

SOUTH AFRICA / JUDGMENT

Mabule v Commission for Conciliation, Mediation and Arbitration and Others (JR1615/21) [2024] ZALCJHB 365; [2024] 12 BLLR 1294 (LC) (13 September 2024)

[2024] ZALCJHB 365

COURT

Labour Court Johannesburg

BEFORE

S Maluleke

CASE / FILE NUMBER

JR1615/21

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Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR1615/21

In

the matter between:

TSHOLO
MABULE
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First
Respondent
JOSEPH
RANKGALE MODISE N.O
Second
Respondent
STANDARD
BANK OF SOUTH AFRICA LTD
Third
Respondent

Heard:

2 July 2024

Delivered: 13 September 2024
This judgment was handed down electronically by emailing a copy to the parties. The 13th of September 2024 is deemed to be the date of delivery of this judgment

JUDGMENT

MALULEKE, AJ

Introduction

- [1] This is an application to review an arbitration award under case no: NWRB1195/8 in which the Second Respondent found that the Applicant, Ms Tsholo Mabule (Mabule) was substantively unfairly dismissed by the Third Respondent.
- [2] The Second Respondent's award further states that the Third Respondent is ordered to pay compensation in the amount of R120 000.00 to the Applicant by no later than 31 July 2021 into her bank account in the same manner she was remunerated.
- [3] The Applicant requires this Honourable Court to review and set aside the Arbitration Award issued by the Second Respondent or the Arbitrator on 13 July 2021, substituting the arbitration award with an order of this Honourable Court that the Applicant is reinstated retrospectively

with effect from the 4th of April 2018, with full back pay and without loss of benefit and remitting the arbitration award back to the First Respondent for the determination of an appropriate remedy other than compensation before another Commissioner other than the Second Respondent.

- [4] The Third Respondent also filed a Counter Review Application in terms of which it requires this Honourable Court to review and set aside the Arbitrator's (Second Respondent) decision under case no: NWRB1195-18 that the dismissal of the Applicant was substantively unfair substituting the Second Respondent's finding with an order that the dismissal of the Applicant was substantively fair alternatively remitting the matter to the First Respondent to be arbitrated afresh by a Commissioner other than the Second Respondent.

Background facts

- [5] The Applicant was employed by the Third Respondent as a Customer Consultant at its Zeerust Branch and she had been in the employ of the Third Respondent since 16 February 1995. The Applicant's job description was inter alia to provide customers with the products, services and solutions to suit their needs.

- [6] In its pleadings, the Third Respondent outlines the background of the Applicant's dismissal as follows: The Third Respondent's client Mrs Senna who at the time was 73 years of age and a widow approached the Third Respondent's Zeerust branch in September 2017 with a letter of executorship with the aim of opening a late estate account with the Third Respondent. Mrs Senna's late husband had an investment account with the Third Respondent and Mrs Senna requested her late husband's estate to be transferred to her account since they were married in community of property and this could only be done by opening an Estate Late account with the Third Respondent.
- [7] On arrival at the Third Respondent's Zeerust Branch, Mrs Senna was informed by the Applicant that the letter she had was not an original letter and she must provide an original one. Mrs Senna then obtained the original letter from the Master of the High Court office and visited the Third Respondent's Zeerust Branch again and the Applicant informed her that the letter in her possession was original however she could not assist her in opening the Estate Late account because she had not secured an appointment. The Applicant indicated to Mrs Senna that she would have to make an appointment for the 20th of November 2017 and further that she must not be late by one minute otherwise her appointment would be moved to December 2017.
- [8] Mrs Senna travelled 50km from her residence in order to visit the Third Respondent's Zeerust Branch and she was turned away by the Applicant. Mrs Senna then lodged a complaint with the Chief Executive Officer of the Third Respondent. As a result, the Applicant was issued with a notice of suspension on the 9th of November 2017 and subsequently a notice to attend a disciplinary hearing was issued and held on the 16th of March 2018.
- [9] At the conclusion of the disciplinary hearing, the Applicant was found guilty of all the charges levelled against her and a sanction of dismissal was imposed. The Applicant then referred the dispute to the First Respondent on 20 April 2018 for conciliation and the dispute remained unresolved. Although the Applicant failed to refer the dispute to arbitration within the required 90 days, she filed a condonation application for the late referral of her dispute to arbitration and the condonation application was dismissed by the First Respondent under Commissioner Solomon Modipa.
- [10] The Applicant then launched review proceedings under case number: JR612/19 to review and set aside the condonation ruling. The Third Respondent opposed the review application. This Honourable Court then reviewed and set aside the condonation ruling and remitted the matter to the First Respondent on the 23rd of March 2021.
- [11] The crux of the matter is that during the arbitration proceedings, the Third Respondent made an application to have the transcript of the Disciplinary Hearing admitted as part of the evidence before the Second Respondent on the grounds that Mrs Senna was 78 years old widow who was sick and bedridden and was not able to testify during the arbitration hearing.

