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- (1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

18/10/23
DATE

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1671/21

In the matter between:

PHAHLANE, JOHANNES KHOMOTSO

and

SOUTH AFRICAN POLICE SERVICES

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

NKOPANE, JOYCE NO

MINISTER OF POLICE

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Heard: 7 July 2023

Delivered: 18 October 2023

JUDGMENT

DAVEY, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award (the award) made by the Third Respondent sitting as the Arbitrator in arbitration proceedings between the Applicant and the First Respondent. The application is opposed by the First and Fourth Respondents.
- [2] The matter came before me on 7 July 2023.

Background

- [3] At the time of his dismissal, the Applicant held the rank of Lieutenant General.
- [4] On 12 July 2010, the Applicant was appointed as the Divisional Commissioner: Forensic Services of the First Respondent. He was later appointed as the Acting National Commissioner of the First Respondent (Acting National Commissioner) on 14 October 2015.
- [5] Criminal Records and Crime Scene Management (CR and CSM), a division of Forensic Services, identified the need for procurement of the 360 x 180 panoramic image capturing system (the system) including the maintenance of the equipment under the Criminal Justice System Budget.
- [6] The bid was denoted as, *"BID NO.19/1/9/1/187 TR(13): SUPPLY AND DELIVERY OF 360 X 180 PANAROMIC IMAGE CAPTURING SYSTEM FOR VISUAL REPRESENTATION OF CRIME AND CRASH SCENE INCLUDING THREE YEAR(3) MAINTENANCE CONTRACT: CRIMINAL RECORD AND CRIME SCENE MANAGEMENT: DIVISION FORESINC SERVICES"*.
- [7] On or about 28 July 2014, following a tender process and the evaluation of bids from two companies, namely Ethemba Forensic Group (EFG) and Forensic Data Analysis (FDA), the contract was awarded to EFG. The contract between the First Respondent and EFG was signed on 28 July 2014.
- [8] Notwithstanding that the contract was signed on 28 July 2014, no orders were placed with EFG for the system.

- [9] On 22 August 2014, FDA disputed the awarding of the contract to EFG and made a request for information in terms of the Promotion of Access to Information Act¹ in respect of the bid. FDA claimed that EFG's proposal had not been properly assessed and that all publicly available information on the Civetta product (being the product provided by EFG in South Africa) indicated that it would not satisfy the bid specifications. As a result, FDA claimed that the contract was unlawful. Notwithstanding this complaint, there is no evidence that FDA sought to review the decision to award the contract to EFG.
- [10] On 4 September 2014, the Supply Chain Management Division of the First Respondent (SCM) forwarded FDA's allegations to the Applicant. The Applicant claims to have received the complaint on or about 8 September 2014. At this time no orders had been placed with EFG for the system. The Applicant has not provided any explanation as to why his division had not placed orders in accordance with the contract prior to being alerted to FDA's complaint. The First Respondent was already in breach of the contract with EFG.
- [11] On 22 October 2014, the Applicant sent a response to SCM and stated that subsequent to the awarding of the bid and receiving of the enquiry, it was found that the bid offer of EFG was not compliant with certain of the bid specifications.
- [12] The Applicant recommended that the contract issued to EFG for the system be withdrawn as the bid offer was misleading and not compliant with the specifications. During the argument, the Applicant's counsel confirmed that this recommendation and finding by the Applicant was made prior to an investigation having been conducted by or at the behest of the Applicant. It would appear that the only information before the Applicant at this time, that informed this recommendation, was the information which was provided by FDA.

¹ Act 2 of 2000.

