



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: JR 1238/23

In the matter between:

**SPRINGS CAR WHOLESALERS
t/a NO FINANCE CARS (PTY) LTD**

Applicant

and

AZWIHANGWISI OBAD RANGOLO

First respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second respondent

MATOME VICTOR SEHUNANE, N.O.

Third respondent

Heard: 3 December 2024

Delivered: This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 27 January 2025.

JUDGMENT

VENTER, AJIntroduction.

[1] This is an opposed review application wherein the applicant (SCW) seeks to review an arbitration award dated 29 May 2023. In the arbitration award, the third respondent (the Commissioner) found that the dismissal of the first respondent (Rangolo) was substantively unfair. The Commissioner ordered SCW to pay 12 months compensation in the amount of R126 000.00 and no order as to costs. The review is launched in terms of section 145 of the Labour Relations Act¹ (the LRA).

The point *in limine*.

[2] Rangolo's attorneys raised a point *in limine* in the answering affidavit. It was alleged that the review application is deemed withdrawn on account of a contravention of the previous practice manual. Paragraph 11.2.2 thereof provided that the records in a review application must be filed within 60-days after the record was made available. Rangolo alleged that by his calculation the 60-days lapsed on 9 October 2023 and as such, absent any explanation for such lateness, the review is deemed withdrawn.

[3] Ancillary to the above, Rangolo also alleged that on account of SCW not being able to provide the name of the person who in actual fact confirmed receipt of the transmission of the record, SCW falls foul of paragraph 14.1.5 of the same practice manual.

[4] When this matter was called, there was only an appearance on behalf of SCW. The court file indicates that the set-down notice was sent to all parties around 23 October 2024. The email confirmation report attached to the court file indicates that the set-down notice was also served on the following email addresses, namely [O\[...\]](#), [m\[...\]](#) and [g\[...\]](#).

¹ 66 of 1995 (as amended).

[5] There is no return mail on the aforesaid. To that extent I readily accepted that there was proper service. However, I was not prepared to proceed in default. Prior to standing the matter down the representatives for SCW were requested to try and contact Rangolo and or his attorneys.

[6] At the same time Adv Moll (for SCW) provided me with heads of argument that were filed on behalf of Rangolo. The matter then stood down, premised on the possibility that Rangolo's legal representatives may not have received the set-down notice, hence their non-appearance.

[7] When the matter was recalled, Adv Moll made the following submissions from the bar, namely that he and his attorney had made attempts to contact Mitti Attorneys and during a conversation with an employee of Mitti Attorneys they were advised that Rangolo had in fact passed away earlier this year, that Mitti Attorneys has withdrawn as attorneys of record and no longer acts for Rangolo and the attorney who was dealing with this matter was not available. There was no notice of withdrawal on the court file. I was also advised from the bar that numerous attempts were made to contact the attorney who was dealing with this file to no avail.

[8] I adopted a practical approach. I indicated to Adv Moll that I would deal with the matter as if it remained opposed, since there was an answering affidavit before court, as well as comprehensive heads of argument.

[9] Considering the above, I then proceeded to decide the point *in limine* and once that was done, I proceeded to deal with the review application. I indicated to Adv Moll that I would reserve judgment and compare his submissions to that contained in the answering affidavit read with Rangolo's heads of argument.

[10] The point *in limine* was then dealt with. The facts were readily apparent in the papers. The submissions made by Adv Moll demonstrated that the record (including the transcript) was served on 13 October 2023. Duly calculating the 60-days as starting around 21 July 2023, it is obvious that the entire record was communicated within the 60-days period. Differently seen, there was substantial compliance with the service requirement, i.e. within 60-days which essentially then left this court to consider whether the absence of an individual's name in an affidavit of service would

then retrospectively invalidate service, and to that effect, cause the review to lapse. I held the view that the previous practice manual cannot be interpreted as such. It was clear to me that there was substantial compliance with service within the 60-days. Had there not been such service, then the point would have gained mileage, but, as indicated, there was service of the record.

