonable assurance exercise. Evidence established that it was indeed a limited assurance exercise. However, its limited assurance does not imply that the Applicant was prohibited from taking the necessary steps when executing his mandate. He is obligated to obtain more information or documentation that would assist him in making an informed decision. His primary responsibility is to act diligently and with honesty. He had to ensure that the outcome of the limited assurance exercise was truthful and accurate.

[25] A perusal of the memorandum of 14 September 2016, in particular the scope of work, establishes that A & F performed a review of, amongst others, *"The existence of the security from Tegeta for the advance payment in line with the contract terms"*. This statement makes it clear that they were required to establish the existence of security for the advance payment. It therefore does not make sense to accept the share certificates as proof of security without knowledge of the value thereof.

[26] In his examination in chief, the Applicant mentioned that he had requested his staff to get one contract that would establish that Tegeta had more than what was advanced. Interestingly, this statement appears nowhere in the written responses he submitted to the investigators. Furthermore, this version was not put to the Respondent's witness under cross examination.

[27] Again, this goes to prove that presentation of share certificates is not sufficient proof that security exists otherwise, the Applicant would not have requested his staff to get him a contract with more money.

[28] The Second Respondent was faced with two mutually destructive versions. He found the version of the Respondent to be more probable than that of the Applicant. Having found as he did, he proceeded to find that the Applicant acted negligently during the review of the Tegeta coal contract and further that it was highly unlikely that security existed as the share certificates were never valued.

[29] Based on the facts stated above, this court finds that the decision arrived at by the Second Respondent is one that a reasonable decision maker could make.

[30] In December 2016, Assurance and Forensic were requested by the Group Chief Financial Officer, Mr Anoj Singh, to conduct a review on procurement process that was followed in appointing Mckinsey. The Applicant found that the procurement of Mckinsey as a sole supplier was in compliance with the applicable policies, procedures and National Treasury guidelines.

[31] However, in his report of 4 April 2018, which was requested at the instance of the Audit and Risk Committee, which is a sub-committee of the Board, the Applicant arrived at a different conclusion. He found that the use of a sole supplier may have compromised the principles of section 217 and section 51 of the Constitution and the Public Finance Management Act, as no market research was conducted as required.

[32] Evidence established that on 29 June 2015, the Acting General Manager Legal, Wawa Xaluva, sent a letter to the Respondent's Acting Group Chief Finance Officer advising that National Treasury Note 1 of 2013/2014 should be complied with in relation to consultants' fees. On 27 September 2017, a memorandum was issued advising that the Respondent is required to obtain approval from the National Treasury prior to implementing risk-based contracts. Mckinsey contract was risk-based.

[33] Cognisance should be taken of the fact that when formulating the second report, the Applicant relied on the same documents that he had used in 2016. He argues that due to the nature of the enquiry, the 2016 report would have less information/ evidence, and that 2018 would have more information/evidence.

[34] It is thus difficult to fathom why the same set of facts would produce a different outcome. What was required of the Applicant in 2016 and 2018 was basically the same thing, which is to determine whether procurement processes and National Treasury Note had been complied with in the appointment of Mckinsey. This can be established from a simple consideration of procurement documents and applicable regulations/policies and in the event of any uncertainty, the National Treasury, which is the author of the Practice Note, or the compliance department could be approached.

[35] From the evidence presented, in 2016, the Applicant simply relied on the representations that Mr Singh had prepared himself at the request of the Board. He argues that it was a limited assurance review. This argument does not assist the Applicant in any way. He should have familiarised himself with the background facts prior to appending his signature. It makes no difference that the report was issued under pressure and that it contains Mr Singh's representations to the board. The report is issued under his name.

[36] His explanation with regards to compliance and/or non-compliance with National Treasury Instruction Note 1 (2013/2014) is that when he approached management enquiring about their failure to comply with National Treasury Note 1 (2013/2024) he was advised that the Respondent had enquired from Treasury on applicability of National Treasury Supply Chain Management Practice Note SCM 3 of 2003 and was advised that it was still in place. He further testified that he had sight of the email from Mr Tshitangano, who was an employee of the National Treasury, which confirmed the applicability of SCM 3 of 2003 and had no reason to doubt him.

[37] The fact that he approached the Respondent concerning compliance and/or non-compliance with National Treasury Note 1 (2013/2014) means that there

was some uncertainty regarding its application. Tasked with a responsibility to determine whether due processes had been adhered to, it was then incumbent on him to ascertain its applicability from the National Treasury and/or Compliance department and not simply rely on what was conveyed to him and the email from Treasury.

[38] Furthermore, he concedes that the error was corrected in his 2018 report[7]. Essentially, the Applicant concedes that the report of 2016 was wrong. He concedes that he was negligent and failed to act with honesty.

[39] A perusal of the arbitration proceedings, in particular the Applicant's evidence in chief, reveals that he was evasive in answering questions and at times his testimony was contradictory. For example, when asked whether he had found the appointment of Mckinsey through a sole supplier mechanism to be irregular, he referenced two steps, stating that it was irregular for some other reasons as *"… a good process had been used to achieve an irregular outcome"*.

