



IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

CASE NUMBER: GATW4224-24

PSA obo Ntshudisane Zebilon **APPLICANT**

and

South African National Biodiversity Institute (SANBI) **RESPONDENT**

Dates of hearing: 02 September 2024, 05 March 2025, 06-08 May 2025

Date of submission of heads of argument: 15 May 2025

Date of award: 22 May 2025

ARBITRATION AWARD

NAME OF COMMISSIONER: MJ MOHLALA

Details of Hearing and Representation

1. This is the award in the arbitration between PSA obo Ntshudisane Zebilon (hereinafter referred to as “the Applicant”) and South African National Biodiversity Institute (SANBI) (hereinafter referred to as “the Respondent”). The matter was referred in respect of an unfair dismissal related to misconduct in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 (as amended) (the LRA).
2. The Applicant attended the proceedings and was represented by Mr. Benny Seema, an official of PSA. The Respondent was represented by Mr. Kabelo Monageng, an admitted attorney, subsequent to a granted application for legal representation for the respondent.
3. The Respondent submitted a bundle of documents which was marked as Bundle R while the applicant’s bundle of documents was marked as Bundle A. At the conclusion of the proceedings, the parties opted to render written closing arguments whose deadline for submission was agreed for 15 May 2025. Both parties complied with the set deadline for submission.

Background Information

4. The applicant was employed by the respondent on 01 February 2007 and was dismissed on 10 January 2024. He occupied the position of a Senior Registry Clerk, Grade 3. He referred an alleged unfair dismissal dispute relating to misconduct. He was charged and dismissed for (1) Contravention of SANBI Policies (SCM Policy) in that on or about 12 July 2023 he played a role in smuggling tender documents after the bid’s closing time for two potential bidders (Marula Skotane Development and Lakeshore Trading); Dishonesty, (Count 1) in that during the investigation, he confirmed that on 12 July 2023, two potential bidders (Marula Skotane Development and Lakeshore Trading) arrived after the closing time for submission of their tender documents and further informed the first potential bidder (Marula Skotane Development) that the tender box was closed, went outside the building to enquire why Marula Skotane Development persons stood at the entrance stairs and indicated that they had responded that they were tired as they came running up the stairs. He further stated that he returned to his workstation and did not remember how the potential bidder ended up inside the building whereas he was the one who granted them access into the building as he also signalled for them to place their tender documents on the table inside the reception office.
5. Count 2 on the charge of dishonesty was that during the investigation he had confirmed that on 12 July 2023, the two potential bidders arrived after the closing time for submission of their tender documents; that

he did not know what happened to the two potential bidders; that the second potential bidder mentioned to him that he did not know where he had parked his vehicle and thus he had gone outside to show him the parking areas. However, he had assisted the second potential bidder to hand over its late tender documents to Mr. Lekgoro at the back of the National Herbarium building.

6. The applicant was also charged and dismissed for bringing SANBI into disrepute in that he had actively played a role in assisting two potential bidders to have their tender documents smuggled after the closing time. His collaboration was said to have the potential to compromise the organisational reputation in terms of tender administration processes. The fourth charge related to disregarding of safety regulations wherein it was alleged that he had permitted an unknown person, Marula Skotane Development official, to enter the SANBI reception office without authorisation. The fifth charge related to alleged desertion of workstation as the applicant on the day in question allegedly left his workstation to assist in smuggling of tender documents of the second potential bidder after closing time.
7. The parties concluded a pre-arbitration minute in terms of which it was agreed as common cause that:
 - (a) The applicant interacted with the two prospective bidders on the day in question;
 - (b) The bid closed at 11h00 on the day;
 - (c) The two prospective suppliers entered the premises of Sanbi on the day after 11h00;
 - (d) At the time that he interacted with the prospective suppliers, the tender box had been removed from the reception area;
 - (e) The applicant worked at the reception area on the day in question;
 - (f) There is no specific safety regulation that speaks to the conduct complained of; and
 - (g) The applicant left the working station, the reception area, going outside the building.
8. It was disputed that:
 - (1) The applicant was ambushed into making a statement;
 - (2) The applicant was dismissed in absentia at the disciplinary hearing after postponement request for asking for a representative was denied by the chairperson;
 - (3) Mr. Lekgoro and Prince Hlongwane were the people who smuggled the tender documents and not the applicant; and
 - (4) The applicant's action in leaving the workplace area was in collaboration with smuggling the tender documents but to show the potential bidder where Lekgoro had parked his car.

