



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR1355/14

In the matter between:

LIMPOPO PROVINCIAL TREASURY

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

COMMISSIONER M.E PHOOKO N.O

Second Respondent

MSINDWANE ANDILE

Third Respondent

Heard: 13 July 2017

Decided: 02 March 2018

JUDGMENT

JULY. AJ

Introduction

- [1] This is an application to have the undated award, made by the second respondent under the auspices of the first respondent, reviewed and set aside. This application is brought in terms of sections 145 and 158 of the Labour Relations Act¹ ("**LRA**").
- [2] The third respondent was employed as a senior manager at the applicant until his dismissal, which according to the referral form happened on 15 August 2011.
- [3] The third respondent was dismissed for misconduct related to sexual harassment. His dismissal was preceded by a disciplinary hearing wherein he was found guilty. He referred an unfair dismissal dispute to the first respondent. The matter was set down for conciliation on 6 September 2011. The dispute remained unresolved as at 11 November 2011. Subsequently, on 12 October 2011 the third respondent referred the dispute to the first respondent requesting that the dispute be arbitrated.

Arbitration hearing

- [4] The arbitration was first set down for hearing on 30 November 2011. There is no explanation afforded in both the affidavits and heads of argument filed by the parties as to what transpired on this day. Instead, in the founding affidavit made on behalf of the applicant, in particular paragraph 6.4 thereof, it is stated that the arbitration hearing commenced on 30 November 2012. This is admitted in paragraph 12 of the third respondent's answering affidavit. Surprisingly, in the applicant's heads of argument, the date of the commencement of the arbitration is said to be 30 November 2013. This is

¹ Act 66 of 1995 as amended.

despite the fact that there were notices of set down issued prior to 30 November 2013.

- [5] According to the transcript filed with this Court, the arbitration hearing commenced on 3 August 2012 and that is when the examination-in-chief of the complainant began. As already stated there were a number of notices of set down that were issued in 2013, but it does not appear that there was ever a sitting in 2013. I mention this to demonstrate the issues I encountered while perusing the papers before me. I had to take it upon myself to make sense of the papers. The parties failed to pay attention to detail. The pleadings contain various contradictions and inaccuracies.
- [6] At the arbitration sitting of 3 August 2012, the applicant presented its case through the evidence of Mathabela, the complainant. The examination-in-chief of the complainant was completed on 3 August 2012, no cross-examination took place and the matter was postponed. On 1 February 2014, a compelling argument was made on behalf of the applicant for postponement citing that the witness that was due to be cross-examined was indisposed. It was further argued that if the second respondent was not inclined to grant postponement, the record of the disciplinary hearing be accepted into evidence. Both applications were dismissed and the matter was set-down for hearing on 1 March 2014. The rulings in relation to the two applications were not filed with this Court. Therefore, I have not had the benefit of understanding the second respondent's reasons for refusing the applications.
- [7] At the commencement of the hearing, on 1 March 2014, Mr. Mashego, the legal representative of the applicant in the arbitration, was not aware of the second respondent's ruling dismissing the application for postponement and the acceptance of the record of the disciplinary hearing into evidence. He was provided with the ruling at the hearing to peruse. Having read the ruling, he advised the second respondent that, in light of the finding disallowing the record of the disciplinary hearing, he was left with no option but to seek a further postponement, because the condition of the witness had worsened and as such she was unable to testify. A formal application was made and the

complainant's elder sister gave evidence in this regard. That notwithstanding, the second respondent refused the application and on page 77 of the transcript he made the following ruling:

"This is an application for postponement brought by the respondent. I must say that this, the grounds for postponement cannot be, are not indistinct grounds for an application for postponement, however, I had already made a ruling in the past to say that there will no longer be a postponement based on the fact that the complaint is indisposed due to ill health. As a result because the reasons advanced for postponement are the same as the ones I have ruled against, so I must abide by the rule that, the ruling that I made myself. So the application for postponement is refused." [sic]

[8] The second respondent's ruling is irrational because the reasons for refusing the application for postponement do not relate to what was presented before him. Instead, the reasons relate to his earlier decision to refuse postponement and the fact that he considered himself bound by that decision. It is clear that the second respondent failed to apply his mind to the facts before him, and I find this to be irrational.

[9] Having refused to grant the postponement and the applicant having no further witnesses to call, the applicant was requested to close its case, a request which the applicant refused. A debate ensued as to what should be done in the circumstances. The second respondent is on record having said:

"Like I said before that I have never come across this kind of scenario, I will need to go and investigate by way of research and even check with the costs for the applicant where possible how the situation can be dealt with. In other words what I will do depending on my findings of the (inaudible) and consultation with judges and fellow commissioners, you will either get a ruling or an award." [sic]

[10] What is evident from the above, is that the second respondent postponed the matter in order to apply his mind as to whether he could compel the applicant

to close its case, and would accordingly make a ruling or give an award in regard thereto.

