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

Reportable

Case no: JR 2324/15

In the matter between:

**MOSES KOTANE LOCAL MUNICIPALITY** **Applicant**

and

**OBADIA MOKONYAMA N.O** **First Respondent**

**TSHOLOFELO MOLOI** **Second Respondent**

**Heard:** **20 July 2017**

**Delivered:** **08 February 2018**

**Summary: The applicant sought in terms of Section 158(1)(h) of the LRA to review and set aside the judgment of the first respondent who was appointed to chair the disciplinary hearing of the second respondent. The evidence in favour of the applicant was clear and convincing. Held that the findings of the chairperson were clearly wrong and the determination was reviewed and set aside. The conduct of the second respondent warranted the sanction of dismissal.**

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**JUDGMENT**

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HUTCHINSON; AJ

Introduction

[1] This is an application in terms of Section 158(1)(h) of the Labour Relations Act 66 of 1995 (the Act) to review and set aside the disciplinary hearing judgment of the first respondent.

Condonation

[2] The applicant sought condonation for the late filing of the record. Notwithstanding, the second respondent's opposition, I am satisfied that a reasonable explanation has been advanced for the delay and that the prospects of success are favourable. Condonation is hereby granted.

Background to the application

[3] The applicant, a municipality, appointed the first respondent to chair the second respondent's disciplinary hearing. The second respondent is employed as the Head of the Supply Chain Management Unit (SCM). Her key function is to manage this unit including the tender process.

[4] On 27 May 2015, the second respondent was issued with a notification to attend a disciplinary hearing to answer four charges. Only two charges are relevant to the determination of this matter, namely:

> '**CHARGE 1: Gross Misconduct**
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> - You are hereby charged with an act of misconduct in that you contravened the provision of clause 1.2.3. of Annexure A of the SALGBC Disciplinary Procedure when you failed to perform your tasks and job responsibilities diligently, carefully and to the best of your ability by not complying with the provisions of Section 118 of the Municipal Finance Management Act, Act 56 of 2003 when you instructed Mr Pitse to copy some of the documents in tender BID NO. 015 B/MKLM/2014/2015 for Supply and Delivery of Light Delivery Vehicles and Sedan for Moses Kotane Local Municipality prior to the bid evaluation and adjudication process.
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> **CHARGE 2: Gross Misconduct**

- You are hereby charged with an act of misconduct in that you contravened the provision of clause 1.2.5. of Annexure A of the SALGBC Disciplinary Procedure by failing to conduct yourself with honesty and integrity when you instructed Mr Pitse to copy some and not all of the tender documents prior to the bid evaluation and adjudication process without providing reasonable justification to select documents in tender BID NO. 015 B/MKLM/2014/2015 for Supply and Delivery of Light Delivery Vehicles and Sedan for Moses Kotane Local Municipality.'

[5] The facts of the matter fall within a narrow compass and are not the subject matter of any controversy. The sticking point relates to the inferences that should properly be drawn from the primary facts. A chairperson is subject to the same duties as any trier of fact namely, to carefully evaluate the inferential weight, strength and force of the evidence.

[6] On 5 March 2015, the second respondent instructed a subordinate of hers Mr Pitse (Pitse) to copy some but not all of the tender documents (as referred to in the charges) prior to the bid evaluation and adjudication process. Whilst Pitse was taking copies of the said documents in the record room, he was approached by the second respondent's superior, the Chief Financial Officer Mr Shikwane (Shikwane) who questioned him about what he was doing. Pitse explained that he had been instructed by the second respondent to copy the said documents. Shikwane took the copies and confronted the second respondent to ascertain why she wanted copies made. She maintained that she wanted the copies for record and backup purposes.

[7] Section 118 of the Municipal Finance Management Act 56 of 2003 (MFMA) provides as follows:

'No person may –

a) interfere with the supply chain management system of a municipality or municipal entity; or

b) amend or tamper with any tenders, quotations, contracts or bids after their submission.'

