

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2187/2020

**In the matter between
MINNAAR BOERDERY**

Applicant

and

CCMA

1st Respondent

RAMADIMALA JACKY MATETA N.O

2nd Respondent

NUFBWSAW obo KOBELA AND 22 OTHERS

3rd Respondent

Heard: 5 October 2023

Delivered: 29 April 2024

Summary: Application to the Labour Court in terms of section 145 of the Labour Relations Act 66 of 1995 as amended to review and set aside the CCMA arbitration award. The CCMA granted an award in favour of 23 employees who were dismissed for misconduct during a protected strike – CCMA found that the employees' dismissal was both substantially and procedurally unfair- Employer now seeks to review and set aside the commissioner's decision and/or have it remitted to CCMA for hearing *de novo* before another commissioner.

The judgment was handed down electronically and was circulated to the legal representatives of the parties. The date and time for hand down is deemed to be 29 April 2024.

JUDGMENT

MORGAN, AJ

Introduction

- [1] This is a review application of an arbitration award by the Second Respondent (Commissioner), acting under the auspices of the First Respondent (CCMA) wherein he found that 23 employees represented by the Third Respondent (trade union) were dismissed from the Applicant's (Minnaar Boerdery) employ unfairly on the ground of misconduct. The Commissioner found their dismissal to be both substantively and procedurally unfair.
- [2] This application is brought in terms of section 145 of the Labour Relations Act¹ (LRA)². The applicant seeks to have the award granted by the Commissioner reviewed, set aside and substituted with an order that the dismissals were both substantively and procedurally fair, alternatively, remit the matter to the CCMA to be heard *de novo* (afresh) before another Commissioner of the CCMA other than the First Respondent.

Background facts

¹ Act 66 of 1995, as amended.

² Section 145 provides:

'145. Review of arbitration awards

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17,20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained

[3] The Applicant is Minnaar Boerdery and conducts its business on two farms. On 25 May 2018, the Third Respondent referred a mutual interest dispute to the CCMA. The facts of the mutual interest dispute are as follows:

3.1 The Applicant received proposals for salary negotiations from a trade union official, Mr Tiba. The Applicant then wrote to the trade union stating that since the Minimum Wage Act³ was about to be implemented, some of the employees' posts would be redundant and would likely be retrenched. The trade union insisted that salary negotiations must take place. The Applicant then issued a list of employees likely to be retrenched and stated that it wanted to deploy some of the employees within the company.

3.2 The third Respondents indicated that they do not accept the Applicant's proposal and after going to the CCMA, they were advised to refer a mutual interest dispute. They were later informed that they could not refer the dispute as the employer withdrew the dispute and requested assistance in terms of section 150 of the Act.

3.3 Both the Applicant and the trade union met with the Commissioner, where the parties agreed on a compromise on the bonus as per demands. Further, the trade union suggested a 9-hour shift, and the employer counter-proposed an 8-hour shift during the week and 5 hours on Saturdays.

3.4 The trade union rejected the employer's offer. The trade union membership started to decrease and were later informed by the employer that its bargaining rights were terminated.

[4] Since the dispute remained unresolved, the trade union referred a dispute to the CCMA and the Commissioner granted a strike certificate on 25 June

³ Act 9 of 2018.

2018, allowing the union and its members to commence with a legally protected strike.

- [5] On 22 July 2018, the trade union served the Applicant with a notice to commence a strike in which they repeated their demands and the fact that the strike would commence on 24 July 2018 at 15h30.
- [6] On 24 July 2018, the Applicant provided the Third Respondent with picketing guidelines and a lock-out notice.
- [7] Thereafter, the strike commenced. As a result of the strike, all major agricultural entrances were barricaded by the striking workers, physically stopping vehicles from entering or leaving the restricted area. The strike lasted till 31 July 2018.
- [8] The Applicant issued disciplinary notices for those employees who participated in the strike on 13, 16 and 23 November 2018. The disciplinary hearings were held on 19 and 26 November 2018.
- [9] On 19 and 26 November 2018, the members of the Third Respondent were dismissed.
- [10] On the subsequent dates: 22 May 2019, 15 to 17 July, 16 September 2019, 11 February 2020 1 to 2 July 2020, 17 July August 2020, and 21 to 23 September 2020, arbitration proceedings were held at the CCMA offices in Tzaneen and the proceedings were concluded on 22 and 27 October 2020, and the findings were as follows.

