



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR1188/16

In the matter between:

REFILOE MONICA CHOANE

Applicant

and

ELSABE SKINNER N.O

First Respondent

**PUBLIC, HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL (GPSSBC)**

Second Respondent

DEPARTMENT OF HEALTH (FREE STATE PROVINCE)

Third Respondent

Heard: 4 February 2025

Delivered: 5 March 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] This is an application for review in terms of Section 145(1)(a) of the Labour Relations Act¹ (The LRA).

[2] This is an application to review and set aside the arbitration award made under case number PSHS559-13/14 dated 5 May 2016 in terms of which the First Respondent found that the conduct of the Third Respondent did not constitute an unfair labour practice.

Material background facts

[3] The Applicant (Refiloe Monica Choane) was employed by the Third Respondent as an Administration Clerk on the 15th of March 2006.

[4] In July 2008 the Applicant was transferred to the Security Directorate doing Supply Chain and Procurements related duties at the office of the Head of Department.

[5] In 2010, the Applicant was promoted to post level 5 Notch 1 in Supply Chain Management.

[6] On the 1st of November 2010, the Applicant was transferred to the MEC's office (MEC Elisa Mabe who was replaced by Fundiswa Ngubentombi in 2011). In the letter of upgrade, she was informed that *"you are further informed that your transfer is linked to the term of the office of the MEC and thereafter, you will revert to your post and salary level"*.

[7] On 2 June 2011, the Applicant was upgraded from post level 6 to post level 8 effective from 1 May 2011 whilst she was still at the MEC's office who happened to

¹ Act 66 of 1995, as amended.

be a different MEC after the former passed away. The letter of upgrade bore no condition attached to the upgrade.

[8] On the 22nd of July 2013, the Applicant was transferred back to Supply Chain Management at the medical depot in Bloemfontein where she was placed at post level 5 Notch 1 effective from 15 July 2013.

The issue to be decided

[9] I am to determine if the finding of the First Respondent that the Third Respondent did not commit an unfair labour practice when they transferred the Applicant back to Supply Chain Management in 2013, where she was placed at post level 5 Notch 1 from post level 8 Notch 1.

The arbitration award

[10] The First Respondent in his arbitration award has set out the evidence adduced by the witnesses. In his analysis of the evidence and arguments, the arbitrator identified the issue to be decided as to whether the Third Respondent committed acts of unfair labour practice.

[11] The Applicant was transferred to the MEC's office on 1 November 2010 and she was upgraded to post-level 6 and she was informed that her upgrade is linked to the MEC's term of office.

[12] Whilst at the MEC's office, she was upgraded to post level 8 in 2011, her new position was Senior Registry Clerk at salary scale/Notch R174 117-R205 101 effective 1 May 2011.

[13] The upgrade was silent about being linked to the MEC's term of office. However, the Third Respondent argued that such an upgrade was linked to the MEC's term of office and as a result, effected in terms of clauses 1.3 of the Ministerial Handbook which read thus:

‘1.3 The Executive Authority may second personnel from components within the Department. The advantage of secondment is that staff members could return to their original components on the approved establishment without any burden to the Department.’

[14] The First Respondent found that the Applicant was seconded to the MEC's office and same is regulated in terms of the Ministerial Handbook.

[15] The impugned upgrade was done in accordance with the Ministerial Handbook, however, the Third Respondent despite an undertaking to present its copy thereof failed to do so as he only produced an extract of the Handbook as well as a copy of the Public Service Act.

[16] The Applicant objected to the presented documents but her representative after reading same, confirmed that the document was indeed an extract from the Ministerial Handbook.

[17] However, the First Respondent attached no weight to either the Ministerial Handbook or the Public Service Act as no evidence was led. Further, the relevance of the handbook in the matter was not indicated.

[18] At paragraph 40 of the award, the First Respondent found that the Applicant's representative argued that the letter of upgrade which upgraded the Applicant to post level 8 did not have any conditions attached to it. The First Respondent stated that he agreed with the Applicant that there were no conditions attached to the upgrade, however, this did not prove that the initial conditions that she would revert to her old salary and position were no longer valid.

[19] At paragraph 43 of the award, the First Respondent ruled that the Applicant failed to make out a case of unfair labour practice on a balance of probabilities when the Third Respondent reduced her salary during the transfer.

Grounds for review

[20] The Applicant raised several grounds of review, amongst others that, the First Respondent's award is unreasonable, failed to apply her mind, committed misconduct, committed irregularities and/or exceeded her powers due to the following:

- 20.1 In finding that the Third Respondent's conduct did not constitute an unfair labour practice.
- 20.2 In finding that the Applicant's dispute is not about the transfer, but only seeking the same salary that she earned when she was working at the MEC's office.
- 20.3 In finding that she would not attach any weight to the extract of Ministerial Handbook as no evidence was led.
- 20.4 By failing to attach any weight to the issue despite that she agreed that the letter submitted by the Third Respondent contained no conditions to the Applicant.
- 20.5 In finding that the Applicant referred to other colleagues who were not downgraded after the upgrade.

