



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 382/13

In the matter between:

**STEVENS SIPHO NGOBENI WA KA MATHONSI**

**Applicant**

and

**THE COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**First Respondent**

**ELEWANI HLUNGWANI N.O.**

**Second Respondent**

**XSTRATA ALLOYS (PTY) LTD- WESTERN MINE**

**Third Respondent**

**Heard: 31 October 2017**

**Delivered: 17 April 2018**

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**JUDGMENT**

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**MAMOSEBO, AJ**Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act<sup>1</sup> (LRA) to review and set aside the arbitration award issued by the second respondent (the commissioner) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) under case number NWRB 4284-12 dated 23 January 2014 in which he confirmed that the dismissal of the applicant was substantively fair. The applicant further seeks ancillary relief and costs.
- [2] On 14 January 2013 the applicant appeared in person before the commissioner. Xstrata Alloys (Pty) Ltd - Western Mines (Xtrata), the third respondent, the applicant's employer, was absent. The commissioner verified that Xstrata Alloys was notified by fax for the Con/Arb process on 03 January 2013 and proceeded to hear the arbitration by default and heard the evidence of the applicant.
- [3] Common cause facts are the following: the applicant was Xtrata's resident engineer since 01 June 2011 for the Horizon Mine and Boshhoek Open Cast Mine in the Rustenburg Area. Xtrata needed to refurbish the Horizon Crusher Plant which had defects affecting its optimal output. It tasked the applicant with the responsibility of facilitating the refurbishment to ensure that remedial work was carried out properly, as the defects posed a health and safety risk to the Xtrata's employees. A document containing specifications and the scope of work was used. The applicant was part of the team responsible for the development of the said document. A company known as Tshwane Engineering and Hydraulics CC was appointed to carry out the refurbishment. Whereas only 90% of the work

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<sup>1</sup> Act 66 of 1995 as amended.

was done the applicant signed off their work as complete and the contractor was paid in full.

- [4] Xstrata received an anonymous complaint highlighting the sub-standard work performed by Tshwane Engineering, its failure to complete some of the specified work in the Scope of works and further that it left the Crusher Plant in an unsafe condition. An investigation conducted by Xstrata confirmed those allegations. This, together with alleged misconduct allegations levelled against the applicant, caused Xstrata to require the applicant to undergo a polygraph test. He refused to take a polygraph test having initially agreed. The charges levelled against the applicant were serious and were preceded by his suspension from work. He was charged with gross negligence relating to the incomplete and shoddy work done by Tshwane Engineering and dishonesty in an alleged act of bribery. He was dismissed but declared a dispute of unfair dismissal against his employer.
- [5] The applicant testified that he was in possession of the diagrams and notes and the annotations on the diagram were more specific but were overlooked by him and Tshepo, the platinum engineer. He went on before the commissioner:

'When done with the work myself and Peter Morewa inspected the work and I was satisfied based on the scope of work. On his version there were noted things that missing balls, loose balls which Peter Morewa instructed the guys to fix immediately.'

The applicant also said the following:

'I believe the dismissal is unfair because of Tshwane Engineering have done the work in accordance [with] the scope of work that they were provided with. However, I indicated [at] the hearing that there is a difference which may have been overlooked by everyone between the scope of work and the drawing'

And

'So I sent the scope of work and the drawings with these notes which I did not see and Peter Morewa did not see and we sent it to the engineering manager and the engineering manager he approved this package and this package is not talking the same thing.'

[6] The applicant's legal representative raised the following issues for determination: That the commissioner disregarded the irregularities which allegedly occurred at the disciplinary enquiry stage and misdirected herself in accepting the record of the internal disciplinary enquiry when no evidence was tendered at the arbitration proceedings on behalf of the employer:

6.1 Whether the applicant's dismissal was procedurally and substantively unfair.

6.2 Whether the proceedings of the internal hearing were procedurally and substantively unfair?

6.3 Whether the CCMA proceedings were procedurally and substantively fair, with specific reference to whether the commissioner:

6.3.1 Committed a misconduct in the performance of her duties as arbitrator.

6.3.2 Committed a gross irregularity or;

6.3.3 Exceeded her powers?

[7] The applicant did not enunciate succinctly what the grounds for his review are. In addition even his legal representative, Mr Fhedzisani Pandelani, did not quite spell out what the grounds relied on are. It fell to Xstrata's attorney who took pains to extrapolate such grounds when presenting his client's case. The

following are the ostensible grounds upon which the applicant seems to rely on in seeking the relief. That the Commissioner:

- 7.1 Failed to deal with the procedural fairness of his dismissal;
- 7.2 Refused him legal representation during the arbitration thereby committing misconduct and a gross irregularity;
- 7.3 Was biased and assumed the role of Xstrata thereby committed misconduct and gross irregularity;
- 7.4 Erred by cross-examining him in certain instances; and
- 7.5 Erred in demanding the outcome of the disciplinary enquiry.

[8] The applicant challenged both the procedural and substantive fairness of the arbitration proceedings. The challenge lacks substance because in the transcribed record the commissioner clarified with the applicant whether he was challenging the procedure but his response was that he was challenging the substantive fairness of his dismissal only. This appears in the arbitration record of proceedings:

“Commissioner: what are you challenging, procedure or substance? The reason for the dismissal or the?

Applicant: No, substance.

Commissioner: And you are not challenging procedure. Are you happy with the way the hearing was conducted?

Applicant: It was biased but it was conducted procedurally.

Commissioner: Okay, because I need to understand as to what you are challenging. Are you only challenging substance?

Applicant: Yes, substance.”