- [13] In a letter dated 4 November 2014, the Divisional Commissioner: SCM, requested that the Bid Evaluation Committee (the BEC) chairperson reconvene the BEC to consider the Applicant's recommendation and FDA complaint.
- [14] On 14 November 2014, the BEC Chairperson, Brigadier TD Magagula reconvened the BEC.
- 14.1 The findings of the meeting were communicated to the Divisional Commissioner: SCM on 20 November 2014, in an information note. The BEC re-checked both bid documents from EFG and FDA. The following determination was made:
- 14.1.1 Both bidders complied with the specific requirements and conditions of the bid and were in accordance with the specifications.
- 14.1.2 Both bidders' sites were visited by panel members for demonstration and their items were found to be compliant with the requirements of the bid.
- 14.1.3 Both bidders were recommended and proceeded to the final phase i.e. price and preference points.
- 14.1.4 EFG obtained the highest points (99) and FDA came in second with (21.99).
- 14.1.5 EFG as the bidder with the highest points was therefore recommended by the committee.
- 14.1.6 The technical experts were part and parcel of the Committee who agreed both bidders met all requirements during the evaluation and site visits.
- 14.1.7 The technical experts indicated that their representatives who visited the bidders' sites were not competent enough to make informed decisions after the visits.

14.1.8 The final recommendations did not highlight the concerns raised in the complaint received, these concerns were only highlighted as the pros and cons of both bidders products.

14.1.9 The issues raised by FDA in the complaint were not found to be part of the bid specification and therefore could not be considered for the cancellation of the contract.

14.1.10 The matter should be referred to legal services for advice and proper guidance.

- [15] On 31 March 2015, the Acting Divisional Commissioner: SCM, issued a letter to EFG providing reasons as to why there had been no purchase orders for the system, namely that the end-user evaluated the bid specification and response received from EFG and found that the proposed equipment offered by EFG was not in line with the bid specification that was advertised. The areas of concern were highlighted and EFG was called upon to respond and provide a technical report that addressed the issues raised.
- [16] On 7 May 2015, a technical report prepared by Dr Marcus Weiss, CEO of Weiss AG was provided by EFG to address the complaint by FDA.
- [17] On 13 May 2015, the technical report was forwarded to the Applicant by the Divisional Commissioner: SCM. The Applicant was requested to respond by 20 May 2015.
- [18] The Applicant only responded on 4 June 2015. In his response, the Applicant stated that he had only received the technical report on 19 May 2015, that his office was aware of the urgency of the matter and would provide a detailed response at an "opportune moment".
- [19] Neither the Applicant nor his office provided a response, detailed or otherwise, as undertaken in the letter dated 4 June 2015.
- [20] On 29 September 2015, the Applicant requested that R46 000 000.00 which had been allocated for the purchase of the system, be repurposed to cover

the costs of Forensic Light Services. At this time, no steps had been taken to cancel the contract and the First Respondent was in breach of the contract.

- [21] On 2 October 2015, the Divisional Commissioner: SCM sent a follow up letter to the Applicant to request a response to the technical report provided by Mr Weiss. The Applicant did not respond.
- [22] On 14 October 2015, the Applicant was appointed as the Acting National Commissioner.
- [23] On 10 February 2016, EFG sent a follow up letter to the First Respondent detailing the benefits of the system and requested that an official order be placed. No orders were placed.
- [24] On 29 March 2016, EFG issued a letter of demand.
- [25] On 25 April 2016, EFG sent a further letter requesting a meeting with representatives from the Division: Forensic Services and Division: SCM.
- [26] On 29 April 2016, the Acting Divisional Commissioner: Forensic Services, EK Ngokha provided a response to EFG wherein he reiterated that the system was not compliant with the bid specifications.
- [27] The Division: Forensic Services then recommended that the matter to be referred to the Council for Scientific and Industrial Research for an independent and objective assessment on compliance of the bid specifications. This did not happen.
- [28] On 1 June 2016, an information note was sent to the Applicant in his position as Acting National Commissioner by the Divisional Commissioner: Legal and Policy Services, IT Molefe (Mr Molefe) wherein it was noted that the SAPS may have difficulty in proving that the administrative decision taken to award the contract to EFG was invalid. Mr Molefe cautioned that the technical report by Weiss AG submitted on behalf of EFG could be submitted in court as valid evidence and that this, coupled with the fact that the experts from Division: Forensic Services, formed part of the BEC and recommended the EFG bid to the Bid Adjudication Committee (BAC) would make it difficult to prove that the

administrative decision taken to award the contract to EFG was invalid. In an effort to prevent litigation, Mr Molefe recommended that representatives from the Division: Forensic Services and SCM accede to EFG's request for a meeting prior to any further steps being taken.

