



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2733/17

In the matter between:

**ADCOCK INGRAM HEALTHCARE
PROPRIETARY LIMITED**

Applicant

and

SOLOMON ZINYANA

First Respondent

**NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY**

Second Respondent

COMMISSIONER NOMUSA MBHELE N.O.

Third Respondent

Heard: 27 May 2020

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 26 June 2020.

Summary: Review application – employee must cooperate with the employer in order to facilitate incapacity process – opinion by employee's doctor that he is able to perform his duties is fatal to a claim of incapacity – employer is not expected to keep the employee who is patently poor performing for exceedingly long period.

JUDGMENT

NKUTHA – NKONTWANA, J

Introduction

[1] The applicant, Adcock Ingram Healthcare Proprietary Limited (Adcock), seeks to review and set aside the arbitration award rendered by third respondent, Ms Nomusa Mbhele (Commissioner), under the auspices of the National Bargaining Council for the Chemical Industry (NBCCI), under case number GPCHEM264-16/17, dated 17 November 2017. The arbitration proceedings pertained the dismissal of the first respondent, Mr Solomon Zinyana (Mr Zinyana), and the Commissioner held as follows:

- ‘1. The applicant’s dismissal was substantively unfair and procedurally fair.
2. The respondent, Adcock Ingram (Tiger Brands) is directed to reinstate the applicant, Solomon Zinyana, on the same terms and conditions of his employment that were applicable prior to the dismissal. The reinstatement date is from 11 December 2017.
3. The respondent is directed to pay the applicant arrear wages of R410 000,00 (four hundred and ten thousand rand) by no later than 15 December 2017.
4. The respondent is directed to start a disability process from 11 December 2017.
5. There is no order as to costs.’¹

[2] The nub of Adcock’s impugn is that the Commissioner committed gross irregularities and exceeded her powers. This application is opposed only by Mr Zinyana.

Pertinent facts

¹ See: Arbitration Award at pages 41-42.

- [3] Facts in this matter are mostly common cause. Adcock manufactures, markets and distributes a range of healthcare products within both the private and public sectors. It is subject to the Medicines and Related Substances Act² (MRSA). The MRSA establishes the Medicines Control Council (MCC), whose function is to control the registration of medicines, determine whether medicine is suitable for use for its intended purpose and to assess the medicines' relative risk against its benefits.
- [4] Any failure on the part of Adcock to comply with the requirements of the MRSA, its regulations and the directives of the MCC could result in Adcock being prohibited from manufacturing, marketing and/or distributing medicines. The employees in the Adcock's Regulatory Affairs Department have to diligently perform their duties.
- [5] Any failure in the execution of duties by employees in the Adcock's Regulatory Affairs Department could directly impact on Adcock's abilities to operate in the pharmaceutical industry; the loss of a manufacturing licence; the recall of products (which would result in significant financial losses); criminal charges or possibly even medical risks to patients.
- [6] Mr Zinyana commenced his employment with Adcock on 4 July 2005, as a Regulatory Affairs Pharmacist (RA Pharmacist) in Adcock's Regulatory Affairs Department. His responsibilities in that post, in accordance with the MRSA and its Regulations, were to:
- 6.1. Register new products with the MCC;
 - 6.2. Maintain and keep product dossiers up to date. Product dossiers contain, *inter alia*, the manufacturing method used to produce a product, the quality of the product and the source of the ingredients;
 - 6.3. Resurrect existing/dormant dossiers, perform a due diligence of the dossier, and ensure a dossier is compliant with the current requirements and ready for launch within the specified timeframes; and

² Act 101 of 1965.

