



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

Not Reportable  
Case No: JR452/20

In the matter between:

**SOUTH AFRICAN FORESTRY COMPANY COC (LTD)**

**Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION (CCMA)**

**First Respondent**

**DIALE NTSOANE CEDA N.O**

**Second Respondent**

**GEBELA BATHOBILE**

**Third Respondent**

**Heard: 17 November 2022**

**Delivered: 09 March 2023**

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## JUDGMENT

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**MAMABOLO, AJ**

Introduction

- [1] On 27 January 2020 the Second Respondent issued an award in terms of which he found the dismissal of the Third Respondent to have been substantively unfair.
- [2] Having found the dismissal to have been substantively unfair, the Applicant was ordered to reinstate the Third Respondent effective 17 February 2020 and further ordered compensation from the date of dismissal to the date of reinstatement.
- [3] In its application to review and set aside the award, the Applicant contends that the Second Respondent disregarded documentary evidence and its version. It is further contended that the Second Respondent failed to apply his mind to the evidence that was led.
- [4] The Third Respondent was charged and dismissed on the following allegations:
- “1. Alleged circumvention of the recruitment and selection policy of SAFCOL alternatively, Gross dishonesty, alternatively, Gross negligence in that:
- 1.1. You contravened the Recruitment and selection policy of SAFCOL by allowing, alternatively being directed that a curriculum vitae of a candidate: Reuben Khonou who did not meet the minimum requirements for the position of Senior Manager Supply Chain Management, be included for interview. You have furthermore

concealed alternatively caused this fact to be concealed from the organization.

1.2. You failed, alternatively neglected to verify the qualification in respect of Mr Khonou

1.2.1. You failed to verify the Honours in MAPP in khonou's cv was indeed an honours and included it, yet upon verification later it was confirmed that it was not an honours degree.

1.2.2. Furthermore, no confirmation was available of his claim that Mr Khonou had a Masters Business Administration (MBA) degree from Regenesys alternatively, allowed his appointment, without the required background checks being performed.

1.2.3. You assisted in appointing Mr Khonou to the position : Supply Chain Management, alternatively had knowledge that Mr Khonou was irregularly appointed when he was not the best alternatively the most suitable.

2. Circumventing the provisions of the SAFCOL Recruitment Policy, alternatively Gross dishonesty, alternatively gross negligence in that:

2.1. You complied with an unlawful instruction from Ms Jacobs to include Ms Pillay on the candidate list for the position of Chief Financial Officer when you were aware, alternatively should reasonably have been aware that she did not meet the minimum requirements for the position and was not eligible to be interviewed appointed.

3. Breach of the duty of good faith, which you owed to the company, in that:

3.1. You concealed wrongdoing by Ms Jacobs, alternatively failed in your responsibilities to report any wrong doing or alleged wrong doing through the well-established SAFCOL forums and/ or fraud line.

3.2. You concealed some of the evidence from the forensic investigators, such as the handwritten piece of paper that you only produced during Ms Jacobs' disciplinary inquiry."

- [5] It was common cause between the parties that both Mr Khonou and Ms Pillay were appointed irregularly. They both did not meet the necessary requirements. It was further common cause that Mr Theron, the former Acting CEO, was a board member. The Applicant's witness who investigated the irregular appointments testified in her examination in chief that the Third Respondent forwarded a list of shortlisted candidates to Ms Jacobs on 24 March 2016. According to her testimony, Ms Pillay was not on the list. An enquiry with the Third Respondent established that Ms Pillay did not meet the minimum requirements, hence her name was not included on the short list.
- [6] She interviewed Tamarin Jacobs, the HR Business partner who confirmed that Mr Theron enquired why the name of Ms Pillay was not on the list and further instructed that she should be included. She, Ms Jacobs, informed the Third Respondent to look for the cv of Pillay. After she was informed that the reason Ms Pillay was not included on the short list was her failure to meet minimum requirements, she requested the Third Respondent to forward her Ms Pillay's cv. The witness was asked as to who would have breached the recruitment policy and her response was that it was the former Acting CEO and Ms Jacobs.
- [7] As far as the appointment of Mr Khonou, the witness testified that her investigations revealed that Mr Khonou did not meet the minimum requirements and was not included on the shortlist of candidates to be interviewed. Ms Jacobs informed her that Ms Khonou's name was included on the short list on the instruction of the then Acting CEO, Mr Theron.
- [8] After interviews, a draft motivation was sent to Ms Jacobs who instructed the Third Respondent to include certain information in the motivation. The Third Respondent did not understand the additional information that was required from her and she eventually sent the draft motivation to Ms Jacobs who effected some changes to the draft.

