



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1275/21

In the matter between:

**DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT,
LAND AND ENVIRONMENTAL AFFAIRS** **Applicant**

and

SAMBO, MARTIN N.O. **First Respondent**

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL (GPSSBC)** **Second Respondent**

NEHAWU obo STEMMER MLINDWA NDALA **Third Respondent**

Heard: 6 May 2025

Delivered: 8 May 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 8 May 2025.

JUDGMENT

MAKHURA, J

[1] The applicant or the Department launched these review proceedings in terms of section 145 of the Labour Relations Act¹ (LRA) against the arbitration award issued in favour of the individual third respondent, Stemmer Mlindwa Ndala (Ndala or employee). In addition, the applicant seeks substitution of the award with an order that the dismissal of the employee was substantively fair, alternatively remitting the matter to the second respondent for a fresh hearing before a different commissioner. The application is opposed by the third respondent.

[2] The applicant also applied for condonation for the late delivery of its replying affidavit. The delay is not significant, and there is no prejudice that the employee would suffer if condonation were granted. This being a review application where evidence was led at arbitration proceedings and the replying affidavit is not intended to and did not introduce new evidence, it is in the interest of justice to grant condonation.

[3] In this replying affidavit, the applicant takes issue with the fact that the answering affidavit was deposed to by a union official, and not the employee. The applicant submits that the answering affidavit must be disregarded as it constitutes hearsay evidence and that the matter should be determined on an unopposed basis because the employee did not sign a confirmatory affidavit and there is no explanation provided why he did not sign the answering affidavit.

[4] The point must be dismissed as meritless for the following reasons – the employee is a member of a registered trade union, which referred the unfair dismissal dispute on his behalf and represented him during the arbitration proceedings, and the

¹ Act 66 of 1995, as amended.

answering affidavit was deposed to by a trade union official, whose authority is not challenged. The trade union is entitled to represent its member.² The point is dismissed.

[5] The employee faced three allegations of misconduct. After a disciplinary hearing, he was found guilty of and dismissed for the following two allegations:

'Charge 1

It is alleged that you contravened the disciplinary code and procedure (Chapter 7 of the SMS handbook) in that you wilfully and negligently mismanaged the finances of the State in that you failed to do due diligence during the course of your duties to wit, you caused a payment of Mreku Investment Holdings JV Kusile Development Solutions to a total sum of R576 840.00 without approval from the accounting officer.

Charge 2

It is alleged that you contravened the disciplinary code and procedure (Chapter 7 of the SMS handbook) in that you wilfully and negligently mismanaged the finances of the State in that around May 2017 you submitted an invoice of more than R200 000 to the Department for work that was charged for R56 155.80, which was done by Mr G. Viljoen.'

[6] At the arbitration proceedings, the applicant called three witnesses, namely Gerhardus Viljoen (Viljoen), Mapholoba Letswalo (Letswalo) and Maada Dagada (Dagada). The employee testified and called no other witnesses.

[7] This review application is determined without the bundle of documents and the transcript of the oral evidence of Letswalo. The applicant has noted the missing part of the transcribed evidence of Letswalo. No explanation has been proffered for the failure to file the bundle of documents, nor is there any explanation why Letswalo's transcript was not transcribed or could not be reconstructed. The applicant elected to proceed with the review application in the absence of this missing record.

² Section 200(1) and (2) of the LRA.

[8] In terms of charge 1, the employee is alleged to have wilfully and negligently mismanaged the finances by failing to do due diligence and thereby causing payment of R578 840.00 to Mreku Investment. This payment, so the applicant alleged, required the approval of the accounting officer but was effected without such approval.

[9] The commissioner, in his analysis of the charge and evidence, correctly observed that the essence of the charge is that the employee caused the payment of R578 840.00 without the accounting officer's approval. He noted that the evidence of Letswalo and Dagada established that the payment was made prior to the employee seeking approval from the accounting officer. Further, that the applicant sought to prove the charge by relying on the fact that the employee prepared a memorandum seeking approval from the accounting officer, and concluded that the employee would not have requested approval if he had the authority, and therefore, the accounting officer's authority was required and the employee had no such authority.

[10] The commissioner also observed that the applicant did not provide any delegation of authority or any financial delegation document that proved that the employee required the approval of the accounting officer before he could "cause" the payment of R578 840.00 to be made. The employee, on the other hand, provided documentary evidence in the form of a delegation of authority and a letter of appointment as a Project Manager to show that, as the Chief Director, he had the authority to sign financial transactions of up to R2 million. The employee's evidence was that the memorandum was written *ex post facto* the payment, and after the Chief Financial Officer questioned whether the payment was in accordance with the Service Level Agreement. His evidence was further that the Supply Chain Management division had confirmed that all the necessary documents were submitted in support of the payment before the finance division authorised the payment.

[11] Having considered the evidence above, the commissioner stated correctly that the onus is on the applicant to prove the charge and the fairness of the dismissal. The commissioner found that Dagada and Letswalo did not provide evidence to show that

the employee required the authority to pay R578 840.00, that despite the employee's call for the applicant to provide any evidence to contradict his documentary evidence showing that he was authorised to make payment of up to R2 million, the applicant failed to provide any evidence to the contrary. The commissioner then concluded that the employee was not guilty of charge 1.

