IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NO. D998/12

In the matter between:

RAYNOLD ZITHULELE MDLANGATHI Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MIKE COWLING N.O. Second Respondent

EZEMVELO KZN WILDLIFE Third Respondent

Heard: 14 February 2015

Delivered: 10 July 2015

Summary: Review of an award – manipulation of adjudication process of tenders – preparation of initial payment assessment when work is far from completion – unreasonableness in the award not proved.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] to review, set aside, substitute and/or correct the arbitration award dated 14 September 2012, handed down by the second respondent, acting under the auspices of the first respondent. The third respondent opposed this application.

Factual Background

[2] The applicant was employed in the Technical Services Department as an Acting Project Manager and his main duties were to identify projects and thereafter to source service providers through a tender process that was determined by an adjudication committee which he had to facilitate. His duties included liaising with successful bidders and taking part in authorizing payment on completion of projects or tasks as well as general oversight of the project. Such oversight was done in conjunction with Inspectors of the Department. One such Inspector was Mr Duma. All the information concerning inspections undertaken is recorded in the Site Instruction Book which is thereafter communicated to the applicant to alert him of the progress in such projects. In the bidding process the applicant did not have the final say. He merely made recommendations which were passed on to Mr Khumalo, his line Manager. Ultimately the bidding process was referred to the adjudication committee which had the final responsibility.

[3] Most of the maintenance work was outsourced and therefore it was necessary for the applicant to assess the nature of the work and estimate the cost thereof. Thereafter this information would be sent to Procurement Services who would provide a list of companies that qualified in terms of the third

[1] Act Number 66 of 1995.

respondent's procurement policy to perform that particular type of work. The applicant would only meet potential contractors at the compulsory briefing sessions that were held on site.

[4] Mr Thembani Mzulwini was a Project Coordinator having oversight of the Umlalazi Project which fell under the work supervised by the applicant. Mr Mzulwini received an interim payment certificate relating to the Umlalazi Project that was signed by the applicant. As a result of complaints received from the Camp Hospitality Manager at Umlalazi it was known that the work was incomplete. The interim payment certificate had been received at the very early stages of the project. The interim payment certificate was normally signed to confirm that work had been done. In the Umlalazi case, that was false since it was known that the work had not been done. An interim payment certificate would normally not on its own result in payment being made as supporting documentation, such as a bill of quantities, invoice and a completion certificate, needed to be submitted along with the interim payment certificate.

[5] According to Mr Mzulwini, in order to clear the Umlalazi debacle up, a meeting was arranged between him, the applicant and the Camp Hospitality Manager which would take place on site in order to determine whether the work had in fact been completed. However the applicant failed to appear at this meeting.

[6] Nominya Construction and Rapid Dawn 1099 CC are some of the companies which tendered for some of the projects handled by the applicant. At one instance of the bidding process, the applicant did not recommend the tender by Rapid Dawn due to the fact that only one of the line items was above the rates estimate and despite the latter having the overall lowest quote. That tender was awarded to Nominya Construction. Subsequent to that the applicant recommended the awarding of a tender to Rapid Dawn despite being outside rates estimates in regard to certain items. That recommendation excluded Nominya Construction which had tendered for the project.

[7] Ms Xolisile Hlongwane was the owner of Nominya Construction. Sometime in or around 2006 the applicant sold his motor vehicle to her while at that time she was one of the contractors that the applicant had to deal with, but this was an open transaction. According to the applicant Ms Hlongwane paid for the motor vehicle by making erratic monthly deposits into his Absa Bank account.

[8] An investigation was ordered by the KwaZulu-Natal (KZN) Provincial Parliament arising from a concern about fraudulent and corrupt activities that were allegedly taking place within the Third Respondent. A firm of auditors, DeLoittes and Touche, was commissioned to conduct a broad investigation. On completion of that investigation a report was submitted that purported to unearth a number of alleged irregular activities which were attributed to the applicant. He was put on suspension and was charged with 40 counts of misconduct but he was found guilty of 31 counts and a sanction of summary dismissal was imposed.

[9] He referred an unfair dismissal dispute to the first respondent challenging both the procedural and substantive fairness of my dismissal. The second respondent was duly appointed to arbitrate the dispute. At the commencement of the arbitration proceedings two further counts of misconduct (counts 36 and 37) were withdrawn by the third respondent. Therefore, in arbitrating the unfair dismissal dispute, the second respondent had to determine, *inter alia*, whether the applicant was guilty of the remaining 29 counts of misconduct. The second respondent found that the applicant was not guilty of all remaining counts of misconduct except counts 2, 9 and 40. Based on the finding that he was guilty of counts 2, 9 and 40 the second Rrespondent concluded that the dismissal was substantively fair. This conclusion and the findings incidental thereto are the subjects of this review application. Counts 2, 9 and 40 were described as:

<u>Count 2</u>

"You are guilty of Gross Dishonesty and/or gross misconduct in that during January 2007 you manipulated the adjudication process of the Tender EKZNWL T/2006/12/1 by applying inconsistent procurement process and thereby caused the work to be awarded to Nominya Construction and not Rapid Dawn 1099 cc even though Rapid Dawn submitted a lesser quotation."