- [9] When asked why consequent management was not recommended against the Third Respondent, the witness testified that Third Respondent was on special leave and the people who were involved in the process of appointment were the former Acting CEO and the HR representatives. The Third Respondent, according to the witness, did not include both Ms Pillay and Mr Khonou in her short list.
- [10] Under cross examination, the witness conceded that there is no evidence to prove that the Third Respondent acted in breach of the recruitment policy by including on to the shortlist, candidates that did not meet the requirements. She testified that invitations to interviews were not sent by the Third Respondent but by someone else. She confirmed that Nosipho Themebe (Thembe) did send out the invite for interviews and that Magdalene Selopyane (Selopyane) conducted a reference check and further prepared a motivation in respect of the appointment of Mr Khonou during the Third Respondent's leave.
- [11] The Applicant's second witness was Mathe, a Senior Manager. In cross examination she conceded that the Third Respondent was on leave on 27 May to 7 June 2016 and again on 8 to 10 June 2016. She conceded that the Third Respondent was on leave when the alleged incidents occurred. He further conceded that disciplinary proceedings have not been instituted against Selopyane, Thembe and Thomas Ngubane who participated in the appointment process.
- [12] The Third Respondent testified that she had a lot of positions to fill and could not handle all of them by herself. As such it was agreed that Thembe who was based in Polokwane, should assist in the appointment of Manager Supply Chain and that Selopyane should handle the two senior positions that are closer to her region.

- [13] Shortlisting for the position of Manager: Supply Chain was done by Thembe. On 10 May 2016 she received a list of seven shortlisted candidates from Thembe which she forwarded to Ms Jacobs for approval. This list did not include Mr Khonou. She had a discussion with Ms Jacobs concerning the non- inclusion of Mr Khonou. She advised that he did not meet the requirements. Ms Jacobs requested her to include him on the list and she refused. She was instructed to send the seven cv's of the shortlisted candidates to Thembe. This she did on 12 May 2016 and informed Thembe to invite the candidates for an interview.
- [14] The Third Respondent referenced an email which demonstrates that Thembe sent herself Mr Khonou's cv from the recruitment folder on 12 May 2016. On 13 May 2016, the Third Respondent received an email from Thembe informing her that all shortlisted candidates have been invited for an interview and had accepted the invite. She noticed that the eighth candidate was now included on the list.
- [15] On 16 May 2016 Thembe sent an email to Klaas Mokobane and attached to this email was a list of candidates to be interviewed which included Mr Khonou. Due to the fact that Thembe was based in Polokwane and interviews were taking place in Gauteng, the Third Respondent was requested to sit in the interviews. Mr Khonou came out as the third preferred candidate.
- [16] Subsequent to the interviews and in the absence of the Third Respondent who was on leave at the time, Thembe was instructed to conduct credit and criminal record checks and to further draft a motivation for the appointment of Mr Khonou. Since Thembe was not available, Selopyane had to step in. On 10 June 2016 Selopyane addressed an email confirming that credit checks had been done and further made an undertaking to send a draft motivation the same day which she later did. This motivation was written under the Third Respondent's name.

- [17] Upon her return on 14 June 2016, she received an email from Ms Jacobs requesting her to quickly complete the motivation which was previously sent to her by Selopyane. She enquired why Mr Khonou who was recommended as the third candidate for consideration was now recommended for appointment. She was advised that Mr Theron and Sakekile had agreed that he had a strong background and should be appointed.
- [18] The Third Respondent was then requested to edit the motivation and include information that supported the appointment of Mr Khonou and she refused. Ms Jacobs proceeded to complete the motivation on her own. She was then informed that because the position fell within her region, she had to sign the motivation which she did.
- [19] With regards to the appointment of Ms Pillay, the Third Respondent submitted a shortlist of candidates that met the requirements and Ms Pillay was not one of them. Ms Jacobs informed her that Mr Theron would like Ms Pillay to be included on the shortlist. She, after checking the cv advised that Ms Pillay did not meet the requirements and she was requested to forward the cv to Ms Jacobs which she did on 7 April 2016.

#### The legal framework

- [20] In *Herholdt v Nedbank Ltd and Another*<sup>1</sup> the Supreme Court of Appeal held as follows:

“In summary, the position regarding the review of CCMA award is this: A review of CCMA award within one of the grounds is permissible if the defect in the proceedings fall within one of the grounds in s 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

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<sup>1</sup> [2013] 11 BLLR 1074 (SCA).

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 the particular facts, are not in and of themselves sufficient for an award to be set aside but are only of consequence if their effect is to render the outcome unreasonable.”

- [21] The Constitutional Court restated the review test in the matter of *Duncanmec (Pty) Limited v Gaylard NO and Others*<sup>2</sup>. The test is whether the award itself meets the requirements of reasonableness. An award would meet this requirement if there were reasons supporting it. In determining whether the impugned award is vitiated by reasonableness, the court is required to examine the award for the reasons motivating the decision reached. If the reasons advanced supports the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified. This would be the position even if the court does not agree with the reasons furnished.
- [22] I must mention from the onset that that Third Respondent’s version was backed up by documentary evidence which comprised of emails and affidavits. These affidavits were taken during an investigation by an independent investigating company. Interestingly, both parties relied on these documents to support their respective cases.
- [23] From the email trail and which is supported by the oral evidence of the investigator, the Third Respondent did not shortlist both Ms Pillay and Mr Khonou. The reason being that they both did not meet the requirements. Secondly, the investigator who interviewed Ms Jacobs confirmed that the instruction to include both Ms Pillay and Mr Khonou came from the Acting CEO.
- [24] Documentary evidence established that Thembe took over from the Third Respondent and she, based on the instruction from Ms Jacobs, proceeded to include Mr Khonou on the shortlist. Thembe concluded the shortlist of candidates

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<sup>2</sup> [2018] 12 BLLR 1137 (CC).



to be interviewed which included Mr Khonou and further invited him to an interview. The commissioner considered all of the above and concluded that Third Respondent did not circumvent the Applicant's recruitment and selection policy.

