

SOUTH AFRICA / JUDGMENT

BBD Management Services (Pty) Ltd v Zwane N.O and Others (JR1855/20) [2023] ZALCJHB 7 (13 January 2023) [2023] ZALCJHB 7

COURT

Labour Court Johannesburg

BEFORE

Swartz

CASE / FILE NUMBER

JR1855/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 1855/20

In

the matter between

BBD

MANAGEMENT SERVICES (PTY) LTD

Applicant

and

THEMBA

ZWANE N.O.

First

Respondent

COMMISSION

FOR CONCILIATION, MEDIATION

AND

ARBITRATION, JOHANNESBURG (CCMA)

Second

Respondent

VUYISWA

PORTIA XORILE

Third

Respondent

Heard:	8 November 2022
Delivered:	13 January 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 13 January 2022 at 14h00).
Summary:	Review application in terms of section 145 of the Labour Relations Act 66 of 1995 Incapacity – ill health – objectives of the process contained in Schedule 8 items 10 and 11 of the Code of Good Practice Determination as to the compliance with such process – duties of employer Restatement of review test set out in <i>Sidumo and Another v Rustenburg Platinum Mines Ltd and Others</i> (2007) 28 ILJ 2405 (CC) – There was no misdirection by the commissioner on procedural fairness of dismissal as consideration of procedural fairness is inextricably linked to the determination of substantive fairness of a dismissal. Award standing scrutiny of the review test - award falling within band of reasonableness.

JUDGMENT

SWARTZ AJ

Introduction

- [1] This matter concerns an application by the applicant to review and set aside an arbitration award of the first respondent in his capacity as a commissioner of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). This application has been brought in terms of section 145 of the Labour Relations Act
- [1] (the LRA).
- [2] The third respondent was employed by the applicant on 4 August 2017 and was dismissed on 20 May 2019 (date the third respondent was informed of her dismissal) for reasons related to incapacity based on ill health / incapacity. The third respondent referred her dismissal as an unfair dismissal dispute to the CCMA and the matter came before

the first respondent for arbitration on 12 September 2019, 15 October 2019 and 16 October 2020. Pursuant to the arbitration proceedings the first respondent determined that the dismissal of the third respondent by the applicant was substantively unfair and he, consequently awarded the applicant to pay the third respondent four months' salary as compensation. It is this award by the third respondent that forms the subject matter of the review application brought by the applicant, which application was timeously filed on 25 November 2020.

Factual

background

- [3] In August 2018 the third respondent was transferred from the IT department to the administrative department. The third respondent's duties included amongst others managing cleaning staff and managing the driver's deliveries
- [4] On 19 March 2019 the third respondent's clinical psychologist wrote a letter stating that the third respondent was suffering from major depressive disorder / post-traumatic stress disorder / complicated grief reaction. The third respondent's psychologist determined that the third respondent was unwell and unfit for duty and booked her off work from 19 March 2019 to 2 May 2019.
- [5] The third respondent was admitted to a psychiatric clinic from 26 March 2019. On 2 May 2019 the third respondent did not return to work. The third respondent's clinical psychologist made a further determination that the third respondent was too ill to be treated as an out-patient. In the late afternoon on 2 May 2019 the third respondent came to work and presented a further sick note booking her off work until 5 August 2019.
- [6] On 10 May 2019 an incapacity hearing was convened. The third respondent did not attend the hearing as she was on sick leave. The third respondent was dismissed on 20 May 2019.
- [7] The third respondent had utilised all her sick leave days and therefore was on unpaid sick leave for a period of time until she was dismissed.

Parties'

Submissions

Third respondent's case

- [8] The third respondent contends that her transfer into the administrative department was accompanied by a decline in her working environment in that she found herself under more stress, the expectations of her were higher and there was a breakdown of the relationship between herself and her manager Ms O'Donoghue ("O'Donoghue").

