



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1083/23

In the matter between:

DIGICALL TRANSPORT SOLUTIONS (PTY) LTD

Applicant

and

GOSA, GCOBISA N.O

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

JONATHAN FRY

Third Respondent

Heard: 23 April 2025

Delivered: 10 July 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an opposed application brought by the applicant to review and set aside the arbitration award of the first respondent (the Commissioner) in terms of which it was found that the third respondent's dismissal by the applicant was both substantively and procedurally unfair. The applicant was ordered to pay compensation to the third respondent in the amount of R590 000.00 by no later than 23 May 2023.

Background

[2] The applicant has submitted that the third respondent was employed as the Chief Operating Officer (COO) and was dismissed due to the applicant's operational requirements in November 2022.

[3] The applicant during 2022 restructured its business, which, as aforementioned, resulted in the third respondent's dismissal. The applicant has submitted, in terms of its founding affidavit, that with the new proposed structure, the applicant sought to eliminate the reliance on a central chief operating officer role and restructure the position into two operations manager roles to ensure the continuous running of its operations.

[4] The applicant has further submitted that the third respondent was offered the position of an operations manager at reduced remuneration. The applicant contends that the third respondent failed to meaningfully participate in the restructuring process and was not willing to accept the applicant's alternative role of operational manager and the reduction in remuneration.

[5] The applicant elected not to file a supplementary affidavit.

[6] In opposition to the applicant's version as contained in the founding affidavit, the third respondent in his answering affidavit has stated the following in summary:

6.1 No actual restructuring occurred within the applicant's business; and

6.2 The purpose of the so-called restructuring was to simply compel the third respondent to accept a lower salary.

Grounds of Review

[7] From a reading of the founding affidavit, the applicant raises a catalogue of criticisms against the reasoning of the Commissioner and alleges the following grounds of review:

7.1 The Commissioner failed to apply her mind properly or at all to the evidence presented to her by the parties and that she erred on and/or misinterpreted same;

7.2 The Commissioner's reasoning process in terms of the factual and legal findings made by her in the award, as well as her assessment of the evidence, is inexplicable, and as such, she reached a decision that a reasonable decision maker could not reach;

7.3 The Commissioner committed a reviewable irregularity and thereby arrived at a conclusion which no reasonable decision maker could have reached in finding that the dismissal of the third respondent was substantively unfair;

7.4 When determining the matter, the Commissioner did not make use of her own sense of fairness as she is required to do by law, but instead imposed herself in the place of the applicant to effectively prescribe to it how it should run its operations;

7.5 The Commissioner ignored the rationale put forward by the applicant that, to ensure the smooth running of its operations, a centrally located COO was redundant in the business. This was an objectively reasonable business decision, and the Commissioner committed an irregularity by not evaluating this evidence;

7.6 The Commissioner was not permitted to second-guess the applicant's business rationale, to instead of one COO, have two operations managers at a benchmarked salary. By doing so, she acted unreasonably;

7.7 The Commissioner failed to consider the fact that the applicant approached the consultation process with a concept in mind, namely that the

third respondent be appointed as an operations manager with a remuneration of R80 000.00 per month; and

7.8 The third respondent consistently and steadfastly failed to meaningfully participate in the consultation process. The Commissioner, by failing to make an adverse finding against the third respondent, came to an unreasonable conclusion.

[8] In opposition the third respondent has submitted that the applicant merely presents conclusions which it seeks this Court to reach and does so without presenting any evidence in support of its conclusions.

[9] Furthermore, the Commissioner at no stage dictated to the applicant how to run its business or that it second-guessed the applicant's business rationale. In support hereof, the third respondent submits that the Commissioner effectively concluded that the applicant had failed to adduce any credible evidence in support of its averred business rationale, thereby rendering his dismissal both substantively and procedurally unfair.

The Award

[10] The Commissioner considered at paragraph 27 of her award whether the applicant had a *bona fide* reason to retrench the third respondent.

[11] In making her determination, the Commissioner considered the section 189(3) notice in terms of the Labour Relations Act¹ (the LRA) that had been issued to the third respondent, and that the reason for the proposed retrenchment was said to be structural.

