

SOUTH AFRICA / JUDGMENT

# Khosana v Phalane and Others (JR 885/17)

## [2021] ZALCJHB 50 (29 March 2021)

[2021] ZALCJHB 50

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR 885/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 885/17

In

the matter between:

KAMOHELO  
MABIKINYANE KHOSANA Applicant  
and

COMMISSIONER:

THABO PHALANE  
First  
Respondent  
PUBLIC  
HEALTH AND SOCIAL DEVELOPMENT  
SECTIONAL  
BARGAINING COUNCIL Second  
Respondent  
DEPARTMENT  
OF HEALTH: NORTH WEST  
Third Respondent

Heard:

04 August 2020  
(On papers)

Delivered: This judgment is handed electronically by circulation to the parties' legal representatives by email, and released to the court's library and SAFLII. The date for hand-down is deemed to be 29 March 2021.

## JUDGMENT

MAHOSI J

### Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act<sup>[1]</sup> (LRA) to review and set aside the arbitration award issued by the first respondent (arbitrator) under the auspices of the second

respondent, the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), under case number PSHS 81-16/17, dated

16 November 2016. In his award, the arbitrator found that the dismissal of the applicant was substantively and procedurally fair.

[2] The applicant seeks that the arbitration award be substituted with an order to the effect that the dismissal of the applicant was procedurally and substantively unfair, and that the applicant be reinstated with a compensation. Alternatively, the applicant wants the matter to be remitted to the second respondent to be heard de novo before an arbitrator other than the first respondent.

[3] Coupled with this application, there is a condonation application for the late filing of the above review application and the reinstatement application as a result of the late filing of the record. The third respondent opposed all the applications.

[4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

### Background

[5] The applicant was employed by the third respondent as a Professional Nurse and placed at Grace Mokhomolo Clinic from 01 January 2007. The applicant was charged with the following acts of misconduct:

‘Charge one (Gross unprofessional misconduct and abuse of position): you are guilty of having misconducted yourself on several occasions when with Ms Nnana Melesi who was a patient of the sub-district during her pregnancy culminating in you indecently insulting her on 23 December 2014 by having told her that you were no longer interested in putting your hands in her vagina but wanted to instead have sex with her.

Alternative charge to charge one (Unprofessional misconduct and abuse of position) you are guilty of having misconducted yourself on several occasions when with Ms Nnana Melesi who was a patient of the sub-district during her pregnancy culminating in you indecently insulting her on the 23 December 2014 by having told her that you were no longer interested in putting your hands in her vagina but wanted to instead have sex with her.

Charge two (Unprofessional misconduct and abuse of position): you are guilty of having misconducted yourself against Ms Pamela Tivhase during her ante natal clinical visit on the 17 December 2014 by having told her that her private parts were big caused you an erection and requested her to have sex with you and thereafter showed your private parts whilst on duty and performing your official duties as professional nurse at Grace Mokhomomo Clinic.’

- [6] Following a disciplinary enquiry that was held on 11 May 2015, the applicant was found guilty on all the charges levelled against him and as a result, he was dismissed on 22 July 2015. The applicant lodged an appeal that was unsuccessful. His dismissal was confirmed on 04 April 2016. Aggrieved by the third respondent’s decision to dismiss him, the applicant referred a dismissal dispute to the bargaining council challenging the procedural and substantive fairness of his dismissal.
- [7] The dispute was unsuccessfully conciliated on 24 May 2016. It was then referred to arbitration, which was held on 2 September 2016 and from 20 to 21 October 2016. Subsequently, on 16 November 2016, the arbitrator issued an arbitration award, which is the subject of this application. Prior to considering the review application, it is necessary to make a determination on the applicant’s condonation applications.

### Condonation

- [8] The applicant has filed an application for condonation in terms of clause 11.2.3 of the Practice Manual in respect of the late filing of the record. The application to review and set aside the arbitration award was launched on 11 May 2017. The bargaining council dispatched the record on 9 June 2017 and the applicant only filed the record on 14 March 2018.
- [9] It is trite that the provisions of the Practice Manual have force and effect. Rule 7A(6) requires the applicant to furnish the Registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body. Clause 11.2 of the Practice Manual regulates the period within which an applicant must file the record and it reads:

## ‘11.2 Applications to review and to set aside arbitration awards and rulings

11.2.1 Once the registrar has notified an applicant in terms of Rule 7A(5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

11.2.2 For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent’s consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.

11.2.4 If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

...

11.2.7 If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.

<sup>[10]</sup> It is apparent that Clause 11.2.2 of Practice Manual requires the applicant to file the record with the Labour Court within 60 days of the date it was dispatched by the CCMA or the bargaining council, failure of which would have the effect of having the review application deemed to have been withdrawn.

