

SOUTH AFRICA / JUDGMENT

Impala Platinum Limited v Commission For Conciliation Mediation and Arbitration (JR623/2020) [2023] ZALCJHB 348 (31 July 2023)

[2023] ZALCJHB 348

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

JR 623/2020

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 623/2020

In

the matter between:

IMPALA
PLATINUM LIMITED
Applicant
And
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION
First Respondent
COMMISSIONER
LAZARUS MATLALA N.O.
Second Respondent
SIPHO
MUDAU
Third
Respondent

Heard:

09 February 2023

Delivered:

31 July 2023

JUDGMENT

MABASO AJ

Introduction

- [1] The Third Respondent (“Mr Mudau”), whilst employed by the Applicant, Impala Platinum Limited (“Impala”) as its Mine Manager, was summoned before a disciplinary hearing to answer to counts of misconduct. The resultant finding was guilty on some of the charges and dismissal followed. Consequently, he declared an unfair dismissal dispute before the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) wherein he prayed for compensation. The Second Respondent (“the Arbitrator”) arbitrated the dispute and produced the resultant arbitration award thus: confirming the guilty finding on merits, however, ruled that it was procedurally unfair, and ordered Impala to pay Mr Mudau compensation equivalent to 10 months of the latter’s remuneration.
- [2] Dissatisfied with this outcome, Impala has approached this Court seeking an order to review and set aside the procedural unfairness outcome. Mr Mudau is opposing this application. In addition, Mr Mudau launched an application to review and set aside the finding of substantive fairness. According to the evidence, the arbitration award was served on the parties on 23 March 2020. Impala delivered the review application on 5 May 2020, within 6 weeks as envisaged by section 145 of the Labour Relations Act[1] (LRA). Mr Mudau launched his review on 16 October 2020, accompanied by a condonation application as it was 28 weeks out of time. In opposing this application, Impala has raised a point in limine, which is briefly addressed hereafter in this judgment.
- [3] Hereafter, the main issues are the following:
- 3.1 The Impala review application (the main review application).
- 3.2 Mr Mudau’s condonation for the late delivery of the cross-review application (Cross-review and its condonation application).

Main review application

- [4] The sole issue in this review application is two-fold which relates to the finding of procedural unfairness by the Arbitrator. If this Court concludes that the finding of procedural unfairness by the Arbitrator is reasonable as Impala accepts that it did not entirely follow the correct procedure in the acceptance of part of the evidence that produced the dismissal of Mr Mudau. This Court has to move to whether the amount awarded is just and appropriate taking into account the totality of the circumstances that served before the Arbitrator.
- [5] The basis of the Arbitrator's finding that the dismissal is procedurally unfair is found in paragraph 36 of the arbitration

award, wherein he reasoned thus: the decision by the chairperson of the disciplinary hearing from the evidence of people who were never called as witnesses was in violation of the disciplinary code of Impala. Then according to him this indicates that it rendered the disciplinary hearing to be procedurally unfair; the reason being that clause 9.10 of Impala's disciplinary code partly reads as follows:

‘...statement/affidavit shall not be accepted as evidence without the right of the other party to cross-examine the person who made such document unless the evidence common cause or it is agreed between the parties...’