- [9] The third respondent's working environment was a substantive contributing factor to her ill health / incapacity. O'Donoghue being the third respondent's manager, often shouted at the third respondent which sometimes result in the third respondent crying in the bathroom. The third respondent read the in - hospital occupational therapist's report which speaks directly to O'Donoghue's treatment towards the third respondent.
- [10] The third respondent was not trained to perform her duties in the administrative department which led to a more stressful working environment for her.
- [11] The third respondent in the arbitration raised the fact that despite her ill health / incapacity, the applicant failed to attempt to accommodate her to assist her with dealing with her stress related issues at work.
- [12] The third respondent during the arbitration attempted to challenge the procedural fairness of her dismissal but after much debate abandoned this challenge.
- [13] The third respondent submits that Van Aarde, an employee of the applicant, was called as a witness but never testified.
- [14] The conclusion of the third respondent's incapacity / capability within the workplace could only be reached after a proper assessment of her conditions were made. The applicant failed to establish whether it could adapt the third respondent's work conditions to accommodate her incapacity and failed to follow Schedule 8 of The Code of Good Practice items 10 and 11: Dismissal for Incapacity arising from ill health or injury ("the code").

The applicant's case

- [15] The applicant denied that O'Donoghue was one of the causes of the third respondent's ill health / incapacity in that they had a good working relationship and no grievance was ever lodged by the third respondent against O'Donoghue. The cause of the third respondent's ill health / incapacity issues was due to her home environment situation.
- [16] The applicant relied on the numerous WhatsApp texts and O'Donoghue's testimony to prove that there was no causal link between O'Donoghue's conduct towards the third respondent and the third respondent's

ill health / incapacity. O'Donoghue supported and comforted the third respondent.

- [17] O'Donoghue testified that the third respondent's job was not excessively stressful and the third respondent's workload did not increase. Further, Demi Demikatso a junior administrative staff member trained the third respondent and supported her. O'Donoghue also assisted the third respondent. The third respondent's work environment was not the cause of the third respondent's stress nor ill health / incapacity.

- [18] The third respondent disclosed to O'Donoghue her personal situation at home that being that she was being physically abused by her daughter and had to care for her disabled son. These were the reasons that led to the third respondent's high levels of stress. O'Donoghue recommended that the third respondent attends the applicant's wellbeing programme (ICASS). The third respondent declined to attend ICASS because she had already started seeing a psychologist.
- [19] O'Donoghue denied that she contributed to the third respondent's stress and ill health / incapacity. On the contrary O'Donoghue emotionally supported the third respondent which was evidenced by the various texts messages exchanged between them. O'Donoghue did admit that she occasionally shouted at the third respondent.
- [20] The third respondent was duly notified of her incapacity hearing but failed to attend.

Grounds of Review

- [21] The procedural fairness of the third respondent's dismissal was not challenged by the third respondent despite the third respondent attempting to challenge the procedural fairness during the arbitration.
- [22] The first ground of review is that the commissioner ignored the entire testimony of the first witness Van Aarde.
- [23] The second ground of review is that the first respondent ignored issues put beyond dispute and agreed to be common cause (words used by the applicant). These issues were:

23.1 it was common cause that the third respondent was incapable of performing any work due to her medical condition yet the first respondent found the third respondent's dismissal to be substantively unfair; and

23.2 the parties agreed that the procedure was not in dispute due to the pre arbitration minute. However the first respondent noted the procedural shortcomings of the applicant's process to dismiss the third respondent such as the investigation, the extent of the third respondent's ill health / incapacity and the inability by the applicant to explore alternative duties to accommodate the third respondent. The applicant alleges that the first respondent exceeded his powers in this regard by delving into the procedural irregularities of the applicant's conduct. Such conduct prejudiced the applicant as its' witness/es never dealt with the alleged procedural unfairness issue. This is exasperated by the fact that the first respondent ignored Van Aarde's evidence in its entirety.

- [24] The third ground of review is the first respondent's conclusion that O'Donoghue's conduct contributed to the third respondent's ill health / incapacity. The applicant contends that based on O'Donoghue's testimony supported by the various WhatsApp texts, this conclusion is unreasonable.

- [25] The fourth ground of review is that the first respondent exceeded his powers when he questioned O'Donoghue. Such questions mainly focused on the procedural aspects leading up to the third respondent's dismissal.
- [26] The fifth ground of review is that the first respondent accepted documents without the author testifying to the authenticity of such documents. This issue pertains to the medical reports linking the third respondent's ill health / incapacity issues to her work place environment resulting from O'Donoghue's conduct towards the third respondent.

