IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C51/2024

In the matter between:

KERKDIENS (PTY) LTD t/a
SCHIDHAUSER ELECTRICAL AND PLUMBING **Applicant**

and

THE NATIONAL BARGAINING COUNCIL FOR
THE ELECTRICAL INDUSTRY OF SOUTH AFRICA **First Respondent**

MICHEAL MARAWU NO. **Second Respondent**

SAKHE PERCIVAL ZANTSI **Third Respondent**

Heard: 1 July 2025

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 12h00 on 17 November 2024.

JUDGMENT

MAPOMA, AJ

[1] This is an opposed review application in terms of section 145, alternatively section 158(1)(g) of the Labour Relations Act[1] (LRA). The applicant, Kerkdiens (Pty) Ltd, trading as Schmidhauser Electrical and Plumbing ("Kerkdiens") seeks an order reviewing and setting aside the arbitration award that was handed down by the second respondent ("the commissioner") on 27 December 2023, under the auspices of the first respondent ("the bargaining council").

The Award

[2] In the impugned award, the commissioner declared that the third respondent, Sakhe Percival Zantsi (Mr Zantsi), who was an independent contractor to the applicant, is presumed to have been the applicant's employee for the duration of his independent contractor employment relationship with Kerkdiens. The commissioner further ordered Kerkdiens to register its business, as well as its employees, with the bargaining council by no later than 30 January 2024.

[3] The main basis of the review is Kerkdiens' contention that the commissioner committed a reviewable irregularity as contemplated in section 145(2)(a)(ii) of the LRA in that the commissioner failed to have regard to material facts in the arbitration and therefore failed to give the applicant a full and fair hearing in the determination. The consequence, so goes the argument, is that the commissioner came to a conclusion that is unreasonable.

[4] The application is opposed by the bargaining council. The latter contends that the commissioner did not commit any reviewable irregularity and thus the award is unassailable based on the correctness test. The dispute arises from the background facts set out in the ensuing paragraphs.

The Background

[5] On 18 May 2021, Zantsi concluded a service provider agreement with Kerkdiens, in terms of which he agreed to provide certain electrical services to Kerkdiens as an independent contractor and thus a service provider to Kerdiens.

[6] Clause 3.3 of the service provider agreement provides as follows:

[1] Act 66 of 1995, as amended.

> '3.3 The service provider shall be rendering services for and on behalf of the Company as an independent contractor. The appointment of the service provider in terms of this agreement, and this agreement itself, shall not be construed in any way to:
>
> 3.3.1 constituents an employer/employee, agency, joint venture or partnership agreement in any shape or form between the parties; and/or
>
> 3.3.2 …
>
> 3.3.3 …
>
> 3.4 The service provider acknowledges that it has no right to or expectation of any employment, further contact with, or appointment by, the company.'

[7] On 22 September 2023, Kerkdiens terminated the service provider agreement with Zantsi and paid him what was due for the services he rendered up until the termination of the agreement.

[8] Aggrieved by Kerkdien's termination of the service provider agreement, Zantsi referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). In his referral form, Zantsi raised the issue that Kerkdiens was not registered with the bargaining council as contemplated in the collective agreement with the bargaining council.

[9] At the CCMA, Kerkdiens took a jurisdictional point, challenging the jurisdiction of the CCMA to determine the matter, contending that Zantsi was not an employee but rather an independent contractor providing electrical services to Kerkdiens based on the service provider agreement that was concluded between the two parties governing their employment relationship.

[10] On 16 November 2023, the CCMA issued a directive in terms of section 147 of the LRA, where it pronounced that, because the applicant operates a business of electric services, the applicant falls under the registered scope of the bargaining council. The CCMA accordingly stayed its proceedings and referred the dispute to the bargaining council in terms of section 147(2)(a)(i) for resolution by the bargaining council.

[11] On 26 October 2023, the bargaining council issued a compliance order, seeking to enforce its collective agreement in terms of section 33A of the LRA. In pursuit of its enforcement, the bargaining council called Kerkdiens to an arbitration hearing, alleging that Kerkdiens was contravening its main collective agreement insofar as it relates to Zantsi.