Issue to be Determined.

9. The issue to be decided is whether the dismissal of the applicant was procedurally and substantively fair. The applicant sought retrospective reinstatement as relief.

Preliminary Matters

10. An application for legal representation was moved on behalf of the respondent and a ruling granting same was rendered. The applicant objected to the admissibility of the CCTV footage that the respondent was to rely on as evidence in these proceedings and the respondent opposed the objection. I overruled the objection on the basis that the CCTV footage was relevant to proving and/or disproving the charges and that the authentication of the CCTV footage could be testified to by the person who was going to testify on it.

Analysis of Evidence and Arguments

11. Mr Dumisi Mokoena, the investigating officer responsible for coordination of security within the respondent, and Mr. Prince Hlongwane, Tender Contracts and Travel Services Manager, testified for the respondent. The applicant was the only witness for his case. All witnesses led evidence under oath.
12. Section 138(7) (a) of the LRA provides that the commissioner must issue an arbitration award with brief reasons. It is therefore not the purpose of this award to provide a detailed account of all the evidence and arguments placed before me at arbitration as same have been digitally recorded. I have considered all the evidence adduced as well as arguments rendered by the parties in arriving at the decision I make below.
13. Section 192 (1) of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Subsection (2) of this section further provides that if the existence of the dismissal is established, the employer must prove that the dismissal is fair. Establishing the existence of the dismissal was not necessary in this matter as it was common cause that the applicant was dismissed on 10 January 2024.
14. At the core of this arbitration is whether the applicant had played a role in the attempt to smuggle late tender bids at the respondent on 12 July 2023. The focus of this award is primarily on this alleged offence without disregarding the other charges that flew from his actions on the day in question. The attempt to smuggle the late bids as an offence, is serious on its own to warrant dismissal, and thus sits as the primary issue to be determined.
15. The evidence of the respondent is overwhelming in establishing that the applicant had actively played a role in attempting to smuggle late tender documents by Marula Skotane Development and Lakeshore

Trading. The CCTV footage evidence led by Dumisi Mokoena puts the matter beyond doubt that the applicant had played an active role in attempting to assist the late bidders to have their late bids accepted after the bid closing time. It could not have been that he had gone to the first late bidder at the stairs to ask them why they stood by at the stairs. If that was so, they could not have ended up coming back into the reception area and him signalling to them to place their bid documents at the reception counter. It is more probable that he had gone to them to assist them to make their submission after the bid closing time. He knew that the bid had closed and all he had to do was to inform the late bidders as such and have no further interaction with them. For him to go to them and them later bringing in their late bid documents to his desk, shows that he had an intention to assist them to smuggle their late tender bids. He, therefore, played an active role in the attempt to smuggle the late bid from the first late bidder. He could not have taken the bid documents himself as he was manning the reception area and thus Lekgoro had to be involved.

16. It is no surprise that he knew what he was involving himself in. His defence that he knew that Lekgoro was assisting the first late bidder is testament to the fact that he was actively playing a role in attempting to smuggle the late bids. His action in taking the second late bidder to Lekgoro was in furtherance of their motive to have late bids accepted and potentially adjudicated upon by the tender evaluation committee. He knew his scheme with Lekgoro as regards the first bidder and that same could still be effected with the second late bidder. His defence that he was to point out car park areas to the second bidder is baseless and untruthful. Nowhere in the CCTV footage did he point out to any space where car may be parked. How the second late bidder might have, in such a short space of time, forgotten where he had parked his car is beyond me. His defence, in this regard, is a representation of a desperate attempt to escape liability for his actions and to be untruthful. The only thing that he did with the second late bidder was to take him to Lekgoro and to give Lekgoro the second late bidder its late bid documents. The only logical conclusion is that he had taken the second late bidder to Lekgoro so that the latter could also attempt to smuggle the second late bidder's late bid.

17. The totality of the evidence thus far proves that the applicant was guilty of contravening the respondent's SCM Policy. He had been involved in a scheme to have late bids accepted. His defence that he does not any procedure relating to SCM and tenders is another desperate attempt to escape guilt. He ought to have known that when the tender box is closed and removed from the reception area that no late bids will be accepted. He has worked in the reception area for a considerable length of time to know same.