The arbitration award

- [11] The dismissed employees referred an unfair dismissal dispute to the CCMA. They challenged both the substantive and procedural fairness of their dismissals.
- [12] For brevity, I will summarise the arbitrator's findings as follows:

- 12.1 The dismissal of the employees is found both procedurally and substantially unfair because they were not given the opportunity to cross-examine witnesses,
- 12.2 With reference to the Code of Good Practice⁴, the employer must put allegations to the employee in a manner that they can understand.
- 12.3 The Respondent is ordered to reinstate the Applicants back to employment (immediately after their dismissal and they must report for duty on 1 December 2020) on the same terms and conditions or terms that are no less favourable than the ones applied before their dismissal.
- 12.4 As a result of the retrospective nature of the Applicant's reinstatement, the Respondent is ordered to pay amounts that would have been the Applicant's salaries from the date of their dismissals to the date of their reinstatement.
- 12.5 These back payments are subject to statutory deductions.

Review by the applicant

[13] The Applicant brought an application for review as per section 145 of the LRA, on the following grounds: (a) the Commissioner committed misconduct in relation to his duties as an arbitrator and/or (b) gross irregularities in the conduct of the arbitration proceedings by:

- 13.1 Failing to conduct the proceedings in a fair manner;
- 13.2 Allowed the Applicant to adduce evidence and by making unreasonable rulings not supported by facts and or law;

⁴ Labour Relations Act, No. 66 of 1995 – Schedule 8 CODE OF GOOD PRACTICE: DISMISSAL.

- 13.3 Failed to deal with the factual disputes in a fair and legal manner by disregarding material facts;
- 13.4 Committed numerous errors of fact; and
- 13.5 Erred in awarding retrospective reinstatement by failing to have regard to circumstances surrounding the dismissal of the Third Respondent's members.

Issues in dispute

[14] The issue in dispute before this Court is the test for review, which is reasonableness. The question to ask is: *"Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"*⁵

Legal framework

The test for review is reasonableness.

[15] *Sidumo v Rustenburg Platinum Mines Ltd and Others*⁶ (*Sidumo*) is a landmark case in South African labour law, which established the test to be used in reviewing awards granted by commissioners. It must be noted that section 145 of the LRA is suffused by the constitutional standard of reasonableness.

[16] An applicant must not only establish that the commissioner's reasons are unreasonable, but also that no good reason exists in all the material presented before the commissioner to justify the award.

[17] The threshold for meeting the test for reviewing a CCMA award is very high. The test is not that the arbitrator made an incorrect decision—this is the basis for an appeal—but that the arbitrator's decision must be one that no reasonable decision-maker could reach on all the material that was before them.

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

⁶ *Ibid.*

- [18] Fundamental labour rights are embodied in section 23 of the Constitution. It reads as follows: “(1) *Everyone has the right to fair labour practices*”.⁷ This constitutional provision protects the right to fair labour practices and oversees the relationship between an employer and employee.
- [19] Additionally, section 185 of the LRA goes hand in hand with the dictates of the Constitution. It echoes section 23 of the Constitution, by providing that “*every employee has the right not to be unfairly dismissed or subjected to unfair labour practices*”.⁸
- [20] On an international perspective, we must concern ourselves with the International Labour Organisation (ILO), particularly Convention 158. South African law corresponds with the ILO's approach, which says that every dismissal must be done in a fair manner and for reasons concerned with either the behaviour or performance of the employee or the operational requirements of the employer.⁹
- [21] Conflict in employment relationships is nothing new in labour practices. Conflicts in workplaces can neither be prevented nor avoided but can be managed. Should it happen that the parties to a dispute are unable to come to an agreement, the involvement of an external and impartial third party is vital in assisting the parties in resolving any disputes that may arise.¹⁰ In the South African context, this is where the labour legislation, together with the CCMA, comes into play. With the adoption of the LRA, the primary objective of fair labour practices is achieved, which is to have an effective resolution of labour practices.¹¹

⁷ Constitution of the Republic of South Africa, 1996.

⁸ Section 185(a) to (b) of the LRA.

⁹ Andrew Levy's *Labour Law in Practice- a guide for South African Employers 2010* (Macmillan, Cape Town 2010).

¹⁰ Phungula “A Critical Review of labour commissioners' dilemmas when dealing with workplace disputes in South Africa” (2024) Vol. 12 (2) Journal of Law and Sustainable Development.

¹¹ Botma *The role of reasonableness in the review of labour arbitration awards (Part 1)* (2009) Obiter.

[22] In determining the reasonableness of an arbitrator's award, the Labour Court must broadly analyse and consider the merits of the dispute. If it is established that the arbitrator's decision is unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence, and involves speculation by the arbitrator.¹²

[23] Returning to the majority judgment in the *Sidumo* matter, Navsa AJ next reflected on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*¹³ (*Bato Star*), in which the constitutional formulation of reasonableness had first been devised. In this matter, the Constitutional Court (CC) pointed out that gross unreasonableness was not a requirement to justify a review. Instead, the question was simply whether the decision made by the relevant commissioner was “one that a reasonable decision-maker could not reach”.¹⁴

[24] In Navsa AJ's judgment, the standard of reasonableness was stated as follows:

‘The ultimate question in determining whether to interfere with a commissioner's award in arbitral proceeding is whether the conduct of the commissioner falls into any of the grounds of review set forth in section 145 (2) of the LRA, namely, misconduct in relation to his or her duties, gross irregularity in the conduct of the arbitration proceedings, or acting in excess of his or her powers. These grounds of review must be interpreted in light of the constitutional constraints referred to above

¹² *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (Securitas)* [2021] ZALAC 5; (2021) 42 ILJ 1071 (LAC) at para 9.

