THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR19/22

In the matter between:

THOKA MAKORWANE PATRICK KGOALE **Applicant**

and

THABA CHWEU LOCAL MUNICIPALITY **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

LETSEMA MOKOENA *N.O.* **Third Respondent**

Heard: **21 November 2024**

Delivered: **12 December 2024**

JUDGMENT

MAKHURA, J

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Introduction

[1] This review application is against the arbitration award issued by the third respondent (commissioner) dated 23 December 2021 in terms of which the commissioner found the applicant's dismissal to be procedurally and substantively fair and dismissed his claim. Aggrieved, the applicant launched these proceedings in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the award and substitute the award with an order that the dismissal was unfair, and order the Municipality to reinstate him with full backpay. The application is opposed by the first respondent (Municipality).

Material facts

[2] The applicant was employed as a Municipal Manager with effect from 2 May 2017. 13 months later in July 2018, he was suspended and subsequently charged with allegations of misconduct. The allegations related to breach of procurement processes and in particular, irregular appointments of service providers, unauthorised payments to these service providers and failure to honour the Municipality's contractual obligations with Eskom SOC Ltd (Eskom). He was found guilty of all charges and dismissed with effect from 10 May 2019.

[3] He referred an unfair dismissal dispute to the second respondent (CCMA). He challenged both the procedural and substantive fairness of his dismissal. At the end of the arbitration proceedings, the commissioner found the applicant guilty of two allegations of misconduct and concluded that his dismissal was both procedurally and substantively fair.

[4] The first charge is related to the irregular appointment of a service provider. The charge reads as follows:

> 'On or about 28 July 2017, you irregularly, wrongfully and unlawfully appointed ARMS AUDIT AND RISK MANAGEMENT SOLUTION to supply services in

[1] Act 66 of 1996, as amended.

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> contravention of Regulation 12(1) of the Thaba Chweu Local Municipality Supply Chain Management Act No. 56 of 2003, thereby causing the Municipality to incur an irregular and/or fruitless and wasteful expenditure amounting to R931 240.00 (Nine Hundred and Thirty One Thousand Two Hundred Forty Rand).'

[5] The commissioner, in his analysis of evidence on this charge, considered the provisions of the Constitution of the Republic of South Africa[2], the Supply Chain Management Policy (SCM Policy) and the Municipal Finance Management Act[3] (MFMA). He concluded that the appointment of ARMS, which was made after the applicant negotiated directly with ARMS without requesting any quotations from any other service providers, offended the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

[6] The second charge related to the applicant's alleged failure to honour its contractual obligation with Eskom. The Municipality formulated the charge as follows:

> 'In that during or between the months of July 2017 to June 2018 you failed to discharge your duties in terms of section 55(2) of the Municipal Systems Act No. 32 of 2000 when you neglected to honor the Municipality's contractual obligations towards the Eskom account. Consequently, your failure resulted in the mismanagement and maladministration of the municipality's funds amounting to R94 651 409. 11 (Ninety Four Million Six Hundred and Fifty One Thousand Four Hundred and None Rand Eleven Cents.'

[7] Referring to the provisions of MFMA and the Municipal Systems Act[4] (MSA), the commissioner found that the evidence showed that all monies collected on behalf of Eskom were not paid to Eskom as required and were used for other operational purposes. He concluded that the applicant conceded to breaching the rule.

[8] The procedural unfairness challenge was that the chairperson of the disciplinary hearing was seen in the acting municipal manager's office with the acting municipal

[2] Section 217 of the Constitution of the Republic of South Africa, 1996.
[3] Local Government: Municipal Finance Management Act 56 of 2003.
[4] Local Government: Municipal Systems Act 32 of 2000.

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manager and the initiator, which raised a reasonable apprehension of bias and therefore the chairperson should have recused himself. These allegations were contained in an affidavit deposed to by one Pompie Joel Ledwaba (Ledwaba) and the applicant sought permission, in addition to submitting the affidavit in support of the application for the chairperson's recusal, to lead oral evidence of Ledwaba, which request was refused. The second leg of the challenge was that he was not given an opportunity to submit mitigating factors.

[9] The applicant therefore seeks to impugn the award on the basis of unreasonableness in respect of the following – procedural fairness, the ARMS and Eskom charges and the sanction of dismissal.

