
**REPUBLIC OF SOUTH AFRICA**

Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

Case no: JR 975/13

In the matter between:

| | |
|---|---|
| **RAND WATER** | **Applicant** |
| and | |
| **J K MHLANGA** | **First Respondent** |
| **SAMWU** | **Second Respondent** |
| **FATEMA SHAIKH (*N.O.*)** | **Third Respondent** |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **Fourth Respondent** |

**Delivered**: 04 September 2015

**Summary:** (Review – unreasonableness)

---

**JUDGMENT**

---

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the applicant's dismissal was substantively unfair and ordered his reinstatement with a limited back pay.

[2] The first respondent, Mr J K Mhlanga ('Mhlanga') had been employed by the applicant as a mechanics foreman since April 1996 and was dismissed in December 2012. He had been found guilty of a number of charges which need to be itemised for the sake of clarity. The charges against him were that:

> "1. Schedule B, clause 1.8 offence as per Rand water is disciplinary code and grievance for deliberately giving untrue erroneous or misleading information or testimony whether verbal or in writing
>
> (a) You took a valuable Rand water assets to a supplier without following the required processes and lied that procurement was involved during this process.
>
> (d) You handed three quotations to Rand water for the installation of a sampling point at K1 (Zuurbekom) Well #8 and you misled Rand water that three suppliers attended a site meeting.
>
> 2. Schedule A, 1.8 offence "Failure to observe company policies and procedures"
>
> (a) You failed to complete an advice note for the removal of the following items i.e: Hydraulic Jacks (7), generator (1), grinders (2), and an impact wrench (1).
>
> (b) You failed to provide the advice note of the above items to procurement section to enable them to source suppliers to quote on these items.
>
> (c) You failed to send the faulty equipment i.e: Hydraulic Jacks (7), generator (1), grinders (2), and an impact wrench (1) to the Electrical Section for repairs.
>
> (d) You submitted three quotations for the installation of a sampling point at Zuurbekom Well #8 to the procurement section without involving the buyers in this process.

3. Schedule B, 1.18 offence, any deliberate act which causes real or potential prejudice to the employer.

(a) You allowed a supplier (DNM Mining and Industrial Supplies) to remove Rand Water property from the site without ensuring that the supplier completes and signs the required documentation for the equipment to be removed.

4. Schedule B, 1.20 offence serious transgression of Rand water code of ethics b) Corporate Assets (5.8)

Clause 5.8.3

Employees shall not use Rand water assets, equipment and property in an improper manner or for the purpose other than the conduct of Rand water business.

You instructed your staff on various occasions to transport you with Rand water's vehicle for your own private business."

The arbitrator's findings and grounds of review

[3] Essentially, the review is one based on unreasonableness and relates to the arbitrator's finding on certain of the offences Mhlanga was charged with, but which she acquitted him of. The applicant also takes issue with the arbitrator's finding that it suffered no prejudice as a result of Mhlanga permitting goods to be removed irregularly and her finding on the appropriate sanction. Much of the criticism is based on an alleged failure of the applicant to take account of various evidence. It is now well established that a mere omission to take account of relevant evidence is not a self-standing ground of review: it must also result in the outcome being an unreasonable one.[1] It must be said that some of the alleged omissions mentioned by the applicant are not omissions at all because the

[1]See ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*** **(2013) 34 *ILJ* 2795 (SCA**) at 2806, para [25], viz:

> "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 any consequence if their effect is to render the outcome unreasonable."

arbitrator clearly mentions the evidence in question in the course of her analysis. Nonetheless, the issue remains whether on a holistic consideration of all the evidence before her, irrespective of whether she specifically mentions all of it or not[2], the outcome is one that no reasonable arbitrator could reach. For the sake of contextualising the matter and looking at it holistically which is useful to set out all the arbitrator's findings. The arbitrator dealt with each charge in turn, and her findings are summarised below. In the course of the summary, the grounds of review for setting aside certain of those findings are considered.

*Charge 1 (a)-*

[4] The arbitrator accepted that the items in question had been sent to the supplier, ('DMH'). She also implicitly accepted that the items should only have been removed for repairs using an advice note on which the details of each item being removed and the name of the supplier removing them would appear. Further, it was undisputed that the document used to

---

[2] See ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*** **(2014) 35 *ILJ* 943 (LAC)** at 950, viz:

> "[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this E is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. F It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."

remove the items was a gate pass, which was normally used for the removal of items from the premises for the purpose of performing work. Mhlanga had instructed his assistant, Mr D Msebenzi ('Msebenzi') to take the items to the supplier for repair and had assumed he would comply with the necessary formalities. The arbitrator found that this was merely an administrative defect and the applicant had not suffered any prejudice as a result of the wrong procedure being used. In relation to the question whether Mhlanga had lied about procurement being involved in the process which led to the items on leaving the premises, the arbitrator found that there was no evidence of any substance to support the charge or to contradict his own evidence that he had never lied because he gave instructions for the items to be sent to DMH.

