

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1142/15

In the matter between:

SASBO OBO MAHLANGU, DESMOND

Applicant

And

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

First Respondent

LUNGILE MATSHAKA

Second Respondent

STANDARD BANK OF SOUTH AFRICA

Third Respondent

Delivered: 20 March 2019

JUDGMENT

MAHOSI.J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ to review and set aside the arbitration award issued by the first respondent (the commissioner) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GAJB 3916/15 dated 19 June 2015.
- [2] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to set forth the facts that form the relevant background to the dispute between the parties.

Material background facts

- [3] The factual matrix in this matter is very straightforward and not in dispute. The essential facts may be summarized as follows:
- [4] The applicant's member (Mr Mahlangu) started working for the third respondent (Standard Bank) on 1 September 2004 as an Operations Clerk and was subsequently promoted to various positions. At the time of his dismissal, Mr Mahlangu was employed as a Sales Enablement Consultant: VAF Sales Centre (Vehicle and Asset Finance) and his duties included organising finance for customers who want to buy new vehicles in the Sandton area. Mr Mahlangu was expected to reach the monthly budget targets set for him in terms of the performance contract that was signed by him on 17 February 2014. However, he failed to meet the monthly budget targets set for him.

¹ Act 66 of 1995 as amended.

- [5] Standard Bank had numerous informal discussions with Mr Mahlangu from early 2014 during which it was brought to his attention that his performance was lacking.² The parties agreed on a tactical plan in order to assist Mr Mahlangu with his performance. There was still no improvement in his performance. Standard Bank took a decision to put Mr Mahlangu on a formal performance monitoring process in terms of its policies. In this regard, the performance monitoring meetings were held on 20 August, 28 November 2014, 16 January 2015 and 29 January 2015 respectively, but they did not yield any positive results.
- [6] Standard Bank then issued Mr Mahlangu with a termination letter on 4 February 2015, terminating his employment effectively from 1 March 2015. Dissatisfied with the decision to terminate his employment, Mr Mahlangu referred an unfair dismissal dispute to the CCMA. The matter was conciliated unsuccessfully and Mr Mahlangu referred the matter to arbitration that was then set down for 10 June 2015.
- [7] At the commencement of the arbitration hearing Mr Mahlangu requested a postponement as his attorney was unable to attend however the commissioner refused to grant the postponement. The arbitration proceeded with Mr Mahlangu unrepresented and Standard Bank represented by Mr P. Mashalane, its Legal Manager. The arbitration award was subsequently issued on 19 June 2015 in terms of which the commissioner found Mr Mahlangu's dismissal substantively fair. It is this award that is the subject of this application.

The Grounds for Review

² Pages 180-194 of paginated bundles.

- [8] Mr Mahlangu challenged the arbitrator's award on a number of grounds. Firstly, that the commissioner's finding that his dismissal was substantively fair was not supported by the evidence before him.
- [9] Secondly, that the commissioner misconducted himself during the arbitration in that he was dosing off while he (Mr Mahlangu) was presenting evidence to an extent that he had to wake him up. However, the commissioner was allegedly awake when the Standard Bank was presenting evidence.
- [10] Thirdly, that the commissioner was allegedly biased towards Mr Mahlangu in that he was irritated and impatient with Mr Mahlangu when he was challenging Standard Bank's evidence. Furthermore, the commissioner was allegedly not taking notes when Mr Mahlangu was presenting evidence but he took notes when Standard Bank was presenting evidence.
- [11] Fourthly, Mr Mahlangu challenged the commissioner's decision to refuse postponement on the basis that he failed to take into account the comparative abilities of the two parties.

The Respondents' submissions:

- [12] Standard Bank opposed this application on the basis that Mr Mahlangu was unable to identify any irregularities that affected the reasonableness of the decision reached by the commissioner having regard to the evidence adduced during the arbitration proceedings. It contended that the commissioner correctly recorded all the evidence that Mr Mahlangu adduced during the arbitration hearing. Further that the commissioner was alive to all issues before

him and he applied his mind and arrived at a decision that is reasonable in the circumstances.

