REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1830/11

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PTY) LTD — **Applicant**

And

TOKISO DISPUTE SETTLEMENT (PTY) LTD — **First Respondent**

PATRICK DEALE N.O. — **Second Respondent**

SELLO MOTAUNG — **Third Respondent**

Heard: **25 January 2013**
Delivered: **26 February 2013**
Summary: Review – misconduct – contravention of policies – dismissal fair.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Mr Sello Motaung ("the employee") is employed as a procurement manager by the applicant (PRASA). Following a forensic investigation, PRASA alleged that the employee had not complied with a number of policy directives relating to supply chain management. A pre-dismissal arbitration in terms of s 188A of the Labour Relations Act[1] was held under the auspices of Tokiso, the first respondent. The arbitrator (Mr Patrick Deale, the second respondent) found the employee "not guilty" on 4 of the charges. He found the employee guilty of "minor insubordination" and imposed a final written warning in respect of one charge; and guilty of "technical non-compliance with supply chain management policy" on the remaining charge, for which he imposed a written warning and "counselling on SCM policy".

[2] PRASA seeks to have the arbitration award reviewed and set aside in terms of s 33 of the Arbitration Act[2]. Both parties were legally represented at arbitration and, initially, in this court. The employee's attorneys delivered an answering affidavit; however, they did not deliver heads of argument and, on the day of the hearing, neither the employee nor his attorneys attended the proceedings. I nevertheless took into account the answering affidavit in considering this judgment.

Background facts

[3] It is common cause that the employee was subject to PRASA's "Supply Chain Management Policy" (SCM Policy). Following a forensic investigation, PRASA charged the employee with the following counts of misconduct:[3]

> "Charge 1: Non-compliance with clause 9.6.10 of the Supply Chain Management Policy in that you, without submitting a motivation to RTPC[4] explaining your failure to involve the Facilities Department in the

[1] Act 66 of 1995 ("the LRA").

[2] Act 42 of 1965.

[3] Charge 2 was amended. That is not relevant to this judgment.

[4] Regional Tender Procurement Committee.

appointment of Karuwa Consulting and related services, and/or obtaining condonement from RTPC for non-compliance with the policy, approved an application for additional work which resulted in the initial contracted amount of R274 813, 98 being increased to +- R500 000, 00.

Charge 2: Gross insubordination, alternatively, acting beyond your delegated powers and authority in that you, in your capacity as Supply Chain Manager, acted as both the project initiator and approver in the Geldenhuys project despite a clear instruction from the Senior Manager: Supply Chain Management to submit a motivation for the upgrading of the Geldenhuys building to the Facilities Department."

Charge 3: Gross negligence in that on or about 16 October 2008 you, in your capacity as Supply Chain Manager, appointed ERB Technologies (Pty) Ltd contrary to the provisions of clause 25.2 of the Supply Chain Management Procurement Procedure and the criteria set out in the evaluation score sheet to install two points machines and related circuit at Tembisa station.

Charge 4: Non-compliance with Supply Chain Management Policy and Procurement Procedures in that you, in your capacity as Supply Chain Manager, failed or neglected to ensure that three quotations are obtained and/or that the transactions go through the competitive bidding process in respect of the following:

4.1 Electrorail (Pty) Ltd Wadeville. Purchase order number OW009630, amount R 100 035, 00.

4.2 Electroweb cc Centurion, Purchase order number OW 011069, amount R442 763, 90.

Charge 5: Non-compliance with the provisions of clause 11.3.2 of the Supply Chain Management Policy in that you, in your capacity as Supply Chain Manager, approved and accepted quotations from the service providers mentioned hereinunder without going through the competitive bidding process:

5.1 Electroweb cc Centurion, Purchase order number OW 011613, amount R 594 369, 80.

5.2 Siemens Ltd Halfway House, Purchase order number OW 011915, amount R497 982, 12."

[4] The arbitrator found the employee "not guilty" on charges 1; 3; 4.2; 5.1 and 5.2 – in other words, he found that the employee had not committed the misconduct complained of. With regard to charge 2, he found that the employee had committed only "minor insubordination" and that a final written warning would be an appropriate sanction. On charge 4.1 the arbitrator found the employee "guilty of technical non-compliance with the SCM policy" and imposed a written warning, coupled with counselling on the SCM policy.

