



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2374/2022

In the matter between:

EXXARO COAL (PTY) LTD (GROOTGELUK)

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

MATHEKGA N.O.

Second Respondent

SOLIDARITY TRADE UNION

Third Respondent

SCHEEPERS, GIDEON

Fourth Respondent

Heard: 23 October 2024

Delivered: 11 June 2025

JUDGMENT

VUKEYA, AJ

[1] The applicant, Exxaro Coal (Pty) Ltd, brings an application in terms of section 145 of the Labour Relations Act¹ (the LRA) for the review and setting aside of an arbitration award issued by the second respondent and dated 27 September 2022. In its Notice of Motion, the applicant prays for an order as follows:

- 1.1. Reviewing and setting aside the arbitration award in the dispute between Exxaro Coal (Pty) Ltd and Solidarity Union obo G Scheepers, issued by the second respondent under case number LP3737-22 on 27 September 2022 and served on the applicant by the first respondent on 27 September 2022;
- 1.2. Substituting the award, issued by the second respondent, with an order that the fourth respondent's dismissal was substantively fair;
- 1.3. Alternatively to prayer 2 above, directing that the matter be referred back to the first respondent for consideration *de novo* before a commissioner other than the second respondent;
- 1.4. Directing that such a respondent who opposes the relief sought herein be ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

[2] The applicant contends that the second respondent committed gross irregularities in the assessment of the evidence and misconstrued the nature of the enquiry. According to the applicant, the gross irregularities had a distorting effect on the commissioner's conclusions and outcome that the fourth respondent was not guilty of dishonesty and on his finding that the fourth respondent's dismissal was substantively unfair.

[3] The factual matrix of this matter are common cause between the parties and can be summarised as follows: The fourth respondent was booked off sick on the 4th of August 2021 for a knee operation. Dr Olivier booked him off sick from 4 August 2021 until 31 August 2021 to also allow for recuperation. The

¹ Act 66 of 1995, as amended.

fourth respondent's sick leave was authorised by the applicant in terms of the applicant's leave policy.

- [4] The fourth respondent had applied for annual leave prior to the sick leave for his knee operation, which was disapproved by his line Manager. A few months after his annual leave application was rejected, the fourth respondent had to have a knee operation. He applied for sick leave to have the knee operation, and it was approved. Indeed, the fourth respondent had the operation. While on the road to recovery, his wife organised a trip to Cape Town, and the fourth respondent went on this trip with his wife while, according to the applicant, he was supposed to be recuperating at home. The two went on a three-day trip on the Blue Train from Cape Town to Pretoria, which departed on 26 August 2021 and arrived in Pretoria on 28 August 2021. The couple flew to Cape Town on 25 August 2021.

- [5] The applicant discovered through the fourth respondent's wife's Facebook page that the fourth respondent was on vacation in Cape Town when he was supposed to be recovering from the operation. The fourth respondent was charged with dishonesty by the applicant, categorised as misuse of sick leave other than for purposes of recuperation and medical treatment. According to the applicant, the offence is contained in the applicant's Disciplinary Code and it reads thus:

'Any dishonesty or attempted dishonesty including conspiracy, theft, unauthorised possession of property, misuse of sick leave for purposes other than recuperation or for medical treatment, bribery, fraud, corruption, forgery or giving false or misleading statements to anybody.'

- [6] In terms of the applicant's Disciplinary Code, the recommended sanction for the offence of dishonesty is dismissal, even if one is a first offender. The fourth respondent was found guilty of dishonesty during a disciplinary hearing and was dismissed from work on 22 March 2022. He then approached the first respondent and lodged a dispute in terms of the Labour Relations Act and the matter proceeded to arbitration on 1 August 2022 and 19 September 2022.

