**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA106/2019

In the matters between

| | |
|---|---|
| **DELIWE NANCY NYATHIKAZI** | **First Appellant** |
| and | |
| **PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL** | **First Respondent** |
| **JAMES NGOAKO MATSHEKGA N.O** | **Second Respondent** |
| **DEPARTMENT OF HEALTH – LIMPOPO** | **Third Respondent** |
| **MEC FOR HEALTH – LIMPOPO** | **Fourth Respondent** |

**Heard:** **04 May 2021**

**Delivered:** **26 May 2021**

**Coram: Davis JA, Coppin JA and Molefe AJA**

---

**JUDGMENT**

---

DAVIS JA

Introduction

[1] This Court is called upon to determine an appeal against the decision of the Labour Court in which the appellant's application to review and set aside an arbitration award that was granted by the second respondent was dismissed on the basis that the award was reasonable and was one to which a reasonable Commissioner could have made. The fact that this Court is called upon to determine this appeal in the circumstances of this specific case highlights that which has become a significant problem particularly in respect of dismissal disputes, namely that the legislative objective of the expeditious resolution of these disputes are too often honoured in the breach than in compliance.

[2] The chronology in this case is illustrative of this problem. The award of the second respondent was made on 29 December 2016. The judgment of the court *a quo* in dismissing the review application was delivered on 29 March 2019. More than two years after the judgment was delivered, this court is called upon to determine the appeal. It is time that the entire legislative framework within dismissal disputes are adjudicated in South Africa requires a careful and thorough re-examination, in order to assess whether the objectives of the Labour Relations Act 66 of 1995 (the LRA) are adequately met in the present context.

The factual background

[3] At the time of her dismissal, the appellant held the position with the third respondent of Senior General Manager: Academic and Tertiary Department. On 8 January 2015, she received a notification that she was required to attend a disciplinary hearing at which she was to be charged on two counts:

> Count 1. It is alleged that on or around March 2011 at or around Department of Health Provincial Office, Limpopo you contravened Guide for Accounting Officers, Public Finance Management Act, section 38(a)-(c) of the Pubic

> Finance Management Act 1 of 1999 read with section 51(1) (a)-(c) of the said Act and National Treasury Practice Note Number 6 of 2007/2008, in that you approved the procurement of control room/two way radio for the department of Health from Kitso Tech Cooper radio to the amount of R 7 085 409.16 where supply chain processes were not followed and further that supply chain management was not involved.
>
> Count 2. It is alleged that on or between February and March 2011 at or around Department of Health Provincial Office, Limpopo you contravened Guide for Accounting Officers, Public Management Act, section 38 (a)-(c) of the Public Finance Management Act 1 of 1999 read with section 51(1) (a)–(c) of the said Act and the National Treasury Practice Note Number 5 of 2009/2010, in that you on or between February and March 2011 approved the procurement and payment of additional Columbus software to the amount of R 4 976 647.20 where supply chain processes were not followed and further that supply chain management was not involved.'

[4] The inquiry found the appellant guilty as charged and ordered her dismissal. The appellant referred the dispute to the first respondent on 13 August 2015. However, conciliation which took place on 14 September 2015 was unsuccessful and the matter was then referred to arbitration to be heard before the second respondent.

*The first count*

[5] It was common cause that a letter had been generated by the Deputy Manager Communication at the third respondent on 4 March 2010 which read as follows[1]:

> 'RE: REQUEST TO PARTICIPATE IN BID POL/05/2009-DELIVER INSTALLATION AND COMMISSIONING GUARANTEE AND MAINTENANCE OF TWO WAY RADIO COMMUNICATION SYSTEM

[1] Regrettably the letter as it appears in the record is a very poor copy; hence the gaps in its reproduction in this judgement

> The Department of Health and Social Development hereby wish to seek for permission to participate in your contract BID POL/05/2009 as per Provincial Treasury Installations on….
>
> The above mentioned contract is urgently needed by the department for our 2010 world cup preparations. We managed to agree with the service provider Kitso Tech Coopers radio on terms and conditions as stipulated in the contract and we are now humbly requesting your support in this regard.'