[12] The applicant's issue with the commissioner's findings and conclusions above is that they constitute a gross irregularity and demonstrate that the commissioner's misconceived the enquiry. In its heads of argument, the applicant's counsel submitted that the employee *"committed an act of gross misconduct in awarding a contract to a third party in circumstances where he had no powers or authority to do so"* and that he *"was supposed to have requested and obtained an approval from the HOD"*. This was not the charge against the employee and certainly not the reason for his dismissal.

[13] The applicant persists with the submission made during the arbitration proceedings, which is, as captured by its counsel in the heads of argument – if the employee *"thought that he had the necessary powers, what was the purpose of issuing a memo to the ... HOD"* and that *"the only logical explanation is that [he] knew that he did not have such powers and that is why he sought to rectify his misdemeanours ... by issuing a memo to then HOD for the ex post facto approval when in fact the ship had already sailed"*.

[14] The applicant is clutching at straws. As the commissioner correctly observed, the applicant bore the onus to prove the charge. The applicant failed to adduce any evidence to support the charge but instead sought to prove the charge by speculation and conjecture, even on the face of the employee's documentary evidence that he had the authority. There is nothing unreasonable about the commissioner's findings and conclusions. The applicant failed to prove charge 1, and the ground for review against the commissioner's decision in this respect is dismissed.

[15] The review ground against an award of reinstatement insofar as charge 1 is concerned must equally fall with the above finding. The employee is not guilty of the charge, and there was no evidence outside the charge to suggest that reinstatement would not be reasonably practicable.

[16] The second review ground is that the commissioner failed to deal with charge 2 and the evidence. In terms of this charge, the employee was alleged to have wilfully and negligently mismanaged the applicant's finances by submitting an inflated invoice of more than R200 000 for work that was charged or invoiced for R56 155.80 by Viljoen.

[17] Despite evidence being led on this charge, the commissioner made no analysis of the evidence, nor did he make any findings on the charge. He simply did not deal with charge 2. Ms Ndaba, appearing for the third respondent, sought to persuade the Court, *albeit* feebly, that the commissioner had considered the charge by referring to the part of the award where the commissioner was dealing with the appropriateness of the sanction of dismissal, which of course is an enquiry necessary only after a finding of guilt. The commissioner made no finding whatsoever on charge 2.

[18] Whilst the review test is stringent and should not be interfered with lightly³, this Court must satisfy itself that the commissioner considered the principal issue before him and evaluated the evidence presented at the hearing before reaching conclusions. As the Constitutional Court elaborated and clarified the review test in *Duncanmec (Pty) Ltd v Gaylard NO & others*⁴:

'The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'⁵

³ *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.

⁴ (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

⁵ *Ibid* at para 43.

[19] The commissioner's failure to consider the fairness of the dismissal based on charge 2 constitutes an irregularity and/or misconduct in the proceedings that denied the parties, in particular the applicant, the right to a fair hearing of the issue and the commissioner that the dismissal was unfair is arbitrary.

[20] It is clear that whilst the award is reasonable insofar as the findings and conclusions that relate to charge 1, the failure to determine the fairness of the dismissal based on charge 2 constitutes a serious defect in the proceedings. It is my view that the appropriate relief would be remit the matter to the second respondent to deal with charge 2. I do not believe that this is an issue that the Court can determine because it is an issue reserved for the commissioner. However, even if the Court was inclined to sit as a commissioner to determine the issue in the interest of expediency⁶, the Court would be constrained in that the full record of the arbitration proceedings has not been filed.

[21] Both parties agreed, though reluctantly because the applicant wanted a full remittal and the third respondent wanted a full dismissal of the application, that the appropriate remedy would be to remit the charge 2 dispute to the second respondent for determination or hearing *de novo*, before the same or a different commissioner. If the matter proceeds before the first respondent, who had already heard the evidence, he may call for further written and oral submissions and submission of the record of the proceedings, including the transcribed record of the oral evidence. If the matter is heard by a different commissioner, he may equally call for these documents, and for written and oral submissions and/or may require evidence to be led afresh. Ultimately, the

⁶ Section 158(2)(b) of the LRA provides that: "(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may -

(b) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable".

In my view, there may be circumstances that may warrant this Court invoking this provision and determining an issue in review proceedings which was not addressed or determined by the commissioner, in the interest of expediency.

commissioner remains empowered to deal with the issue in terms of section 138 of the LRA.

[22] In the premises, the following order is made:

Order

1. The late delivery of the applicant's replying affidavit is condoned.
2. The review application is successful only to the extent that the commissioner failed to address charge 2, which formed the reason for the employee's dismissal.
3. The unfair dismissal dispute between the employee and the applicant is remitted to the second respondent for consideration of charge 2 by the first respondent, alternatively and in the absence of the first respondent, for a hearing *de novo* before a different commissioner only in respect of charge 2.
4. Save for paragraphs 2 and 3 above, the review application is dismissed.
5. The second respondent is ordered, within 15 days of receipt of this judgment, to issue a notice of set down enrolling the matter for hearing.
6. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M. Zondo

Instructed by: Morolong Inc.

For the 3rd Respondent: Ms T. Ndaba

Instructed by: Sebola Nchupetsang Sebola Inc.