THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
HELD AT JOHANNESBURG

JR09/2022

In the matter between:

NORTHAM PLATINUM LIMITED – ZONDEREINDE **Applicant**

And

COMMISSIONER FOR CONCILIATION, MEDIATIONA AND ARBITRATION **1st Respondent**

COMMISSIONER DONALD KGALAKE NKADIMENG N.O. **2nd Respondent**

KARIKI VINCENT MAILE **3rd Respondent**

Heard: **02 May 2025**
Delivered: **05 March 2025**

This judgment was handed down electronically by emailing a copy to the parties. The 5th March 2025 is deemed to be the date of delivery of this judgment.

JUDGMENT

MOKOSE AJ

Introduction

[1] This is an application to review the decision of the arbitration award of the second respondent acting under the auspices of the first respondent under case number LP2306-21 on 30 November 2021. This matter is brought in terms of Section 145 of the Labour Relations Act 66 of 1995. The matter is opposed by the third respondent (who will hereinafter be referred to as the respondent). The commissioner concluded in the arbitration award that the respondent's dismissal from the employ of the applicant was substantively and procedurally unfair. He was reinstated with backpay.

Brief Facts

[2] The respondent was employed in the company as an electrician in or about 2008. He was charged with gross negligence for an incident that occurred on 8 February 2019 which resulted in his electrocution. At the time of his dismissal, he was earning the sum of R38 000 per month. The charge sheet read as follows:

> *"Gross negligence in that on the 08/02/2019 at 6-23 FWD West Haulage mini sub-station you committed the following safety misconducts and as a result suffered injuries, which kept you away from work for about two years.*
>
> - *You failed to lock-out and isolate power source before working on the equipment as per SP094*
> - *You did not complete the (HIRA) Hazard Identification and Risk Assessment before performing the task*
> - *You did not use the full PPE before performing the task*
> - *You performed the task without the required assistants"*

[3] The respondent attended a disciplinary hearing and was found guilty, resulting in his dismissal from the company. He then appealed his dismissal which was upheld by the chairperson of the appeal committee.

[4] The respondent then challenged his dismissal at the CCMA on the grounds of substantive and procedural fairness. The applicant in this matter called several witnesses and the respondent failed to call any witnesses at all.

[5] It is not in dispute that on 8 February 2019 the respondent was on shift providing electrical services. He had available to him 3 assistants. He was at the workshop with his assistants before the incident. He received a call from Lawrence, a technician team leader, who informed him of a breakdown in electrical services at 6/23. When he asked what the problem entailed, he was told that the power detection system was down. He thought it was at the Battery Bay. Because there was an assistant stationed there, he went to ascertain what the problem was. On his way, he met the assistant who told him that there were no problems. Despite being so informed, he proceeded towards the Battery Bay to personally check that there was no problem. He testified that there were no issues found.

[6] In his statement dated 8 February 2021, the respondent contends that he did not have any tools with him at the time and that he did not open the wire mesh as to do so requires tools. Furthermore, he contends that he left all his tools and his assistants because it was already late, and they were due to knock off. He knows nothing further of what happened but that he found himself in hospital.

[7] Mr Thomas Bunga testified that he found the respondent in front of the sub-station having seen a headlight shining. On investigation he found the respondent lying near a drain and shaking violently. He called for help and assisted in the respondent bring brought to the surface.

[8] Mr Willem Meintjies testified that he was at the surface when the respondent was brought up. When he looked at the respondent, he noted that he had been burnt on his left hand and eye. He further testified that he was airlifted to Milpark Hospital. He was then directed to go and secure the area where the incident had occurred and

on 9 February, he was part of an *in loco* inspection team which included the respondent's sister who was also employed by the applicant. The findings of this inspection were that the wire mesh was opened, the door to the sub-station was also open and that live wires protruded from the sub-station. This evidence was corroborated by Mr Teesen, the foreman, on behalf of the applicant.

[9] The commissioner concluded, *inter alia,* that the applicant was consistent in the application of discipline in that it had circulated communication on 9 January 2019 informing employees of harsher action it would take to employees not adhering strictly to safety standards. Furthermore, it found that the respondent had left his assistants and tools at the station in circumstances he should not have done. The respondent was found to be guilty of working without the required assistants. It was further found that the respondent did not have any tools with him and could accordingly not have opened the mini-substation without the said tools nor was evidence furnished of him being in possession of the special key used to open the mini-substation. Accordingly, and on a balance of probabilities, the respondent did not have the intention to perform any work and that the issue of failing to lock-out and isolate power could not be considered. He however found that the respondent did not have the correct PPE on before attending to the Battery Bay.