- [29] On 14 July 2016, EFG's attorneys, VZLR Incorporated, sent a letter addressed to the Applicant in his capacity as the Acting National Commissioner to inform the First Respondent that EFG accepted the First Respondent's repudiation of the contract and notified the Applicant that it would be instituting legal action for damages.
- [30] On 30 September 2016, EFG served a combined summons on the First Respondent citing the Applicant, in his capacity as the Acting National Commissioner, as the defendant. In terms of the combined summons, EFG claimed that the Applicant was liable to compensate EFG in the amount of R14 879 500.00 for damages as a result of the breach of the contract by the First Respondent.
- [31] On 4 October 2016, an information note was addressed to the Applicant. The note recommended that at the time it was not advisable for the First Respondent to approach the courts with an application to have the defective decision to award the contract to EFG set aside, due to the risks involved. Accordingly, it was recommended that the First Respondent await the issuing of summons by EFG and defend the matter. It was further recommended that an independent expert assessment be conducted to ascertain whether the system offered by EFG complied with the bid specification, as this would remain relevant when dealing with the matter in the future.
- [32] The dispute between EFG and the First Respondent was ultimately settled on payment, by the First Respondent to EFG, in the sum of R24,494,080.65. The First Respondent did not receive any benefit from this payment.

Disciplinary action and dismissal

- [33] On 1 June 2017, the Applicant was asked to step down as the Acting National Commissioner.

[34] On 7 June 2017, the Applicant was suspended by the First Respondent.

[35] On or about 6 July 2020, and following an investigation the Applicant was presented with allegations of misconduct and informed that an expeditious process in terms of regulation 9(2)(b) of the South African Police Service Discipline Regulations² (the Discipline Regulations) would be held.

[36] Lieutenant General Riet (Riet) was appointed by the National Commissioner of the First Respondent in terms of Regulation 9 of the Discipline Regulations as the functionary of the expeditious process against the Applicant.

[37] The Applicant was charged with:

‘Contravening regulation 5(4)(x) of the SAPS Discipline regulations, 2016 “Any act or misconduct which detrimentally affects the image of the Service or brings the service into disrepute or which contains an element of dishonesty” in that between 2013 and 2016 you acted intentionally or negligently in the repudiation/ non-compliance in respect of contract 19/1/9/1/187 TR (13) purchase of 360 degree panoramic cameras resulting in a loss/ fruitless expenditure in the amount of R24 494 080.65.

Contravening regulation 5(4)(x) of SAPS Discipline regulations, 2016 “Any act or misconduct which detrimentally affects the image of the Service or brings the service into disrepute or which contains an element of dishonesty” in that you made a misrepresentation to the National Treasury by shifting funds in the amount of TR (R46 000 000.00) allocated for the purchase of 360 degree panoramic cameras whilst know (sic) that the failure to perform in terms of contract 19/1/9/1/187 TR (13) was subject to pending litigation.

Contravening regulation 5(4)(x) of SAPS Discipline regulations, 2016 “Any act or misconduct which detrimentally affects the image of the Service or brings the service into disrepute or which contains an element of dishonesty” in that you failed to comply with Section 44 of the Public Finance Management Act in that you wilfully / negligently failed to exercise a legal obligation with regard to the repudiation / non-compliance with contract 19/1/9/1/187 TR (13) resulting in fruitless expenditure in the amount of R24 494 080.65.’

² GNR.1361 of 1 November 2016: South African Police Service Discipline Regulations.

- [38] The notice specified that “*In terms of Regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016, you are hereby summoned to appear in person at the Expeditious Process which will be held at the Division Supply Chain Management, Silverton, Pretoria, Room 5452, 4th floor on the 13th day of July 2020 at 09h00.*” The Applicant was also informed that he was entitled to be represented by an employee or a union representative.
- [39] The expeditious process was held on 13 and 22 July 2022.
- [40] Following the expeditious process, Riet found the Applicant guilty of the first and third allegations but made no finding in relation to the second allegation.
- [41] The Applicant was dismissed on 7 August 2020.