[11] I proceeded to find that the review application was not deemed withdrawn.

[12] This meant that the answering affidavit was filed outside of the *dies* provided for in the previous rule 7A(9). I prompted Adv Moll to reconsider the opposition to the late introduction of the answering affidavit and after him being so instructed, I was advised that SCW would waive the opposition to the answering affidavit being filed late. Thus, the matter then proceeded on the basis that the review was alive and that I would consider the answering affidavit.

The facts.

[13] SCW is in the business of selling motor vehicles. Rangolo was employed as a mechanic around 25 November 2015. Rangolo held this position until his dismissal on 7 March 2023 when Rangolo was arrested by the South African Police Service (SAPS) along with two of his colleagues. The reason why these three employees were arrested was on account of them being apprehended whilst in possession of or in close proximity to three new motor vehicle tyres, belonging to SCW. The SAPS contacted SCW, who arrived at the scene and it was explained to SCW that the employees were caught loading tyres into the boot of a vehicle that belonged to a fellow employee by the name of Ismail.

[14] Thereafter Rangolo was placed on a precautionary suspension and around 2 March 2023 he was issued with a notice to attend a disciplinary enquiry. The charges read as follows: -

“1. Gross dishonesty and misconduct in that:

1.1 The unlawful misappropriation of company property for your personal benefit and gain as reflected per Annexure B1 and B4.”

[15] Subsequent to the disciplinary hearing, Rangolo was found guilty of the allegations and was dismissed, whereafter he proceeded to refer an alleged unfair dismissal dispute to the second respondent.

The arbitration.

[16] At arbitration Rangolo's defence was that on 23 March 2023 and during lunchtime he went on lunch with Ismail. They travelled in Ismail's car. Upon passing security with Ismail's car they drove down Elizabeth Street and whilst in Elizabeth Street another employee, namely Elvis, was found standing beside the road, and he had three tyres in his possession.

[17] Elvis flagged Ismail down. They had a discussion. Rangolo says that he, despite being a passenger in Ismael's vehicle, did not hear what was said. The next moment the SAPS arrived on the scene and all three of them were arrested. Rangolo denied that he was involved in the theft of the tyres and he testified that when Elvis flagged down Ismail, the tyres were on the pavement. Rangolo thus denied guilt.

[18] The Commissioner devoted four paragraphs in his analysis of the evidence and argument to the finding that Rangolo was not guilty of the offence. The only two paragraphs that really deal with the Commissioner's consideration of the facts and argument are paragraphs 11 and 12 of the arbitration award.

The Commissioner's reasoning.

[19] The Commissioner was of the view that what must be determined is whether Rangolo was also involved and/or was part of the removal of the three tyres belonging to SCW. In other words, a plain reading of paragraph 11 of the award indicates that the Commissioner concerned himself with whether or not Rangolo was in any way involved or was in any way part of the removal of the employer's property. The Commissioner found that SCW failed to present any persuasive or convincing evidence that he was.

[20] SCW introduced Mr Ragheeb Rahman (Ragheeb) in support of its case and the Commissioner found that his evidence did not assist him (the Commissioner) at all. In paragraph 12 of the award the Commissioner said that:

“I understood the predicament of Ragheeb, as he would not have known as to who, where and how the plan was hatched to remove the tyres hence his answers to the pertinent questions posed by the Applicant’s representative was that ‘I don’t know’.”

[21] The Commissioner thus discounted the evidence of Ragheeb, and for that matter SCW, and found that Rangolo really was just at the wrong place at the wrong time.

The review.

[22] SCW advances three grounds of review. It firstly complains that the Commissioner disregarded circumstantial evidence, that he failed to draw the most probable inference from the proven facts and to that extent that he committed a material error in law and/or misconceived the nature of the enquiry pertaining to the assessment of the evidence.

[23] Adv Moll submitted that primarily its case is based on circumstantial evidence.

