



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1899/21

In the matter between:

MEDICLINIC NELSPRUIT (PTY) LTD

Applicant

and

CHARLES THAMSANQA SHIBA

First Respondent

GEORGE GEORGIADES N.O.

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 27 June 2024

Delivered: 09 June 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 14h00 on 09 June 2025

JUDGMENT

ZWANE, AJ

Introduction

[1] A whirlwind workplace romance between the first respondent (Shiba) and his colleague, Nyakane soured and eventually ended towards the end of the year 2020. This resulted in the first respondent *crashing out*,¹ colloquially speaking.

[2] Shiba was later disciplined for continued interactions with Nyakane despite the applicant's management having requested him to cease all communication and contact with Nyakane, who is employed by the applicant as a reception administrator. Shiba referred his dismissal to the third respondent (CCMA) claiming unfair dismissal. Shiba's application was successful in that he was reinstated.

[3] Aggrieved by the second respondent's ruling under the auspices of the CCMA, the applicant filed the current application for review² in terms of Section 145 of the Labour Relations Act³ (LRA).

[4] The applicant seeks an order reviewing and setting aside the second respondent's arbitration award (award) which was in favour of Shiba. At the time of his dismissal, Shiba was employed as a Human Resources Business Partner (HRBP), and he opposes this application for review.

Synopsis of relevant background

[5] According to the applicant, Shiba refused to accept that Nyakane no longer wished to continue their romantic relationship. Consistent with this refusal, Shiba continued to contact Nyakane via telephone calls and messages. Shiba would also go to Nyakane's home to persuade her to reconsider ending their romantic relationship.

¹ Pleadings: founding affidavit, page 8, paras 14 and 15.

² Pleadings: notice of motion, pages 1- 4.

³ Act 66 of 1995, as amended.

[6] Fed up, Nyakane approached the local Court in January 2021 for a protection order against Shiba, which protection order was granted. On broad strokes, the protection order prohibited Shiba from communicating with Nyakane either by way of calls or text messages. The applicant avers that Shiba ignored the protection order by communicating with and harassing Nyakane at work, as he believed that the protection order did not extend to the workplace. The harassment included Shiba phoning Nyakane on her landline at work after she had blocked his calls on her mobile phone.

[7] The applicant submits that at one point, there was an altercation between Shiba and Nyakane at the reception area which is the latter's workstation. Shiba was at Nyakane's workstation despite him having been requested by the applicant's management to stay away from and cease all contact with Nyakane. It is apposite that Nyakane did not report to Shiba.

[8] Shiba's attempt to win back Nyakane's heart went haywire. He would rock up at work on the days he was not on duty just to pass by Nyakane's workstation. He requested a colleague to speak with Nyakane on his behalf.

[9] Shiba was later charged with misconduct namely unprofessional and unacceptable conduct towards Nyakane and using his position to intimidate her. The upshot of the disciplinary hearing was a recommendation that Shiba be dismissed, which recommendation the applicant accepted.

[10] Aggrieved, Shiba referred a dispute of an alleged unfair dismissal to the third respondent.

The arbitration proceedings

[11] As the dismissal was not in dispute, the applicant bore the duty to begin and to prove the fairness of the dismissal. The applicant led the evidence of 5 witnesses, namely Ms Tentile Motha, Ms Carmen Savva, Ms Cecile Strumpher, Mr Bongani Magagula and Nyakane.

[12] According to Savva, the applicant was one of the 4 senior managers at the time responsible for all human resources related issues. Shiba's conduct towards Nyakane was in breach of the applicant's terms and conditions of employment in that it put the name of the applicant into disrepute.

[13] She got wind of the issues between Shiba and Nyakane on 3 March 2021 through an email correspondence from Strumpher, Patient Administration Manager, who requested her to investigate the matter. She instructed Shiba to stop all contact with Nyakane and her colleagues at the reception. Shiba was later disciplined and dismissed.

[14] Strumpher testified that Magagula, Reception Supervisor and Nyakane's direct line manager, reported the reception incident to her. The incident is that Shiba phoned reception and asked to speak with Nyakane. Magagula answered the call and advised Shiba that Nyakane was unavailable as she was busy attending to patients at reception. Shiba then came to the reception and asked to speak with Nyakane. She refused to talk to Shiba and was upset as a result. Shiba left the reception.

[15] When Magagula came to Strumpher's office to report the reception incident, Shiba was in her office. In his defence, Shiba mentioned that the reception incident happened because Nyakane had disrespected him. As a result of the said incident, Magagula changed Nyakane's day shift to night shift to limit potential interaction between Nyakane and Shiba.

[16] When testifying, Shiba denied that he had acted inappropriately or unprofessionally towards Nyakane. And called no witnesses to corroborate his version.

[17] At the conclusion of the arbitration, the second respondent found that the dismissal was procedurally and substantively unfair and ordered that he be reinstated. It is this outcome that the applicant is challenging on review.

Evaluation

[18] Key to his defence is Shiba's claim that his workplace interactions with Nyakane were of a professional nature. However, the evidence contained in the record of proceedings filed with this Court contradicts Shiba's version. At all material times after the relationship ended, Shiba's interactions with Nyakane at work were an endeavour to win back Nyakane's love.