[5] PRASA argues that, in coming to the findings that he did, the arbitrator failed to apply his mind to the evidence before him and committed a gross irregularity in the arbitration process, with potential prejudice to the employer.[5]

Evaluation / Analysis

[6] In *NUM v Brand NO*[6] the Labour Court held that, when reviewing arbitration awards in terms of the Arbitration Act, it must apply the same standards as those that are applicable to the review of CCMA awards. A similar approach was followed in *Ntshangane v Speciality Metals CC*[7] and in *Orange Toyota (Kimberley) v Van der Walt*[8]. And in *Cox v CCMA*[9] Waglay J held that insofar as section 145 (2) of the LRA mirrors section 33 (1) of the Arbitration Act, the interpretation of the one section should be no different from that of the other. That is the approach I shall follow in this review application.

[7] Section 217 (1) of the Constitution[10] is the basis of the law dealing with procurement. It provides that the State must contract in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Subsection (3) provides for national legislation that must prescribe a fair

[5] Cf *Southern Sun v CCMA* [2009] 11 BLLR 1128 (LC); *Herholdt* v *Nedbank* (2012) 33 *ILJ* 1789 (LAC) para [40].

[6] [1999] 8 BLLR 849 (LC).

[7] [1998] 3 BLLR 305 (LC) par 30.

[8] [2001] 1 BLLR 85 (LC).

[9] [2001] 2 BLLR 141 (LC) at par 18.

[10] Constitution of the Republic of South Africa, Act 108 of 1996.

framework to give effect to policy. That legislation is the Preferential Procurement Policy Framework Act[11] (PPPF Act) and its sec 4 provides that an organ of state "must determine its preferential procurement policy and implement it within (a prescribed) framework". PRASA has in place procurement policies of which which the employee is aware. He did not comply with those policies.

[8] The obligations imposed by the Constitution must obviously be fulfilled. PRASA has an interest and a duty to act on behalf of the public[12]. It is also under a duty not to submit itself to unlawful contracts but to resist attempts to enforce such contracts[13]. The applicant is duty bound to set aside its own irregular administrative act.[14] Procurement is peremptory in nature. An administrative authority has no inherent power to condone failure to comply with a peremptory requirement.[15]

[9] Section 9 of the PPPF permits a contract not scoring the highest number of points to be awarded on reasonable and justifiable grounds. In *Minister of Social Development v Phoenix Cash and Carry-PMB CC*[16], the SCA acknowledged the pinnacle position of price in holding that public interest is the best served by the selection of the tenderer who is best qualified by price. It is in this context that the employee's actions (or inaction) need to be considered.

[10] In considering the conclusions reached by the arbitrator, I shall deal with each of the charges separately in the light of the evidence at arbitration.

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[11] Act 5 of 2000.

[12] See *Qaukeni Local Municipality and another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23.

[13] See *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* [2000] 3 All SA 247 (SCA) para 36-37.

[14] See *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 10.

[15] *Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekwini Municipality and others; Group Five Construction (Pty) Ltd v Ethekwini Municipality and others* [2012] 1 All SA 200 (KZP) para 14 & 33.

[16] [2007] 3 All SA 115 (SCA) para 2.

Charge 1: appointment of Karuwa Consulting

[11] This charge arises out of the employee appointing Karuwa to do additional work on a project designed to refurbish a building for the employee's staff. He had identified the Geldenhuys Building in Benoni for this purpose. He secured quotations for the project and appointed Karuwa as service provider. The tender amount was in the region of R274 000. Karuwa did additional work on the project; payment was approved without referral to the RPTC.

[12] The arbitrator found that there were areas of ambiguity and some confusion about the procurement procedures that applied at the time of the Geldenhuys project. The 2007 SCM policy was updated from 1 April 2009. It is common cause that Zoliswa Copiso, PRASA's Senior Compliance Manager, sent the employee an email on 9 May 2008 explaining that, for expenditure between R4000 and R350 000, three quotes had to be obtained; and expenditure above R350 000 had to go out to tender. She testified that, if Karuwa needed to increase the approved amount above R350 000, the end user would need to write up a motivation and request the RTPC to approve the additional amount. The employee did not do that in this instance.

