



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case No: C536/23

In the matter between:

KWAZI CELANI ZWAKELE NDLOVU

Applicant

and

PHSDSBC

First Respondent

JAMES NGOAKO MATSHEKGA N.O.

Second Respondent

**MEC FOR THE WESTERN CAPE DEPARTMENT OF
HEALTH**

Third Respondent

Heard: 26 June 2025

Delivered : 19 November 2025

JUDGMENT

WHYTE, AJ

Introduction

- [1] The applicant (Dr Ndlovu) applies to review and set aside an arbitration award (the award) made by the second respondent (the commissioner) acting under the auspices of the first respondent (the bargaining council). In the award the commissioner found that Dr Ndlovu's dismissal by the third respondent (the department) was procedurally and substantively fair.
- [2] Dr Ndlovu seeks an order substituting the award with one to the effect that his dismissal was both substantively and procedurally unfair. He also seeks reinstatement into the position of previously held by him as head of the Nephrology Unit at the department's Groote Schuur Hospital.
- [3] The application is one brought in terms of section 145 of the Labour Relations Act¹ (the LRA).
- [4] The department opposes the application.

Background

- [5] On 11 May 2022 Dr Ndlovu was found guilty of seven charges of serious misconduct. Four of these related to alleged unfair discrimination towards colleagues Professor Wearne, Dr Davidson, Dr Zunaid Barday and Dr Zibya Barday. Two of the charges related to alleged disrespectful behaviour to the aforementioned colleagues as well as Dr Jones. A single charge of alleged victimisation, bullying or intimidation in respect of Dr Zibya Barday. He was then summarily dismissed.
- [6] He subsequently referred an alleged unfair dismissal dispute to the bargaining council. A detailed pre-arbitration minute was concluded which precisely identifies the issues that the commissioner was required to determine. The minute also sets out the facts that were common cause and those that were not. The issues for determination relate very broadly to whether Dr Ndlovu was correctly found guilty of the seven charges preferred against him;

¹ Act 66 of 1995, as amended.

whether the chairperson of the disciplinary hearing conducted the hearing in a fair manner; and whether the chairperson was biased.

- [7] More specifically, the commissioner was required to determine *inter alia* whether discrimination (in respect of the first four charges) had been established; whether certain of the statements had been made; whether certain of the statements that had been made were true or 'fair comment'; whether Dr Ndlovu had acted in a disrespectful manner; whether Dr Ndlovu had victimised, intimidated or bullied Dr Zibiya Barday; whether the chairperson had acted in a procedurally unfair manner, particularly by limiting Dr Ndlovu's questioning of the witnesses or by otherwise 'entering the arena' during the proceedings; and whether the chairperson was biased.
- [8] On 23 October 2023, the commissioner issued the award. The commissioner found that Dr Ndlovu was guilty of the charges preferred against him and that, as he had not disputed the fairness of the sanction, dismissal was for a fair reason. The commissioner also found that the dismissal was procedurally fair as the proceedings before the disciplinary chairperson had been conducted in a manner which allowed Dr Ndlovu to be heard.

The review

- [9] Dr Ndlovu's review application constitutes a broad attack against the award, however the following main grounds of review can be distilled from the founding and supplementary affidavits filed in support of the review application.

9.1 First, it is alleged that the findings made by the commissioner are '*unreasonable within the meaning of Sidumo*'².

9.2 Second, it is alleged that the commissioner misconducted himself in a number of respects, both in respect of the ambit of the challenge to the dismissal, as well in respect of the ambit of the factual disputes.

² A reference to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

- 9.3 Third, the commissioner committed gross irregularities by interfering with the leading of evidence and the cross-examination of witnesses.
- 9.4 Fourth, the commissioner did not determine the issues that had been placed before him, *inter alia*, the extent to which the chairperson had interfered with the leading of evidence, whether the chairperson was biased, and whether the conduct of Dr Ndlovu amounted to discrimination, victimization, intimidation or bullying.
- 9.5 Finally, Dr Ndlovu attacks the award for failing to deal meaningfully with any of the key issues and disputes that had been raised.