[10] Despite the conclusions reached and having accepted that the respondent sustained the serious injuries at his place of employment, the second respondent, under the auspices of the first respondent, found that the applicant had not discharged its onus by proving how the respondent was electrocuted. The second respondent then concluded that the dismissal of the respondent was substantively and procedurally unfair and ordered the reinstatement of the third respondent as well as his backpay.

Legal Principles on Review

[11] Section 145(1) provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. The defect referred to in Section 145(1) is one where the commissioner has committed a misconduct in

relation to his duties of a commissioner or arbitrator or he has committed a gross irregularity in the conduct of the arbitration proceedings or even where he has exceeded his powers.

[12] The test on review was espoused by the court in the matter of *Sidumo & Another v Rustenburg Platinum Mines Limited and Others*[1] where it was held as follows:

> *"In light of the Constitutional requirement (in Section 33(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the 'reasonableness standard' should now suffuse Section 145 of the LRA".*

[13] It is clear that a commissioner is obliged to apply his or her mind to the issues in the case.[2]The review court is therefore required to determine whether the decision of the arbitrator is reasonable in light of the totality of the evidence that was before him together with the issues he was required to determine.

[14] The Labour Appeal Court ("LAC") in the matter of *Fidelity Cash Management Service v CCMA and Others*[3] considered what unreasonableness is and held as follows:

> *"[97] The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner is 'one that a reasonable decision maker could not reach' (para 110 of the Sidumo case). If it is an award or decision that a reasonable decision could not reach, then the decision or award of the CCMA is unreasonable, and there, reviewable and could be set aside. If it is a decision that a reasonable decision make could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one*

[1] [2007] 28 ILJ 2405 (CC)
[2] CUSA v Tao Ying Metal Industries [2008] 29 ILJ 2461 (CC) at para 134
[3] [2008] 29 ILJ 964 at para 97

that a reasonable decision make would not reach but one that a reasonable decision make could not reach…."

[15] In a more recent case of *Gold Fields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA and Others*[4] the court interpreted the test set out in the Sidumo case as follows:

"Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator…….In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of proceedings, but extends to whether the decision that the arbitrator arrived as is one that falls in the band of decisions a reasonable decision make could come to on the available material."

[16] The court went on to say:[5]

"…….What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established in Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test."

[17] The court then concluded that[6]-

"In short: A review must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at."

[18] The test on review is ultimately whether the decision reached by the commissioner is one that a reasonable decision-maker could or could not reach. Irregularities or errors in relation to the facts or issues may or may not produce an

[4] [2014] 1 BLLR 20 (LAC) at paragraph 14
[5] Gold Fields Mining (supra) at para 15
[6] Gold Fields Mining (supra) at para 16

unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry.[7]

Grounds of Review

[19] The applicant approaches this court on several grounds of review. I will deal in turn with each ground of review. The first ground is that the commissioner committed a gross irregularity in conducting the arbitration proceedings by failing to properly resolve the dispute of fact. Accordingly, the applicant is of the view that this failure let the commissioner to reach a conclusion that a reasonable decision-maker could not have reached.

[20] The applicant contends that a commissioner when confronted with two irreconcilable versions need apply the test as enunciated in the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA & Others.*[8] The applicant contends that the commissioner was faced with a dispute of fact where on the one hand the third respondent had no knowledge of what had happened to him that resulted in the extensive injuries he sustained. He said that he suspected that he had been attacked by illegal miners. On the other hand, the applicant's version was that the respondent had been electrocuted as there were live wires where the third respondent had been found. Furthermore, he was found shaking and bleeding and was then airlifted to hospital for the treatment of the electrical burns.

[21] The respondent contends that this ground of review lacks the alleged reviewable irregularity in considering and concluding that the version put to him was the proper version. The applicant and its witnesses had provided differing versions and furthermore, hearsay evidence was relied upon during the disciplinary proceedings. Accordingly, the commissioner could not be faulted on the evidence before it in reaching the conclusion that it did.