18. The applicant had also been dishonest when he informed the investigator that he did not know how the first late bidder ended up in the building. He was the one who facilitated their re-entry when he went to them and they ultimately left their late bid at his reception desk. He was asked about this issue on the very first day that it had occurred and his memory could not have betrayed him. The matter was still fresh in his mind and he had opted to be dishonest and untruthful when asked about the late bidders. It was untruthful

of him to inform Mokoena that he had gone out of the reception building with the second late bidder to show him where he had parked his car as nothing in the evidence suggested same. He had gone out of the reception area with the second late bidder to hook him up with Lekgoro so that he could be assisted in smuggling the late tender bid. Accordingly, he was dishonest in his responses to the investigator about the two late bidders on the day.

19. His actions on the day had the potential to compromise the respondent's reputation. The respondent has put measures in place to safeguard the integrity of the tendering processes. It owes the public honesty and integrity in terms of its tendering process. It would bring the respondent's name into disrepute should it be found that the respondent had accepted late bids when it had stipulated in the tender advert that late bids will not be accepted. The action of the applicant in collaborating to smuggle late tender bids had the potential of bringing the respondent's name into disrepute. The respondent could have found itself in costly legal suits had the late bids been part of the adjudication process and somehow emerging as successful bidders.
20. The charge of desertion of workstation in these circumstances is very serious. The desertion was in the course of committing a very serious offence of attempting to smuggle late tender documents. There is no justifiable defence to the applicant's desertion of his workstation. It is not a normal excusable desertion such as when nature calls but in furtherance of a serious offence that breaks the employment trust relationship irretrievably with no prospect of restoration.
21. The parties agreed as common cause that there is no specific safety regulation that speaks to the conduct of the applicant allowing people into the reception cubicle. No evidence has been adduced as to the specific regulation and what the impact of putting the late bid at the reception cubicle desk would have been from a safety perspective. I, therefore, cannot find that the respondent has adduced the necessary evidence to prove that by allowing the first late bidder to place its late bid at the reception desk that the applicant had breached any workplace safety regulation.
22. The dismissal of the applicant is substantively fair.
23. The applicant has challenged the procedural fairness of his dismissal. In this regard, he contended that he was ambushed into making a statement by Mokoena on the day in question. The applicant stated under cross-examination that Mokoena had told him on the day of making the statement that he had the right to tell him what happened or to leave. I cannot see how this could have been a threat or an ambush. He had the right to give a statement or not to. He opted to give a statement. He, therefore, cannot cry foul that he was either ambushed or threatened. There is no evidence suggesting any threat to the applicant or of him having been ambushed into making his statement. There was no evidence led by both parties on the disciplinary hearing proceeding in the absence of the applicant. I am not in a position to make any

finding in the absence of any evidence in this regard. Accordingly, I cannot find any procedural unfairness in the dismissal of the applicant.

24. In **Sidumo and Another v Rustenburg Platinum Mines Ltd and Another (2007) 12 BLLR 1097 (CC)** the Constitutional Court held that in determining the appropriateness of dismissal, the commissioner must consider the totality of circumstances, including the seriousness of the misconduct, the harm caused by the employee's conduct, and the effect of dismissal on the employee. Schedule 8 of the LRA provides, inter alia, that dismissal for a first offence is generally not appropriate unless the misconduct is serious, such as gross dishonesty or wilful damage to property.

25. I accordingly find that dismissal is an appropriate sanction in these circumstances. The applicant had committed very serious offences of attempting to smuggle late tenders, dishonesty and bringing the respondent's name into disrepute. Despite his actions been captured on CCTV footage, the applicant showed no remorse and persisted to fabricate flimsy defences. It would be unreasonable to expect the respondent to keep this kind of an employee in its employ. It would create a bad precedent that employees who commit serious offences would be left unpunished and this will create a chaotic industrial relations environment in the respondent.

Award

26. The dismissal of the Applicant is held to have been substantively and procedurally fair.

27. The applicant's claim for unfair dismissal is unsuccessful and the relief claimed is denied.

APPROVED



NAME OF COMMISSIONER: **MJ MOHLALA**