



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 821/15

In the matter between

AMCU OBO THULI MKHATSHWA & 1 OTHER

Applicant

and

MAGAELE ALFRED MASHEGOANA (cited in his capacity as

Commissioner of the Commission for Conciliation,

Mediation and Arbitration)

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

BHP BILLITON - DOUGLAS COLLIERY

Third Respondent

Delivered: 21 December 2018

JUDGMENT

MAHOSI, JIntroduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award issued by the first respondent (arbitrator) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), under case number MP3707-12, dated 3 May 2015 in terms of which the arbitrator found that the dismissal of the applicant's members, Ms Thuli Mkhathshwa and Mr Phillip Phiri (the employees) was both procedurally and substantively fair.
- [2] The applicant seeks an order to substitute the award with an order to the effect that the dismissal of the employees was both procedurally and substantively unfair. Ms Mkhathshwa seeks retrospective reinstatement and Mr Phiri seeks compensation. Alternatively, that this matter be remitted to the CCMA to be heard *de novo* before an arbitrator other than the first respondent.
- [3] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

Background

- [4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.
- [5] Ms Mkhathshwa was employed by Douglas Colliery on 3 January 2001 in a capacity of a boilermaker. In 2008, Ms Mkhathshwa was involved in a car accident and sustained injuries to her back and spine, which affected her performance of her functions as a boilermaker. Mr Phiri was employed by Douglas Colliery in a capacity of an electrician on 6 November 2006. Mr Phiri was involved in an accident (chemical spill), which resulted in him losing sight on his right eye.

¹ Act 66 of 1995 as amended.

- [6] On 19 June 2007, the employees were issued with surety letters during arbitration proceedings, which guaranteed them employment in similar positions within BHP Billiton Energy Coal South Africa Proprietary Limited (BECSA) after the closure of Douglas Colliery. The guarantee of employment was conditional upon them being declared fit to perform work by an Occupational Medical Practitioner (OMP) in compliance with the Mine Health and Safety Act² (MHSA).
- [7] On 31 August 2011 the employees' employment was terminated for operational reasons due to the closure of Douglas Colliery. As a result, they underwent exit medical examinations and they were paid their severance packages.
- [8] In order to comply with the surety letters, BECSA explored suitable positions for the employees at other mines. The employees were taken off Douglas Colliery's payroll and were paid through a contractor, Amadwala Risk Solution (Amadwala) which administered employee's benefits on behalf of BECSA.
- [9] In November 2011, the employees were requested to report for work at Middleburg Mine, which is the sister mine to Douglas Colliery within the BECSA structure. On reporting for duty, the employees were required to undergo an initial entry medical examination for the purpose of assessing and evaluating their fitness. Both employees were found to be unfit, which decision they did not appeal in terms of section 20 of the MHSA. On 31 March 2012, the employees were dismissed.
- [10] Aggrieved by the employees' dismissals, the applicant referred an unfair dismissal dispute to the CCMA on 21 May 2012. The dispute was unsuccessfully conciliated on 8 June 2012. The arbitration process was scheduled for 17 June 2012 on which date the employees' claim was dismissed due to their non-attendance.
- [11] The applicant applied for rescission of the dismissal ruling on the basis that the employees did not receive a notice of set down. The rescission application was

² Act 29 of 1996 as amended

granted on 16 October 2012. The third respondent took the ruling on review to the Labour Court and the matter was remitted to the CCMA. The matter was set down for arbitration on 24 February 2015, but the arbitrator indicated that the rescission application should be heard *de novo*. The rescission application was accordingly heard and granted. The dispute was set down again for arbitration on 23 April 2015.

- [12] At the end of the arbitration, the arbitrator issued an award in terms of which he found that the employees' dismissal was procedurally and substantively fair. It is this award that is the subject matter of this review application.

Grounds of Review

- [13] Although the applicant raised a number of grounds for review, the question is mainly whether the arbitrator exceeded his powers and failed to properly, rationally and justifiably apply his mind to the facts, the LRA and the CCMA rules.
- [14] The respondent opposed this application on the basis that the applicant is relying on the process-related conduct of the arbitrator, which on its own does not render the award unreasonable and reviewable.

Applicable legal principles

- [15] Arbitration awards are reviewable in terms of section 145 of the LRA, which provides that 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.
- [16] The principle, as laid out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³, is whether the decision reached by the commissioner is one that a reasonable decision maker could have reached. Therefore, the test on review is not whether the commissioner came to a correct decision that the court sitting in the same position as the commissioner would have reached. The test is

³ [2007] 12 BLLR 1097 (CC).

whether the commissioner arrived at a reasonable decision based on the material before him or her.

[17] The applicant challenged the award on the basis that the arbitrator failed to reflect all the evidence in the award. Section 138(1) provides for the manner in which arbitrations may be conducted and it provides as follows:

‘(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

...

(6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings.

(7) Within 14 days of the conclusion of the arbitration proceedings -

(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner.’

[18] The LRA requires the arbitrator to issue the award with brief reasons within 14 days from the date of the hearing. There is no requirement for arbitrators to reflect all the evidence led at the arbitration proceedings in their awards. What is required is that they must expeditiously resolve the real dispute between the parties and act fairly to all the parties.⁴ In doing so, they must assess all the evidence before them before arriving at their conclusion. There is therefore no merit to this ground of review.

