



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR52/2021

In the matter between:

SMALL ENTERPRISE DEVELOPMENT AGENCY

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER P MBATSANA, N.O.

Second Respondent

KWATHI SOPHIA HAZEL KOKA

Third Respondent

Heard: 02 March 2023

Delivered: 09 January 2024

JUDGMENT

VOYI, AJ

- [1] This is an application to review and set aside an arbitration award that was issued by the second respondent, Commissioner P. Mbatsana (Commissioner) on 26 November 2020 under case number GATW905-20.

- [2] The application is launched by the Small Enterprise Development Agency (SEDA), a juristic person established in terms of section 9(1) of the National Small Business Amendment Act.¹
- [3] The third respondent, Ms Kwathi Sophia Hazel Koka (Koka) is an employee of SEDA, occupying the position of Sector Manager Coops & CPPP. She opposes the present application for review.
- [4] The arbitration award that is being assailed on review was issued pursuant to an unfair labour practice dispute that was lodged by Koka with the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [5] The essence of Koka's dispute was SEDA's refusal to evaluate her performance for the 2018/19 performance cycle, running from 1 April 2018 to 31 March 2019. The basis for SEDA's refusal was that Koka did not sign a performance agreement as required by SEDA's Performance Management and Development Policy (Performance Management Policy).
- [6] The Performance Management Policy stipulates thus:
- '...
Line Managers have to ensure that new employees sign the performance contract within the first month of their engagement and the existing employees should contract within the first month of the new financial year i.e. April as per annexure A..'
- [7] In this matter, Koka's performance agreement for the performance cycle in question was not entered into within the first month of the new financial year, which commenced on 1 April 2018. Instead, the performance agreement was entered into on 18 March 2019 and was backdated to 18 March 2018.

¹ Act 29 of 2004.

[8] According to Koka, she engaged with her then-direct manager, Mr Sipiwe Soga (Soga) during the first semester of the 2018/19 financial year to finalise her performance agreement.

[9] Koka and Soga could not agree on the contents of the performance agreement. As a result, she refused to sign the agreement. The Performance Management Policy contemplates this. Under paragraph 3.5 of Annexure A to the Policy, it is provided as follows:

‘An employee may only refuse to sign a Performance Agreement (PA) if and while a disagreement on the content of the Performance Agreement (PA) is being addressed.’

[10] The relief sought by Koka before the CCMA was an order that she is entitled to be evaluated by SEDA in respect of her performance for the 2018/19 financial year.

[11] It is contended by SEDA and acknowledged by Koka that the dispute and the alleged unfair labour practice centred around the validity of the backdated performance agreement.

[12] In the pre-arbitration minute signed by the parties on 29 October 2020, the issues that the Commissioner was required to decide were recorded as follows:

7.1 Whether [Koka's] performance agreement for the 2018/19 financial year is valid.

7.2 Whether [Koka] is entitled to have her performance evaluated for the 2018/19 financial year in terms of the Policy.

7.3 Whether [SEDA], in refusing to evaluate [Koka] for the 2018/19 financial year, has committed an unfair labour practice as defined by section 186(2)(a) of the LRA.’

[13] At the commencement of the arbitration proceedings on 16 November 2020, the parties decided to dispose of the dispute by way of a stated case. In a document entitled “Stated Case”, a summary of the relevant sequence of events was recorded as follows:

‘The performance agreement (‘PA’) was never signed in 2018. On or about 18 March 2019, [Koka] signed the PA with Mr Sipiwo Siga and the signatories backdated in to 18 May 2018. [SEDA] has not evaluated [Koka’s] performance for the 2018/19 financial year, and contends that Mr Soga was not authorised to sign the PA and that the PA is not valid.’

[14] At paragraph 4, the “Stated Case” recorded that the Commissioner is required to issue an award in respect of the following:

- ‘4.1 Whether Mr Soga was authorised to sign the PA on or about 18 March 2019, and to backdate it to 18 May 2018.
- 4.2 Whether [Koka’s] performance agreement for the 2018/19 financial year (Bundle C, page 29 – 40) is valid and enforceable.
- 4.3 Whether [Koka] is entitled to have her performance evaluated for the 2018/19 financial year in terms of [SEDA’s] performance management and development policy (‘the Policy’) (Bundle C, page 1-28).
- 4.4 Whether [SEDA] in refusing to evaluate [Koka] for 2018/19 FY has committed an unfair labour practice as defined by Section 186 (2)(a) of the LRA.’