Test for Review

[21] The test that the Labour Court is required to apply in a review of an arbitrator's award is, *"is the decision reached by the commissioner one that a reasonable decision-maker could not reach within the totality of evidence at his disposal?"*.

[22] The Constitutional Court settled the issue of test for review of an arbitration award in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The Court at para 110 held that the test for review is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach in relation to the evidence before him or her.³

² 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

³ In *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC); [2008] ZACC 15 at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry

[23] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This Court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come to on the available material evidence before him.

[24] As the Court rightly pointed out in the *National Commissioner of the South African Police Service v Myers and Others*:⁴

'whatever one's personal view may be, the test as set out in *Sidumo*... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach.'

[25] Pursuant to the above case law, in order for me to interfere with the decision of the arbitrator, I should be convinced that such a decision is unreasonable based on the totality of material evidence before her. If such a decision falls outside the band of reasonableness, I would be left with no choice but to correct it.

[26] In the case of *Telcordia Technologies Inc v Telkom SA Ltd*,⁵ the Supreme Court of Appeal (SCA) held that:

'an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[27] In the matter in *casu*, that is not the case, the decision of the First Respondent falls within the ambit of reasonableness and therefore, there is no need to interfere with it.

resulting in no fair trial of the issues. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

⁴ (*Myers*) [2012] ZALAC 4; [2012] 7 BLLR 688 (LAC) at paras 103.

⁵ 2007 (3) SA 266 SCA; [2007] 2 All SA 243 (SCA) at paras 52-78 and 85-88.

[28] Further that arbitrators are human, they may also commit error or irregularity, however, in order for the said error or irregularity to constitute reviewable conduct, such has to be material.

[29] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of the Department of Education v Mofokeng and Others*⁶ at paragraphs 30 to 33. The significant passages are emphasized:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd*⁷ and this court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*⁸ have held that before such an irregularity will result in the setting aside of the award, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is

⁶ [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC).

⁷ (2013) 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA).

⁸ [2014] 1 BLLR 20 (LAC); [2013] ZALAC 28.

subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute

a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[30] It is therefore apparent from the above judgments that there must be a *nexus* between the error and the fairness of the trial which should be proven by the Applicant in an application for review failing which the review application stands to fail.

[31] It is therefore trite that when determining whether the result of an arbitrator's award is unreasonable, I must broadly evaluate the merits of the dispute and consider, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator in his award.

[32] The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator. An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

[33] The *Sidumo* test, however, justifies setting aside an award on review if the decision is "*entirely disconnected with the evidence*" or is "*unsupported by any evidence*" and involves speculation by the commissioner.

[34] It is important to indicate that after a cursory glance at the award of the Second Respondent, I could not find any reviewable error, irregularity or conduct.

[35] In terms of the *Sidumo* test, the Applicant is not only required to prove a defect in arbitration proceedings as set out in section 145 but also to prove that the decision in itself was unreasonable, which I am not convinced that she has done so.

[36] The Applicant is correct to say that the letter of upgrade contained no condition similar to the initial letter which stated that the upgrade is linked to the term of office of the MEC. However, a letter can in no way repeal or amend a standing policy of the Department. In any event, if the Applicant was supposed to retain such post level even after transfer back to her original post, the very same letter would have indicated so.

[37] It is therefore my considered view that a policy or the law should prevail over any letter or form of communication. In this matter, clause 1.3 of the Ministerial Handbook should prevail.

[38] On the other hand, when it comes to the issue of inconsistency raised by the Applicant, I am of the view that the First Respondent's decision is equally not entirely disconnected from the evidence before her. The First Respondent was not convinced as no sufficient evidence was presented before her.

[39] It is therefore apparent that the Applicant's secondment was linked to the term of office of the MEC, as a result, there can never be any unfair labour practice in the transfer back to her original position as she was also equally aware of same.

Conclusion

[40] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I find that the arbitrator's award is impeccable.

[41] There are no grounds or reasons for me to interfere with the decision of the arbitrator, as it falls within the band of reasonableness.

Costs

[42] I have had regard to the requirements of law and fairness in considering costs and having done so, I am of the view that a cost order is not warranted in this matter.

[43] In the premises, I make the following orders:

Order

1. The application for review is dismissed.
2. No order is made as to costs.

N Tshisevhe
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Khoza, Union Representative

Instructed by: HICRAWU

For the Respondent: No appearance

Instructed by: