

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR609/23

In the matter between:

FRANCE MAPHOSA

Applicant

and

TRINITY MAINTENANCE GROUP (PTY) LTD

First Respondent

MICHAEL BOYCE

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 5 December 2023

Delivered: 22 February 2024

This judgment was handed down electronically by emailing a copy to the parties. The date for hand-down is deemed to be 19 February 2024.

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] This is an unopposed review application in terms of Section 145(2)(ii) read together with 158(1)(a) of Labour Relations Act¹ (LRA). The applicant seeks to review and set aside an arbitration award issued by the second respondent

¹ Act 66 of 1995, as amended.

(commissioner) dated 2 March 2023 under case number GAJB23957-22 under the auspices of the third respondent (CCMA). The commissioner found that the applicant's dismissal by the first respondent (employer) was substantively fair in that there was a fair reason for the applicant's dismissal by the first respondent. The applicant's referral was dismissed.

Factual background

[2] The applicant was employed by the first respondent as a driver/ gardener from 6 November 2019 to 24 November 2022. The applicant was charged with three allegations of misconduct and the disciplinary hearing was held on 4 November 2022. The charges are as follows:

- 2.1. Dishonesty in that on 21 October 2022, you entered false information on the company document. You indicated on the checklist that you performed your duties as required. Upon investigation by the Manager, Mr Matt van Haght, it was found that the information was not true and that all the tasks were not completed.
- 2.2. Bringing the company name into disrepute in that on 21 October 2022, the client was very unhappy with the standard of work.
- 2.3. That you failed to supervise your staff because you were sitting at Caltex Garage while they were working.

[3] Following a disciplinary hearing, the applicant was found guilty of two charges of dishonesty and bringing the name of the company into disrepute and was subsequently dismissed. He was not found guilty of the third allegation. The applicant referred an unfair dismissal dispute to the CCMA.

Grounds for review

[4] The applicant raised three grounds of review. The first ground is that the commissioner erred in making a finding that it was possible that the applicant may not have completed the tasks as they appear on the checklist as he was not at the site as the first respondent claims. The second ground of review is that the commissioner erred by failing to realise that the photographs that were taken by the

first respondent were taken at the time when he was not yet at the site as the photographs were taken and sent to him at 15h25 in the afternoon and he attended to the site only at 15h40 to 17h30. The third ground of review is that the commissioner took the evidence of the first respondent at face value without interrogating it. It was submitted that failure by the commissioner to understand the evidence before him affected his ability to take into account the totality of the facts and therefore misconducted himself when he decided in favour of the first respondent, thereby committing a legal and factual error; and that the decision of the commissioner is a decision which another person in the position of the commissioner would not have arrived at.

Evaluation

[5] The applicant's grounds of review are essentially the failure of the commissioner to evaluate the evidence presented to him by parties during the arbitration proceedings and therefore overlooked material evidence in reaching his conclusion. The arbitrator found that the applicant completed the checklist of the tasks to be performed, to have been properly performed as testified by the first respondent's only witness Matthew Rhys van Haght (van Haght), whereas they have not actually been performed on 27 October 2022.

[6] The commissioner found that the applicant was dishonest in completing the checklist. It appears in the commission's award that photographic evidence in the first respondent's bundle of documents indicated that various tasks had not been performed. Van Haght testified that the photographs were taken on 27 October 2022 at the Bryanston complex, the first respondent's client after the applicant's team had left the company to go to work at that site but had not completed all the tasks that should have been completed.

[7] It is apparent from van Haght's testimony that he arrived at the site shortly after 15h00 on 27 October 2022 and took the photographs at the site after the applicant and the team left the site, but the applicant completed on the checklist that he completed various tasks at 15h40 to 17h30 whereas those tasks were not properly carried out.

