



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 760/21

In the matter between:

SANDTON MINING (PTY) LTD

Applicant

and

SOLLY MASHEGO N.O

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

AMCU obo PIENAAR KHUBEKA

Third Respondent

Heard: 20 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 07 May 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In this opposed application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the first respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner found that the dismissal of the individual third respondent, Mr Khubeka (Khubeka) was substantively unfair and further ordered his reinstatement together with back-pay.

[2] The application for review was filed some three days outside of the statutory time limits contemplated in section 145(1)(a) of the Labour Relations Act (LRA)¹. Condonation was sought in this regard and not opposed. Due to the insignificant amount of the delay and the explanation proffered in that regard, the interests of justice dictate that the late filing of the review application be condoned.

The proceedings before the Commissioner:

[3] Khubeka was employed with effect from April 2019 and had occupied the position of Water Bowser Operator at the time of his dismissal in July 2020. Having referred a dispute to the CCMA and upon the failure of attempts at conciliation, the matter came before the Commissioner for arbitration.

[4] Khubeka was dismissed for alleged misconduct in that on 3 July 2020, he had called the members of the SAPS and reported that the applicant as an employer, had contravened the then promulgated National Lockdown Regulations. The report and information to SAPS according to the applicant, was false; done in an attempt to bring its name into disrepute or cause it damage or sabotage its operations. Khubeka was said to have made the report without first utilising the internal grievance procedure.

[5] The evidence before the Commissioner was that the information or report made by Khubeka to members of SAPS pertained to the applicant's alleged non-

¹ Act 66 of 1995

compliance with Covid-19 regulations pertaining to the issuing of masks, sanitizers and enforcement of social distancing.

[6] In justifying the fairness of the dismissal, the applicant relied on the evidence of Mr Ruan Moore, its Site Manager. He had refuted that the applicant had failed to comply with the Regulations in that all employees were issued with all the required Covid-19 personal protective equipment (PPE) daily. These included hand gloves, sanitizers and facemasks. He had further testified that social distancing was adhered to and always enforced at the workplace. Documentary proof in the form of attendance registrars of employees and their signatures of acceptance of PPE was referred to.

[7] Moore had testified that after Khubeka and other employees had complained, members of the SAPS came to the workplace, and in one instance, they came on no less than five occasions to the workplace to investigate the complaint. Meetings were also convened between management, members of the SAPS and employees, where their complaints were addressed.

[8] Moore testified that Khubeka was identified in a meeting held on 20 April 2020 as the employee who had called members of the SAPS and complained about the applicant's alleged non-compliance with the regulations. This came about at the meeting when he was identified by the members of SAPS. His identification came about after the members of SAPS were asked to identify the caller of the complaint's phone number, which happen to have been that of Khubeka when his phone rang in the meeting. According to Moore, Khubeka when identified had initially denied that it was him, but he later conceded that he was indeed the complainant who made the call.

[9] The applicant's Safety Office, Mr Nathi Maseko merely confirmed his presence at the meeting of 20 April 2020 with the members of the SAPS and employees, and the identification of Khubeka at a meeting through the call to his phone, as the complainant who had contacted the SAPS.

[10] Khubeka's version of events in disputing the fairness of the dismissal was that his phone was used by a shop steward named 'Shorty', as the latter did not have airtime to make the call from his phone. He testified that employees had reason to be aggrieved because of shortages of PPE.

[11] The Commissioner in the award had recorded that Khubeka's version was different from the one he gave at the disciplinary enquiry. When this was put to him under cross-examination, his response was that he could not recall what he had said at that enquiry. His version at the disciplinary enquiry was that it was his daughter who had used his phone to call members of the SAPS about an unrelated matter.

[12] Mr Moses Makwakwa's testimony on behalf of Khubeka was merely to confirm that employees were aggrieved with problems related to lack of PPEs, and the shop stewards' decision, more particularly, the said 'Shorty', to call members of the SAPS for intervention. He also testified that 'Shorty' used Khubeka's phone to make the call to members of the SAPS.

The Commissioner's findings:

[13] The Commissioner held that he was confronted with 'highly factual' disputes and different versions and determined that there were two central issues for determination, i.e., whether Khubeka made the phone call to members of the SAPS, and whether the complaint was unsubstantiated and false, in the light of the charges preferred against Khubeka.

[14] The Commissioner concluded that from the evidence, Khubeka was the person who made the call from his own phone to members of the SAPS. The corroborating evidence of Maseko was not helpful in the absence of that of the said 'Shorty', who was not called upon to testify. The Commissioner also drew negative inferences from the different versions Khubeka gave at the internal disciplinary enquiry and at the arbitration proceedings.

[15] As to whether the complaint made to members of the SAPS was false, the Commissioner concluded that indeed there was reason for the employees to

complain about the shortage of PPE. The Commissioner concluded that the evidence of Moore and the documentary evidence produced in support of the contention that the applicant complied with the regulations, was unsatisfactory in proving that there was compliance.

