



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no.: JR 2452/2008

In the matter between:

MAISHE MAPONYA

Applicant

And

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL ("SALGBC")

First Respondent

JAFTA MPHAHLANI N.O.

Second Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

Third Respondent

Heard: 13 DECEMBER 2012

Delivered: 28 April 2015

Summary: Review proceedings – gross irregularities as grounds of review. The test on review considered and applied – grounds lacking merit to sustain review based on material before Arbitrator – review dismissed.

JUDGMENT

WOODHOUSE AJ

Introduction

- [1] This matter came before this Court as an application for the review and setting aside of the arbitration award of the Second Respondent (“the Arbitrator”), handed down under the auspices of the First Respondent (“the SALGBC”) on 30 September 2008, under case number 216/JDBC/07/05/03.
- [2] The Applicant party (“Maponya”) brought the current application before the Court seeking the review and setting aside of the abovementioned arbitration award on various grounds as will be dealt with herein below. The Third Respondent (“The City”) has opposed this application.
- [3] Accompanying the review application, and as a preliminary issue for the Court’s determination, was an application for the condonation of the late service and filing of the City’s answering affidavit in the review application.

Background of material facts

- [4] This matter arises from the employment of Maponya by the City, for present purposes, as a Director: Arts, Culture and Heritage on 1 April 2001.
- [5] Pursuant to pre-dismissal arbitration proceedings conducted by the City in *absentia* on 24 – 27 March 2003 before Commissioner Larry Shear (“Commissioner Shear”), Maponya was dismissed on 3 April 2003 for various allegations of misconduct.
- [6] In proceedings subsequently launched by Maponya before this Court, my brother Francis J (as he then was in this Court) held that Maponya had the

right to challenge the fairness of his dismissal through arbitration proceedings in the normal course.

- [7] Maponya subsequently, on 7 May 2003, referred an alleged unfair dismissal dispute to the SALGBC for conciliation and, failing that, arbitration.
- [8] On 22 March 2006, a certificate of non-resolution was issued indicating that, as at that date, the alleged unfair dismissal dispute referred by Maponya remained unresolved.
- [9] The matter was subsequently referred to arbitration, which took place on various dates commencing from 25 May 2006 until around 23 April 2008.
- [10] As already indicated above, on or around 30 September 2008, the Arbitrator issued his arbitration award.
- [11] Briefly, in his arbitration award, the Arbitrator found that the dismissal of Maponya had been procedurally and substantively fair, and dismissed his referral, with no order as to costs.
- [12] The charges preferred against Maponya were damning and related, *inter alia*, to his alleged irregular conclusion of a contract of employment with one Reggie Zikalala ("Zikalala"); the irregular conclusion of a contract with Zikalala for a transport allowance; the irregular appointment of 21st Century Communications CC and Marinsky Promotions and Productions CC, as well as the effecting of payments to these entities; the alleged irregular appointment of Khulekani Security Services CC and Fanya Fujo U Wone Security and Cleaning Services CC, as well as the irregular effecting of payments to these entities; the alleged irregular appointment of South African Promoters Association, of which Zikalala was a director, as well as authorising payments to be made to this entity; the alleged irregular making of payments to Jaja CC; the alleged irregular appointment and effecting of payments to 707i Entertainment; and

misrepresentation with respect to payments of loans taken by Maponya from the City.

- [13] Subsequently, on or around 14 November 2008, Maponya launched the current proceedings. On 25 November 2008, the City served and filed its notice of opposition.
- [14] On 13 August 2012, the City served and filed its answering affidavit in opposition to the review application accompanied by an application for the condonation of the late filing thereof.
- [15] On 21 August 2012, Maponya served and filed his replying affidavit. Heads of Argument were subsequently served and filed by the parties on 1 November 2011 and 26 November 2012 respectively.
- [16] The matter was subsequently scheduled for argument before this Court on 13 July 2012, at which point an order directing Maponya to serve and file the missing portions of the record was issued. The missing portions of the record were then served and filed on 27 July 2012.
- [17] The matter was then scheduled for argument on the merits on 13 December 2012, after which Judgment was reserved.

The condonation application

- [18] After perusing the file and the papers in the application for condonation, it became clear that condonation was, in fact, not necessary in the matter as, in truth, the answering affidavit was not served and filed out of time. Even if I am wrong in coming to this conclusion, I am satisfied that the City has provided a plausible explanation for the delay and that it, coupled with the good prospects of success and relative prejudice, militate in favour of the granting of condonation in this matter for the following brief reasons:

18.1 the review application was served and filed on
14 November 2008;

- 18.2 it is not clear when the record was initially filed;
- 18.3 Maponya then served and filed a Notice in terms of Rule 7A(8)(a) accompanied by a supplementary affidavit dated 31 August 2010;
- 18.4 the City served and filed its Notice of Opposition on 25 November 2011;
- 18.5 it appears that, the record of the arbitration proceedings having been found to be incomplete, a reconstruction meeting was held between the parties on 5 May 2011;
- 18.6 it is unclear what the parties' representatives agreed to at such a reconstruction meeting, but it appears that some agreement for Maponya not to serve the outstanding portions of the record (the bundles of documents relied upon at arbitration) was reached. Insofar as Maponya alleges that agreement was also reached that he not serve or file a Notice in terms of Rule 7A(6), as well as not file the missing record in Court, this is disputed by the City;
- 18.7 be that as it may, Maponya did not, at any stage prior to being directed by order of this Court dated 13 July 2012, serve or file a Notice in terms of Rule 7A(6). Nor did he, in fact file the outstanding portions of the record with the Court before that – the Notice in terms of Rule 7A(6) accompanying the outstanding portions of the record were only subsequently filed on 27 July 2012;
- 18.8 Maponya filed (but did not serve) heads of argument in the matter on 1 November 2011;

- 18.9 on 13 August 2012, the City served and filed its answering affidavit accompanied by its application for the condonation of the lateness thereof;
- 18.10 Maponya's replying affidavit was served and filed on 21 August 2012;
- 18.11 the matter had at that stage been scheduled for argument on the opposed motion roll before me on 13 July 2012, at which point the order mentioned at paragraph 18.7 above was issued;
- 18.12 briefly, that Court order directed Maponya to serve and file the outstanding portions of the record within 10 days, after which the parties would serve and file their subsequent pleadings within the applicable time periods in terms of the Rules of this Court;
- 18.13 the City's Heads of Argument were subsequently served and filed on 27 November 2012 and the matter was then re-scheduled for argument on the merits before me on 13 December 2012.
- 18.14 the above being the case, and noting that an Answering Affidavit only falls due once a complete record of the arbitration proceedings has been served and filed by an applicant party, the Answering Affidavit filed on 3 August 2012, in circumstances where the complete record was only served and filed on 27 July 2012, in this matter was clearly not filed out of time.¹ At that stage, the answering affidavit was filed 5 days after the Notice in terms of Rule 7A (6) and the events that had transpired had rendered Maponya's Notice in terms of Rule 7A(8) filed on 31 August 2010 clearly premature. For these

¹ See: Rule 7A (9) read with Rules 7A(6) and 7A(8) of the Rules. See also: *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others* [2003] 5 BLLR 416 (LAC).

reasons, there is no delay in the filing of the Answering Affidavit that requires condonation by this Court.

18.15 as already concluded earlier, even if this conclusion is wrong, I am satisfied that condonation stands to be granted having regard to the plausible explanation given, the City's good prospects of success on review, the balance of convenience and the importance of the case.²

[19] For these reasons, and insofar as necessary, condonation for the late filing of the Answering Affidavit stands to be granted.

The review application

[20] Maponya has attacked the arbitration award on various grounds, the essence of which is the following:

- 20.1 the Arbitrator disregarded relevant and material evidence and abrogated his duty to assess the totality of the evidence in a fair and balanced manner, which resulted in him denying Maponya his right to a fair hearing;
- 20.2 had the Arbitrator regarded the evidence before him he would have come to the conclusion that Maponya was not guilty of the allegations of misconduct preferred against him;
- 20.3 the Arbitrator effectively ignored or misconstrued all the evidence that sought to indicate that Maponya exercised his duties in accordance with his contract of employment;
- 20.4 the Arbitrator acted in a grossly unreasonable and unjustifiable manner in coming to the conclusion that Maponya's dismissal

² See: *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) and *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

was fair, which was indicative of his failure to apply his mind to the evidence before him;