[8] The procedure is that when bids are invited, a closing date for the receipt thereof is stipulated. On the closing date, bids are opened in public and various details are recorded such as: the time of receipt, the name of the bidder and the bid price of each tender. Pursuant to this process, the tender documents are stored in a storeroom until the first meeting of the Bid Evaluation Committee (BEC). The documents are examined for the first time at the BEC meeting. The documents are expected to be in the exact same state as they were when delivered by the bidders. All of this evidence was not disputed by the second respondent.

[9] At the first meeting of the BEC, no evaluation took place because the Committee suspected that the bids had been tampered with. Some of the documents had been filed upside down. The first respondent (the chairperson) recorded the following in his judgment: *"The schedule indicating where to find which returnable document could not be relied on because there was a mix up and some bids had some pages missing."* [1]

[10] Shikwane and the second respondent were called by the BEC to account for the state of the documents. At that meeting, the second respondent conceded that the mixed-up state of the documents was in all probability attributed to the fact that they had been unbound in order for copies to be taken as per her instruction to Pitse. Presumably, after Pitse took the copies he did not file the originals in the correct order.

[11] The second respondent provided various explanations for her highly suspicious conduct. At some stage. she claimed that the Auditor-General issued a negative audit finding relating to missing documents and both she and the previous CFO resolved to copy the bid documents for record and safe keeping purposes. The applicant strongly challenged this version and submitted that it was inconsistent with the fact that she only caused copies to be made of some of the documents. In respect of this submission, the chairperson remarked: *"Although they dispute this evidence they failed to*

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[1] Record 254

*tender evidence indicative of malicious and caprice from the part of the employee".* [2]

[12] A number of reasons were advanced by the applicant as to why there was no need for the second respondent to take copies. In the first place, the server had been upgraded to ensure that there was enough space to store the documents. According to the second respondent, she was not aware of this fact. In addition, it was pointed out by the applicant that the bidders are obliged to submit a compact disk (CD) of all the documents. Accordingly, the CD serves as a backup which is loaded onto the server. The second respondent did not dispute this but maintained that the CD's are not reliable: *"Sometimes they do not have the complete documents, are empty and the only way to ensure that a proper record is kept is by making physical copies of the documents".* [3]

[13] The chairperson recorded that the second respondent did not present any evidence to support her contention that it was not for the first time that she had copied the documents prior to the BEC meeting. In fact, Pitse contradicted the second respondent and insisted that documents are only copied after a bid has been awarded. As a result of the of the second respondent's conduct in tampering with the documents, the whole process commenced *de novo* at considerable expense and inconvenience.

[14] The first respondent went on to state:

> 'In my view, record keeping of these documents could have been easily done; copying was not the only remedy. The Employee is the one who controls the storeroom. She could have simply taken the documents and locked them in the storeroom and ensured that no one has access to such a storeroom until the BEC is vested with the documents. Once the compliance stage within the evaluation process is completed, she would also have ample opportunity to make copies for back up and record purposes.' [4]

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[2] Record 255 at para. 36
[3] Record 256 at para. 38
[4] Record 262 at para. 45.5

[15] The first respondent found that the applicant failed to prove that the second respondent "*had an intention to damage or tamper with the documents*" however, he found that the second respondent's instruction for copies to be made constituted a breach of Section 118 of the MFMA.

[16] The first respondent held that the second respondent's explanation as to why she caused the copies to be made "*makes reasonable sense.*" Finally, the first respondent concluded as follows:

> 'The Employer submits that the copying was influenced by ulterior motives only known to the Employee. No proof is proffered to substantiate this allegation and for me this is insufficient. The Employer needed to prove that when the Employee made copies she did that intentionally, such evidence is not available. The Employee proved on a balance of probabilities that her actions were bona fide and her reasons were excusable and genuine.' [5]

[17] The chairperson resolved that a final written warning should be imposed upon the second respondent on the basis that she made an innocent mistake.