[15] During the 2018/19 financial year, Koka’s line manager was Soga from 1 April 2018 to 21 October 2018.

[16] From 22 October 2018, Mr Koenie Slabbert (Slabbert) took over from Soga and was Koka’s line manager for the period 22 October 2018 to 31 March 2019.

[17] Following the arbitration proceedings, it was the Commissioner's decision that SEDA had committed an unfair labour practice towards Koka. He accordingly ordered SEDA to evaluate Koka's performance for the financial year 2018/2019.

[18] The Commissioner further directed that such evaluation be concluded and the results thereof communicated to Koka on or before 31 December 2020. In arriving at this decision, the Commissioner reasoned as follows:

[19] [Koka] was throughout persistent that the disputed content must be resolved before she signs the PA. whether [Koka's] grievance had merits, the Policy provides for such grievances to be escalated up until the CEO's attention, which happened in this case. [SEDA's] case is that [Koka] should have signed with Slabbert who was the line manager in January 2019. Slabbert was not prepaid (sic) to contract with [Koka] and referred [Koka] to Sogo. Slabbert left it as a choice or discretion for Sogo whether to sign and backdate [Koka's] PA. The discretion which is not provided for in the policy. I subsequently find that Sogo has authority to contract with [Koka], despite, the review period of the first semester was to be conducted by him. [Koka] cannot be prejudiced for lodging a grievance.

[20] The averments by [SEDA] that Slabbert should have signed [Koka's] PA in January 2019, infers that the contract can be backdated. I find that the Performance Agreement was valid and that [SEDA] subject (sic) [Koka] to an Unfair Labour Practice patterning (sic) to benefits as [Koka] might have been eligible to such benefit if her performance was found to be at the required standard for such incentives. The performance of [Koka] must be evaluated for the financial year 2018/2019.'

[19] It was SEDA's stance before the Commissioner that the backdated performance agreement is not valid and Koka has no right to be evaluated for her performance for the 2018/19 financial year.

- [20] In particular, SEDA contended that Soga did not have the necessary authority to sign and backdate the performance agreement entered into with Koka on 18 March 2019.
- [21] There are three principal grounds for review advanced by SEDA in these review proceedings. The first two grounds for review relate to the CCMA's jurisdiction to arbitrate the dispute.
- [22] First, it is contended that the unfair labour practice dispute was lodged outside the 90 days time period stipulated under section 191(1)(b)(ii) of the Labour Relations Act² (LRA). Secondly, it is contended by SEDA that the CCMA lacks jurisdiction to rule on the interpretation, application and validity of agreements other than collective agreements in terms of section 24 of the LRA and in certain situations, settlement agreements.
- [23] The irony is that SEDA had agreed at paragraph 5.13 of the pre-arbitration minute that the CCMA has jurisdiction to arbitrate the dispute. This implies that SEDA, which was represented by a legally trained person, had accepted that all the jurisdictional prerequisites for the CCMA to pronounce on the dispute were present.
- [24] Furthermore, SEDA had agreed at paragraph 7.1 of the said minute that the Commissioner is required to decide whether the backdated performance agreement was valid. This was repeated at paragraph 4.2 of the "Stated Case" to which SEDA was a party.
- [25] It seems to me rather disingenuous, if not opportunistic, for SEDA to now turn around and seek to quash the Commissioner's decision on the basis of a belated jurisdictional challenge. In my view, such a misleading approach should not be countenanced.³

² Act No. 66 of 1995, as amended.

³ See: *Ueckermann v Feinstein* 1909 TS 913 at 920 (*Ueckermann*); *Otto v Schurink and another* 1911 TPD 367 at 373-4; *Negro v S.A. Railways* 1911 TPD 979 at 981; *Centner NO v Griffin NO* 1960 (4) SA 798 (W); *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and another* 1986 (4) SA 329 (D).