[24] The second ground advanced on behalf of SCW was aimed at the calculation of compensation awarded by the Commissioner, i.e. 12 months. SCW argued that awarding 12 months’ compensation boils down to a punishment and that the Commissioner speculated in a number of respects in reaching the remedy granted in favour of Rangolo. The third ground of review was not vigorously pursued. It centred around the Commissioner allowing a few leading questions. I dispose of this ground at this stage by finding that it does not in itself carry sufficient weight to persuade me that the arbitration suffers from a procedural or reviewable taint.

[25] In considering the answering affidavit, it is quite clear that Rangolo opposed all the grounds of review. Rangolo contends that there was no evidence supporting any of the allegations against him and that there is no basis to review and set aside

the arbitration award. Rangolo also contended that SCW's failure to call the SAPS to testify on its behalf should weigh against it. In argument Rangolo says that SCW does not have any evidence that he stole the tyres and equally reminded this Court that SCW failed to open the case with the SAPS against Rangolo.

[26] Rangolo further argues that SCW has essentially fabricated a version that he stole tyres and that the alleged events remain unproven and were not corroborated.

[27] Rangolo further said in his argument that there is a duty on a Commissioner to properly determine the evidence, which means that an arbitrator should assess all witnesses, documents and the probabilities of a case. Invariably this then leads one to the review test. The review test is trite.²

[28] The provisions of section 145(2)(a)(i)-(iii) of the LRA are suffused with the reasonability standard.

[29] A review Court asks itself the following question: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?³ This Court recently summarised the review test and its application as follows: -

"[25] In sum, applying the correct review test has a logical chronology. First, it must be determined if there is a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator."⁴

[30] In the well-known matter of *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵ Van Niekerk J (as he then was) said the following: -

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

³ *Sidumo (supra)* at paragraph 110; *Fidelity Cash Management v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC).

⁴ *Fidelity Cash Management v Commission for Conciliation, Mediation and Arbitration and Others (supra)* at paragraph 102.

⁵ (2010) 31 ILJ 452 (LC).

“[17] In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this must not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or gross irregularity during the proceedings under review and that party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”

[31] It is quite clear that in respect of the aforesaid there is no requirement in the review test that a singular or dominant finding must prevail. The reference to a “... *band of reasonableness*...” clearly indicates that there is a span of findings that could be made on the same set of facts and may be reached by various arbitrators.

Grounds of review.

Ground 1: Evidence tendered was circumstantial (not direct)

[32] This matter involved some circumstantial evidence. In deciding this ground of review, I consider the recent judgment *Mapyane v SA Police Service and Others*⁶ where the Labour Appeal Court said the following:

“[46] In *Khambule v National Union of Mineworkers and Others* the LAC reiterated that a reviewing court should not defer to the reasoning of a commissioner as ‘the reasoning of a commissioner is no guiding light in determining whether the decision or more particularly the ‘order’ handed down is reasonable’, but must consider all the evidence led at the arbitration and in the light of that evidence determine whether the award is one which any commissioner in the position of the commissioner, who determined the arbitration, could reasonably make. If the answer is in the positive, then there must be no interference with the award.” (Emphasis added)

⁶ (2024) 45 ILJ 564 (LC).

[33] Circumstantial evidence often forms an important part of arbitration proceedings before commissioners, duly considering the informal nature within which these proceedings are conducted. Once circumstantial evidence becomes readily apparent in the proceedings, then – as in this case - an arbitrator is required to draw inferences. This is so as witnesses may not have made direct assertions to any of the facts that are adduced or which come into play. For obvious reasons the inferences that are being drawn must comply with the rules of logic.⁷

[34] It is also a well-known legal principle that in civil proceedings (and equally so during statutory arbitrations) if an inference is drawn or sought to be drawn, that inference must also then be consistent with all the facts that were proven during the proceedings. Those facts are not required to point to the only inference. It is sufficient that “*the most probable inference*” is drawn from these facts.⁸ A singular or dominant inference falls outside the scope of the civil test.

