

SOUTH AFRICA / JUDGMENT

South African Municipal Workers Union and Another v Govan Mbeki Local Municipality (JR 2492/09) [2013] ZALCJHB 220 (10 September 2013) [2013] ZALCJHB 220

COURT

Labour Court Johannesburg

BEFORE

Malan

CASE / FILE NUMBER

JR 2492/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case no: JR2492/09

In the matter between:

SAMWU

.....First

Applicant

MDLANKOMO, N

.....Second

Applicant

and

GOVAN MBEKI LOCAL MUNICIPALITY

.....First

Respondent

SALGBC

.....Second

Respondent

MASEKO, N N.O.

.....Third

Respondent

Heard: 17 July 2013

Delivered: 10 September 2013

Summary: CCMA arbitration proceedings – review of
proceedings, decision and award of arbitrator – reasonableness
of

award – misconduct – sanction

JUDGMENT

MALAN AJ

Introduction

This is an opposed application in terms of which the applicants seek to have the arbitration award ('the award') dated 3 August 2009 and handed down by the third respondent ('the Commissioner') under the auspices of the second respondent ('the bargaining council') reviewed and set aside ('the review application'). The applicants elected to bring this review application in terms of s 158(1) (g) of the Labour Relations ('the LRA').¹

The second applicant, Ms N Mdlankomo ('Ms Mdlankomo') was dismissed by the first respondent, Govan Mbeki Local

Municipality ('the municipality') on 12 November 2007 pursuant to a disciplinary enquiry. Although the municipality

levelled four charges against Ms Mdlankomo, the crux of the charges can conveniently be summarised as follows: The municipality contended that Ms Mdlankomo was guilty of misconduct in that she, in breach of the municipality's supply chain management policy, placed herself under a financial obligation and acted dishonestly by accepting a gift and/or favour from Live Seling Civil Construction, a service provider of the municipality.

Aggrieved by the outcome of the disciplinary enquiry, Ms Mdlankomo referred a dispute to the bargaining council contending that her dismissal was unfair. Conciliation failed and the matter proceeded to arbitration. On the record it does not appear that procedural fairness was placed in dispute during the arbitration proceedings. Following the arbitration, the Commissioner found Ms Mdlankomo's dismissal to be substantively fair. It is this determination by the Commissioner that the applicants seek to have reviewed and set aside in terms of s 158(1) (g).

In the applicants' founding affidavit, deposed to by Ms Mdlankomo, she contends that the decision reached by the Commissioner is one that no reasonable decision-maker could reach. In support of the aforesaid contention, she contends *inter alia* that the "[The Commissioner's] Ruling reflects that he gave insufficient weighting to..." There is no Ruling

by the Commissioner, but only the award. I take this to be an error and proceed accordingly.

The applicants also delivered a supplementary affidavit. In terms of the supplementary affidavit, Ms Mdlankomo contends that she wishes to expand upon the submissions made in her founding affidavit. After quoting various extracts from the transcript of the arbitration proceedings, Ms Mdlankomo concludes by simply submitting (which is in essence the same as her submissions in her founding affidavit) that the Commissioner failed to properly consider the evidence prior to arriving at a finding that no reasonable decision-maker could reach.

As mentioned earlier, except for the applicants' contention in general terms that the decision by the Commissioner is not that of a reasonable decision-maker, no specific allegations are made that the Commissioner contravened any of the provisions of s 145(2) of the LRA. The applicants, being dominus litis, have brought the review application on very narrow grounds, the review application will be determined on the basis as it stands.²

Synopsis of relevant background facts

On the record, most of the material facts in this matter appear to be common cause. Ms Mdlankomo was employed as a technical assistant in the municipality's technical and engineering services department at a level 8 position. During November 2006, she wanted to purchase a motor vehicle. However, due to a bad credit record she was unable to obtain finance.

Consequently, she approached a friend, Mrs Sabongile F Lukhele ('Mrs Lukhele'), to assist her with the finance for the purchase of the motor vehicle. In terms of the arrangement between the Ms Mdlankomo and Mrs Lukhele, Mrs Lukhele would obtain finance in order to purchase the motor vehicle and Ms Mdlankomo would then pay the monthly instalments to Mrs Lukhele who would in turn pay these instalments to the company providing the finance. The motor vehicle, namely a VW Polo, was according to the arrangement between Ms Mdlankomo and Mrs Lukhele financed through Wesbank and registered in the name of Live Seling Civil Construction. The purchase price was R104 860.84.