Standards of Proof

[18] South African law recognises three standards of proof (also referred to as standards of review). The preponderance and criminal standards are well known. To date our courts have not deemed it necessary to assign either a name or a label to the third standard of proof. This is an intermediate standard that lies at some point between the preponderance and criminal standard. For many decades USA courts have referred to this as the *"clear and convincing standard."*

[19] Kevin M. Clermont in his article *Death of Paradox: The Killer Logic Beneath the Standards of Proof* [6] states *"….. the law today limits its choice to no more than three standards of proof – preponderance, clearly convincing, and beyond a reasonable doubt – from among the infinite range of probabilities stretching from slightly probable to virtual certainty; the law did not always*

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5 Record 238 at para. 17

6 Notre Dame Law Review Vol 88 Issue 3 (2-1-2013) p 1061

*recognize this limitation, but with time the law has acknowledged that the conceivable spectrum of standards coalesced irresistibly into three."* [7]

[20] The clear and convincing standard is distinguishable from the preponderance standard (more likely than not) and the criminal standard of beyond reasonable doubt. To meet the clear and convincing standard, the probabilities must be highly likely or highly probable. There is no dispute that the mathematical percentage probability for the preponderance standard is set at 50% plus X where X is greater than zero. For present purposes, I will refer to this as the 51% standard.

[21] Valiant attempts have been made in the USA to assign a percentage probability for the other two standards of proof. USA studies amongst judges and jurors have revealed that many of them equated the clear and convincing standard of proof with a probability of 75%. Frederick E. Vars in his article *Toward a General Theory of Standards of Proof* [8] highlights the following:

> 'The assumption that the preponderance standard equals 0.5 and the clear and – convincing standard equals 0.75 has both descriptive and normative components. Descriptively, as reported ..... a large survey of judges found a mean, median, and mode of 0.75 for the clear – and – convincing – evidence standard. This is from evidence, but it obscures the fact that 65% of judges picked a level other than 0.75 and that the responses in general, ranged from 0.5 to 1.' [9]

[22] In mathematical terms, the criminal standard has often been equated with a 90% probability. My preference is to associate the clear and convincing standard with a 70% probability which is the mid-point between the preponderance standard of 50% and the criminal standard of roughly 90%. Kevin M. Clermont in his article *Procedure's Magical Number Three: Psychological Bases for Standards of Decision* [10] maintains that the criminal standard rarely prevails outside criminal law. [11] In light of Section 33(1) of the

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[7] At 1087
[8] Catholic University Law Review Vol 60 Issue 1 Fall 2010 article 3
[9] At 18
[10] Scholarship @ Cornell Law: A Digital Repository – Cornell Law Faculty Publications 9-1-1987
[11] At 1120

Constitution of the Republic of South Africa, 1996 which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, there is no place for the application of the criminal standard in administrative law.

[23] The test propounded in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [12] is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach. This test does not spell out the standard of proof that must be applied to successfully challenge factual findings of statutory arbitrators. David Schwartz and Christopher Seaman in their article *Standards of Proof in Civil Litigation: An Experiment from Patent Law* [13] state the following:

> 'Our litigation system is based upon the assumption that standards of proof matter. They 'serve to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions.' The various standards of proof reflect the legal system's judgments about the proper allocation of risk between litigants, as well as the relative importance of the issues at stake.' [14]

[24] In a similar vein, Kevin Clermont maintains the following: *"The prevailing but contested view of proof standards is that fact- finders should determine facts by probabilistic reasoning. Given imperfect evidence, they first should ask themselves what they think the chances are that the burdened party would be right were the truth to become known and they then should compare those chances to the applicable standard of proof."*[15]

Appeals Involving Questions of Law and Fact

[25] The preponderance standard applies to an appeal on an issue of law. The enquiry is a *de novo* one and no deference is shown to the trial judge's legal conclusions. An appeal on an issue of fact requires a more deferent intermediate standard of proof. The position has been articulated as follows:

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[12] [2007] 12 BLLR 1097 (CC)
[13] Harvard Journal of Law and Technology Vol 26, no. 2 Spring 2013
[14] At 430
[15] *Death of Paradox* at 1061

> 'The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the 'cold printed word'… thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.' [16]

[26] Factual findings shall not be set aside unless clearly wrong. One of the benefits of the adoption of a clearly erroneous standard of proof is that "*appellate courts can focus their capacities on developing law as opposed to focusing on factually intensive, case-specific questions with little value beyond the case at issue ….. deference is appropriate in cases based primarily on multifarious, fleeting, special, narrow facts that utterly resist generalization and where the investment of appellate energy will …. fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law."*[17]

[27] In reality, the appeal court embarks upon a review of the trial court's factual findings. The *"appeal"* part where the preponderance standard applies is confined to issues of law and to factual findings where there has been a clear misdirection on the facts. In the latter case, if the misdirection impacts on the probabilities, the appeal court is entitled to disregard the findings of the trial court and thereby determine the matter afresh utilising the preponderance standard. The discussion that follows hereunder is confined to the case where the original decision-maker has not committed a material misdirection on the facts.

[28] Therefore, if an appeal court is satisfied that there is a 51% probability that the trial court erred in its assessment of a factual issue, it will not brand the finding as being *"clearly wrong."* It will simply disagree with it. If on the other hand,

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[16] *Bernert v ABSA Bank Ltd* 2011(4) BCLR 329 (CC) at 357

[17] Christopher M. Pietruszkiewicz *Economic Substance and the Standard of Review* Alabama Law review, Vol 60, p 339, 2009 at p 360

the court finds that the appellant's evidence was highly likely as contemplated in the clear and convincing standard of proof, it ought to interfere with the decision. A clearly wrong or obviously wrong factual finding falls squarely within the ambit of the clear and convincing standard of proof. If the evidence was clear and convincing in respect of proposition A, a finding in favour of proposition B must be *"obviously wrong."*

[29] Opinions may well vary as to whether the test for an appeal (essentially a review) on a question of fact (a clearly wrong decision) involves the same standard of proof that should be applied to a review involving the reasonable decision-maker test as contemplated in *Sidumo*. Emma Fergus in her review of the book by Anton Myburgh and Craig Bosch *Reviews in the Labour Court* [18] contends the following:

> 'Whether the suggested standard of `obviously wrong' is the ideal benchmark for testing unreasonableness I am unsure. Once a court is invited to consider whether a decision is `wrong' (albeit with a condition that to be set aside it must be `obviously' wrong) the line between an appeal and a review becomes more difficult to maintain. Perhaps more concerning though is that by doing so, the essence of reasonableness may be lost: considering whether something is reasonable essentially requires a court to ask whether it can be adequately justified ….. is that akin to asking whether something is obviously wrong? I am doubtful.'[19]

[30] If a factual finding is clearly wrong, one would intuitively have reservations about it surviving a justifiability test. One may ask whether it is desirable to apply a higher intermediate standard of proof to a commissioner's findings of fact as opposed to that of a trial judge's. Essentially, they both engage in an exercise of probabilistic reasoning to resolve disputes of fact by assessing, analysing, measuring, comparing and evaluating evidence to determine its inferential weight, strength or force. Applying a higher standard would mean that more deference is accorded to a commissioner and less to a trial judge. In mathematical terms, the argument would have to run along the lines that interference with a trial court's findings of fact is warranted at say a 70%

[18] (2017) 38 ILJ 807
[19] At 810

probability whereas, in the case of a commissioner, the probability should be higher at possibly 80%. This further begs the question whether a factual finding based on a probability of less than say 30% is justifiable.

[31] In my view, to calibrate a more deferent threshold for a justifiable decision would set a very low standard for statutory arbitrators in dealing with disputes of fact. An unintended consequence is that a more stringent standard could readily be confused with the standard applicable to the review of private arbitration awards where reasonableness as a ground of review is excluded.