[8] According to the applicant's testimony, van Haght's evidence was false as he had shown him those photographs presented during the arbitration hearing on the morning of 27 October 2022 and even sent him a WhatsApp communication from the client who had complained that work was not properly done; and that at the time van Haght alleged he arrived at the site shortly after 15h00, he was still at the complex enquiring with the client about the complaint but did not start working and the client denied any such complaint. The applicant further testified that van Haght lied that he came to the complex whereas he did not. The applicant further testified that he was given a notice to attend a disciplinary hearing in the morning of 27 October 2022 even before he visited the Bryanston complex and he saw members of his team writing statements early in the morning of 27 October 2022. Further van Haght sent him the photographs at 15h22 on the same day and at that time he had already spoken to the client to establish the client's complaint. His further testimony was that van Haght took the photographs on 20 October 2022 not on 27 October 2022 as on the latter date van Haght was not at the complex.

[9] In his award, the commissioner stated as follows:

'[5.6] The respondent's case against the applicant was based solely on the evidence of van Haght and the photos taken, while the applicant was the sole source of the evidence tendered by him. Van Haght was adamant that the misconduct had occurred and the photos were taken in 27 October 2022, while the applicant was equally adamant that the photos were taken on 20 October 2022 and there had not been any misconduct on 27 October 2022.'

[10] The commissioner continued as follows:

'[5.7] The evidence of the respondent's witness (van Haght) was far more probable than that of the applicant and tallied with documentary evidence, as will become apparent. I found no reason to question the credibility of the respondent's witness and I accept his evidence in preference to the evidence of the applicant. To be blunt, the applicant had no defence to the charge against him and this was the reason he sought to create confusion relating to the date of misconduct.'

[11] It must be determined whether the findings of the commissioner in the evaluation and assessment of the material evidence before him are reasonable and determined with due regard to all the evidence in relation to the issues that were before him, especially when faced with conflicting versions as the commissioner has already alluded.

[12] The further analysis of the evidence stated that he found no rational or logical reason for the respondent to charge the applicant for misconduct on 27 October 2022 if the misconduct occurred on 20 October 2022 and that the applicant's attempt to a divorce between the date of the photographs; and this he found surprising as according to him the photographs constitute solid irrebuttable evidence of the task that had not been properly carried out in direct contrast to what the applicant indicated on the checklist had been carried out. The commissioner found that it was the discrepancy between the photographs and the checklist that had given rise to the charge of dishonesty against the applicant.

[13] The commissioner then concluded that:

'[5.12] It is improbable, taking into account the totality of the evidence that the applicant's evidence can be true or that any weight can be attached to his evidence. On a balance of probabilities, I find that the applicant committed the misconduct of dishonesty. There was insufficient evidence to show that the applicant brought the respondent's name into disrepute, although it would be surprising if this was not the case. The evidence of van Haght in this regard was simply hearsay evidence.'

[14] The commissioner in his award did not reason on the finding that the applicant deliberately and knowingly made a misrepresentation that the tasks to be completed at the complex had been completed whereas this was not true. He seemed to have merely admitted the first respondent's version that the applicant lied and was dishonest in making a misrepresentation that the task to be completed at the complex had been completed whereas this was not true.

[15] The commissioner was required to assess the credibility and probability of the evidence presented by van Haght that he received a client's complaint and he

was at the site shortly after 15h00 on 27 October 2022 and even took photographs against the applicant's version that van Haght had shown him the photographs taken on 20 October 2022 in the morning of 27 October 2022 and later sent him the photographs at 15h22, when he, in fact, completed the tasks from 15h40 to 17h30. However, the commissioner failed to evaluate and assess objectively the evidence in order to arrive at a finding that the photographs were not taken on 20 October 2022 but on 27 October 2022 as alleged by Mr Haght.

[16] There is also undisputed evidence led by the applicant that he saw his two team members, Busani and Melusi on the morning of 27 October 2022 signing statements and it transpires in the transcript that during the disciplinary hearing indeed two team members of the applicant made those statements and were called as witnesses of the first respondent, and the applicant challenged their statements on the basis that they did not write the statements themselves but van Haght wrote for them and made them sign, which version was conceded by van Haght in his testimony. The commissioner has not dealt with this evidence and clearly overlooked this material evidence before him.

