

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J1236/17

In the matter between:

GREATER TAUNG LOCAL MUNICIPALITY

Applicant

**SOUTH AFRICA LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

RICHARD BYRNE N.O.

Second Respondent

SAMWU OBO MPHO MASIA-NOBULA

Third Respondent

MPHO MASIA-NOBULA

Fourth Respondent

Heard: 8 August 2024

Delivered: Judgment delivered by email on 13 August 2024, which is deemed to be the date that the judgment was handed down.

JUDGMENT

DAVE, AJ

Introduction

[1] This is an application to review and set aside an arbitration award (award) issued by the Second Respondent (the Commissioner) dated 17 March 2017 under case number NWD071617.

[2] The Fourth Respondent (Ms Masia-Nobula) opposes the application.

Background

[3] In October 2011 Ms Masia-Nobula was employed by the Applicant as an Asset Manager.

[4] The Applicant was mandated to approach individual bidders for quotations for the building of houses. A total of 65 bidders were extracted from the Applicant's database whereafter the bidders were vetted to confirm if they were registered with the NHBRC.

[5] Of the 65 bidders only 5 met the requirements provided in the bid documents when the bid closed on 18 January 2013. One of the bidders in question was an entity called Amadwala Trading 700 cc (Amadwala).

[6] According to Ms Masia-Nobula, on 30 January 2013, she was instructed by the chairperson of the Bid Evaluation Committee (BEC) to evaluate Amadwala's tender documents as per the evaluation criteria provided. The handing out of the bids to members of the BEC was done randomly by the secretary of the BEC. She evaluated the Amadwala tender documents per the said criteria and awarded them 98 total points.

[7] Based on the score given by Ms Masia-Nobula, Amadwala was ultimately awarded the tender.

[8] Following the appointment and delivery of the houses by Amadwala, the Applicant appointed Ernst & Young to investigate irregularities in the procurement of service providers for the rebuilding of the council houses. Ernst & Young's findings pertaining to Ms Masia-Nobula identified, inter alia, that Ms Masia-Nobula was a friend of one of the directors of Amadwala, namely Tebogo Liphuko, and that

Tebogo's husband was also a director of Amadwala and that she used her influence in the procurement process to benefit Amadwala.

[9] Consequent to the Ernst & Young's findings, on 25 March 2015, Ms Masia-Nobula was notified of a disciplinary hearing and charged as follows:

"CHARGE 1

You are guilty of misconduct by breaching of SCHEDULE 2; section 2 of the conduct for MUNICIPAL STAFF MEMBERS, AS PER municipal systems act 32 OF 2000 READ WITH ANNEXIRE A OF SALGBC DISCIPLINARY PROCEDURE AND CODE COLECTIVE AGREEMENT.

You acted with gross disloyalty and dishonesty whilst being an employee of the municipality when you failed to disclose your relationship with the member of Amadwala trading, and proceeded to be party of the committee evaluating those bids."

[10] Ms Masia-Nobula was found guilty and the sanction imposed was demotion short of dismissal. She appealed the procedural fairness of the hearing as well as the appropriateness of the sanction. Her appeal did not succeed.

[11] Dissatisfied with this sanction, Ms Masia-Nobula referred an unfair labour practice dispute to the First Respondent.

The award

[12] It is common cause that one of the directors of Amadwala, Tebogo Liphuko (Tebogo) was known to Ms Masia-Nobula. However, according to Masia-Nobula, she was unaware at the time of evaluating Amadwala, that Tebogo and her husband, were the directors of the entity. According to Ms Masia-Nobula, her relationship with Tebogo was a "*casual*" one.

[13] In his award, the Commissioner found that the sanction of permanent demotion is considered too harsh, and that the Applicant is to place Ms Masia-Nobula back in the position she was before her demotion, effective 1 April 2017.

[14] In his analysis, the Commissioner stated that he was not convinced that Ms Masia-Nobulo did not know who her friend's husband was. He further found that Ms Masia-Nobulo and Tebogo knew *"each other for quite some time"* and *"having discussed her friend's relationship with her husband over email, tends to suggest that they knew who each other were"*. Further that *"it is uncontested that there were documents attached to the tender documents that indicated all the directors of the company involved in that tender. There is no good reason why the Applicant would not have seen it"*.

[15] The Commissioner then finds that *"it should be expected of a person on this level to know that one should recuse oneself from any matter where a close friend could derive some benefit. As such, she should have recused herself from this particular tender, even though her involvement in terms of what her Manager expected of her, did not in itself result in her friend obtaining the tender"*.

[16] Finally, in reaching the Order in his award, the Commissioner concludes that Ms Masia-Nobulo's manager, Mr de Jager's (de Jager) instructions and his understanding of what was required in terms of the scoresheet has diluted what would otherwise have been a stronger case for the Applicant.

[17] The Applicant challenges this on the basis, *inter alia*, that in issuing his award, in the terms that he did, the Commissioner came to a conclusion that no reasonable decision maker could, having regard to the evidence placed before him.