[22] From the record before this court, the respondent provided two versions as to what had caused his injuries – one that he had been hit by a loco and the other that

[7] Head of the Department of Education v Mofokeng and Others [2015] 1 BLLR 50 (LAC) at para 33
[8] 2003 (1) SA 11 (SCA)

he was hit by '*izinyoka'* (illegal miners). It is evident that he was not sure what had happened to him. The applicant's version was rejected by the commissioner although the evidence was before him that the respondent had been electrocuted. Furthermore, evidence had been given by the applicant's witnesses that there were live wires where the third respondent had been found and that he had been airlifted to Milpark Hospital which specialised in electrical burns. Evidence by the medical staff who attended to the third respondent was also furnished.

[23] When a court is faced with two contradictory and mutually destructive versions, it is obliged to resolve disputes in accordance with the technique set out in the matter of *SFW Group Limited & Another v Martell et Cie & Others*[9] where the court summarized the technique as follows:

> *"To come to a conclusion on the disputed issues, a court must make findings on:*
>
> *(a) The credibility of the various witnesses;*
>
> *(b) Their reliability;*
>
> *(c) The probabilities.*
>
> *As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a number of subsidiary factors not necessarily in order of importance such as:*
>
> *(i) The witnesses' candour and demeanour in the witness box;*
>
> *(ii) His bias, latent or patent;*
>
> *(iii) Internal contradictions in his evidence;*
>
> *(iv) External contradictions in what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions;*
>
> *(v) The probability or improbability of particular aspects of his version;*
>
> *(vi) The calibre and cogency of his performance compared to that of other witnesses testified about the same incidents or events.*
>
> *As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) – (ii), (iv) and (v) above, on*

[9] Supra at para 5

(i) The opportunity he had to experience or observe the events in question; and

(ii) The quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of a probability or improbability that each parties' version of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, the probabilities will prevail."

[24] The preference of one or the other version by the court will depend on the outcome of the evaluation of the evidence using the technique as espoused in the Stellenbosch Farmer's Winery case (*supra*). The LAC has also placed reliance on this case in resolving factual disputes.

[25] I have read the record several times and am of the view that the commissioner failed to utilize and consider the test as enunciated in the Stellenbosch case. For this reason, I am of the view that the decision of the commissioner is a reviewable irregularity on this ground.

[26] The second ground of review is that the commissioner committed a gross irregularity in conducting the proceedings by failing to attach the appropriate weight to the evidence before him. In particular, the applicant contends that the commissioner ignored the evidence provided by Mr. Meintjies in relation to the circumstances surrounding the respondent's electrocution. He ignored evidence that when the respondent was brought to the ground, he was incoherent and had burn blisters on his left hand and face and was airlifted to Milpark Hospital to receive treatment therefor. Furthermore, the applicant contends that the commissioner ignored evidence of Mr. Bunga that he approached a light near 6/21 mini-substation and identified the respondent lying on the floor and shaking violently and that the

respondent did not have any tools with him and that the sub-station's mesh wire was open.

[27] The applicant is of the view that had the commissioner attached appropriate weight to the evidence before him, he would have concluded that the weight of the evidence of the applicant is heavier and accordingly more probable than that of the respondent and found that the respondent was therefore guilty of the gross negligence charges levelled against him. The LAC in the matter of *Nampak Corrugated Wadeville v Khoza*[10] found that an employee's failure to take proper care of equipment for which he was responsible, in that he failed to switch off a defective boiler that he had been operating causing overheating which resulted in damage, amounted to gross negligence.

[28] The commissioner concluded, as stated above, that the respondent had failed to complete the HIRA (Hazard Identification Risk Assessment). He also found the respondent did not have the correct PPE on before attending the Battery Bay. He further concluded that the respondent left his assistants and tools at the station in circumstances when he should not have done so. He knew he had to always travel with his assistants. However, he concluded that on a balance of probabilities, the respondent did not have the intention of performing any work as there was no direct evidence of the respondent being seen to be performing his duties on the substation and finally that it was not proven how he sustained the injuries and accordingly that the dismissal was substantively unfair.

[29] I am of the view that no reasonable commissioner could have come to the conclusion that he did on the evidence presented to him. The inference sought to be drawn by the commissioner must be consistent with the proven facts.

[30] The next ground is that the commissioner committed a gross irregularity in that he failed to consider relevant factors that were before him but considered irrelevant factors that were not placed before him. The applicant contends that the commissioner recorded in his award that the applicant had failed to produce the

[10] [1999] 2 BLLR 108 (LAC)

medical reports that the respondent had been electrocuted even though the issue of the medical records was not put before him. As a matter of concern is that whilst the commissioner drew a negative inference in respect of the company's failure to produce medical reports, he accepted the respondent's two different versions that he was hit by a loco and that he had been assaulted by illegal miners.

