

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1508/17

In the matter between:

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Applicant

and

SITHEMBISO SIPHELELE MKHIZE

First Respondent

M.M. SAMBO N.O.

Second Respondent

**GENERAL PUBLIC SERVICES SECTORAL
BARGAINING COUNCIL**

Third Respondent

Heard : 5 August 2019

Delivered: 21 January 2020

Summary: Application to Supreme Court of Appeal for leave to introduce new evidence - Supreme Court of Appeal Judgment ordering that the matter be remitted to the GPSSBC to continue the arbitration before the same commissioner – evidence at resumed hearing limited to the new evidence, and evidence emanating there from - GPSSBC and Third Respondent exceeded their powers by not acting in compliance with the Supreme Court of Appeal Order – award reviewed and set aside.

JUDGMENT

HOLMES, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) for an order reviewing and setting aside the arbitration award issued by the second respondent (commissioner Sambo) on 22 June 2017.
- [2] The first respondent, Sithembiso Siphelele Mkhize (Mkhize) raised a number of *points in limine* in his answering papers. At the commencement of proceedings, the parties advised me that an agreement had been reached that he is not pursuing these *points in limine*, therefore, I will only deal with the merits of the review application.

Background and material facts

- [3] Mkhize was employed by the National Department of Correctional Services as a correctional officer earning an annual remuneration of R82 223.00. Mkhize was dismissed on 19 May 2008 for: (i) being in possession of illegal, unauthorised, habit forming and/or stupefying drug on departmental premises; and alternatively; (ii) for permitting an offender to take alcohol or any prohibited drug or to have these substances in his or her possession.
- [4] Following his dismissal, Mkhize referred an unfair dismissal dispute to the General Public Services Sectoral Bargaining Council (GPSSBC). The Council found that Mkhize's dismissal was both substantively and procedurally fair. Mkhize launched a review application in this Court, which was dismissed on 21 June 2012. Mkhize then petitioned the Labour Appeal Court for leave to appeal, which was dismissed on 28 February 2012.

¹ No. 66 of 1995, as amended.

- [5] Mkhize then approached the Supreme Court of Appeal (SCA), for special leave to appeal against the decision of the Labour Court and Labour Appeal Court pertaining to his dismissal, including that the commissioner had failed to consider various procedural issues and had erred on the evidence when holding Mkhize's dismissal substantively fair.
- [6] In addition, he sought leave to introduce new evidence in the form of a sworn affidavit dated 1 October 2012 by one Gilbert Sibiya (Sibiya's Affidavit), in which he confessed to giving false evidence against Mkhize at both the disciplinary hearing and arbitration.
- [7] In light of established jurisprudence, the SCA found that neither the grounds of appeal pertaining to the procedural issues or that the commissioner had erred on the evidence, warranted interference by the Supreme Court.
- [8] The SCA accordingly only dealt with the admission of Sibiya's evidence confessing to giving false evidence against Mkhize. In this regard, the SCA judgment notes that "*accordingly, and counsel on his behalf accepted this, the only questions for decision in this appeal resolve around the attempt to introduce the evidence of Mr Sibiya*".
- [9] Based on a finding that Sibiya's evidence was material and indicated the possibility of there having been a miscarriage of justice, the SCA set aside, *inter alia*, the order of the Labour Court dismissing the review application and the decision of the arbitrator and remitted the dispute concerning Mr Mkhize's dismissal to the GPSSBC to continue the arbitration before the original commissioner, Commissioner Silas Ramushwana, or if he was unable to continue the arbitration, another commissioner appointed by the Council, on the sole question of whether Mkhize's dismissal was substantively fair.
- [10] The SCA provided clear guidance to the GPSSBC on the purpose for continuing with the arbitration and how the arbitration should be conducted, including that:

10.1. Sibiya's Affidavit should not be accepted on face value;

10.2. The content of Sibiya's Affidavit must be tested, if it is still feasible to do so. In this regard not only will Mr Sibiya need to give evidence and be cross-examined, but witnesses who gave evidence before the commissioner might need to be recalled to give further evidence or to be cross-examined in light of his evidence;

10.3. In addition, the alleged perpetrator, the prisoner called Zola, will need to be identified and will also give evidence;

10.4. The circumstance in which Mr Sibiya's affidavit was prepared and by whom, as well as the circumstances in which it came to the attention of Mkhize's lawyers will also have to be explored.

