



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: C 362/2023

In the matter between:

BEVIN PETER ABELS

Applicant

and

UNIVERSITY OF STELLENBOSCH

First Respondent

COMMISSIONER DANIEL DU PLESSIS N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 25 June 2025

Delivered: 4 July 2025

JUDGMENT

VENTER AJ

Introduction

- [1] In this opposed application, the applicant approached this Court seeking an order reviewing and setting aside an arbitration award, dated 21 May 2023, issued by the second respondent (Commissioner), acting under the auspices of the third respondent, Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] In the award, the Commissioner found that the applicant's dismissal was both substantively and procedurally fair, and the application was dismissed.
- [3] The application for review was served and filed outside the prescribed statutory period and the court was therefore, also called upon to determine whether condonation should be granted.

Background and evidence before the Commissioner

- [4] The applicant was employed by the first respondent (the university) until his dismissal on 23 May 2022. He held the position of a Faculty Administrator. In this capacity, he was responsible for providing administrative support to the respondent's Faculty of Science.
- [5] The applicant challenged both substantive and procedural fairness, and the arbitration proceedings were held before the Commissioner on 7 November 2022 and 3 May 2023. The applicant was represented by a legal practitioner, while the university was represented by its Deputy Director of Employee Relations.
- [6] Prior to the arbitration proceedings, the parties entered into a pre-arbitration agreement in terms of which the following facts were common cause:

- 6.1 On 7 March 2022, the applicant was invited to attend a meeting to discuss the university's concerns regarding the applicant's poor work performance and alleged misconduct.
- 6.2 The meeting took place on 7 April 2022, and on 29 April 2022, the university addressed a letter to the applicant and requested that he provide written representations as to why he should not be dismissed. The applicant emailed his representations to the university on 6 May 2022.
- 6.3 On 23 May 2022, the applicant was notified of the university's decision to terminate his employment due to incapacity related to poor work performance. His employment was terminated with three months' notice.
- 6.4 The applicant was not required to tender his services during the notice period.
- 6.5 The applicant began working for the university in 2002 and served as the Faculty Administrator from July 1, 2006, until his dismissal. At the time of his dismissal, the applicant's gross monthly salary was R40 834,21.
- 6.6 It was also agreed that during January 2021, the applicant was medically diagnosed with depression.
- 6.7 The parties were also in agreement that there were poor work performance issues prior to the diagnosis of depression. The applicant conceded, on record, during the university's evidence to all the performance-related issues contained in the university's bundle of evidence.
- 6.8 It was disputed whether the applicant's performance improved during the Performance Improvement Plan, which was established according to the university's policies.

6.9 The applicant was issued a final written warning for negligence in performing his tasks, at the same time as he was informed of his dismissal due to poor work performance.

- [7] During the arbitration proceedings, the university called one witness, Mr. Ashmin Daniels, who was employed as the Deputy Registrar. He provided a detailed explanation of the reporting structure, the applicant's performance issues since 2019, and the applicant's subsequent diagnosis of depression. He also clarified that certain steps were taken to accommodate the applicant.
- [8] The witness also explained that the applicant submitted medical certificates or reports. These reports highlighted his anxiety, lack of skills, and the need for further training and reducing workplace stress. The applicant's performance did not improve, and a meeting was held with him on 7 April 2022.
- [9] The applicant admitted to poor performance, and an offer of 8 months' salary was made to him. The applicant later declined the offer and denied that his performance was poor. The university then dismissed the applicant due to poor work performance.
- [10] The applicant testified and explained, in essence, that his parents passed away in December 2020, and he experienced depression as a result of their deaths. He took sick leave on several occasions, and the work environment was extremely stressful.
- [11] The applicant stated that his medical reports were not discussed with him. Instead, there was a reintegration discussion between him and Mr. Daniels. He explained the steps that would be taken to support him moving forward. Additionally, he began attending various courses offered by the respondent.

[12] The applicant held the view that he was dismissed for poor health and not for poor performance and that the university failed to follow due process.

Commissioner's findings

[13] The applicant's case was, in essence, that the true reason for his dismissal was his mental health condition, although the poor work performance was conceded. However, the university believed that the reason for dismissal was due to consistent poor performance over a protracted period.

[14] The Commissioner was unable to determine that the true reason for dismissal was the applicant's mental health. The commissioner also stated that the matter must be decided based on the reason provided by the university for the dismissal, namely incapacity due to poor work performance. The applicant's mental state will be one of the factors considered to explain the lack of performance, and whether the university considered this, if it is proven that the mental state was the cause of his underperformance.