- [11] The second respondent made an award which makes no reference to the issue he undertook to research. The only evidence before him at the time of the award was that of the applicant. At the very least, the applicant expected a ruling based on the issue that the second respondent undertook to research (i.e. compelling the applicant to close its case). However, granting an award on the basis of issues that were not properly before him, was irregular. For the sake of completeness, the arbitration award at paragraphs 14 to 18 reads as follows-

Sections 145 and 158(g)

- [12] Since the arbitration cannot be appealed, this Court has powers to review awards in terms of section 145 and is confined to those instances where "*any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission*".
- [13] Section 158(1)(g) on the other had enjoins this court to review an award based on "*the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law*".
- [14] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*²) held that the powers conferred by section 158 are wide enough to include arbitral awards made by commissioners. That, notwithstanding, the Constitutional Court held further that:

"The general powers of review of the Labour Court under section 158(1)(g) are, therefore, subject to provisions of section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation

² [2007] 12 BLLR 1097 (CC).

to his or her duties; gross irregularity in the conduct of the proceedings, where the Commissioner exceeds his or her powers, or where the award was improperly obtained. These are the only grounds upon which arbitral awards of the CCMA Commissioners may be reviewed by the Labour Court under section 145(2) of the LRA. It follows, therefore, that a litigant who wishes to challenge an arbitral award under section 145(2) must found his or cause of action on one or more of these grounds of review."

[15] This is a review of an award made at the bargaining council and in light of the decision of the Labour Appeal Court in *Reddy v KZN Department of Education and Culture and Others*³.

[16] The grounds for review are stipulated in paragraph 8 of the founding affidavit submitted on behalf of the applicant. These grounds are:

"8.1 The Second Respondent committed an irregularity and misconducted himself and/or exceeded his powers in arriving at the finding that dismissal of the Third Respondent was substantively unfair and that the Applicant was ordered to pay the Third Respondent an equivalent of 12 months' salary, inclusive of bonuses and incentives;

8.2 The Second Respondent committed an irregularity and misconducted himself and/or exceeded his powers by admitting inadmissible evidence and rejecting admissible evidence presented before him in arriving at the finding or conclusion that the dismissal of the Third Respondent was substantively unfair and that the Applicant must reinstate the Third Respondent;

8.3 The Second Respondent further committed an irregularity and thus misconducted himself by not having regard to decided cases of the above Honourable Court in making the order that the dismissal of the Third Respondent was substantively unfair and that the Applicant was

³ [2003] 7 BLLR 661(LAC).

ordered to pay the Third Respondent an equivalent 12 months' salary, inclusive of bonuses and incentives;

- 8.4 The Second Respondent committed an irregularity and misconducted himself and/or exceeded his powers by failing to apply his mind or appreciate the legal principle applicable on the facts that were before him; in particular the best evidence rule;
- 8.5 The Second Respondent committed an irregularity and misconducted himself and/or exceeded his powers by failing to apply his mind or appreciate the fact that the only evidence before him was that of the Applicant's witness as the third Respondent did not adduce any evidence to the contrary.
- 8.6 The Second Respondent committed an irregularity and misconducted himself and/or exceeded his powers by misconstruing the provisions of the Labour Relations Act in arriving at the finding or conclusion that the Applicant must reinstate the Third Respondent; and
- 8.7 The Second Respondent further committed an irregularity and thus misconducted himself by making a decision which no reasonable decision maker would have made under the circumstances of the present case."

Irregular conduct by the second respondent

[17] The third respondent was dismissed because he was found guilty of sexual harassment. The dismissal was preceded by a disciplinary hearing. The disciplinary hearing was chaired by Mr Lebea from Lebea & Associates, an attorney by profession. The applicant and the third respondent were both legally represented as can be seen from paragraph 3.3 of the ruling on sanction.

[18] As already indicated, an application for postponement was made on 1 February 2014. The ground for such postponement was that the

complainant, who was a crucial witness to the applicant's case, was ill. This is the same person who was the victim of sexual harassment. She was so ill that she was not in a position to be cross-examined on evidence that she had tendered. Although the findings are not in the court file, it is contained in the transcript of the arbitration that such application was refused.