[12] The evidence presented to her by the applicant was that the business no longer required a COO and wished to restructure this role by appointing two operations managers. The third respondent was offered the position of operations

¹ Act 66 of 1995, as amended.

manager at a reduced salary of R80 000.00 per month, and the third respondent's refusal was considered by the applicant to be unreasonable.

[13] In opposition to the applicant's version, the third respondent, through his evidence, argued that the new structure was merely used as a fiction after the third respondent had refused to accept the reduced salary. The Commissioner further evaluated the reasons provided by the applicant for the proposed retrenchment and the reasons for the proposed reduction in salary. The evidence *inter alia* considered by the Commissioner is that of Mr Naude, during which evidence, reference was made to his email of 21 June 2022, which fails to mention that the applicant was intending to remove the role of COO as a reason for the reduction in the third respondent's salary. The critical issue mentioned was to reduce the third respondent's salary to be in line with the benchmarking standards.

[14] The Commissioner determined that, as a result of the restructuring only being raised after the third respondent had rejected the reduction in salary was clearly proof of the applicant having created the restructuring to compel the third respondent to accept the new salary. It was clear from the evidence led that the applicant intended to reduce the applicant's salary, and only once he rejected the reduction, did the applicant reconsider its position and commence with the restructuring.

[15] After having considered the totality of the evidence, the Commissioner concluded that the reason advanced by the applicant for the retrenchment was not the true reason and that the true reason related to the third respondent's refusal to accept the reduced salary and the subsequent restructure was implemented in order to dismiss the third respondent for operational reasons.

[16] The Commissioner was also not provided with any salary-related information, despite the applicant submitting that the salary determination of R80 000.00 was based on benchmarking. The Commissioner, therefore, determined that the third respondent's dismissal was substantively unfair.

[17] In respect of procedural fairness, no other alternatives were considered by the applicant, and the reduction of salary by 29% was unreasonable. The Commissioner

determined that the applicant had no intention of considering other alternatives or an increase in the salary proposed to demonstrate its willingness to meaningfully engage with the third respondent, this notwithstanding its submissions during the arbitration that its restructuring was not financially motivated. The evidence by the third respondent demonstrated that the reduction in salary was unreasonable and would not be able to sustain him.

[18] In conclusion, the Commissioner found that the consultation process was a *fait accompli*, as the applicant had already decided, prior to initiating the process, that the third respondent would be required to accept the reduced salary. Consequently, the dismissal was also found to be procedurally unfair.

Test for review

[19] In a range of cases, starting with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² and the jurisprudence that followed,³ the test on review and as set out in the matter of *Herholdt v Nedbank Limited*⁴, the Supreme Court of Appeal has defined with greater clarity the standard of review:

19.1 It must be established either that the arbitrator has misconceived the nature of the enquiry or that they arrived at an unreasonable result.

19.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

19.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

19.4 If the arbitrator's reasons provide a reasonable "route" leading towards the conclusions, it must follow that the decision is one that could have been

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

³ *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* [2013] ZASCA 97; 2013 (6) SA 224 (SCA) (*Herholdt*); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

⁴ *Herholdt supra*.

reached (and in fact was) made by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

19.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, "*the result is one that a reasonable decision maker could reach in light of the issues and the evidence*".

19.6 A review court is required to examine the merits "*in the round*" only.

[20] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[21] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.⁵ A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.⁶

The applicant's review application

[22] It is trite that the purpose of affidavits is to define the issues between the parties and to place the essential averments and evidence before the other parties and the Court. Rule 7A of the Labour Court Rules⁷ (now repealed) provides for the delivery of four sets of affidavits. Of significance is Rule 7A(8)(a) which permitted the applicant to deliver a supplementary affidavit. It is trite that the purpose of the supplementary affidavit is to supplement the founding affidavit with reference to the record.

[23] In considering the applicant's review application and the deficient nature thereof, I have further considered the role of this Court in relation to a review application.

⁵ *South African Rugby Union v Watson and Others* [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC) at para 25.

⁶ *Ibid.*

⁷ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[24] In the matter of *CUSA v Tao Ying Metal Industries and Others*⁸ (*Tao Ying*) the Constitutional Court held that:

‘... the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do may very undermine the objective of the LRA to have labour disputes resolved as speedily as possible.’