- [7] At the arbitration hearing, it was apparent that the fourth respondent would challenge the substantive fairness of his dismissal based on the following: that there was no contravention of a rule as the employer did not have a rule regarding where an employee must recuperate during sick leave. Alternatively, if it is found that there is such a rule, the fourth respondent did not contravene the rule, and therefore, not guilty of the misconduct with which he was charged. Further, alternatively, if it is found that a rule was transgressed, the sanction of a dismissal was too harsh.
- [8] In essence, the fourth respondent did not deny the factual basis of the allegations and his defence was that the vacation was planned by his wife while he was on sick leave without his involvement or even his knowledge. He provided proof of bookings done by his wife and these documents showed that his wife started the booking process on 13 August 2021. The reservation for the train indicated a medical condition and that a wheelchair assistance was needed for the Blue Train and the flights due to the fourth respondent's knee injury. The purpose of the vacation was to celebrate the birthday of the fourth respondent's wife. The fourth respondent however denied that his conduct amounted to dishonesty and that the applicant had a rule that employees were to be confined to their homes while recovering from medical conditions.
- [9] After hearing evidence at the arbitration hearing, the second respondent found that the applicant had failed to make out a proper case of dishonesty and concluded that the fourth respondent's dismissal was substantively unfair. He then ordered the applicant to pay compensation to the fourth respondent in the amount of R226 520.70, equivalent to his month's salary.
- [10] The second respondent determined the issues to be decided to be 1) whether the fourth respondent was guilty of dishonesty; 2) Alternatively, whether the fourth respondent had sought and was granted leave for other purpose than recuperation; and 3) Whether the fourth respondent was precluded from travelling while on sick leave by a workplace rule or custom. In the event he found that the dismissal was unfair for one or other reason, determine a reasonable sanction.

- [11] He remarked when making the award that he was not persuaded that the fourth respondent has acted dishonestly and applied for sick leave for purposes of going on holiday. He was satisfied that the fourth respondent was indeed ill, that he had undergone an operation and that he had been booked off sick to recuperate away from work. Although the second respondent was of the view that the fourth respondent had concealed his knowledge of the vacation, he was charged with being dishonest with regard to the purpose for which he sought leave and was granted leave but not his knowledge of the planned trip, he remarked.
- [12] According to the second respondent, the applicant has no such rule that required the fourth respondent to confine himself to his home for purposes of recuperating. He therefore agreed with the finding of the disciplinary inquiry that the fourth respondent was not guilty of dishonesty. The second respondent relied on the evidence of Ms Maluleke that she was not aware of any rule barring the fourth respondent from travelling while on sick leave and one that relates to where an employee must recuperate during a sick leave.
- [13] The second respondent rejected the evidence of Mr Baloyi that the applicant has a practice regulating where employees should be confined during sick leave for purposes of recuperating. According to Mr Baloyi, these practices bar travelling during this period. Baloyi seems to have conceded in his evidence that there was no evidence before him of any previous cases dealing with a similar matter where an employee was charged for contravening the rule or practice. For reasons such as lack of credibility, untruthfulness and fabrication, the second respondent rejected Baloyi's evidence. It is for the above brief reasons that the second respondent concluded that the fourth respondent's dismissal was substantively unfair.
- [14] The second respondent declined to award maximum compensation and thus awarded compensation equivalent to six (6) months' remuneration to the fourth respondent. Although he remarked that the fourth respondent's defence that he did not know about the vacation until the date of travelling was flimsy and absurd, he granted compensation stating that the onus was on the

applicant to prove the case it set out in the charges and not on the fourth respondent.

- [15] Clearly, the applicant was aggrieved by the findings and the award made by the second respondent, hence this application. The applicant raises the following grounds to have the award reviewed and set aside by this Court:

15.1 The second respondent committed the gross irregularities in the assessment of the evidence and misconstrued the nature of the enquiry;

15.2. The second respondent did not apply his mind to the common cause facts, otherwise, he would have arrived at a different conclusion;

15.3. The second respondent failed to address the issues raised for determination, resulting in a total misconception of the inquiry;

15.4. The second respondent concerned himself with determining misconduct that the fourth respondent was not charged with, instead of determining that which he was found guilty of.