- [26] I have not lost sight of the fact that the CCMA is a creature of statute.⁴ I am also mindful of the trite position that the consent of parties cannot confer a coercive jurisdiction upon the court, which the law expressly denies to it.⁵ The same position applies to the CCMA.
- [27] Not only was there submission to jurisdiction in this matter, the CCMA's jurisdiction over the dispute existed as a fact. The allegation that the dispute was lodged outside the 90-day time frame is not borne out by the evidence. On the contrary, the evidence points to Koka having explored internal avenues to have the issue resolved up to 18 November 2019. As the unfair labour practice dispute was lodged on 17 January 2020, the referral was on time.
- [28] I also find no merit in the jurisdictional challenge based on what I consider to be a misapplication of section 24 of the LRA. In the first place, the dispute lodged by Koka with the CCMA was not concerning the interpretation, application and validity of the backdated performance agreement. Quite to the contrary, it was concerning an alleged unfair labour practice as contemplated in section 186(2)(a) of the LRA.
- [29] The pronouncement on the validity of the backdated performance agreement was, in my considered view, incidental to the real dispute between the parties. The real dispute was whether the SEDA committed an unfair labour practice towards Koka by refusing to evaluate her performance, which evaluation could have a bearing on the payment of a performance bonus.
- [30] For the above reasons, I, therefore, reject the grounds for review questioning the CCMA's jurisdiction to arbitrate over the dispute lodged by Koka. What now remains for consideration is the third ground for review, which pertains to the Commissioner's determination that the backdated performance agreement was valid and that SEDA subjected Koka to an unfair labour practice by not evaluating her performance.

⁴ See: *SA Rugby Players Association, and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at para 40.

⁵ See the judgment of Innes CJ in *Ueckermann supra* at 919-20.

- [31] As indicated hereinbefore, there were four issues that the Commissioner had to decide in terms of the “Stated Case”. They are captured at paragraph [11] of this judgment. In essence, the Commissioner found that the performance agreement entered into between Soga and Koka on 18 March 2019 and backdated to 18 May 2018 was valid.
- [32] I have no hesitation in saying that no reasonable commissioner could make such a finding. With this finding being the basis for the Commissioner arriving at the decision that SEDA subjected Koka to an unfair labour practice by refusing to evaluate her, I am satisfied that the arbitration award is susceptible to being set aside on this basis alone.
- [33] It is common cause in this matter that the performance agreement was only concluded on 18 March 2019. It was deliberately backdated so as to bring it in line with the provisions of the Performance Management Policy.
- [34] This case compels me to pronounce on the propriety of backdating a document. That is so in light of the submission that was made on behalf of Koka before the CCMA that the “... *backdating of contracts is a generally accepted practice*”. I am unable to agree with this general proposition, which was repeated in argument when the matter was heard before me. To put it in general terms, backdating as a generally accepted practice cannot be correct.
- [35] The propriety of the backdating of a document depends upon the purpose and effect of the act. In determining the propriety of backdating a document, it is said that a distinction must be drawn between backdating that fabricates (or misrepresents, to put it mildly) and backdating that memorializes.⁶ The latter is an instance where backdating can be regarded as not only innocuous but reflective of the truth. An instance that comes to mind is a minute or resolution of the board of directors that is prepared after the event, viz: the board meeting itself. The one who drafts such a document at a later date may not be faulted in backdating it to reflect the actual date of the event.

⁶ J L Kwall, S Duhl, “*Backdating*”, 63 Bus. Law. 1153 (2008).

- [36] Similarly, an agreement can be entered into verbally and only recorded in a written contract much later. When the written agreement is executed, it can be backdated to reflect the actual date when agreement was reached. In such an instance, the backdated contract merely memorializes an event which has already occurred. In these instances, where there is no intention to deceive, the act of backdating cannot attract censure.
- [37] In the examples I give above, the necessary *proviso* is that the event recorded must have occurred at the earlier date to which the document is being backdated. If the event did not occur at all, the act of backdating would be the worst form of fabrication which would strip such an act of its legitimacy or propriety. As indicated above, the purpose and/or effect of the act of backdating is instructive.
- [38] In *Jubi Properties (Pty) Ltd v Boyce*⁷, the court dealt with an agreement that was backdated. It did not express any opprobrium on the actual act of backdating but dealt with the exact date when, in law, the agreement came into existence.
- [39] In this matter, no performance agreement whatsoever was, as a matter of fact, concluded between Koka and Soga in or during May 2018. The objective evidence indicates that there was disagreement on the contents of the draft agreement that was exchanged during the year 2018.
- [40] As a general proposition, a contract will be made at the time and place where agreement or consensus is reached.⁸ Again as a general proposition, agreement is reached when each party is aware that the other is in agreement with him.⁹ Therefore, the only time Koka and Soga reached consensus was on 18 March 2019 when they eventually concluded and signed the performance agreement, albeit backdating it to 18 March 2018.

