



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1785/21

In the matter between:

NGAKA ANDRIAN LESALA

Applicant

and

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

First Respondent

LUNGILE MATSHAKA N.O.

Second Respondent

SCAW SOUTH AFRICA

Third Respondent

Heard: 30 July 2024 and 6 August 2024

Delivered: 21 February 2025

JUDGMENT

NHLAPO, AJ

Introduction

[1] Before me is an application to review and set aside the arbitration award dated 6 July 2021, which award found the dismissal of the applicant to be procedurally and substantively fair, as well as several interlocutory applications.

[2] The first of these interlocutory applications is that the applicant served the notice of motion and founding affidavit in Word format via email, which was in non-compliance with Rule 4 of the then Rules of this Court¹. Furthermore, that neither the founding affidavit nor the notice of motion was signed or commissioned to the date of the answering affidavit.

[3] I have before me a commissioned founding affidavit and a signed notice of motion. Both are dated 24 August 2021, which appears to be the date on which they were filed in compliance with the prescribed period of six weeks. The email (the premise of the complaint) appears to have been sent on the same day – 24 August 2021 – to the third respondent.

[4] I am mindful of the fact that the applicant is self-representing. Of course, he might have sought assistance in the preparation of the founding papers, but this assumption does not translate to the conduct of the entire review proceedings. Importantly, there is no prejudice that appears to have been suffered by the third respondent.

[5] In view of these factors and the view I take regarding the review application, I condone such non-compliance in order to deal with the merits of the review.

[6] There is also an application to compel the first and second respondents to comply with the provisions of the then Rules of this Court in relation to the delivery of the arbitration record.

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

[7] There is further an application for an extension of time in filing the replying affidavit in the main review application.

[8] The view I take renders it unnecessary to deal with these two last issues arising from the review application.

Background

[9] On 9 December 2019, the applicant was summoned to a disciplinary hearing to answer to the following allegations of misconduct:

‘Gross misconduct in that you falsely accused a Senior Manager (Mr Nicky Louw) of racism.

Gross insubordination in that you took leave, notwithstanding that you were directly instructed not to do so.’

[10] A disciplinary hearing was held, and the applicant was found guilty of both allegations. The first charge of gross misconduct (falsely accused Mr Nicky Louw of racism) led to his dismissal on 20 December 2019.

[11] An unfair dismissal dispute was referred to the bargaining council on the first charge. At arbitration, the third respondent led the evidence in chief of its sole witness, Mr Nicky Louw (Mr Louw) who was also the complainant. Notably, there was no meaningful cross-examination of Mr Louw due to his unavailability as well as a bad network connection. I extensively deal with this pertinent issue herein below.

[12] The applicant also testified and was subjected to cross-examination.

Grounds for review

[13] In the founding affidavit, the applicant’s ground for review is articulated in the following manner:

[23] The Second Respondent found that the dismissal of the Applicant was both substantively and procedurally fair despite the sole witness of the Respondent having failed to present himself to cross-examination by the Applicant.

[24] This witness was reported by the Respondent to have taken leave and went to Namibia for personal reasons.

[25] The arbitration hearing had to be postponed more than twice due to reasons relating to the unavailability of this witness.

[26] By the time the Applicant had to present his case, there was no cross-examination of the Respondent's witness.

[27] At the end of the Respondent's case the Commissioner indicated that he was going to make a Ruling on the admissibility of the untested evidence of the Respondent's sole witness.

[28] The Commissioner failed in his duties and has committed a gross irregularity when he did not make any ruling on the admissibility of the Respondent's 'disappeared witness'.

[29] The Commissioner should have disregarded the untested evidence of the Respondent's sole witness and only had regard to the only tested evidence of the Applicant which was unshaken by the Respondent's representative's tough cross examination.

[30] The Commissioner did not apply his mind to the admissible evidentiary material before him and that there was only one probable and plausible version, which is that of the Applicant.'

[14] The third respondent's answer to the above can be summarised as follows:

[54] Louw did not fail to present himself for cross-examination as alleged. It is apparent from the history of the proceedings set out in paragraphs 23 to 34 above, the only time when Louw was unavailable for the proceedings of his own accord was when he was in Namibia on 28 April 2021...

...

[57] To reiterate, the only date on which Louw was unavailable for the arbitration was on 28 April 2021. Louw was available but not present at the proceedings of 23 February 2021 in circumstances where I had pre-empted

that the arbitration may be postponed due to the belated attempt by Bikitsha to have the Hearing Transcripts introduced as evidence...

...

[59] There was some cross-examination of Louw before Bikitsha abandoned his questioning in favour of commencing with Lesala's evidence in chief.

[60] Save to state that Scaw's case did not 'end', in circumstances Bikitsha failed to complete his cross-examination of Louw and Scaw did not have the opportunity to re-examine him, the remaining contents of this paragraph are admitted.

[61] Scaw admits that the Commissioner did not make any ruling on the admissibility of Louw's evidence in the Award. However, it must be borne in mind that some cross-examination of Louw did take place, and it was Bikitsha who, in Scaw's submission, waived the right to effectively cross-examine Louw in a haste to conclude the proceedings...