[11] The broad principles for the determination of condonation as pronounced in *Melane v Santam Insurance Co. Ltd*[2] are well established. This Court is required to exercise its discretion, having regard to, inter alia, the degree of lateness, the reasons for the delay, the prospect of success and the prejudice the parties will suffer if condonation is granted or refused. The Constitutional Court in the matter of *eThekweni Municipality v Ingonyama Trust*[3] stated as follows:

‘As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation.’

[12] As aforesaid, the bargaining council dispatched the transcribed record on 9 June 2017. To an extent that it was filed on 14 March 2018, the delay outside of the sixty days period contemplated in Clause 11.2.2 of the Practice manual from the date on which it was dispatched the record is about 154 days. The delay is excessive.

[13] In explaining the reason for the delay in filing the record, the applicant submitted that following the advice from the transcribers on 21 August 2017 that the record had been prepared, it was collected on 12 September 2017 by the corresponding attorneys. The applicant’s attorneys then served copies of the transcribed record to the first respondent. Both attorneys did not file it at the Court. It is the applicant’s submission that this was as a result of a misunderstanding that the other was to do so. The applicant’s attorneys only filed the record on 14 March 2018. This submission is bare in that it is not clear from the founding affidavit what was the cause of the misunderstanding and when the applicant’s attorneys became aware of it.

[14] It is trite that an applicant seeking an indulgence from this court for non-compliance must give a full explanation for every period of the delay. In this matter, the applicant seems not to appreciate the responsibility that rests on him as a litigant who seeks such an indulgence. What makes things worse for the applicant is that the review application was filed about 4 months out of the prescribed period. In this regard, the applicant attributed the reason for lateness to the fact that he only became aware of the award on 12 December 2016 and further to the financial constraints he experienced because of being unemployed and the legal costs he incurred from litigation against the third respondent.

[15] The third respondent in opposing correctly pointed out that the applicant failed to explain the circumstances that led to him only becoming aware of the award on 12 December 2016. Further that there is no explanation on what steps the applicant took to secure financial assistance as he merely stated that he managed to secure the funds by receiving monthly financial loans from friends and relatives. The applicant did not provide an explanation why he did not seek the services of his union which represented him during the disciplinary hearing or the pro bono office of this Court. To an extent that the applicant failed to do so, his explanation is unsatisfactory and for that reason it must be rejected. However, the unreasonable explanation will not necessarily be regarded as absolute bar to condonation.

- [16] It is the applicant's submission that he has reasonable prospect of succeeding in the review application. However, the third respondent opposes this on the basis that the award is reasonable and rational. In order to make a determination in this respect, there is a need for an objective conspectus of all the facts.

#### Merits

- [17] Arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award.

- [18] The principle, as laid out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4], is whether the decision reached by the commissioner is one that a reasonable decision-maker could have reached. Therefore, the test on review is not whether the commissioner came to a correct decision that the court sitting in the same position as the commissioner would have reached. The test is whether the commissioner arrived at a reasonable decision based on the material before him or her.

- [19] In the current matter, the applicant's grounds of review were that the arbitrator failed to consider all the evidence that was tendered before him and to properly, rationally and justifiably apply his mind to the evidence and the case law provided by the applicant in their heads of argument.

- [20] The evidence that the arbitrator allegedly failed to consider is, inter alia, that the complainant reported the incident almost one year later, could not prove that she was at hospital on the date of the alleged incident, failed to inform another nurse that she saw on the same day of the incident, admitted under cross-examination

that she spoke and influenced the second complainant, admitted the authenticity of the Facebook message in which she provoked the

applicant and contradicted herself by not mentioning some details of what happened on the day on the incident.

- [21] The applicant further submitted that the arbitrator ignored the evidence led by his witness, Mr Modime, who testified about what happened when he (the applicant) and the first complainant met in the street on 23 December

2014. Furthermore, the applicant submitted that the arbitrator's factual findings do not correspond with the evidence and the documents that were placed before him. According to the applicant, the arbitrator made crucial mistakes in the award and did not record crucial facts. Furthermore, the applicant submitted that the length of the analysis of evidence in his award is an indication that the award was rushed.

[22] Section 138(1) provides for the manner in which arbitrations may be conducted and it provides as follows:

‘(1) The commissioner may conduct the arbitration in a manner that the

commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter

being considered in the arbitration proceedings.

(7) Within 14 days of the conclusion of the arbitration proceedings -

(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner.’

[23] It is apparent from the reading of provisions of section 138(7) that the LRA requires the arbitrator to issue the award with brief reasons within 14 days from the date of the hearing. There is no requirement for arbitrators to reflect all the evidence led at the arbitration proceedings in their awards. What is required is that they must expeditiously resolve the real dispute between the parties and act fairly to all the parties.[5] In doing so, they must assess all the evidence before them before arriving at their conclusion.

