



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: C342/2024

In the matter between:

SONY ARISTOS MUYULENU

Applicant

and

GLOBAL TELESales (PTY) LTD T/A

First Respondent

LUFTHANSA INTOUCH

COMMISSION FOR CONCILIATION, MEDIATION

Second Respondent

AND ARBITRATION

GAIL MCEWAN N.O.

Third Respondent

Heard: 14 August 2025

Delivered: 04 September 2025

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] This is an opposed application in terms of s145 of the Labour Relations Act¹ (LRA), to review and set aside the arbitration award delivered by the third

¹ Act 66 of 1995, as amended.

respondent (the Commissioner) under case number WECT14624-23 on 3 July 2024.

Facts

- [2] The applicant commenced employment with the first respondent (the employer) during August 2009. He is a citizen of the Democratic Republic of Congo (DRC) but had refugee status in the Republic of South Africa.
- [3] On 5 July 2023, the applicant's refugee status expired and was not renewed.
- [4] The applicant was called to an incapacity hearing, and on 25 July 2023, he was dismissed for incapacity. He was however, afforded the opportunity to "*reapply for any available positions once he is in possession of a document that allows him to take up employment within South Africa*".

The test on review

- [5] The principles laid down in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*² in connection with the review ground that an award was one that no reasonable commissioner could reach, and expanded on in a number of other cases, are well known.
- [6] However, there is another element in this matter, namely whether the conduct of the Commissioner constitutes a defect in terms of s145(2)(a)(i) or (ii) of the LRA in that the Commissioner either "*committed misconduct in relation to the duties of the commissioner as an arbitrator*" or "*committed a gross irregularity in the conduct of the arbitration proceedings*".
- [7] The court was not referred to case law in this regard, but it is apposite to refer to the decision in *Chabalala v Metal & Engineering Industries Bargaining Council & others*³ where the Labour Court held as follows:

² (2007) 28 ILJ 2405 (CC)

³ (2014) 35 ILJ 1546 (LC).

'I conclude on the issue of the review standard to be applied in this current matter by reference to the following dictum in *Naraindath v Commission for Conciliation, Mediation & Arbitration & others*, where the court said:

"In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."⁴

The merits

- [8] The court shall first deal with the ground of review that the award was one that no reasonable Commissioner could reach, and thereafter with the ground of review that the Commissioner had either committed misconduct or a gross irregularity in the conduct of the proceedings.

Award that no Commissioner could reach

- [9] The Commissioner held that the dismissal of the applicant was both substantively and procedurally fair.
- [10] Although the applicant challenged the procedural fairness of his dismissal, he could advance no submissions relating to the manner in which the incapacity enquiry had been conducted.
- [11] This leaves the issue of substantive unfairness. The applicant made a number of submissions about the commercial wisdom of the employer not doing more to assist him with retaining or regaining his status, but this does not address the

⁴ Ibid at para 14.

issue of substantive unfairness.

- [12] The central issue on the aspect of substantive fairness is whether the employer could lawfully employ the applicant after his refugee status had been withdrawn. The applicant could not direct the court to any basis for this. To the contrary, his continued employment would have been illegal in terms of s 38(1) of the Immigration Act⁵.
- [13] Accordingly, the award on the fairness of the dismissal is probably correct and certainly not one that a reasonable Commissioner could not reach.

Misconduct/irregularity

- [14] The Commissioner's conduct of the proceedings was unacceptable. A number of examples show this:
- 14.1 At the commencement of cross-examination of the employer's witness, the Commissioner gave the applicant a perfunctory explanation of what cross-examination was and almost immediately reminded him that he was not asking a question but making a statement.
- 14.2 A short while later, she asked the applicant whether he had any further questions.
- 14.3 The Commissioner informed the applicant that French was not a critical skill and suggested that every South African could speak French.
- 14.4 The Commissioner then argued with the applicant about the fact that French was not stated on his visa as a critical skill. This argument developed to the Commissioner telling the applicant that he could not tell her to ask immigration any questions; it was not her job.