¹³ [2004] ZACC 15; 2000 (4) SA 490 (CC).

¹⁴ *Fergus From Sidumo to Dunsmuir: The test for review of CCMA Arbitration awards*. University of Cape Town, 2013.

and the primary objective of the LRA. This is the interpretive injunction contained both in section 39(2) of the Constitution and in the LRA.¹⁵

[25] The CC had resolved that the reasonableness of decisions was to be determined with reference to:

‘the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.’¹⁶

[26] Looking into the judgment of *Securitas* in the Labour Appeal Court, an application for a review of an arbitration award was dismissed. Kathree-Setiloane AJA referred to the judgment in the Labour Court in which the following was said: before the arbitrator concluded that the employees’ dismissals were procedurally and substantially unfair, the arbitrator dealt exhaustively with evidence and facts before him. It cannot be argued that he acted in contravention of his duties as an arbitrator or that he went above and beyond his powers. Therefore, the decision of the arbitrator was a decision that a reasonable person would reach. Furthermore, it is a decision that was reasonable and warranted by the proof and facts brought forward. With that being said, the Court has no reason to interfere.¹⁷

[27] The reasonableness standard is applicable because the emphasis is on the commissioner’s subjective reasons for his findings that led him to a said conclusion, rather than the jurisdictional fact’s objective existence. A court on review can accordingly set aside a decision if the commissioner, in coming to a conclusion that committed one or more of the section 145 grounds for review.¹⁸

¹⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 164.

¹⁶ *Bato Star* at para 45.

¹⁷ *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] ZALAC 5; (2021) 42 ILJ 1071 (LAC).

¹⁸ Botma *The role of reasonableness in the review of labour arbitration awards (Part 1)* (2009) Obiter.

[28] The outcome of *Sidumo* was clearly informed by legislative intent, and read with contextual factors specific to CCMA proceedings. The CC declared the rule that reasonable decisions may differ from one decision-maker to the next. *“This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner”*.¹⁹

Application of the law to the facts

Reasonableness as a test for review.

[29] Under this matter, the issue before this Court is the following:

(a) Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?

[30] Under this standard, courts must assess the reasonableness of a Commissioner's award by establishing whether the decision is one that a reasonable decision-maker could not reach.

[31] Different from Conciliation, whereby parties are obliged to decide how they would agree to resolve their dispute, Arbitration grants the decision-making powers to the arbitrator.²⁰ If a commissioner fails to apply his/her mind properly to material facts and consequently narrows the inquiry by incorrectly construing the scope of an applicable rule, he/she will not fully and fairly determine the case before him/her. In addition, it held that such a decision will be tainted by dialectical unreasonableness, which results in a lack of rational connection between the decision and the evidence and, hence, a likely unreasonable outcome.

¹⁹ Fergus *From Sidumo to Dunsmuir: The test for review of CCMA Arbitration awards*. University of Cape Town, 2013.

²⁰ Phungula “A Critical Review of labour commissioners' dilemmas when dealing with workplace disputes in South Africa” (2024) Vol. 12 (2) Journal of Law and Sustainable Development at p6.

[32] It must be pointed out that if the reviewing court comes to a conclusion that the commissioner has committed misconduct or a gross irregularity or has exceeded his powers in terms of section 145(2) of the LRA because the decision is not justifiable in terms of the reasons given then the arbitration award is reviewable and to be set aside.

[33] The Commissioner, as an impartial and independent person, exercised reasonableness taking into account all facts and evidence presented to him. The Commissioner, in addition to this, applied his mind and exercised what was stemmed in the *Sidumo* case. He further, in evaluating the circumstances of this case upheld the constitutional values and LRA goals of affording everyone rights to fair labour practices. The commissioner's reasoning process, defective or not, should not be the determining factor to warrant a review of his arbitration award.

[34] From the record filed and pleadings before me, I am satisfied that the Commissioner's award was correct and justified in finding and outcome in light of the evidence that was placed before him by the parties in the arbitration proceedings.

[35] In the circumstances, I make the following order:

Order

1. The CCMA award is confirmed, the dismissal of the 23 (twenty-three) employees by the Applicant was procedurally and substantially unfair.
2. This application is dismissed.
3. There is no order as to costs.

LM. Morgan

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate D Groenewald

Instructed by: Van der Smit Attorneys

For the Respondents: Mr N Voyi

Instructed by: Voyi Inc.

LABOUR COURT