[6] A year later, that is on 22 March 2011, the appellant approved a request "for approval from control room/centre for two-way radios for the Department of health". The request was set out thus:

> 'The Department had a contract for two-way radio technologies with Kitso Coopers Radio, and such contract expired in 2009. Subsequent to that the two-way radio infrastructure stood idle and dilapidated since the lapse of the contract. The Department wrote a letter to Polokwane Municipality to request participation in the contract that the Polokwane Municipality has with Kitso Coopers (see attached letter dated 04/03/2010). The Polokwane Municipality then granted permission to the Department to participate in BID 05/2009 (which is the bid to supply, install and maintain two-way radios), (see attached letter dated 16 March 2010). During the Public Service employees' strike a special memo was written to the HOD through the bid committee, for a once off transaction, and the HOD approved it.
>
> MOTIVATION
>
> The department needs to urgently get the HOD's approval in order to procure the relevant equipment and have it installed as well as start negotiations for signing a Service Level Agreement (SLA). In addition, we will review the technology offerings. While we are thankful that the HOD approved the memo related to two-way radio once off transaction, we realise that the Department needs a more robust solution to avoid being crisis orientated. The once off solution is inadequate, and not-integrated. We need a comprehensive two-way radio solution that will enable the department to deal

with communication challenges facing the Department. A two-way radio solution provides one-to-many and many-to-many communication network so vital for disaster and emergency management.

FINANCIAL IMPLICATIONS

Based on quotation from Kitso Coopers Radio, the costs for the control Centre equipment is R7 085 409.16 including VAT. This costs can be covered before the close of this financial year as the equipment can be delivered in this financial year.'

On the strength of this document, the appellant approved the acquisition of the radios from Kitso Tech Coopers Radio (Kitso) for an amount of R7 085 409 .16

Count 2

[7] A memorandum was generated for the procurement of an additional 2700 software licenses from Columbus which application the appellant approved on 22 February 2011. It was common cause that the procurement agent of government for such licenses is the State Information Technology Agency (Pty) Ltd (SITA). Treasury Practice Note 5 of 2009/2010 outlines the process that has to be followed to procure goods and/or services through SITA as well as the accountability of accounting officers or authorities. It was clear that the procurement of the Columbus software which had been authorised by the appellant constituted a deviation from s 7 of the SITA Act 88 of 1998 (SITA Act). In terms of s 7(3) of the SITA Act, every department must, subject to subsection (4), procure all information, technology, goods or services through SITA. SITA played no role in the execution of the Columbus transaction.

The arbitration award

[8] At the arbitration hearing, the third respondent contended that as a consequence of the purchase of the two way radios together with the Columbus software, a considerable amount of public funds was expended. In

relation to the control room equipment provided by Kitso, the third respondent paid over an amount of R 7 085,409.16. In relation to the Columbus software, payment in the amount of R 4 976 647.20 was made over the Columbus. The essence of the charges was that the appellant had approved a considerable amount of irregular expenditure.

[9] The second respondent was referred to the legislative framework which was designed to regulate this kind of expenditure. Section 1 of the Public Finance Management Act of 1999 (PFMA)defines irregular expenditure as expenditure other than unauthorised expenditure incurred in contravention of or that is not in accordance with the requirement of any applicable legislation including (a) this Act or (b) the State Tender Board Act, 86 of 1968 or any regulations made in terms of this Act; (c) any Provincial legislation provided for procurement procedures in that Provincial Government.

[10] Section 76(1)*(a)* of the PFMA authorises National Treasury to make regulations concerning any matter that must be prescribed for departments in terms of the Act. Pursuant thereto, Regulation 16 A, 6.1 of Treasury Regulations issued on 15 March 2005 provides that, 'procurement of goods and services either by way of quotations or through a billing process must be within the threshold values that is determined by the National Treasury.' In addition, Practice Note of 8 of 2007/2008 generated by National Treasury requires that any goods or services by R 500 000 must be acquired through a competitive bidding process. In addition, Regulation 16 A, 6.6 of the 2005 Regulations provides that 'the accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of State, subject to the written approval of such organ of State and the relevant contractors.

[11] The second respondent found that the evidence showed compellingly that, while the third respondent had followed a competitive bidding process in

respect of the initial provision of two-way radios from Kitso in the amount of R 2 392 628.70, no similar mandated set of procedures had been followed before the appellant approved the payment of R 7 085 409.16 on 23 March 2011 for "the delivery of the equipment". In his reasons, the second respondent found that the procurement of these goods from Kitso clearly constitutes irregular expenditure as defined and that the charge of misconduct against the appellant in respect of the Kitso transaction had been properly established.

[12] Turning to the procurement of software from Columbus, the second respondent recorded that the appellant had argued that the procurement of the Columbus Software had been acquired in accordance with the provisions of the contract that had been entered into between Eclipse Networks (Pty) Ltd and SITA (referred to as the RT543 contract). However, that contract provided expressly 'that the supplier shall not, without the prior written consent of SITA sign the agreement or any part thereof or any benefit or interest thereunder without the written consent of SITA which consent shall not be unreasonably be withheld.' It was common cause that, while Eclipse had entered into a contract with SITA, Columbus had not been part of that contract. Hence, in similar fashion to the Kitso transaction, the procurement of goods from Columbus by the third respondent and the R 4 976 647.20 expenditure that had been incurred as a result thereof constituted irregular expenditure. For these reasons, the second respondent found that the fourth respondent had proved on the balance of probabilities that the appellant had approved irregular expenditure.