Assessment

- [10] Fundamental to the duties of arbitrating commissioners is to determine the substantive merits of the dispute³, inclusive of the issues placed before them, and to provide reasons.⁴ Where the commissioner fails to determine the issues placed before them by the parties, the commissioner commits a gross irregularity as the nature of the proceedings are misconceived.⁵ Failure to give reasons would further constitute a gross irregularity and misconduct. Reason-giving is now common to the lawful exercise of all public power.⁶
- [11] Generally speaking, reasons must be adequate.⁷ What constitutes adequacy is context dependent.⁸ They are however required to be explanatory in nature such that a dissatisfied party might know why the decision went against them.⁹ Reasons should consist of more than mere conclusions and should refer to all relevant facts and law as well as the reasoning process leading to those conclusions.¹⁰

³ Section 138(1) of the LRA.

⁴ Section 138(7) of the LRA.

⁵ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

⁶ *Judicial Services Commission and another v Cape Bar Council* 2013 (1) SA 170 (SCA).

⁷ *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at para 62.

⁸ *Ibid* para 63

⁹ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at para 40.

¹⁰ Hoexter and Penfold *Administrative Law in South Africa* (3ed) at p 645.

- [12] It is readily apparent from the award that the commissioner did not engage with the issues in dispute placed before him and did not give adequate reasons. I say so for the following reasons.
- [13] First, the commissioner failed to deal at all with the extensive factual disputes between the parties. These were critical to a reasonable determination of the dispute given that these disputes pertained not only to what was said, but also to its context and whether what was said amounted to discrimination, victimisation, bullying or intimidation. Other than simply listing the identities of the witnesses and setting out a laughably high-level summary of each side's overall case, no assessment of the evidence is made at all.
- [14] Second, despite discrimination being a key component to four of the charges, the commissioner failed to engage with the question as to whether the conduct was in law discriminatory. Much the same can be said regarding the charges relating to victimisation, bullying and intimidation. The commissioner simply appears to have taken it as axiomatic that the statements were discriminatory.
- [15] Third, Dr Ndlovu's procedural complaints, and particularly that of bias, were not dealt with at all, save in the most perfunctory of manners. The commissioner appears to have simply assumed that if an employee is given some sort of opportunity to be heard by their employer, that would satisfy any challenge to the procedural fairness, including one going to bias.
- [16] It is correct that section 138(7) of the LRA only requires that commissioners give brief reasons for their awards. Moreover, given the time constraints under which commissioners act and the relative informality of the proceedings, it would be unreasonable to require commissioners to provide awards that are lengthy, detailed or equivalent to judgments of this court. The important caveat being that the length and complexity of the case may influence the detail required of the reasons.

[17] However, the furnishing of reasons for awards underpins the accountability of commissioners.¹¹ Further, the provision of reasons is important to achieve and sustain transparency, accountability and openness in proceedings held at the Commission for Conciliation, Mediation and Arbitration (CCMA), and that good reasoning serves to discourage review applications.¹²

[18] The Constitutional Court has emphasised that a commissioner is required to determine all of the issues that are placed before them by the parties and even a failure to determine one of those issues would constitute both misconduct as well as a gross irregularity. Thus, in *Toyota SA Motors (Pty) Ltd v CCMA and Others*¹³, the court held:

‘It is important that an arbitrator who is assigned a dispute about the fairness of a dismissal to arbitrate determines every component of the dispute that is in issue between the parties. If he or she fails to determine any component of the dispute that is in issue between the parties, he or she will have failed to carry out his or her statutory function. This would constitute misconduct as well as a gross irregularity in the proceedings.’

[19] Moreover, commissioners are required to give reasons for preferring one disputant’s version over another’s.¹⁴ This is particularly important where there are mutually destructive disputes of fact and it is necessary to employ the *dicta* in *Stellenbosch Farmers’ Winery Group Ltd and another v Martell et Cie and others*¹⁵ (*SFW*) in order to resolve those disputes, namely through as assessment of credibility, reliability and probabilities associated with the evidence.¹⁶ Where a commissioner does not do so, this would constitute a gross irregularity in the proceedings.¹⁷ It is important to note that this duty extends beyond a mere recital of the parties’ evidence followed by a conclusion. Commissioners are required to conduct an analysis such that there is a reasoned outcome based on, as I have stated, the test in *SFW*.

