



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2826/18

NOT REPORTABLE

In the matter between:

MINISTER OF HOME AFFAIRS

Applicant

and

**PUBLIC SERVICE ASSOCIATION
OBO GR NGOBENI**

First Respondent

**GENERAL PUBLIC SERVICES
SECTOR BARGAINING COUNCIL**

Second Respondent

COMMISSIONER NGAKO NO

Third Respondent

Heard: 19 November 2024

Delivered: 25 February 2025

Summary: Application to review and set aside the arbitration award of third respondent. Application granted, dispute remitted for rehearing.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside an arbitration award, issued by the third respondent (the “commissioner”) on or about 1 October 2018, under case reference GPBC1349/2017.

[2] This application demonstrated the difficulties of determining a matter on review in the absence of a complete record. The transcript included the testimony of the applicant’s only witness, though large chunks of his evidence were inaudible. The first respondent called three witnesses; however the transcript of the testimony of the second witness ends at the start of cross-examination, while the testimony of the third witness is completely absent. In addition, while the reasoning of the commissioner plays a reduced role in determining the reasonableness of the outcome, the reasoning of the commissioner was hard to decipher.

Material facts

[3] The facts of the matter are straightforward:

3.1 Mr Ngobeni was employed by the applicant at its Refugee Office based in Marabastad, Pretoria. Initially, Mr Ngobeni was engaged as a Refugee Reception Officer, and thereafter promoted to Refugee Status Determination Officer. At the time of the misconduct, Mr Ngobeni was the Acting Refugee Reception Manager, a position he held for more than five years before his dismissal.

3.2 The applicant charged Mr Ngobeni with misconduct and, following a disciplinary hearing, dismissed him. Mr Ngobeni was charged with two counts of misconduct: (1) gross negligence in that he extended the asylum seeker temporary permit of Mr Geoffrey Iga despite the fact that the Refugee Appeal Board (“RAB”) had finally rejected Mr Iga’s

application for asylum, (2) gross negligence in that he extended the temporary permit of Mr Temesgen Adebo despite the fact that the RAB had finally rejected Mr Adebo's application for asylum.

Arbitration proceedings

3.3 The applicant called a single witness at arbitration, Mr Thivhafuni Mbevhana ("Mr Mbevhana"), the line manager of Mr Ngobeni.

3.4 Aside from Ngobeni the first respondent called two other witnesses, Mr Tshilili Maphidzo ("Mr Maphidzo") and Mr Mandla Madumisa ("Mr Madumisa").

3.5 Mr Maphidzo was a Refugee Reception Officer (also based at Marabstad) and Mr Madumisa was Chief Director: Asylum Seekers Management. Mr Madumisa, a senior official within Home Affairs, was not directly engaged in the operations of the Refugee Reception Office.

3.6 The evidence revealed that the Refugee Reception Office and the RAB worked with physical files as well as with a computerized system, the National Immigration Information System (the "NIIS" or the "System"). The physical files were supposed to be regularly updated, and contain the same information as the NIIS. Access and functionality of the NIIS varied depending on the seniority, and role, of the official concerned.

3.7 The applicant presented evidence that Mr Ngobeni had extended the temporary permits of Messrs Iga and Adebo despite the fact that their appeals (against the refusal of asylum) had been rejected by the RAB several months earlier:

3.7.1 In respect of Mr Iga, following a hearing on 30 December 2013, the RAB issued a ruling rejecting asylum on 13 January 2014. Despite this, on 22 May 2014, Mr Ngobeni extended his temporary permit for three months.

3.7.2 In respect of Mr Adebo, following a hearing on 30 September 2014, the RAB had issued a ruling rejecting asylum on 13 February 2015. Despite this, on 6 May 2015, Mr Ngobení extended his temporary permit for three months.

[4] The applicant presented evidence as follows:

4.1 At the time Mr Ngobení extended the temporary permits of Messrs Iga and Adebo, the System reflected that the RAB had already rendered its decisions.

4.2 The applicant contended that a “file instruction” had been issued by Ms Sarie Brits, the Head of Administration, to the effect that the RAB had rendered its decision. The file instruction ought to have reflected on the NIIS. Because the System reflected “RAB Decision” this would have alerted Mr Ngobení that he needed to acquire the decision before taking any further steps.