Analysis

Procedural fairness

[10] The applicant raised two grounds upon which this Court should impugn the decision that his dismissal was procedurally fair. He contends that the commissioner was influenced by an error of law, failed to consider relevant evidence and arrived at an irrational decision.

[11] First, he contends that he had a reasonable apprehension that the chairperson would not bring an impartial mind to the matter. In support of this contention, the applicant sought to argue that the chairperson and the initiator of the disciplinary hearing met the acting municipal manager in the latter's office. They were allegedly seen by Ledwaba. In addition, when he brought the application for recusal, which was supported by the affidavit signed by Ledwaba, and wanted to lead the oral evidence of Ledwaba, the chairperson refused his request.

[12] The commissioner found nothing unfair with the chairperson's decision to refuse the leading of oral evidence in support of the application. He found that the affidavit was sufficient and agreed with the chairperson's remarks that the request to lead oral evidence was an attempt to delay the disciplinary hearing and dismissed the procedural unfairness claim on this leg.

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[13] The applicant contends that the commissioner did not determine whether the chairperson and the initiator met with the acting municipal manager in his office. The chairperson of the disciplinary hearing testified at the arbitration proceedings and denied that he met the acting municipal manager and the initiator. His testimony was that he met the acting municipal manager alone (without the initiator) for the purpose of concluding his appointment contract as a chairperson. This was not disputed during the arbitration proceedings. Whether the failure to decide this issue specifically constitutes a gross irregularity depends on the significance of the issue and its distorting effect on the ultimate decision taken by the commissioner that the dismissal was procedurally fair. No case was pleaded in this regard.

[14] In addition, there was no evidence presented on behalf of the applicant during the arbitration proceedings, which are conducted *de novo*, about the nature of the evidence that he sought to lead Ledwaba on and Ledwaba was not called to testify about the issue. In my view, the absence of Ledwaba's evidence at arbitration proceedings means that the commissioner had only the evidence of the Municipality to consider. There was no shred of evidence before the commissioner to controvert the Municipality's case and to support or sustain the applicant's case of procedural unfairness. Therefore, there is no basis for this Court to interfere with the commissioner's decision and the applicant has failed to make out a case.

[15] The second leg of the challenge is that the chairperson refused to afford the applicant an opportunity to file mitigating factors after the finding of guilt. The applicant stated that on 1 May 2019, the chairperson directed the parties to file aggravating and mitigating factors by 10 May 2019. He noted that later on the same day, the chairperson amended his directive and directed the parties to file the mitigating and aggravating factors by 6 May 2019, instead of 10 May 2019.

[16] On 6 May 2019, the applicant requested an indulgence to file by 9 May 2019. The chairperson denied the request. The chairperson issued a sanction ruling on 10 May 2019, though dated 5 May 2019. Now the applicant complains that *"the*

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chairperson issued his sanction ruling without giving me an opportunity to make submissions in respect of mitigation".

[17] The attack in this regard is limited to an opportunity "not given" or denied for him to submit mitigating factors. The complaint is not that the chairperson unreasonably refused to extend the period for filing mitigating factors. On the facts, it is obviously not true that the chairperson denied him the opportunity to submit mitigating factors. The established facts are that the chairperson directed the parties to file by 6 May 2019. Even if this Court finds that the complaint extends to an alleged unreasonable refusal to grant him an extension to file his mitigating factors, the applicant has not established prejudice nor has he led evidence as to the reasons why he could not file the mitigating factors on 6 May 2019. This ground falls to be rejected.

[18] Accordingly, the applicant has failed to make out a case that the commissioner's finding is liable to be reviewed and set aside. The review ground stands to be rejected.

The ARMS allegation

[19] This allegation relates to the alleged irregular appointment of ARMS. In his deviation memorandum, the applicant recorded that the municipal council mandated him as the accounting officer to appoint a credible audit firm *"through following the SCM procurement processes"*. The applicant elected to deviate from the normal procurement processes for the following reasons, as articulated by him in the memorandum:

> 'The normal procurement processes could not be followed for the assignment as mandated by MPAC through resolution Number A63/2017. Due to the following reasons:
>
> - The nature and scope of the investigations will cover all transactions authorized and initiated by all officials.

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- Municipal SCM Regulations 27, 28 and 29 require finance official to form part of the bid committees including the Chief Financial Officer who is preferred to Chair the Bid Adjudication Committee.

Based on the above reasons, normal bid processes could not be followed as the officials can compromise the procurement processes and this can have a material impact on the integrity of the investigation outcome.'