Count 9:

"You are guilty of Gross Dishonesty and/or gross misconduct in that during January 2007 you manipulated the adjudication process of the Tender EKZNWL T/2006/12/4 by applying inconsistent procurement and evaluation process and thereby caused the work to be awarded to Rapid Dawn 1099 cc whilst the rates quoted by them for two items were outside of that of the cost estimates."

Count 40:

"You are guilty of gross misconduct and / or gross negligence in that you failed to exercise due diligence and care in performance of your duties in that you prepared the initial payment assessment to Maziya for the full tendered amount (less retention) whilst all of the work had not been performed according to the specifications per the Bills of Quantities."

Evidence at arbitration

[10] Five witnesses testified for the third respondent. The first witness was Mr Clinton Ungerer, a Senior Manager in the Risk Advisory Division of Deloitte and Touche. He was involved in the said investigation and he focused on the fraudulent conduct arising from procurement processes as well as the sourcing of various services and whether those processes were actually rendered. Mr Sean Webster, who was also part of the Deloitte and Touche investigation team, was the next witness and he testified in regard to the issues surrounding the Umlalazi Nature Reserve project. Mr Thembani Mzulwini was another witness and as a Project Coordinator had oversight of the Umlalazi Project. He is the one who received the interim payment certificate relating to the Umlalazi Project that was signed by the applicant. Mr Anandroy Ramdaw who chaired the disciplinary hearing testified on procedural issues. The applicant testified in defense of himself.

[11] Most of the evidence relating to the three outstanding charges was common cause at arbitration. That evidence intended to show, inter alia, the following:

1. The applicant admitted that he prepared and signed the Interim Payment Certificate for the full amount claimed by Maziya Electrical, being a service provider, for the work they claimed to have done, namely the renovation of chalets 1 to 5 at Umlalazi nature Reserve.
2. Due to the nature of his job which required him to be out of office most of the time, the applicant took it as a normal and acceptable practice to prepare and sign payment certificates and other administrative documents, so that if other supporting documents, like the completion certificate which was prepared by the Works Inspector after inspecting the works, are done whilst he was out of the office, the complete set of documents could be put together and be submitted for processing without further delay occasioned by his absence from the office.
3. The applicant advised the owner of Maziya Electrical that the Works Inspector, Mr Duma would prepare a completion certificate after inspecting the works.
4. The interim payment certificate, without the supporting documents particularly the completion certificate was submitted to Mr Mzulwini whilst the applicant was already on suspension. The third respondent's witnesses correctly conceded that without the supporting documents the interim payment certificate was meaningless and no payment could be effected. Indeed no payment was effected because of the absence of the supporting documents.

[10] The third respondent proved, through a bundle of documents admitted as evidence during the cross-examination of the applicant, that some monies were transferred from the bank account of Ms Hlongwane to the Absa Bank account of the applicant. The applicant unsuccessfully objected to the admissibility of that evidence as hearsay and as irregular due to the absence

of the necessary legal basis for it admissibility. An amount of R110 000 was paid by Ms Hlongwane to the applicant in 2006. Then in 2007 further amounts totaling R107 000 were also paid by Ms Hlongwane to the Absa Bank account of the applicant. Most of the payments were made a few days after Ms Hlongwane was paid by the first respondent for projects in which the applicant had procured and managed such projects.

[11] The applicant testified that the transferred monies were the proceeds of the sale of his motor vehicle to Mrs. Hlongwane who came up with the best offer which was slightly below the market value. He said that she paid him intermittently and during that period he retained the log-book. He emphatically denied that the sale of the motor vehicle to Mrs. Hlongwane played any role in his decision to recommend contracts in favour of Nominya Construction. He also denied that such transfers were kickbacks flowing from the tenders awarded to Nominya Construction.

Chief findings of the first respondent and grounds for review

[12] The submissions by the applicant on the grounds for review include the findings assailed. As examples I shall refer to some but not all such submissions.