[11] In this regard, the SCA ordered, inter alia, that:

"In the resumed hearing, the evidence heard to date will remain as evidence on the record and the arbitrator will hear the evidence of Mr G Sibiya, such further evidence as may be tendered by either party in the light of that evidence and further evidence from or, if requested, cross-examination of, any witness who had already testified at arbitration."

[12] Finally the SCA held that the "remittal is limited to a de novo determination of whether Mr Mkhize's dismissal was substantively fair."² The matter was remitted back to the GPSSBC, and set down for the hearing to continue before Commissioner Martin Sambo, the Second Respondent, and not the original Commissioner, Silas Ramushowana as ordered by the court.

[13] At the commencement of the arbitration proceedings before the second commissioner, the applicant raised a preliminary point namely that, as ordered by the SCA, the matter must proceed before Commissioner Silas Ramushowana, the same commissioner who considered the original matter, unless he was unable to continue the arbitration. Commissioner Sambo

² Own emphasis.

initially made an *ex tempora* ruling, which he later confirmed in his written award. In this regard he found that there was no merit in the applicant's preliminary point, the SCA judgment gave the GPSSBC the discretion to appoint another commissioner if Commissioner Silas Ramushowana was not available or able to proceed, and that the GPSSBC had exercised the discretion. No indication was given, or investigation made, at the time Commissioner Sambo made his *ex tempore ruling* as to why Silas Ramushowana was unavailable or unable to hear the matter.

- [14] During the arbitration, although a number of further preliminary reports were raised, including the scope of the arbitration and whether or not preliminary points or evidence could be raised which had no bearing on Sibiya's evidence, Commissioner Sambo refused to deal with such issues until the end of the arbitration.
- [15] Ultimately, Commissioner Sambo dealt with the matter as a hearing *de novo*, allowing Mkhize's representative to raise preliminary points and call witnesses which had no bearing on Sibiya's evidence. At one stage, he went so far as to advise the applicant to deal with the hearing as a hearing *de novo* and present its case again including recalling all witnesses previously called, irrespective of whether or not their evidence was relevant to or emanated from Sibiya's evidence.
- [16] Commissioner Sambo ultimately found that Mkhize's dismissal was substantively unfair, and ordered *inter alia*, his reinstatement with immediate effect and backpay in the amount of R740 007,00.

Proceedings and Grounds of Review

- [17] On perusal of the papers, the grounds of review appear to be the following:

17.1. Commissioner Sambo exceed his powers and/or committed gross misconduct by assuming power, not delineated by the SCA in its

judgment, when finding that the GPSSBC had the discretion to appoint another commissioner other than Commissioner Silas Ramushwana to arbitrate the matter;

17.2. Commissioner Sambo committed a gross irregularity by refusing to read the SCA judgment which resulted in him undertaking the wrong enquiry. The manner in which the arbitration was to proceed was clearly set out in the SCA judgment;

17.3. Commissioner Sambo erred in allowing Mkhize to raise a *point in limine*, pertaining to charges, irrespective of the fact that the SCA limited the continued enquiry to evidence pertaining to the Sibiya Affidavit only;

17.4. Commissioner Sambo erred in his conclusion that the duty was on the applicant to begin, irrespective of the fact that the SCA limited the continued enquiry to evidence of Sibiya; and

17.5. Further he erred in allowing new witnesses to be called, including Simelane, who had not presented evidence at the original enquiry and for considering this new evidence; and

17.6. Commissioner Sambo failed to have regard to material evidence.

Evaluation of Law

[18] In the decision of *NEHAWU obo Hoho v CCMA and Others*³, the Labour Appeal Court (LAC), when considering similar facts found that an award was

³ [2018] 8 BLLR 768 (LAC).

reviewable in circumstances where the Commission for Conciliation, Mediation and Arbitration, contrary to a court order, assigned a different presiding officer and allowed the hearing of new evidence.