[20] The commissioner found that in terms of the SCM Policy, deviations were allowed in exceptional circumstances. He found that:

> 'It is my finding that deviations are allowed in the following circumstances: emergency, single provider, special works of art or historical objects, animals for zoo, in exceptional cases where it is impractical or impossible to follow the official procurement processes.
>
> I accept that the circumstances surrounding the appointment of ARMS as explained by the Applicant that impractical or impossible to follow officials procurement process (sic). The Applicant went further to explain that he did not have the luxury of time, he therefore negotiated directly with ARMS. This in my view answered the bone of contention throughout this arbitration that the Applicant did not follow SCM process. He was aware that he had to follow them but the circumstances that befell him were such that he was unable to.
>
> According to me this is where the issue of section 112 and Regulation 11 comes in …
>
> Other than luxury of time one can ask what prevented the Applicant to at least at the same time as when he negotiated directly with ARMS to also request quotation from another service provider. In my view taking into consideration section 217 of the Constitution and section 112 of the MFMA, the process did not pass the Constitutional muster only in as far as the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.'

[21] The applicant contends that the finding that he knew he was required to follow the normal supply chain processes is an interpretative finding and not borne out of the

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evidence. He then attacks the commissioner's finding on the basis that he committed a material irregularity and misconduct by relying on his own interpretation.

[22] Section 217(1) of the Constitution provides:

> 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

[23] Section 112 of the MFMA states that the SCM Policy of a Municipality *"must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management"*. The Municipal Supply Chain Management Regulations[5] (Regulations) make provision for deviations from the normal procurement processes. Regulation 36(1) provides that:

> '(1) A supply chain management policy may allow the accounting officer –
>
> (a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only –
>
> …
>
> (v) <u>in any other exceptional case where it is impractical or impossible to follow the official procurement processes</u>…' [Emphasis added]

[5] Promulgated in terms of section 168 of the MFMA, GG No. 27636, Notice 868 of 2005.

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[24] If the municipal manager deviates using the above provision, he or she is required to record the reasons for the deviation and report them to the next council meeting and include same as a note to the annual financial statements.[6]

[25] The Municipality's SCM Policy mirrors the Regulations. Clause 38 of the SCM Policy is similar to Regulation 36. It gives the municipal manager the discretion to deviate from its provisions *inter alia* in exceptional circumstances and where it is impractical or impossible to follow the SCM provisions.

[26] In terms of clause 11(1)(c) of the SCM Policy, the municipal manager is required to implement the system of acquisition management in order to ensure *inter alia* that the threshold values for the different procurement processes are complied with. Clause 12(1)(d) provides that procurement of long-term contracts and goods or services valued at R200 000.00 and above may be done by way of a competitive bidding process.

[27] The applicant's case is that he complied with Regulation 36 and clause 38 of the SCM Policy. In his attempt to show that the commissioner's finding that he was guilty of this charge was unreasonable, the applicant contends that since he followed or relied on clause 38 of the SCM Policy, the commissioner was only required to confine his enquiry to whether he complied with clause 38. In terms of clause 38, he was only required to meet two conditions – a report to the council meeting and a note in the annual financial statement. He had complied with these two pre-conditions and thus is not guilty of the charge. Therefore, by considering section 217 of the Constitution and section 112 of the MFMA, the commissioner committed material irregularities and/or misconduct.

[28] The applicant has, in my view, fundamentally misconstrued Regulation 36 and clause 38 of the SCM Policy. The exceptional circumstances, according to him, were that he was investigating the SCM and/or finance officials, which are involved in the process of supply chain processes. This argument is unsustainable because

[6] Regulation 36(2) *supra*.

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it suggests that in all cases where officials in the finance or SCM departments are or may be implicated in wrongdoing, that constitutes exceptional cases or circumstances which make it impractical or impossible to follow the normal procurement processes. This is an absurd interpretation and application of the deviation provisions in Regulation 36 and clause 38 of the SCM Policy.

[29] In this matter, the Municipality has informed the applicant, by way of a charge sheet, that his appointment of ARMS was not compliant with the SCM Policy. The applicant raised a defence that whilst the appointment did not comply with the normal procurement processes, it complied with the deviation process. Therefore, it was for the applicant to show that the appointment of ARMS complied with the SCM processes. For the applicant to discharge this onus, he was required to establish first, that there were exceptional circumstances, and second, that the exceptional circumstances made it impractical or impossible for him to follow the normal or official procurement processes. Only after these two conditions had been successfully established would the enquiry proceed to whether the applicant recorded the reasons for the deviation, reported the deviation and reasons to the next council meeting and whether the deviation and/or reason have been noted in the annual financial statements.