- [6] This clause also allows acceptance of hearsay evidence in exceptional circumstances. The “exceptional circumstances” are not defined therein. Subsequently, the Arbitrator concluded that there was no evidence that justified deviation from this rule, so the procedure was found to be unfair. Based on this deviation only, the Arbitrator ordered Impala to pay compensation of 10 months’ remuneration, R 1 764 629.20 to Mr Mudau. Impala is accordingly attacking only this conclusion.
- [7] The charge that Mr Mudau faced consisted of a number of sub-charges. Impala contends that the Arbitrator did not provide reasoning as to how he arrived at the conclusion that 10 months’ remuneration is a just and equitable outcome, as such, it submits that he committed a reviewable irregularity by taking into account that the deviation from the code constituted a minor level of unfairness and this conduct did not prejudice Mr Mudau. Furthermore, the charges that he was found guilty of are of a serious nature. Reading the affidavits before this Court, Mr Mudau is not seriously disputing these assertions.
- [8] Impala further asserts that the Arbitrator, in concluding that Mr Mudau shall be paid compensation equivalent to 10 months, “did not provide any reasoning as to how he arrived at [this conclusion]”. At this juncture, it is necessary to highlight what the Labour Appeal Court (LAC) reiterated about the structure of an arbitration award, as in *Mogale v A&D Spitz*[2] where it stated that: “...the arbitration proceedings issue an award with brief reasons... Although the reasons must be concise, they must be well reasoned and deal with the substantive merits of the matter. The reasons must not only include what the arbitrator decided but also why he/she decided as he/she did”. This assertion by Impala cannot be disputed because, considering the arbitration award, indeed no explanation is provided therein and as a result, this Court concludes that the Arbitrator committed irregularity in not providing reasons for its finding relating to the quantum. However, this finding does not automatically mean that such irregularity is gross to justify interference by this Court.
- [9] As Impala contends the compensation “is not just and equitable”, this Court is still required to determine if the irregularity is gross which will invite the intervention of this Court. Impala also presents, in the supplementary affidavit, that the Arbitrator, in order to reach a just and equitable outcome, was required to take into account inter alia factors such as harm and prejudice suffered by Mr Mudau and the behaviour of both parties before and after the unfairness. Now since there are no reasons provided in the arbitration award, it is the duty

of this Court to investigate this by first looking at the applicable principles, as done hereinafter.

[10] The Constitutional Court in *McGregor v Public Health & Social Development Sectoral Bargaining Council and others*,^[3] reminds us that compensation is the stuff of legal discretion in that it must be just and equitable and that there are limited grounds for another Court to interfere with such discretion especially relating to the amount of compensation, it was held thus:

“In regard to the determination of the amount of compensation [in terms of s 194(1)] the Labour Court or arbitrator exercises a true or narrow discretion... [which means that] this court’s power to interfere is circumscribed and can only be exercised on the limited grounds... In the absence of one of those grounds this court has no power to interfere with the amount of compensation.”

Those limited grounds include where the tribunal or court:

“(a) *did not exercise a judicial discretion; or*

- (b) exercised its discretion capriciously; or
- (c) exercised its discretion upon a wrong principle; or
- (d) has not brought its unbiased judgment to bear on the question; or
- (e) has not acted for substantial reasons; or
- (f) has misconducted itself on the facts; or
- (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.” (Own emphasis)

[11] It is expected that a reasonable decision-maker must apply their mind to the question of quantum, as the same Court emphasised this point partly as follows:^[4]

‘However, the operative word is “may”. Although every employee has the right not to be unfairly dismissed in terms of section 185(a) of the LRA, the infringement of that right neither necessarily nor automatically confers a right to a remedy. Specifically, an award of compensation is never guaranteed. To borrow the language of section 193(1)(c), a court or arbitrator is not obliged, but may order the employer to pay compensation. It is also trite that section 194(1) visits the arbitrator or the Labour Court with a discretion, albeit not unlimited, as to the extent of the compensation that may be awarded. Compensation flows from the findings as to the quality and nature of a dismissal and ultimately, “a whole range of factors must be taken into account to determine whether compensation has to be paid and if so, for how many months”. Indeed, “to compensate or not to compensate and if compensation is to be awarded, for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA”. Accordingly, notwithstanding that Dr McGregor may have been considered for an award of compensation, compensation is the stuff of legal discretion in terms of which “the main criterion is that [it] must be just and equitable” in the circumstances.’

(Own emphasis)

[12] The LAC in *Kemp t/a Centralmed v Rawlins*,^[5] said the following regarding these discretionary powers that arbitrators have in determining if an employee is to be awarded compensation or not, following a successful finding on procedural unfairness:

‘There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

(a) ...

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both

substantively and procedurally unfair than is the case if it is only substantively unfair, or, even less, if it is only procedurally unfair.

(c) Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less

the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably

refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) Insofar as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) Insofar as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.’ (Own emphasis)

[13] Back in casu, as the Arbitrator concluded that there were no exceptional circumstances that could have led to the submittal of part of the evidence that was relied upon, this was after Mr Mudau challenged the admittance and reliance upon the evidence of information that was presented without calling the relevant people in order to be cross-examined.