[25] It was further held in the matter of *Mpe v Polokwane Local Municipality*⁹ that:

‘[14] A party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification, namely that the Court is obliged to deal with a point of law apparent from the papers.’¹⁰

[15] In short: it is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and it be linked to the applicant’s grounds of review.’

[26] The role of the reviewing Court is therefore limited to deciding issues that are raised in the applicant’s founding and supplementary affidavit. It is therefore imperative that the factual foundation of the review application, including the relevant evidence or reference thereto, is made in the pleadings.

[27] In respect of the applicant’s grounds of review, these grounds are simply statements made by the applicant and no supporting evidence is referred to by the

⁸ [2008] ZACC 15; (2008) 29 ILJ 2461 (CC) at para 66.

⁹ (JR101/2023) [2024] ZALCJHB 426 (7 November 2024).

¹⁰ Ibid at para 68.

applicant. The applicant simply assumes that the review Court will consider the record for purposes of “finding” evidence in support of its grounds of review.

[28] In *Moraka v National Bargaining Council for the Chemical Industry and Others*¹¹ the Court held that:

‘[21] ... In setting out the grounds of review in his founding affidavit, the applicant did not set out any factual basis for those grounds, but merely sets them out in the form of conclusions. Examples of this are the first two grounds of review he mentions, namely:

“2.1 The Commissioner committed misconduct by making findings not justified on the evidence;

2.2 Gravely misunderstood evidence presented before her...” (sic)

[22] The Labour Appeal Court has made it clear in the unreported case of *Comtech (Pty) Ltd v Commissioner Shaun Molony N.O & Others* (Case no DA 12/05, dated 21 December 2007) that it is not sufficient for a party simply to relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base its review. While it may be excusable in a founding affidavit to state limited grounds of review and in less detail, by the time an applicant has the record of proceedings it must then make up for the deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. When it came to his supplementary affidavit, the applicant did not supplement or amend the grounds of review set out in the founding affidavit, nor did he lay a factual foundation for the grounds set out in the founding affidavit. On the approach of the LAC in the *Comtech* case, no factual basis was provided for the review application. It was only in his heads of argument that the applicant for the first time set out a factual basis for his claim.

[23] I am bound to follow the approach of the LAC in regard to the assessment of the prospects of success and conclude that the applicant failed to provide any factual basis for his grounds of review in his founding papers. Accordingly, it is not necessary, on the basis of the *Comtech* approach, to

¹¹ [2010] ZALC 139; (2011) 32 ILJ 667 (LC) at paras 21-23.

consider the merits of the case set out later, and for the first time, in the applicant's heads of argument.'

[29] It is evident from the applicant's founding affidavit that the applicant simply puts forward conclusions it wishes the Court to adopt, without providing any evidence in support thereof. Moreover, the applicant improperly attempts to advance its case through its heads of argument.

[30] It is well-established that a review Court is not tasked with conducting a fact-finding exercise to uncover facts or evidence in support of the applicant's grounds for review. In this case, the applicant has failed entirely to provide such support, and it therefore follows that the review application must fail.

Costs

[31] This Court has a wide discretion in awarding costs in terms of section 162 of the LRA. Whilst the ordinary principle in this Court is that costs do not follow the result¹², the manner in which the applicant dealt with its review application in circumstances where there are no merits in my view warrants a cost order.

[32] In *Public Servants Association of South Africa obo Khan v Tsabadi and Another*,¹³ it was emphasised that:

'...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this Court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

¹² *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

¹³ [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

[33] The review application forced the third respondent to oppose it, despite the applicant having failed to set out a proper case in its pleadings. The applicant merely invited this Court to determine, without any supporting evidence or substantiation for the conclusions stated in its grounds of review, whether there was a basis to interfere with the award.

[34] The applicant despite being legally represented, did not deem it necessary to present any factual averments to enable this Court to assess the grounds of review and further sought to make out its deficient case in its heads of argument. I am therefore of the view that the interests of justice require that the applicant be ordered to pay the third respondent's costs.

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

Order

1. The review application is dismissed.
2. The applicant is ordered to pay the third respondent's costs on a party and party scale.

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr AJ Posthuma of Snyman Attorneys

For the Third Respondent: Advocate Nel

Instructed by: Darren Ledden Attorneys