[17] Another difficulty that I have in the commissioner's finding is that he found the first respondent's evidence more probable than that of the applicant that he merely labelled the applicant's version as a lie with inconsistencies without also pointing out the inconsistencies on the part of the applicant to support this finding that led him to find the applicant's evidence improbable. The commissioner seemed to have confused the applicant's version that the last time he was at the site was on 20 October 2022 and again on 27 October 2022, not that he was never at the site on 27 October 2002 at all. In his testimony, the applicant was clear that on 27 October 2022, upon his arrival at the site, he went to see that client that van Haght indicated had complained about their services, and completed the tasks at 15h40 to 17h30 as it appears on the checklist.

[18] The evidence of the photographs presented by the first respondent's bundle of documents did not show the date and time to confirm the first respondent's evidence that the photographs were indeed taken on 27 October 2022 at 15h00 and the Applicant disputed that van Haght was at the site and took those photographs.

The arbitrator has accepted the photographs were taken by the witness without applying the correct legal principles on the law of evidence and admissibility of photographs, but instead stated in his award that the photographs constitute “*solid irrefutable evidence*” that the tasks that had not been carried out in contrast to what was indicated by the applicant in the checklist.

[19] It is also evident on record that the applicant wanted to present evidence of his own photographs in support of his version to prove that the first respondent’s witness was not on site on 27 October 2022 but the commissioner omitted or failed to guide the applicant in presenting his documentary evidence and photographs from his cell phone, and such his evidence in this regard was then not considered by the commissioner. It is clear from the transcript that the commissioner already on record accepted the version of the first respondent about the date that the photographs were taken and made certain conclusions or findings during the arbitration process. On page 88, line 14, the commissioner stated:

‘So, if it was taken on 20 October 2022 after they have done their work, it was not right. If it was taken on 27 October 2022 after they did their work, it was right.’

[20] The commissioner then confirmed what he said on record in his finding in his award that the photos by van Haght were not taken on 20 October 2022 but on 27 October 2022 with no justification of such a finding in rejection of the applicant’s version which appears clearly on Page 48 of the transcript that looking at the photos that were sent to him on 27 October 2022, he worked on the site on 20 October 2022 and had not been to the site since that day until the 27th of October 2022 at 15h40 when he came to complete the tasks in the checklist.

[21] The commissioner misdirected himself to make a finding that the applicant implied the date of misconduct is 20 October 2022 and that the photographs were irrelevant in respect of any purported misconduct of such a date as they relate to the date of 20 October 2022 not 27 October 2022, the date of the allegations for which he was charged. The commissioner also made an incorrect finding on law as he overlooked the law of evidence that photographs are considered secondary evidence, are not irrefutable and cannot be considered conclusive evidence; but

should be considered with the other evidence presented in coming to a decision of whether they are relevant and admissible evidence.

[22] Page 57, line 16, the transcripts of the record of the proceedings clearly indicate the presentation of the notice to attend the disciplinary hearing by the first respondent and the applicant also presenting the one he received on the morning of 27 October 2022 before he could leave to do his tasks, which he refused to sign. Accordingly, the commissioner in his award has failed to assess, evaluate and make a finding on the material documentary evidence presented by both parties relevant to the commission of the offence by the applicant on 27 October 2022.

[23] In *Booi v Amathole Municipality and Others*², the Constitutional Court remarked that:

‘[29] ... the limitation of remedy to the mechanisms of review, as opposed to an appeal, evidenced a clear intention to prevent labour dispute resolution procedures from becoming costly and time-consuming. Arbitration awards are intended to be final and binding. A review court must necessarily respect this choice, and refrain from treating reviews as appeals. In essence, the determination of the fairness of a suspension (like a dismissal) involves the exercise of a value judgement, something about which reasonable people may differ, and which requires an arbitrator to decide whether what the employer did was fair, after having taken into account the totality of circumstances.’

