



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR534/12

In the matter between:

PAREXEL INTERNATIONAL (PTY) LTD

Applicant

and

CHAKANE, T N.O.

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

MOSIME-MASETI, KEFILWE DOROTHY

Third Respondent

Heard: 26 October 2017

Delivered: 21 November 2017

Summary: Rule 11 application – prejudice not substantial to warrant a dismissal of the main application.

Review application – incapacity for ill health – employer enjoined to establish the extent of incapacity based on objective facts and explore means to reasonably accommodate employee – engrossed by the length of absence, the employer failed to explore other alternatives short of dismissal – inquiry on substantive and procedural fairness inextricably linked.

JUDGMENT

NKUTHA- NKONTWANA J

Introduction

- [1] This is an application for the review of an arbitration award issued on 13 February 2012 by the second respondent (the commissioner) in terms of which he found that the dismissal of the third respondent was procedurally and substantively unfair. The third respondent is opposing the application.
- [2] The applicant's main ground of review, précised, is that the commissioner committed a reviewable irregularity by failing to properly and justifiably apply his mind to the facts and law in the circumstances of the matter.

Interlocutory application

- [3] The third respondent lodged a Rule 11¹ application seeking an order dismissing the main application for lack of diligent prosecution by the applicant. This application was heard simultaneously with the main application. The primary complaint was that the applicant dragged its feet after the filing of the reply affidavit. It had to be nudged by the third respondent to attend to the pagination and indexing of the Court file. Also it failed to comply with the Court's directive on the filing of heads of argument.
- [4] The applicant's counsel conceded that there was slackness in the manner in which the applicant prosecuted the main application, but he submitted that the delay pertained to processes after the close of pleadings and it did comply soon after it was put on terms by the third respondent. The applicant always demonstrated an intention to persist with the litigation, so it was further submitted.

¹ Rule 11 of the Labour Court Rules dealing with interlocutory applications.

- [5] I agree with the third respondent's counsel that the delay in the finalisation of this matter is regrettable. The third respondent was dismissed on 14 April 2011 and 6 years down the line, she is yet to enjoy the fruits of her victory. The prejudice suffered by the third respondent is, however, not substantial so as to warrant a dismissal of the main application.
- [6] In the circumstances of the case, I am disinclined to dismiss the main application. Even so, the delay was duly considered in the awarding of costs.

Background facts

- [7] The facts of this matter are, to a large extent, common cause. The third respondent was employed as a clinical research nurse and commenced her employment on 1 March 2010. On 29 June 2010, she was hit on her head by a cabinet door at work. Consequently, she fell on crates and injured her back. She lost consciousness and was rushed to hospital. She was booked off sick from 1 July 2010 and was granted a special leave up until 30 September 2010. Henceforth, she was on sick leave up until 26 November 2010 and annual leave up until 20 December 2010.
- [8] The applicant assisted the third respondent to lodge an application with Discovery Health for disability benefits. The application was declined on 10 December 2010 because the third respondent's medical condition had been diagnosed as treatable. As of 20 December 2010, the third respondent was on unpaid leave.
- [9] The applicant also reported the accident and injury in terms of Compensation for Occupational Injuries and Diseases Act² (the COIDA). Dr De Kock who was treating the third respondent at that time filed a medical report dated 26 January 2011 in support of the COIDA process. It is apparent from the medical report that the third respondent was not fit to resume duties but had prospects of recovering 'in time'.

² No. 130 of 1993.

- [10] The first incapacity enquiry was scheduled for 12 January 2011 but postponed at the instance of the third respondent so as to allow her time to consult with Dr De Kock. The medical report issued by Dr De Kock on 9 February 2011 states that the third respondent's main medical problem at that time was not related to the injury caused by the accident at work on 29 June 2010. She was diagnosed with 'pre-morbid mood disorder'. This condition was said to be resinous enough to cause functional limitation. The third respondent was referred to a psychiatrist, Dr Jordaan, who treated her up until the date of her dismissal. During the whole period of treatment, Dr Jordaan had issued medical certificates booking the third respondent off sick (i.e. from 7 February 2011 to 24 February 2011 and 25 March 2011 to 25 April 2011). In essence, the third respondent remained off sick up until the date of her dismissal.
- [11] On 14 March 2011, the applicant reconvened the incapacity enquiry that had been postponed on 10 March 2011 in order to allow Dr Jordaan to submit his medical report. Dr Jordaan's report, dated 10 March 2011, clearly states that the third respondent's medical condition was treatable but she needed to undergo further investigation by Dr Bester hence she was booked off sick for another month (i.e. 25 February 2011 to 25 March 2011). In the enquiry, the third respondent echoed her eagerness to resume work, subject to her doctor's recommendation.
- [12] The next incapacity enquiry was scheduled for 28 March 2011 but only sat on 31 March 2011 at the instance of the third respondent. She failed to present medical certificate on her progress or sick note for days she had been absent on after 25 March 2011. She was then instructed to report for duty on 1 April 2011 or face disciplinary action. The applicant did comply with the instruction but only for three days. On 6 April 2011, the third respondent's husband sent an SMS to the applicant reporting her wife off sick. The same day the applicant received a medical certificate from Dr Jordaan booking the third respondent off sick for another month (i.e. 25 March 2011 to 25 April 2011).

