



ARBITRATION AWARD

Case Number: GATW 16080-20
Commissioner: Werner Kruger
Date of Award: 30 November 2022

In the **ARBITRATION** between

PSA obo Dikobo Thabang Brian

(Union / Applicant)

and

Public Protector SA

(Respondent)

APPROVED

DETAILS OF HEARING AND REPRESENTATION

- [1] This is the award in the arbitration between Mr. Thabang Brian Dikobo, the employee, and the Public Protector SA, the employer.
- [2] The arbitration was held under the auspices of the CCMA in terms of **Section 191(5)(a)** of the **Labour Relations Act, 66 of 1995** (*"the LRA"*), and the award was issued in terms of **Section 138(7)** of this Act.
- [3] Mr. Thobakgale a union official represented the employee and Mrs. Manyike from the IR department represented the employer.
- [4] The arbitration was held over two days and finalized on 24 November 2022. The arbitration was held at the offices of the CCMA at Tshwane.

ISSUE TO BE DECIDED

- [5] The issue to be decided is whether the Applicant committed the misconduct that culminated in his dismissal, and if so, whether dismissal was the appropriate sanction for such misconduct.
- [6] Only the substantive component regarding the fairness of the Applicant's dismissal, was placed in dispute for my consideration.

BACKGROUND TO THE DISPUTE

- [7] The Applicant was appointed at the Respondent on 7 March 2016 and he was dismissed on 3 December 2020. He was appointed as a Supply Chain Practitioner and remunerated at R 23 506.85 per month.
- [8] The Applicant's services were terminated pursuant to a formal disciplinary hearing. The charges were –

Dishonesty

On or about 4th June 2020, you prepared bidders compliance and submitted it together with the memorandum for approval and misled the employer that TasteAfrica (Pty)Ltd bidding price was R 319 522.84 and that they submitted their quotation on the 27th May 2020 at 09h33 whereas TasteAfrica (Pty) Ltd's bidding price was R 306 202.39 and it was received on the 27th May 2020. As such your action resulted in contravention of clause 4.1 of the National Treasury Code of Conduct for Supply Chain Management Practitioners in that you were not open and honest to the employer, as the quotation of R319 522.84 was re-quoted and received by you on the 3rd June 2020.

Failure to adhere to the Supply Chain Management Procedure Manual

On or about the 3rd of June 2020, you contacted the supplier TasteAfrica (Pty) Ltd and advised the supplier to amend / correct the quotation since you claimed that they made a mistake on the pricing of the masks which is contrary to the provisions of the Clause 6.5 Supply Chain Management Procedure Manual for the PPSA in that you advised the supplier to revise the quotation or re-quote.

- [9] On 7 December 2020, the Applicant referred the matter to the CCMA alleging his alleged unfair dismissal.
- [10] The dispute was set down for conciliation on 29 December 2020 but the matter remained unresolved and a certificate to that effect was issued.
- [11] On 6 January 2021, the Applicant requested that this dispute be resolved through arbitration.

FACTS THAT WERE COMMON CAUSE

- [12] The parties conducted a pre arbitration and from the evidence the following facts were not disputed –
- I. The Applicant invited bidders from the Centralized Service Provider Data base to submit quotations for the delivery and supply of Covid - 19 PPE's;
 - II. The invitation went out on 22 May 2020 and the closing date was on 29 May 2020;
 - III. At the closing date six bidders responded;
 - IV. One of the bidders TasteAfrica (Pty) Ltd submitted a quotation for R 306 202.39;
 - V. In the quotation they quoted for 18 surgical masks in the amount of R 134.55;

- VI. On 3 June 2020 the Applicant phoned the supplier and asked about the 18 surgical masks. This was not in accordance with specification and should have been 18 boxes of surgical masks;
- VII. On the same date the supplier sent a second quote in the amount of R 319 522.84. The new amount quoted for the surgical masks were R 13 455.00;
- VIII. On 4 June 2020 the Applicant prepared the submission and, in the submission, he included the amount of R319 522.84 and not R306 202.39;