[31] The court in the matter of *Head of the Department of Education v Mofokeng & Others*[11] said the following:

> *"The determination of whether a decision is unreasonable in its result is an exercise inherently dependant 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 interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed 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 with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence."*

[32] As stated above, the commissioner in his award deemed it necessary for the applicant to produce the medical reports proving the respondent's electrocution. He could have used his powers afforded him under the Labour Relations Act of 1995 (LRA) and requested them from the respondent as the owner of the records. However, he found fault with the applicant for not producing same. I agree with the applicant that this was a display on the part of the commissioner not to have conducted proceedings in a fair manner. Accordingly, I am of the view that the commissioner committed a gross irregularity.

[11] [2015] 1 BLLR 50 (LAC)

[33] In the next ground of appeal, the applicant contends that the commissioner committed a gross irregularity in that he awarded the respondent reinstatement and back pay in circumstances where the respondent had been found guilty of misconduct.

[34] Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.[12] Reinstatement carries with it no automatic connotation of retrospectivity and will, absent any order of retrospectivity, operate from the date of the award.

[35] It follows that a commissioner is making such an award (back pay) must exercise his discretion reasonably. It goes without saying that a commissioner should consider withholding back pay where an employee is not without blame. It is interesting that whilst the commissioner found that the respondent failed to complete the HIRA as per the safety requirement and that he found the respondent did not use the full PPE before performing the task at the Battery Bay and guilty of working without the required assistants, he still found it fit to make an award which included back pay. It is clear that the commissioner identified serious transgressions by the respondent but yet granted the award as stated above. This, I believe, is a gross irregularity on the part of the commissioner.

[36] The final ground is that the commissioner committed a gross irregularity in that he made an error in law which resulted in the commissioner misconstruing the nature of the enquiry and as such reached an unreasonable outcome.

[37] The respondent is of the view that the commissioner was correct in describing the evidence of Mr Meintjes that he had been informed by a doctor who attended the respondent as being serious electrocution as being hearsay. The applicant agrees that the evidence was hearsay but further contends that the commissioner failed to apply his mind properly regarding the issue of the admissibility of the evidence.

[12] Equity Aviation [Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC)

[38] The LAC in the matter of *Matsekelong v Shoprite Checkers (Pty) Ltd*[13] found as follows pertaining to admissibility of evidence:

> *"….the failure by the Commissioner to apply his mind properly of the issue of admissibility of Mr. Roberts' affidavit constituted a material error of law and a gross irregularity on the part of the Commissioner which prejudiced the appellant in her right to a fair hearing."*

[39] I have no doubt that had the commissioner applied his mind properly to the evidence of Mr. Meintjies, he would have come to a different conclusion that the respondent indeed sustained the serious injuries as a result of an electrocution.

[40] For the reasons stated above, I am of the view that the award of the commissioner is reviewable as the outcome reached would never have been reached by a commissioner in his position and with the evidence before him.

Costs

[41] The general rule in litigation pertaining to an award of costs is that costs should follow the result. However, this does not find application in labour disputes due to the power imbalance between an employer and an employee. This court has a wide discretion in respect of the award of costs, considering fairness and the principles of law and further considering the power relationship between the employer and employee.[14] This principle was confirmed in the matter of *Zungu v Premier of KZN and Others*[15] where the Constitutional Court stressed that the court should seek a balance between unduly discouraging litigants from approaching the Labour Court to have their disputes dealt with and allowing those litigants to bring their matters to the court which should not have been brought in the first place. I have considered the circumstances in this matter and accordingly, I am of the view that no order as to costs should be made in this matter.

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[13] [2013] 2 BLLR 130 (LAC)
[14] Union for Police Security and Corrections Organisation v South African Custodial management (Pty) Ltd [2021] ZACC 41
[15] 2018 ZACC 1

Order

[42] Accordingly, the following order is granted:

1. The order and award granted by the second respondent under the auspices of the first respondent on 30 November 2021 under Case Number LP2306-21 is reviewed and set aside in terms of Section 145 of the LRA.
2. The arbitration award is substituted with the following order:

"The third respondent's dismissal was substantively and procedurally fair."

3. No order is made as to costs.

MOKOSE AJ

For the Applicant: Adv Maake
Mn Attorneys

For the Respondents: Adv Mndebele
Instructed by Webber Wentzel