[40] He denied that in 2016 he was tasked to determine whether the procurement process that was followed in appointment of Mckinsey was irregular[8]. This is in direct contrast to the objective as stated in his memorandum of 12 December 2016[9]. The fact that he was requested to determine whether procurement processes complied with policies and procedures and National Treasury regulations means that he had to determine whether the process was regular.

[41] When questioned whether it is stated in his 2018 report that the appointment of Mckinsey through a sole supplier mechanism was irregular, he answered in the negative[10]. However, his report stated categorically that *"The use of a sole supplier might have compromised the principles as stated in S217and S51 of*

[7] See Record Volume 3 of 7 page 726 lines 1 – 25.
[8] See Record Volume 3 of 7 page 737 lines 1 -5.
[9] See Record Volume 7 of 7 page 158(b).
[10] See Record Volume 3 of 7 page 739 lines 20 – 25.

the constitution and PFMA respectively as no market research was conducted as required".[11]

[42] Another contradiction in his testimony is when he tries to explain that the finding on irregularity of the appointment is based on the fact that management had lied when they said the file did not exist[12].

[43] This court is thus satisfied that the decision arrived at by the Second Respondent is within the bounds of reasonableness.

[44] The last issue for determination is the alleged procedural unfairness that pertains to a failure to institute disciplinary proceedings within 3 months as stipulated in the disciplinary code, and secondly, a failure to afford the Applicant an appeal hearing.

[45] Even if it can be said that the Respondent failed to comply with its own disciplinary code and procedure, the main issue is always whether the Applicant has suffered prejudice as a result of the alleged procedural unfairness. The Applicant must allege such prejudice and ultimately it has to be found that such prejudice exists, in order for disciplinary proceedings to be held to have been procedurally unfair. In *Bogoshi v Commission for Conciliation, Mediation and Arbitration and Others*[13] the Court held that *"… any provisions in an employer's disciplinary code and procedure containing detailed procedural prescripts in conducting a disciplinary process does not always result in a finding of procedural unfairness simply because those procedures have been contravened. I am not saying that the employer should simply ignore those provisions. It is of course true that where an employer defines its own processes and sets its own procedural requirements, it should be expected to adhere to the same. An employer that does not comply with its own disciplinary code and procedure would thus always run the risk that such failure could be found to be procedurally unfair. However, this obligation on an employer must always be tempered by considerations of workplace efficiency…"*.

[11] See Record Volume 5 of 7 page 1838.
[12] See Record Volume 3 of 7 page 740 lines 4 – 20.
[13] (JR 1106/16) [2012] ZALCJHB 186 (2 August 2021) 110 at para 85.

[46] The following *dictum* in *Delport and Others v S*[14] is instructive *"The question in regard to irregularities is always whether they have resulted in a failure of justice. Bearing in mind that irregularities do not in and of themselves lead to a failure of justice, there is little likelihood of this court, or any other, holding that they did in this circumstances".*

[47] The evidence before the Second Respondent established that the Applicant reported to the CEO, and further in terms of the disciplinary code, an appeal should be directed to the Employee Relations Practitioner in case of a hearing or the manager in case of enquiry.[15]

[48] Uncontroverted evidence established that the Applicant was afforded a fair opportunity to present his case before the chairperson of the disciplinary hearing. He was given time to prepare for the hearing; he understood the charges levelled against him and had an opportunity to question the Respondent's witnesses. This is basically what is envisaged by a fair process.

[49] The Court in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*[16] held that *"…the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision".*

[50] Furthermore, it was common cause that Applicant reported directly to the CEO. The Applicant's letter of dismissal was issued by the CEO. This being the case, the CEO would not have been an appropriate person to conduct the Applicant's appeal. The question that arises is whether an external person should have been appointed and if so, whether such non appointment has resulted in the Applicant suffering any prejudice. The court finds that Applicant suffered no prejudice. His matter was ventilated fully and anew before the CCMA with the assistance of a legal representative.

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[14] [2015] 1 All SA 285 (SCA) at para 35.
[15] See Record Volume 3 of 7 page 854 lines 1 – 6.
[16] (2006) 27 ILJ 1644 (LC).

[51] There was no evidence before the Second Respondent to prove prejudice, if any, that the Applicant had suffered. Accordingly, the authorities cited above do not favour the Applicant. The Second Respondent was quite alive to the requirement that Applicant had to prove prejudice suffered and he found that the Applicant was not prejudiced by Third Respondent's conduct.

[52] Therefore, based on all the reasons set out above, the Court finds that the award of the Second Respondent is not reviewable. The finding by the second respondent is supported by the evidence that was before him.

[53] Consequently, the following order is made:

<u>Order</u>

1. The application by the Applicant to review and set aside the arbitration award is dismissed.

2. There is no order as to costs

N.O. Mamabolo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms. Michelle Lage

Instructed by:

For the Third Respondent: Adv L.T. Sibevo SC

Instructed by: Verveen Attorneys