



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
HELD AT JOHANNESBURG**

CASE NO: JR1768/2022

In the matter between:

FINKIE MONTSHO

Applicant

And

FIDELITY SECURITY SERVICES (PTY) LIMITED

1st Respondent

VUSI MOYO N.O.

2nd Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

3rd Respondent

Heard: 23 May 2024

Delivered: 26 March 2025

This judgment was handed down electronically by emailing a copy to the parties. The 26th March 2025 is deemed to be the date of delivery of this judgment.

JUDGMENT

MOKOSE AJ

Introduction

[1] The applicant approaches this court in terms of Section 145 of the Labour Relations Act 66 of 1995 ("LRA") for an order reviewing and setting aside the second respondent's award, made under the auspices of the third respondent on 22 July 2022. In the alternative, the applicant seeks an order that the matter be remitted back to the first respondent for hearing before a different commissioner. The order sought is as follows:

1. That the arbitration award granted by the second respondent dated 22 July 2022 but received on 22 July 2022 by the applicant, case number GAEK 10991/17 be reviewed and set aside.
2. That the award be reviewed and set aside, alternatively;
3. That the matter be remitted back to the third respondent for a hearing before another Commissioner.
4. Directing that any of the Respondent who may opposed this application be directed to pay the costs of this application
5. Grant the Applicant such further and alternative relief as this Court may deem appropriate.

[2] The applicant contends that the award was irrational and that the second respondent failed to apply his mind to the facts on hand and that a different commissioner faced with the same set of circumstances would have come to a different conclusion. Furthermore, the applicant contends that the second respondent failed to apply his mind to the rules of the third respondent. As such, a costs order should be awarded against anyone who opposes the review application.

[3] The application is opposed by the first respondent. *In limine*, the first respondent contends that this is not actually a review application as the applicant seeks to supplement the record of proceedings with documentation which was not

previously filed in accordance with Rule 7A(3) by the third respondent and was not presented by the applicant during the proceedings on 12 July 2022. Furthermore, the first respondent seeks a costs order on a punitive scale.

[4] The second and third respondents have not opposed the application.

Brief Facts

[5] The facts of the matter are briefly as follows: the first respondent held a disciplinary hearing against the applicant for misconduct. The applicant was found guilty of the charges proffered against him and was dismissed on 11 October 2017. The dismissal was referred timeously to the third respondent who set the matter down for a hearing on 4 June 2018. An application was made for the appearance of certain witnesses at the hearing however, they failed to appear whereupon the arbitration was postponed. As a reason for the postponement the applicant was ordered to pay the witnesses.

[6] In August 2020, the applicant having referred his matter to Legal Wise for legal assistance and having been referred to Mr Dlamini of ODBB Attorneys, the CCMA was contacted by the applicant's attorneys enquiring about the status of the matter. This was in November 2020. On 25 May 2021 the attorneys contacted the first and second respondents to request the record of the arbitration hearing. The third respondent informed the attorneys on the same day that there were no records of the previous sitting of the 4th of June 2020.

[7] Despite numerous requests being made to set the matter down, the matter was not scheduled. It was only set down for 12 July 2022, which arbitration was attended by the applicant and his attorney. At this hearing, the first respondent's legal representative complained about the delay in the scheduling of the matter and lamented the inability of tracing their witnesses which was blamed on the delay in scheduling the matter. The first respondent contends that no points *in limine* were raised however, the second respondent misconstrued this lamentation as a point *in limine* and issued an award dismissing the arbitration application having disallowed the first respondent's legal representative to represent him in the proceedings. This

award was based on the fact that the applicant delayed in having the matter scheduled.

[8] It is this award which is the basis of the review matter before this court today. The applicant applies for the review and setting aside of the award.

Point in limine

[9] The first respondent raises a point *in limine* that despite the applicant bringing this application in terms of Section 145 of the Labour Relations Act 66 of 1995 (LRA), this is not actually a review application as the applicant seeks to supplement the record of proceedings with documentation which was not previously filed in accordance with Rule 7A(3) by the third respondent and was not presented by the applicant during the proceedings on 12 July 2022. These documents therefore did not serve before the second respondent. Any non-consideration thereof is nothing more than the applicant's failure to present the documents at the appropriate time.

[10] In his founding affidavit and *in limine*, the first respondent contends that on 23 August 2022 the second and third respondents gave notice in terms of Rule 7A(3) in terms of which the record of proceedings were filed with the Registrar for collection, copying and subsequent delivery by the applicant. On or about 21 September 2022 the applicant delivered a notice in terms of Rule 7A(6) wherein the transcript purporting to be documentary portion of the record, the overwhelming majority of which are not referred to in the Rule 7A(3) notice were not referred and did not form part thereof. The first respondent contends that the documents did not form part of the record of proceedings before 12 July 2022 and that similarly, certain annexures, FM7-FM9 and FM16-FM24 supporting the founding affidavit did not form part of the record of proceedings and are not appropriate to be included in this application.