The discipline regulations

- [42] Regulation 8 of the Discipline Regulations provides the procedure to follow when dealing with serious misconduct that requires the holding of a disciplinary enquiry.
- [43] Regulation 9 of the Discipline Regulations sets out an exception to the holding of a disciplinary hearing and provides for an expeditious process to be followed. In this regard, regulation 9 provides:

‘(1) A supervisor who is satisfied that the alleged *misconduct* is of a serious nature and or falls within the ambit of regulation 5(4) he or she must ensure that the expeditious process is initiated, and a full substantiated report is submitted to the National Commissioner or a person designated by him or her, which person may not hold a rank lower than that of Brigadier and assumes the power of the *employer* for purposes of this regulation.

(2) The said person must –

- a. on receipt of the full substantiated report satisfy himself or herself that the alleged *misconduct* is *misconduct* as contemplated in regulation 5(4) and that the nature of the misconduct justifies an expeditious procedure;

- b. if satisfied that the *misconduct* justifies an expeditious procedure he or she must notify the *employee* of the allegations of *misconduct* and instruct the *employee* to appear before him or her to answer to the allegations of *misconduct*. The notice must contain a description of the allegations of *misconduct*, that he or she has the right to be represented, the date and time when the *employee* must appear, and supporting documents and statements (if available). The notice period may not be less than five (5) *calendar days*, and it must be served in the manner set out in these Regulations. If not satisfied that the *misconduct* justifies an expeditious procedure he or she must refer the matter back to the *supervisor* for it to be dealt with in accordance with the normal procedure;
- c. when the *employee* appears before him or her, he or she must inform the *employee* of the allegations of *misconduct* and allow the *employee* to defend himself or herself against the allegations (as provided in the expeditious procedure). The said person may take any steps deemed necessary to finalise the matter provided for in these Regulations;
- d. consider the *evidence* of the *employee* and make a finding within five (5) *calendar days* with regard to the alleged *misconduct*; and
- e. if he or she finds that the *employee* has committed *misconduct*, after hearing mitigating and aggravating circumstances impose a sanction referred to in regulation 12.'

[44] Regulation 11 provides for the conduct of a disciplinary hearing.

[45] In considering whether the use of the expeditious process is justified, it is necessary to determine whether the alleged misconduct falls within the ambit of regulation 5(4). Regulation 5(4) provides:

'The following forms of *misconduct* may warrant the institution of the expeditious procedure as provided for in regulation 9 -

...

(x) Any act of *misconduct* which detrimentally affects the image of the Service or brings the Service into disrepute or which involves an element of dishonesty.'

[46] When one considers the regulations it is clear that regulation 9 provides for circumstances where a disciplinary hearing, as envisaged by regulation 8, may be bypassed. Regulation 11 specifically sets out the conduct of a disciplinary hearing, it does not apply to the conduct of an expeditious process.

The arbitration award

[47] The Commissioner concluded that on a balance of probabilities, the Applicant intentionally caused the non-compliance with contract 19/1/9/1/187 TR (13) in that:

47.1 he refused to place orders in accordance with the contract;

47.2 he failed and/or refused to provide and take steps to mitigate and assist the other departments to ensure that steps were taken to avoid litigation in this matter;

47.3 his failure to act appropriately resulted in wasteful expenditure in the sum of R24 494 080.65.

[48] The Commissioner found that the Applicant was guilty of the first charge. In relation to the third charge, he found that this amounted to an undue splitting of charges. The Commissioner stated that there was no evidence to support a finding of guilt on the second charge. The Applicant sought to raise the fact that the Commissioner considered the second charge as a basis on which to review the award. Nothing turns of this as the Commissioner's finding in relation to this charge was unrelated to the basis on which he found that the Applicant's dismissal was substantively fair.