[24] The determination of any reviewable irregularity on the part of the decision maker determines if the decision of the arbitrator falls within a band of decisions to which a reasonable decision maker could come to on the available material. If so, the award must be upheld regardless of any lapses in the decision maker’s reasoning or conduct. This test is outcome-based. If the outcome can be sustained by reference to the available evidence, regardless of the manner in which the outcome was reached, it must be sustained.

² [2021] ZACC 36; (2022) 43 ILJ 91 (CC) at para 51; see *Department of Public Works and another v Vukela and others* [2022] JOL 54644 (LC) at para 29.

[25] The above evaluation of the commissioner's evidence reveals a failure by the commissioner to rationally and properly assess the evidence before him.

[26] In *Head of the Department of Education v Mofokeng and Others*³, the Court stated as follows:

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues

³ [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC).

to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on the ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’

[27] The judgement of the Labour Appeal Court (LAC) in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*⁴ (*Fidelity Cash*) held:

‘[102] ... It seems to me that, even if there may have been a debate under Carephone and prior to Sidumo on whether a commissioner’s decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner’s decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely

⁴ [2007] ZALAC 12, (2008) 29 ILJ 964 (LAC) at para 102.

to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B, and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain that decision.'

[28] The LAC in *Fidelity Cash* concluded:

'[103] Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of that decision or finding or arbitration award⁵.'

[29] The arbitrator overlooked material evidence in reaching his conclusions. It is evident from the award and transcript record that the commissioner grappled with the conflicting evidence of the parties. The commissioner had to assess and evaluate the evidence as such holistically with regard to the available evidence before him. In *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*⁶ the test is formulated as one in which the technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows:

'[5] To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and

⁵ Ibid at para 103.

⁶ [2002] ZASCA 98; [2003] (1) SA11 (SCA) at para 5.

demeanour in the witness-box,(ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version,(vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.'

[30] In *Masisela v Leonard Dingler (Pty) Ltd*⁷ it was stated that:

'The credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version...'

[31] Further guidance was also provided in *Sasol Mining (Pty) Ltd v Ngqeleni and Others*⁸, in which it was held that:

'[9] The commissioner was obliged to at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought also to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. Instead, he summarily rejected the evidence of the applicant's witnesses on grounds that defy comprehension.

...

[13] ... the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award clearly may have been different had the commissioner properly acquitted himself, renders the award reviewable on account of a

⁷ (2004) 25 ILJ 544 (LC); [2004] JOL 12507 (LC) at para 29.

⁸ [2010] ZALC 141; (2011) 32 ILJ 723 (LC) at paras 9 and 13.

gross irregularity committed by the commissioner in the conduct of the arbitration proceedings.’

[32] Similarly, in this case, it was required of the commissioner when faced with conflicting versions of the parties to weigh the evidence that is tendered before him with a view to arrive at a version that is more probable. I, however, find that the commissioner, in this case, had failed to do so, and this resulted in gross irregularity on his part. The commissioner failed to apply his mind to the facts before him and that affected his sense of fairness in dealing with the dispute. Therefore, his arbitration award stands to be reviewed and set aside.

Costs

[33] The general principle in labour matters is that costs do not follow the result. Cost orders are made unless the requirements of law and fairness are met. This is an unopposed review application and there are no good reasons why a cost order can be granted.

[34] I thus make the following order:

Order

1. The arbitration award of the second respondent is reviewed and set aside.
2. The unfair dismissal dispute between the first respondent and the applicant is remitted for re-hearing before the CCMA by another commissioner other than the second respondent.
3. There is no order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Tolo Sadike

Instructed by: Oosthuizen, Du Toit, Berg & Boon Attorneys