



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2081/22

In the matter between:

AUTO PEDIGREE, DIVISION OF MOTUS GROUP

Applicant

and

DISPUTE RESOLUTION CENTRE (MIBCO)

First Respondent

COMMISSIONER MPAI NO

Second Respondent

SETHINTHA JERRY MOGASHOA

Third Respondent

Heard: 4 February 2025

Delivered: 4 February 2025

Summary: Application to review and set aside award. Application dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] This is an application brought to review and set aside the arbitration award issued by the second respondent (hereafter the “commissioner”) on 5 September 2022, under case reference MIPT33375. The commissioner found that the dismissal of the third respondent was substantively fair, but procedurally unfair.

Review applications: General remarks

- [2] The arbitration process and the resulting arbitration award both constitute administrative action. Section 33(1) of our Constitution requires all administrative action, including the arbitration process conducted under section 145 of the LRA, to be lawful, reasonable, and procedurally fair.
- [3] It was in this context that the Constitutional Court fashioned the appropriate review test¹ in relation to arbitration awards, issued under section 145 of the LRA, in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* The test has come to be known as the “*Sidumo* test” or the “reasonableness test.”

¹ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

Background facts

- [4] The third respondent was employed by the applicant, as a branch manager, until he was dismissed for misconduct. There is no need to recite the facts related to the misconduct for which the third respondent was dismissed, suffice to state that he was found guilty of three charges (of the four charges levelled against him); each of which related to serious misconduct involving gross insubordination, gross negligence, and dishonesty. As the commissioner indicated, each of these charges would have sufficed to find that the third respondent's dismissal was substantively unfair.
- [5] The third respondent failed to attend his internal disciplinary hearing, which had earlier been postponed due to ill health. On the final occasion, on 27 October 2021, the third respondent represented that he was sick once again. The applicant required him to attend the hearing, to be conducted virtually, to explain why he was so sick that he could not proceed with the hearing. The third respondent failed to do so, and instead submitted a medical certificate. The applicant took the view that the third respondent was not sick, and merely wished to obstruct the disciplinary process. The disciplinary hearing proceeded in the absence of the third respondent. He was found guilty of the charges against him, and dismissed.
- [6] The third respondent challenged the fairness of his dismissal at the Dispute Resolution Centre ("DRC") of the Motor Industry Bargaining Council. To repeat, the commissioner found that the dismissal of the third respondent was substantively fair but procedurally unfair. The commissioner awarded him one and half months' salary as compensation for the procedural unfairness.

Proceedings in the Labour Court

- [7] The third respondent filed a notice of opposition on 17 November 2023, many months after the applicant's supplementary affidavit was delivered, on 16 March 2023.
- [8] The Rules of the Labour Court are clear. The third respondent must deliver his answering affidavit within ten (10) days of receipt of the supplementary affidavit, or the notice to abide.
- [9] In his notice of opposition, the third respondent seeks condonation for the late opposition, and further seeks an order reviewing and setting aside the arbitration award. The third respondent attaches to the notice, an affidavit in which he purports to oppose the review application, bring his own review application, and seek condonation for the late opposition. In essence, in his affidavit:
- 9.1 The third respondent states that he lacked funds to bring a review application himself and he lacked funds to oppose the review at the time when he should have filed an answering affidavit.
- 9.2 His affidavit lacks sufficient detail explaining the extremely lengthy delay. In addition, a lack of funds, without more, is inadequate.
- 9.3 The third respondent never explains where he ultimately secured funds, nor why such funds were not secured earlier.
- 9.4 The third respondent does not explain why he could not oppose the review application himself given that he was not a blue-collar worker - but a branch manager of a large corporate entity.

- [10] In the circumstances, the delay is lengthy, and the explanation extremely poor. On this basis alone, condonation is denied to the third respondent, and he may not oppose the review application. It is not in the interests of justice to grant condonation.
- [11] Insofar as the third respondent's notice of opposition, and supporting affidavit, purports to be a separate or independent review application, that application ought to have been brought within six weeks of the arbitration award, issued on 5 September 2022. Instead, the application was brought on 17 November 2023, more than one year later. There is no reason provided for this extremely lengthy delay. Condonation, insofar as it is sought for the late filing of the review application, of the third respondent, is dismissed.

Arbitration award: procedural unfairness

- [12] The commissioner found that the dismissal of the third respondent was procedurally unfair. The commissioner arrived at this conclusion for two reasons: (1) the disciplinary hearing proceeded in the absence of the third respondent when this was unfair, and (2) the third respondent had requested the documents to be used at the hearing but did not receive them. The commissioner points out that the third respondent's version, regarding the documents, was undisputed.

Analysis of the grounds of review

- [13] The applicant states that the commissioner unreasonably found that the disciplinary hearing should not have proceeded in the absence of the third respondent. The commissioner failed to consider that the hearing was scheduled to proceed *virtually*, and the third respondent could

therefore have attended to explain that he was ill. Instead, says the applicant, the third respondent submitted a medical certificate – and failed to attend.

[14] If the commissioner indeed failed to consider that the hearing was virtual, this would likely have been problematic. However, the review process is an outcome-based process and, to justify a review, the outcome itself must be unreasonable. The reasoning of the commissioner is not particularly important within this prism. Here, the applicant required the third respondent to attend the hearing, albeit virtually, to explain his illness. The commissioner reasonably considered that, if third respondent was sick, he may not have been able to attend, even if this was just to explain his sickness. In that context, the finding of procedural unfairness was not so unreasonable that no reasonable decisionmaker could have arrived at such decision.

[15] More importantly, the commissioner (also) found the dismissal was procedurally unfair because the applicant refused or failed to provide the third respondent with documents prior to the disciplinary hearing. The applicant failed to deal with this issue in its founding and supplementary affidavits. If the hearing had proceeded, without the third respondent being provided with the documents he had requested, he may have been prejudiced. The finding of procedural unfairness, in those circumstances, was not so unreasonable that no reasonable decisionmaker could have reached it.

Conclusion

[16] In the circumstances, I cannot find that the arbitration award was so unreasonable that no reasonable decision maker could have reached that conclusion. Accordingly, the application is dismissed.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

[INSERT]

For the Third Respondent:

[INSERT]

LABOUR COURT