[30] The applicant could not show any exceptional circumstances. The applicant raised that the officials may *"compromise the procurement processes"* which may *"impact on the integrity of the investigation outcome"*. It is incomprehensible how, at that initiation stage of appointing a service provider to conduct an investigation, it can be said with conviction that the officials may compromise the process which may compromise the integrity of the investigation outcome. The deviation memorandum is devoid of any details of the nature of the allegations to be investigated, who may be implicated and how these officials may compromise the procurement process. This deviation memorandum contains wild and unsubstantiated allegations. The reasons are flimsy and not genuine.

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[31] Simply put, there were no exceptional circumstances and even if the circumstances were to be found to be exceptional, they were self-created. The enquiry should end at this stage. However, even if it were to be accepted that there were exceptional circumstances, there is nothing to suggest that the exceptional circumstances were of a nature that made it impossible or impractical to follow the normal procurement processes. The applicant therefore still falls short on this leg. The deviation was unjustified and constitutes an abuse of the provisions.

[32] The criticism that the commissioner went beyond the scope of the issues before him, even if it was correct, which I do not accept, is not material and sufficient to vitiate the finding that the applicant was guilty of the charge. The applicant has failed to make out a case on review. This ground therefore stands to fail.

The Eskom allegation

[33] The applicant is alleged to have failed to discharge his duties in terms of section 55(2) of the MSA because he failed to honour a contractual obligation to Eskom and thereby mismanaged and maladministered R94 652 409.11. The commissioner found that:

> 'Adduced evidence among other things highlighted … there was a Council Resolution that all electricity collections must be paid to Eskom and in terms of section 55 of Municipal Systems Act all monies collected on behalf of Eskom by the Respondent must be paid to Eskom. The Applicant on the other hand under cross examination tellingly indicated that the money collected for Eskom which was supposed to be paid over to Eskom, some of it was used for salaries.
>
> In my view based on the aforesaid the Applicant conceded to breaching the rule as alleged and what remains to be addressed is his reason.'

[34] The applicant criticizes the above finding as irregular and unreasonable. He contends that there was no council resolution nor was there a contract which directed that all monies collected on behalf of Eskom be paid to Eskom. He then continues to set out, as per the investigation report, that in the 2017/18 financial

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year, the Eskom bill was R184 349 060.93 and that during that period, the Municipality paid R111 407 805.21 and was in arrears of R72 941 255.72 plus interest on this amount which amounted to R21 710 153.39, totalling R94 651 409.11. Therefore, so the applicant contends, the charge was based *"on nothing else but compliance with the repayment plan"*. He continues:

> 'The uncontested evidence before the commissioner suggests that it was not practical to comply with the contractual obligation. The commissioner accepted this fact but went on to consider a question which was not placed before him. This question was whether or not the respondent had paid over all amounts which Eskom billed the municipality. The commissioner had no basis [to] consider any other alleged contravention outside what is contained in the investigation report. His decision to enquire whether I had paid over everything collected to Eskom was an irregularity and/or misconduct on the part of the commissioner.'

[35] The applicant had clearly misconceived the charge and the commissioner's findings. The commissioner's finding is simply as follows – the applicant, as the accounting officer of the Municipality, failed to pay Eskom's debt, in accordance with the repayment plan or the contractual obligation. It is immaterial whether there was a council resolution before the commissioner. The obligation on the part of the Municipality to pay the Eskom debt in terms of the repayment plan or a contractual obligation was not placed in dispute. The repayment plan would have been signed after the municipal council resolution. For as long as the electricity collections from consumers by the Municipality on behalf of Eskom are not, wholly or partly, paid over to Eskom, there was mismanagement of funds because funds that belonged to Eskom were used by the Municipality for its own benefit. In the absence of an agreement with Eskom to use those funds, accounting officers should not permit such a situation to happen. The payment of all electricity collections over to Eskom is a legal obligation.

[36] Section 55(2) of the MSA provides that:

> '(2) As accounting officer of the municipality the municipal manager is responsible and accountable for –

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(a) all income and expenditure of the municipality;

(b) all assets and the discharge of all liabilities of the municipality; and

(c) proper and diligent compliance with the Municipal Finance Management Act.'