[13] The employee's version at arbitration was that the R350 000 limit was "impractical" and that an audit report shortly after Copiso's email stated that tenders were only needed for amounts over R1 million. The arbitrator found, though, that the instruction to the employee by Copiso was clear with regard to amounts above R350 000; despite this, he found that there was "no clear procedure" to deal with a situation such as this, where Karuwa did the additional work and then demanded payment. He found, therefore, that there was no clear rule in the SCM policy to deal with the Karuwa anomaly.

[14] That finding is not supported by the evidence at arbitration. The SCM policy specifically deals with situations such as this one under the heading, "Price Increases".[17] In cases of supplier price increases it provides that:

[17] SCM Procurement Procedure clause 21.6 (Bundle A page 240).

> "A formal submission should be made to the Tender Committees (CFST, TPC and RTPC) for all contract price increases."

[15] There was a clear rule. The employee was aware of it; yet he breached it. He was in a senior position as SCM manager. In these circumstances, the arbitrator did not apply his mind to the evidence – albeit lengthy and convoluted – that this was the case. Had he done so, the only reasonable conclusion he could have reached is that the employee did commit the misconduct complained of. With regard to the appropriate sanction, that would have to be considered together with the findings on the remaining charges.

[16] On charge 1, the finding of the arbitrator must be reviewed and set aside.

Charge 2: Initiator and approver in Geldenhuys project

[17] This charge arose from the fact that the employee initiated the project and also approved it. The arbitrator found that the corporate governance objectives for separating the roles of initiator and end user in the context of the application of a procurement policy are well understood and legitimate. For a party such as the SCM manager to "wear two caps" could well lead to abuse. However, the arbitrator found that the facts of this case did not indicate that the employee intentionally breached the "two caps" rule. He found that the employee was guilty of insubordination, but that there were mitigating factors leading to a conclusion that it was not "gross" insubordination. In these circumstances this incident in itself did not lead to a breakdown in the relationship and a final written warning was deemed to be an appropriate sanction.

[18] The finding on sanction falls within a range of reasonable sanctions. It is a conclusion that a reasonable arbitrator could have reached. The finding on charge two is not open to review.

Charge 3: ERB Technologies

[19] In this case, the correct process was followed in obtaining three quotes from service providers. The quotation request was sent to Alstom,

Siemens and ERB on 29 September 2008, requesting an urgent response by 3 October 2008.

[20] Alstom scored the highest points for the tender; yet the employee awarded the tender to ERB. This meant that PRASA paid R20 000 more than the Alstom quotation provided for.

[21] The employee's explanation was that there was an urgent need to replace the points machine at Tembisa station. ERB had the necessary components and could deliver them within 3-4 weeks; Alstom would have to import the components.

[22] The arbitrator accepted that there were good reasons to award the contract to ERB, i.e. the need to replace the components urgently. However, this finding loses sight of the fact that the employee contravened a clear rule; and that the quotation request did not specify urgency or a shortened delivery period as a tender condition. It merely stated that the quotation was needed urgently, and did not specify any lead time. The scope of work did not specify a time period for completion either. It merely stated that "the contract period shall be stated by the Contractor including lead times for material". And delivery time was not part of the evaluation criteria specified on the tender scoresheet for the project. It also bears mentioning that the problem that needed to be fixed had existed for more than 12 years. There was no direct evidence before the arbitrator that Alstom would not have been able to deliver within a specified time period. The employee's awarding the tender to ERB led to a loss of R20 000 for PRASA (and thus for the taxpayer).

[23] Against this background, the finding by the arbitrator is not supported by the facts before him. The finding on charge three must be reviewed and set aside.

Charge 4.1: Electrorail Wadeville

[24] The SCM policy required three quotes for this purchase order. The employee did not obtain three quotes. However, where the provider is the sole supplier, the CEO may give permission to deviate from the policy. In this case, the employee did not seek permission from the CEO, yet he

ordered brush boxes from Electrorail. His testimony was that he did so because it was an original equipment manufacturer (OEM).