[5] The applicant contends that the arbitrator completely overlooked Mhlanga's responsibility for what happened and that he could not absolve himself from responsibility that the proper procedure was not followed because he gave the instruction to a subordinate. The applicant further contends that there was no basis for the arbitrator to conclude that no prejudice resulted from the wrong procedure being used because there was the undisputed evidence of the forensic investigator Mr S Mogorosi ('Mogorosi') that the tools, which had been irregularly removed, had been discovered in a stripped and unusable state in a bottle store.

[6] Although it was put to Mhlanga that he had the responsibility for performing his duties, his defence that he had believed his subordinate would follow the correct procedures in taking the equipment to the supplier for repair was not seriously challenged, and he had not been charged with an alternative charge of negligent supervision or something similar. There was also evidence that Msebenzi had the necessary level of authority to authorise goods to leave the premises. Further the evidence of what was set out on the gate pass did not differ markedly from the details that would have been included in the advice note and in that sense it was not unreasonable of the arbitrator to conclude that no prejudice had resulted from the use of a different form. Similarly, the fact that the grievance might have ended up in a state of greater disrepair rather than being repaired does not seem to follow from the use of the wrong form, but more probably

the competence of the supplier that was supposed to repair them. It might be argued that the arbitrator focused overmuch on the question of the appropriate form and whether the supplier could be identified from the gate pass form, when the bigger issue was whether there had been a proper requisitioning of the repairs, but this was not a prominent feature of the evidence.

[7] In the circumstances, I do not think that the arbitrator's findings on this charge are ones that no reasonable arbitrator could reach.

*Charge 1 (d)-*

[8] The arbitrator found that there was conflicting evidence on whether Mhlanga had misled the applicant that three suppliers had attended a site meeting, when the evidence showed that only one supplier's representative from Nguko Construction (Pty) Ltd had attended the site on 30 August 2011. Mogorosi had testified that Mhlanga had indicated to him that three suppliers had attended the site meeting on 30 August 2011 but had been uncooperative when he attempted to meet with him to get further information. It was common cause that a site meeting was only supposed to take place with the involvement of Ms M Mochane, the procurement buyer ('Mochane'). Mhlanga denied misrepresenting who had attended the meeting. He claimed that convening a meeting at the site was something for the buyer to do and that he had never said there was a site meeting. The arbitrator found that both Mogorosi's and Mhlanga's versions were credible, but in the absence of Mogorosi's version being corroborated she could not find Mhlanga guilty of misleading the applicant about who had attended the meeting.

[9] The arbitrator treated the evidence of Mogorosi and Mhlanga as equivalent in value even though Mogorosi was not challenged under cross-examination about his testimony that Mhlanga refused to cooperate with him when he wanted to investigate the question of the site meeting and the three quotations further with him. However, the respondents are correct when they point out that Mochane did not say in her evidence that Mhlanga had lied to her about a site meeting having taken place and Mogorosi's claims about Mhlanga having lied about the site meeting were

largely based on his interpretation of what Mochane had told him. In the circumstances, even though the only reasonable conclusion to draw from the uncontested evidence of Mogorosi is that Mhlanga was avoiding his attempts to get information about the process leading to the award of work at Zuurbekom, that does not mean that Mhlanga had necessarily misrepresented whether a site meeting had taken place or not. His evasive conduct in that regard might have been for other reasons.

[10] On the evidence, even though another arbitrator might have come to a different conclusion on the same evidence, it cannot be said that the finding is one that no reasonable arbitrator could have reached.

*Charge 2 (a)-*

[11] The arbitrator accepted that Mhlanga had delegated the task of sending the items to DMH to his assistant, Msebenzi, and that completing an advice note for this purpose was within the competence of Msebenzi, as testified by Mochane.

[12] The applicant's criticism of this finding is essentially covered in the discussion under Charge 1 (a) above and consequently I am satisfied there is no reason to disturb the arbitrator's finding on this charge on grounds of irrationality.

*Charge 2 (b)-*

[13] On this charge, the arbitrator accepted that if Mhlanga had followed the proper procedure then the procurement section would have been involved in items being sent to a supplier to quote on the items even if it would still have meant that a gate pass was still incorrectly used to remove the items from the premises. The arbitrator consequently accepted that Mhlanga was guilty of this charge. Although Mhlanga did not seek to cross review the award, it was argued at the hearing  contended that it was illogical of the arbitrator to acquit him of Charge 2 (a), but to find him guilty of charges 2(b) and (c). However, paradoxical though it is, in the absence of these claims been raised in a cross review, the arbitrator's findings on those charges must stand.