Evaluation of the Evidence

[32] Professor Andrew Paizes in his article *Chasing Shadows: Exploring the Meaning, Function and Incidence of the Onus of proof in South African Law* cautions judges against adopting a lethargic approach to the evaluation of evidence by too readily declaring a 50/50 tie and thereby allowing the *onus* of proof to determine the outcome. In this regard, he pertinently observes the following: [20]

> '….. the part played by the onus in determining the result of litigation should be kept small as possible, and that we should rather direct our efforts at identifying, developing and refining alternative techniques for resolving deadlock—human adjudicative techniques that might prompt one to reconsider what appears, at first blush, to be a situation of equipoise (or a `50-50' perspective) in order to determine whether or not it may be viewed as, say, either a `51-49'or a `49-51' perspective, with the result that a reliance on the onus becomes unnecessary.' [21]

[33] Based on the totality of the evidence, the probabilities in this matter are by no means marginal. The applicant's case inspires a high degree of confidence. There is clear and convincing circumstantial evidence to prove that the second respondent's instruction to copy only certain bid documents was not *bona fide* but for a mendacious purpose. The documents were safely stored in a locked room to prevent tampering. There was no logical or rational reason

[20] South African Law Journal (1999) at 531
[21] At 534 and 535

to remove them from a secure environment. The act of removing the documents from a secured area and taking copies of some demonstrates a clear intention to tamper with them. In order to make copies, the documents would have to be separated. Accordingly, anyone deciding to remove documents from the safety of a storeroom, would have to have a legitimate reason to do so.

[34] There was no factual basis to the suggestion by the second respondent that the CD's were not reliable. It is clear that the second respondent did not bother to check any of the CD's before issuing the instruction to copy some of the documents. How would she have known that those particular documents were not captured on the CD's without having inspected same. Moreover, since the tender was for a relatively large contract, one would expect the potential bidders to ensure that their documents were in order. The applicant was targeting professional service providers.

[35] The record keeping excuse falls to the ground. Only some documents were being copied. This was also at a time when there was no reason to suspect that documents may go missing from the storeroom. In addition, it is unlikely that by virtue of her senior position, the second respondent would not have been aware of the upgrading of the server.

[36] Since all the excuses advanced by the second respondent were utterly unconvincing, one is driven to the conclusion that the second respondent was guilty of dishonest conduct. The approach adopted by the chairperson to the resolution of factual disputes is not beyond criticism. No evidentiary burden was placed upon the second respondent to justify her conduct. Instead of focusing on the evidence that was adduced, the chairperson appeared to be distracted by concentrating on evidence which the applicant did not have at its disposal. For instance, the chairperson maintained that the applicant failed to tender evidence concerning *"malicious and caprice….."* behaviour on behalf of the second respondent. In this regard, the evidence led by the applicant was of a circumstantial nature to demonstrate the second respondent's *mala fides.* In the absence of direct evidence, the chairperson was under a duty to determine the inferential weight of this evidence.

[37] On a full conspectus of the weight of the evidence, the chairperson's findings are not justifiable but clearly wrong. In line with the case of *Hendricks v Overstrand Municipality*,[22] I do not see any reason to remit the matter to the chairperson. The second respondent showed no remorse and extensive evidence was led on the breakdown of the trust relationship. In light of the gravity of the misconduct, dismissal is the only appropriate sanction. As to costs, the second respondent was defending a decision of the chairperson which was in her favour.

[38] In the circumstances, I make the following order:

Order

1. The first respondent's determination on sanction is reviewed and set aside and replaced with a sanction of summary dismissal.

2. There is no order as to costs.

WJ Hutchinson

Acting Judge of the Labour Court

[22] [2014] 12 BLLR 1170 (LAC)

Appearances:

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| For the applicant: | M Mphahlele |
| | Instructed by: Chosane Attorneys |
| For the second respondent: | M Magoshi from MT Raselo Inc |