[12] At the arbitration, the commissioner, in his characterisation of the dispute, identified the issue for determination as turning on whether Zantsi was an employee, or whether he was an independent contractor of Kerkdiens. The commissioner considered the opening addresses of the parties' legal representatives for the parties without hearing any evidence, be it from Zantsi or Kerkdiens. The commissioner made the determination based on the legal submissions made by the parties during their opening addresses.

[13] Upon his assessment of what he considered to be the common cause facts and the proven facts in the dispute, the commissioner concluded that Zantsi's real employment relationship with Kerkdiens was such that Zantsi was an employee of Kerkdiens. In this regard, the commissioner reasoned that it was uncontested that Zantsi operated as an employee of Kerkdiens. According to the commissioner, Kerkdiens' selected challenge was largely about the intricacies of section 200B of the LRA and that it only sought to exclusively argue that it was not the employer, without dealing with the provisions of section 200A and 213 of the LRA.

[14] The commissioner further reasoned that it was common cause that in their employment relationship the parties engaged each other in the manner consistent with at least up to six listed factors contemplated in section 200A(1) of the LRA to qualify Zantsi as presumed employee, and that Zantsi was earning below the threshold set out in the Basic Conditions of Employment Act.[2]

[15] The commissioner also took the view that Kerkdiens did not seek to deny that Zantsi met most of the factors listed in section 200A(1) of the LRA, which make Zantsi presumed to be an employee regardless of the nature of the employment

[2] Act 75 of 1997.

relationship. The commissioner further found that it was uncontested that Zantsi had operated as the employee of Kerkdiens.

[16] In essence, Kerkdiens' case is that the commissioner committed a reviewable irregularity as envisaged in section 145(2)(a)(i) and (ii) of the LRA when he reasoned that Zantsi was an employee of Kerkdiens, the latter operating within the scope of the industry covered by the bargaining council, placing reliance on what he claimed to be common cause facts and proven facts whereas such facts were in dispute and not proven by evidence.

[17] According to Kerkdiens, the issue for determination as to whether Zantsi was an employee, as claimed by the bargaining council, or an independent contractor, as claimed by Kerkdiens, required a factual determination. According to Kerkdiens, contrary to what the commissioner found, there were no common cause facts between the parties which could have been used to resolve the dispute between them. Also, there were likewise no proven facts, as claimed by the commissioner.

[18] Kerkdien's further contention is that, despite being requested to allow the parties to lead evidence, the commissioner did not afford them that opportunity. Consequently, all the parties, including Zantsi, were not afforded that opportunity to lead any evidence to prove their contentions.

<u>Review Test</u>

[19] The bargaining council argues that the issue as to whether Zantsi was an employee is a jurisdictional fact, in that, in the absence of an employment relationship between Kerkdiens and Zantsi, the bargaining council lacked jurisdiction to determine the matter. The council argued that, because the arbitration was about the determination of jurisdictional fact, the proper review test to be applied is the correctness test, to determine whether the commissioner was right or wrong in his award, instead of the reasonableness review test.

[20] Further, the bargaining council case has taken a somewhat different slant, in that it argues that the court should decide the matter based on consideration of

the entire record, including documentary evidence *de novo* to determine whether the commissioner was right or wrong. In so doing, so goes the argument, the Court should, on its own accord, determine the existence of the employment relationship.

[21] The generally accepted view is that in review proceedings we have a bifurcated review standard, namely, a reasonableness and correctness test. The issue in dispute determines the review test to be applied, and as such, it is important to identify the issue in dispute, which will determine which review test to be harnessed in order to resolve the dispute.[3] Where the court is required to analyse the objective facts to determine whether the bargaining council had jurisdiction, the correctness test is applicable.[4]

[22] However, the above cannot be said in a case where the errors of facts are at issue. In the present case, while on the face of it, one might argue that the dispute was a determination of a jurisdictional point, the real issue for determination to establish jurisdiction lied on the disputed facts that were highly contentious, namely, whether Zantsi was an employee or not. In this case, that issue was not based on objective facts, but required rigorous scrutiny to establish the disputed facts. It is therefore my view that the correctness test is not an appropriate test to be applied in this case.