[49] The Commissioner found further that the misconduct was of a serious nature and the Applicant had a duty to lead his division and to ensure that the First Respondent's finances were not wasted.

[50] The Commission found that the Applicant had failed to show any remorse for his conduct and concluded that the Applicant's dismissal was substantively fair.

[51] In relation to the Applicant's challenge to the procedure followed, the Commissioner found that:

51.1 The allegations against the Applicant fell within the purview of regulation 5.4;

51.2 Riet held a rank higher than Brigadier and there was nothing wrong with his appointment;

51.3 Riet conformed with the process envisaged by regulation 9;

51.4 The process envisaged in Regulation 9 is different from the one envisaged in Regulation 8;

51.5 There was no reasonable basis on which to support the claim that Riet was biased.

Review test

[52] It is trite that the test for review as formulated by the Constitutional Court is that the decision reached by the commissioner in his/her award must be one that a reasonable decision-maker could not have reached³:

'[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[53] In *Herholdt v Nedbank Ltd*⁴ the Supreme Court of Appeal held that:

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC).

'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.'

[54] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁵ the Labour Appeal Court held:

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and /or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'⁶

[55] In *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁷ the Labour Appeal Court referred with approval to the decision of the Labour Court in *Herholdt supra*:

'[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will

⁴ [2013] JOL 30796 (SCA) at para 13.

⁵ [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC).

⁶ *Ibid* at para 14.

⁷ [2015] 2 BLLR 105 (LAC); (2015) 36 ILJ 968 (LAC) at paras 12 and 13.

only be set aside if both the reasons and the result are unreasonable. In determining whether the results of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. This result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review...'

[56] In *Fidelity Cash Management Services v Commissioner for Conciliation, Mediation and Arbitration*⁸ the court held:

'... the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[57] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁹ confirmed that an error of law on its own does not warrant or

⁸ (2008) 29 ILJ 964 (LAC); [2007] ZALAC 12 at para 102.

⁹ (2015) 36 ILJ 2802 (LAC); [2014] ZALAC 50 at para 33.

indeed justify reviewing and setting aside an arbitration award. Before this court will be justified in reviewing and setting aside an arbitration award the error must render the result unreasonable.

Grounds of review

[58] The Applicant raised the following grounds of review.

[59] The Commissioner failed to apply the correct legal principle to the adjudication of the dispute and in doing so found the Applicant guilty of an offence he was not dismissed for:

59.1 The Commissioner made a finding on the second charge in circumstances where the Applicant was found not guilty of this charge.

59.2 The Commissioner failed to correctly apply the legal principle that *"it is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal."*

59.3 The Commissioner failed to deal with the basis on which the Applicant was found guilty, i.e. dishonesty and elected to find the Applicant guilty of an allegation on an alternative basis i.e. that his averred inaction in both the order of EFG products and in the resolution of the dispute with EFG was the cause of material loss to the SAPS.

[60] The Commissioner acted in an irregular manner and unlike a reasonable Commissioner by ignoring the laws of evidence and placing an amplified burden of proof on the Applicant where no such burden exists in law.

[61] The Commissioner committed a reviewable irregularity by rejecting the Applicant's version as to what occurred on 6 August 2015 and not applying his mind to the fact that the EFG report (by Mr Weiss) was insufficient as an independent review of the products was required.

- [62] The Commissioner ignored pertinent evidence in relation to the failure of SCM to act on input from Forensic Services.
- [63] The Commissioner failed to apply his mind to the Applicant's case in relation to the interaction between Regulation 9 and Regulation 11 and the fact that the chairperson of the Applicant's hearing ought to have been of higher rank than the Applicant.
- [64] The Commissioner failed to apply his mind to the allegations that Riet was biased.
- [65] The Commissioner disregarded and/or ignored the evidence of Lieutenant General Mokwena in relation to the SCM's role in considering the requirements of the end user and disregarded the fact that the Applicant recommended that the contract with EFG be withdrawn and that, as such SCM ought to have commenced the process of cancelling the contract. Instead, the Commissioner focused solely on the evidence of Riet and Brigadier Kruger.
- [66] The Commissioner's conclusion that the Applicant was dishonest was without any legal or factual basis, was irregular and was a conclusion that no reasonable commissioner would make.