THE RESPONDENT'S EVIDENCE AND SUBMISSIONS

- [13] The evidence is part of the record. I am not going to repeat the evidence as captured in the previous paragraphs. For purposes of this award the evidence can be summarized as follows:
- [13.1] Employer witness Mrs. Memusimbori testified under oath that she was at the time the assistant manager and the applicant reported to her. She testified that the Respondent wanted to purchase PPE's and the Applicant was task to invite service providers to quote. After the closing date she printed the documents and asked the Applicant to evaluate it. There were six bidders but one bidder was disqualified because they received his bid after the closing date. When she received the submission, she supported it and gave it to Maswi for her recommendation. She noticed the discrepancies on the submission and the comparative schedule. Upon her investigation she found that TasteAfrica had re – quoted. This was not allowed. The Applicant did not discuss this with her.
- [13.2] Mrs. Maswi testified that she is the senior manager. When she received the submission, she saw that the price was not in line with the original calculation sheet. This matter was urgent and she supported the submission and took it to the Chief Financial Officer for his approval. Thereafter she investigated. Upon her investigation she found the original quote and the amended quote. The supplier was not allowed to re – quote and the second quote was submitted after the closing date. The Applicant did not discuss the matter with her and she can no longer trust him. As a result of the irregularity TasteAfrica was disqualified.

THE APPLICANTS EVIDENCE AND SUBMISSION

- [14] The Applicant testified that there was a demand from the end user and he drafted the specification. He sent a Request for Quotation to the suppliers on the centralized supplier database. When he received

the quotations, he had to evaluate it and see if they complied with tax laws and if they were BBBEE compliant. He also had to check if the quotes were in line with the specifications.

- [14.1] TasteAfrica was the lowest and when he checked their quotation, he saw that they have quoted for 18 surgical masks and not 18 boxes of surgical masks. This was an honest mistake and he phoned the supplier and inquire about it. The supplier corrected the mistake and he submitted the corrected quote. According to him he was allowed to engage with the supplier and this was not a re- quote but a correction. He was not dishonest. His managers had the original quotes and the comparative schedule. They could see that it differs from the submission that was sent for their approval.

LEGAL CONSIDERATIONS

- [15] The Respondent had to prove on a balance of probabilities that the dismissal of the Applicant was fair. **Section 192(2)** of the **LRA** explicitly requires the Employer to prove that a dismissal is fair, and **Section 188(1)** thereof states that a dismissal will be unfair if the Employer fails to prove that the reason for the dismissal is for such a fair reason, and that the dismissal was not affected in accordance with a fair procedure. In this case procedure was not in dispute.

- [16] In **terms of Clause 37.5 of the Supply Chain Management Policy**

All quotations prices shall be deemed to be fixed (Not subject to contract price adjustment) unless otherwise stated in the quotation documents.

Clause 37.6

No quotations submitted after any stipulated closing date and time shall be considered.

- [17] **Clause 4.1 of the Code of Conduct**

Practitioners should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only if it is in the public interest to do so.

- [18] **Supply Chain Procedure Manual – Step five**

Only signed awards that contain the CCMA approved watermark are authorised.

GATW16080-20

Page 5 of 8

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SCM Practitioners must ensure that all the SBD documents are completed in full, initiated and signed where the bidders are supposed to sign including the signing of the quotation.

If documents are not completed in full or not initiated the bidder must be informed in writing to complete and initial the documents and given 2 days to re-submit the documents

NB Bidders are not supposed to re-quote

[19] **Section 217 of the Constitution** provides:

“When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

[20] Regulation 16A.9 provides that “The accounting officer or accounting authority must –

(a) take all reasonable steps to prevent abuse of the supply chain management system;

(b) investigate any allegations against an official or other role players of corruption, improper conduct or failure to comply with the supply chain management systems, and when justified –

(i) take steps against such official or other role player and inform the relevant treasury of such steps;...”

