



LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1714/2023

In the matter between:

NOMTHI YVONNE MOPEDI

Applicant

and

COMMISSIONER K DLAMINI N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

ROYAL BAFOKENG PLATINUM

Third Respondent

Heard: 20 November 2024

Delivered: 16 January 2025

Summary: Review of arbitration award – section 145 of LRA and review test considered – determination of conduct of arbitrator, gross irregularities and unreasonable outcome. Evidence – totality of evidence and principles of evidence considered – findings and conclusions of Commissioner based on speculation and unsupported by evidence – award reviewed and set aside – remedy pleaded by applicant in his notice of motion granted – matter remitted to CCMA for a hearing *de novo*.

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The Applicant is approaching this Court in terms of section 145 of the Labour Relations Act¹ (LRA), seeking an order to review and set aside the arbitration award issued by the first respondent under case number NWRB358-22. The application is not opposed.

Background facts

[2] The Applicant was employed by the third respondent as a Mechanical Foreman. She was dismissed on 31 January 2022 subsequent to a disciplinary hearing premised on the following allegations of misconduct:

‘unbecoming conduct of a senior official in that:

- i. You acted against the best interests of the company by introducing without authorization a “cash stokvel” within the department, thereby exposing the company to potential theft, robberies and burglaries (cashless workplace).
- ii. You circumvented the company’s process, by introducing an unauthorised selective “Fines System” to the detriment of the business (Breach of Behavioural Management Procedure).
- iii. Bullying and victimization of subordinates who refused to participate in an unauthorized stokvel created disharmony among the employees (Breach of HR: Harassment Policy and RBPlat values)
- iv. Conflict of interest, in that you solicited employment for your former nanny from a constructing company. This solicitation was done without declaring

¹ Act 66 of 1995, as amended.

your relationship with her to your supervisor, which violates recruitment policies and ethical code.'

[3] The applicant alleges that she was not afforded a disciplinary hearing but was requested to submit written submissions which is a breach of her right to a fair trial and a contravention of the disciplinary code of the third respondent.

[4] Subsequent to her dismissal, the applicant referred a dispute of unfair dismissal to the CCMA. The first respondent, commissioner Kenneth Dlamini (Commissioner) was appointed to arbitrate the matter. Four witnesses testified on behalf of the third respondent and the applicant testified in her own defence. She denied that she breached any rule or standard regulating conduct in or relevant to her workplace.

Arbitration proceedings and the award

[5] It was argued on behalf of the applicant that her dismissal was procedurally unfair because the written representations enquiry was held as an accomplished fact, in that, her fate was already decided before she was invited to make representations. The third respondent informed her that the working relationship was no longer possible at the time of inviting her to make representations. Furthermore, the written representations procedure was conducted in a manner which is against clause 8.3.2 of the third respondent's Behavioural Policy.²

[6] The witness of the third respondent, Mr Hendrick Willem Strauss conceded during cross-examination that the procedure adopted in the hearing of the applicant was unfair in that she was not provided with evidence prior to making written submissions in line with the above-mentioned clause.

[7] The Applicant further argued that her dismissal was substantively unfair because there was no workplace rule which she contravened. In respect of charge 1,

² This clause states that: "where special circumstances exist, the employer, on proper consideration given to the principle of audi alteram partem, may elect to conduct any hearing by way of written representations to a chairperson appointed by the company which will allow the employee to understand the case presented by the employer and state her case to the fullest of his / her ability".

she denied any knowledge of the cash stokvel but admitted that her section was participating in the fines system.

[8] She stated that Annexure A of the third respondent's policy does not list one offence that prohibits the carrying or storing of cash in the workplace and she could not have known that the storing of cash is prohibited. Furthermore, the fourth witness, Mr Hassan Govender testified that he also implemented a fines system at Maseve amongst the members of the MDT Multi-Disciplinary Task Team and the contributions were used to buy food for the members. He further admitted that a similar fine system was introduced by Mr Johan Meyer and he discontinued it immediately when it was brought to his attention before 2020.

[9] The applicant stated that dismissal as a sanction was applied inconsistently in that another colleague who had engaged in the 'fines system' was not dismissed. She stated that corrective action was taken against Mr Meyer who also operated the fines system in that he was only warned to stop the system and never disciplined and/or dismissed.