[37] Section 64(4) of the MFMA provides that:

'(4) The accounting officer must take all reasonable steps to ensure –

(a) that any funds collected by the municipality on behalf of another organ of state is transferred to that organ of state at least on a weekly basis; and

(b) that such funds are not used for purposes of the municipality.'

[38] Accordingly, Municipal Managers whose municipalities collect funds on behalf of other organs of state must ensure that those funds are deposited into the account of that organ of state on a weekly basis and that the Municipalities they lead do not appropriate those funds for any purpose of the Municipality. Failure to adhere to these peremptory provisions in my view must be considered as a material breach of the law.

[39] The applicant, as the commissioner correctly found, conceded to using funds collected on behalf of Eskom for salaries. This is an admission of a breach of the MFMA. Senior positions come with a high premium of responsibilities. The legal position per section 64(4) of the MFMA is expressed in simple and unambiguous terms and does not require any interpretation. The applicant failed to do what the law required of him to do. The Municipality alleged in a charge sheet that the applicant mismanaged the funds because he failed to ensure that the funds collected by Eskom were transferred to Eskom. He then did what the law prohibited him to do – he used the funds for the Municipality's operational reasons. In the process, this in no doubt had a negative impact on Eskom because it did not receive its funds despite providing the electricity to the Municipality.

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[40] It may be that if the applicant opted to pay all the collected funds to Eskom and failed to pay the employees' salaries, this may have constituted a breach of the Basic Conditions of Employment Act[7] (BCEA) and/or the employees' contract of employment. However, a wrong cannot be corrected with another wrong. The applicant accepted the responsibility of the position of the Municipal Manager. He cannot breach one law to avoid breaching another law and expect no consequences to flow from his breach. It matters not that he inherited the Municipality's historical debt. It matters not that the Municipality might have been experiencing financial challenges. He was expected to rise to the occasion. He knew or should reasonably have known of the demands of the position and the challenges that came with it.

[41] The commissioner's decision falls within the bands of reasonableness and the review ground stands to fail.

Sanction

[42] The issue of sanction was not seriously pursued during the hearing. In fact, no arguments were presented. However, it was not expressly abandoned. The criticism is that the commissioner did not conduct the enquiry into the appropriateness of sanction and that he deferred to the Municipality's decision. The applicant contends that had the commissioner conducted this enquiry, he would found that the circumstances relating to the alleged acts of his misconduct did not warrant his dismissal.

[43] The commissioner's award abruptly ends with him analysing the inconsistency challenge. The commissioner has not embarked on a separate analysis of the appropriateness of sanction. Does the applicant's contention that the circumstances of the misconduct did not warrant his dismissal have merit? It does not. The applicant was found guilty of contravening legislation and procurement processes. The allegations are serious. The importance of compliance with

[7] Act 75 of 1997.

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procurement processes cannot be gainsaid. The applicant was an accounting officer, tasked to ensure amongst others that the Municipality acts within the legal prescripts. He acted against the requirements of his position. The commissioner found the dismissal to be fair and on the objective analysis of the facts and considering the review test, I am not convinced that the commissioner's decision is unreasonable and liable to be set aside. Accordingly, the sanction ground falls to be rejected.

Conclusion

[44] The test for review is trite. It is outcome-based – whether the decision reached by the commissioner is one that a reasonable decision maker could not reach.[8] Mere failings, errors or irregularities on the part of the commissioner are not sufficient to review and set aside the award. Awards will be reviewed only if these failings, errors or irregularities resulted in the commissioner's decision ultimately being unreasonable.[9]

[45] The applicant's criticisms, properly examined, are nothing more than unhappiness with the commissioner's reasons for the decision that his dismissal was fair. The criticisms are in any event not sustainable. The award meets the standard of reasonableness. No case has been made out to review and set it aside. It follows that the application stands to be dismissed.

[46] In the premises, the following order is made:

Order

1. The review application is dismissed.

2. There is no order as to costs.

[8] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[9] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25; *Head of Department of Education v Mofokeng and Others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at paras 31 – 33.

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M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr A. Nase assisted by Mr T. Majang
Instructed by:	Majang Inc. Attorneys
For the First Respondent:	Mr J. Hlongwane
Instructed by:	WS Nkosi Attorneys

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