[13] On 7 April 2011, the applicant served the third respondent with a notice to attend a further incapacity enquiry that was scheduled for 14 April 2011. The third respondent replied in writing and addressed some of the issues that were going to be discussed in the enquiry. Pertinently, she was categorical about the fact that she was not in a position to affirm whether she would be fit to resume work on 26 April 2011 or comment on the prospects of her recovery. Nonetheless, she granted the applicant permission to contact her doctors, an offer that was never taken on by the applicant.

[14] On 14 April 2011, the third respondent failed to attend the incapacity enquiry. Her husband testified that she did not attend because she was frail. He conceded to permitting the applicant to continue with the investigation in the third respondent's absence if that was what it sought to do. Indeed, the incapacity enquiry proceeded in the absence of the third respondent and recommended her dismissal. The chairperson of the final incapacity enquiry, Ms Vos, testified that in arriving at her recommendation, she had considered the following:

14.1. The medical reports that had been submitted by the third respondent;

14.2. The fact that the third respondent had been absent from work for 10 months and still did not provide the applicant with the report stating the nature of her illness, prospects of recovery and when would she be able to resume her normal duties; and

14.3. The applicant's financial constraints at that time and the fact that it could not adapt the third respondent's position or offer her an alternative position.

Review Test

- [15] Tritely, the test for review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.³ In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*,⁴ the Court simplified the approach to be adopted when dealing with irregularities resulting from errors made by commissioners in the conduct of arbitrations as follows:

'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 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 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, 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.'

- [16] In *Head of the Department of Education v Mofokeng*,⁵ the LAC, endorsed the findings in *Herholdt* and by way of emphasis stated that:

'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 the 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 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.'

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 110; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA; and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

⁴ *Herholdt* at para 23.

⁵ *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33.

- [17] It is clear from the authorities referred to above that a mere failure by the commissioner to properly determine a factual dispute or draw inferences or make factual findings does not in itself constitute a basis for review. Ultimately, the determining factor is the substantive unreasonableness of the commissioner's decision.

Analysis

- [18] It is common cause that the third respondent's employment contract was terminated due to her ill health. The reason given was that she was incapable of performing the work for which she was employed due to her continuous ill health.

- [19] Item 10 Schedule 8 to the Labour Relations Act⁶ (the LRA) - the Code of Good Practice: Dismissal (the Code) gives the following guideline on incapacity: ill health and injury:

- '(1) *Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.*
- (2) *In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in*

⁶ Act 66 of 1996 as amended.

response and to be assisted by a trade union representative or fellow employee.

- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.
[Emphasis added]

[20] On the other hand, Item 11 of the Code is addressed to a person determining the fairness of the dismissal for incapacity due to ill health or injury. It provides that:

‘Any person determining whether a dismissal arising from ill health or injury is unfair should consider -

- (a) whether or not the employee is capable of performing the work; and
- (b) if the employee is not capable -
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee’s work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee’s duties might be adapted; and
 - (iii) the availability of any suitable alternative work.’

- [21] In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*,⁷ relied on by the third respondent, the Court opined that an enquiry contemplated in Item 10(1) ‘an enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee’s recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer’.
- [22] In this case, it is common cause that Dr De Kock diagnosed the third respondent’s medical condition as a ‘pre-morbid mood disorder’ and accordingly referred her to Dr Jordaan, a psychiatrist. Both asserted in their respective medical reports that ‘pre-morbid mood disorder does affect functionality but is treatable. The last medical report was Dr Jordaan’s, dated 10 March 2011.
- [23] The applicant argued that the third respondent’s absence from work had nothing to do with her injury at work on 29 June 2010 as per Dr De Kock’s diagnosis. As such, her mental condition was permanent but treatable. The third respondent was not on treatment but instead persisted with being absent unendingly. This argument has no merit as no medical report had declared the third respondent permanently incapacitated. Other than divorcing the third respondent’s mental condition from the injury she had suffered at work on 29 June 2010, Dr De Kock, and subsequently Dr Jordaan, never conclusively pronounced on the extent of the third respondent’s incapacity. In fact, Dr Jordaan indicated that Dr Bester would be brought on board to perform further investigations. As of 10 March 2011, the third respondent’s medical condition was still under investigation. In the absence of Dr Bester’s report or additional report by Dr Jordaan, the applicant had no medical basis for its conclusion that the applicant was permanently incapacitated.