[23] Moreover, it is trite that the role of the review court is limited to deciding issues that are raised by the party who seeks to review the arbitral award in the review proceedings. The court may not, on its own accord, raise issues which are not raised by a party seeking to review the arbitral award.[5]

[24] In this case, the review application was launched in terms of Section 145(2) of the LRA. The main review ground raised by the applicant is that the commissioner committed gross irregularity as contemplated in section

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[3] *Jonsson Uniform Solutions (Pty) Ltd v Brown and Others* (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) at paras 33 to 36.
[4] *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another* (CA 10/2005) [2008] ZALAC 5 (12 May 2008).
[5] *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) at para 67.

145(2)(a)(i) and (ii) of the LRA, in that the commissioner failed to properly consider the real issue by determining the material facts. The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[6] held that section 145 of the LRA is suffused in reasonableness, and that the threshold for reasonableness of the award is whether the decision reached by the commissioner was one that which a reasonable decision maker could not have reached. It is my view that the reasonableness test is the appropriate test applicable in this case.

[25] In light of the grounds of review mentioned above, the central issue for determination is whether the arbitrator, in his reasoning and in arriving at his decision, committed gross irregularity complained of that rendered the award reviewable. Based on the postulated review grounds, the question to be determined is whether the arbitrator properly considered the principal issue before him by properly evaluating the essential facts and correctly applied the relevant legal principles to the facts in arriving at the award.[7]

[26] In determining whether a reviewable irregularity has occurred, the general rule is that the crucial question is whether the conduct of the commissioner prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to gross irregularity.[8] It then follows that the decision is one that a reasonable decision maker could not have reached.

[27] Gross irregularity as a ground of review derives its strength from section 33(1) of the Constitution,[9] which guarantees everyone the right to administrative action that is lawful, reasonable, and procedurally fair. Since an arbitral award constitutes an administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that, an award that fails to meet these requirements is liable to be set aside on review.[10]

[6] 2008 (2) SA 24 (CC).
[7] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at paras 16 - 18.
[8] *Goldfields Investments and Another v The City of Johannesburg and Another* 1938 TPD 551 – 560, cited with approval in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2016] 3 BLLR 217 (CC) at para 101.
[9] The Constitution of the Republic of South Africa, 1996.
[10] *Duncanmec (Pty) Ltd v Gaylard NO and Others* 2018 (6) SA 335 (CC) at para 40.

[28] When a commissioner commits a procedural irregularity, the award would be set aside on review if it results in the aggrieved party not having its case fully and fairly determined.[11] Once the applicant for review establishes a material act of procedural unfairness, that alone is sufficient to sustain a review without it being necessary to also assail the substantive reasonableness of the outcome of the award.[12]

[29] In this case, the commissioner determined the issue by his interpretation of the provisions of 200A of the LRA. Section 200A of the LRA creates a statutory rebuttable presumption that certain categories of workers are to be presumed to be employees. The section reads as follows:

> '200A. Presumption as to who is employee
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> (1) Until the contrary is proved, for the purpose of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present—
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> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or direction of another person;
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> (e) the person is economically dependent on the other person for whom he or she works or renders services;
> (f) the person is provided with tools of trade or work equipment by the other person; or
> (g) the person only works for or renders services to one person.'

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[11] Myburgh 'et al', Review in the Labour Courts, 2016; *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2016] 3 BLLR 217 (CC) para 105.
[12] Myburgh, ibid.

[30] The commissioner purported to apply the presumption of employee status contained in section 200A to what he alone considered to be common cause facts and proven facts, which, according to him, established the existence of the listed factors in section 200A. On this basis, the commissioner arrived at the conclusion that Kerkdiens was the presumed employer of Zantsi. Importantly, the applicant contends that the facts the commissioner claimed as common cause were, in fact, the very issues in dispute and required rigorous scrutiny through the establishment of facts.