The Test for review

[13] 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. Section 145(2)(a) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.

[14] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ is a test of the substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry⁴, entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.⁵

[15] In *Bestel v Astral Operations Ltd and Others*⁶ the Court stated as follows:

'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz, supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better

³ [2007] 12 BLLR 1097 (CC).

⁴ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 2899 (LAC) at 2906H-I.

⁵ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 13.

⁶ [2011] 2 BLLR 129 (LAC).

decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.⁷

[16] For the applicant to succeed with the review application, it must be established that the commissioner's decision fell outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by him.⁸

[17] Item 9 of Schedule 8 outlines a guideline in cases of dismissal for poor work performance and it provides as follows:

'Any person determining whether a dismissal for poor work performance is unfair should consider -

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not -
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

[18] The principles to be applied by the commissioner in considering the fairness of a dismissal for poor work performance were summarised by the Labour Appeal

⁷ Id fn 5 at para 18.

⁸ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others*⁹ as follows:

'In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counseling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.'

Analysis

[19] Mr Mahlangu challenged the commissioner's finding that his dismissal was substantively fair on the basis that it was not supported by the evidence before him. Item 9 of Schedule 8 requires the commissioner to firstly consider whether the employee failed to meet a performance standard. In a case where he has not failed to meet the required performance standard, that should be the end of the enquiry. It is only after it has been established that he failed to meet a performance standard that the commissioner is required to consider whether he was aware or could have reasonably been expected to be aware of the required performance standard, whether he was given a fair opportunity to meet the required performance standard and whether dismissal was an appropriate sanction for not meeting the required performance standard.

[20] The award evidenced that the commissioner based his finding on the evidence which he summarised in his analysis as follows:

⁹ [2014] 1 BLLR 20 (LAC) at para 25.

'33. Turning to the present case, it is common cause that the Applicant was placed on a performance improvement process that commenced with performance contract signed for 2014. According to a detailed individual performance graph the Phase one (1) was between 8 and 27 July 2014. Four (4) formal discussions took place during the said period.

34. Phase two (2) was from 5 September 2014 to 28 November 2014 and during this period the Applicant's individual graph reflects formal 12 discussions. I must also point out that I have noted the tactical plan as well the list of actions that were put in place. All that the discussions reflect that nothing was done during the entire process. What came out also came out from the Respondent's evidence is that the Applicant did not meet the criteria of his scope of work.

35. I have carefully considered what the Applicant tried to explain in relation to the budget or targets set for him that he agreed to. In essence, that at critical stage he opted to go on leave, displayed not understanding or appreciating what he was facing.

36. I have also noted that during the performance improvement review, the Applicant was given an opportunity to explain his continued unacceptable work performance. It has also come loud and clear that the Applicant was notified beforehand [to prepare] to fully prepare himself. He was further reminded that he may be assisted by either his union (SASBO) or fellow employee. As for the record the Applicant did challenge the procedural fairness of the process.

37. As highlighted by Grogan on has to accept that the employer has the right to set reasonable requirements in terms of output and the standard of work required of the employee. If the employee fails to attain the standards set by the employer, the employer is entitled to terminate the contract. Further, as also spelt out in Medpro (supra) failure by employees to meet performance set by their employers may of course justify the employee's dismissal'

[21] It is apparent from the above that Mr Mahlangu failed to meet a performance standard that he was aware of or could have reasonably been expected to be aware of. In addition, he was given a fair opportunity to meet the required performance standard in that mechanisms were put in place to assist him to

improve his performance. Despite that, he could still not meet the required performance standard. For these reasons and relying on case law, the commissioner found that dismissal was an appropriate sanction.

[22] It is my view that the commissioner was reasonable in his assessment of the evidence before him and reached a conclusion that any reasonable decision-maker could have reached on the probabilities of the versions placed before him. There is, therefore, no reason for this Court to interfere with his finding that Mr Mahlangu's dismissal was substantively fair.

