

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR439/21

In the matter between:

BRIDGE SERVICE AND PANEL (PTY) LTD

Applicant

and

**COMMISSION FOR CONCLIATION,
MEDIATION AND ARBITRATION
XOLANI NYEMEZELE NO
ALFONSO AMARAL**

First Respondent

Second Respondent

Third Respondent

Heard: 21 February 2024

Delivered: 21 February 2024. This judgment was handed down electronically by emailing a copy to the parties.

Summary: Review of CCMA award. Commissioner failing to apply rules of evidence. Award therefore unreasonable and set aside.

JUDGMENT

DANIELS J

Introduction

[1] The applicant seeks to review and set aside an arbitration award (the “award”) issued by the second respondent (the “commissioner”) on 4 March 2021 under CCMA case reference GAJB13149/20.

[2] The applicant agreed not to oppose the third respondent’s late filing of its answering affidavit. The third respondent (the “employee”) agreed not to oppose

the late filing of the arbitration record, supplementary and replying affidavit. The third respondent further agreed that the citation of the applicant should be amended from Mokoro Holdings Co. (Pty) Ltd to Bridge Service and Panel (Pty) Ltd (hereafter the “employer”). Given that these measures advance the expeditious resolution of the dispute, those issues are dispensed with in accordance with the parties’ agreement.

Material facts

[3] The employee was engaged by the applicant as an assistant mechanic. When he was dismissed, he had about 2 years of service and a clean disciplinary record.

[4] The employer had a strict policy (the “policy”) that no employee was permitted to enter its storage yard in the absence of permission from a supervisor. As the employer’s witness put it at arbitration, the policy or rule was that no employee was “to go anywhere into the yard for any reason without any permission”.

[5] The policy was designed to prevent theft from the storage yard, where the employer stored various items of value, and from where there had been much theft. The employer presented evidence, at arbitration, that its business was not doing well due to the high incidence of theft from the storage yard. This was not contradicted.

[6] The employee was fully aware of the policy. In fact, the policy had been explained to him on the morning of the incident which ultimately led to his dismissal.

[7] On 20 May 2020, the employee was seen in the storage yard by a manager, Mr Sharad Mane (“Mane”). The manager asked the employee why he was there. In response:

7.1 On the employer's version, the employee told Mane that he had forgotten about the rule and apologized.

7.2 On the employee's version, he told Mane that he was executing an instruction by his supervisor, Mr Shane Dwayne (hereafter "Dwayne") which required him to enter the storage yard.

In the presence of Mane, and the employee, the supervisor denied that he had given the employee permission to enter the storage yard.

The Arbitration

[8] It was common cause that:

8.1 The employer had a strict policy that employees should not enter the storage yard without permission.¹

8.2 On the morning of the incident, Dwayne informed everyone that they are not to enter the storage yard without permission.² This information was imparted during the daily morning meeting held in the workshop.³ The employer's sole witness was present at the meeting.

8.3 The employee had not been given permission by his supervisor to enter the storage yard.⁴

8.4 Despite the absence of permission, the employee had entered the storage yard.

[9] Quite correctly, the employer viewed the abovementioned concessions as adequate proof that the employee had committed the offence. Despite it

¹ Transcript p59 lines 3 – 10

² Transcript p57 line 7 – p58 line 12

³ Transcript p57 lines 7 - 11

⁴ Transcript p71 lines 14 – 20

being common cause that the employee had not been given permission to enter the storage yard, the commissioner maintained that the employer should have called the supervisor to corroborate this.⁵

[10] At the start of the arbitration, the commissioner warned the parties as follows: *“it is critical or crucial for both parties when you cross examine a witness and you are disputing the version the witness is putting it is crucial for you to put the version you rely on to the witness”*.⁶ Despite this, when the employee cross-examined Mane, the employer’s sole witness, the employee put no version to Mane that his supervisor had given him permission to enter the storage yard, or that the instruction from his supervisor required him to enter the yard.⁷

[11] When the employee testified that on receiving the supervisor’s instruction to move a vacant car into the bay, he first looked for the car in the parking area. Thus, on the employee’s own version, the supervisor was not aware that his instruction had required the employee to enter the storage yard.