- 20.5 the Arbitrator failed to have any or adequate regard to the evidence of Maponya;
- 20.6 the Arbitrator arrived at conclusions that were not rationally connected with or sustainable on the evidence properly before him;
- 20.7 the Arbitrator failed to properly conceptualise the nature of the legal issues to be determined;
- 20.8 the Arbitrator failed to take proper account of the circumstances surrounding Maponya's dismissal in *absentia*, which included the fact that the pre-dismissal arbitration proceedings were conducted unlawfully, that the ruling made in *absentia* was unfair, that Maponya was not afforded an opportunity to make representations on guilt or mitigating circumstances before a final conclusion was made on the issue of sanction;
- 20.9 the Arbitrator misdirected himself in coming to the conclusion that a negative inference should be drawn from the fact that Maponya failed to call Zikalala as a witness at the arbitration but failed to draw a similar inference in respect of the City's failure to call Zikalala, as the onus of proof rested on it;
- 20.10 the Arbitrator failed to make a finding on whether a duty rested on Maponya to ensure that the car loan was deducted from his salary and whether, in failing to do so, Maponya breached a rule regulating conduct in the City's workplace;
- 20.11 the Arbitrator failed to take into account the circumstances surrounding the car loan, including the restructuring that took

place and the fact that the insurance was still being deducted from his salary;

20.12 the Arbitrator descended into the arena on numerous occasions and allowed inadmissible evidence to be adduced (hearsay evidence) as well as allowed the City's representative to ask leading questions in both examination-in-chief and the re-examination of the City's witnesses;

20.13 the Arbitrator failed to take proper account of the circumstances surrounding the car hire issue and, in particular, that Zikalala made representations to Maponya which were untrue, which, together with the urgency of the matter at the time, led to Maponya arranging for payment of a car for Zikalala; and

20.14 for all of the above reasons, so Maponya submits, the Arbitrator's award stands to be reviewed, corrected or set aside as it is not justified and rationally connected to the evidence before him.

[21] Despite no prayer in the Notice of Motion and Founding Affidavit to this effect being sought, the parties are *ad idem* that the Court should substitute the Arbitrator's award with its own order should it find that the award stands to be reviewed and set aside.

The test on review

[22] Arbitration awards issued by commissioners of the CCMA and arbitrators of various bargaining councils are reviewable in terms, *inter alia*, of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") on any of the specific grounds set out therein. These grounds are:

22.1 where the Commissioner commits misconduct in relation to his duties as an arbitrator;

22.2 where the Commissioner commits gross irregularities in the conduct of the arbitration proceedings;

22.3 where the Commissioner acts out of his powers as an arbitrator, or where the Commissioner's ruling/award was improperly obtained.

[23] The test to be applied by this Court in deciding on the reviewability or otherwise of an arbitration award has been settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC). This test is based on the Constitutional standard of reasonableness which, as the Constitutional Court held in *Sidumo*, now suffuses the grounds of review set out in section 145 of the LRA précised above.

[24] Insofar as any controversy may have emerged on the full extent of this Court's powers on review, it has been finally settled by the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Limited and Others*.³

[25] In the *Herholdt* decision, the SCA recognised the continued applicability of the gross irregularity ground of review.⁴ The SCA, however, considered that the upper ground of review (based on unreasonableness) should apply a little more narrowly than certain Judgments of the LAC and this Court had previously found. The key paragraph of the SCA decision is the following:

'In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a

³ See: *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).

⁴ See: s145 (2)(b) of the LRA.

reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.⁵

- [26] In my view, the effect of the SCA decision is important, but hardly extraordinary. It is not open to an applicant to seize upon errors of fact or law (gross irregularities) made by a commissioner/arbitrator and regard these as being sufficient to sustain a review application. The errors must have led to an unreasonable result (i.e. ultimate decision). But this does not mean that errors of fact or law by commissioners will not make for a successful review challenge in appropriate cases. I consider the following observations by Murphy AJA in the LAC Judgment in *Herholdt v Nedbank Limited* [2012] 9 BLLR 857 (LAC), to remain instructive:

‘... I imagine, few decisions that are wrong are likely to be upheld as reasonable. Leaving aside the moral hazard of a message to commissioners that there is no need to get their decisions right, it being enough if they act reasonably, commissioners who get it wrong on the facts will usually commit the concomitant irregularity of not taking full or proper account of material evidence, and where they erred on the law, they will fall short in not having properly applied their minds to the issues and thereby having denied the parties a fair trial. The inexorable truth is that wrong decisions are rarely reasonable....’⁶

- [27] The above notwithstanding, I am of the view that none of the grounds of review raised by Maponya have any merit in this matter. At the outset, most of the grounds (i.e. paragraphs 1 – 7) raised by Maponya are cast in unacceptably general terms without specific reference being made to precisely how it is alleged that the Arbitrator committed reviewable irregularities with regard to the material before him in each instance. In my view, it is not enough for a review applicant to set out grounds of review

⁵ At para 25.