Mrs Lukhele was a director of a company by the name of Live Seling Civil Construction. The motor vehicle in question was purchased by Mrs Lukhele. According to the certificate of registration, the motor vehicle was then registered in the name of Live Seling Civil Construction. Following the aforesaid, Ms Mdlankomo then used the motor vehicle. On the record it is not disputed that Mrs Lukhele did not use the motor vehicle.

During November 2006, the municipality awarded a tender to Live Seling Civil Construction. Although Ms Mdlankomo, as a technical assistant at a level 8, did not participate in any decision-making in respect of the awarding of tenders, she would, however, from time to time monitor the execution of work awarded to service providers, which included the work performed by Live Seling Civil Construction.³

It was further common cause that Ms Mdlankomo did not disclose to the municipality her relationship with Mrs Lukhele or the arrangement between herself and Ms Mdlankomo. This is despite the fact that Live Seling Civil Construction was at the time a service provider to the municipality.

Following an investigation during March 2007, the municipality confronted Ms Mdlankomo with this arrangement concerning the purchase of the motor vehicle. Ms Mdlankomo in turn and only then provided a memorandum to explain the arrangement.⁴ As mentioned earlier, the municipality contended that Ms Mdlankomo was guilty of misconduct in that she breached the municipality's

supply chain management policy. Following a disciplinary enquiry the municipality dismissed Ms Mdlankomo.

I now turn to deal with the applicants' grounds of review.

Grounds of review

I understand the applicants' grounds of review to relate to their contention that the Commissioner's decision is not that of a reasonable decision-maker because the Commissioner ignored the evidence of the municipality's witness, Mr van der Merwe. On this basis, the applicants contend that Mr van der Merwe confirmed, in essence, that given her level and position within the municipality, Ms Mdlankomo could not have influenced the tendering and adjudication process of awarding the tender to Live Selinge Civil Construction.

In support of their contention that Ms Mdlankomo had no influence over the municipality's service providers, the applicants contend further that Ms Mdlankomo had no authority to approve the stock requisitions from service providers because she was only employed at a level 8. In this regard, although her signature appears on a stock requisition form, she was tasked to obtain three quotations as instructed by her manager for construction work to be executed. There were only three service provider companies on the municipality's database, Live Selinge Civil Construction being one of them.

Consequently, the applicants contend that the evidence before the Commissioner does not support a finding of "dishonesty"

or "a corrupt" or "fraudulent relationship", as concluded by the Commissioner.

Lastly, the applicants contend that there was no evidence that there had been a breakdown in the trust relationship between Ms Mdlankomo and the municipality.

The review-test

The proper approach to be adopted by this Court in dealing with arbitration reviews is trite. It has been clearly set out in a number of decided cases, chief amongst which is *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁵ In a nutshell, the test is whether a reasonable decision-maker could reasonably arrive at the same conclusion that the decision-maker whose decision is under review, has arrived at.⁶

The *Sidumo* test has been confirmed in *Edcon Ltd v Pillemer NO and Others*,⁷ where it was further held that the focal point of the enquiry into arbitration awards in review applications is the reasonableness of the award and that the Court should focus not only on the conclusion arrived at, but also on the material before the Commissioner when making the award.⁸

The operation of the *Sidumo* test was also addressed by the Supreme Court of Appeal ('SCA') in *Samancor Tubatse Ferrochrome v MEIBC and Others*.⁹ This judgment, in relation to the operation of the *Sidumo* test, demonstrates what has been stated by both the SCA and Labour Appeal Court ('LAC') in the past about the *Sidumo* test¹⁰, namely that: the *Sidumo* test is a result-

based test, which tests the reasonableness of the result / outcome of the award; in order to assail an award on the basis of the Sidumo test, an applicant must thus assail not only the commissioner's reasons, but also the result of the award; the reasonableness of the result of the award stands to be determined on all the material that was before the commissioner (with the result that the award can be sustained for reasons not considered by the commissioner); the focus is on whether the result of the award falls within a range of reasonable outcomes, as opposed to whether it was correct (this so as to maintain the distinction between a review and an appeal); and seen in the context of the above, the fact that a commissioner (as occurred in Samancor) commits an error in the process of his/her reasoning will not result in the Sidumo test being met, unless the result of the award is incapable of justification on all the material before the commissioner.¹¹

The SCA's judgment reiterates the fact that the Sidumo test is a conservative one, and that an award will only fail the test if it is truly incapable of (reasonable) justification. This was well expressed recently by Davis JA in *Bestel v Astral Operations Ltd and Others* ¹², in the context of commenting on the Sidumo test:

'It is important to emphasise ... 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' (my emphasis).¹³

The LAC, however, stated as follows in *Andre Heroldt v Nedbank Limited*¹⁴:

'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration

proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved

party from having its case fully and fairly determined. Proper consideration of all relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in the dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.'¹⁵

In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others*¹⁶ van Niekerk J held that a CCMA award is reviewable where it is shown that the commissioner's process related conduct is found wanting. Van Niekerk J further expressed the opinion that the reasonableness requirement is relevant to both process and outcome. In other words an award will be reviewable if it suffers either from dialectical unreasonableness or is substantively unreasonable in its outcome.

There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the

material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically inter-linked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.¹⁷

The LAC in *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and others*¹⁸ stated as follows:

‘The fact of the matter is that the reasonable decision maker yardstick crafted in *Sidumo*, viewed in proper context, is none other than that in the absence of a ‘rational objective basis’ [the *Carephone* test] between the decision arrived at and the material placed before the decision maker, the relevant decision is clearly not one which a reasonable decision maker would have arrived at.’

In dismissing the appeal, the LAC stated in *Gaga v Anglo Platinum Ltd and Others*¹⁹ the following:

‘Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA’ (my emphasis).²⁰

Lastly and before embarking upon an evaluation of the applicants’ grounds of review, it is important to be reminded of what Zondo JP (as he was then) stated in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration & Others*²¹:

‘It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decisions of a CCMA Commissioner,

the Court feels that it would have arrived at a difference conclusion or finding to that reached by the Commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the Commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review’.

It is against this background the applicants' grounds of review and the arguments presented by the respective parties in this regard are considered.

analysis of evidence and grounds of review

On the record, the evidence is clear, at least in my mind, that Ms Mdlankomo, given the level at which she was employed, had no influence over the awarding of tenders. Insofar as the stock requisitions are concerned, it is evident that Ms Mdlankomo merely acted on the instructions of her manager to obtain three quotations, which included that of Live Seling Construction, being one of the three service providers on the municipality's database. The aforesaid, however, does not detract from the fact that Ms Mdlankomo was still responsible for the monitoring and reporting on the proper execution of work performed by service providers which included that of Live Seling Civil Construction.

According to Government Notice 868 of 2005, the Minister of Finance acting with the concurrence of the Minister for Provincial and Local Government, had in terms of s 168 of the Local Government Municipal Finance Management Act, 2003 (Act 56 of 2003) made regulations ('the regulations').²²

Paragraph 46 of the regulations read as follows:

46. Ethical Standards

- (1) A supply chain management policy must establish a code of ethical standards complying with sub-regulation (2) for officials and other role players in the supply chain management system in order to promote –

mutual trust and respect; and

an environment where business can be conducted with integrity and in a fair and reasonable manner.

- (2) A municipal code of ethical standards must stipulate that an official or other role player involved in the implementation of the supply chain management policy of the municipality or the municipal entity –
 - (a) must treat all providers and potential providers equitable;
 - (b) may not use his/her position for private gain or to improperly benefit another person;
 - (c) may not accept any reward, gift, favour, hospitality or other benefit directly or indirectly, including to any close family member, partner or associate of that person;
 - (d) notwithstanding sub-regulation (2)(c) must declare to the accounting officer details of any reward, gift or favour, hospitality or other benefit, promise, offered or granted to that person or to any close family member, partner or associate of that person;

...

- (h) must assist the accounting officer in combatting fraud, corruption, favouritism and unfair and irregular practise in the supply chain management system; and
- (i) must report to the accounting officer any alleged irregular conduct in the supply chain management system which that person may become aware of, including –
 - i. any alleged fraud, corruption, favouritism or unfair conduct;
 - ii. any alleged contravention of regulation 47(1);
 - iii. any alleged breach of the code of ethical standards’.

Paragraph 47(1) of the regulations regulates the conduct of service providers or prospective service providers insofar as it concerns inter alia any reward, gift, favour or hospitality to any official of the municipality.

Pursuant to the regulations, the municipality adopted the supply chain management policy (‘supply chain policy’). The supply chain policy reads very similar to the regulations. The purpose of the supply chain policy is to promote mutual trust and respect in an environment where business can be conducted with integrity and in a fair and reasonable manner.

One of the general principles of the supply chain policy is that officials and other role players involved in the supply chain management should be fair and impartial in the performance of their functions. They should at no time afford any undue preferential treatment to any group or individual or unfairly discriminate against any group or individual.²³

Paragraph 2 of the supply chain policy provides as follows:

‘2. Conflict of interest

2.1 An official or other role player involved with supply chain management –

- (a) must treat all providers and potential providers equitably;
- (c) may not accept any reward, gift, favour, hospitality or other benefit directly or indirectly, including to any close family member, partner or associate of that person, of a value more than R350.00’;

It was common cause that the arrangement between Ms Mdlankomo and Mrs Lukhele was for Mrs Lukhele to assist her to obtain finance in order to purchase the motor vehicle through WesBank in her name and to register it in the name of Live Seling Civil Construction. It was also common cause that Live Seling Civil Construction was a service provider that was awarded a tender by the municipality and that Mrs Lukhele was the sole director of Live Seling Civil Construction.

Having regard to the nature of the arrangement between Ms Mdlankomo and Mrs Lukhele, a director of one of the municipality's service providers, I have no doubt in my mind that the arrangement between them and the assistance offered by Ms Lukhele constitutes a favour or benefit as envisaged and more importantly prohibited by the municipality's supply chain policy. Ms Mdlankomo's conduct is exactly the type of conduct that the supply chain policy, in no uncertain terms, prohibits.

These rules are fair and necessary in order to combat corruption, fraud, favouritism and unfair conduct. In any event, during the arbitration neither the existence nor the fairness of the rules was challenged. The rules are there to promote mutual trust and respect and an environment where the business can be conducted with integrity and in a fair and reasonable manner. It follows that a breach of these rules undoubtedly constitutes a breach of the trust relationship. The Commissioner properly identifies and deals with this aspect in a reasonable manner in his award. He states *inter alia* as follows: 'She was placed in a position of trust by the respondent. She was assigned to monitor work performed by the service providers, including Live Silinge Construction. She therefore had a conflict of interest, and consequently breached her fiduciary duty to act in the best interest of the respondent.' (sic) 24

On the record there is also no evidence to suggest that Ms Mdlankomo was unaware of the relevant provisions of the supply chain policy. Despite the aforesaid, Ms Mdlankomo still proceeded to contravene the supply chain policy by making arrangements to receive a favour and benefit from Mrs Lukhele and Live Silinge Civil Construction for that matter. No proper explanation was tendered why Ms Mdlankomo did not approach another friend or relative but specifically chose to approach Mrs Lukhele.

It is also significant that Ms Mdlankomo, being well aware of the relevant provisions of the supply chain policy proceeded to make this favourable arrangement and to receive the benefits thereof from one of the municipality's service providers. This is one of the service providers which she was responsible for monitoring and reporting on the proper execution of work completed.

It is clear that Ms Mdlankomo was placed in a position of trust, although even at her level of employment. Her favourable arrangement with Mrs Lukhele as well as the benefits she derived from the arrangement clearly creates a conflict of interest or at the very least has the potential of creating a conflict of interests. This is the very reason why the municipality, pursuant to the Minister's regulations, has put a policy in place to prevent such potential favouritism. If Ms Mdlankomo had any doubt in her mind regarding this favourable arrangement between herself and Mrs Lukhele or the benefits that she derived from it, she ought to have cleared it with the relevant superiors at the municipality. She, however, did not do so and elected to rather conceal it from the municipality, until questioned about it.

Insofar as the Commissioner refers to the employer's "corrupt relationship with Lukhele" and the fact that "she was party to a fraudulent transaction with a service provider", I am of the view that this might be overstating the nature of the relationship. The focus is clearly on Ms Mdlankomo's contravention of the relevant provisions of the supply chain policy. Ms Mdlankomo was in a position of trust which trust relationship, on a conspectus of all the evidence seen as a whole, was undoubtedly irreparably harmed.