[19] The applicant submitted that the arbitrator should have rejected Mpembe’s evidence on the basis that it was hearsay and should have found that the third respondent failed to follow a fair procedure. The issue is whether the arbitrator’s finding that the third respondent attempted to assist the employees

⁴ *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1 (CC).

through a process of consultation and proper consideration of alternatives to dismissal was supported by evidence before him.

[20] Section 188(2) of the LRA provides as follows:

‘any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act’.

[21] Schedule 8 of the LRA deals with some of the key aspects of dismissal for reasons related to conduct and capacity. Items 10 and 11 thereof provide as follows:

‘10. Incapacity: Ill-health or 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 response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of the 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 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 incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill-health or injury.

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.'

- [22] The evidence before the arbitrator was that the employees were re-employed under discretionary fitness and placed under a subcontractor for about five months while alternative positions were explored. Consultations were held with the employees, on 11 January 2012 and 27 February 2012, to discuss their medical incapacity. The documentary evidence, in a form of emails, indicating that the third respondent sought to explore alternative positions for the employees was placed before the arbitrator and was not disputed. The employees were then called to report for duty at Middleburg Mine where they were subjected to a fitness test as required by MHSA, results of which showed that they were unfit for their positions. Having found no alternative employment, their employment was terminated.

[23] In his analysis of evidence and arguments, the arbitrator started by referring to the requirements contemplated in Schedule 8 Item 11 of the LRA. The arbitrator further had regard to the guidelines outlined in *IMATU obo Strydom v Witzenburg and Others* where the Court stated as follows:

‘[6] It is trite that the code of good practice is binding on commissioners. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (“The *Sidumo* case”). My reading of item 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee’s capability or otherwise can only be reached once a proper assessment of the employee’s condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee’s work circumstances so as to accommodate the incapacity, or adapt the employee’s duties, or provide him with alternative work if same is available.’

...

[9] I am of the view that the provisions of item 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair. This view is strengthened by the following remarks made by the former Labour Appeal Court in *National Union of Mineworkers and Another v Libanon Gold Mining Co Ltd*, where the court interpreted the relevant provision of the previous Labour Relations Act as follows:

‘In my view it would not be fair to dismiss an employee without first exhausting the possible alternatives. ...What is in issue is the respondent’s act of terminating the appellant’s employment. Observance of a fair process is in my view fundamental to the question whether its decision to do so was fair. In my view, the fairness or otherwise of the decision cannot be divorced from

the process by which it was arrived at.’

- [10] In the case of *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council and Others*, the court, dealing with a dismissal based on incapacity albeit not one related to illness, stated as follows:

‘Manifestly, the question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist.’

- [24] Having considered the evidence, the arbitrator found that the third respondent complied with the provisions of Schedule 8. The arbitrator further found that the employer took necessary steps to accommodate the employees. It is apparent from the reading of the award that the arbitrator took into consideration all the evidence that was led before him and applied his mind to the issues before him. It was for this reason that he found the employees’ dismissal to have been procedurally and substantively fair.
- [25] The applicant also challenged Dr Murwamphida’s evidence on the basis that he did not examine the employees. In the survey of evidence, the arbitrator seems to have been alive to the fact that Dr Murwamphida was not part of the medical examination process. The commissioner stated that Dr Murwamphida testified on the rules for minimum standard of fitness for different job specifications.
- [26] The transcribed record reveals that Dr Murwamphida was called as an expert witness. His evidence was that according to the OMP’s report, Mr Phiri did not meet the minimum standard of work on a mine due to the blindness on one of his eyes⁵ and further that Mkhathswa was declared permanently unfit as a boilermaker which meant that she did not meet the inherent physical

⁵ Transcribed record page 81 para18 -21.

requirements of the job.⁶ Dr Murwamphida further testified that the OMP's reports are legal and binding and that they can only be overturned by the Chief Inspector of Mines.⁷ As aforesaid, he was called as an expert witness thus making the fact that he did not examine the employees of no consequence. It is therefore clear that Dr Murwamphida's evidence was not hearsay.

- [27] The applicant further alleged that, during closing arguments, the arbitrator descended into the arena in an attempt to assist the third respondent. There is nothing in the transcript of the arbitration to show that there was any undue interference in the arbitration proceedings and with the testimony of witnesses. Therefore, there is nothing that becomes apparent from the transcript which could remotely convince me that the arbitrator conducted himself in a manner that could be seen as biased. I can therefore find no irregularity insofar as it relates to this ground of review.
- [28] It is trite that the application brought in terms of section 145 of the LRA is not an appeal. There is a fundamental difference between appeal and review. When reviewing the arbitration award, it is not the function of this Court to decide whether the arbitrator acted correctly but whether he or she committed misconduct or gross irregularity or exceeded his or her powers as provided for in section 145 of LRA.
- [29] In *casu*, the applicant has not established any basis upon which the Court could find that the arbitrator's award is reviewable. As such, it failed to discharge the onus of establishing that the arbitrator either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers. What the applicant seeks to do, in this application, is to bring an appeal against the decision of the arbitrator in a guise of a review. It is my view that the decision of the arbitrator is not a decision that a reasonable decision-maker could not reach.

⁶ Transcribed record page 83 para1 -8.

⁷ Transcribed record page 93-94.

It is a reasonable decision that is justified by the evidence that was placed before him. There is, therefore, no reason for this Court to interfere with his award.

[30] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[31] In the circumstances, I make the following order.

Order

1. The applicant's application for review is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant

Mr F.Marais of AMCU

For the respondent

Advocate A. Snider

Instructed by

Webber Wentzel Attorneys