6.4. Record any regulatory changes in the product dossier, which must be sent to the MCC for approval.

- [7] In March 2008, Mr Zinyana suffered a stroke and was hospitalized. He was placed on disability leave for approximately one year. In July 2009, Mr Zinyana returned to work and was provided temporary assistance to execute his normal duties.
- [8] On 29 February 2012, Mr Zinyana's specialist neurologist, Dr Jody C Pearl (Dr Pearl), addressed a letter to Adcock stating that, Mr Zinyana had made remarkable progress since his stroke in March 2008 and, despite having difficulty finding his words, he was 'capable of full employment in a job with responsibility as long as he does not need to speak to large number of people or have to write lengthy documents'.³
- [9] In 2014, Adcock underwent a restructuring exercise which resulted in Mr Zinyana's erstwhile manager's move from his department. In 2015, it became apparent to Adcock that Mr Zinyana could not perform his functions as a RA Pharmacist. His performance rating during the period June 2015 and March 2016 varied between 1 and 2 which was extremely poor.⁴
- [10] On 3 May 2016, a performance review meeting was convened with Mr Zinyana, his new manager, Mr Driaan Botha (Mr Botha) and Human Resources officials. Mr Zinyana did not dispute his poor performance and was presented with three options: firstly, medical boarding; secondly, mutual termination of employment; and thirdly, a poor work performance process. Mr Zinyana elected the medical boarding option.
- [11] In order to assist him, Adcock arranged a consultation for him with its doctor, Dr Victor. Dr Victor advised Mr Zinyana to meet with his Specialist Neurologist, Dr Pearl. It is not disputed that Dr Victor made it clear to Mr Zinyana that he would have to:

³ See: Founding Affidavit, annexure "NM2" at page 43.

⁴ Based on a rating system of between 1 – 5, 1 being poor and 5 being good.

11.1. Provide his job profile to Dr Pearl to enable her to assess whether he was capable of performing his Regulatory Affairs Pharmacist functions; and

11.2. Seek a medical diagnosis from Dr Pearl.

[12] Instead of meeting with Dr Pearl as advised by Dr Victor, Mr Zinyana sent her an email. On 1 June 2016, Dr Pearl responded through a letter addressed to Dr Victor stating that:

‘Mr Solomon Zinyana has been under my care since 2008 following a spontaneous left carotid artery dissection resulting in a left middle cerebral artery territory stroke with global aphasia. Mr Zinyana underwent an intensive rehabilitation and speech therapy and while he still remains with finding difficulty and mild expressive dysphasia, he has no receptive speech difficulties and no cognitive impairment. In my opinion he is able to fulfil his duties as a RA pharmacist, he may however express some difficulties in expressing himself fluently.’⁵

[13] Mr Zinyana then forwarded Dr Pearl’s letter to Dr Victor. On 7 June 2016, a meeting was convened with Mr Zinyana, Mr Botha and Human Resources officials, following Adcock’s receipt of Dr Pearl’s letter, to discuss the way forward. Mr Zinyana accepted Dr Pearl’s opinion and confirmed that he could perform his Regulatory Affairs Pharmacist functions.

[14] Owing to the poor work performance record, Mr Zinyana was put on a Performance Improvement Programme (PIP), a process he agreed to. Throughout 2015 and 2016 Mr Zinyana was provided with significant external and internal assistance to improve his performance. Over a period of six months, between June 2016 and December 2016, eight performance improvement sessions were held with Mr Zinyana, however he failed to show any improvement during this period and consequently he was issued initially with a written warning on 19 July 2016 and ultimately with a final written warning, neither of which were challenged by him.

⁵ See: Transcribed Record at page 34.

- [15] On 25 January 2017, Mr Zinyana was issued with a notice to attend the poor work performance enquiry which was scheduled for 31 January 2017. At this enquiry, the parties were afforded the opportunity to present the evidence. The chairperson found Mr Zinyana guilty of poor work performance and recommended his dismissal. On 8 February 2017, Adcock confirmed the chairperson's recommendation and dismissed Zinyana.
- [16] On 8 March 2017, Mr Zinyana successfully challenged his dismissal at the NBCCI. The Commissioner found that Mr Zinyana's dismissal was procedurally fair. This point is not controverted. What is in dispute is whether Mr Zinyana's dismissal was, as the Commissioner found it to be, substantively unfair. At the core of the inquiry is whether the Commissioner committed gross irregularities or exceeded her powers in making the order that she did in the arbitration award.

Review test

- [17] The review test is trite. The award must be one that a reasonable decision-maker could have arrived at in order for it to escape being assailed.⁶ However, that is not the end of the enquiry. In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,⁷ the Labour Appeal Court (LAC) stated that:

'[15] ...the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.

- [16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in *Head of the Department of Education v Jonas*

⁶ See: *Sidumo v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110; see also [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC); See also *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

⁷ [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at paras 15 to 16.

Mohale Mofokeng and Others, ‘for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result’. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator ‘must not misconceive the inquiry or undertake the inquiry in a misconceived manner’, as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

‘Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.’ (Emphasis added)

Analysis

[18] The crux of Mr Zinyana’s case at the arbitration was that dismissal was not an appropriate sanction due to his medical condition. This claim was mooted for the first time at the arbitration during the opening address by Mr Jack Madzhivhandila (Mr Madzhivhandila), Mr Zinyana’s legal representative. It is clear from the transcript that Mr Madzhivhandila argued that Mr Zinyana conceded that his performance was poor and that since this fact was known to Adcock, he should have been subjected to ill-health process as opposed to poor work performance enquiry. This argument was persisted with during these proceedings. Counsel for Mr Zinyana submitted that the commissioner

was confronted with a long history of poor work performance. On 3 May 2016, Mr Zinyana was presented with three options and, by electing the medical boarding option, he made a clear indication that he has medical challenges.

[19] There are difficulties with Mr Zinyana's assertion that by electing to be medically boarded he was unequivocally declaring his incapacity due to ill-health.

19.1. Firstly, he was directed to request a report to support his medical boarding application from Dr Pearl, his own doctor who had been treating him for eight years. It is not disputed that he just sent an email to Dr Pearl and the contents of that email remain unknown because Mr Zinyana did not testify during arbitration nor discover that email. I deal with Mr Zinyana's failure to testify later in the judgment; save to mention that Dr Pearl responded to that email by the letter dated 1 June 2017 wherein she expresses her unequivocal opinion that Mr Zinyana is able to fulfil his duties as a RA pharmacist, he may however 'express some difficulties in expressing himself fluently'.

19.2. Secondly, when Mr Zinyana was confronted with Dr Pearl's opinion that he was capable of performing his duties, he was not startled or record his disagreement or, better still, request a second opinion.

19.3. Thirdly, Mr Zinyana did not reopen the discussion on the other two options he had been presented. He simply accepted Dr Pearl's opinion and agreed to be subjected to PIP. Therefore, his argument that Adcock ought to reopen the discussion is clearly flawed.

19.4. Lastly, throughout the performance review discussions, he did not raise the issue of his medical condition as a reason for his poor work performance. In fact, even during the final performance enquiry, he did not raise ill-health as a defence.

[20] The evidence before the Commissioner included Dr Pearl's medical reports which she had been submitting over the years and pertinently the letter dated 1 June 2017. Dr Pearl was called as witness for Mr Zinyana. Her attempts to talk down the contents of her letter dated 1 June 2017 were unsuccessful as the following emerged when she was quizzed:⁸

'MR VERMAAK: All I am saying is that hypothetically if Solomon comes to me as his manager, and I offer him cretin alternatives, and he says to me: Here is my letter from DR PEARL, which says I am fine, I am just going to have some speech difficulties, but I can do my work then the company should accept that based on your letter. Is that correct?

DR PEARL: I think there are two points to make. SOLLY expressly wanted to continue working. From the day he had the stroke, all he wanted to do was to go to work. I supported that decision. At no point during this process was I ever contacted in any lengthy way to find out – I think accommodation were made, and then suddenly weren't made for him, to be honest. My letter was based on the fact that to my knowledge he had successfully been doing the same job that he had been doing for the past eight years, without a problem. In fact, I went so far as to reinvestigate him, to make sure there was no additional thing that I had missed, in order to say: There was no new stroke; everything is as was in 2008. This was all done in a very innocent sense of saying: Well, Solly, you're doing your job, you've been doing it for eight years, you are happy doing your job, I don't find any difference in you; in fact your tests don't show ant difference – can do the job. It's simple as that.'

[21] Dr Pearl was evidently constrained to concede that her letter confirmed that Mr Zinyana could perform his duties as he had no cognitive impairment despite the speech difficulties. In fact, it was not the first time that Dr Pearl expressed this opinion. In a letter dated 29 February 2012, Dr Pearl

⁸ See: Transcribed Record at pages 398 - 399, lines 24-13.

expressed the same opinion in validation of Mr Zinyana's full time employment.⁹

[22] Nothing much turns on whether Dr Pearl was aware of the changes in terms of the scope of Mr Zinyana's duties. It was Mr Zinyana who requested to be medically boarded and, as such, he had a responsibility to ensure that his Doctor is fully apprised on all relevant facts in relation to the conditions of his employment and the reason why he opted to be boarded.

[23] I do not wish to toy with the idea that Dr Pearl could have lied about Mr Zinyana's medical condition. My view, is that either Mr Zinyana was able to perform his duties or he was incapacitated and this fact was concealed from Adcock. If indeed he could not perform his duties due to ill-health, he was supposed to be upfront with Adcock. There is no reason why Adcock should have doubted Dr Pearl's opinion that Mr Zinyana was able to perform his duties.