⁷ [2016] ZAGPJHC 338 (7 December 2016) (*Jubi Properties*).

⁸ RH Christie, GB Bradfield, "*Christie's the Law of Contract in South Africa*", 6th ed (LexisNexis) at p 31. See also: *Jubi Properties supra* at para 18.

⁹ *Id.*

[41] The deliberate act of backdating the agreement was, therefore, not to memorialize an agreement that had been reached previously. Instead, it was to fabricate the true state of affairs. Such conduct amounts to false misrepresentation which cannot be legally sustained.

[42] In *Beautement v Propnu t/a Properteam Rental and Another*¹⁰, the court regarded backdating which was aimed at defrauding the South African Revenue Service as a clear misrepresentation.

[43] I find that by looking at the agreement itself without any awareness of the true state of affairs, any third party would be deceived as to when exactly the agreement was concluded. Both Koka and Soga did not bother to disclose their act of backdating in the agreement itself. I, therefore, find that the performance agreement was backdated to fabricate the time at which its conclusion occurred.

[44] As justification for backdating the agreement, reliance was placed on an email from Slabbert dated 17 January 2019 wherein he concluded with the following remarks:

I hope that you will find this to be in order. You are however free to still sign and backdate it with Mr Soga if he is amenable to that.

[45] The email correspondence by Slabbert cannot be used as an excuse or justification for backdating the performance contract. In the first place, Slabbert was wrong to suggest that the performance agreement can be backdated without having established if an agreement had been reached previously between Koka and Soga. Secondly, I say that, as a senior employee of SEDA, Koka should have known better. In fact, she did realise that what Slabbert suggested was not correct.¹¹

¹⁰ [2020] ZAGPJHC 365 (9 October 2020),

¹¹ In a document forming part of her referral to the CCMA, Koka stated: “In my view Mr Slabbert deliberately misled Mr Soga and I into believing that in order to cure the alleged defect the performance agreement had to be backdated”.

[46] Under such circumstances, it would border on being duplicitous for Koka to persist with her reliance on Slabbert's suggestion as authority for backdating the performance agreement. In an email dated 15 August 2019 to Ntokozo Majola, Koka stated the following:

'In my view Mr Slabbert deliberately misled Mr Soga and I into believing that in order to cure a defect we had to backdate the performance agreement. In fact, a defect never arose, and I believe that if Mr Soga and I had known, we would have used the date which we signed the contract which was 18 March 2019.'

[47] All things considered, I am warranted to come to the conclusion that the backdated performance agreement is invalid, null and void *ab initio*, and thus is of no force and effect whatsoever.

[48] In view of this considered finding, I would have found it unnecessary for me to consider whether Soga was authorised to sign the performance agreement on 18 March 2019 and to backdate it to 18 March 2018. However and in view of the fact that the Commissioner pronounced on this issue, finding that Soga had the authority to contract with Koka, I am compelled to deliberate on this pronouncement.

[49] The immediate answer to the question of Soga's authority is in paragraph 3.3 of the Performance Management Policy, which stipulates that the immediate/direct supervisor is the only person authorised, on behalf of SEDA to enter into a performance agreement with his or her subordinate.

[50] As at 18 March 2019, which is the date the performance agreement was concluded and backdated, Soga was not the immediate/direct supervisor to Koka.

[51] The following passage in *South African Eagle Insurance Company Ltd v NBS Bank Ltd*¹² is apt to the circumstances of this matter:

¹² [2002] 2 All SA 220 (A) at para 27.

‘... where one of them purports to be acting in a representative capacity but has in fact no authority to do so, the person whom he or she purports to represent can obviously not be held bound to the contract simply because the unauthorised party claimed to be authorised. That person will only be held bound if his or her own conduct justified the other party’s belief that authority existed.’