⁷ [2007] ZALC 98; [2008] 4 BLLR 356 (LC); (2008) 29 ILJ 1239 at paras 70 -76.

- [24] The applicant referred to *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others*⁸ where the court emphatically found that the commissioner misdirected himself by failing to consider the latest medical report which clearly stated that Mr Strydom has recovered from his mental condition and could resume duties. In my view, *Witzenberg* does not support the applicant. Conversely, it seems to support the third respondent's case in many respects as the Court pertinently stated that:⁹

'In my view, the question posed and the aforementioned remarks made by the court a quo were misplaced as they did not take the following facts into account: firstly, none of the medical reports that were submitted claimed that the employee was permanently disabled or incapacitated. Secondly, there was a substantial lapse of time (a period of six months) between the application for medical boarding and the incapacity enquiry, such that by the time the arbitration hearing was held, the employee had, according to dr Kalinski recovered from his mental condition and could resume duties. Under such circumstances, there was no basis for finding that the employee was permanently incapacitated or that he could not reasonably be accommodated by the employer.' [Emphasis added]

- [25] Even this case, it is common cause that the third respondent had attempted to access the Discovery's Capital Disability Benefit. Her claim was declined on 10 December 2010 because her functional impairment was expected to improve with time. Whilst, in order to qualify for the Discovery benefit, the medical condition had to be permanent regardless of treatment. It is without doubt that by December 2010 the applicant was aware that the third respondent's incapacity was temporal. The subsequent medical reports by the third respondent's doctors confirmed that. There had been no medical report to the contrary when the last incapacity inquiry was conducted on 14 April 2011. During the arbitration, the applicant testified that her condition had improved and was in a position to resume her duties.

⁸ (2012) 33 ILJ 1081 (LAC) at para 20.

⁹ Id at para 27.

- [26] The applicant, ultimately, had an onus of proving the third respondent's incapacity in order to justify the dismissal.¹⁰ Even though the third respondent was indisposed for a period on 10 months, the applicant failed to enquire into extent to which the third respondent was able to perform her work, a factual enquiry to establish the effect that her incapacity has on her performing her work. This, in essence, was the finding by the commissioner.
- [27] The applicant argued that the third respondent's absence was unreasonably long given the fact she had been 4 months in its employ when she sustained the injury at work. There is no evidence on the record, other than the duration of her absence, that the applicant did explore all other possible alternatives short of dismissal. It is common cause that the third respondent had been on unpaid sick leave as from 10 December 2010 and as such there was no financial hardship on the applicant henceforth. If indeed the third respondent's position was so crucial to the applicant's operations and her absence affected it adversely, a possibility of securing a temporary replacement for her could have been a viable option. Nonetheless, that option was never explored.
- [28] The applicant was, however, engrossed by the third respondent's length of absence and failed to explore other alternatives short of dismissal. That approach was rejected in *MTN Service Provider (Pty) Ltd v Matji NO and Others*,¹¹ where the court pertinently stated that:
- 'It appears from all the evidence that the applicant's decision to dismiss her was based not so much on her incapacity as her long and persistent periods of absence from work due to ill-health. That is why the applicant insisted that the enquiry before the first respondent should have been formulated broader than it was to make reference to the "habitual" and "persistent absenteeism" of the third respondent. That is not the test. The test is whether the third respondent was at the time of dismissal capable of rendering her services to the applicant. She was never given a chance to prove that she was. I am thus satisfied that the first respondent asked and answered the correct question.'

¹⁰ Section 192(2) of the LRA.

¹¹ [2007] ZALC 40 at paras 14 – 15.

As regards the second issue, there was no evidence before the first respondent that the third respondent had any say in the applicant's "consideration" of alternative positions of a less stressful hue. Whether or not such positions indeed existed is a separate enquiry.'

- [29] These principles are trite. By now it is reasonable to expect that employers clearly understand the obligations in terms of Items 10 and 11 of the Code. Even though an employer may not be obliged to retain an employee who is not productive, fairness requires that a proper assessment be made of whether that situation has been reached before the employer resorts to dismissal.¹² Such an assessment cannot be undertaken in an arbitrary manner and without properly consulting the employee on possible alternatives.¹³
- [30] It is also clear from the award that the commissioner was alive to the fact that the arbitration is a hearing *de novo* and his duty to make a determination as to the fairness or otherwise of the third respondent's dismissal on the basis of evidence that was adduced before him, including evidence that was not before the chairperson of the incapacity enquiry.¹⁴
- [31] In this regard, the third respondent testified that she had been in a position to perform her duties, subject to reasonable accommodation, especially since most of her tasks could be performed seated. Though, she readily conceded under cross-examination that she could not sit down for a long period due to back pains, a condition that persisted till October 2011, post her dismissal. Subsequently, her medical condition had improved to the extent that she was confident that she would be in a position to perform her duties.
- [32] The applicant, on the other hand, failed to prove that the third respondent's prolonged absence from work was unreasonably arduous. Also, it failed to consider adapting the third respondent's work so as to allow her to perform her duties seated, when it was enjoined to do so given the fact that the

¹² *National Union of Mineworkers and Another v Libanon Gold Mining Co Ltd* (1994) 15 ILJ 585 (LAC).