- [12] Further to the above, was that the Third Respondent was of the view that due to the health condition, the age of Mrs Senna and the COVID-19 pandemic at the time it was not practical to secure the testimony of Mrs Senna hence the application for the transcript of the Disciplinary Hearing as part of the evidence in the arbitration proceedings.
- [13] During the arbitration hearing, the Third Respondent contended that the transcript of the Disciplinary Hearing must be admitted as evidence as it contains the most important aspects of the case being the matter in which the Applicant interacted with Mrs Senna and according to the Third Respondent, the evidence further speaks to the heart of the dispute between the parties and therefore there was a compelling purpose to admit the transcript. The Third Respondent further submitted that no prejudice could be suffered by the Applicant should the transcript be admitted into evidence due to the fact that the Applicant already had the opportunity to cross-examine the witnesses.
- [14] Further to the above, the Third Respondent submitted that the circumstances of this matter were exceptional and that it would be in the interest of justice to admit the transcript into evidence. The Applicant has while testifying in support of her case denied mistreating Mrs Senna and maintained that she informed Mrs Senna that she was required to make an appointment for purposes of opening the Estate Late account which she scheduled for the 20th of November 2017.

The award

- [15] The Second Respondent concluded that the Applicant's dismissal was substantively unfair. The core of his reasoning was that:

15.1 There is no statement and/or affidavit from a witness or client detailing out what transpired on the day in question except the minutes of the Disciplinary Hearing which were also written by the third party, being the Chairperson of the Disciplinary Hearing and one cannot attest to their accuracy or not;

15.2 That Section 3(1)(c) of the Law of Evidence Amendment Act[1] is not a license for the wholesale admission of hearsay evidence in the proceedings;

15.3 The Section 3(1)(a) of the Law of Evidence Amendment Act provides that hearsay evidence will be admissible if each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

15.4 That the Applicant objected to the admission of hearsay evidence and there is no agreement for admission of hearsay evidence;

15.5 That the Third Respondent bore the evidentiary burden over and above mere reliance on hearsay evidence.

- [16] The Second Respondent relied upon the authority of *Alpha Pharm (EC) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[2], where the Court accepted that it was in the interests of justice for the Commissioner to admit the statement from a witness into evidence who was not called to come and testify during the arbitration and weigh its probability against the evidence tendered. However, the Respondent bore the evidentiary burden over and above mere reliance on hearsay.
- [17] It is common cause between parties that the Third Respondent has during the arbitration hearing made an application to have the transcript of the internal disciplinary hearing admitted as part of the evidence before the Second Respondent and more importantly as it relates to the testimony of Mrs Senna which application was not granted by the Second Respondent.
- [18] The question is therefore whether the Second Respondent was able to reach to an appropriate ruling without the testimony of Mrs Senna who according to the Third Respondent was the main witness in the internal disciplinary hearing.
- [19] In light of the abovementioned, the Honourable Court on the 2nd of July 2024, directed both the Applicant and the Third Respondent to file written submissions to address the import of the recent

Constitutional Court Judgment in *Kapa v S*[3] and this directive was intended to address the counter review application by the Third Respondent on the Second Respondent's

exclusion of the Third Respondent's hearsay evidence, which the Third Respondent had at the commencement of the arbitration

proceedings applied for its admission.

- [20] In consideration of the submissions made by both the Applicant and the Third Respondent, it is noted that in paragraph 77, the Constitutional Court stated that:

'the factors listed in Section 3(1)(c) of the Hearsay Act must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence. The factors that bear consideration when a court is determining whether it is in the interest of justice for the statement to be admitted are:

- (a) the nature of the proceedings;
- (b) the nature of the evidence;
- (c) the purpose for which the evidence is tendered as evidence;
- (d) the probative value of the evidence;
- (e) the reason why the evidence is not given by Ms Dasi;
- (f) any prejudice which the admission of the evidence might entail for the Applicant; and