Analysis

- [67] I have considered each of the grounds of review raised by the Applicant and I do not believe that the award stands to be reviewed and set aside.
- [68] The Commissioner found that:

'On the totality of the evidence I find that the respondent has proved on a balance of probabilities that the applicant intentionally caused the non-compliance in respect of contract 19/1/9/1/187 TR (13) purchase of 360 degree panoramic cameras. The applicant refused to place orders as per the said agreement. He failed and or refused to provide and take any steps to mitigate and assist the other department to ensure that steps are taken to avoid litigation in this matter. The failure to act appropriately as outlined in the above analysis resulted in an

award being made against the respondent to pay R24 494 080.65.
The respondent did not derive any benefit for this expenditure.'

[69] The Commissioner accepted that the Applicant's conduct contravened some of the subsections of section 45 of the Public Finance Management Act¹⁰ (the PFMA) but that this was not sustainable as a separate charge to charge 1.

[70] The Commissioner found:

'In this case the misconduct with which the applicant was found guilty of is serious. The applicant was the head of Forensic Division and he had the responsibility to lead the division. He also had a responsibility to ensure that the finances of the respondent are not wasted. What I find aggravating is the fact that from 2015 October the applicant was appointed as the Acting National Commissioner, he was the Accounting Officer of the South African Police Services and I am of the view that he had a greater responsibility to ensure that the finances and assets of the respondent were protected. He failed to do this. As indicated above, the Public Finance Management Act places an obligation and a responsibility on public officials and more specifically senior managers to take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due. In this case, the applicant failed to do this.'

[71] The First Respondent sought to justify the Applicant's dismissal on the basis that it contained elements of dishonesty, but this was not the sole reason for dismissal. The First Respondent found that the Applicant was found guilty of the first and third allegations. From a reading of the award it is clear that the Commissioner was of the view that the First Respondent had established that the Applicant was guilty of the first allegation against him in that he had acted intentionally in not complying with the contract between the First Respondent and EFG, that he had breached certain subsections of section 45 of the PFMA and his conduct resulted in fruitless and wasteful expenditure. This finding by the Commissioner is reasonable and is supported by the evidence.

¹⁰ Act 1 of 1999.

The fact that the Commissioner made no finding as to whether the Applicant's conduct held an element of dishonesty does not lead to an unreasonable result and does not indicate that the Commissioner found the Applicant guilty on an alternative basis.

[72] There is nothing in the award or in the Applicant's papers that supports a finding that the Commissioner ignored the laws of evidence or that he ignored or unreasonably rejected relevant evidence. Even if he had done so, this would not lead to an unreasonable result.

[73] The findings of the Commissioner and the award as a whole are supported by evidence that was led at the arbitration and the Commissioner's decision falls within a band of reasonable decisions. Accordingly, there is no basis on which to review and set aside the award. The following factors support the Commissioner's conclusion that the Applicant was guilty of the allegations against him and that his dismissal was substantively fair:

73.1 On or about 28 July 2014, the contract was awarded to and signed by EFG.

73.2 The Applicant's division was required to put in orders for the system once the contract had been concluded.

73.3 No orders were placed by the Applicant or his division.

73.4 FDA only challenged the awarding of the contract to EFG in a letter dated 22 August 2014, approximately three weeks after the contract had been awarded to EFG.

73.5 On the Applicant's version, he only became aware of this challenge on 8 September 2014.

73.6 Prior to 8 September 2014, the Applicant had no basis on which to believe that the EFG system was non-compliant with the bid specifications.