⁶ At para 55 of the LAC Judgment.

that, in effect, constitute general complaints/conclusions about some or other conduct by an arbitrator without specific details being provided of the material giving rise to such alleged reviewable irregularities. It is not for this Court to guess what each general complaint might possibly relate to. Maponya's grounds of review are more akin to grounds of an appeal. They are not satisfactory for the purposes of an application in terms of section 145 of the LRA.

- [28] Be that as it may, it cannot be said, in the circumstances of this case, that the Arbitrator either disregarded material evidence and abrogated his duties, thereby denying Maponya a fair hearing; or acted unreasonably in finding Maponya guilty of the charges against him; ignored or misconstrued evidence; failed to apply his mind to evidence; failed to have any or adequate regard to Maponya's evidence; arrived at conclusions which were not rationally connected to the evidence; or failed to conceptualise the contentious legal issues; or produced an award that was unreasonable in the *Sidumo* sense.
- [29] As to the review ground set out at paragraph 20.8 above, this Court cannot fault the Arbitrator's findings on procedural fairness as they were properly founded on the material before him. In this regard, it was common cause that proper notification to attend the pre-dismissal arbitration / disciplinary enquiry had been given to Maponya extending, as it was supposed to, all the necessary rights to him in terms of the Code of Good Practice: Dismissal and that he, of his own accord, decided not to attend that hearing. Furthermore, the Arbitrator's finding that, despite being held by this Court to not constitute proper pre-dismissal arbitration proceedings conducted in accordance with a valid pre-dismissal clause, the purported pre-dismissal arbitration proceedings still constituted a hearing (i.e. a valid disciplinary enquiry) as required by the Code of Good Practice: Dismissal is beyond reproach. The Arbitrator also took account of the provisions of section 138 of the LRA and the well-established jurisprudence of this

Court⁷ to the effect that arbitrators ought not to adopt an overly technical / legalistic approach in conducting arbitration proceedings or determining procedural fairness. The fact that arbitration proceedings are proceedings *de novo* was also considered in support of the Arbitrator's findings. For these reasons, I am of the view that Maponya's ground of review in this regard is without merit as it cannot be said that the Arbitrator's reasoning and conclusion on procedural fairness are decisions that fall outside the band of reasonable decisions having regard to the material before him. The fact that Maponya's case was not heard at the disciplinary stage was due to his own conduct in choosing not to attend.

- [30] As to the review ground set out at paragraph 20.9 above, it was Maponya himself who was alleged to have entered into a contract of employment with Zikalala, to have had knowledge of Zikalala's involvement (Principalship) in 21st Century and to have authorised payments to 21st Century, the result of which would benefit Zikalala personally. The City's evidence established, on a balance of probabilities, that Maponya was guilty of these charges, i.e. he, with full knowledge of Zikalala's involvement in 21st Century, entered into an employment contract with Zikalala and authorised the payment to 21st Century and, thus, extended the personal benefit to Zikalala. Despite his denial of it, evidence was placed before the Arbitrator that, in my view, clearly established that Maponya was well aware of Zikalala's Principalship of 21st Century and which established his guilt of the above charges.⁸ This clearly established a *prima facie* case, and resulted in a shift of the evidentiary burden to Maponya to disprove by adducing some material evidence. He failed to do

⁷ See: *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others* [2006] 9 BLLR 833 (LC).

⁸ The evidence included, *inter alia*, the written contract entered into with Zikalala, Zikalala's testimony before Commissioner Shear to the effect that he knew Maponya from the University of the Witwatersrand and that there was no way that Maponya would have been unaware of his involvement in 21st Century taking into account that he (Zikalala) had previously presented a proposal to Maponya on behalf of 21st Century. Maponya's own testimony that he knew about 80% of all the people in the industry and that he had, at some point, become close friends with Zikalala further confirmed the City's version in this regard.

so.⁹ His failure to call Zikalala exacerbated his position in this regard, and not that of the City. Accordingly, the Arbitrator's findings in this regard, being supported as they are by the material properly before him, are unassailable.

