

SOUTH AFRICA / JUDGMENT

Mahlase v Transnet Bargaining Council and Others (JR475/14) [2016] ZALCJHB 313 (19 August 2016)

[2016] ZALCJHB 313

COURT

Labour Court Johannesburg

BEFORE

Morgan

CASE / FILE NUMBER

JR 475/14

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 475/14

In

the matter between:

SHIRLEY
MAHLASE
Applicant
And
THE TRANSNET
BARGAINING COUNCIL
First Respondent
MARK HAWYES N.O.
Second Respondent
TRANSNET FREIGHT
RAIL (AN OPERATING
DIVISION OF
TRANSNET SOC LTD)
Third Respondent

Heard:

5 July 2016

Delivered:

19 August 2016

JUDGMENT**MORGAN, AJ****Introduction:**

- [1] This is an application in terms of Section 158(1)(g) of the Labour Relations Act[1] (the LRA”) to review and set aside an arbitration award (“the award”) in respect of a pre-dismissal arbitration presided over by the Second Respondent, acting under the auspices of the First Respondent.
- [2] The Applicant, to whom I shall refer as Dr. Mahlase was employed by the Third Respondent, to whom I shall refer as Transnet from November 2010 until her dismissal in terms of the award which is dated 3 February 2014.
- [3] The arbitration took place over a number of days at which (with the exception of the last) both Dr. Mahlase and Transnet were legally represented.
- [4] Dr. Mahlase was charged with three counts of misconduct which are more fully set out in the charge sheet[2]. These counts all arose as a consequence of a contract negotiated and entered into by Dr. Mahlase on Transnet’s behalf with an entity known as the Institute for People Development (“IPD”).
- [5] The charges relate to the period 1 January 2012 to 4 February 2013.
- [6] At some point during the contract with IPD Dr. Mahlase formed the view that they were not delivering.
- [7] This led to an e-mail being sent by Dr. Mahlase on or about 5th February 2013 to a Mr. Gert Boshoff[3] (“Boshoff”). This e-mail triggered a demand to IPD for them to comply with certain outstanding requirements[4] which in turn elicited a response from their Attorney, Christo Mulder[5]. This then led an examination of the events and an investigation into Dr. Mahlase’s conduct culminating in the charges and arbitration.

The evidence led:

- [8] The evidence led at the arbitration was voluminous and I am grateful to Dr. Mahlase’s Attorneys for the manner in which the court file was bound and prepared.
- [9] Transnet led the evidence of four witnesses. I deal briefly with the critical aspects thereof below.
- [10] Their first witness was Mr. Evan Scannell, the National Tactical Procurement Manager for Supply Chain Services (“SCS”)

within Transnet Freight Rail. His role entails ensuring compliance with the various procurement processes and policies. He referred to a number of documents including the Procurement Procedures Manual[6] (“the PPM”) and a flow chart[7] indicating the different processes involved, which were dependant on the value of the contract in question.

[11] His evidence provides insight into the correct processes which were to be followed. While different rules apply to contracts involving

different values the IPD contract, which had a value of just under one million rand, should have gone to a “RFQ” or Request For Quote process in which three quotes should have been obtained and then adjudicated upon by someone other than Dr. Mahlase.

[12] He further testified that SCS should have been involved in the process – in fact any contract with a value of more than R20 000.00

required the involvement of SCS.

[13] Mr. Scannell pointed out a number of aspects in respect of which Dr. Mahlase had not complied with the requirements[8] set out in the PPM.

[14] The second witness, Shakeel Ndeli testified to the investigation that had been conducted by the risk management department during which Dr. Mahlase indicated to him that she had attempted to engage SCS. I return to this aspect below.

[15] Transnet then called Mr. Jacob Kruger, a Senior Manager responsible for Training Delivery. He testified that he had not been involved in the negotiation or conclusion of the contract with IPL but that he should have been. He further ventured an opinion that the material developed by IPD was not up to standard.

[16] The final witness was Ms. Lindi Makhabo, a Procurement Manager at SCS. Ms. Makhabo testified that the IPD contract had not been discussed with her but that she would have assisted Dr. Mahlase had she discussed the contract with her. She further testified that she would not have said that it was not necessary for the contract to go out to tender (which was Dr. Mahlase’s version).