[25] The arbitrator found that the employee had not complied with the procedure to obtain the CEO's approval; however, he found that it was "technical non-compliance" because there were compelling reasons to appoint Electrorail to repair the brush boxes. It could not be attributed to dishonesty, incompetence or recklessness.

[26] Although there is no such offence as "technical non-compliance", the arbitrator reasonably took mitigating factors into account. His finding that a written warning was a sufficient sanction for this misconduct was not unreasonable and is not, in my view, reviewable.

Charges 4.2 and 5.1: Electroweb

[27] In both cases relating to Electroweb, the employee failed to go through the prescribed competitive bidding process. The employee assumed that Electroweb was the sole supplier; the arbitrator accepted that it was "an approved supplier", and the only one for the items referred to in charges 4.2 and 5.1. "There were thus good reasons for him to believe he had authority to go directly to them to supply the items".

[28] The difficulty with this finding is that it does not take into account that the employee breached a clear rule. As Supply Chain Manager, he cannot work on assumptions; he acts as gatekeeper and has to ensure that the necessary checks and balances are in place to prevent any possibility of kickbacks, bribery or corruption – elements of trade that have become all too common in South Africa, especially in the interface between parastatals and suppliers. It is understandable that PRASA should adopt a "zero tolerance" policy in this regard, even if there is no intimation of dishonesty on the employee's part. Even if Electroweb was a single supplier, the SCM policy clearly states: "The decision to make use of a single source shall be motivated for approval and ratification by the CEO." That was not done. The employee clearly and blatantly breached a workplace rule that has direct bearing on him as Supply Chain Manager.

[29] The arbitrator's finding in this regard cannot be sustained on the evidence before him. It is irrational and unreasonable and must be reviewed and set aside.

Charge 5.2: Siemens

[30] The same considerations apply with respect to this charge. Even if Siemens were a single supplier, that did not enable the employee to flout the clear rules. The arbitrator's finding that the employee "reasonably concluded" that he had the authority to go directly to Siemens to supply the product is contrary to the evidence of a clear rule that he did not have that authority. He committed the misconduct. The contrary finding of the arbitrator is irrational and must be reviewed and set aside.

Conclusion

[31] I have come to the conclusion that the arbitrator's findings on charges 1, 3, 4.2, 5.1 and 5.2 are not reasonable with regard to the material facts before him, especially the clear rules that bound the employee. Those findings must be reviewed and set aside. The findings on charges 2 and 4.1 are reasonable.

Remit or substitute?

[32] Both parties' witnesses gave extensive evidence over the course of 9 days. It would be an unnecessary duplication of time and costs to hear the matter afresh. This court is in as good a position as another arbitrator to consider the evidence afresh. My only concern would be that the Court will have to make a decision on sanction in circumstances where the parties have not specifically addressed possible mitigating and aggravating factors; but this concern has been addressed in that both parties' attorneys submitted extensive written heads of argument to the arbitrator in which circumstances in mitigation and aggravation were addressed.[18] Those arguments are before the Court.

[18] Bundle D pp 71-73 and 87.

[33] I have taken into account the employee's circumstances and the nature of the misconduct. There is no evidence that he acted *mala fide* or dishonestly. He led evidence from co-employees who found him approachable and a good leader. On the other hand, the employee was placed in a senior position of the utmost trust. He was the custodian of the Supply Chain Management processes for PRASA's Wits region; yet he breached those policies when he deemed it convenient. That type of culture cannot be condoned. There is no insinuation that the employee was out to enrich himself; but if a senior manager accountable for procurement cannot be relied upon to follow the prescribed procedures, the carefully crafted checks and balances fall away and the door is opened for the all too common instances of bribery and kickbacks that plague our political and business lives. This type of non-compliance simply cannot be condoned in the circumstances.

[34] For these reasons, I find that dismissal would be a fair sanction.

Order

[35] The arbitration award of the second respondent under case number Tokiso-P10-035 dated 1 July 2011 is reviewed and set aside.

[36] The award is substituted with an award that the employee. Mr Sello Motaung, should be dismissed for misconduct.

[37] There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	FJ Nalane
	Instructed by Maserumule Inc.