- 73.7 The Applicant has failed to provide any explanation as to why no orders had been placed as of 8 September 2014.
- 73.8 The fact that no orders had been placed during the period 28 July 2014 until 8 September 2014 is a serious concern. At this stage, the First Respondent was in breach of its contractual obligations and there is no evidence to justify such breach.
- 73.9 On 22 October 2014, the Applicant addressed a letter to SCM and stated that the EFG's product was not compliant with the bid specifications. There is no explanation from the Applicant as to why it took him so long to respond to SCM. This delay would have been understandable had the Applicant been investigating the allegations by FDA or had he commissioned such an investigation and been awaiting the outcome thereof. But the Applicant had not conducted his own investigation or caused an investigation to be conducted in order to make an independent assessment of whether the EFG product complied with the bid specifications (this was confirmed by the Applicant's counsel in argument). Instead, the Applicant seems to have accepted FDA's say so on the matter.
- 73.10 At this time, no orders had been placed and, as a matter of fact, no orders were ever placed notwithstanding that the contract remained in place and was binding on the First Respondent.
- 73.11 As a result of the Applicant's letter to SCM regarding the alleged non-compliance with the bid specifications, EFG was approached for comment.
- 73.12 On 3 May 2015, EFG provided a detailed response to explain why they maintained that their bid was compliant with the bid specifications. This response included a report by Mr Weiss, the developer of both the EFG product and FDA product.
- 73.13 This report was forwarded to the Applicant on 13 May 2015 and, according to the Applicant received by him on 19 May 2013. The

Applicant was requested to respond by 20 May 2013. The Applicant only responded on 4 June 2015 wherein he stated that his office understood the urgency of the matter and would respond at an "opportune moment". Notwithstanding that SCM sent a reminder to him on 2 October 2015, the Applicant did not respond even though SCM had requested his response before taking further steps in relation to the contract with EFG.

73.14 The Applicant took no further action in relation to the EFG contract. By this time, the overwhelming impression is that the Applicant made up his mind based on FDA complaint and was not willing to budge or consider anything that gainsaid what FDA had stated.

73.15 To make matters worse for the Applicant, he sought to have funds that were earmarked for the system repurposed in circumstances where the First Respondent had contractual obligations to EFG and without the issue with EFG having been resolved.

[74] The Applicant's conduct put in motion a sequence of events that ultimately led to significant financial loss to the First Respondent. From this factual matrix, it cannot be said that the Commissioner's finding is unsupported by any evidence and/or that it is unreasonable.

[75] It is common cause that the Applicant was dismissed as a consequence of his conduct whilst he was employed in the position of Divisional Commissioner: Forensics Division. The Commissioner's award is not rendered unreasonable simply because he was of the view that the Applicant's conduct post his appointment as the Acting National Commissioner was an aggravating factor.

[76] In so far as the Applicant claimed that the Commissioner found that he was dishonest and that this was a finding that no reasonable decision maker would make, an analysis of the award illustrates that the Commissioner made no such finding.

[77] Having considered the evidence and the award, there is no merit in the claim that the Applicant's dismissal was procedurally unfair.

77.1 As stated above, regulation 11 did not apply to the Applicant's dismissal as it refers to the conduct of a disciplinary hearing and not an expeditious process.

77.2 The Applicant was clearly aware of the purpose of the meeting with Riet as this was specified in the notice to attend an expeditious process and he engaged with Riet during the process and was given an opportunity to defend himself against the allegations.

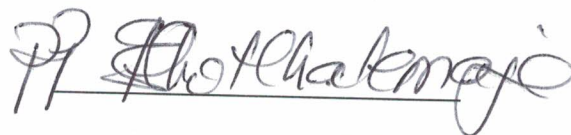
77.3 The Commissioner's finding that use of the expeditious process, as set out in regulation 9, was fair, is not unreasonable.

77.4 There is no evidence that Riet was biased and the basis for the Applicant's claim of bias does not hold water. Riet was not the Divisional Commissioner of Supply Chain at the time that the events leading to the Applicant's dismissal occurred.

[78] In the premise, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.



R Davey

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv A.J. Nel

Instructed by: Dawid H Botha, Du Plessis & Kruger Inc.

For the Respondent: Adv Y.S. Ntloko

Instructed by: State Attorney

LABOUR COURT