[17] Dr. Mahlase gave evidence in her own defence.

[18] She testified that the first contract she had been involved in at Transnet was with Gray Training in 2011. This contract involved an amount of more than two million rand and thus had to go out to a full tender process. She was assisted by Ms. Makhado on this contract which appears to have been successful.

[19] She denied having received training or being fully aware of the requirements of the PFMA as applicable to Transnet.

[20] She had previously used IPD on a small contract (less than R20 000.00 and thus not requiring SCS involvement).

[21] When the need for certain training in respect of train drivers, train control officers and yard personnel arose she identified IPD as a likely service provider. She discussed the project with Ms. Makhado who advised her that she could not assist given that the value of the contract was less than two million rand. She stated that she had followed up her various conversations with e-mails but that these had been deleted.

[22] She entered into the contract with IPD and all seemed to go well at first.

[23] IPD delivered a set of training manuals which she was happy with. Accordingly IPD's invoice was paid. These manuals subsequently

disappeared from her office. She did not involve other subject matter experts in assessing these manuals – although at the

conclusion

of the arbitration an e-mail was admitted into evidence which indicated that she was in fact aware of the need to involve subject matter experts in making the assessment as to whether or not the materials were acceptable.

Delay in initiating disciplinary action:

[24] At the commencement of the arbitration a point in limine was raised regarding delay in charging Dr. Mahlase.

[25] It would appear that it was only on or about 5 February 2013 that the matter was escalated to Transnet's legal department and the exchange of communication referred to above took place

[26] The response from Attorney Mulder referred to above appears to have been received by Transnet on or about 16 March 2013 and a memo to Mr. Boshoff in response thereto was sent by Dr. Mahlase on or about 2 April 2013[9] – this seems to have sparked the investigation which was concluded on or about 3 June 2013

[27] The charge sheet is dated 5 August 2013 and appears to have been issued on or about that date. The hearing was scheduled to commence on 8 August 2013[10]. The main cause of complaint appears to be the delay from conclusion of the investigation to the issuing of the charge sheet.

[28] I was referred to Transnet's disciplinary code and procedure[11], specifically paragraphs 6.2.1 and 6.2.2 which provide as follows:

6.2.1 A disciplinary hearing must be held as soon as possible after the commission of an alleged offence.

6.2.2 Transnet must endeavour to hold the disciplinary enquiry as soon as possible after it has finalised its investigation into the conduct of an employee. While Transnet will make every effort to ensure that discipline is implemented contemporaneously with the offence allegedly committed by the employee, it is recognised that certain investigations may take longer to complete and that it is not always possible to bring disciplinary proceedings contemporaneously.

[29] At the arbitration Mr. Anderson agreed that a disciplinary hearing should be convened as soon as possible. However his submission was essentially that the delay was not excessive.

[30] The question of delay in initiating disciplinary action has come before the courts on occasion [12]. The requirement is crisply set out in *Cameron: The right to a hearing before dismissal* – part 1[13] in which the learned author states that:

... promptness ... is essential to ensure that the employee can present his case effectively since delay can lead to inadequate recall on the part of the employee or the unavailability of his witnesses ...

[31] The question is simply whether or not the Commissioner was correct in dismissing this point in limine.

[32] Clearly none of the difficulties referred to in *Cameron* presented themselves. In fact Dr. Mahlase was quite able to defend herself and I cannot find that the delay resulted in any unfairness.

[33] Certainly the hearing could have been initiated sooner but the fact that it was not does not, in this instance, lead to any unfairness.

[34] Accordingly I cannot fault the Commissioner's finding in dismissing this point in limine and this ground of review must fail.

The Commissioner's conclusions on the merits:

[35] The Commissioner found Dr. Mahlase to have been an unsatisfactory witness[14] and it is accordingly necessary to analyse this finding. In doing so it is not necessary to repeat the Commissioner's findings, save to state that he quite clearly considered the evidence, applied his mind to the question of credibility and made a finding which is rationally connected to the evidence and reasonable in light thereof.

[36] This is clearly of relevance in light of the allegations made by Dr. Mahlase that she received no assistance from SCS. Her version in this regard is not entirely plausible and – even if I were to disagree with the Commissioner's finding, it remains one which a reasonable decision maker could reach.

[37] Accordingly it is not for this court to interfere with this finding.