[31] Notwithstanding the above, I am of the view that the Arbitrator was entitled and even enjoined to have regard to the evidence of Zikalala presented at the pre-dismissal arbitration proceedings in keeping with the provisions of section 138 of the LRA, section 3 of the Law of Evidence Amendment Act, 45 of 1988, and the Judgments of this Court in *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] 10 BLLR 1105 (LC) and *Naraindath v CCMA and Others* [2000] 6 BLLR 716. This was particularly so because the City had made every attempt to bring Zikalala before the arbitration proceedings, including having a subpoena validly issued for him, but was simply unable to.

[32] As to the review grounds set out at paragraphs 20.10 – 20.11 above, the undisputed evidence before the Arbitrator was that Maponya was obliged, in terms of a written loan agreement, to repay, in 72 instalments, the loan extended to him by the City. The Arbitrator found, again through undisputed evidence presented, that Maponya had failed to make and/or to ensure that instalment payments were made from his bank account over a period of 4 years.

[33] To explain this failure, Maponya referred to a letter he had written to the City dated 20 September 2002 in which he asserted that the he "*had had deductions made from [his] salary since October 1996*", which was clearly untrue. Once that explanation was proven to be misleading, Maponya proffered a second one – he alleged that he had assumed, from the then Municipal Manager's itemisation of his package and deductions, that the car loan he owed and had not repaid in 4 years had been "*written off*" by the City subsequent to some restructuring exercise. He, however, did not

⁹ See: *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC).

bother to confirm his assumptions with the Municipal Manager. From the evidence before the Arbitrator, it was clear that a positive obligation rested on Maponya, as a senior member of the City's management and a Director, to take steps to ensure that his loan was repaid. He failed to do so, and his explanations for not doing so appeared to be flawed and contrived. The explanations he did tender were either unsatisfactory or false. It was, therefore, not unreasonable, in the *Sidumo* sense, for the Arbitrator to conclude that Maponya was guilty of this charge.

[34] As to the review ground set out at paragraph 20.12 above, after perusing the copious record of the arbitration proceedings, I have found no instance of the Arbitrator acting improperly by descending into the arena of the dispute thereby disadvantaging Maponya or effectively denying him the opportunity of having his dispute fully and fairly determined. In keeping with section 138 of the LRA, the Arbitrator was empowered to conduct the arbitration proceedings as he deemed fit, including choosing to adopt either an inquisitorial or adversarial approach to the proceedings. I have not found any conduct by the Arbitrator that went beyond the bounds of either approach, nor, in fact, has Maponya pointed out any such conduct with the required specificity. For these reasons, the ground of review raised in this regard also stands to fail.

[35] As to the review ground set out at paragraph 20.13 above, I am of the view that this ground lacks any merit as well. In this regard, the common cause evidence before the Arbitrator was that Maponya incurred an expense on the City's behalf of R3, 923.60 towards a car rental for Zikalala's benefit, which was impermissible in that Zikalala was already a beneficiary of a car allowance at the City's expense. This was also done without the proper procedures being followed by Maponya. The fact that Dlamini testified that Maponya neither informed him nor sought and acquired his consent to hire the car for Zikalala during a JOC meeting between the two, coupled with Dlamini's testimony, which was corroborated by Mulaudzi, Rechter, Britz, and Mazibuko, that the City kept

a pool of cars to be utilised in cases such as Zikalala's, meant that Maponya's decision in this regard was flagrantly improper. Maponya was directly responsible for the car hire and for taking the decision on behalf of the City - it did not lie in his mouth to blame Zikalala for any false representations allegedly made to him by the latter. For these reasons, the Arbitrator's conclusions in this regard, being fully supported by the evidence, do not constitute a reviewable irregularity.

[36] In the above circumstances, I am satisfied that the Arbitrator's award passes muster in the *Sidumo* and/or *Herholdt* sense in that it embodies a decision that falls within the band of reasonable decisions that could be reached in the circumstances of this case. I am, furthermore, satisfied that the Arbitrator committed no material irregularities and/or acts of misconduct the result of which were to render his overall outcome unreasonable.

[37] Finally, both parties' representatives argued that costs should follow the result. There are no reasons why the City should not be entitled to its costs, both in law and in fairness.

[38] In light of the above, I make the following Order:

- 38.1 insofar as necessary, condonation for the late service and filing of the City's Answering Affidavit is hereby granted;
- 38.2 the application for the review and setting aside of the Arbitrator's Award dated 30 September 2008 is hereby dismissed;
- 38.3 Maponya is to pay the City's costs.

Woodhouse, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Mr C Mogane of Mohlaba and Moshoana Attorneys

For the Respondent: Advocate F A Boda

Instructed by: Bowman Gilfillan Attorneys