- [19] I have not had sight of the second respondent's findings and therefore do not have the benefit of his reasons for refusing postponement.
- [20] Having refused to admit the disciplinary hearing record into evidence, on 1 March 2014, another application for postponement was refused.
- [21] In refusing the 1 March 2014 application, the second respondent considered himself bound by his February 2014 finding refusing postponement. This decision was taken by the second respondent in the face of uncontradicted evidence that a victim of the sexual harassment was terminally ill. I find the second respondent to have been insensitive and mechanical in his approach. The commissioner's function is to be fair to both parties. Therefore, how can he arrive at a fair finding without providing a victim an opportunity to be heard? There was no evidence contradicting the illness of the complainant.
- [22] When the second respondent refused to grant postponement, how did he expect the complainant to attend the arbitration for cross-examination?
- [23] Having refused to grant the applicant postponement, the applicant instructed its attorneys of record not to close its case. This created a dilemma.
- [24] The hearing was adjourned on the basis that the second respondent was going to conduct research on the issue and depending on his findings and consultation with judges and fellow Commissioners, he would make a ruling or an award.
- [25] The second respondent made no finding as to the next step, instead, he granted an award. The award itself does not disclose a finding as to the issue of applicant closing its case. The award is written in a manner that creates the

impression that there was common understanding on the issue regarding the applicant closing its case. He therefore, failed to make a finding on the issue. In addition, the second respondent disregarded the evidence tendered at the arbitration on 3 August 2012 on the basis that cross-examination of the witness had not taken place. This failure by the Commissioner to consider the evidence was a further material and fatal misdirection.

Substantive fairness

[26] In my view, the decision to refuse to grant the application for postponement on 1 March 2014 was not exercised judicially. The fact that the complainant was terminally ill, was never disputed. The Commissioner considered himself bound by his earlier decision that no further postponement would be granted. He refused postponement even after the complainant's elder sister had testified as to the complainant's condition.

Refusal to admit the transcript of the disciplinary hearing

[27] The issue of refusing to admit the transcript of the disciplinary hearing as evidence, on the basis that the arbitration is a hearing *de novo* is an error of law. In the matter of *Rand Water v Legodi NO and Others* ⁴ the court held:

"[18] In my view, the fact that arbitration proceedings are regarded as hearings *de novo* does not mean that the legislation permitting hearsay in certain circumstances would not apply to arbitration hearings, which is the reasoning the arbitrator seemed to have followed. The decision-maker or trier of fact, faced with the same situation as the arbitrator was faced with in this case, had a discretion to permit hearsay evidence or to exclude it. To determine whether he exercised that discretion judiciously, or in a manner resulting in one party not having a fair trial, necessitates some scrutiny of that hearsay

⁴ (2006) 27 ILJ 1933 (LC).

evidence. In this case, it was the evidence given at the disciplinary hearing, in other words, the transcript.

[19] ...

[20] ...

[21] ...

[22] The arbitrator had to decide whether that hearsay evidence was permissible or not. In terms of s 3(1) of the Amendment Act, hearsay evidence may be permitted in certain circumstances such as when the relevant witness is not available and it would be in the interest of justice to do so. Once the decision is made to admit the evidence, then the weight to be given to the particular testimony depends on the probabilities and credibility of the witnesses. No arbitrator or judge should readily admit hearsay evidence when a witness has disappeared. All the facts have to be assessed, in addition to the purpose for which the evidence is to be led. The arbitrator did not make such an assessment."

[28] In the matter of *Matsokoleng v Shoprite Checkers (Pty) Ltd*⁵ the court held that:

"Section 3(1)(c) of the Act confers a discretion on a court (or Tribunal) in terms of admitting hearsay evidence if, in the opinion of the court (or Tribunal), as the case may be, it is in the interests of justice to admit such hearsay evidence. The fact that the respondent's representative would not have been in a position to cross-examine the author of, or deponent to, the affidavit if it was admitted, was not, in my opinion a legally sound ground to have refused admission of the affidavit, in the light of section 3(1)(c). That aspect of the matter would only be relevant on the question of the evidential weight to be attached to the affidavit evidence concerned. As the matter stood, it did not appear that the Commissioner properly applied his mind on this issue, if at all. In my view, the Commissioner's failure in this regard constituted a serious misdirection and gross irregularity, on the

⁵ [2013] 2 BLLR 130 (LAC).

Commissioner's part in the conduct of the arbitration proceedings, which rendered the award reviewable and liable to be set aside."

[29] From a reading of the award it is evident that the commissioner rejected the evidence tendered at the arbitration and the record of the disciplinary hearing and failed to consider the principles of hearsay evidence. This constitutes gross irregularity on his part.

[30] On this basis alone, the arbitration award made by the second respondent should be set aside.

[31] I therefore make the following order:

Order

1. The undated arbitration award (GPBC3741/2011), made by the second respondent under the auspices of the first respondent, is reviewed and set aside.
2. The matter is referred back to the first respondent to be presided over by a different commissioner.
3. That the record of the disciplinary hearing be considered as evidence in the event that the witness is still indisposed.
4. There is no order as to costs.

S. July

Acting Judge of the Labour Court of South

Africa

Appearances

For the Applicant Advocate S. Mphahlele

Instructed by State Attorney

For the Third Respondent Mr C. Mogane

Instructed by Mohlaba & Moshwana Attorneys

LABOUR COURT