



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1145/23

In the matter between:

MOLOPE MADONDO ATTORNEYS

Applicant

and

SOPHIE NGCANA

First Respondent

ZANELE SIBIYA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 20 May 2025

Delivered: 26 September 2025

Summary: Application to review and set aside arbitration award. Applicant established no basis to review the award. Outcome reasonable. Application dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] This judgment relates to an application brought in terms of section 145 of the Labour Relations Act No. 66 of 1995 (the “LRA”) to review and set aside the arbitration award issued by the second respondent (the “commissioner”) on or about 3 May 2023 under CCMA case reference GAJB6445-23.

Material facts

- [2] The material facts are largely common cause. Where there are factual disputes, this is indicated.

- [3] The material facts are as follows:

3.1 During February 2020, the first respondent was engaged by the applicant, a law firm, as a receptionist.¹ Following difficulties securing payment from the Road Accident Fund (the “RAF”) on behalf of its clients, the applicant required the first respondent to deal with RAF issues.

3.2 During late 2022, the director of the applicant sent a WhatsApp message to the first respondent stating: “We need to talk” (the “WhatsApp message”). The applicant contends that the WhatsApp message constituted a notice in terms of section 189(3) of the LRA.

3.3 The applicant made its employees, including the first respondent, aware that it was experiencing financial problems because of its

¹ Record, Transcript p187 lines 23 - 25

difficulties with the RAF. This led the applicant to transfer its RAF files to another law firm.

3.4 Following the WhatsApp message, in either October or November 2022, applicant met with the first respondent. During that meeting, several issues were discussed including the tension between the first respondent and the applicant's paralegal, personal issues, and other routine office matters.² This meeting constituted the full extent of the 'consultation process'.

3.5 Either at the meeting, or at that approximate time, the first respondent proposed that she be permitted to work for no salary. The applicant's director, initially, testified that she rejected this proposal.³ Thereafter, the applicant testified, she accepted the offer.⁴

3.6 On 1 December 2022, the applicant handed the first respondent a letter advising her of her dismissal with effect from 15 December. However, the first respondent failed to tender her services after 7 December. The applicant's primary witness testified that the first respondent gave no reason for her absence; but the first respondent testified that the applicant's director informed her that she need not work for the full notice period because of her fragile emotional state.

3.7 Between late 2022 and March 2023, the applicant retrenched another secretary and two drivers.

² Record, Transcript p 204 (line 20 - 25), p212 lines 1 - 14

³ Record, Transcript pp 181 (line 10) – 182 (line 15)

⁴ Record, Transcript p 240 (lines 23 - 25)

3.8 The first respondent contends that the poor financial position of the applicant was not the real reason for her dismissal, and the true reason was that she had clashed with the paralegal.

3.9 The applicant's accountant testified that he prepared monthly management accounts for the arbitration. He presented, at the arbitration, the unaudited management accounts for the period from November 2022 until March 2023.

3.10 Following the first respondent's dismissal, during January 2023, she learnt that the applicant had employed a new receptionist.⁵ This led the first respondent to refer a dispute, concerning the fairness of her dismissal, to conciliation.

3.11 The commissioner found that the first respondent's dismissal was procedurally and substantively unfair and awarded her eight months wages. The commissioner also ordered the applicant to pay her all her outstanding leave.

Legal principles

[4] In relation to CCMA arbitration awards, the test on review is settled. The court is required to ask whether the "*arbitration award [is] one which no reasonable commissioner could reach on the material before him or her?*" The test is known as the 'reasonableness test' or the '*Sidumo* test' so-called because of the citation.⁶

⁵ Record, Transcript p280 lines 15 – 20

⁶ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

- [5] As to what is reasonable, this is determined by the circumstances of each case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*⁷ the Constitutional Court held:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

(own emphasis)

- [6] The court on review need not consider every issue raised at arbitration. Instead, the court must consider whether the commissioner considered the principal issue before him/her; whether the commissioner evaluated the evidence presented, and whether the outcome is reasonable.⁸
- [7] Provided that the commissioner asks the right question, and applies his mind to the issues, the award is not reviewable merely because the outcome is incorrect. The court must guard against blurring the line between reviews and appeals.⁹

⁷ 2004 (4) SA 490 (CC) at para [45]

⁸ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at paras [15] and [16]

⁹ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) at para [18]

[8] When applying the *Sidumo* test, the court follows a logical sequence:

8.1 First, the court must determine if there is a failure or error on the part of the commissioner.

8.2 Second, where there are errors, the court must determine whether, but for the errors, the outcome would have been different.¹⁰

[9] Accordingly, errors of fact, by themselves, may not be sufficient to vitiate the award. What matters is the materiality of the errors.