...

[63] Scaw denies that the only option available to the Commissioner in dealing with Louw's evidence was to disregard it entirely. It was open for the Commissioner to determine how much weight to place on Louw's evidence in circumstances where it was incomplete.' (Own emphasis added)

[15] The above (extracts from founding and answering affidavits) calls for a consideration of the transcript to the extent that some of the averments of the applicant are denied, which are material to a determination of the review gleaned from the affidavits.

[16] A consideration of the transcript reveals the following in so far as the discussions on 28 April 2021 are concerned, which is the date of the events covered in the affidavits referred to in this judgment:

'EMPLOYER REP: ...Commissioner, I have, while I was preparing with my witness he mentioned to me that out of the blue, he's going to be in Namibia on the 28th of April which is today and on this day he's also travelling from Namibia to Botswana. I did mention to my witness that he must make other

arrangements to be here today because I understand that this matter has been postponed on a prior occasion, and it was mentioned that it was a final postponement.

...

EMPLOYER REP: Now Commissioner I did speak to Nicky and urged him to be here today, unfortunately Commissioner, it fell on deaf ears, and I just could not secure the witness for today. Commissioner, this is totally out of my hands, and I really do, really, really from the bottom of my heart apologise to both the counsel and Mr Vuyo, I really do not know what to do.

Like I did mention we can attempt to do it over Zoom, Commissioner, it should also be taken into consideration that if I do it over Zoom I'm going to have to do it on my cell phone, it's the only device that I have Zoom on and Commissioner, taking into consideration that the witness, and I know it's no fault of any other party but Mr Nicky Louw, taking into consideration that my witness is, if we could put it in brackets, overseas, so Commissioner for me to go on Zoom for seven questions and then we start with cross-examination which I am pretty sure is going to take the whole day, Commissioner, it's going to deplete my financial, it's going to ruin me financially.

...

EMPLOYER REP: Commissioner, but still I just want to reiterate Commissioner my greatest apologies, I know this I frustrating, and Commissioner, I do believe at the end of the day Mr Vuyo will be asking or arguing for costs and I would not blame him, Commissioner, but for us to proceed without cross-examination because I'm going to ask him four questions, or seven questions and if there's a technicality with Zoom it will be in the cross-examination. So, I don't really, I've never been in this situation before. Then we don't have the version of the applicant on file. So that's the other thing I'm thinking about. But obviously it will be procedurally unfair if there's no cross-examination.

...

EMPLOYER REP: For me cross-examination is the most critical and I think for Mr Vuyo as well, if we can just get a direction from Commissioner,

because I've never been in this situation, I don't know, what to do because what we have now is only the respondent's version and if that is not tested that evidence will stand, if it's not tested under cross-examination that evidence stands and its going to be hard to, if we attempt to do it on papers, I don't know how that is going to work, Commissioner, I'm happy to proceed but I just don't know how.

...

EMPLOYER REP: Maybe before we go and yet again I know this is orthodox. If we cannot maybe park the cross-examination, because after this I'm closing my case, after the cross-examination of this witness I'm done.

COMMISSIONER: We would then proceed with the applicant's

EMPLOYER REP: Yes.

EMPLOYEE REP: [indistinct] park it?

EMPLOYER REP: And we come back, yes no we come back.

EMPLOYEE REP: Come back.

EMPLOYER REP: To the cross-examination for Nicky Louw, because I don't want to take away the cross-examination on your side but, because I do not want that for my witness for my case its going to be ...intervenes]

EMPLOYEE REP: That will be [indistinct] and prejudicial then the respondent must finish his case in terms of the onus and then we must come in and present our version. After that the respondent has closed it case.

...

MR LOUW: Ja, sorry, I'm struggling to hear you but [indistinct].

EMPLOYEE REP: Commissioner, this is frustrating me. It's really frustrating me, this ...[intervenes]

EMPLOYER REP: Sorry Commissioner, really I went to [indistinct] do this.

EMPLOYEE REP: What's your answer, what's your comment; I'm saying to you never said in the hearing that there was no grievance lodged by Lesala, what's your answer to that? Do you have an answer, do you want to comment? Nicky? Commissioner [indistinct].

EMPLOYER REP: Well my signal is bad here.

COMMISSIONER: [indistinct].

EMPLOYER REP: Sorry Commissioner, I really tried [indistinct].

COMMISSIONER: [indistinct].

EMPLOYEE REP: Commissioner the instruction from the junior is that the, in an unfair dismissal matter the respondent has the onus.

COMMISSIONER: Sure.

EMPLOYEE REP: And the respondent, the applicant cannot start its case before that of the respondent is closed. We ... [intervenes)

COMMISSIONER: Ja, there's (indistinct).

EMPLOYEE REP: We maintain that we're not deviating from that.

COMMISSIONER: That's the normal process, understood very clear.'

(Own emphasis added)

[17] The above from the transcript does not support the third respondent's averment that the applicant's representative elected not to continue with the cross-examination of Mr Louw.

[18] Furthermore, it appears that Mr Louw elected not to attend the proceedings of 28 April 2021 and was accommodated through a virtual session which was a complete disaster due to connectivity issues.