The arbitration award

- [27] In the first respondent's conclusion in the award, he referred to item 10 of the code. The first respondent noted that the third respondent did not attend the hearing as she was still under medical attention and booked off sick.
- [28] The first respondent concluded that there was no investigation conducted as per the code. The first respondent noted that the challenge to procedural fairness was avoided by the applicant due to the pre arbitration minute in which procedural fairness was not put in dispute and then concluded that "given the parties' submissions, I am persuaded that the respondent went through the motions to effect dismissal of the applicant much against the better advice of schedule 8 item 10."
- [29] The first respondent further traversed why the third respondent should not be reinstated relying on the breakdown of the relationship between the third respondent and O'Donoghue.
- [30] The first respondent found that "the sanction against the applicant was inappropriate considering the failure to properly investigate the extent of the incapacity or injury of the applicant."

Evaluation

- [31] In terms of the review test enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] , in order to pass muster of judicial review for reasonableness under section 145 of the LRA, an arbitration award must be one falling within the range of decisions which a reasonable decision-maker could have made in the circumstances[3]. The Supreme Court of Appeal, in *Herholdt v Nedbank (Cosatu as amicus curiae)*[4], restated the test in the following terms:

"While the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions. ...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."

[32] The code provides, amongst others as follows:

“10 Incapacity: Ill health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed to state a case in response and to be assisted by a trade union representative or fellow employee.

11 Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

- (a) whether or not the employee is capable of performing the work;
- (b) if the employee is not capable –
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitable alternative work.”

[33] Compliance with the provisions of items 10 and 11 of the code in cases of incapacity for ill health are expected from an employer. In other words, non-compliance with these provisions would potentially render termination of an employee's employment on the ground of incapacity, both procedurally and substantively unfair. In *IMATU obo Strydom v Witzenberg Municipality*,^[5] the Labour Appeal Court (per Molemela AJA, as she then was) stated:^[6]

“[7] I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognised

as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under

such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

[8] The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the Employment Equity Act 55 of 1998. In their work Employment Equity Law 2001: 7-3 to 7-4, JL Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but "is a duty that is implied in the concept of unfair discrimination in a general sense" and "is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely non-compliance with such an

important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal

as well?

[9] I am of the view that the provisions of items 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair.."

[34] The second ground of review will be dealt with first as the second ground of review is central to this review application. The applicant's second ground of review, items 10 and 11 of the code are inextricably linked and non-compliance with the code renders a dismissal substantively unfair. In other words the substantive aspect of fairly dismissing an employee for incapacity is lacking if there is non-compliance with the code, which provides for certain procedural aspects to be adhered to.

[35] As stated by Grogan in Dismissal[7] when discussing the code:

"Only once these steps have been taken will dismissal of an injured or sick employee be deemed substantively fair. Although in cases of dismissal for reasons related to the illness or injury of the employee it makes little sense to speak of procedural fairness as an independent requirement, the code indicates the steps an employer should take before dismissing an employee for this reason. The guidelines are set out in item 11."

[36] The applicant failed to appreciate this aspect in their case. Even if the parties agreed not to traverse the procedural aspects of the dismissal procedure, such agreement cannot sidestep the code. No evidence by the applicant was led about compliance with the code. The first respondent was acutely aware of this aspect as borne out by the first respondent's conclusion in his award.

- [37] Accordingly, the result that the first respondent reached in finding that the third respondent's dismissal was substantively unfair was reasonable.
- [38] Despite the first respondent not dealing in his conclusion with the issue of the third respondent not attending her incapacity hearing on 10 May 2019, it must be noted that as the third respondent was on unpaid sick leave there seems to be no justification for not waiting for the third respondent to return to work on 5 August 2019 to then convene the incapacity hearing. For the applicant to have convened the third respondent's incapacity hearing while she was booked off on sick leave was also unfair.
- [39] The first, ground of review pertains to Van Aarde's evidence. While the transcript does refer to Van Aarde's evidence[8] the transcript itself does not reflect Van Aarde's evidence. The first respondent in his award states that he has no notes on Van Aarde's evidence and the third respondent in her answering affidavit states that while Van Aarde was called as a witness, she did not testify. Further it is to be noted that there is no confirmatory affidavit from Van Aarde attached to any of the applicant's affidavits confirming that Van Aarde did in fact testify. On the balance of probabilities I find that there was no testimony from Van Aarde. Even if I am wrong and having regard to what is stated above in relation to the non-compliance with the code, Van Aarde's testimony would not have advanced the applicant's grounds for review much further.
- [40] The third ground of review that O'Donoghue contributed to the third respondent's ill health is linked to the applicant's fifth ground of review that the first respondent accepted the medical report (occupational Therapist Monica Tshabalala's report) implicating O'Donoghue as a contributing factor towards the third respondent's ill health / incapacity.
- [41] It is unfortunate that the pre-arbitration minute is not contained in the bundle of evidence as such a minute would have dealt with whether documents were or were not to be accepted as they purport to be. From the contents of the transcript there did not seem to be any objection to the contents of the aforementioned medical report. From the evidence of the third respondent together with the evidence contained in this medical report it was reasonable for the first respondent to
- have explored the possibility of reinstatement in light of O'Donoghue's conduct toward the third respondent, and thus by implication found that O'Donoghue's conduct towards the third respondent was a contributing factor to the third respondents ill health / incapacity. Again, even if I am wrong and having regard to what is stated above in relation to the non-compliance with the code, the first respondent's conclusions in relation to O'Donoghue's conduct towards the third respondent would not have advanced the applicant's grounds for review much further.
- [42] The fourth ground of review alleges that the first respondent exceeded his powers when he questioned the applicant's witness.