In the final analysis, I find that the Commissioner's decision is not one which a reasonable decision-maker could not arrive at. The Commissioner applied his mind to the evidence properly before him and he did not misconstrue evidence or take into account

irrelevant evidence or fail to take into account relevant evidence.

Consequently, the basis on which the review application has been formulated, I find that there is no basis to review and set aside the award.

Costs

Finally, in relation to the issue of costs. In the exercise of the discretion conferred on me by s 162 of the LRA, the requirements of the law and fairness dictate that there should be no order as to costs. The reason for setting aside the award is ultimately one related to the conduct of the Commissioner, and the opposition to the application was neither vexatious nor frivolous.

Order

In the premises, I make the following order:

The application is dismissed.

There is no order as to costs.

Malan ,AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr D Norton of Mkhabela Huntley Adekeye Incorporated

For the First Respondent: Advocate Z S Sibeko of Themba Sibeko Nkosi Incorporated

1Act 66 of 1995 (as amended)

2See: Vodacom Service Provider Co (Pty) Ltd v Phala NO and Others

(2007) 28 ILJ 1335 (LC); Nataniel v Northern Cleaners Kya Sands (Pty) Ltd and Others (2004) 25 ILJ 1286 (LC); Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others (2005) 26 ILJ 876 (LC)

3Record: p 173, lines 8 – 18 (transcript)

4Record: p 347 - 8 (memorandum)

5 2008

(2) SA 24 (CC); also reported at (2007) 28 ILJ 2405 (CC) and also at

[2007] 12 BLLR 1097(CC)

6Ehrke v Standard Bank of SA andOthers (2010) 31 ILJ 1397 (LC) at par 19 B/C-D; See also Fidelity Cash Management Service v CCMA and Others (2008) 29 ILJ 964 (LAC); also reported at [2008] 3 BLLR 197 (LAC)

7(2009) 30 ILJ 2642 (SCA).

8Ehrke v Standard Bank of SA & Another (2010) 31 ILJ 1397 (LC) at par 19 F-H

9National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) (2011) 32 ILJ 1618 (SCA); Also see Samancor Tubatse Ferrochrome v MEIBC and Others (2010) 31 ILJ 1838 (LAC)

10See, in particular, Edcon Ltd v Pillemer NO and Others [2010] 1 BLLR 1 (SCA); Fidelity Cash Management Service v CCMA and Others

[2008] 3 BLLR 197 (LAC).

11‘Reviewing the Review Test: Recent Judgments and Developments’ by Anton Myburgh SC (2011) 32 ILJ 1497

12 [2011] 2 BLLR 129 (LAC) at para 18; Also see: Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others [2009] 11 BLLR 1128 (LC); SA Airways (Pty) Ltd v Blackburn and Others [2010] 3 BLLR 305 (LC) at 313D-E; Lithotech Manufacturing Cape, a division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper and Packaging Industries andOthers [2010] 6 BLLR 652 (LC) at para 18; Pam Golding Properties (Pty) Ltd v Erasmus and Others (2010) 31 ILJ 1460 (LC) at para 8; MEC for Education, Gauteng v Mgijima

[2011] 3 BLLR 253 (LC) at par 4

13At par 18

14(2012) 23 ILJ 1789 (LAC)

15at par 36

16 [2009] 11 BLLR 1128 (LC)

17Herholdt v Nedbank Limited (2012) 23 ILJ 1789 (LAC) at par [39]; Also see Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC); and Gaga v Anglo Platinum Ltd and Others (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC). In each case aforementioned, the LAC either set aside or confirmed the setting aside of the award on review predominantly on the basis of process-related grounds of review.

18(2012) 33 ILJ 1381 (LAC) at para 21; [2012] 7 BLLR 649 (LAC) at par 21.

19(2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC); In each case aforementioned, the LAC either set aside or confirmed the setting aside of the award on review predominantly on the basis of process-related grounds of review.

20at par 44

21(2008) 29 ILJ 964 (LAC) at , para 98.

22Record: pp 185 – 187 (Government Gazette 30 May 2005 General Notice)

23Record: p 216, para 1.3 (supply chain policy)

24Record: p 319, para 5-1-8 (the award)

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