[31] There is no evidence that what the commissioner claimed to be common cause facts were, in fact, common cause facts between the parties. What is before the Court is a contention that what was claimed to be common cause facts were contentious issues. These are the very issues that had to be determined by evidence for them to be regarded as established facts. In the circumstances, the Court finds that it was grossly irregular for the commissioner to hold that the disputed facts are common cause facts, more so without hearing evidence despite request from the parties to be allowed to do lead evidence. The opening addresses, as gleaned from the record, do not reveal any proven facts or common cause facts.

[32] The provisions of section 200A of the LRA create a rebuttable presumption of employee status. The fact that the listed factors in section 200A exist creates only a presumption that is open for rebuttal by the contesting party. It does not by itself mean that Zantsi was proved to be an employee without affording Kerkdiens an opportunity to rebut the presumption, particularly in circumstances where Kerkdien disputed the employee status of Zantsi.

[33] In my view, the words *"until the contrary is proved"* mean that section 200A(1) entitled Kerkdiens with a right to prove when the dispute was arbitrated on merits that Zantsi was not its employee. Section 200A thus left the door open for the applicant to prove the contrary, and in so doing, it is not inconceivable that there is an evidential burden to the applicant, as the party contesting the presumed employee status, to prove the contrary. Equally, the commissioner is enjoined to determine whether the contrary had been proved and thereafter make a pronouncement on whether Kerkdiens was the employer of Zantsi.

[34] Kerkdiens contends that, while it was open for it to prove the contrary as envisaged in section 200A, the commissioner did not allow the parties to lead evidence to that effect, despite a request to do so. The commissioner made the decision, based on the presumption, that Kerkdiens was the employer and issued the award on that basis.

[35] In my view, even if the commissioner pronounced that the applicant was presumed to be the employer, that is not the end of the matter. Section 200A of the LRA permits the bargaining council to afford the applicant a right to put up a case to rebut the presumption of employment. On the facts before the Court, it seems that such an opportunity was not afforded to the applicant despite its request to the commissioner to do so. Nothing can be more irregular in the circumstances.

[36] Allowing the parties to lead evidence would have enabled the commissioner to bring impartiality to bear by, first, affording the applicant opportunity to rebut the presumption, and second, affording the parties a full and fair hearing and thereby determining through established facts the real relationship between the Kerkdiens and Zantsi. It would be at this stage that the commissioner would be in a fair position to find common cause and proven facts. Accordingly, failure on the part of the commissioner to allow the parties to lead evidence in the circumstances of this case to enable him to establish the disputed facts constitutes a reviewable irregularity.

[37] The Court is mindful that section 138 of the LRA gives the commissioner the authority, in his discretion, to conduct arbitration proceedings in a manner he considers appropriate, with minimal legal formalities, to ensure fair and swift determination of disputes. However, the commissioner is duty bound to exercise this discretion judicially. Importantly, the discretion endowed to the commissioner by section 138 of the LRA does not preclude the constitutional obligation on the part of the commissioner to observe the rules of natural justice. These rules include the *audi alteram partem* rule which bestows a right to be heard. In this case, the Court finds that the case of the applicant was not fully and fairly heard as it should have been.

[38] In conclusion, having considered the issues in this matter, the Court is satisfied that the applicant has established valid grounds to have the award reviewed and set aside. Accordingly, the review applicant must succeed.

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

Order

1. The arbitration award is reviewed and set aside.
2. There is no order as to costs

[redacted]

Z.L Mapoma

Acting Judge of the Labour Court

Appearances:

Counsel for the Appellant	:	Adv B Joseph SC
Instructed by	:	BDP Attorneys, Cape Town
Counsel for the Respondent	:	Mr X Wehncke
Instructed by	:	Wehncke Parsons Incorporated, Cape Town