- (g) any other factor which should, in the opinion of the court, be taken into account.’
- [21] Having regard to the abovementioned factors in its submissions the Third Respondent states that the reliability of the testimony contained in the transcript can never be in doubt as it was transcribed by an independent transcription company and that a certificate of veracity is attached to the transcription, furthermore, cross-examination has already been done during the internal disciplinary hearing and therefore no prejudice could be suffered by the Applicant should the transcript be admitted as part of the evidence.
- [22] The Third Respondent further submit that Mrs Senna’s complaint centres around the manner in which the Applicant treated her when she visited the branch for the opening of the Estate Late account and this includes the manner in which the Applicant interacted with Mrs Senna and that therefore there is a compelling purpose for the transcript to be admitted as part of the evidence in the arbitration.
- [23] Further to the above, the Third Respondent also submits that the reason why the evidence was not being given by Mrs Senna was due to the fact that Mrs Senna was elderly, gravely ill, bedridden, her age and COVID-19 pandemic and therefore she was unable to testify during the arbitration hearing.
- [24] It is clear from the award of the Second Respondent that consideration was only given to the provisions of Section 3(1)(a) and the provisions of Section 3(1)(c) were overlooked.

Review test and evaluation

- [25] The Sidumo test remains the landmark judgment in review applications. Therefore, this Honourable Court is obliged to consider the reasonableness test as postulated by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[4]. The question is therefore whether the decision arrived at by a Commissioner is one that a reasonable decision-maker could reach,

having regard to the material properly before them. Furthermore, arbitration awards may also be reviewed and set aside where a

Commissioner commits a gross irregularity in the conduct of the arbitration proceedings.

- [26] The Labour Relations Act[5] (LRA) and more importantly Section 145(1) reads as follows:

‘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.’

- [27] Furthermore, Section 145(2)(a)(ii) of the LRA states the following:

‘A defect referred to in subsection (1), means: -

- (a) that the commissioner -

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or ...'

[28] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and others*[6] (LAC) in paragraphs 33 of the Judgment held that:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide compelling indication that the Arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the Arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesis be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.'

[29] The first question is whether it was in the interest of justice for the Second Respondent not to admit as part of the evidence the transcript that contains the testimony of Mrs Senna, who is regarded as the main witness in the internal disciplinary hearing.

[30] The second question is therefore whether the Second Respondent was able to reach an appropriate ruling without the testimony of Mrs Senna who is considered to be the main witness in the internal disciplinary hearing.

[31] It is of significance to state that the provisions of Section 3(1)(c) of the Law of Evidence Amendment Act - Hearsay evidence (Hearsay Act) were overlooked in the arbitration award. Although at the time of the arbitration award, the Landmark case of *Kapa v S* was not in place, the Second Respondent ought to have holistically considered the factors outlined in Section 3(1)(c) of the Hearsay Act when considering whether to deny or grant the admission of the transcript containing the testimony of Mrs Senna as part of the evidence in the arbitration proceedings.

[32] In this case, this Honourable Court is of the view that it was not in the interest of justice for the Second Respondent not to admit into evidence the transcript of the internal disciplinary hearing and more importantly, the testimony of Mrs Senna who is considered to be the main witness. Furthermore, this Honourable Court is of the view that there appears to be no prejudice on the part of the Applicant since the Applicant was able to cross-examine Mrs Senna during the internal disciplinary hearing.

[33] Having regard to the above analysis on the failure by the Second Respondent to holistically consider the factors enshrined under the provisions of Section 3(1)(c) of the Hearsay Act which led to an arbitration award to the exclusion of the testimony of Mrs Senna, this Honourable Court is not convinced that a proper and/or appropriate ruling could be reached.

[34] It is of crucial importance to note that this Honourable Court will not entertain the issue of compensation highlighted in the Applicant's submission since it is of the view that the Second Respondent could not have reached to an appropriate ruling with the testimony of Mrs Senna excluded in totality.

[35] In the premises, I make the following order:

Order

1. The Arbitration Award granted by the Second Respondent on the 11 of July 2021 under case number: NWRB1195-18 is reviewed and set aside;
2. The matter is referred back to the First Respondent for a hearing de novo before a Commissioner other than the Second Respondent;
3. There is no order as to costs.

S. Maluleke

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Mzondi Job Molepo

Instructed by:

Ramolotja Attorneys Inc

For the Third Respondent: Mr Doctor Cithi of Mervyn Taback Inc t/a Andersen

[1] Act 45 of 1988.

[2] [2019] ZALCPE 7.

[3] 2023

(4) BCLR 370 (CC); [2023] ZACC 1.

[4] (2007) 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).

[5] Act 66 of 1995, as amended.

[6] 2015

(1) BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC).

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