[10] Importantly, it is only where the award cannot be sustained on any of the evidence before the commissioner that the review will succeed.¹¹ This principle was also recognized in *Sidumo* at para 119.

[11] More recently, the Constitutional Court, in *Vodacom (Pty) Ltd v Makate and another*¹² (“*Vodacom*”) held as follows

“The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous,

¹⁰ *Fidelity Cash Management Service* (2008) 29 ILJ 964 (LAC) at para [96]; *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras [32] and [33]

¹¹ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) at para [32]; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* (2015) 36 ILJ 1453 (LAC) at para [12]

¹² (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para [45]

but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred.”

(own emphasis)

- [12] Given that the reasons given for the award acts as the first indication of whether the evidence and submissions received proper consideration, *Vodacom* held that:

“the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.”

Grounds of review and analysis

- [13] The grounds of review, in the applicant’s founding and supplementary affidavits, must be considered.¹³
- [14] It is trite that heads of argument cannot broaden the grounds of review, which appears from the pleadings.¹⁴ There is therefore no reason for this court to consider the submissions in the applicant’s heads of argument to the effect that the commissioner failed to consider whether the first respondent had deserted or absconded, because this was not presaged in the pleadings. In any event, in argument, the applicant conceded it had made no such argument before the commissioner. The commissioner can hardly be blamed for not considering legal issue not raised.

¹³ In this matter the applicant filed no supplementary affidavit.

¹⁴ *CWU and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 (LC) at paras [35] and [39]

[15] The grounds of review are summarised and analysed below:

15.1 The applicant contends that the commissioner was biased¹⁵ because she found made findings of fact which were unfavourable to it. There is no merit in this. As previously mentioned, in *Vodacom*, the Court held that the material disputes of fact must be determined by the decisionmaker, and this is precisely what the commissioner did. In addition, in *Bernert v Absa Bank Ltd*¹⁶ our apex court warned that: *“The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her.”* (own emphasis)

15.2 The applicant contends that the commissioner improperly found that the management accounts were not authentic or accurate when this was not in dispute, because the commissioner found that the accounts were unaudited and proved nothing. The proper approach to the assessment of evidence was summarised by Eksteen AJP (as he then was) in *National Employers General Insurance Co. Ltd v Jagers*¹⁷ the court explained that the assessment of evidence is a unified process involving the assessment of the probabilities, as well as issues of credibility. It appears to me that the commissioner did consider the probabilities, as well as credibility.¹⁸ More importantly,

¹⁵ The test for recusal is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant, in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) at paras [36] to [39]

¹⁶ 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) (9 December 2010) at para [35]

¹⁷ 1984 (4) SA 437 (E) at 440

¹⁸ Credibility depends on a variety of factors such as; the witness' candour and demeanour, his bias whether latent or blatant, internal contradictions in his evidence, external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial

the commissioner highlights the fact that the financials related, largely, to the period post the dismissal. As such, they were largely irrelevant. Thus, the commissioner's finding that the financials prove nothing, is reasonable. In the absence of proof that the applicant was performing poorly, the applicant could not prove that the reason was bona fide and rationally justified. In *Havemann v Secequip (Pty) Ltd*¹⁹ the LAC stated:

"[28] A fair reason is one that is *bona fide* and rationally justified, informed by a proper and valid commercial or business rationale. The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair"

15.3 The applicant contends that the commissioner irregularly found that the applicant "totally ignored" the consultation process, though the evidence showed here was some consultation. The finding must be considered in context.