[15] The Commissioner relied on the Labour Appeal Court decision of *Somyo v Ross Poultry Breeders (Pty) Ltd (Somyo)*¹ and determined that the applicant was a senior employee who was acutely aware of his duties and that the normal rules regarding counselling, training, and warning for poor work performance may be dispensed with in the case of senior employees.

[16] The Commissioner also held that the applicant was given a final written warning for mistakes made before the December 2021 graduation, and that these mistakes were serious. The Commissioner further found that there was sufficient

¹ (1997) 7 BLLR 862 (LAC)

evidence of poor performance over a long period, and the applicant never disputed these poor performances. The university made many attempts to accommodate the applicant.

[17] The Commissioner considered *Nkosinathi Mogomatsi v Lillian Goredema N.O and Others*² as well as the decision of the Labour Appeal Court in *Legal Aid SA v Jansen (Jansen)*³ and he was alive to the fact that dismissal for reasons of misconduct would be substantively unfair in the event that it is established that an employee who, on account of their depression, their state of mind (cognitive ability), as well as their will (conative ability), has been impacted to the extent that they are unable to appreciate the wrongfulness of their actions or to realise or appreciate that they are underperforming and due to their mental state cannot perform to the required standard.

[18] According to the Commissioner, the onus is on an employee to prove that their depression affected their conative ability, thereby establishing a direct link between the illness and the misconduct or poor performance, as in this case. The employee must therefore demonstrate that the illness was the cause of their poor performance.

[19] The Commissioner also held that it was decided in *MEC for Education, Western Cape Government v Jethro N.O and Another*⁴ that an employer has a statutory duty to investigate possible alternatives if an employee is suffering from stress, depression or anxiety.

[20] The Commissioner subsequently found that the university took the applicant's condition into account, and that the applicant failed to provide a complete

² (2022) ZALCC 20; (2022) 43 ILJ 2063 (LC)

³ (2021) (1) SA 245 (LAC)

⁴ (2019) 40 ILJ 2318 (LAC)

prognosis or analysis to the university, and that the evidence in this regard was uncontested.

- [21] The Commissioner also found that the university made attempts to accommodate the applicant, and the brief medical reports were, in fact, hearsay evidence. It was also held that the poor performance started long before the depression diagnosis, and there was no evidence explaining why medication would have taken a year to affect the applicant's mental state.
- [22] The university considered alternatives but had no viable options and held meetings with the applicant to try to improve his performance. The applicant was eventually summoned to a meeting and given a chance to present his case. At no point did the applicant contest or dispute his poor performance.
- [23] The Commissioner found that the medical reports submitted by the applicant and the reports from the occupational therapist confirmed that he was unable to perform all his functions. This was linked to his depression, but no expert evidence was presented to establish that his depression was the only or primary reason for his poor performance.

Grounds for review

- [24] The applicant submitted that the Commissioner committed misconduct, material irregularities during the proceedings and that the outcome was unreasonable.
- [25] It was argued that the Commissioner erred in his interpretation of the *Somyo* supra decision as the applicant disclosed his medical condition to the university. It was therefore argued that the Commissioner was precluded from addressing the matter as poor performance.

- [26] The applicant averred that the university was aware of his medical condition and that an improvement plan was inappropriate and that the Commissioner overlooked the duties of an employer as described in the *Jansen* supra matter.
- [27] It was also argued that the applicant discharged the onus by establishing at least a prima facie case of a serious medical condition and that the Commissioner erred in not blaming the university for failing to take the necessary steps to accommodate the applicant.
- [28] It was also argued that the university was unsympathetic and that the Commissioner erred in not arriving at a conclusion that the reason for dismissal related to ill-health.
- [29] By not finding that the applicant was dismissed for ill-health, the Commissioner erred in not considering the Code of Good Practice as captured in the Labour Relations Act, 66 of 1995 (the LRA).
- [30] It was also argued that the applicant was treated unfairly because the university never provided the applicant with a bundle of documents during the meeting held on 7 April 2022.
- [31] It was also submitted that the Commissioner failed to consider that the university never implemented its own improvement plan.
- [32] Another review ground relates to evidence that there has been no poor performance since 2021.