- [16] The applicant, therefore, contends that the award made by the second respondent is not a decision a reasonable decision maker would have arrived at on a full conspectus of the facts before him.

- [17] In its heads of argument, the applicant submits that the second respondent misconstrued the facts and confused the issues he had to determine by describing the misconduct as that the fourth respondent applied for and was granted sick leave for purposes of travelling to Cape Town on holiday rather than remaining at home to recuperate. It is the applicant's submission that it was never its case that the fourth respondent was dishonest when applying for sick leave, but that he travelled on holiday whilst on authorised paid sick leave.

- [18] According to the applicant, the question for determination should have been whether the fourth respondent, who was on authorised sick leave, with a valid medical certificate, was able to go on holiday when he should have been at

home recovering. It was argued on behalf of the applicant that the second respondent should have considered that if the fourth respondent could go on vacation during this period, he could have performed his desk duties as a clerk. The second respondent should have dealt with the question of whether the employee misused his sick leave to such an extent that he was dishonest.

[19] It was further submitted on behalf of the applicant that even though there is no express written rule setting out that employees cannot take a holiday during sick leave, the rule must be implied in the general employment relationship, given the fourth respondent's obligation to render service on being paid for such service. The applicant submitted that the fourth respondent's silence regarding the holiday and the explanation given on record indicate that he was dishonest regarding his time in Cape Town and how the holiday came about. The explanation provided by the fourth respondent relating to the fact that he suffered depression while on sick leave was, according to the applicant, not supported by medical evidence and therefore carries no weight in favour of the fourth respondent.

[20] The second respondent should have taken into consideration that he had accepted that sick leave was to recuperate and that the fourth respondent had conceded that one recuperates at home. The responses elicited during cross-examination and the concessions made show that the second respondent committed gross irregularity in finding that the applicant did not have an established practice of employees recuperating at home whilst on paid sick leave, the applicant argued.

[21] It was submitted on behalf of the third and fourth respondents that the applicant has failed to prove that the fourth respondent's conduct amounted to dishonesty. These opposing respondents submit that the applicant relied on speculation and unsupported evidence to suggest that the fourth respondent should have returned to work, as he was able to tender service if he had been able to go to Cape Town. They argue that the fourth respondent was declared unfit to work by a medical practitioner.

[22] According to the opposing respondents, the second respondent understood the nature of the dispute before him and considered all relevant facts in arriving at the conclusion, which is reasonable. The applicant had no express rule informing the employees where they should be confined to for purposes of recuperating. It is the opposing respondents' submission that the facts do not meet the threshold required to prove that the fourth respondent acted with dishonest intentions and that he was not recuperating while on the trip.

[23] The opposing respondents further submit that it remains unfair to dismiss the fourth respondent in circumstances where there is no express policy or rule of the applicant which requires an employee to recuperate from home during a sick leave. Therefore, a dismissal was not an appropriate outcome even if it was found that it is normal practice for employees to recuperate from home, argued the opposing respondents. The respondents, therefore, submit that any decision maker would have come to the same conclusion had they considered the evidence in this matter.

[24] It is the respondent's further submission that the applicant's grounds for review have no merit and fall to be dismissed as no reasonable decision maker would have concluded that the dismissal of the fourth respondent was fair. The fourth respondent prays to this Court to find that there was no misconception of the true inquiry that led to an unreasonable finding.

[25] In this review application, this Court has to determine whether the second respondent misconstrued the facts that it resulted in him reaching a wrong conclusion.

[26] In seeking the aforementioned order, the applicant relied on the provisions of section 145 and contended that the Commissioner committed a gross irregularity in the conduct of the proceedings. Section 145 provides as follows:

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

...

- (2) A defect referred to in subsection (1), means-
 - (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.
- (3) The Labour Court may stay the enforcement of the award pending its decision.
- (4) If the award is set aside, the Labour Court may-
 - (a) determine the dispute in the manner it considers appropriate; or
 - (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.'