15.4 The applicant contended that the WhatsApp message constituted a section 189(3) notice, though it contained none of the information required by the subsection. The section 189(3) notice is not a mere formality.²⁰ Its purpose is inter alia to provide affected employees with information to enable them to participate meaningfully in the consultation process. While shortcomings in the section 189(3) notice do not necessarily render the process procedurally unfair²¹ in the absence of a compliant notice the employer must show that there

statements or actions, the probability or improbability of particular aspects of his version, and the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA)

¹⁹ (JA91/2014) [2016] ZALAC 53 (22 November 2016)

²⁰ *SA Society of Bank Officials on behalf of Fourie v Nedbank Ltd* (2020) 41 ILJ 500 (LC)

²¹ *Havemann v Secequip* supra fn. 17

has been substantial compliance.²² Even if a provision is peremptory, compliance must be considered in light of whether the purpose of the section has been achieved. In *NEHAWU v Minister of Public Works and Administration and others*²³ the Court held as follows:

“The purported compliance with a statutory injunction can no longer be determined by a mere label such as *peremptory* or *directory*. The distinction between whether the legislation is mandatory or directory is not necessarily determinative of the question whether failure to comply with its provisions inevitably results in nullity. All statutes must be construed consistently with the Constitution. In deciding whether there has been compliance with the statutory injunction, what is important is the object sought to be achieved and whether this object has been achieved.”

15.5 The applicant did not argue or present evidence at the CCMA that the purpose of section 189(3) had been achieved. In any event, it is apparent from the applicant’s papers that the purpose of section 189(3) was not achieved.

15.6 The applicant contends that the sole ‘consultation’ meeting, which lasted between 30 and 60 minutes (dealing inter alia with office matters and personal issues) constituted ‘consultation’ as contemplated in s189. The Court held in *Solidarity obo Members v Barloworld Equipment Southern Africa and others* (“Solidarity”):²⁴

“46] What may be gleaned from the authorities is that for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable

²² *SASBO - The Finance Union obo Madiba v Nedbank Group Limited* (J1754/19) [2019] ZALCJHB 263 (4 October 2019) at para [19]

²³ (2022) 43 ILJ 1032 (CC) at para [72]

²⁴ (CCT 102/21) [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC); 2023 (1) BCLR 51 (CC) (6 May 2022)

consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with a pre determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful.”

(own emphasis)

15.7 The consultation process must be a meaningful joint solution seeking exercise not a mechanical tick box exercise.²⁵ The applicant presented no evidence that the short meeting was thorough or comprehensive.

15.8 In this context, it is little wonder that the commissioner found that the applicant “totally ignored” the process. The finding was reasonable.

15.9 The applicant contends that the commissioner irregularly found that the applicant did not engage volunteers. The commissioner made no such finding. The commissioner contrasted the applicant’s reluctance to engage the first respondent on a volunteer basis, to its willingness to engage others on a volunteer basis. Even if the commissioner wrongly found that the applicant did not engage volunteers, this is not a material misdirection because it had no effect on the outcome.

15.10 The applicant contends that the commissioner overly focussed on the fact that the first respondent was crying during her testimony. In the award, the commissioner makes no mention of the first respondent crying. The commissioner refers only to the first respondent giving evidence in a genuine, detailed, heartfelt, and uninhibited manner. There is nothing wrong with this comment. The commissioner would

²⁵ *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para [29]

be remiss not to comment on the manner that the testimony was delivered. There is therefore no evidence that the commissioner was unduly influenced by the first respondent's tears.

15.11 The applicant submits that the commissioner failed to apply the "audi principle" and afford the applicant a fair opportunity to present its case. However, the applicant provides no details. Accordingly, this submission lacks foundation.

Costs

[16] I see no reason in law and fairness to depart from the rule that costs do not follow the result. There are no exceptional circumstances which demand a cost order. Accordingly, no costs order is made.

Conclusion

[17] In my view, the commissioner considered the principal issues before her; evaluated the evidence presented, and the outcome is reasonable. The applicant failed to establish any basis to review and set aside the award.

[18] The application therefore falls to be dismissed with no costs. My order is as follows:

18.1 The application is dismissed,

18.2 There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances

For the Applicant

B Phahlela

Molope-Madondo Attorneys

For the First Respondent

Sembete Owen Buthelezi

Dlamini Inc

LABOUR COURT