Count 40

[13] The submission was that crucial evidence ignored by the Commissioner in this regard is that, due to the nature of his job which required him to be out of office most of the time, it was an accepted practice for the applicant to prepare a payment certificate in advance. The Commissioner was said to have completely ignored or disregarded the fact that this version was pertinently put to the third respondent's witnesses at the disciplinary enquiry and at the arbitration. In order to fairly convict the applicant of Count 40 the third respondent had to prove, among other things, the existence of the workplace rule at the time. The applicant said that since the third respondent failed to rebut the applicant's contention that the pre-signing of the payment

certificate was an acceptable practice, there was no basis whatsoever for the second respondent to conclude that the applicant was guilty of Count 40. It was further contended that there was no evidence supporting the Commissioner's finding that there was potential prejudice by signing the payment certificate in advance. The third respondent's witness Mr Webster conceded that no payment could be effected without a completion certificate confirming the amount of work that had been done.

Counts 2 and 9

[14] The applicant's conviction on Counts 2 and 9 was said to have been entirely based on the 'bank statements' contained in a bundle which was put to the applicant for the very first time during cross-examination. The Commissioner effectively stated that if it was not for the bank statements the third respondent would have failed to prove that the applicant was guilty of these charges. While the sale of the motor vehicle to Ms Hlongwane by the applicant was common cause, at the disciplinary enquiry, the amount paid and the manner of payment by Ms Hlongwane were never an issue. Even at the arbitration the third respondent closed its case without leading any evidence whatsoever about possible discrepancies in the amount paid by Ms Hlongwane for the vehicle.

[15] Despite the CCMA subpoena calling upon a bank official to attend arbitration to produce bank statements, nobody attended and testified about the bank statements. As a result, the 'bank statements' were not authenticated. Most of the statements were electronic copies without even a logo of the bank. The affidavits accompanying the bank statements were in terms of section 36 of the Criminal procedure Act[2] whereas the arbitration is conducted in terms of the LRA. Some of the so-called affidavits were not even signed by the deponent. The inadmissibility of the 'bank statements' was pertinently raised during cross-examination and re-examination of the applicant, as well as during argument. The Commissioner's admission of the copies of the bank

[2] 51 of 1977

statements contained in the bundle was said to offend the Civil Proceedings Evidence Act.[3] Sections 27 to 32 of the CPEA deals specifically with the procedure of presenting banker's books as evidence in civil proceedings.

[16] The Commissioner inferentially concluded that the monies allegedly paid by Ms Hlongwane into the applicant's bank account in 2007 were kickbacks based on the finding that the applicant testified that Ms Hlongwane's last instalment was at the end of December 2006 and he could not explain the 2007 payments. Six examples evincing several gross irregularities allegedly committed by the second respondent relating to this aspect were identified by the applicant

Opposition to the review application

[17] In respect of count 40, pertaining to the pre-signing of payment certificates the submission by the third respondent was that even if such a practice existed, the applicant in his capacity as the acting project manager:

1. had a duty to oversee the completion of projects and payment thereof ;

2. had an obligation to refrain from perpetuating such practice and to normalize the payment procedures.

[18] The submission was further that, as the acting project manager, the responsibility lay with the applicant to truthfully represent to the third respondent's finance department whether they should pay the service provider and in this case the extent of such payment. A fundamental rule was that the service providers were not paid for work that they had not completed. It was then absurd to suggest that the applicant was not aware of that rule. Further, the fact that he contended that the finance ought to have picked up the irregularity suggested that he knew that the rule was in place.

[3] 25 of 1965 ("CPEA").

[19] It was contended that the third respondent was an organ of state and that therefore it was duty bound to award the tender to the tenderer who scored the most points in accordance with the provisions of section 2(1) of the Preferential Procurement Policy Framework Act.[4] The third respondent said that it could not be emphasized enough how important a factor price played in the award of a tender and the applicant perpetuated the same irregularity in the tender that formed the subject of count 9, which tender was awarded to Rapid Dawn.

[20] The third respondent observed that the second respondent further formed the view that the applicant was a poor witness whose explanations were unsatisfactory; he gave a range of answers and changed his version and that the second respondent was justified in drawing the inescapable inference that those payments were kickbacks from the respective tenderers.

Evaluation

[21] At the commencement of this application both parties relinquished the stance each adopted on condonation for the late filing of the founding and answering affidavits. It was a correct position as the award came to the notice of the applicant much later than the date of the award. Condonation was not necessary. With the applicant withdrawing his opposition to the late filing of the answering affidavit, a need to seek condonation was dispensed with.