*Charge 2(c)-*

[14] The arbitrator found that even if Mhlanga had obtained his manager' s permission to send the equipment to DMH, as he claimed, he ought to have followed the normal procedure which meant that the equipment would first be sent to the Electrical Department and, if they could not repair it, a suitable contractor would be sourced by the buyer. She also found that the appointment of DMH as the supplier was arbitrarily done by Mhlanga which did not follow a procedure to ensure that the selection of the supplier was fair and transparent. As a result, she found Mhlanga was guilty of this charge as well.

*Charge 2 (d)-*

[15] The crux of this charge was that Mhlanga had not involved the buyers in the process which led to the award of a contract to Nguka Construction. The arbitrator concluded that she could not say that either the evidence of Mr V Smith, the District Superintendent at Rand Water, Zuurbekom ('Smith') or that of Mhlanga as to what constituted an emergency work could be construed as 'incorrect interpretations' of the term 'emergency' in the absence of a 'policy definition' thereof. Consequently, she could not find that the situation which led Mhlanga to bypass normal procurement procedures did not qualify as an emergency situation which justified such a measure.

[16] The applicant complains that she unreasonably reached this conclusion despite also finding that the time lapse between the site visit by the sole supplier on 30 August 2011 and the creation of the purchase order some 20 days later and nearly two weeks after the quotation date indicated that "the situation at Zuurbekom may not have been an emergency". Further, the applicant complains that the arbitrator ignored the fact that there was evidence of the procedures that had to be followed even if the work in question was emergency work. The respondents retort that Mhlanga testified that he had approval to go directly to the suppliers irrespective of whether there was an emergency procedure. They also contended that there would be no reason for him to mislead the procurement Department about the existence of a site meeting because the site meeting would have

been convened by procurement, though it was never suggested to Mogorosi when he testified about the procedure for procuring emergency work that such a site meeting with all concerned parties was not necessary.

[17] Quite apart from not attempting to reconcile the apparent lack of urgency in procuring the services of the supplier to install the sampling point, the arbitrator strangely makes no mention of the evidence of Mogorosi about the procedures for emergency situations nor about Mhlanga's version about the source of his authority to choose a supplier himself.

[18] What the procedure clearly showed, amongst other things, that the adjudication of which supplier will be selected is a matter to be done *jointly* with the buyer and the person requesting the service, viz:

> "6.10.1.
>
> (d) The requester and buyer can then source the market and adjudicate upon the service provider and then request goods/services with the selected service provider."

[19] Mhlanga's first version of the source of his authority to appoint a supplier was put to Mogorosi as originating in the emergency requisition procedure mentioned above. It is true that procedure requires management approval to initiate the requisitioning process, but as the Clause cited above shows, approval of a supplier did not lie in the hands of the requester, which in this case was Mhlanga. All that was put to Smith when he was cross-examined was that it needed senior management's sanction to classify a job as emergency work. Mhlanga's own testimony was that he had obtained the approval of the section manager for the requisition on the basis that it was an emergency and then gave the buyer the purchase requisition number. He then claimed to have solicited quotations based on business cards he had. Even on a narrow view of the charge, there was no evidence that the selection was done jointly with the buyer and it is hard to understand how the arbitrator could have avoided finding Mhlanga guilty of the charge if she had read the provision cited above herself when witnesses were referred to it. It is interesting to note in this regard that on

each occasion when Mhlanga's representative read out the provision, he read it in such a way that the buyer was not mentioned in the clause.

[20] In any event, it seems that having got caught up with the question about whether the Zuurbekom work truly constituted emergency work she forgot that this was merely a preliminary question to be determined before deciding whether he ought to have nonetheless involved the buyer in the procurement process. The arbitrator also did not pay any attention to the evidence that the work on the Zuurbekom site had already started on 9 September before the purchase order had been created nearly two weeks later, and only two days after the three quotations were issued on 7 September, which suggest that there was something amiss about the appointment process. Given also the undisputed evidence of Mogorosi that all three of the quotes obtained emanated from businesses controlled by the same person, it is hard to understand why the arbitrator did not see the need to scrutinise compliance with the procedures especially in relation to the complaint underlying the charge, which was about the failure to engage with the buyer to the extent required by the procedure.