[24] In *Parexel International (Pty) Ltd v Chakane N.O and Others*,¹⁰ referred to by counsel for Adcock, the LAC overturned the finding of this Court in a case of a dismissal due to incapacity. The respondent employee had been absent from work for more than nine months. The respondent employee failed to provide the appellant employer with medical reports on her prognosis for her recovery. The LAC found that since there 'was no dispute that the employee's position had already been kept open for her for more than nine months. Given these facts, the appellant's failure to consider alternatives short of dismissal was not unfair'.

[25] In the present case, Dr Pearl conceded that Mr Zinyana had been accommodated for eight years since his stroke. The process of medical boarding was halted by Dr Pearl's letter that declared him capable of performing his duties. It is telling that Mr Zinyana did not cry foul when he was subjected to PIP, issued with a final written warning for poor work

⁹ See: Transcribed Record at page 141.

¹⁰ (2019) 40 ILJ 2344 (LAC); [2019] 11 BLLR 1245 (LAC).

performance and lastly summoned to a poor work performance inquiry. As stated in *Parexel*,¹¹ it would be unduly onerous to expect the employer to put up with an employee who is either not performing in accordance with agreed key performance standards or incapacitated, for whatever reason, for an exceedingly long period without a lasting solution.¹²

- [26] There is no merit in the submission by Mr Zinyana's counsel that the *dictum* in *Parexel*¹³ is distinguishable because Mr Zinyana was not given a clear instruction as to what was expected of him after he elected to being medically bordered. Adcock's evidence that Dr Victor advised Mr Zinyana to provide Dr Pearl with his job profile to enable her to assess whether he was capable of performing the functions of a RA Pharmacist was no disputed.
- [27] Mr Zinyana chose not to testify during the arbitration proceedings and the reason recorded in the award is that 'Mr Madzivhandila submitted that the applicant would not be testifying because in terms of the evidence, the parties did not seem to be in disagreement. [Mr Zinyana] would not contradict everything that had been said should he testify'.¹⁴
- [28] Dr Pearl's concession that Mr Zinyana had no cognitive impairment and was in a position to perform his duties, as per the letter dated 1 June 2017, was fatal to Mr Zinyana's claim of incapacity due of ill-health. Therefore, the Commissioner's finding that, since 'it was not the case of Adcock that prior to 2008 Mr Zinyana's work performance was poor, it is more probable that his poor work performance was linked to other factors, such as medical reasons, that he had no control over' is untenable as it is purely conjectural.¹⁵

¹¹ Id n 10.

¹² See: *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (2014) 35 ILJ 406 (SCA) at para 31.

¹³ Ibid.

¹⁴ See: Arbitration Award annexure "NM1", Founding Affidavit at page 34, para 9.

¹⁵ Ibid page 41, para 45; see also: *Independent Municipal and Allied Trade Union obo Strydom* [2012] ZALCCT 56 at para 27,

[29] On this ground alone, the arbitration award stands to be reviewed as set aside. I deem it unnecessary to deal with other issues that arose in this matter as this ground is determinative of the dispute before me.

Conclusion

[30] The Commissioner clearly misconceived the nature of the enquiry and, consequently, arrived at a decision which no reasonable decision-maker could reach on all the material that was before her. As such, the award is vitiated by this irregularity.

[31] In the interest of justice, I deem it expedient not to remit this matter back to the Commission for Conciliation, Mediation and Arbitration (CCMA). The issues were properly ventilated during the arbitration proceedings and the adequacy of the record of those proceedings is not placed in issue. I am, accordingly, in a position to determine the matter to its finality.

[32] In the light of the findings that I have arrived at above, it is clear that the dismissal of Mr Zinyana is substantively fair.

Costs

[33] It is trite that costs do not follow the result in this Court. I am not persuaded that Mr Zinyana should be saddled with costs as it would offend the principle of fairness and equity to do so.

[34] In the premises, I make the following order:

Order

1. The arbitration dated 17 November 2017 issued under case number GPCHEM264-16/17 is reviewed and set aside and substituted with the following order:

1.1 The dismissal of Mr Solomon Zinyana is substantively fair.

2. There is order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate Fourie SC

Instructed by: Werksmans Attorneys

For the Respondent: Advocate A Saloojee

Instructed by: RS Madzivhandila Attorneys

LABOUR COURT