[27] The applicable test when deciding whether the arbitrator's decision is reviewable has been emphasized numerous times in a number of decisions, and more clearly in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*² (*Sidumo*). In *Sidumo*, the Constitutional Court held that the test is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach and that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[28] In *Herholdt v Nedbank Ltd (Congress of South Africa Trade Unions as amicus curiae)*³ the Supreme Court of Appeal made the following remarks at paragraph 25:

'[25] In summary, the position regarding the review of CCMA awards is this:
A review of a CCMA award is permissible if the defect in the

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC) at para 110.

³ [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

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.'

[29] Returning to the case in consideration, as already indicated above, the issue for determination is whether the second respondent misconstrued the facts that resulted in him reaching a wrong conclusion. It is common cause that the second respondent applied for and was granted sick leave to undergo an operation and to recuperate from such an operation while on sick leave. The sick leave was approved with effect from 4 August 2021 until 31 August 2021. It is also common cause that the second respondent indeed had a knee operation during this period and that he travelled with his wife on holiday to Cape Town during this sick leave period.

[30] The charges faced by the fourth respondent at the disciplinary hearing were that he had committed a transgression of dishonesty, or attempted dishonesty by misusing sick leave for other purposes than recuperation or medical treatment. The second respondent determined the issues to be decided during the arbitration hearing as follows: *"Whether the applicant is guilty of dishonesty in that he misused sick leave, alternatively, he sought and was granted sick leave for other purposes other [than] recuperation, and whether the applicant is precluded from travelling while on sick leave by a workplace rule or custom..."*.

[31] The main ground of review in this application is that the second respondent misconstrued the nature of the inquiry, resulting in the distortion of the conclusions and outcome of the hearing. Firstly, the second respondent repeatedly mentioned the issues that were for determination before him, which were whether the fourth respondent was guilty of dishonesty, and

whether he contravened a rule or practice for travelling to Cape Town for a holiday while on sick leave instead of being confined to his home for purposes of recovery. Secondly, the second respondent correctly determined that for the charge of dishonesty, the respondent's case was that the applicant sought and was granted sick leave but used it for purposes of travelling to Cape Town on a holiday rather than remaining at home for the purposes of recuperating.

[32] The above may sound like the second respondent had missed the point in the sense that it may mean that the fourth respondent applied for sick leave while he was not sick, and used it to go on holiday, but this is not what the second respondent was saying. The second respondent continued to state a fact which was common cause, and that is, that the fourth respondent was booked off sick and underwent a knee surgery and had been booked off sick during the course of his travel to Cape Town.

[33] The second respondent further asserted the correct position and stated firstly, that the fourth respondent was on authorised sick leave, secondly that, his medical condition was not in question and thirdly, that for the fourth respondent to have acted dishonestly, he must have sought leave under false pretences by alleging that he was sick while he was not. Through the evidence of Ms Maluleke, it is clear that the applicant's silent allegation was that he had applied for leave under false pretences. I mention this because Ms Maluleke alleged in her testimony that the fourth respondent first applied for leave prior to August 2021, which application was refused.

[34] This the applicant could not take further because when he applied for sick leave in August 2021, it was to undergo an operation and he indeed underwent a knee operation. I cannot find any reason to agree with the applicant that the second respondent misconstrued the nature of the inquiry, resulting in the distortion of the conclusions and outcome of the hearing. It is clear from the record that there was no allegation made clearly that the fourth respondent applied for leave while he was not sick, and there is no determination of such a nature made by the second respondent.