¹³ *Standard Bank* above n 6 at para 111.

¹⁴ *Witzenburg*, above n 7 at paras 15 & 25.

genesis of the third respondent's medical condition was due to the accident that happened at work. The applicant's evidence in this regard was limited to a mere mention of financial difficulties without providing exact facts on how tweaking of the third respondent's duties could have saddled it unduly.¹⁵

- [33] On procedure, the third respondent's husband, Mr Maseti, testified that she was indisposed on the day of the final hearing, a fact he communicated to the applicant, a fact that was denied by Ms Vos. In any event, nothing turns on that because the applicant had already been served with the doctor's sick note that booked the third respondent off duty from 25 March 2011 to 25 April 2011.
- [34] The commissioner correctly found that Ms Vos ought to have applied her mind to the fact that the applicant had participated in most of the incapacity investigations previously. She also gave no consideration to the third respondent's medical history and the fact that the genesis thereof was the injury sustained at work. Accordingly, the applicant was expected to go an extra mile in its attempt to reasonably accommodate the third respondent. There was no justification for the haste with which the process dismissing the third respondent was conducted.
- [35] The applicant's counsel submitted that since the third respondent did not avail herself to the opportunity to be heard, she could not complain about the unfairness of the procedure. The sick leave could not be used as an excuse not to attend an incapacity hearing, so it was further submitted. I disagree. The applicant was not accused of abusing sick leave and the sick note was never disputed. This case is distinguishable from *AECI Explosives Ltd (Zomerveld) v Mambalu*,¹⁶ relied on by the applicant. In *AECI*, addressing the issue of procedural fairness, the court held that there should be a distinction between dismissal for persistent but intermittent absence for ill health and dismissal for prolonged absence owing to long-term illness. In that matter, the employee was dismissed for persistent but intermittent absence for ill health. The court stated that a persistent but intermittent

¹⁵ *Standard Bank* above n 6 para 137 – 138.

¹⁶ (1995) 16 ILJ 1505 (LAC)

absence for ill health should be treated as analogous to a disciplinary matter capable of being regarded as a dismissal for misconduct as opposed to incapacity. The procedure followed by the employer was found to be fair as it had given the employee warnings to improve his attendance at work; it had given him the opportunity to make representations; it had investigated his claim that his working conditions were the cause of his illness and found that that claim had no substance; and, finally when there was no adequate improvement in the employee's attendance record, it had been justified in treating the persistent absences as a sufficient reason for dismissing him.

- [36] In this case, it is common cause that the applicant followed the incapacity for ill health process. In fact, it is clear from the outcome report by Ms Vos that misconduct was never considered, not even in the alternative. In *Witzenburg*,¹⁷ the LAC made it clear that employers are constrained to adhere to the provisions of Items 10 and 11 of the Code. It was stated that:

'The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the Employment Equity Act 55 of 1998. In their work *Employment Equity Law 2001: 7-3 to 7.4*, J L Pretorius *et al* submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but "is a duty that is implied in the concept of unfair discrimination in a general sense" and ... "is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely noncompliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?'

- [37] On the issue of the remedy, the third respondent had sought reinstatement on the basis that she was well enough to resume with her normal duties. In the absent of any evidence to prove that it was not reasonably practicable for the applicant to re-instate the third respondent, the primary remedy of reinstatement was correctly awarded.

¹⁷ Above n 7 at para 8.

Conclusion

[38] In all the circumstances, the commissioner certainly understood the true nature of the enquiry and rendered a decision that is substantively reasonable. In my view, the applicant's qualms are predicated on the negligible material errors of fact as well as the weight and relevance to be attached to particular facts which, on the review test expounded in the authorities above mentioned, are not in and of themselves sufficient for an award to be set aside.

Costs

[39] Even though the Rule 11 application is dismissed, there is no justification for awarding costs against the third respondent. The application was not frivolous given the sluggish manner in which the applicant prosecuted the review application.

[40] On the contrary, there is no reason why costs in the main application should not follow the result.

[41] In the premises, I make the following order:

Order

1. Rule 11 application is dismissed with no order as to costs.
2. The review application is dismissed with costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr S Snyman

Attorney from: Snyman Attorneys

For the third respondent: Mr M Khang

Attorney from: Mphafi Khang attorneys

LABOUR COURT