4.3 The file instruction from Ms Brits indicating that a decision had been made by the RAB should not have been deactivated¹ but Mr Ngobení did so and altered the System to reflect that the Refugee Office was still awaiting the appeal results from the RAB. Bizarrely, instead of disputing that there was any file instruction, the representative for Mr Ngobení put to Mr Mbevhana that there was a “*written instruction that was issued to these asylum seeker and on the basis (sic) and on the strength of those written instructions on letterheads with stamps and signatures this applicant sitting here deactivated those file instructions*”.² In other words, it was put that the first respondent deactivated the instruction from Ms Brits because he (Mr Ngobení) had received an instruction from the appeals clerk.

¹ Transcript p 65 lines 10 – 20

² Transcript p71 lines 7 – 12

4.4 The applicant contended, through its witness, that if the System had not been updated by the appeals clerk to reflect “RAB Decision” (and it only reflected “Awaiting Appeal Results”) then Mr Ngobeni ought to have contacted the appeals clerk, either by email or personally, to determine if a decision had been rendered by the RAB. In addition, Mr Ngobeni could have investigated the status of these individuals (Messrs Iga and Adebo - referred to in arbitration as “the clients” or “the applicants”) by accessing the physical file, which would have been stored in the filing room.

4.5 The applicant contended that temporary permits may be extended for short periods (one month, three months, or six months) for a maximum of 12 occasions, by the regular Refugee Reception Officers. Thereafter, the Refugee Reception Manager (such as Mr Ngobeni) may only extend temporary permits. It is when permits have been extended for more than 12 occasions, and an appeal hearing has been held, that the manager must verify with the appeals clerk that the RAB has taken no decision. If the RAB has refused the appeal, the clients must be deported.

4.6 The appeals clerk could not have communicated with Mr Ngobeni in writing about the outcome of the RAB hearings because such notes must be retained in the physical file, and not destroyed as Mr Ngobeni submitted. The applicant contended that there was no note from the appeals clerk to him (indicating that the RAB had not rendered its decision) and this version was fabricated. The representative for Mr Ngobeni put to Mr Mbevhana that it occurs often that decisions of the RAB have been made but not yet reached the appeals clerk.³

[5] The first respondent presented evidence, through its witnesses as follows.

³ Transcript p64

5.1 Mr Ngoben testified that:

5.1.1 When a client (who is awaiting an appeal decision) arrives at the Refugee Reception Office he or she is ushered by security to the appeals office.⁴ The appeals clerk must determine whether the RAB has made a decision. If the RAB made the decision to refuse asylum, the client is directed to immigration officials for deportation. If the RAB decision has not been rendered, the appeals clerk will direct the individual to the Refugee Reception Office, with a stamped note saying "Extend".

5.1.2 In respect of Mr Iga, such a note had been issued by Mr Maphidzo.⁵ These kinds of notes are thrown "into the box" and later burnt.⁶ When questioned about whether the notes are stamped *and signed*⁷ he testified that the notes are stamped but he neither confirmed nor denied that such notes are signed (the version put by his own representative to the applicant's witness).

5.1.3 The System was problematic because the manager's section did not always reflect that a "file instruction" had been issued by the RAB. When this was reported to the Department's IT service providers in 2016, they acknowledged the problem.⁸

5.1.4 There was no obligation on him to speak to the appeals clerk *personally*, and there was no obligation on him to search for the physical files.⁹

5.1.5 During examination in chief, Mr Ngoben testified that he was questioned about whether, in respect of the two clients, there were file instructions from Ms

⁴ Transcript p109

⁵ Transcript p190

⁶ Transcript p111

⁷ Transcript p115 lines 19 – 20

⁸ Transcript p124

⁹ Transcript p114

Brits.¹⁰ Mr Ngobeni did not deny that Ms Brits had issued file instructions, or that he was aware of the file instructions, but went on to explain why that is “not how we operated” given the large number of applicants, and the enormous pressure.¹¹

5.2 The offices of the RAB and the Refugee Office are not located in the same building. The record does not reflect the exact location of the physical files. Given the testimony from Mr Ngobeni that all clients are first directed to the appeals clerk, and thereafter to the Refugee Reception Office, this may well have impacted on the probabilities, but its significance was not explored, during cross examination, by the applicant.¹²

5.3 Mr Maphidzo corroborated the version of Mr Ngobeni to a large degree.¹³ Mr Maphidzo testified that he was an appeals clerk during the period when Mr Ngobeni allegedly committed the misconduct, but he had no recollection of issuing a note in respect of either of the two clients.

5.4 The representative for Mr Ngobeni put to Mr Maphidzo that in the two instances, for which Mr Ngobeni was charged, the decision of the RAB was not with the appeal clerk but the System reflected “RAB Decision”.¹⁴ On this version, when he extended the permits, Mr Ngobeni was aware that the RAB had already issued its decisions.

5.5 Although the applicant alleges that the commissioner placed too much emphasis on the evidence of Mr Madumisa, his testimony does not part of the record at all. The commissioner records that the Mr Madumisa testified that the filing system was in shambles and it would have been a

¹⁰ Transcript p114 lines 14 – 21

¹¹ Transcript p144 line 21 - p145 line 1

¹² Transcript pp121 – 122

¹³ The transcription of the arbitration ends abruptly - at the beginning of the cross examination of Mr Maphidzo.

¹⁴ Transcript p241 lines 10 – 19

waste of time for Mr Ngobeni to check the physical file. Further, according to the commissioner, Mr Madumisa testified that, if the appeals clerk had not updated the status of the appeal (to reflect that a decision had been taken by the RAB) then Mr Ngobeni was entitled to extend the permit. In addition, according to the commissioner, Mr Madumisa testified that the file instructions are not binding.

[6] The commissioner found that the dismissal of the first respondent's member, namely Mr Gilbert Ngobeni ("Mr Ngobeni", or "the first respondent") was substantively unfair and reinstated him with 15 months backpay.

Grounds of review

[7] It is trite that the grounds of review must be pertinently set out in the applicant's founding and supplementary affidavits.¹⁵ These grounds may not be extended in the replying affidavit or in heads of argument. In this matter, the applicant filed no supplementary affidavit.

[8] In brief, the grounds of review pertinent to this judgment are as follows:

8.1 The commissioner gave no serious consideration to the evidence of Mr Mbevhana that the RAB decisions (in respect of the two clients) had been issued before the extensions were printed by Mr Ngobeni.

8.2 The commissioner gave little or no consideration to the evidence of Mr Mbevhana that the rule which applied was that managers (such as Mr Ngobeni) were required to enquire about the RAB decision from the appeal clerk, or to have personally checked the physical file for such decision.

8.3 The commissioner should have rejected the evidence of Mr Madumisa wherever this contradicted the evidence of Mr Mbevhana.

¹⁵ *Communication Workers Union and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 at paras 35 and 39

[9] The applicant makes the broad allegation that the award is one no reasonable decisionmaker could arrive at based on the evidence properly before him.

Review applications: General remarks

[10] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court fashioned the appropriate review test¹⁶ in relation to CCMA arbitration awards 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.”

[11] Subsequently, in *CUSA v Tao Ying Metal Industries and Others*¹⁷ (“Tao Ying”) the Court held at para 76:

“76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

“Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the

¹⁶ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

¹⁷ (2008) 29 ILJ 2461 (CC) (18 September 2008)

sanction, it can hardly be said that there was a fair trial of issues." (Own emphasis)

[12] Thus, following *Tao Ying*, it is clear that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

[13] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*¹⁸ the court clarified that the *Sidumo* test did not extinguish the procedural grounds for reviews contemplated in section 145(2)(a) of the LRA. However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry, or arrived at an unreasonable result.

[14] In *Bestel v Astral Operations Ltd & others*¹⁹ the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that:

'... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.' (Own emphasis)

[15] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*²⁰ the court held that the concept of reasonableness embraces a wide range of outcomes, many

¹⁸ (2013) 34 ILJ 2795 (SCA)

¹⁹ [2011] 2 BLLR 129 (LAC) at para 18

²⁰ (2014) 35 ILJ 943 (LAC) at para 14

of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

[16] In *Head of the Department of Education v Mofokeng and others*²¹ the court again confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[17] The applicant contends that the commissioner failed in his duties to consider all the material evidence, and render a reasonable outcome. The applicant submits that the commissioner ought to have rejected the evidence of Mr Madumisa where he contradicted the evidence of Mr Mbevhana. It is trite that, when faced with diametrically opposed versions, the commissioner is required to evaluate the evidence based on the credibility of the witnesses, their reliability, and the probabilities.²² Of these factors, the most important is the probabilities. Here, however, the commissioner did not consider any of the relevant factors. Instead, the commissioner accepted the evidence of Mr Madumisa because he is senior to Mr Mbevhana. This was clearly irregular and improper. This misdirection had a significant distorting effect on the outcome given that the commissioner relied heavily on the evidence of Mr Madumisa to reach his conclusion.

