



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR95/21

In the matter between:

ZOZI NTSOKOLO MOJALEFA HAROLD

Applicant

and

COMMISSIONER LEBOGANG RUDOLPH MATLOGA N.O First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION (CCMA)**

Second Respondent

LEONARD DINGLER (PTY) LTD

Third Respondent

Heard: 4 February 2025

Delivered: 09 June 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] This is an application for review in terms of Section 145(1)(a) of the Labour Relations Act¹ (LRA) 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 dismissal of the applicant was substantively fair.

Material background facts

[2] The Applicant (Zosi Ntsokolo Mojalefa Harold) was employed by the Third Respondent since 27 October 2008 and was occupying a position of a Machine Operator at the time of his dismissal.

[3] The Third Respondent is in the business of tobacco production, supply of tobacco and related products, with its plant in the East Rand (Ekurhuleni) where the Applicant was based.

[4] The Applicant was dismissed on 27 August 2020 on account of allegations of absenteeism.

[5] It was alleged that he absented himself from work without authorisation and failed to communicate such absence to his line Manager within two hours of commencing work on the days in question.

[6] It was alleged that the Applicant absented himself on the following days:

- 6.1 24, 25, 26 June 2020,
- 6.2 01, 02, 03, 20, 21, 22, 23 and 24 July 2020,
- 6.3 04 and 05 August 2020.

[7] The Applicant disputed all the allegations, however, he was summoned to a hearing where he was found guilty of all the charges and a sanction of dismissal was meted out.

¹ Act 66 of 1995, as amended.

[8] Aggrieved by the dismissal, the Applicant referred a dispute of unfair dismissal to the Second Respondent with the First Respondent as an arbitrator.

The arbitration award

[9] The First Respondent in his arbitration award set out the evidence adduced by the witnesses which is well documented therein and therefore, there is no need to burden this judgment with an iteration.

[10] In his analysis of the evidence and arguments, the arbitrator identified the issue to be decided which was whether the dismissal of the Applicant was substantively unfair.

[11] The First Respondent found that the existence of the rule was not in dispute that the Applicant was required to contact his line Manager and inform him of his absenteeism if he was unable to report for duty for any reason.

[12] The First Respondent further found that it was common cause that the Applicant was well aware of the existing rule as in the past he reported his absence to his supervisor.

[13] The First Respondent further found that the Applicant herein was not a credible witness compared to the Third Respondent's counterpart. The First Respondent found that the Applicant's contention that he reported that he would not report for duty on 24 June 2020 was perfidious.

[14] The First Respondent found that the Third Respondent bore the onus of proving that the dismissal was fair but the Applicant failed to discharge the evidentiary burden as he gave several unsubstantiated and flimsy excuses for his failure to report for duty on the days he was scheduled to report for work

[15] That the Applicant at one instance claimed that he lost his phone, went to the Department of Home Affairs to obtain an ID book as well as a birth certificate of his newborn baby.

[16] The First Respondent found that of all the above excuses, the Applicant could only produce a birth certificate for his newborn baby.

[17] Further, the Applicant himself conceded that he was not authorised to be absent on 5 August 2020 and as a result the First Respondent found that he cannot attach any weight to the fact that the Applicant was authorised by Mr Rabalao not to report for duty on 6 August 2020.

[18] As a result, the First Respondent found that that the Applicant was guilty of the misconduct on a balance of probabilities, and that despite him being the first offender dismissal was an appropriate sanction

[19] Further that the case of the Applicant is different to that of Dlamini who the Applicant claimed was treated differently. The First Respondent found that Dlamini had reported his absence from work whereas the Applicant simply just stayed away from work.

The issue to be decided

[20] I am required to determine whether the finding of the First Respondent that the dismissal of the Applicant was substantively unfair was unreasonable. If I find that it was unreasonable within the totality of evidence before him, I am required to interfere with such decision and substitute it with an appropriate one.

Grounds for review

[21] The Applicant raised several grounds of review, amongst others that, the First Respondent committed irregularities and/or serious errors of law as he failed to take judicial notice of alert level 3 regulations which:

21.1 completely prohibited the Third Respondent and its employees from carrying out the said tobacco business from 1 June 2020 until 11 July 2020;

21.2 partially prohibited Third Respondent and its employees from carrying out the said tobacco business from 12 July 2020 to August 2020.

21.3 That had Commissioner Matloga taken judicial notice of the above-mentioned Alert level 3 Regulations, he could have found that:

21.3.1 The Applicant's dismissal for absenteeism on 24, 25, 26 June 2020 and 01, 02, and 03 July was unfair as the Third Respondent's instruction to require him to work during the aforesaid days, was unlawful because it was in contravention of alert level 3 regulations which completely imposed a tobacco ban,

21.3.2 That the Applicant's dismissal for absenteeism on 20, 21, 22, 23 and 24 July 2020 and 4 and 5 August 2020 was unfair as the Third Respondent's instruction to require him to work on the aforesaid days, was unlawful as it was in contravention of alert level 3 regulations which partially imposed a tobacco ban.

[22] The Applicant submitted that the First Respondent ignored relevant evidence showing that he did not breach the rule. The award is unreasonable based on the material evidence before him especially that during Alert level 3 regulations, interprovincial travel was prohibited.

[23] The Applicant further submitted that the Third Respondent's witness, Rabalao, the Applicant's supervisor, admitted that he received a call from the Applicant notifying him of his absence from work and that this was further fortified when his witness Celumusa, corroborated his version that the message was conveyed to Rabalao that he was unable to report for duty.

[24] The Applicant averred that that First Respondent disregarded the principle of consistency and the parity principle, in that, one Dlamini also absented himself but was never disciplined as he was only given an annual leave.

[25] On the other hand, the Third Respondent submitted that the award is reasonable and the First Respondent did not commit any reviewable irregularity, as a result the application be dismissed with costs.

Test for Review

[26] 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?*"

[27] The Constitutional Court settled the test for the review of an arbitration award in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The Court 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 totality of evidence before him or her.³

[28] 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.

[29] As the Labour Appeal Court (LAC) 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.'

² (2007) 28 ILJ 2405 (CC) at para 110.

³ In *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC) 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 resulting in no fair trial of the issues. See also: *Sidumo* (Ibid).

⁴ (2012) 33 ILJ 1417 (LAC) at paras 103 to 104.

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

[31] In the case of *Telcordia Technologies Inc v Telkom SA Ltd*,⁵ the Supreme Court of Appeal 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.’

[32] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*⁶, the LAC rejected a piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “*assumes the form of an appeal*” and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in section 138 of the LRA in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, *albeit* expeditiously and fairly. 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.

[33] On this approach, therefore, the failure of a commissioner “*to mention a material fact in his or her award*”, or “*to deal in his/her award in some way with an*

⁵ 2007 (3) SA 266 (SCA) at paras 52 to 78 and 85 to 88.

⁶ (2014) 35 ILJ 943 (LAC).

issue which has some material bearing on the issue in dispute", or *"commits an error in respect of the evaluation or consideration of facts presented at the arbitration"*⁷ would not, in itself, render the award reviewable. Having considered the evidence at arbitration, the LAC in *Myers* held:

"....I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come".⁸

[34] It is my considered view that arbitrators are human, they may also commit errors or irregularity, however, in order for the said error or irregularity to constitute reviewable conduct, such error has to be material.

[35] 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*⁹. 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* and this court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* 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

⁷ See: *Sidumo* (Id fn 2) at para 110.

⁸ *Myers* (Id fn 4) at paras 103-104.

⁹ [2015] 1 BLLR 50 (LAC) at paras 30 to 33.

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 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.'

Analysis of submissions

[36] The *Sidumo* test, however, justify 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.

[37] The Applicant's ground of review that the arbitrator failed to take judicial notice of Covid-19 regulations Alert Level 3 is meritless in that, the regulations did not prohibit the production of tobacco but its sale thereof.

[38] Further ground that the interprovincial travel was prohibited was equally dealt with by the arbitrator wherein evidence adduced proved that the Applicant was given a permit to travel and/or where he did not have such permit, the employer was willing to assist him.

[39] 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 of the LRA, but also to prove that the decision in itself was unreasonable, which I am not convinced that she has done so.

[40] In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, despite finding the Arbitrator's reasoning lacking, the result is nevertheless capable of justification for reasons other than those given by the arbitrator.¹⁰ The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[41] A consideration of the evidence presented by the witnesses as contained in the transcript convinces me that the same reasoning as posited in the *National Union of Mineworkers and another v Commission for Conciliation, Mediation and Arbitration and others*¹¹ case applies equally. There is simply nothing on the transcript to show that the credibility finding of the Commissioner is completely out of kilter with the evidence or the probabilities.

[42] The First Respondent, through its witnesses and documentary evidence established a *prima facie* case of misconduct as outlined in the charge sheet, which then shifted the evidentiary burden to the employee to present evidence that would exonerate him from blame in this regard.

[43] I could not find any irregularity or misconduct to have been committed by the First Respondent that warrant interference with her award.

[44] In my view, when an employee decides not to report for work for no valid reason, such employee by implication, is no longer interested in the employment relationship. Why would a person be flogged to the workplace each day as if he does not benefit from same? Unfortunately, due process needs to be followed in order to hear the side of the employee. In *casu*, the Applicant failed to discharge his evidentiary burden.

Conclusion

¹⁰ See: *National Union of Mineworkers and Another v Samancor Ltd* (Tubatse Ferrochrome) and Others (2011) 32 ILJ 1618 (SCA).

¹¹ [2018] 3 BLLR 267 (LAC).

[45] 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 therefore, without any trepidation find that the arbitrator's award is reasonable under the circumstances and as a result, I have no reason to excoriate the award.

[46] The reasons provided by the arbitrator are in my view correct and are certainly substantiated by the transcript.

[47] Having due regard to the reasoning of the arbitrator on the evidence before her at the arbitration, it is perspicuous from an analysis of the award that the arbitrator properly weighed up all of the evidence before her, the totality of the circumstances, in the parlance of *Sidumo*, and it is in light of all those circumstances that she found that dismissal was a fair sanction.

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

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

Order

1. The application for review is dismissed.
2. There is no order as to costs.

N. Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv M.S Sebola

Instructed by: Sebola Nchupetsang Sebola INC.

For the Respondent: Mr. Alex du Plessis from Pinsent Masons South Africa Inc