[35] Having said that, it then becomes quite clear that a trier of fact, such as the Commissioner in this instance, during his assessment, evaluation and consideration of circumstantial evidence should at least pay consideration to the cumulative effect of this evidence. This is so as in evaluating circumstantial evidence, the weight does not necessarily pertain to each individual portion of the evidence, but the combination which that evidence would have in its entirety.⁹

[36] In argument Adv Moll referred me to paragraph 11 of the arbitration award where he contended that the Commissioner correctly determined that the question to be answered in this matter is whether Rangolo was involved in or part of the removal of the tyres belonging to SCW. Having considered the transcript, it readily becomes clear that both parties, on occasion either did not challenge evidence, or presented a sparse version. There are portions of Ragheeb’s and Rangolo’s evidence which are not grappled with by the Commissioner in paragraphs 11 and 12 of the arbitration award. This is quite normal and does not automatically upset the evidence cart.

⁷ *R v Blom* 1939 AD 188 at 202 - 203.

⁸ *Govan v Skidmore* 1952 (1) SA 732 (N) 735; *MacLeod v Rens* 1997 (3) SA 1039 (E).

⁹ *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 136G.

[37] Amongst others is the evidence of Ragheeb where he during cross-examination testified that the loading of tyres into a vehicle's boot, at the back of the business, ought to have raised suspicion. In addition, during his cross-examination it was also put to him that Elvis has on occasion told Rangolo that SCW from time to time *"gives him stuff"*. That version was denied by Ragheeb. Ragheeb further on that score testified that he would not know anything about giving Elvis any stuff and he reminded the Commissioner that the tyres that were found were brand new and not second-hand.

[38] This evidence was not denied during Ragheeb's further cross-examination. A further portion of important evidence was Ragheeb's testimony on how SAPS knew that employees were stealing, to which he answered that Elvis was on the wall and that the stolen tyres were *"... coming over the wall and that is when the vehicle was on site"*.

[39] This information was equally not interrogated by the Commissioner. No evidence was introduced by Rangolo confirming that Elvis had indeed been provided with three brand new tyres. No documentation to that extent was submitted during the arbitration and neither was Ragheeb confronted with such documentation either. Elvis was not called to verify this version.

[40] Rangolo testified that when Ismail stopped his vehicle, beside the road, Elvis was going to load the tyres which at that stage were on the pavement. Rangolo testified that the tyres at the time of their arrest were still on the pavement. The arbitration bundle contains several photographs where SAPS was involved and the photograph marked "B1" on page 20 reveals that three tyres were in actual fact in the boot of Ismail's vehicle, contrary to what was testified to by Rangolo.

[41] During his evidence in chief Rangolo testified that Elvis was a cleaner, who did maintenance and related chores. Significantly he testified that *"... most of the time he was asking this stuff and he just lend the money for transport and all those stuff and we give him whatever we can give him..."*. This version was not put to Ragheeb during his cross-examination. The record is replete with similar examples.

[42] It readily became apparent during Rangolo's cross-examination that the vexed merchandise did not leave the premises of SCW in the ordinary fashion as proposed to Ragheeb. The transcript reveals that during the cross-examination of Rangolo a rudimentary illustration of the surrounding area was drawn on a piece of paper and concessions were made by Rangolo as to the layout of the surrounding area. Rangolo admitted under cross-examination that if any merchandise is provided to an employee, then there is a procedure that must be followed to remove the item from the premises. What is absent in paragraphs 11 and 12 of the arbitration award is any attempt by the Commissioner to interrogate these portions of evidence which clearly indicate that any merchandise that is removed from the employer's premises must first of all be brought to the attention of the employer and in this instance the evidence clearly indicates that the three tyres were unlawfully removed. Logic dictates that legally obtained merchandise would then pass through the front gate, so to speak, which did not happen in this case. The inescapable conclusion is then that the tyres were stolen. I get the impression that the Commissioner at least appreciated that.

[43] One question, however, must be answered. Did Rangolo – despite being in Ismael's vehicle - act in accordance with the charge sheet? I pause to add that I was not able to find evidence that Rangolo assisted Elvis.