Test on review

[33] The appropriate test for review has been settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁵ the Constitutional Court held that ‘the reasonableness standard should now suffuse section 145 of the LRA’. The Court further held that the threshold test for the reasonableness of an award was whether “...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

[34] This involves a two-stage review process. First, the review applicant must prove that there was a failure or error by the arbitrator. If this cannot be demonstrated, the matter ends there. Second, if such a failure or error is shown, the applicant must then prove that the arbitrator's outcome was unreasonable. If the outcome remains reasonable despite the error or failure, the review also ends. In short, for the review to succeed, the error or failure must impact the reasonableness of the outcome enough to make it unreasonable. In *Herholdt v Nedbank Ltd and Another (Herholdt)* ⁶, the Court stated:

“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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[35] The reasonableness consideration as articulated in *Herholdt* supra was then applied by the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd*

⁵ (2007) 28 ILJ 2405 (CC).

⁶ (2013) 34 ILJ 2795 (SCA)

*(Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁷ as follows:

“... 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 the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.”

- [36] Against the above principles and test, the court will now consider the applicant's application to review and set aside the arbitration award of the Commissioner.

EVALUATION OF REVIEW GROUNDS

- [37] The application was served and filed seven days outside the statutory period of six weeks. The applicant submitted that he had to secure funds before instructing his attorney. He also submitted that his prospects of success were reasonable and that there was no prejudice to be suffered by the university.

- [38] The university did not oppose the application, and the court was satisfied that the explanation for the delay was reasonable, that the applicant had reasonable prospects of success and that the university was not prejudiced by the delay. Condonation was therefore granted.

⁷ (2014) 35 ILJ 943 (LAC) at para 14.

- [39] The applicant argued that the university's conduct was not in line with the *Somyo supra* and *Jansen supra* judgements. It is therefore crucial to consider these judgements.
- [40] In *Somyo supra* it was held that an employer who is upset about the alleged poor performance of any employee should appraise the employee's work performance, warn the employee that if the work performance does not improve, he or she might be dismissed, and allow the employee a reasonable opportunity to improve performance. It was however specifically held that an exception might be where the employee is a senior employee who was able to judge for himself whether his performance is up to standard.
- [41] The Commissioner considered the abovementioned principles and concluded that the applicant was a senior employee with many years of service and that he was aware of his poor performance. This conclusion was supported by evidence and is reasonable.
- [42] Turning to the *Jansen supra* judgment, it is correct that the Labour Appeal Court described depression as a prevalent illness and that employers should be sympathetic and should investigate alternative accommodation. It was also held that there must be a causal link between the depression and the misconduct or poor performance. The core issue was whether the primary reason for the dismissal was misconduct (performance) or depression. Crucial to this aspect was that the employee failed to present compelling evidence showing that he was dismissed because of depression. Due to the employee's continued poor performance, the university had a valid reason for dismissing him. There is indeed a burden on the employee to demonstrate with evidence that depression

caused the dismissal. Although the two scenarios are interconnected, nothing prevents an employer from taking action, based on poor performance.

[43] The Commissioner duly considered the abovementioned judgment, and his findings are reasonable. He concluded that the applicant was performing poorly long before he was diagnosed with depression and that he was acutely aware of his poor performance. The Commissioner examined the evidence regarding alternative accommodation and found that the university made several attempts to assist the applicant. The court cannot blame the Commissioner for these findings, and it appears to be reasonable and supported by the evidence presented.

[44] It is correct that the university was aware of the applicant's condition and they granted him a fair opportunity to undergo treatment and to fulfil his duties as a senior employee. The Commissioner reasonably concluded that the onus was on the applicant to prove the claim that his depression affected his cognitive ability, and that there was a direct link between the illness and the poor performance. He also found that the applicant failed to discharge this onus.

[45] The Commissioner's reasoning regarding the bundle of documents and the improvement plan also appears to be reasonable and in line with the evidence

[46] The award and reasons for it are reasonable, and there are no material errors of law or misconduct by the Commissioner. For these reasons, the applicant has failed to establish that the Commissioner's award should be reviewed and set aside.

[47] Regarding costs, the Labour Appeal Court has indicated that, in matters concerning individual employees, courts should be cautious when considering costs orders, as this might discourage employees who seek in good faith to have

their disputes decided by the court. Although the applicant has not succeeded in the present application, the court accepts that he was bona fide aggrieved by the outcome of the arbitration proceedings and that he has sought to review that outcome in good faith. In these circumstances, the court does not intend to make any costs order.

[48] I make the following order:

Order:

1. Condonation for the late filing of the review application is granted.
2. The application for review is dismissed.
3. No order as to costs.



PIETER VENTER

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant:

Instructed by:

For the First Respondent:

Instructed by:

Adv Bandath

Thotharam Attorneys

Adv Bosch

Chenny Albertyn Attorneys