[13] The second respondent however went on to deal with an inconsistency challenge raised by the appellant, namely that the third respondent had failed to take similar disciplinary action against other heads of department who had been equally guilty in authorising irregular expenditure. The second respondent held that 'it was not in dispute that they (the three other acting heads of department) had approved memoranda that culminated in

expenditures on both the Kitso and the Columbus transactions. It is also not in dispute that their role and/or involvement became known to the respondent and that no disciplinary action was taken by the respondent against the trio.' The second respondent found that the third respondent had provided no "reliable evidence and reasonable explanation" why these employees had not been disciplined notwithstanding that they played a role similar to that of the appellant. Accordingly, the second respondent held that the dismissal of the appellant had been substantively unfair.

[14] There was also a question of procedural fairness which was raised by the appellant. On 14 July 2015, the appellant was in attendance at the disciplinary hearing. Those who were responsible for the conducting of the hearing had not arrived. As a consequence of having waited for a while without any appearance of a presiding officer, the appellant left the venue where the hearing was to take place. The question which the second respondent was required to consider was whether the appellant had waived her right to be heard. The second respondent found that the decision to proceed with the disciplinary hearing, notwithstanding the appellant's absence while those conducting the hearing had initially been in default, was grossly unreasonable and thus procedurally unfair.

[15] In the light of these findings, the second respondent found that it was not possible to reinstate the appellant. Not only had irregular expenditure been incurred of more than R 11 million but the appellant had showed no remorse nor had she acknowledged any wrong doing on her part. The continuation of a normal employment relationship was therefore intolerable. Invoking s 194(1) of the LRA, the second respondent awarded the appellant compensation in the amount of R 181 495.32 being the equivalent of two months' remuneration calculated at the appellant's rate of remuneration at the date of dismissal.

<u>The court a quo</u>

[16] Sitting in the court *a quo* Lallie J found that the second respondent's decision had been supported by the evidence tendered at the arbitration. Her finding is captured in the following paragraph:

> 'She approved payment which was effected based on her approval. The finding that the so called participation was not on the same terms and conditions of the contract entered into between Kitso and the Polokwane Municipality and the breach of the relevant rules is therefore reasonable. The argument that the arbitrator interpreted "irregular expenditure" incorrectly does not assist the applicant. Even if the arbitrator made an error of law in the manner in which he interpreted "irregular expenditure", errors of law only do not constitute valid grounds for review. In addition to proving that an arbitrator has made an error of law, the applicant is required to establish that the error led the arbitrator to reach an unreasonable decision. The reasonableness of an award is based on the totality of the evidentiary material tendered at arbitration. When all the evidence is taken into account it does not vitiate the reasonableness of the award.'

[17] To appellant's argument regarding the Columbus acquisition that the appellant was not aware of the exact nature of contract RT543 which the second respondent held could not justify a contractual relationship with Columbus and hence upon which finding the conclusion of misconduct had been based, Lallie J found 'the arbitrator cannot be faltered for reaching the decision that applicant should have obtained knowledge of the relevant information before approving procurement of the software judging by the applicant's seniority and the millions of rands the contract cost the third respondent.'

[18] Turning to the question of a practice of discriminatory discipline, Lallie J found that the second respondent's decision regarding the third respondent's failure to apply discipline consistently was reasonable as it was based on the evidence before him and therefore was not subject to being reviewed. The court *a quo* held further that the decision not to order reinstatement was

based on the clear consequences of appellant's conduct which rendered the continuation of a normal employment relationship intolerable as between the appellant and the third respondent. For these reasons, the court *a quo* found no reason by which to interfere with the award, including the amount of the award of compensation.

The appeal

[19] On appeal, two questions arose for determination. In the first place there was an application for condonation by the appellant regarding noncompliance with Rule 5(8) and 6(1) of the Labour Appeal Court Rules and the related Practice Directive. Briefly, on 24 November 2020 the appellant's appeal had been struck off the roll for noncompliance with the Rules.