- [25] The commissioner further took into account the evidence that proved that when Mr Khonou's qualifications were verified, the Third Respondent was on leave. The above is supported by documentary evidence that was produced by the Third Respondent and was not challenged by the Applicant. In fact, the Applicant's witness, Mathe, confirmed this fact. Documentary evidence established a clear instruction was given to Nosipho Thembe to conduct verification of qualifications in the Third Respondent's absence.
- [26] Even a motivation to appoint Mr Khonou was not prepared by the Third Respondent. It was prepared by Selopyane. Third Respondent was on leave at the time. Upon her return from leave she refused to finalise the motivation as she could not comprehend why a candidate that came out third during the interviews would be recommended for appointment. Uncontroverted evidence which was supported by the evidence of the investigator established that Ms Jacobs edited and completed the motivation.
- [27] The fact that Third Respondent participated in the interview of Mr Khonou does not take the matter any further. Invitations were sent out by Thembe and the Third Respondent was requested to sit in the interviews only because Thembe was based in Polokwane. It was undisputed that according to the results of the interview of which the Third Respondent was a part of, Mr Khonou was ranked third. Furthermore, the evidence by the Third Respondent that she signed the motivation after it had been explained to her that she had to sign as the position fell within her region sounds plausible. However, cognizance must be taken of the fact that she refused to complete the motivation, and this was done by Ms Jacobs.

- [28] The Applicant could not prove that Third Respondent was involved in appointment of Ms Pillay. Despite an instruction from the acting CEO to have Ms Pillay's name included on the shortlist, the Third Respondent refused to comply and only forwarded Ms Jacobs a copy of the cv. The assertion in her affidavit that she "*complied*" with the instruction should be understood in this context. She refused to include Ms Pillay to the shortlist but complied with an instruction to forward her cv to Ms Jacobs. Documentary evidence establish that it was Ms Jacobs who forwarded Ms Pillay's cv to the then acting CEO for consideration for the CFO shortlisting.
- [29] Subsequent the above, Ms Jacobs gave Julie Kekana a list of all candidates that had been shortlisted. Kekana was an intern reporting to Ms Jacobs. Candidates including Ms Pillay were invited for a preliminary interview, and this was not done by the Third Respondent. Candidates were invited to an interview by Kekana. When she attended the preliminary interview, the Third Respondent had absolutely no knowledge as to who had been shortlisted.
- [30] The authority to appointment a CFO lies with the board. Mr Theron, the acting CEO, was the chairperson of the board. The CFO position reported to him and he was also involved in the interview of Ms Pillay. This is the same person that had instructed that Ms Pillay be included on the shortlist. Fortunately for the Third Respondent, she refused to include Ms Pillay on the shortlist.
- [31] Lastly, the evidence established that Third Respondent communicated her reasons for not including the two candidates on the shortlist to Ms Jacobs who is her senior. The Third Respondent reported to Mr Msizi Gumede who was the Senior Manager Centres of Excellence. Mr Gumede reported to Ms Jacobs. The evidence of the investigator established that after gaining this knowledge, Ms Jacobs reported to the acting CEO. The CEO is the chairperson of the board.

[32] Accordingly, attempts to have included on to the shortlist, candidates who did not meet the requirements were reported/ communicated to the highest body. Regrettably, the instruction to include candidates who did not meet the requirement came from the highest body. The allegation by the Applicant that the Third Respondent failed to report the irregularities and further that there was no evidence that she was intimidated does not hold.

[33] It is apparent from a perusal of the commissioner's award that he perfectly understood the nature of the case that was before him. He took into consideration material evidence and arrived at a conclusion that the dismissal of the Third Respondent was substantively unfair. I therefore have difficulties in appreciating why it can be said that the commissioner's award is not one that a reasonable decision maker could arrive at. I am in the end satisfied that there is no basis to conclude that the commissioner ignored pertinent material. Accordingly, there is no basis to interfere with the award.

[34] In the premise the following order is made:

Order

1. The Applicant's application to review and set aside the arbitration award issued by the Second Respondent under case number GATW 12199-19 on 27 January 2020 is dismissed.
2. I see no reason why Applicant should not be ordered to pay the costs of the application.

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N.O. Mamabolo

LABOUR COURT

Appearances:

For the Applicant : R S Mafuyeka of Mafuyeka & Associates Inc

For the Respondent : Adv Mark Coetsee

LABOUR COURT