[12] During the cross-examination of Mane⁸ the following exchange occurred:

“Interpreter: Did you question him?”

Mane: Yes.

Interpreter: What was the answer?

Mane: His answer was, was we took a commission (this referred to permission⁹) from the supervisor which wasn’t right. I was having a supervisor next to me. There wasn’t any commission (permission) taken. Anything.”

⁵ Transcript p69 lines 11 – 16

⁶ Transcript p51 lines 10 – 12

⁷ Transcript p60 line 12 – p61 line 17

⁸ Transcript p61 lines 1 – 15

⁹ During the hearing, the parties’ representatives agreed that the transcript was incorrect and the word “commission” should be “permission”.

[13] As to the reason why the employee entered the storage yard, there were at least two different versions from the employee:

13.1 The disciplinary hearing minutes recorded that the *employee went to the storage yard to look for colleagues* - to assist him to move a vehicle into his vacant bay.¹⁰ (Version 1) The status of the minutes, at arbitration, was unclear. However, during the hearing, the representatives of the third respondent referred me to paras 15 – 17 of the minutes. These paragraphs indicate that the employee's version was that he went to the storage yard to find colleagues to assist him to move the car.

13.2 The employee testified¹¹ that he entered the storage yard *to retrieve the car*. (Version 2).

[14] The manager testified that he met the employee in the storage yard.¹² On the other hand, the employee testified that he met the manager in the "workshop" where *he went to look for petrol*.¹³ The employer understood this testimony to mean that the employee went to the storage yard to look for petrol, which would be a third version.

Grounds of review

[15] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*¹⁴ the Constitutional Court held that because arbitrations under the auspices of the CCMA and Bargaining Councils constitute administrative action, our Constitution requires that such action must be lawful, reasonable, and procedurally fair. These requirements are in addition to the grounds set out in

¹⁰ Documents bundle, p26

¹¹ Transcript p72 lines 1 – 8

¹² Transcript p60 lines 20 - 23

¹³ Transcript p65 lines 12 – 13

¹⁴ (2007) 28 ILJ 2405 (CC) at para 110

section 145(2) of the Labour Relations Act No. 66 of 1995 as amended (hereafter the “LRA”).¹⁵

[16] The Constitutional Court stated that an award of the CCMA or Bargaining Council is susceptible to review if the outcome is so unreasonable that no reasonable decision maker could reach it, on all the material before him or her.

[17] In *Commercial Workers Union of SA v Tao Ying Metal Industries & others*¹⁶ (hereafter “*Tao Ying*”) the majority quoted, with approval, from para 267 of *Sidumo* stating that:

“It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

‘It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.” (Own emphasis)

[18] Thus, following *Tao Ying* the failure of an arbitrator to apply his or her mind to the material facts, or failure to apply the law to the material facts, could

¹⁵ *Duncanmec (Pty) Ltd v Gaylard NO & others* (2018) 39 ILJ 2633 (CC) at para 40

¹⁶ (2008) 29 ILJ 2461 (CC) at para 76

lead to a review on the basis that there was a gross irregularity in the proceedings and thus no fair trial of the issues.¹⁷

[19] In *Genesis Medical Scheme v Registrar of Medical Schemes and another*¹⁸ the Constitutional Court stated at para [21]: “By explicitly affording the right to just administrative action, the Constitution bestows on courts the power to review every error of law, provided of course it is material.” (Own emphasis)

[20] Providing further valuable insights on the test on review of CCMA and Bargaining Council arbitration awards, the Labour Appeal Court (hereafter the “LAC”) held that:

20.1 An arbitrator’s reliance on irrelevant factors, or ignoring of material relevant factors, must be assessed to determine whether the wrong enquiry was engaged in, the enquiry was conducted in an improper manner, or the error led to an unreasonable result.

20.2 A material error may, and usually will, lead to an unreasonable result or the denial of a fair trial of the issues.¹⁹

20.3 The reasonableness of the award must be assessed in relation to all the evidence presented.²⁰

20.4 Aside from the reasonableness test, the irregularities contemplated by section 145(2) may also sustain a review application.²¹

¹⁷ A Myburgh “The Correctness Standard of Review” (2023) 44 ILJ 724 at 731.