[9] In terms of s 145 of the LRA a party to an arbitration award may apply to the Labour Court for an order reviewing and setting aside the arbitration award based on a defect in the arbitration proceedings, if the commissioner:

- 9.1 Committed misconduct in relation to his or her duties as an arbitrator;
- 9.2 Committed a gross irregularity in the conduct of the arbitration proceedings;
- 9.3 exceeded his or her powers; or
- 9.4 the award was improperly obtained.

[10] Section 158(1) (g) of the LRA provides:

‘that subject to section 145, the performance or purported performance of any function provided for this Act on any grounds that are permissible in law.’

[11] In *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*<sup>2</sup> the Constitutional Court held that the review grounds set out in s 145 of the LRA have been suffused by the standard of reasonableness, and that an arbitration award of the CCMA or bargaining council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

[12] In *Andre Herholdt v Nedbank Limited, (Congress of South African Trade Unions as amicus curiae)*<sup>3</sup> the Supreme Court of Appeal (SCA) had occasion to interpret the grounds of review set out in s 145 of the LRA as developed in the *Sidumo* judgment by making the following pronouncement:

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<sup>2</sup> 2008 (2) SA 24 (CC).

<sup>3</sup> [2013] 11 BLLR 1074 (SCA).

'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 section 145(2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry 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 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.'

[13] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*<sup>4</sup> Waglay JP remarked:

"[15] ....it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process related to review.

[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[14] The other grounds levelled against the commissioner to determine whether they have been substantiated or not now follow. The applicant claims that the failure by the commissioner to allow him legal representation is a misconduct and a gross irregularity. Xstrata's legal representative argued that the commissioner acted in accordance with Rule 25(1)(c) of the Rules for the Conduct of Proceedings before the CCMA which stipulates:

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<sup>4</sup> [2014] 1 BLLR 20 (LAC) at 949C – D

'(c) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner in the proceedings unless –

- i. the commissioner and all the other parties consent;
- ii. the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
  - a. the nature of the questions of law raised by the dispute;
  - b. the complexity of the dispute;
  - c. the public interest; and
  - d. the comparative ability of the opposing parties or their representatives to deal with the dispute.'

[15] The applicant's legal representative argued the matter as if permission for legal representation was sought and refused. This is however not the case. The commissioner, having verified that Xstrata was served with the documents for the proceedings, and failed to attend, continued to explain to the applicant that he or she will pose a few questions to him by way of obtaining background information, which he/she did.

[16] Zondo JP in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others*<sup>5</sup> remarked:

'Anyone who has had anything to do with our labour law and the dispute resolution system in the labour field will know that, by far, the majority of cases

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<sup>5</sup> [2009] 4 BLLR 299 (LAC) paras 44, 45 and 46

that affect employers and employees and that “consume” public resources are dismissal cases and most of the dismissal cases are those relating to dismissal for misconduct. The legitimate Government purpose in relation to the provision of compulsory arbitration under the Act was to provide a speedy, cheap and informal dispute-resolution system. If you failed to achieve that goal in regard to disputes concerning dismissals for misconduct, you would never achieve that goal in respect of the entire Act.

If one has a look at all the cases in which the Act provides for a right to legal representation, one will note a common denominator to the cases. That is that of all these cases occur very seldom. Indeed, they are few and far between. Furthermore, the issues that arise in most of them can be quite technical, for example, demarcations, essential services and others.

If provision was to be made for an absolute or general right to legal representation in respect of such disputes, that would make a serious contribution towards taking our new dispute-resolution system in the 1995 Act back to the pre-1994 dispute-resolution system under the Labour Relations Act 28 of 1956 which had become totally untenable by the time the 1995 Act was passed. That cannot be done.’

- [17] The Supreme Court of Appeal considered the constitutionality of Rule 25(1)(c) of the CCMA rules and overturned the North Gauteng decision’s declaration of invalidity of the said rule in *The Commission for Conciliation, Mediation and Arbitration and Others v Law Society, Northern Provinces*<sup>6</sup>. The SCA pronounced that the sub-rule is sufficiently flexible to allow legal representation in deserving cases. I am of the view that the commissioner was alive to that fact when he proceeded with the arbitration having escalated the process from conciliation to arbitration in the absence of the employer. I therefore find that the applicant’s allegation against the commissioner on the aspect of legal representation has not been substantiated. I therefore find that the commissioner cannot be faulted on this aspect either.

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<sup>6</sup> (005/13) [2013] ZASCA 118 (20 September 2013).

[18] The applicant seems to operate under the impression or perception that any act of asking questions by the commissioner is a misconduct or gross irregularity. I have not discerned from the record the basis for that allegation. The proceedings were undeniably one-sided based on the fact that the employer did not participate. It was expected of the commissioner to understand the matter in its totality to be able to make a determination at the end of the hearing. There is nothing wrong with the involvement of the adjudicator, be it a commissioner or presiding officer, from asking questions for clarity or obtaining background information.

[19] In my view the commissioner's summary of the evidence, analysis thereof and the subsequent findings cannot be faulted. It is clear that he/she applied his or her mind to the issues in the case. I find that the commissioner articulated the award properly based on the evidence. It was also not discernible from the record that any weight was attached to the disciplinary enquiry because the findings in the award were based on the arbitration proceedings. The conclusion that the commissioner came to was one that a reasonable decision-maker could make. There is nothing in the papers or oral argument that persuades me to review and set aside of the arbitration award. The application stands to fail.

[20] In as far as costs are concerned there is no reason why the respondent should be burdened with costs.

#### Order

[21] I therefore make the following order: The applicant's review application is dismissed with costs.

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M C Mamosebo  
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Fhedzisani Pandelani of FR Pandelani Inc Attorneys

For the third respondent: Mr Dion Masher of Edward Nathan Sonnenbergs Inc

LABOUR COURT