⁵ 13 of 2002, which reads:

38 Employment

(1) No person shall employ-

(a) an illegal foreigner;
 (b) a foreigner whose status does not authorise him or her to be employed by such person; or
 (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

14.5 The witness for the employer then asked the applicant a question, and the Commissioner told him to answer the question.

14.6 At the commencement of the applicant's evidence, the Commissioner told him:

'You talking again and I don't know why you doing it, because you said you had no further questions for this witness and I haven't sworn you in yet.'

14.7 Last, there was a long debate about the status and standing of a letter on which the applicant wished to rely, which ended with the Commissioner stating "*well, maybe you shouldn't be so flippant with me, because you need to prove your case*".

[15] A litigant who is unsuccessful often leaves the proceedings feeling that they have not received a fair hearing. Often that feeling is caused by the loss and not the conduct of the decision-maker.

[16] In this matter, the applicant was entitled to feel that he did not have a fair hearing. The conduct of the Commissioner was such that it denied him a fair hearing.

[17] In the premises, the conduct of the Commissioner constitutes a patent gross irregularity in the conduct of the arbitration proceedings. This warrants the setting aside of the award.

Remedy

[18] The court asked both parties whether the matter should be remitted in the event of a conclusion that the applicant had been deprived of his right to a fair hearing.

[19] The difficulty with remittal is that the law is so clearly against the applicant that he has no prospects of success, and it would be a waste of time to subject him, his employer and the CCMA to an arbitration which could only end in a finding against him.

[20] Against this weighs the fact that, should the matter not be remitted, the applicant would leave the court with no substantive relief, even though he

succeeded in persuading the court that the conduct of the Commissioner constituted a gross irregularity in the conduct of the arbitration proceedings.

- [21] This aspect troubled the court and led to a request to the parties to submit post-hearing submissions on the issue of whether the court should remit the matter to the CCMA or whether it should decide the matter itself.
- [22] The court was not referred to any decision which is directly in point on the appropriate remedy where an award has been set aside on the ground of a gross irregularity, but a decision on the merits by any future arbitrator would be a foregone conclusion.
- [23] Ms De Waal submitted, both initially and in her post-hearing submissions, that the principle enunciated by the Labour Appeal Court (LAC) in *Palluci Home Depot (Pty) Ltd v Herskowitz & others*⁶ should apply despite the fact that the case did not deal with a patent gross irregularity in the conduct of proceedings. The LAC held⁷:

‘Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court “is in as good a position” as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration or substitute its own decision for that of the commissioner.’

- [24] Even though the case is not on all fours with the matter before court, the court has decided to apply it. The court concluded that the dispute should not be remitted to the CCMA because, on the unequivocal facts before court, the applicant would be unsuccessful in proving procedural or substantive

⁶ (2015) 36 ILJ 1511 (LAC)

⁷ Ibid at para 58.

unfairness at future arbitration proceedings. In coming to this conclusion, the court has taken into account that the Labour Court is more likely to substitute an award in arbitration proceedings than the High Court would be a decision in administrative proceedings, because the Labour Court is a specialist court.

Costs

[25] Applying the principles laid down by the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal & others*⁸, the court is of the opinion that this matter does not warrant a costs order.

Conclusion

[26] The Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

[27] The award should be set aside and substituted by an award that dismissal of the applicant was substantively and procedurally fair.

[28] Accordingly, the following order is made:

Order

1. The application for review is granted.
2. The arbitration award is set aside.
3. The arbitration award is substituted by an award that the dismissal of the applicant was substantively and procedurally fair.
4. There is no order as to costs

 H. Nieuwoudt
Acting Judge of the Labour Court of South Africa

⁸ (2018) 39 ILJ 523 (CC) at para 24.

Appearances:

Applicant: In person

Sony Aristos Muyulenu

For the Respondent:

Instructed by: Norton Rose Fulbright South Africa Inc.

Gillian Lumb