¹¹ *Dairybelle (Pty) Ltd v CCMA and others* [1999] 10 BLLR 1033 (LC).

¹² NUMSA and another v Rustenburg Platinum Mine (Mogalakwena Section) and others [2015] 1 BLLR 77 (LAC) at para 29

¹³ (2016) 37 ILJ 313 (CC) at para 108.

¹⁴ *Toyota SA* para 132

¹⁵ 2003 (1) SA 11 (SCA) para 5

¹⁶ *Ibid* at para 5.

¹⁷ *Toyota SA* at para 132. See also: *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni and others* [2011] 4 BLLR 404 (LC) at para 8 to 9.

Moreover, commissioners are required to do more than to summarise overarching case authority but must independently apply their minds to what is required in any dispute.¹⁸ Acceptable reasons must be provided for every area where there is a material dispute, most certainly where the outcome might turn on the resolution of that dispute.¹⁹

[20] The duty to give reasons is important for a further reason, namely that reasons stand as a demonstration that the commissioner has engaged with the substantive merits of the dispute. Thus, where a commissioner fails to determine the disputes between the parties, it cannot be said that the substantive merits of the dispute have been dealt with at all, with the result that the parties are denied their right to a fair hearing, and to that extent the proceedings might be rendered a nullity. This is a question apart from whether the outcome is objectively reasonable based on a consideration of the record.²⁰

[21] The position can be succinctly summarised as follows:

“It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. It will not suffice to merely recite a general formula or restate a statutorily-prescribed conclusion. It is also preferable if the reasons demonstrate that a systematic analysis has been undertaken by the decision-maker . . . The reasons must generally state the decision-maker’s material findings of fact (and, if the facts were disputed at the hearing, their evidential support), and meet the substance of the principal arguments that the decision-maker was required to consider. If a decision is made on the basis of the evidence of witnesses or experts, reasons for preferring one witness or expert over another should generally be explained. In short, the reasons must show that the decision-maker successfully came to grips with the main contentions advanced by the parties,

¹⁸ *Simani v Mosselbay Municipality and others* (2014) 35 ILJ 2295 (LC) (*‘Simani’*) at para 45; *Jusayo v Mudau NO and others* [2008] 7 BLLR 668 (LC) at para 22.

¹⁹ *Simani* paras 49-51

²⁰ *Simani* paras 44-50; 58-60 and 70-74

and must tell the parties in broad terms why they lost or, as the case may be, won.’²¹

[22] As Myburgh and Bosch note²² there is a measure of inconsistency in this court judgments regarding when an award will be set aside for want of adequate reasons and they express the view that an award will be set aside where the decision is “*unreasoned and its rationale cannot be determined from other findings and is not self-explanatory.*”²³ This court aligns itself with that view.

[23] Although there are decisions²⁴ that have found that an award will not be reviewable if the reviewing court could substantiate, through *ex post facto* analysis of the record, the conclusions reached by the commissioner concerned, this is not a satisfactory solution simply because it requires the court to second guess the commissioner’s reasoning. This court accordingly prefers those authorities that find accordingly.²⁵

[24] All of the above is supported by the recent judgment of the Constitutional Court in *Vodacom (Pty) Ltd v Makate and Another*,²⁶ where the Court emphasised that decisionmakers are subject to a ‘*duty of proper consideration*’ which was integral to the constitutional right to a fair hearing. The Court found further that a decisionmaker might (but not exclusively) discharge that duty by providing adequate reasons for its decision, particularly dealing with all of the material evidence and submissions placed before it. This the Court found underpinned the ‘duty to provide reasons’. In summary,

‘Woefully lacking reasons are symptomatic of a flawed assessment of facts and issues. For present purposes, flawed in the sense that amounts to a failure of justice. We must not lose sight of the fact that the adequacy of reasons relates to a proper consideration of the evidence and issues and –