- [38] The evidence of Mr. Scannell established the expected standard quite clearly. His evidence showed conclusively that Dr. Mahlase had not complied with a number of requirements relating to procurement processes set out in the PPM.
- [39] In fact it does not appear to have been seriously contended that Dr. Mahlase had complied with the PPM. There is no question on the evidence before the Commissioner that there was a contravention.
- [40] Mr. Scannell provided evidence of training which he had facilitated on the procurement processes and such however could not provide clear evidence that Dr. Mahlase had attended such training.
- [41] The Commissioner deals with this critical aspect[15] finding that
- Employee cannot hide behind the contention that she had not received induction training on commencement of employment on Transnet's procurement policy. As a senior employee it was incumbent on her to fully acquaint herself to Transnet policies and procedures.
- [42] Had Dr. Mahlase been a low level employee I may have been prepared to accept that an absence of training would exculpate her however on her own version she has substantial experience in procurement and I align myself with the Commissioner's view expressed above.
- [43] Dr. Mahlase occupied a senior position. She is highly qualified and experienced and employers are entitled to expect a higher standard
- from high level employees.
- I was referred by Mr. Anderson in his heads of argument to the matter of Somyo v Ross Poultry Breeders (Pty) Ltd[16] which dealt with the dismissal of a senior employee on the basis of poor performance. In that matter the Court held that the requirements
- normally expected of an employer in dealing with poorly performing employees may not apply in cases where one is dealing with a manager or senior employee who should be able to: judge for himself whether he is meeting the standards set by the employer.[17]
- [44] While Somyo dealt with an incident of poor performance it is my view that the considerations taken into account by the Labour Appeal Court in that matter apply equally to matters of misconduct.
- [45] An employer is entitled to expect more from a senior than a junior employee in respect of both performance and conduct.
- [46] While I have no reason to doubt that Dr. Mahlase entered into the IPD contract in good faith and on the basis that she had experienced a high quality of work from them in the past I share the Commissioner's view that her conduct fell short of what Transnet was entitled to expect from her.

[47] In short there is nothing to indicate to me that the Commissioner committed any form of gross irregularity or other reviewable conduct

in coming to the conclusion that he did.

[48] He quite clearly assessed the evidence in totality, identified the issues to be determined, applied his mind to the determination

thereof and reached a conclusion which is reasonable.

Review:

[49] The test for review is well known by now and need not be repeated, save to point out that the function of the court is to consider whether the award is one which a reasonable decision maker could reach on a proper consideration of all the evidence.

[50] It is my view that the award is one which a reasonable decision maker could reach and that the award contains no defect as contemplated by Section 145(2) of the LRA.

[51] As far as costs are concerned I am not of the view that this is a matter in which costs should follow the result.

Order:

I. The application is dismissed;

II. There is no order as to costs

Morgan, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr Levin of Clifford Levin Attorneys

On behalf of the Respondent: Mr Anderson of Pule Inc

[1] Act 66 of 1995

[2] Annexure "F" to the founding affidavit appearing at pages 369 to 370

[3] Bundle B pg 1

[4] Bundle B pgs 74 to 75

[5] Bundle B pgs 76 to 77

[6] Bundle C pgs 14 – 95

[7] Bundle A pg 133

- [8] Transcript pg 56, line 18 to pg 58, line 18
- [9] Bundle B pg 49
- [10] The notice refers to 2012 however this is clearly a typographical error
- [11] Bundle A pg 99
- [12] See *Mohlala v South African Post Office and Others*, unreported judgment of the Labour Court (JR 737/10 10 June 2013); *Minister of Labour v General Public Sector Bargaining Council and Others* (2006) 27 ILJ 2650 (LC); *Public Servants Association of South Africa v Education Labour Relations Council and Others*, unreported judgment of the Labour Court (JR 2452/10 3 April 2014)
- [13]
- (1986) ILJ 183 at 200
- [14] Arbitration award paragraphs 70 to 71
- [15] Award paragraph 77
- [16]
- [1997] 7 BLLR 862 (LAC)
- [17] On the basis of *Stevenson v Sterns Jewellers (Pty) Ltd*
- (1986) 7 ILJ 318 (IC) and *Blue Circle Materials Ltd v Haskins*
- (1992) 1 LCD 6 (LAC)

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