- [43] In terms of section 138 of the LRA, commissioners may conduct arbitration proceedings in a manner that a CCMA commissioner considers appropriate to determine the dispute fairly and quickly as well as deal with the substantial merits of the dispute with minimum legal formality.
- [44] In the *Impala Platinum v Jansen and Others*[9] matter in the Labour Court (“LC”), (the Impala matter) the issue was raised about an allegation of bias by the CCMA commissioner.
- [45] The Labour Appeal Court (“LAC”) on appeal of the matter held that a commissioner has relative *carte blanche* to conduct the proceedings with minimal legal formalities in an inquisitorial or investigative mode. He or she is entitled to solicit information himself/herself to come to a finding that is fair.
- [46] In the Impala matter, the commissioner adopted a mixture of adversarial and inquisitorial approaches. While he did ask a number of questions, a holistic assessment of the transcript shows that he was even-handed and questioned most of the witnesses. The LAC found that if the CCMA commissioner had addressed more questions to the employee this was not an indication of bias. The Court saw no reason to find that there was a reasonable apprehension of bias. The appeal was upheld with costs.
- [47] From the reading of the transcripts I do not find that the questioning of O’Donoghue’ by the first respondent resulted in the first respondent exceeding his powers.
- [48] The fifth ground of review has been dealt with under the third ground of review.

Conclusion

- [49] The test for review is this: “Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?”[10] To maintain the distinction between review and appeal, an award of an arbitrator / commissioner will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of a commissioner’s award is unreasonable, this court must broadly evaluate the merits of the dispute and consider whether, if the commissioner’s reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the commissioner. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the commissioner. [11]
- [50] This court has eschewed a piecemeal approach to review applications. The proper approach is for the court to consider the totality of the evidence in deciding ‘whether the decision made by the arbitrator is one that a reasonable decision-maker could make.’ [12]

[51] In the circumstances, it cannot be said that the first respondent's award did not fall within the range of decisions which a reasonable decision-maker could have made. I am, therefore, unable to fault the award by the first respondent. Accordingly, the first respondent's award falls within the band of reasonableness on the basis that "the decision of the arbitrator...is not a decision that a reasonable decisionmaker could not reach" and based on the totality of the evidence, was justified.

Costs

[52] I see no reason why costs should not follow the result.

[53] In the result, the following order is made:

Order

1. The review application is dismissed with costs.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

F van der Merwe

Instructed by:

Darren Ledden Inc.

For the Third Respondent: C Grant

Instructed by:

Wits Law Clinic

[1] No. 66 of 1995.

[2]

2007) 28 ILJ 2405 (CC).

[3] Ibid at para 110.

[4] 2013 (6) SA 224 (SCA) at para 13.

[5] 2012] 7 BLLR 660 (LAC).

[6] Ibid, at paras 7, 8 and 9.

[7] Dismissal, Third Edition, p 466.

[8] Transcript p 85 l:24 to 25, p 93 l:16 to 17, p 174 l:11, p 180 l:1 to 5

[9] 2017] 4 BLLR 325 (LAC).

[10] Sidumo (Id fn 2) at para 110.

[11] Herholdt (Id fn 4) at paras 12 and 13.

[12] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

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