[18] It is pertinent for the purposes of this judgement to note the nature of the sanction issued against Ms Masia-Nobula and which forms part of the record, which reads as follows:

‘That the Employee Mrs Masia-Nobula be demoted from current position as Manager: Assets to a one grade lower position with commensurate loss of income, with effect from 1 April 2016 and that she, in this lower position, not be involved, directly or indirectly, with any procurement of any goods or services for the municipality, in any form or manner, for a period of not less than one year after which her re-appointment in her previous position, if such vacancy exists at the time, may be considered with the explicit understanding that such re-appointment is not guaranteed.’

The test for review

[19] The test for review of an arbitrator’s award has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹ (*Sidumo*). The Constitutional Court held that: “.... section 145 is now suffused by the constitutional standard of reasonableness”².

[20] In *Herholdt v Nedbank Ltd (congress of South African Trade Unions as amicus curiae)*³ (*Herholdt*), it was held that a review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds listed in section 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 the 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.’

[21] The Court in *Herholdt* also held that:

¹ [2007] 12 BLLR 1097 (CC) at para 110.

² *Sidumo* supra.

³ 2013 (6) SA 224 (SCA) at para 25.

‘...[T]he test ‘is a stringent [one] that will ensure that... awards are not lightly interfered with’... The *Sidumo* test will, however, justify setting aside an award on review if the decision is “entirely disconnected with the evidence” or is “unsupported by any evidence” and involves speculation by the Commissioner.’⁴

[22] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*⁵, affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing Court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

Application of the test

[23] The review Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make, based on the evidence adduced.⁶

[24] Applying the test of reasonableness, the Applicant must show that the Commissioner ultimately arrived at an unreasonable result, one that a reasonable arbitrator could not reach on the material available to him. With this in mind, the Commissioner’s award is the result of him attaching weight to de Jager’s evidence in respect of what was required in terms of the scoresheet and that this is what, according to the Commissioner, dilutes the Applicant’s case but for which it would have been stronger. I cannot see how it is that de Jager’s evidence dilutes the strength of the Applicant’s case in circumstances where the Commissioner finds that Ms Masia-Nobula ought to have recused herself and considering the Commissioner’s findings in paragraphs 10 and 12 of his award. These are two

⁴ *Herholdt* at para 13.

⁵ (2014) 35 ILJ 943 (LAC) at para 16.

⁶ *Ibid* at paras 18 – 19.

distinct issues and the one ought not have any bearing on the other. The fact that the Applicant was complying with instructions of her manager (de Jager) misses the point. Ms Masia-Nobula was found guilty of a serious charge of misconduct. The sanction imposed was to remove Ms Masia-Nobula from dealing with tenders' consequent to her misconduct. However, and further to the above, what seems to have been missed in all this, is that the sanction is not necessarily permanent in nature if one considers its wording. It's for a period of not less than one year "after which she will re-appointment in her previous position, if such vacancy exists at the time." Whilst this was not a guarantee, the opportunity was given to exist for her re-appointment in certain circumstances.

[25] Flowing from the above, the question is whether the Commissioner's changing of the sanction issued by the Applicant in the face of the conclusions he reached, reasonable? In my view, doing so is not supported by the evidence nor by Commissioner's own reasoning, considering the evidence that was before him.

[26] In *casu*, the Commissioner's reasoning in relation to the impact of de Jager's evidence bearing in mind the Commissioner's findings in paragraphs 10 and 12 of his award, is misguided and his decision is not one of a reasonable decision maker and thus, in my view, his award is not one that a reasonable decision maker could make. As alluded to earlier, the transgression committed by Ms Masia-Nobula, is, on any assessment, a serious one and more so where tender awards are, and have been for many years, under severe criticism and scrutiny.

[27] In so far as the reserved costs are concerned pursuant to the order granted by my sister, Justice Mahosi, dated 1 December 2022, I see no reason why the wasted cost for the appearance of the Fourth Respondent's counsel on the day should not be awarded to the Fourth Respondent in circumstances where the removal of the matter was occasioned by the Applicant's failure to file a complete arbitration award.

[28] Conclusion

[29] For the reasons above, I am satisfied that the Commissioner's Order in his award falls to be reviewed and set aside.

[30] It would make no sense (and bearing in mind that this review application was launched as far back as 19 June 2017) to remit the matter back to the First Respondent in the circumstances of this case.

[31] Accordingly, the following order is made:

Order

1. The arbitration award of the Second Respondent is reviewed and set aside and substituted with an award that:

1.1 The demotion of the Fourth Respondent by the Applicant is substantively fair;

2. The wasted costs for the appearance by the Fourth Respondent's counsel on 23 November 2022 are to be paid by the Applicant;

3. There is no other order as to costs.

L. Dave

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: D K Chwaro

Instructed by: Modiba Attorneys

For the respondent: L Mukome

Instructed by: Molatudi Attorneys