Analysis

[19] It is common cause that the sole witness of the third respondent – Mr Louw – did not attend the proceedings of 28 April 2021. Instead, Mr Louw went to Namibia knowing his examination in chief was yet to be completed, and further that cross-examination was expected from the applicant's representative.

[20] Further to the above, it is also common cause that there were no prior arrangements for Mr Louw to testify in any of the virtual platforms, now that he opted to travel to Namibia. Notwithstanding, on 28 April 2021, the applicant's representative reached a compromise for Mr Louw's evidence to be heard on the Zoom virtual platform.

[21] I have also gathered from the transcript that the virtual platform was very unstable (very poor connectivity), resulting in very limited cross-examination. In my view, there was no effective cross-examination as Mr Louw and the cross-examiner were hardly able to hear each other.

[22] Importantly, the third respondent, who has now changed its tune in the answering affidavit, sympathised with the applicant (not for the first time) stating:

‘I just need to hear from Commissioner, how it's going to work from there on out, because obviously Mr Vuyo do have a lot of questions left for Mr Nicky and I think it will be unfair if that chance is taken away, not to cross-examine the witness properly, at a later stage, I do understand it's difficult for Vuyo to cross-examination like this, with being interrupted. So Commissioner, so I'm in Commissioner's hands. I just think its necessarily for the witness to be cross-examined and it's not even my duty to cross-examine.’ (Own emphasis added)

[23] Of further importance is that the applicant's representative stated the following to be his instructions:

‘...that in unfair dismissal disputes, the respondent has the onus. ... the applicant cannot start its case before that of the respondent is closed... We maintain that we are not deviating from that.’

[24] I thus do not accept that the applicant's representative elected to commence with the applicant's case because he was in a hurry to complete the proceedings. In any event, the procedure followed was initially suggested by the third respondent's representative.

[25] Further to the above, the transcript reveals that the applicant opposed any further postponements meant to accommodate Mr Louw. The third respondent's representative seemed also to agree.

[26] The Commissioner was also in agreement with the parties and undertook to make a ruling at the end of the proceedings on how the evidence was to be handled in view of the circumstances. Further, the Commissioner made an undertaking to the applicant to make a ruling on whether the third respondent closed its case.

[27] Notwithstanding the commitment, the Commissioner failed to make a ruling or to mention any of the circumstances of that day – 28 April 2021. In the award, nothing is said regarding how he then handled or evaluated the evidence in view of the lack of cross-examination. This, in my view, constitutes a gross irregularity that renders the entire award susceptible to being reviewed and set aside.

[28] Furthermore, the absence of cross-examination of the sole witness, who is also the complainant, constitutes an irregularity that cannot be cured with any order except to review and set aside the award and remit the matter to the bargaining council.

[29] My finding in this regard finds support in *Distillers Korporasie (SA) BPK v Kotze*² where the following principle was stated:

‘The first question to be considered was whether there had been an irregularity. The answer could not be in doubt. The disallowance of proper questions sought to be put to a witness by cross-examining counsel is an irregularity which entitles the party represented by the cross-examiner to relief from a Higher Court, unless that Court is satisfied that the irregularity did not prejudice him (see *Chester v Oldman*, 1914 T.P.D. 67 at p. 72; *Stemmer v Sabina and Sub-Commissioner for Natives, Johannesburg*, 1910 T.S. 479 at pp. 484 to 485; *Jockey Club of SA and Others v Feldman*, 1942 AD 340 at p. 359).’

[30] The Supreme Court of Appeal in *Technology Corporate Management Pty Ltd and Others v De Sousa and Another*³ reiterated the principle that to curtail cross-

² 1956 (1) SA 357 (A) at 361H.

examination on matters pertinent to the decision is an irregularity which entitles the party represented by the cross-examiner to relief from the Court.

[31] In this instance, I have already made a finding that there was no effective cross-examination of the third respondent's sole witness. Furthermore, the Commissioner failed to even mention this important aspect and how he dealt with or weighed the evidence in view of the onus of proof. It is further not known how the third respondent's sole witness would have reacted to the questions under cross-examination, more so in that he was also the complainant. I am also not able to speculate about the outcome of the cross-examination. As such, I am not inclined to make an order that is speculative.

[32] In view of the above, I am inclined to review and set aside the arbitration award and remit the matter back to the first respondent for an arbitration *de novo* before a commissioner other than the second respondent.

[33] I make no order as to costs for many reasons that I deliberately do not articulate due to the dominant factor, which is that the applicant is self-representing.

[34] In the result, the following order is made:

Order

1. The arbitration award issued under case number: MEGA55824, dated 13 July 2021 is reviewed and set aside, and the dispute is remitted to the first respondent for a hearing *de novo* before a commissioner other than the second respondent.
2. There is no order as to costs.

S.B Nhlapo

Acting Judge of the Labour Court of South Africa

³ [2024] ZASCA 29; 2024 (5) SA 57 (SCA) at para 268.

Appearances:

For the Applicant: N. A Lesala (self-represented)

For the Respondent: V Mdebele

Instructed by: Wilken Incorporated

LABOUR COURT