²¹ Wolf H et al De Smith’s Judicial Review (7th ed) paras 7 – 102, quoted in Myburgh and Bosch Reviews in the Labour Court (Juta 2016) p 237

²² Myburgh and Bosch pp 237-8

²³ Ibid

²⁴ For example: *Cementation (Africa Contracts) (Pty) Ltd v CCMA and others* [2000] 5 BLLR 573 (LC) para 20

²⁵ *Boxer Superstores (Pty) Ltd v Zuma and others* [2008] 9 BLLR 823 (LAC) paras 11 - 12

²⁶ *Vodacom (Pty) Ltd v Makate and Another* [2025] 11 BLLR 1105 (CC).

based on that – taking a reasoned decision. That, in no way, means that the reasons must be correct.’²⁷

- [25] The importance of the duty was emphasised with reference to the Court’s earlier decision in *Mphahlele v First National Bank of South Africa Ltd*²⁸ namely that of the purposes served by the duty are openness and transparency; ensuring that decisions are not arbitrary; and that it is essential to the appeal process, precisely because failure to give acceptable reasons robs the parties and the appeal court from determining whether the initial decision is correct. I see no reason why these considerations ought not to apply to the parties and review court in proceedings brought under section 145 of the LRA.
- [26] Finally, the Court in *Makate* emphasised that the duty is context specific and will depend on the complexity of the matter and, this court suggests, the nature of the proceedings and type of decisionmaker in question.
- [27] To summarise, Dr Ndlovu and the department were entitled to have their dispute properly considered and determined. This involved the commissioner considering the competing factual versions and legal considerations, assessing them followed by the making of a decision. In accordance with the duty to give reasons, he was required to provide brief written reasons dealing with the substantive merits of the dispute. Here the commissioner failed dismally, and the parties have been left with no appreciation as to why they won or lost. The conclusions reached by the commissioner can in no way be considered to be self-explanatory, nor is there any apparent rationale for considering one parties version over the other.

Remedy

- [28] It is thus my conclusion that the award stands to be reviewed and set aside. As to the question of whether to remit or to substitute, the view was expressed in *Boxer Superstores (Pty) Ltd v Zuma and others*²⁹ by the Labour Appeal Court that the appropriate relief was to remit the matter back to the

²⁷ Ibid para 47

²⁸ *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) at para 12.

²⁹ [2010] 10 BLLR 1061 (LC) at para 24.

commissioner concerned such that he could receive further evidence on the question of the relief to be awarded to the employee party. However, in this matter all the evidence is in.

[29] Whilst I am appreciative of the fact that this matter has a lengthy history and that the arbitration process was a lengthy one, I do not believe that an order of substitution would be appropriate. As noted above, the decisionmaker has not dealt with the substantive merits of the dispute, nor has he discharged the twin duties of due consideration and reason-giving. The proceedings are, in that sense, a nullity.

[30] Respectful of this court's need to defer to the primary dispute resolution mechanisms established under the LRA, I am of the view that an order of remittal would be appropriate. Further, given the impugned conduct of the commissioner, it would be unfair to the parties to require them to submit to the same decision maker, and I thus intend to order that remittal be made back to the bargaining council and that a commissioner other than the second respondent be appointed to hear the matter. This to me seems consistent with the order made in *Makate*.³⁰

[31] Given that it would be inappropriate to saddle the new decision maker with a defined procedure, and mindful of the provisions of section 138(1) of the LRA, I intend to order that the matter be determined *de novo*. I do however encourage the parties to utilise their best endeavours to reach agreement of at least some of the issues such that an expeditious hearing can take place.

[32] This is not a matter in which an order of costs would be appropriate considering the reasons for the order that I intend to make.

[33] Accordingly, I make the following order:

Order

1. The award made by the second respondent is reviewed and set aside;

³⁰ *Makate* (Id fn 27) at paras 104 – 105; 108.

2. The applicant's alleged unfair dismissal dispute is remitted back to the first respondent for re-determination de novo before a commissioner other than the second respondent; and

3. There is no order as to costs.

J. Whyte

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : In person

Instructed by :

For the respondent : Ms R Nyman SC

Instructed by : The State Attorney