[10] In respect of charge 2, the applicant submitted that she did not circumvent the company policy because the fines system is not prohibited in the policy of the third respondent. She stated that when she introduced the fines system she relied on clause 8.1.4.1 of the Policy which reads that "*it is not necessary to make use of formal procedures every time a rule is broken or a standard is not met. Minor violations may be dealt with by way of an informal discussion, pointing out the necessary steps for correction of the behaviour*". She only imposed the fines on employees who broke the team rules and not the actual company rules. And further that her supervisor, Victor Mgolombane was aware of the fines system she imposed on her team because they knew that Mr Govender was also imposing the same fines system at management level which she was part of.

[11] The third respondent called Ms Keamogetswe Bridgette Moitsheki to testify in respect of charge 3. She testified that she was never bullied or victimised by the applicant.

[12] With regards to charge 4, the applicant denied that she solicited employment for her former nanny from a subcontractor and testified that it was the subcontractor who asked her if she knew any female who was looking for a job. She denied that the policy prohibited the employees of the third respondent from sharing CVs with subcontractors. This fact was confirmed by Mr Strauss who testified that there was no explicit rule prohibiting employees of the third respondent from sharing CVs with contractors.

[13] At the close of proceedings, the Commissioner found that the dismissal of the applicant was procedurally and substantively fair and confirmed her dismissal.

Applicant's grounds for review

[14] The Applicant is challenging the arbitration award on the grounds that the Commissioner committed gross irregularities and/or misconduct in the conduct of the arbitration proceedings by failing to ensure that there was a fair trial of the issues which resulted in him arriving at an unreasonable conclusion not supported by evidence. The second ground is that the Commissioner failed to undertake a balanced assessment of the reliability, credibility and probabilities associated with the evidence of the respective witnesses to resolve the dispute as to whether or not the Applicant could be found guilty and dismissed on the charges levelled against her.

[15] The applicant submitted that the Commissioner misconstrued the nature of the enquiry when he sought to justify the differential treatment between the applicant and Mr Meyer. He misunderstood the nature of the enquiry in that the issue before him was not whether the fines system implemented by Mr Meyer traumatised the employees but whether such a system was allowed or not.

[16] The commissioner failed to deal with the issue of historical inconsistency in that the applicant was dismissed for running a fines system but two other employees who ran the same system were never dismissed. The commissioner arrived at a decision that no reasonable decision maker presented with the same evidence could have reached.

[17] The Applicant is seeking an order that the arbitration award be reviewed and corrected, remitted to the CCMA for rehearing or set aside.

The test for review

[18] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ held that “*the reasonableness standard should now suffuse section 145 of the LRA*”⁴, and that the threshold test for reasonableness of an award “...is [whether] decision reached by the commissioner one that a reasonable decision maker could not reach?”⁵

[19] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd and Another (Congress of SA Trade Unions as Amicus Curiae)*⁶ held as follows:

‘A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[20] In this matter, the Applicant has listed a number of grounds for review which have been summarised above. The debate on the right to review an arbitration award on process-related grounds as opposed to result-related grounds was finally settled by the Labour Appeal Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁷ as follows:

‘[13] The right to review an arbitration award on process related grounds has been a topic of recent discussion and debate. It has been regarded as a different species of review to that postulated in *Sidumo*. *Sidumo* requires the review court to ask the question: is the decision made by the arbitrator one

³ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) (*Sidumo*).

⁴ Ibid at para 106.

⁵ Ibid at para 110.

⁶ [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25.

⁷ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at paras 13 – 14 and 18.

that a reasonable decision maker could not reach on the available material? This has been interpreted by some to suggest that the *Sidumo* test deals only with the result or outcome of the arbitration proceedings and that it remains open to review an award on process-related grounds.

[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of section 145 of the LRA. This implies that an application for review sought on the grounds of misconduct⁸, gross irregularity in the conduct of the arbitration proceedings⁹, and/or excess of powers¹⁰ will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.

...

[18] In a review conducted under section 145(2)(a)(c) (ii) of the LRA, the reviewing 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 award. This piecemeal approach of dealing with the arbitrator’s award is improper as the reviewing 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.’

⁸ S145(2)(a)(i) of the LRA.

⁹ S145(2)(a)(ii) of the LRA.