[14] This Court proposes to deal with the nature and extent of the deviation from the procedural requirements during the disciplinary

hearing. It is common cause that the chairperson called for the affidavit to be submitted relating to one contested issue. When the witness for Impala was being cross-examined about the issues relating to clause 9.10 specifically about the submittal of information

without calling the author thereof his answer was that “it depends on case by case”. This court has looked at the evidence presented during the disciplinary hearing and what was stated during the arbitration relating to this aspect, and it concludes that indeed there was no need for the chairperson to ask for further information because both parties had already submitted their respective evidence relating to the disputed issue. Therefore, this Court agrees with the conclusion of the Arbitrator that this aspect made the procedure to be unfair, but this Court takes note that it was only about one count.

[15] This Court has also taken into account that the chairperson of the disciplinary hearing asked the HR office to obtain information from an official on the injury of severity classification. It is also not clear why the chairperson of the disciplinary hearing did this considering that Impala had already presented evidence relating to this aspect. Again, this Court concludes that it was not necessary for the chairperson to do so considering that Impala was represented. Doing so was more like assisting Impala to the disadvantage of Mr Mudau, and Impala correctly conceded that the dismissal was procedurally unfair.

[16] However, taking into account the totality of the case, especially that Impala had already presented the evidence of injury of one of the employees and that the invitation for the affidavit relates to something that was contested; and that this example relates to some of the counts that Mr Mudau faced. So the nature and the extent thereof are not that serious as mentioned in paragraph 14 above that it related to only one count, considering that in both these examples the chairperson of the disciplinary hearing had already been presented with evidence but it seems like he wanted to be certain about them, so the conduct of the chairperson cannot be said was malicious.

[17] Impala presented evidence during the arbitration to show reasons why the dismissal was warranted, which was that Mr Mudau’s

misconduct had an impact on Impala's operations. Mr Mudau as a Mine Manager was responsible for section 20 of the mine, and an accident was caused by an employee who fell under Mr Mudau's responsibility. The Arbitrator concluded under the substantive

fairness of dismissal that the impact resulting from the "incorrect mining took place in the workplace under [Mr Mudau's] area of responsibility", had threatened the economic viability of 20 shafts. This was because Mr Mudau created working conditions that were not conducive for mining and non-adherence to stop procedures. This clearly indicates that the dismissal was a no-fault dismissal.

- [18] Furthermore, the conduct of Mr Mudau during the arbitration in that he continued to deny the charges against him despite evidence indicating that he committed them, instead of showing remorse, also calls for minimal compensation.
- [19] Consequently, the Arbitrator had ordered 10 months' compensation without giving supporting reasons which resulted in this Court reconsidering this compensation taking into account the evidence before the Arbitrator as set out above, this Court is of the view that appropriate compensation which is just and equitable would be that of two months compensation.

Condonation and Peremption

- [20] The parties received the arbitration award on 23 March 2020. Mr Mudau had until 5 May 2020 to launch his review application, however, he only did so on 16 October 2020, which is more than 5 months out of time. This is an inordinate period. This Court concludes that despite the period being long, it is still necessary to look at the reasons for this delay and if the reasons are not reasonable then there is no need to investigate the prospects of success.
- [21] The reason proffered is that, upon receipt of the arbitration award, he consulted with his legal representatives to determine his course of action as he was not happy with the finding of non-reinstatement. At that time, it was explained to him that he had a right to approach this Court by way of review. The attorneys advised him that litigation in this Court is "not an inexpensive exercise" and might be heard by this Court in about two years. Considering this, he was prepared to accept it as it is and then move on.
- [22] Between the date of receiving the arbitration award and 3 May 2020, there was correspondence where the parties tried to settle the matter but on 4 May 2020 was advised that Impala was not prepared entered into settlement but intended to approach this Court by way of the review application, and he says was made aware of this and on 14 May 2020, delivered notice to opposing the application. As a result of the steps taken by Impala, he reconsidered his position.
- [23] Mr Mudau says that, despite initially being made aware that the challenge was only about the procedural aspects, on 31 August 2020,

he was served with the records and he waited for the Rule 7A(8) notice “hoping that at least, [Impala] will consider amending its founding affidavit to include matters relating to substantive fairness of my dismissal. This would have informed me whether I attack the Commissioner’s finding in answering the [Impala’s] papers or not”. He was subsequently served with the Rule 7A(8) notice on 14 September 2020. He says it would be in the interest of justice “to also bring my issues with the award for this [Court] to rule upon” because Impala was bringing a review application.