[16] The Commissioner concluded that there were no records placed before him to prove that PPEs were issued to the employees long before the meeting of 20 April 2020, and accordingly, the applicant failed to show on a balance of probabilities that Khubeka's complaint was false. It was against these considerations that the Commissioner had made a finding of substantive unfairness and the appropriateness of the award of reinstatement and back-pay.

The grounds of review:

[17] The applicant contends that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings in that despite the parties' agreement at those proceedings that the only issue for determination was whether Khubeka had made the call to SAPS, the Commissioner had found the dismissal to be unfair based on a different issue.

[18] It was further submitted that the Commissioner failed to consider certain evidence led by Moore and Maseko, and that despite acknowledging the narrow issue to be determined, he had nonetheless relied on other issues in making his findings.

The legal framework and evaluation:

[19] The test on review is well-known. The primary enquiry before the reviewing Court is whether the conclusion arrived at by the commissioner is one that a reasonable decision-maker could not have reached based on the material before him or her². In *Herholdt*, the SCA reaffirmed the need to preserve the distinction between

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110. See also *Herholdt v Nedbank Ltd and Congress of South African Trade Unions (Amicus*

review and appeal, and appreciated that inasmuch as the reviewing court must necessarily scrutinise the evidence to determine whether the outcome was reasonable, it must guard against 'judicial overzealousness' in setting aside administrative decisions that do not coincide with the judge's own opinions.

[20] The SCA reiterated that on the *Sidumo* test, there would be justification to set aside an award on review, if the decision was 'entirely disconnected with the evidence or was unsupported by any evidence' and involved speculation by the commissioner³.

[21] The SCA added that the primary focus of the *Sidumo* test is on the reasonableness of a decision reached as opposed to how the decision was reached. Thus, inasmuch as the reasons for the arbitrator's findings must be examined, a flaw in the reasoning in arriving at a conclusion, is not in itself sufficient to set aside the award. The reviewing court must still examine whether or not the conclusion reached by the arbitrator is not one a reasonable decision-maker could reach.

[22] To the extent that the applicant in this case relied on the grounds of review as contemplated in section 145 (2)(a)(ii) of the LRA in alleging gross irregularities in the conduct of proceedings, the SCA in *Herholdt* had held that the general principle is that a "gross irregularity" concerns the conduct of the proceedings rather than the merits of the decision. It added that a qualification to that principle is that a "gross irregularity" is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. That ground of review however, was not to be read in isolation, as it was suffused in the legal principle of 'reasonableness'.

Curiae (701/2012) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25, where it was held;

"... A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

³ At para 13.

[23] Applying the above principles to the facts of this case, it is apparent from the transcribed record of proceedings that during a process of narrowing down the issues, the central dispute for determination was whether Khubeka made the complaints/statement to the members of SAPS. He had denied having made the complaint. Against this primary issue, the Commissioner informed the parties' representatives that the onus was then on the applicant to prove that the statement/complaint was made by Khubeka, and that once this was established, that was the end of the matter⁴.

[24] The basis of the alleged gross irregularities in the conduct of the proceedings was that despite the narrow issue for determination as ventilated in the process of narrowing down of the issues, the Commissioner went beyond that issue, and in the process, denied the applicant a fair trial of the issues as he did not allow its witness Maseko to testify on issues surrounding whether the applicant had complied with the regulations.

[25] It was submitted on behalf of Khubeka that indeed the issues for determination before the Commissioner were crisp, in that central to the determination of the fairness of the dismissal were the charges that led to that dismissal. In this regard, it was argued that the issues were whether Khubeka had made a call to members of the SAPS, and if so, whether the call and statements made were false.

[26] In regards to the issue of who was responsible for making the complaint to members of SAPS, the Commissioner had concluded that it was indeed Khubeka who had done so from his phone. The applicant's contention was that the enquiry ought to have ended at that point as this was the main issue for determination as agreed upon in the narrowing down of issues.

[27] The difficulty however with that proposition is that it is trite that within the framework of section 188(1)(a) of the LRA, a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is fair.

⁴ See Transcribed Record at pages 14, lines 4 - 25

Effectively, the Commissioner was obliged, notwithstanding the parties' narrowing of the issues, to determine the fairness of the reason for the dismissal.

[28] The contention that the Commissioner had not allowed evidence to be lead in regards to the alleged non-compliance with the regulations is however not borne out by the transcribed record. In this regard, the Commissioner indicated that he could not leave the issue unaddressed⁵, and had asked Moore about the documents (attendance registrars) he had relied upon in proving that there was compliance with the regulations to demonstrate that the report to the SAPS was false. Moore had indeed testified on the issue⁶. The only criticism that can be directed at the Commissioner is that having asked Moore about these issues, he did not afford the representatives an opportunity to ask Moore any further questions arising from his own questions. However, whether this omission constituted a gross irregularity which had a distorting effect on the outcome ultimately reached in the sense that the applicant was denied a fair trial of the issues is something else.