- [35] In other words, the purpose for which the sick leave was applied for was to undergo an operation and seeing as no dispute arose around the fact that the fourth applicant may not have been sick, it can be accepted that the sick leave application was for surgery and not to travel. Therefore, I agree with the second respondent that no dishonesty can be attributed to the fourth respondent on this particular aspect.
- [36] The next inquiry was whether the fourth respondent acted dishonestly by travelling to Cape Town with his wife while he was on sick leave and while he was expected to recuperate at home? This is what the applicant found the fourth respondent guilty of: that is, dishonesty or attempted dishonesty by misusing sick leave for purposes other than recuperating or for medical treatment. The second respondent found that indeed the fourth respondent was sick and was on authorised sick leave when he went on holiday to Cape Town. He remarked that the fourth respondent may have concealed his knowledge of the planned trip, but that was not the basis for the charge he faced. The second respondent, therefore, concluded that he could find no reason to agree that the second respondent was guilty of dishonesty.
- [37] The question asked by the second respondent was whether the fourth respondent had misused his sick leave? The fourth respondent underwent a knee operation while on sick leave, so it cannot be said that he misused his sick leave. Did he seek and was he granted sick leave for purposes other than recuperating? The fourth respondent sought leave and was granted sick leave to undergo an operation, and he did. The only thing he did was that, while on sick leave, the fourth respondent embarked on a trip to Cape Town on holiday for three (3) days. His sick leave was from 4 August 2021 until 31 August 2021, while his trip to Cape Town was for three days from 25 August 2021 to 28 August 2021.
- [38] The applicant averred that the fourth respondent could have reported for light duties if he could travel to Cape Town while recovering. In dealing with the issue of dishonesty, it is important to determine if the fourth respondent's actions were deliberate or whether they were ignorant. That is where the issue concerning whether the applicant had a policy in place, known by the

employees, regulating what is expected from an employee who is on sick leave and where that employee is expected to be when recuperating.

- [39] It was conceded, and therefore common cause, that there is no such policy in place and the applicant relies on a general practice to bar its employees from travelling for other purposes than to recuperate, while on sick leave. In *casu*, the question is, was the fourth respondent aware, or was he reasonably expected to be aware of the general practice and whether the applicant in similar circumstances has consistently applied this general practice.
- [40] Policies such as the abuse of sick leave at the place of employment are not to be assumed by employees. Employees are to be made aware of the company's sick leave policies and have to be kept updated on any changes whenever necessary. The evidence of Baloyi was that he had never had to deal with an incident of this nature before, which suggests that it could never have been expected of the fourth respondent to know the general practice relating to the sick leave rule. From this, it is clear that the fourth respondent did not act with the intent to be dishonest to his employer. He was simply ignorant of the unspoken rule or general practice.
- [41] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*⁴, the Labour Appeal Court affirmed the test to be applied in review proceedings and held as follows:

[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

⁴ (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC).

[42] The applicant has the duty to satisfy the test set out in *Sidumo and another v Rustenberg Platinum Mines Limited and others (supra)*. The question to be answered from all the contentions is the following: “*Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?*”. My respectful view is that the second respondent did not misconstrue the issues such that it resulted in him arriving at a misconceived conclusion. He considered the principal issue before him and evaluated the facts presented at the hearing and came to a reasonable conclusion that the fourth respondent’s dismissal was unfair. I cannot fault him, because:

42.1 The fourth respondent genuinely applied for and was granted sick leave without any acts of or any attempt to be dishonest;

42.2 He underwent a knee surgery during his sick leave;

42.3 He remained at home and recuperated there for the most part of his sick leave;

42.4 He utilised only three days of this sick leave, away from home to celebrate with his wife in Cape Town, while still recuperating;

42.5 He was wheelchair-bound during the flight and while in Cape Town;

42.6 There was no policy in place dealing with whether employees of the applicant can recuperate far from their homes when on sick leave.

[43] I agree with the second respondent that the applicant failed to satisfy the court that the fourth respondent misused his sick leave for purposes other than recuperation or for medical treatment, thereby acting dishonestly. The second respondent’s finding that the fourth respondent’s dismissal was substantively unfair was the only decision a reasonable decision maker could have arrived at, and therefore the review application falls to be dismissed.

[44] In the premises, the following order is made:

Order

1. The review application is dismissed.

2. No order as to costs.

L. Vukeya

Acting Judge of the Labour Court of South Africa

LABOUR
COURT

Appearances:

For the Applicant:

Instructed by:

For the Respondent:

Instructed by:

LABOUR
COURT