[11] The applicant denies this and contends that the second respondent has a duty to proceed with the arbitration despite the point *in limine* being raised. He has a duty to assess the prospects of success by hearing the facts of the dispute. Secondly, the applicant contends that the second respondent misconstrued a complaint raised by the first respondent as a point *in limine* particularly as the

applicant had delivered his application for arbitration within the prescribed period of time.

[12] In terms of Rule 7A, a party wishing to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court, must deliver a notice of motion to all affected parties. The notice of motion must call upon these people to show cause why the decision or proceedings should not be reviewed and corrected or set aside. The notice of motion must be supported by an affidavit setting out the factual and legal grounds upon which the applicant wishes to have the decision or proceedings set aside. The rule further provides that the registrar should make available to the applicant the record which the applicant will make copies of such portions as may be necessary for the purposes of review and certify each copy as true and correct. The applicant must then furnish the registrar and each of the other parties a copy of the record and of the reasons filed by the person or body.

[13] The record of proceedings would have been obtained by the applicant from the third respondent. The applicant in his heads contends that he lodged the transcripts and had accordingly complied with the rule. It is evident that the applicant never submitted his arbitration bundle to the third respondent and as such, it could not be considered by the second respondent for the purposes of his ruling. It could not have formed the record of proceedings. It is also not evident the legal basis for the documents attached to the founding papers as to how they formed part of the record of proceedings.

[14] Accordingly, the point *in limine* is upheld. The applicant is therefore precluded from utilising and relying on the documents which do not form part of the record of proceedings delivered in compliance with Rule 7A(2) and 7A(3).

Legal Principles on Review

[15] The applicant contends that a reasonable decision maker would have come to a different conclusion than that of the second respondent and maintains that the second respondent erred in his ruling.

[16] 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.

[17] 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”.

[18] 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.

[19] 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

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

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

[20] 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 at is one that falls in the band of decisions a reasonable decision make could come to on the available material.”

[21] 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.”

[22] The court then concluded that⁶-

“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.”

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

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

Grounds for review

[24] The applicant contends that the second respondent erred when he found that the applicant delayed in having the matter rescheduled. He contends that he lodged the application timeously and was not responsible for its rescheduling. Furthermore, the second respondent failed to understand that the third respondent had granted the subpoenas and accordingly was not responsible to pay the witness fees. Furthermore, the second respondent's refusal for the applicant to be represented at the CCMA in arguing points *in limine* was also a decision no reasonable decision maker could have come to. And lastly, the applicant contends that the second respondent did not hear the facts of the case to determine whether he had a case or not. His evidence should have been allowed, and he would then have been in a position to make his ruling on the basis of such evidence whilst considering the point *in limine*.

Evaluation

[25] The second respondent's ruling was extensive and detailed. He considered the issues of the dispute that were before him. He also refers to the interests of both the applicant in pursuance of his claim for unfair dismissal but also refers to the extensive delay and the prejudice to be suffered by the first respondent should the matter continue. The applicant avers that the second respondent committed an irregularity by failing to take into consideration the facts of the evidence before him and to show an understanding of such evidence. Therefore, his award must be reviewed and set aside.

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

[26] The test as stated above is not whether he was correct or incorrect. I do not see an argument in the applicant's papers in which he shows the court that the award is reviewable on any jurisdictional basis. Even if the second respondent had come to an incorrect conclusion, the requirements of the test for a review have not been met. Furthermore, the applicant fails to refer to the transcript which was delivered in support of his contentions in the review application.

[27] The allegations in the papers by the applicant rather ring of an attempt to appeal the decision by claiming that the second respondent should rather have come to a different conclusion. This is not the intention of Section 145 which was enacted to enable litigants to have their arbitration awards reviewed. No evidence of errors in law have been furnished to show the court that the errors have affected his right to a fair hearing nor was evidence furnished, or reference made to the record in confirmation of the second respondent's denial to allow him legal representation. I am satisfied that he understood and followed the proceedings as an interpreter was available for his use.

[28] Accordingly, I am of the view that the applicant has failed to plead a proper case for the review of the award by the second respondent.

Costs

[29] 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.⁸ This principle was confirmed in the matter of *Zungu v Premier of KZN and Others*⁹ 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

⁸ Union for Police Security and Corrections Organisation v South African Custodial management (Pty) Ltd [2021] ZACC 41

⁹ 2018 ZACC 1

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.

Order

[30] Accordingly, the following order is granted:

The review application is dismissed.

MOKOSE AJ
Acting Judge of the Labour Court
Of South Africa, Johannesburg

For the Applicant Adv Sadiki
Instructed by: Linde Dlamini Attorneys

For the Respondent Mr R .Atcheson(Attorney)
Instructed by: D.H Hinnchson Attorneys