[44] Thus, having considered the aforesaid, I return to the question posed by the Commissioner: Whether Rangolo was involved in or was part of the removal of the three tyres belonging to the Applicant along with his finding in paragraph 12 that Ragheeb finds himself in a predicament as he (Ragheeb) would not know where and how the plan was hatched to remove the tyres. The charges do not revolve around how and where the plan was hatched.

[45] I have quoted the charges already.

[46] The facts then largely pivot around what transpired when Rangolo and Ismael were accosted by Elvis by the roadside. I have already indicated that at this stage, the tyres were misappropriated and were in the possession of Elvis. In other words, from the evidence presented at arbitration, one comfortably reaches the conclusion that the three tyres were unlawfully removed, by Elvis. That then leaves a

consideration whether the Commissioner could reasonably conclude that Rangolo was not part of the removal of the tyres. There is no evidence of what Rangolo did in the yard.

[47] The Commissioner was not, in my view incorrect in finding that Rangolo was not involved in the removal of the tyres. At best, the circumstantial evidence only points to Elvis removing the tyres. The Commissioner cannot be faulted for finding that Ragheed's evidence did not assist him in determining whether Rangolo was part of the plan and eventual removal either. Ragheed's evidence was not able to establish that fact.

[48] However, the removal is not the concern raised in the evidence. Thus despite what I have set out in the preceding paragraphs and to the extent that certain portions of the evidence were not cross-examined and duly considering what was said or not said by the two witnesses, I hold the view that what the Commissioner dealt with in paragraph 11 is supported by the evidence and is thus a conclusion which a Commissioner, reasonably applying his/her mind to that evidence could reach.

[49] As far as interrogating paragraph 12 of the arbitration award, it appears that the thrust of the Commissioner's thinking centred around Rangolo being in the vehicle at the time when their travel intersected with Elvis standing beside the road. I agree with the Commissioner's finding that Rangolo's evidence as to how it came about that he was in the vehicle was not disputed and that he was at the scene when arrested by SAPS and at that time he was in the presence of Elvis and Ismail, is certainly supported by the evidence.

[50] Rangolo disputed the allegations and denied that he was involved in the misappropriation of SCW's property and prior to the arbitration commencing, his representatives stated that his case would be that he was at the wrong place at the wrong time.

[51] I consider the following evidence, namely, that when Elvis indicated to Ismail that he (Ismail) should stop, Elvis was already in possession of the tyres and at that stage Rangolo was in the vehicle with Ismail and moments later the SAPS pounced

on them. I proceed to fully quote Ragheeb's cross-examination which allowed the Commissioner to find that his version on the score was not able to countervail Rangolo's evidence: -

"MS NTSOANE: And I'm going to put a further version not you in saying the applicant is further saying, 'as we were on our way to lunch, we get stopped by Elvis who says can I come with you to lunch'. Can you comment or dispute that?

MR RAHMAN: No, I cannot comment on that."

[52] If anything were to trigger a suspicion, it is Ragheeb's evidence that Rangolo ought to have known that something is wrong, meaning that by "*... loading tyres into a boot and one of the guys at the back of the business, would he not have known that there was something wrong...*". And that is the sum total of the evidence supporting the allegation that Rangolo was involved. What I do consider is the onus and what a person in Rangolo's position would say, other than what his version was at the time of the arbitration.

[53] A similar situation arose in the case of *DHL Supply Chain (Pty) Ltd v De Beer N.O. and Others*¹⁰ in a case where the employer dismissed a number of employees on the basis of them having failed a polygraph examination and where the case was to a large extent premised on the existence of circumstantial evidence. The employees in that case persisted with their plea of not guilty and ultimately the LAC ended up dismissing DHL's appeal. It said that: -

"[15] Furthermore, the notion that they offered no real challenge to the facts adduced by the appellant and that this warrants an adverse inference is illogical. An innocent person in the position of the two respondents could be expected to do no more than deny guilt and express ignorance about how and why it occurred. Significantly, despite the ostensible best efforts of DHL itself, the means of misappropriation remain unknown and precisely when it occurred in the chain of handling could not be established. The proof that the respondents had the opportunity to steal is valueless without more and it

¹⁰ (2014) 35 ILJ 2379 (LAC).

could never be a burden on them to offer alternative theories for the misappropriation in order to achieve exoneration." (Emphasis added)

[54] The finding that there was no evidence that implicated Rangolo, premised on the circumstances is not out of kilter with the review test.