- [19] The LAC found that in circumstances where the order could not be complied with, parties should have approached this Court for an application to vary the order:

“The terms of the order made by van Niekerk, J would have had to be varied by an application, supported by all parties and setting out the reason why the initial order could not, appropriately, be complied with. Such an application needed to be no more than a brief explanation of the circumstance, and would have benefited from the obvious aspect of how another presiding officer should approach the matter being expressly addressed so that Van Niekerk J could give due consideration to an appropriate variation.”

- [20] The failure to comply with a court order would accordingly justify an arbitration award being reviewed and set aside. To the extent that the GPSSBC was unable to comply with such an order, it was necessary for the parties to apply to the court for a variation of the order.

Application of the law to the facts

- [21] From a reading of the SCA judgment, Mkhize sought and was granted leave by the SCA for the admission of the evidence of Sibiya. As such, the SCA remitted the matter back to the GPSSBC, before the same commissioner, so that he could consider Sibiya’s evidence (and any evidence arising from this evidence), and whether this evidence and the circumstances giving rise to the drafting of the affidavit, were credible and would warrant the dismissal of the First Respondent being found to be substantively unfair.

- [22] The *rationale* for the SCA remitting the matter back to the same commissioner, Silas Ramushowana, must surely have been motivated by the
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fact that he was steeped in knowledge of the evidence presented, which would allow the arbitration to continue as ordered.

- [23] The only circumstance when the GPSSBC was permitted to appoint an alternative commissioner was if Commissioner Silas Ramushowana was unable to continue with the arbitration.
- [24] It is not plausible to read into the SCA order a discretion on the part of the GPSSBC to, irrespective of whether or not Silas Ramushowana was unable to proceed, appoint a different commissioner. There were no proper reasons advanced by the GPSSBC, at the time the *ex tempore* ruling was made by Commissioner Sambo as to why Commissioner Silas Ramushowana was unable to proceed with the arbitration. In this regard, it is disturbing that, in light of the SCA order, Commissioner Sambo was not prepared to investigate Commissioner Silas Ramushowana's availability or allow representations on this issue, prior to making his ruling.
- [25] In addition, it is abundantly clear that the scope of the continued hearing was limited to the evidence of Sibiya, and witnesses that might need to be recalled to give further evidence or to be cross-examined in light of his evidence. Commissioner Sambo failed to give any guidance in this regard, and allowed the arbitration to proceed as a hearing *de novo* irrespective of the fact that the SCA ordered that *"in the resumed hearing the evidence heard to date will remain as evidence on the record and the arbitrator will hear the evidence of Mr G Sibiya, such evidence as may be tendered by either party in the light of that evidence and further evidence from or, if requested, cross-examination of, any witness who has already testified if the arbitration."*

Conclusion

- [26] The GPSSBC accordingly exceeded its powers by acting outside of the SCA order when appointing Commissioner Sambo to arbitrate the matter. In addition, Commissioner Sambo exceeded his powers by making a ruling that

the GPSSBC had the necessary discretion to appoint him to adjudicate the matter and allowed the arbitration to proceed outside of the parameters of the SCA order.

[27] In the circumstances, the award must be reviewed and set aside. Although I am reluctant to remit the matter back to the GPSSBC in light of the extensive delays in this matter, I am likewise bound by the SCA judgment and, in the circumstances, not in a position to substitute the arbitration award of the Second Respondent. Therefore the matter has to be remitted to the GPSSBC, for a continuation of the arbitration, as provided for in the SCA judgment.

Costs

[28] In terms of s 162 of the LRA I have a wide discretion whether to order costs or not. In light of the fact that the Second and Third Respondents erred in arbitrating the matter, I do not think it would be appropriate to order costs against the First Respondent, despite the fact that they had agreed that costs should follow the result.

[29] In the premises the following order is made:

Order

1. The arbitration award is reviewed and set aside;
2. The matter is remitted to the Third Respondent for a continuation of the arbitration, as provided for in the SCA judgment;
3. Each party to pay its own costs.

K A Holmes

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant: M B Matlohoane

Instructed by: The State Attorney, Pretoria

For the Third Respondent: M P Voyi of Ndumiso Voyi Inc

LABOUR COURT