[21] Had the arbitrator dealt with all the evidence and completed the enquiry about whether Mhlanga had taken control of the appointment process himself, without the prescribed involvement of the buyer, it is difficult to see how she could have escaped the conclusion that Msebenzi had not complied with the procedure for requisitioning emergency work, even if it is assumed in his favour that it had been classified as such. She would have been hard pressed to avoid the conclusion that he was guilty of charge 2 (d) as well.

*Charge 3 (a)-*

[22] The arbitrator concluded that because the gate pass clearly showed that DMH had signed and completed the document, the fact that it was not an advice note was an administrative defect and did not result in any prejudice to Rand Water. Mogorosi had testified that if the advice note was not completed, the assets could be removed without the applicant's knowledge and they would not be able to trace them.

[23] The applicant argues that by making direct arrangements to send the tools to a supplier, Mhlanga was able to bypass the normal procedures for requisitioning repairs which Mr P Coertzen , the applicant's Electrical Foreman in Bulk Water Distribution, had testified to. Although the applicant may well be right about this, it does not relate directly to the charge as it was framed and I cannot see how this reveals that the finding is flawed for being irrational.

*Charge 4-*

[24] The arbitrator found that in the absence of evidence from Mhlanga's supervisor, Mr C Dintwe, contradicting Mhlanga's own evidence that he had only instructed the driver to take him to see the doctor with his supervisor' s permission, she could not attach much weight to the evidence of Mogorosi. Mogorosi had testified that Mhlanga had given instructions to his subordinates to transport him for his own personal business without the knowledge of management.

[25] Although there was hearsay evidence given by Mogorosi and that management had not given Mhlanga permission to use the applicant's vehicles for his own private business, that hearsay evidence was never corroborated. In the circumstances, I do not think the arbitrator can be blamed for not attaching probative weight to it.

*Sanction*

[26] In considering the appropriate sanction, the arbitrator noted that both charges 2b and 2c were categorised as Schedule A offences, amounting to a failure to observe company policies and procedures. In terms of the company's own disciplinary code and grievance procedure, an employee guilty of such an offence may be formally counselled or issued with a warning. In the circumstances, she held that committing a "Schedule A offence is not necessarily appropriate." She further accepted that Mhlanga held a position of trust but there was no indication that continuing the employment relationship would be intolerable and accordingly dismissal was not appropriate as a sanction. For the same reason, there was no bar to reinstatement as a remedy.

[27] In essence, the applicant contends that the arbitrator simply failed to consider that the evidence tendered by the applicant that Mhlanga could no longer be trusted and that he knew and accepted the company's code of ethics and the consequences of breaching that code. I agree with the respondent that the first question to be determined is whether the dismissal as a sanction was warranted in relation to the misconduct Mhlanga was found guilty of. The arbitrator had only found Mhlanga guilty of charges 2 (b) and (c) which arguably were not serious enough to warrant dismissal on their own.

[28] However, as the outcome of this review application has the effect of the arbitrator's finding in respect of charge 2(d) being set aside and substituted with a finding that Mhlanga was guilty of the charge as well, the appropriate sanction will necessarily have to be revisited. In reconsidering the appropriate sanction, a worrying aspect of the three charges which Mhlanga was guilty of is that they entailed the short-circuiting of established procurement procedures and effectively meant that Mhlanga alone determined which supplier would be used. Clearly, this type of conduct lends itself to the development of corrupt practices, whether that occurred in Mhlanga's case or not. The fact that there was evidence that the two of the quotations for the Zuurbekom job appear to have been contrived and given that Mhlanga claimed he selected the potential suppliers for that work himself would naturally be a cause of great concern to an employer who entrusts him with significant responsibilities in the procurement process by virtue of his position.

[29] Mhlanga was a senior employee managing a budget of R 6 million and a staff of approximately 70. It is true that Mhlanga had a clean disciplinary history and long service, but on the other hand he occupied a responsible senior position in which the employer ought to have had no concerns that it needs to keep a constant eye on his activities, because he cannot be relied upon to follow standing operating procedures which provide built-in safeguards to ensure the integrity of procurement processes.

[30] In the circumstances, Mhlanga's dismissal was appropriate.

Order

[31] The finding of the third respondent that the first respondent was not guilty on charge 2 (d) is reviewed and set aside, and substituted with a finding that he was guilty of that charge.

[32] The third respondent's findings in respect of all other charges remain undisturbed.

[33] The third respondent's finding that the first respondent's dismissal was substantively unfair is set aside and substituted with a finding that his dismissal was substantively fair.

[34] No order is made as to costs

_____

**Lagrange J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

For the Applicant: KCaddy

For: Cliffe Dekker Hofmeyr

For the Respondents:

Adv. V.D. Riet, SC

Instructed by: KD

Maimane Attorneys