[20] The Constitutional Court in *Steenkamp & others v Edcon Ltd* 2019 (40) ILJ 1731 (CC) has held that, in consideration of a condonation application, the purpose of the LRA namely that labour disputes should be resolved expeditiously was a significant consideration which had to be taken into account in deciding the issue of condonation. Much of this case was litigated in a chaotic state. The full record had not been provided by the time the matter was to be heard on 24 November 2020. Subsequently thereto, there were further delays in the filing of record and then a vast swathe of documents was filed, much of which proved to be inconsequential with regard to the determination of this dispute. The question of prospects of success will invariably weigh heavily in such an application. Given the approach that I adopt to the question of the merits of the case, I propose to dispose of the entire dispute Thus for this reason alone the merits of the appeal should be finally determined.

[21] After the decision in *Sidumo and another v Rustenburg Platinum Mines Ltd and another* 2008 (2) SA 24 CC and the further the explication in *Herholdt v Nedbank Limited* 2013 (6) SA 224 (SCA), it is clear that our law dictates that an award delivered by an arbitrator will only be considered to be

unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable.

[22] The observation made earlier in this judgment about the inability to expeditiously resolve these kinds of disputes is luminously illustrated in this case. The *Sidumo* test is now clearly established law. There is nothing on the evidence as contained in the record to suggest that in this case an unreasonable award in respect of the misconduct perpetrated by the appellant was made, let alone that the outcome is unreasonable. Turning to the first charge, it was clear that on the evidence, the second respondent correctly found that the procurement of goods from Kitso for the third respondent and consequently the R 7 085 409.16 incurred as a result thereof stood in contravention of s 217 of the Republic of South African Constitution 1996, the PFMA and, in particular, Treasury Regulations 6 of 2007/2008.

[23] There is simply no factual or legal basis by which to argue that, because an initial contract had been issued for the acquisition of two-way radios pursuant to the 2010 world Cup, somehow this 2010 contract for the urgent provision of these radios extended to the procuring one year later of additional goods from Kitso. To the extent that there was an argument that the third respondent benefitted from this procurement, this was clearly not the case as is evident from the uncontested evidence, particularly that of Mr Masegela, who testified before the second respondent that these radios were never installed in the ambulances and that they were never required. To the extent that the appellant relied on contract RT 543 to justify the acquisition of the Columbus software it too was clear that the procurement of this software constituted a deviation from s 7 of the SITA Act., No user specifications had been submitted, SITA played no role in the execution of this transaction and accordingly the impugned procurement could not have been undertaken in

terms of the contract RT 543. Therefore, it had not been concluded in compliance with s 7 (3) of the SITA Act. Even a swift reading of contract RT 543 between Eclipse and SITA should have made the appellant realise that there was a provision in that contract which read 'the supplier shall not without the prior written permission of SITA assign the agreement or any part thereof or any benefit or interest thereunder without the written consent of SITA…'.

[24] Perhaps in realisation of the parlous state of the appeal on the merits of the appellant's conduct, much of the argument raised by appellant's counsel concerned the question of discriminatory treatment.

[25] In this connection, it is regrettable that the approach adopted both by the second respondent and the court *a quo* stands in contradiction that of this Court as set out in *Absa Bank Ltd v Naidu and others* [2015] BLLR 1 (LAC). Ndlovu JA, after a careful analysis of the existing jurisprudence regarding discriminatory decisions with regard to dismissal stated at para 35:

> 'It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law which are fundamental pillars of the administration of justice.'

The learned judge of appeal then went on to say:

> 'It ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard I am inclined to agree with Professor Grogan when he remarks as follows:
>
> "The parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because disciplinary officers had different views on the appropriate penalty."' (at para 36).

[26] In short, the parity principle may well mean that in the previous case which is invoked in support of the application of an argument concerning discriminatory discipline, then the gravity of the initial disciplinary offence had not been properly appreciated. In such circumstances, it may be unjustified to invoke the parity principle, where an employee has committed a serious offence against the employer and the only defence raised is that in a previous case a wrong decision had been arrived and so that the employee's misconduct in the subsequent case can be overlooked. In the present case, the egregious misconduct of the appellant in two cases, justifies the application of the caution adopted by Ndlovu JA in the *Absa* case. However, as no cross-appeal was lodged by the third respondent against this part of the finding of the second respondent which, in turn, was confirmed on review by the court *a quo*, the appellant can therefore count herself fortunate in this regard.

[27] For all of these reasons therefore, the appeal is dismissed with costs.

_____

Davis JA

Coppin JA and Molefe AJA concur.

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANT: | Adv MZ Makoti and Adv RC Mathevula |
| | Instructed by Nazia Cassim Attorneys |
| FOR THE THIRD RESPONDENT: | Adv Mphahlele SC |
| | Instructed by State Attorney |