¹⁸ 2017 (9) BCLR 1164 (CC) at para 21

¹⁹ *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC) at paras 30 and 31

²⁰ *Masscash (Pty) Ltd t/a Jumbo Cash & Carry v Mtsotsoyi & others* (2023) 44 ILJ 162 (LAC) at para 26

²¹ See *Baur Research CC v CCMA & others* (2023) 44 ILJ 172 (LAC) at paras 19 and 20 the court stated that where a party is deprived of a fair hearing such as where the arbitrator failed to act impartially, or where the arbitrator improperly denied legal representation, this would constitute a reviewable defect. In such instances, the arbitrator commits misconduct in relation to his or her duties or commits a gross irregularity in the conduct of the proceedings.

[21] In *Reinhardt Transport Group (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry & others*²² the LAC held that an arbitrator must take into account all the relevant circumstances including the importance of the rule that had been breached, the reason why the employer decided to impose the sanction of dismissal; and the harm or potential harm which may be caused by the employee's conduct.

Application of the law to the facts

[22] Applying the established legal principles to the facts of this matter, I find that the award is so unreasonable that no decision maker could have arrived at it. The commissioner did not apply his mind to the material issues set out below. He committed several gross mistakes of fact and law, any of which would have rendered the outcome unreasonable:

22.1 The commissioner failed to consider that it was common cause that the supervisor did not give the employee permission to enter the storage yard.²³ There was no indication from the evidence that the supervisor was aware that his instruction would require the employee to enter the storage yard. In fact, the evidence suggested the contrary.

22.2 The commissioner failed to appreciate that there was no reason for the employer to call the supervisor to testify when the employee admitted that he had entered the storage yard without permission from the supervisor.

22.3 The commissioner failed to recognize the importance of the rule, and the reason why the employer imposed the sanction of dismissal. The employer's uncontradicted evidence was that pilfering was affecting the viability of the business. In the circumstances, the employer was entitled to impose strict rules as to who gets to enter the storage yard and how this should happen. This much is clear from para 19 of the LAC's judgment in *Reinhardt Transport*

²² (2023) 44 ILJ 172 (LAC) at para 19

²³ See fn. 1

Group. Further, given that the employee did not contest the existence of the rule, or its reasonableness, it was irregular for the commissioner to do so.

22.4 The commissioner accepted the version of the employee that he had entered the storage yard to execute the instruction from his supervisor when this was hearsay evidence.²⁴ The commissioner should have considered whether this evidence should be admitted in accordance with the Law of Evidence Amendment Act (hereafter “LEAA”).²⁵ It is trite that the failure to apply the rules of evidence, in relation to the material issues, renders the outcome unreasonable.

22.5 Section 3 of the LEAA provides that hearsay evidence is inadmissible unless admitted in the interests of justice - taking into consideration the factors in section 3(1)(c): nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value it depends, prejudice to any party and any other factor which should in the opinion of the court be taken into account. The factors in section 3(1)(c) must be considered cumulatively.²⁶ None of the factors are individually decisive.

22.6 In *Exarro Coal (Pty) Ltd v Chipana and others*²⁷ the LAC warned that section 138 of the LRA does not imply that the commissioner may arbitrarily receive or exclude hearsay evidence. Importantly, at para 19, the LAC states that hearsay evidence which is not admitted in terms of section 3(1) of LEAA is not evidence at all.

Costs

²⁴ Transcript p68 lines 19 – 15

²⁵ No 45 of 1988

²⁶ See *S v Molimi* 2008 (3) SA 608 (CC) at para-35

²⁷ [2019] 10 BLLR 991 (LAC)

[23] Both parties sought costs. In labour disputes, costs do not follow as a matter of course. Here, both parties engaged in the litigation to defend their rights. The opposition by the third respondent was not unreasonable.

Conclusion

[24] In the result, the review application is granted, and an order made in terms of prayers 1, 2 and 3 of the amended notice of motion dated 5 October 2021. The award of the second respondent is set aside, the first respondent is directed to enrol the dismissal dispute for hearing before a commissioner other than the second respondent. There is no order as to costs.

R Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv Sadik

Instructed by:

ODBB Attorneys

For the Respondent:

Mr Mphatlalazana

Mphatlalazana Attorneys