ANALYSIS OF EVIDENCE AND ARGUMENT

[21] The Respondent had a duty to act in a manner that was fair, equitable, transparent, competitive and cost effective when they procured the PPE's and considered the various bids. The Respondent was also obliged to prevent any abuse of the supply chain management system and took steps against any official who did not comply with the relevant policies.

[22] The Applicant had the right to engage with the supplier but in doing so he must be open and transparent and he must give reasons for his decisions. Importantly the supplier is not allowed to re-quote.

- [23] Based on the facts of the case the Respondent followed a competitive bidding process and when they received the quotes, the Applicant evaluated these quotes and made the necessary submissions. TasteAfrica was elected because their price was the lowest and they complied with all the regulations. There was no evidence before me that the Applicant had any kind of relationship with TasteAfrica and there was no evidence that their appointment was because of an abuse of the supply chain management policies.
- [24] When the Applicant contacted TasteAfrica it was to rectify a mistake on the quotation. Even after the quotation was amended TasteAfrica was still the lowest bidder and it would have made business sense to appoint them. Even if the Applicant was wrong in allowing TasteAfrica to amend the quote the Respondent did not prove that he did so in order to abuse the supply chain policies and procedures. The Applicant was however wrong in that he did not in his submission indicate what happened and that he did not give reasons for his decision as was required from him in terms of the Code of Conduct.
- [25] The Respondent had a duty to investigate this matter and to take the necessary corrective steps. It is clear from the facts that the Applicant did not have the intention to abuse the system but he had to provide reasons for his decisions. The Applicant was therefore guilty of misconduct but dismissal was not fair under these circumstances. Dismissal should be substituted with a final written warning valid for 12 months. The following factors in mitigation are important –
- I. The Applicant had a previous verbal warning for absenteeism – he had no previous warnings based on his work;
 - II. There was no evidence that he gave TasteAfrica any preferential treatment. Their price was still by far the lowest and it was cost effective to appoint them. The other bidders were not prejudiced;
 - III. There was no evidence that he intentionally tried to abuse the supply chain policies;
 - IV. If the quote was not corrected it could have led to possible litigation or to engage in another procurement process to procure the correct number of surgical masks.
 - V. The mistake that he made was not to include these facts in his submission and his failure to give reasons for his decision;
 - VI. I can however not conclude that his failure to include this in his submission was because of dishonesty and as a result I can not conclude that the trust relationship was broken;
- [26] The Applicant wanted to be reinstated and I see no reason not to award reinstatement. I am however going to limit back pay. The Applicant testified that this matter took long to complete but part of the

reason was that there were problems between him and his representatives. He was the one that asked for some of the postponements. The Applicant was also guilty of misconduct and the Respondent had a duty to investigate this type of misconduct. For these reasons I am limiting back pay to six months.

AWARD

- [27] The dismissal of the Applicant was substantively unfair. I therefore make an award in the following terms:
- [28] The Employer the Public Protector SA is ordered to reinstate the Employee Mr. Thabang Brian Dikobo in its employ on terms and conditions not less favorable to him than those that governed the employment relationship immediately prior to his dismissal.
- [29] The reinstatement in par 28 is to operate with retrospective effect from 3 December 2020.
- [30] The backpay due to Mr. Thabang Brian Dikobo is limited to six months and it amounted to R 141 041.10 (R 23 506.85 x6) minus such deductions as the employer is in terms of the law entitled or obliged to make.
- [31] The amount referred to in paragraph 30 is to be paid to Mr. Thabang Brian Dikobo on or before 15 December 2022.
- [32] The Applicant must tender his services to the Respondent on or before 15 December 2022.
- [33] I make no order as to costs.

Signature: _____

Commissioner: Werner Paul Kruger

Sector: Premier's office