[22] The law governing the reviewability of an arbitration award is trite. It has to be determined here whether the decision reached by the second respondent is one that a reasonable decision maker could not reach.[5] In *Herholdt v Nedbank Ltd*[6] the court stated that test in the following terms:

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls

[4] No. 5 of 2000
[5] *Sidumo & another v Rustenburg Mines Ltd &* others (2007) 28 ILJ 2405 (CC).
[6] (2013) 34 ILJ 2795 (SCA) at paragraph 25.

within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all 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 any consequence if their effect is to render the outcome unreasonable."[7]

[23] The success of this application lies in determining whether the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result. It is appropriate to deal with each count of misconduct as the parties did in the presentation of this application. In similar vein as did the parties I commence with count 40 and then counts 2 and 9 simultaneously.

Count 40

[24] The allegation facing the applicant was that he:

- prepared the initial payment assessment to Maziya;
- for the full tendered amount (less retention);
- whilst all of the work had not been performed according to the specifications per the Bills of Quantities.

The result of what was alleged was that the applicant:

- ➢ was guilty of gross misconduct and / or gross negligence
- ➢ in that he failed to exercise due diligence and care in performance of his duties.

[25] Throughout the disciplinary and the arbitration hearings it remained common cause that the applicant committed each of the three allegations identified herein . All he did was to deny that the two identified results flew from his conduct and that he was therefore not guilty. The determination of the alleged

[7] See also *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* (2014) 35 ILJ 943 (LAC) at [14] to [21]

results depends on the consideration of the objective interests of society. As alluded to by Mr Saks for the third respondent, the third respondent was an organ of state, which was obliged to adjudicate tenders in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. Any conduct that undermined its constitutional imperatives in the evaluation and adjudication of tenders undermined the procurement process itself and exposed the third respondent to the risk of the review of the tender. Further, as an employer the third respondent was entitled to set standards for compliance by its employees. It did not lie in the mouth of any employee to allege that he contravened a clearly stated, well known and reasonable rule merely because there were other employees who were infringing the rule. The applicant was a senior employee on whom the third respondent was entitled to rely for a proper observance of its rules. The third respondent was, for instance, entitled to be informed by the applicant of any breach of the tender rules by applicant's supervisor, Mr Khumalo.

[26] The applicant's submission that crucial evidence was ignored by the Commissioner in that, due to the nature of his job which required him to be out of office most of the time, it was an accepted practice for the applicant to prepare a payment certificate in advance in an attempt to find a way of escape. His was to comply with the clear precepts of his employer. His claim that his job required him to be out of office most of the time has no factual basis. He was outside most of the time but was unable to determine that the projects for which he pre-signed were far from completion stage. The payment stage was still far off. To confuse matters more, the applicant sought to introduce the issue of the absence of prejudice, saying the chances of moneys being paid out were none existent. This element was never made part of the charge he faced. It was an irrelevant consideration when his guilt was considered. It might have been a factor in mitigation.

[27] In my view, the reasoning of the second respondent cannot be faulted. He neither misconceived the nature of the enquiry nor arrived at an unreasonable result.

Counts 2 and 9

[28] The allegations summarized, are that the applicant manipulated the adjudication process of two tenders by applying inconsistent procurement and evaluation process and thereby caused the work to be awarded to incorrect tenderers. The applicant's main objection was the admissibility of his bank statements, due to them amounting to being hearsay evidence. A party against whom hearsay evidence is sought to be admitted can consent to its admissibility. Assuming for a moment that this was hearsay evidence, the applicant agreed to the bank statements being procured and allegedly tried to get them himself but failed. His representative came on record as having no problem in the statements being admitted into evidence. He well knew long before that the third respondent wanted to have the bank statements admitted as evidence and was thus accorded the notice he might have needed.

[29] Of more importance though, is the fact that the truth of the contents of the bank statements did not depend on the bank officials, who themselves would be giving hearsay evidence on the bank statements, but it depended on him. They were his bank statement, giving an account of transactions by his or at his instance. He bore personal knowledge of the contents of the bank statements. That he might not have a good memory of each transaction is a separate enquiry. The second respondent was accordingly entitled to admit the bank statements into evidence without following the stringent legal route proposed by the applicant, as he was not dealing with hearsay evidence.

[30] Having admitted the bank statements the second respondent had a duty to evaluate all evidential material before him. A further challenge on this would only be permitted on appeal and not on review. Again, in in respect of these two counts the second respondent has not been shown to have misconceived the nature of the enquiry or arrived at an unreasonable result.

[31] Accordingly, the following order is to issue:

1. The review application in this matter is dismissed.

2. No costs order is made.

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Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Mr B Mgaga

Instructed by Garlicke and Bousfield Inc.

For the third Respondent: Mr D J Saks

Instructed by Ndwandwe and Associates.