[29] Against the charges that led to the dismissal, even if on the applicant's version the finding of the Commissioner in regard to the identity of the caller and complainant to the SAPS as Khubeka ought to have been the end of the matter based on the issues as narrowed before the Commissioner, the enquiry went beyond that, in the sense that the Commissioner was obliged to consider the appropriateness of the sanction of a dismissal. Of course this is not the enquiry the Commissioner undertook as he had considered the overall reason for the dismissal, something he was obliged to do.

[30] Against the omissions on the part of the Commissioner that the Court has identified, ordinarily an appropriate order to make would be to remit the matter to the CCMA for a hearing *de novo*. This approach however in my view would not assist the parties in bringing this dispute to an end since Khubeka's dismissal in July 2020. Of course some of the delays were at this Court's door in view of the time it took to deliver the judgment. The Court can only apologise to the parties in this regard.

⁵ At page 49, lines 21 - 24

⁶ At pages 50 55

[31] The point being made with the above observations is that the full transcribed record of the proceedings as was before the Commissioner together with the parties pleadings are before the Court, and it is therefore in a position to finally dispose of the matter rather than remitting it

[32] The Court in having considered the transcribed record, also takes into account that the applicant confined its case to the founding affidavit and omitted not to file a supplementary affidavit. Be that as it may, I have already dealt with the primary issue for determination as recorded by the Commissioner, being whether it was Khubeka who had made the complaint to SAPS and the Commissioner's conclusions in that regard which are not a subject of a cross-review.

[33] It is my view that a mere finding that it was Khubeka who had made the complaint could not have been the end of the matter, as it was more the nature and context of that complaint that would have led the applicant to conclude that the intention thereof was to sabotage its operations or impugn its reputation. Such a conclusion could not have been made from a mere confirmation that it was Khubeka that had made the complaint. It is against these factors that bar the fact that the Commissioner did not afford the parties an opportunity to ask more questions emanating from his own questions to Moore, the fact remains that the latter had indeed testified in regards to how the applicant had complied with the regulations. Equally so, in *Sidumo*, it was said in the minority judgment of Ngcobo J, that 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. It was added that 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 reason⁷. In my view this is what the Commissioner had done in this case.

[34] It is apparent from the questions posed by the Commissioner to Moore in regards to allegations of non-compliance with the regulations, that the former was not convinced that based on the latter's evidence and the documentary evidence

⁷ At para 267

relied on, there was proof that there was indeed compliance. Other than the questions posed to Moore by the Commissioner, the record also reflects that the applicant's representative had even posed questions to Moore about the same issues, despite the applicant's complaints in this review that Moore or Maseko were not afforded an opportunity to address those issues.

[35] In the light of the above considerations, it is my view that the gross irregularity allegedly committed by the Commissioner does not qualify as such, and even if there was any, on the *Sidumo* test, the Commissioner's conclusions cannot be faulted. This is so in that the evidence relied upon by the Commissioner cannot be said to have been disconnected to the facts, nor can it be said that he misconceived the whole nature of the enquiry and as a result, misconceived his mandate or his duties in conducting the enquiry.

[36] Other than the above considerations, it is trite that a mere finding of guilt is not sufficient to justify a sanction of dismissal. Item 2(1) of the Code of Good Practice: Dismissal provides that whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty, as such a penalty should be reserved for cases of serious misconduct or repeated offences. It was long held in *Sidumo* that a variety of factors must be considered in determining the fairness of a dismissal, inclusive of aggravating and mitigating factors

[37] In this case, the Court accepts that Khubeka's denial that he had made the complaint is indeed an aggravating factor. However, this factor on its own is not in the light of the Commissioner's other conclusions on the content and veracity of the complaint, sufficient to have warranted a dismissal. It is correct that Khubeka ought to have been sanctioned for lying when questioned about whether he was responsible for contacting the SAPS. However, it is repeated that a sanction of dismissal on all the facts before the Commissioner was unwarranted. At most, what can be regarded as not falling within the band of reasonableness is the reinstatement with full the backpay that was awarded, in circumstances where Khubeka had lied.

[38] I have further had regard to the requirements of law and fairness in regards to costs. It was correctly submitted on behalf of AMCU and Khubeka that each party must be burdened with its own costs. This is the order I propose to make.

[39] Accordingly, the following order is made'

Order:

1. The late filing of the application for review is condoned.
2. The application to review and set aside the First Respondent's award dated 18 March 2021 is successful only to the extent that an award of back-pay was made to the Third Respondent (Mr Khubeka).
3. The First Respondent's award is accordingly substituted to read as follows;
 - (i) The dismissal of Mr Khubeka was substantively unfair.
 - (ii) The Applicant is ordered to reinstate Mr Khubeka into the same or similar position he previously occupied prior to his dismissal.
 - (iii) Mr Khubeka is not entitled to any form of back-pay resulting from the order of retrospective reinstatement.
4. Each party is to pay its own costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Adv. AC Diamond, instructed by Jansen Van Vuuren Attorneys.

For the Third Respondent: Adv. AL. Cooke, instructed by Larry Dave Incorporated Attorneys.