[24] In the current matter, the arbitrator outlined the evidence of all the witnesses, including Mr Modime’s in the part of the award that deals with the survey of evidence and arguments. In his analysis, the arbitrator found the evidence in support of the applicant’s case improbable. This does not support the applicant’s submission that some evidence was ignored. Additionally, the arbitrator’s analysis of the evidence may not be long, but it shows the thought process he went through to arrive at his conclusion. Therefore, the criticism regarding the arbitrator’s length of the analysis of evidence and his failure to record all the evidence is unwarranted and cannot be ground on which the arbitrator’s award should be reviewed and set aside.

[25] It is trite that an application brought in terms of section 145 of the LRA is not an appeal. There is a fundamental difference between an appeal and a review and this has been confirmed in numerous decisions of various Courts. As aforesaid, when reviewing an arbitration award, it is not the function of the Court to decide whether the arbitrator acted correctly but whether he or she committed misconduct or gross irregularity or exceeded his or her powers within the meaning of section 145 of the LRA.

[26] It is my view that the award is not only coherent, but it contains a detailed exposition of the extensive evidence and documentation presented to the arbitrator during the arbitration. Having assessed the evidence, the arbitrator accepted the evidence of the third respondent’s witness on the basis that it was credible and not an exaggeration. He noted that the third

respondent's witnesses were able to acknowledge inconsistencies and made admissions even when they were not necessarily supporting the third respondent's case. Having applied his mind to the facts and the merits of the case before him, the arbitrator was not persuaded by the applicant's arguments and he came to no other conclusion other than that the applicant's dismissal was fair and appropriate.

- [27] The arbitrator further found the evidence of the third respondent's second witness to be crucial in that it was not challenged save for the applicant's bare denial. Furthermore, the arbitrator, found the applicant's evidence to be contradictory and improbable. It was for that reason that he found that the third respondent succeeded in establishing, on a balance of probabilities, that the applicant's dismissal was for a fair reason.
- [28] At the tail of his award, the arbitrator concluded that the applicant failed to prove that his dismissal was procedurally unfair. In arriving at this conclusion, the arbitrator found that to an extent that the records that the applicant complained not to have received related to only one complainant, on consideration of the second charge, his dismissal remains procedurally fair. In other words, even though he was not furnished with some document relating to the first charge, his dismissal would be found to be fair only on the strength of the second charge.
- [29] Besides, it is not in dispute that the chairperson of the disciplinary hearing, Mr Maibi, testified that the issue of documentation not being issued to the applicant was not raised during the proceedings, but only surfaced in the applicant's heads of arguments. Nevertheless, the evidence is that the applicant was furnished with the said documents at the end of the third respondent's case. The third respondent correctly pointed out that the applicant failed to refute Mr Maibi's evidence.
- [30] The reading of the record and the award does not support the applicant's submission that the arbitrator failed to consider all the evidence that was tendered before him and to properly, rationally and justifiably apply his mind to the evidence and the law. It is my view that the decision of the arbitrator is not a decision that a reasonable decision-maker could not reach. It is a reasonable decision that is justified by the evidence that was placed before him.
- [31] What the applicant seeks to do, in this application, is to bring an appeal against the decision of the arbitrator in a guise of a review. The grounds of review raised by the applicant do not muster the applicable test of unreasonableness. As such, the applicant failed to discharge the onus of establishing that the arbitrator either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers. There is, therefore, no reason for this Court to interfere with his award.

## Costs

[32] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[33] Accordingly, the following order is made:

Order

1. Review is reinstated and condonation for the late filing of the review application is condoned

2 The application for an order to review and set aside the arbitration award issued by the first respondent under the auspices of the second respondent, under case number PSHS 81-16/17, dated 16 November 2016<sup>2</sup>

is dismissed.

3. There is no order as to costs.

-----

D. Mahosi

Judge of the Labour Court of South Africa

Representatives

For the applicant: Brandt & Lambrechts Attorneys

For the third respondent: Leepile Incorporated Attorneys

[1] Act 66 of 1995 as amended.

[2] 1962 (4) SA 531 (A)

[3] 2013

(3) BCLR 497 (CC) at para 28.

[4] [2007] 12 BLLR 1097 (CC).

[5] CUSA v Tao Ying Metal Industries and Others [2008] ZACC 15; 2009

(1) BCLR 1 (CC).

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZALCJHB/2021/50.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/khosana-v-phalane-and-others-unknown-topic-alcjhb-2021>

Prepared on 24 October 2026 · Esheria