



- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR701/23

In the matter between:

BUMBANA MINING (PTY) LTD

Applicant

and

SALU

First Respondent

THANDEKA MSOMI

Second Respondent

MANDLA NKABINDA N.O.

Third Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Fourth Respondent

Heard: 24 February 2025

Reasons delivered: 25 February 2025

REASONS

PHEHANE, J

Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act¹ (LRA) in which the applicant seeks to review and set aside the arbitration award by the third respondent dated 9 March 2023.
- [2] The first respondent, ostensibly a trade union representing the second respondent (Ms Msomi) filed opposing papers that do not comply with the Rules of this Court.² What is astounding is that the first respondent filed an application together with a founding affidavit in an attempt to oppose this review application. The opposition is thus defective and irregular. A trade union ought to have known and applied the Rules in opposing this application. This application is effectively unopposed.

Background

- [3] The applicant conducts an operation as an opencast coal mine and employs approximately 340 employees.
- [4] In terms of the applicant's policies, employees are granted four months of unpaid maternity leave. The applicant avers that this practice is consistent with the provisions of section 25 of the Basic Conditions of Employment Act (BCEA).³
- [5] It is not in dispute that the applicant and Ms Msomi concluded a service agreement in terms of which Ms Msomi, as with all other employees of the applicant, agreed that employees on maternity leave would not receive any remuneration during the period of such leave. The clause on remuneration in the service agreement reads:

‘The employee will receive wages of R43.50 per hour; payable monthly, provided that only hours actually worked shall be paid for. Overtime shall be

¹ Act 66 of 1995, as amended. See also: notice of motion on p 1.

² The Rules that were applicable when this review application was delivered, are the former Rules for the Conduct of Proceedings in the Labour Court dated 14 October 1996 (repealed on 17 July 2024).

³ Act 75 of 1997.

paid according to relevant legislation. The employee will also receive a housing allowance of R1000.00 per month, medical allowance of R250.00 per month and a night allowance (20.00% all of the night hours worked).⁴

- [6] Ms Msomi took approved maternity leave from 22 November 2022 to 21 March 2023. During this period, she was not paid any remuneration.
- [7] Ms Msomi, represented by SALU, referred a dispute to the fourth respondent in terms of section 186(2)(a) of the Labour Relations Act⁵ (LRA), where Ms Msomi claimed that the applicant's conduct in withholding payment of her benefits of a housing and medical allowance while she was on maternity leave constituted an unfair labour practice. The applicant contended that Ms Msomi was not entitled to these benefits which constituted her remuneration while she was on maternity leave in line with its policies and practice which is uniformly applied.
- [8] The third respondent found that the conduct of the applicant in withholding payment of Ms Msomi's housing and medical allowance constituted an unfair labour practice. He accordingly ordered the applicant to pay over to Msomi a total amount of R11 536,38 which constituted the amount of benefits withheld during the period of her maternity leave.
- [9] The applicant seeks to review and set aside the third respondent's arbitration.

Test

- [10] Section 145(2) of the LRA sets out the grounds upon which an arbitration award may be reviewed and set aside. They are that the commissioner:

10.1 committed a misconduct in relation to the duties of the commissioner as an arbitrator;

⁴ Records bundle at p 84.

⁵ Act 66 of 1995, as amended.

10.2 committed a gross irregularity in the conduct of the arbitration proceedings;

10.3 exceeded his or her powers.

[11] The test to be applied in review applications is well established. It is one of reasonableness.⁶ The concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should be evaluated on the totality of the evidence that was before the arbitrator.⁷

[12] In *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*⁸, the Supreme Court of Appeal stated thus:

‘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 proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 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.’

[13] In *Head of the Department of Education v Mofokeng and others*⁹ (*Mofokeng*) the Labour Appeal Court (LAC) clarified that if an arbitrator failed to apply his or her mind to the material issues, this would usually suggest that the outcome is unreasonable or that the arbitrator misconceived the nature of the inquiry. If a mistake of fact or law occurs, what matters is its materiality and whether the error had a distorting effect on the outcome. The mere fact that

⁶ *Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others* (2007) 28 ILJ 2405 (CC) at para [110].

⁷ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC).

⁸ [2013] ZASCA 97; 2013 (6) SA 224 (SCA) at para [25].

⁹ [2015] 1 BLLR 50 (LAC).

the arbitrator's reasoning was flawed is insufficient as the Court must consider if the outcome is unreasonable in light of all the evidence.