¹⁰ S145(2)(a)(iii) of the LRA.

[21] The LAC has made it clear that a review court is not at liberty to pick and choose certain aspects of the award and evaluate them independently as such a piecemeal approach will defeat the requirements in section 138 of the LRA which prescribes how commissioners must conduct arbitration proceedings.

Evaluation

[22] The Commissioner in paragraph 43 of his award stated that *“the applicant admitted to having introduced the cash stokvel for which she later denied that it existed...”* From reading the record, it is clear that the applicant denied that there was a cash stokvel but admitted that there was a fine system. The applicant testified that there was no cash stokvel but the existence of the fine system which was confirmed by both Mr Govender and Mr Meyer.

[23] The Commissioner rejected the evidence of the applicant but found that all the witnesses of the third respondent were credible and their version could not be challenged on any material grounds. However, he did not accept the evidence of the same witnesses, particularly both Mr Govender and Mr Meyer regarding the practice of a fines system that was introduced by them although not regulated within the workplace. He further ignored the evidence of Ms Moitsheki who testified that she was never victimised or bullied by the Applicant. He further ignored the evidence of Mr Strauss who testified that there was no explicit rule prohibiting them from submitting CVs to subcontractors. The arbitrator failed to follow binding court decisions regarding what was expected of him when he was faced with two irreconcilable versions from the witnesses.

[24] The Supreme Court of Appeals in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*¹¹ laid out the accepted test applicable to both a trial court and an arbitrator when faced with a factual dispute, in particular when faced with two irreconcilable versions. According to this judgment, the Court had to

¹¹ 2003 (1) SA 11 (SCA) at para 5.

come to a conclusion on the disputed issues by making findings on (1) the credibility of the various factual witnesses; (2) their reliability; and (3) the probabilities:

‘... The court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of subsidiary factors... such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events...’

[25] In respect to the procedural fairness of the hearing, the Commissioner also ignored the evidence of the first witness, Mr Strauss, who admitted that the third respondent did not comply with the Policy in that the applicant was not given evidence she required in order to prepare for her case. He merely states that the Policy allowed for a hearing to be convened on written submissions on certain circumstances but did not interrogate if the case of the applicant fell under those unspecified circumstances.

[26] The applicant testified that she did not understand the charges levelled against her and as such, she was unable to formulate a defence regarding the cash stokvel and the fines system charges. However, the Commissioner rejected her evidence stating that the applicant was not a credible witness. The LAC in *South African Society of Bank Officials (SASBO) and Another v The Standard Bank Of South Africa and Others*¹² held that:

‘The trier of fact is expected, in the context of discipline in the workplace, to deal with the wrong committed by an employee even if the charge may have been inelegantly phrased provided that the employee is not significantly prejudiced by the incorrect labelling of the charge.’

¹² [2022] ZALAC 100; (2022) 43 ILJ 1794 (LAC) at para 25.

[27] The Commissioner in his award stated that “*no evidence was presented that Mr Meyer’s system traumatised the employees*” and this reasoning is flawed in that his findings were based on his speculation and not supported by evidence. None of the witnesses testified that the fines system either implemented by the applicant, Govender or Meyer traumatised employees.

[28] I am required to determine if the Commissioner complied with the requirements prescribed in section 138 of the LRA. I am satisfied that he identified the nature of the dispute he was required to arbitrate, and he afforded both parties an opportunity to lead and adduce evidence. However, from reading the award and considering the evidence presented to him, I am of the view that he misconceived the nature of the enquiry, which was, to determine the fairness of a dismissal of the Applicant for a misconduct specified on the charge sheet not whether or not the fine system implemented Mr Meyer traumatised employees. There was no evidence presented that the fines system implemented by the applicant traumatised employees.

[29] Accordingly, the review application stands to succeed and the matter should to be remitted to the CCMA for a hearing *de novo* before an commissioner other than the first respondent.

[30] The application was not opposed, and as such, the issue of costs does not arise.

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

Order

1. The arbitration award issued by the CCMA under case number NWRD358-22 is reviewed and set aside.
2. The matter is remitted to the second respondent for hearing *de novo* before a commissioner other than the First Respondent;
3. There is no order as to costs.

G. C. Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M Ntuli of M Ntuli Attorneys

For the Respondent: No appearance

Instructed by:

LABOUR COURT