- [52] It is my view that the email from Slabbert to Koka dated 17 January 2019 cannot be used as authority for Soga to backdate the agreement. Slabbert left the issue entirely at Soga’s discretion.
- [53] The argument that estoppel could come to Koka’s aid on the question of Soga’s authority to sign and backdate the performance agreement is equally of no avail. It seems clear to me that estoppel cannot be relied upon to sustain a false misrepresentation.¹³
- [54] For the reasons stated above, I come to the conclusion that the decision reached by the Commissioner in his arbitration award issued on 30 November 2020 stands to be reviewed and set aside as being one that no reasonable decision-maker could reach.
- [55] The Commissioner premised his decision that SEDA committed an unfair labour practice on his findings in relation to the first and second issues he was called upon to decide. I however find that the third issue, viz: “*[w]hether Koka is entitled to have her performance evaluated for the 2018/19 financial year in terms of SEDA’s performance management and development policy*” is capable of determination even on the face of an adverse finding concerning the first and second issues.
- [56] In as much as paragraph 4.5 of the Performance Management Policy stipulates that “*[i]ndividual performance shall be evaluated against performance agreement as signed*”, it is my view that such an agreement is not the only basis upon which performance may be evaluated.

¹³ See: *Eastern Cape Provincial Government and others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 148F-I.

- [57] There are provisions in the Performance Management Policy which speak to evidence and monitoring of performance.¹⁴ If the performance agreement is the only instrument in terms of which performance can be evaluated, the object of the Performance Management Policy could be frustrated by a mere deadlock on the terms of the performance agreement, as was the case in this matter.
- [58] It was not only the prerogative but the duty of SEDA to see to it that the performance agreement is in place. In this matter, SEDA failed in its obligation to ensure that a performance agreement was entered into with Koka. Whether this was wilful or through neglect is immaterial for purposes of this judgment.
- [59] At paragraph 1.2.5 of Annexure A to the Performance Management Policy, it is stated that managers are ultimately accountable to ensure that performance agreements are entered into and signed. At clause 12.1, the Policy states that the Human Resources department in collaboration with other divisions shall monitor the implementation thereof. The Policy further provides that performance shall be driven by top leadership.¹⁵
- [60] Further and at paragraph 7.2.1 of Annexure A to the Performance Management Policy, it is stated as one of the roles and responsibilities of the immediate manager/supervisor to enter into a performance agreement with their direct report. At paragraph 3.7 of Annexure A to the Performance Management Policy, it is stated that failure to sign a performance agreement without a valid reason will be treated as insubordination and may lead to a disciplinary action being instituted against the affected employee.
- [61] If due regard is given to the provisions of paragraphs 3.5 and 3.7 of Annexure A to the Performance Management Policy, it becomes evident that there may be justifiable reasons for an employee to refuse to sign a performance agreement.

¹⁴ See *inter alia* paragraphs 7.1.12; 7.2.2 and 7.2.7; 7.2.14 of Annexure A to the Performance Management Policy.

¹⁵ At paragraph 4.3.

- [62] The fact that the Policy itself gives an indication that an employee may refuse to sign a performance agreement justifies my finding that there may be instances where an agreement is not signed. If the fault is that of SEDA, by failing to exercise authority and demonstrate leadership, the employee should not be disadvantaged or prejudiced. However and if the fault is that of an employee, the refusal to evaluate performance may be justified. I find myself in no position to determine where the fault lies, mainly because no evidence was led at arbitration as the dispute was dealt with by way of a "Stated Case".
- [63] In the end, I am of the opinion that this matter should be remitted to the CCMA for a determination, by a commissioner other than the second respondent, on whether Koka is entitled to have her performance evaluated for the 2018/19 financial year in terms of SEDA's performance management and development policy. This is the relief that is recorded as being sought by Koka in terms of the pre-arbitration minute signed by the parties. In making a determination on this issue, the commissioner seized with the matter will be at liberty to also consider whether Koka was justified in refusing to sign the performance agreement.
- [64] With the review application being successful, what ultimately remains for consideration is the question of costs. In the exercise of my discretion, I find no basis to make an order for costs against the unsuccessful litigant in this matter. The papers before me indicate an existing employment relationship between the parties. The requirements of the law and fairness therefore do not call for a costs order against Koka.

[65] I accordingly make the following order:

Order

1. The arbitration award issued by the Second Respondent on 30 November 2020 under case number GATW905/2020 is reviewed and set aside.
2. The matter is remitted back to the First Respondent for arbitration *de novo* before a commissioner other than the Second Respondent on whether Koka is entitled to have her performance evaluated for the 2018/19 financial year in terms of SEDA's performance management and development policy.
3. There is no order as to costs.

N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J. Nysschens of Johan Nysschens Attorneys

For the Third Respondent: Mr R. Kuhn of Rudolf Kuhn Attorneys

LABOUR COURT