[19] The instruction from Savva to Shiba was unambiguous. Shiba had to stop interactions with Nyakane. It is this instruction that Shiba defied and continued reaching out to Nyakane. Although Shiba was not charged with insubordination, however his continuation to interact with Nyakane regarding their ill-fated relationship led to him being disciplined.

[20] There was no evidence before the second respondent that Shiba's interactions with Nyakane were work-related. In fact, there was no reason for Shiba to interact with Nyakane on any work-related matters as she did not report to him directly or indirectly. Magagula is Nyakane's direct line manager and Strumpher is her second line manager.

[21] For some reason, this critical aspect of the evidence led before him seems to have escaped the second respondent's attention. Had he properly considered this evidence, he would have reached a different conclusion.

[22] In relation to procedural fairness, the second respondent found that the applicant fell short on procedure because the charge sheet was not articulately drafted and that Shiba was neither given sufficient time to prepare for the disciplinary hearing nor did he understand the charges against him. The second respondent adopted a rather rigid and inflexible approach. It is trite law that the charge sheet, at the minimum, should be in a language which an employee understands.

[23] The undisputed evidence is that at the first sitting of the hearing, Shiba was afforded 48 hours' time to prepare for the hearing. At the reconvention of the hearing, Shiba indicated that he was ready to proceed with the hearing. It does not

seem like Shiba protested either the charge sheet or insufficient time to prepare. Moreover, Shiba meaningfully participated in the hearing. Ultimately, he understood the case he had to answer. To me, there are no reasonable basis for the second respondent's conclusion that the dismissal of Shiba was procedurally unfair.

[24] In relation to the finding on substantive unfairness, the second respondent stated the following in his award –

‘137. The workplace behaviour referred to by the respondent, extended over 4 months and only, and not 14 months. The applicant testified that the personal relationship between him and Ms. Nyakane was kept separate to their professional relationship. Ms Nyakane testified that she only told the hospital management of her personal relationship with the applicant in March 2021. This implies that the workplace behaviour of the applicant, referred to by the respondent, was either of a personal nature or alternatively, for a period of around 4 months only.

138. This suggests that if the behaviour referred to, was of a professional nature, it did not span over 14 months as suggested by the respondent, but only 4 months. The charges, however, refer to the “recent establishment” of the alleged transgressions.

139. If the behaviour was of a personal nature, it follows that the dispute was not one that the CCMA had jurisdiction to hear and that the dispute would be required to be disposed of by a civil court.’

[25] It seems to that the second respondent's assessment of the evidence as enunciated above was fundamentally flawed. The romantic relationship between Shiba and Nyakane ended around October 2020. In January 2021, Nyakane obtained a protection order against Shiba. In March 2021, Savva instructed Shiba to cease all communication and contact with Nyakane at the workplace. In defiance of Savva's instruction, Shiba continued, and this led to him being disciplined and dismissed.

[26] Accordingly, it matters not whether Shiba's conduct complained of spanned a period of 14 or 4 months. Shiba's attempts at reconciliation with Nyakane were

unwelcome by Nyakane and this was well known to Shiba. Despite this knowledge, Shiba persisted to attempt communicating with Nyakane.

The applicable law

[27] The law on reviews of this nature is trite. This Court will only interfere with the arbitration award only if the commissioner has reached an unreasonable result. In other words, this Court must assess whether the decision of the commissioner is that of a reasonable decision maker in light of the evidence which was led before him or her.

[28] In *Herholdt v Nedbank Ltd (Congress of south African Trade Unions as amicus curiae)*,⁴ the Court stated that:

‘A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry 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.’ (own emphasis)

[29] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*, the Labour Appeal Court held as follows in relation to an irregularity committed by a Commissioner:

‘In a review conducted under section 145(2)(a)(c)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the

⁴ [2013] 11 BLLR 1074; (2013) 34 ILJ 2795 (LAC) at para 25.

factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily 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.'⁵

[30] In *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as Amici Curiae)*,⁶ the Constitutional Court remarked –

'There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decisionmaker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decisionmaker.'

[31] In the case of *Head of the Department of Education v Mofokeng and others*⁷ the LAC stated thus:

'[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 *Goldfields 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.

...

[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

⁵ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 18.

⁶ 2006 (2) SA 311 (CC); [2005] ZACC 14 at para 511.

⁷ [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at paras 30-33.

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 dispute. A material error of this order would point to at least a *prima facie* unreasonable result.'

[32] In the totality of the circumstances, it is my view that the second respondent committed a gross irregularity which distorted the outcome of the arbitration proceedings.

Costs

[33] In terms of Section 162 of the LRA, this Court has a broad discretion to make appropriate cost orders in accordance with the requirements of law and fairness.

[34] In my view, this is one of those cases where the interests of justice will be best served by each party bearing its own costs.

[35] In the result, I make the following order:

Order

1. The arbitration award under case number MPMB1048-21 is reviewed and set aside, and replaced with the following order –
 - a. the dismissal of the applicant was procedurally and substantively fair.
 - b. The application is dismissed.'
2. There is no order as to costs.

N.I. Zwane

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv. M. C. Edwards

Instructed by: Cliffe Dekker Hofmeyr Incorporated

For the First Respondent: Self-representing

LABOUR COURT