[55] SCW also argued that no evidence was presented that Rangolo is 57 years old or that his employment prospects are slim. As for Rangolo's age I have considered a few documents. The SAPS 14A form refers to Rangolo's identity number. It captures that he was born in 1966. His identity number also appears on the LRA Form 7.11, and at the part where he was required to indicate how old he was, he wrote 57. His age appears on his Salary Schedule, his UI-19 Form, and this is also confirmed in his certificate of service. The Commissioner, considering a catalogue of the information before him, could reasonably assess Rangolo's age. While the Commissioner does not say where he obtained that information, it cannot be gainsaid that it was before him, one way or the other.

[56] This then leaves me to consider whether the award of 12 months compensation was unreasonable. Rangolo sought maximum compensation. If a dismissal is found to be substantively unfair, then section 193(2) requires the primary remedy of reinstatement, unless any of the elements described in section 193(2)(a)-(d) are present. The Commissioner avoided the primary remedy, on account of Rangolo seeking maximum compensation. The Commissioner at paragraph 13 stated that Rangolo is unemployed, that Rangolo does not have an income and that his prospects of employment are slim.

[57] Section 193(1)(c) of the LRA provides for compensation to be paid to a dismissed employee. Section 194 provides for the limits of compensation. Compensation in the case of a substantive unfair dismissal amounts to an attempt to redeem the income or salary loss suffered by the affected employee.

[58] Whilst I accept that Rangolo was at the time 57 years old, it is equally true that he was a mechanic. In other words, he was not an unskilled labourer, and the possibility of him being able to secure employment was not remote. He had not yet reached pensionable age. The granting of compensation in terms of section 194 of

the LRA involves a value judgment, and such compensation awarded must be just and equitable. There is no motivation by the Commissioner on how he concludes that 12 months compensation is appropriate. His award on that score is thus not reasoned, just nor equitable. The mere asking for maximum compensation does not equate to granting that requested amount.

[59] In conclusion and just to be clear: The circumstantial evidence assessment in this case, cannot extend to Rangolo being linked to the removal of the tyres, even less its planning. That left the Commissioner with Rangolo's presence in the car. I hold the view that the circumstantial evidence cannot be considered in a manner that results in an overly elastic application, aiming to bring Rangolo within the domain of paragraph 47.5 of the Applicant's heads of argument.

[60] Given the aforesaid, I hold the view that the finding by the Commissioner on the merits of the dismissal is not unreasonable and his conclusion (apart from the remedy) falls within a band of decisions that could be reached on the evidence, considering that circumstantial evidence. Doing so allowed for an obvious inference, logically achieved, namely that Rangolo was not part of the removal. Merely being in the vehicle is not circumstantially sufficient to implicate him. The result is that the finding that Rangolo's dismissal was substantively unfair, remains.

[61] In the premise, the following order is made.

Order

1. The review application is hereby dismissed in regards to the finding on the substantive fairness of the dismissal of Aswihangwisi Rangolo but upheld in regard to the award of compensation.
2. Paragraph 15(b) of the arbitration award under case number GAJB6741-23, made by Commissioner Mr Matome Victor Sehunane dated 29 May 2023 is reviewed and substituted with the following:

*“The Respondent (**Springs Car Wholesalers t/a No Finance Cars**) is ordered to pay the Applicant (**Aswihangwisi Rangolo**) an amount of 5 months compensation calculated as follows: $5 \times R10,500 = R52,500$ ”.*

3. There is no order as to costs.

F. Venter
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv P Moll
Instructed by:	Raees Chothia Attorneys
For the first respondent :	No appearance.