[24] Section 145(1A) of the LRA gives this Court the discretion to condone the late delivery of a review application on good cause shown, and this has been digested to mean that this Court has to take into account inter alia the nature of the delay, the cause for the delay, reasonableness of the explanation for such delay, prospects of success.

[25] In *Madinda v Minister of Safety and Security*, [6] held thus regarding good cause:

“Good cause” looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the Applicant, and any contribution by other persons or parties to the delay and the Applicant's responsibility therefor.’ [Own emphasis]

[26] In *Moila v Shai and Others*, [7] the LAC said the following about both excessive delay and unreasonable explanation:

‘Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an “explanation”

has been given, but such “explanation” amounts to no explanation at all, I do not think it is necessary to consider the prospects of success.’

[27] As this Court indicates above, it has to look at whether or not the explanation is reasonable; it deems it necessary to refer to what the Supreme Court of Appeal said in *Associated Institutions Pension Fund and others v van Zyl and others*, [8] which was referenced by the LAC in *Colett v Commission for Conciliation, Mediation And Arbitration and Others*: [9]

‘The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosana* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E

- F).’

- [28] The explanation proffered by Mr Mudau is unreasonable because of the following. Impala won the CCMA case on the substantive part of the dismissal, so how would a party that has successfully as in this case at the CCMA level challenge such a decision? He does not explain what caused the delay between the time when he received a seven-day notice and the date of the launching of the counterview application. He was told as early as March that he had a right to bring a review application but opted instead not to take any action, what also works against him is that he has been represented by the same attorneys from the disciplinary hearing so it was going to be easy for him to deliver the notice of review application as early as May 2020 upon being served with the Impala review application.
- [29] Furthermore, if this condonation application were to be granted, this Court would be inviting litigants who are respondents to review applications to deliver a cross-review later accompanied by a condonation application which would mean the expeditious resolution processes of matters in this Court will be defeated.[10]Therefore, the condonation for the late delivery of the cross-review application is refused.
- [30] Considering the ruling on the condonation, this Court deems it unnecessary to deal with the issue of peremption as the

conclusion

above disposes of the review of Mr Mudau.

Order

1. Order 38 of the arbitration award herein is reviewed and set aside and replaced with an order that:

“For the procedural unfairness, Impala Platinum Ltd is ordered to pay Mr Sipho Mudau an amount of R 352 925.84 as compensation equivalent to 2 months within 20 days of this Order.”

2. The Condonation application for the late delivery of the cross-review application by Mr Mudau is dismissed, consequently, the cross-review is dismissed.
3. Each party to bear its own costs on both matters.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr B Abraham

Instructed by:

Webber Wentzel

For the Third Respondent: Mr Dikane

Instructed by:

Pheello Dikane Inc.

[1] Act 66 of 1995, as amended.

[2] (JA36/2011)

[2013] ZALC 21 (22 August 2013) (Mcgregor) at para 15.

[3] (CCT 270/20) [2021] ZACC 14; (2021) 42 ILJ 1643 (CC) at para 2. See also Kemp t/a Centralmed v Rawlins

(2009) 30 ILJ 2677 (LAC) (Rawlins) at para 23.

[4] Macgregor supra at para 24.

[5] Rawlins supra at para 20.

[6] [2008] ZASCA 34; 2008 (4) SA 312 (SCA) at para 10.

[7] [2007] ZALAC 1; (2007) 28 ILJ 1028 (LAC) at para 34.

[8] [2004] ZASCA 78; 2005 (2) SA 302 (SCA) at para 48.

[9] [2014] 6 BLLR 523 (LAC) (Collet) at para 32.

[10] Cf. Collet supra and CUSA v Tao Ying Metal Industries and others

[2009] 1 BLLR (CC) at para 62.

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