Grounds of review

[14] In essence, the applicant avers that the third respondent committed gross irregularities, ignored the evidence before him, alternatively, failed to apply his mind to the evidence before him when he:

- 14.1 ignored the evidence before him that the policies and practice of the applicant did not make provision for the payment of remuneration during maternity leave;
- 14.2 ignored the terms of the service agreement concluded between the applicant and its employees that provided that employees would receive wages, a housing allowance and medical allowance and other benefits for services rendered;
- 14.3 ignored the concession by the second respondent that in terms of the applicant's leave policy, she was not entitled to receive remuneration during maternity leave as the policy provides that employees receive unpaid maternity leave;
- 14.4 ignored the undisputed evidence before him that the Mutual Agreement, being a collective agreement concluded between the first respondent and the applicant provided that employees on maternity leave are subject to the provisions of section 25 of the BCEA;
- 14.5 drew a distinction between a salary and benefits as remuneration and such a distinction is artificial and unsustainable.¹⁰

¹⁰ *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2013] ZALAC 3 at para [25] (*Apollo Tyres*).

- [15] The applicant contends that the third respondent's irregularities and conduct as aforesaid, distorts the outcome that he reached and, in the premises, the outcome does not fall within the band of reasonable decisions and is therefore, reviewable.

Evaluation

- [16] At the outset, it transpires from the transcribed record of the arbitration proceedings, as well as the third respondent's handwritten notes, that the SALU union representative, Mr Vilakazi, did not lead any evidence-in-chief of Ms Msomi, notwithstanding that Ms Msomi was sworn in as a witness.¹¹ Ms Msomi was cross-examined by the representative of the applicant, Mr Scholtz. During her cross-examination, Ms Msomi made several concessions.
- [17] With reference to a copy of service contract of another individual, the content of which she did not dispute, she confirmed that the above quoted clause on remuneration was correct and did not dispute that it applied to her. She also confirmed that remuneration means 'pay'. In addition, when referred to the applicant's leave policy, she confirmed that the applicant's leave policy provided that a female employee is entitled to at least four consecutive month's unpaid maternity leave and conceded that she thus was not entitled to receive remuneration while on maternity leave and was entitled to claim maternity benefits from the Unemployment Insurance Fund.¹²
- [18] Ms Msomi further confirmed with reference to the collective agreement between SALU and the applicant, that the agreement referred to section 25 of

¹¹ See: transcribed record at pp 5 to 8.

¹² *Ibid* at pp 8 to 10. Clause 4.4.1 of the applicant's leave policy that makes provision for unpaid maternity leave appears at p 76 of the records bundle and reads:

'A female Employee Is entitled to at least 4 (four) consecutive months' maternity leave, unpaid, and subject to the Employee having worked for a period of 12 (twelve) months for BUMBANA MININ.G [sic].'

the BCEA in respect to maternity leave provisions.¹³ With reference to the provisions of section 25 of the BCEA, Ms Msomi disagreed that the benefits are included in remuneration. She did not quarrel with her not being entitled to receive a salary during maternity but insisted on being entitled to receiving her benefits.¹⁴

- [19] The uncontested evidence of Mr Scholtz was that it was a consistent practice of the applicant not to pay remuneration, which included wages and benefits to employees during maternity leave periods.
- [20] Ms Msomi conceded that remuneration is a collective term relating to all payments she received.¹⁵
- [21] In *Apollo Tyres*¹⁶ the Labour Appeal Court (LAC) stated as follows regarding remuneration and benefits and distinguishing between the two:

[25] The distinction that the Courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all extras or benefits. Remuneration is defined as: “Remuneration means any payment in money or in kind made or owing to any person in return for that person working for any other person, including the State, and “remunerate” has a corresponding meaning.

[26] Many benefits that are payment in kind form part of the *essentialia* of practically all contemporary employment contracts. Many extras are given to employees as a *quid pro quo* for services rendered just as much as the wage is given as a *quid pro quo* for services rendered’.

(Own emphasis).

¹³ *Ibid* at pp 10 to 12. The collective agreement appears at pp 63 to 65 of the records bundle. Clause 7.1 of the collective agreement on p 64 of the records bundle refers to section 25 of the BCEA in respect to maternity leave.

¹⁴ Transcribed record at p 12, at lines 1 to 25.

¹⁵ *Ibid* at pp 13 to 14.

¹⁶ fn. 10 *supra*.

- [22] On the totality of evidence before the third respondent and on the *ratio* in *Apollo Tyres* that a distinction between wages and benefits is artificial, Ms Msomi did not discharge the onus on her to prove that the non-payment of her housing and medical benefits constituted an unfair labour practice. The concessions made by her in her evidence are fatal.
- [23] The third respondent ignored material evidence before him and misconstrued the definition of remuneration. In the premises, his decision is unreasonable and reviewable.
- [24] In the premises, the following order was made:

Order:

1. The arbitration award by the third respondent dated 9 March 2023 under case number MPEM982-23 is reviewed and set aside and is substituted with the following order:
 - 1.1. The referral of the unfair labour practice dispute by the first and second respondent to the fourth respondent is dismissed.
2. There is no order as to costs.

M. T. M. Phehane
Judge of the Labour Court of South Africa