[18] The applicant submits that the commissioner did not take into consideration that Mr Mbevhana is the line manager, and familiar not only with the practices and policies, but also the challenges faced in that particular work environment. I accept that this factor was relevant to any proper evaluation of

²¹ [2015] 1 BLLR 50 (LAC)

²² *NUM and another v Rustenburg Platinum Mine (Mogalakwena Section) and others* [2015] 1 BLLR 77 (LAC) at para 43

the evidence, and ought to have played a material role in the resolution of factual disputes.

[19] The applicant argues that the commissioner gave no meaningful consideration to testimony of Mr Mbevhana that the rule was that, in circumstances where the appeal decision was pending, Mr Ngobeni was required to enquire of the appeals clerk (whether the RAB has rendered its decision) or to have personally checked the physical file for the RAB decision.

[20] Importantly, the commissioner failed to appreciate that the first respondent did not actively pursue a case that there were no file instructions (indicating that the RAB had rendered its decisions) in respect of the two clients.²³ If the RAB decision had been to grant asylum, any temporary extension would not have been necessary. However, if the RAB decision had been to refuse asylum, the clients should have been deported.

[21] As previously explained, a reasonable decisionmaker must apply himself to all the evidence material to a fair determination of the dispute. This did not occur here. If Mr Ngobeni was aware that the RAB had rendered its decisions, as the evidence appears to suggest, the commissioner should have considered whether a senior manager could rely on a note from an appeals clerk - without ascertaining the nature of the RAB decision. For this reason alone, the outcome is one no reasonable decisionmaker could reach.

[22] It is worth mentioning that the commissioner should have considered whether the version of the first respondent (that notes from the appeal clerk are routinely destroyed by fire) was probable given that, on the first respondent's own version, there are many instances where the RAB decisions are issued but have not reached the appeal clerk – which can lead to disciplinary action.

²³ During examination in chief Mr Ngobeni did not testify, as expected, that there were no file instructions or that none were visible on the System. Furthermore, the version put by his representative to Mr Mbevhana was that the file instructions were on the System, but the RAB decisions were not with the appeals clerk.

Costs

[23] I note that the applicant has been successful in the review application, but I propose to make no cost order in relation to the review application. The first respondent was entitled to defend the hard-won arbitration award issued in its favour. In *Zungu v Premier of the Province of KwaZulu-Natal & others*²⁴ the Constitutional Court confirmed that the rule of practice that costs follow the result does not apply in labour matters. The court must seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this court (or oppose) cases that should not have been brought to court (or opposed) in the first place.

[24] I have been given no convincing basis to make any order of costs in the earlier application, brought under case number J805/24, to interdict the sale of the applicant's property in execution of the arbitration award. However, on 12 November 2024, the applicant was granted condonation for the late filing of its review application, with costs reserved. The review application had been brought some five weeks out of time. The late filing of the review was one of several reasons why this application has taken more than six years to finalise. These kinds of delays and dilatoriness is antithetical to the expeditious resolution of labour disputes, one of the primary objects of the Labour Relations Act No. 66 of 1995. In the circumstances, it is proper, and fair, that the applicant bear the costs of its condonation application. Accordingly, I make no order as to costs in the review application but I order the applicant to pay the costs of its condonation application.

Conclusion

[25] In the circumstances, for the reasons set out above, I make the following order:

²⁴ (2018) 39 ILJ 523 (CC) at para 24.

25.1 The arbitration award issued by the third respondent on 1 October 2018, under case reference GPBC1349/2017, is hereby reviewed and set aside;

25.2 The unfair dismissal dispute of the first respondent is remitted back to the second respondent for rehearing *de novo* before a commissioner other than the third respondent;

25.3 The applicant is ordered to pay the reserved costs relating to its condonation application;

25.4 There is no costs in the review application.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Sandile July
Werksmans Attorneys

For the First Respondent:

Adv L Pretorius
Ndebele Du Plessis Attorneys