[23] Mr Mahlangu further challenged the commissioner's conduct during the arbitration proceedings in that he occasionally fell asleep whilst he was testifying. The commissioner did not file an opposing affidavit to rebut this submission. In the absence of such rebuttal, I accept Mr Mahlangu's submission. In so doing, the commissioner committed misconduct of a fundamental nature that amounts to gross irregularity. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,¹⁰ the Labour Appeal Court (LAC) stated as follows:

'[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the

¹⁰ [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[24] In view of the above judgment, the applicant must demonstrate that the commissioner's misconduct had a distorting effect on the ultimate decision that he made. In other words, the applicant must make out a case showing that the alleged sleeping by the commissioner during the arbitration proceedings resulted in a mistrial of issues and/or failure by the commissioner to resolve the substantial dispute between the parties. It is apparent from the award that, but for the irregularity, a different outcome would not have resulted.

[25] The other ground for review was that the commissioner was biased towards Mr Mahlangu in that he was irritated and impatient with Mr Mahlangu when he was challenging Standard Bank's evidence. After having had the benefit of reading the papers and the record, I do not find merit in the complaint raised against the commissioner in this regard. As demonstrable from the record, all that the commissioner attempted to do was to guide Mr Mahlangu on how to properly put questions to the witnesses. There is nothing, in the record, to show that there was undue interference by the commissioner in the arbitration proceedings and with the witnesses' testimony. There is therefore no indication that the commissioner abandoned the rules of natural justice or that he conducted himself in a manner that could be seen to be irregular or biased. As such, I am of the view that Mr Mahlangu has not shown that the commissioner did not bring an impartial and unprejudiced mind on the resolution of the dispute before him. Mr Mahlangu's apprehension of bias, if any, is not reasonable. I can therefore find no irregularity that exists insofar as it relates to this ground of review.

[26] Mr Mahlangu challenged the commissioner's decision to refuse postponement on the basis that he failed to take into account the comparative abilities of the two

parties. The commissioner's basis for his decision appears on paragraph 6 of his award as follows:

'In the applicant's case, I refused the postponement of the proceedings on the basis that his attorney was not on record and the applicant made no mention why his union, SASBO, was not present at these proceedings. Further, it would not have been sensible to postpone these proceedings when his attorney has not bothered to place himself or herself on record by making direct contact with the Commission.'

[27] It is trite that the granting of postponement is an indulgence which involves the exercise of a discretion on the part of the commissioner. His refusal is reviewable if the discretion was not judicially exercised. Mr Mahlangu challenged the commissioner's decision not to grant postponement on the basis that he failed to take into account the comparative abilities of the two parties in that he appeared in person whilst Standard Bank was represented by an attorney during the arbitration. This was disputed by Standard Bank. The commissioner recorded, in his award, that Standard Bank was represented by its Legal Manager: Employee Relations. It is, therefore, not correct that Standard Bank was represented by an attorney. It follows that the basis on which Mr Mahlangu challenged the commissioner's decision not to grant postponement is unsustainable. As such, Mr Mahlangu has failed to make out a case showing that the commissioner exercised his discretion upon wrong principles, capriciously or not judicially. I, therefore, find no irregularity that exists insofar as it relates to this ground of review.

Conclusion

[28] The applicant has not established any basis upon which the Court could find that the commissioner's award is reviewable. As aforesaid, the arbitrator considered all the evidence before him and applied his mind to the issues raised

by the parties. As such, it failed to discharge the onus of establishing that the commissioner reached a decision that a reasonable decision-maker could not make. There is, therefore, no reason for this Court to interfere with the arbitrator's award.

Costs

[29] In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹¹, that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

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

Order

1. The application to review and set aside the arbitration award issued by the first respondent under the auspices of the second respondent under case number GAJB 3916/15 dated 19 June 2015 is hereby dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

¹¹ (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC).

Appearances:

For the applicant: Mr Mahlangu (In person)

For the respondent: Mr D. Cithi of Mervyn Taback Inc.