
SOUTH AFRICA / JUDGMENT

Mazibuko v CCMA and Others (JR1138/19) [2022] ZALCJHB 176 (27 June 2022) [2022] ZALCJHB 176

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR1138/19

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1138/19

In the matter between:

SAKHILE OWEN MAZIBUKO

Applicant

and

THE CCMA

First Respondent

ARCHIBALD MAFA N.O.

Second Respondent

ESKOM HOLDINGS SOC LTD

Third Respondent

Heard: 14 June 2022

Delivered: 27 June 2022

Summary: Review application – reasonability of the decision. The outcome is one that a reasonable decision maker may reach. The award

is not reviewable in law. Held (1): The review application is dismissed. (2): There is no order as to costs.

Judgment

MOSHOANA, J

Introduction

[1] This is an application seeking an order to review and set aside an arbitration award issued by Commissioner Mafa, in terms of which he found that the dismissal of Sakhile Owen Mazibuko (Mazibuko) is both procedurally and substantively fair. Mazibuko was aggrieved thereby and launched the present application. The application is duly opposed by Eskom Holdings SOC Ltd (Eskom). After hearing oral submissions, this Court reserved its judgment. What follows hereunder are the reasons and the order of this Court.

Background

facts

[2] At the relevant time, Mazibuko was employed by Eskom as a Senior Supervisor: Customer Network Centre (CNC). He was stationed at Eerstehoek. On or about 25 April 2018 between 17:00 and 17:20, Eskom alleged that Mazibuko and one Mr Themba Nyambi (Nyambi), the Works co-ordinator at Eerstehoek CNC, were seen in the pole stock yard with three unknown men who had arrived in a white Toyota bakkie with registration letters and numbers DKG 013 MP. The said three men, in the presence of Mazibuko and Nyambi loaded Eskom

poles in their bakkie, whereafter, Mazibuko and Nyambi escorted the bakkie laden with the poles to Mazibuko's house, where more poles belonging to Eskom were encountered.

[3] Owing to the above incident, on 16 August 2018, Mazibuko was served with a notice to attend a disciplinary hearing in order to answer to allegations of misconduct. Mazibuko was found guilty as charged. A sanction of dismissal was imposed on Mazibuko on 31 December

2018. Aggrieved thereby, Mazibuko launched an internal appeal. On appeal, Mazibuko failed to overturn the conviction and sanction of dismissal. Displeased thereby, on 12 February 2019, Mazibuko referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal.

[4] Conciliation failed to resolve the dispute. Commissioner Mafa was appointed to resolve the dispute through arbitration. After conducting arbitration, Mafa published the denounced arbitration award. Nettled thereby, Mazibuko launched the present application. As indicated earlier, the application stands resisted.

Grounds for review

- [5] Effectively, Mazibuko impugns the arbitration award on five grounds, namely; (a) incorrect admission of hearsay evidence; (b) commissioner did not consider the matter afresh (de novo);
- (c) commissioner did not make a proper credibility finding; (d) mistakes of law and gross irregularity; and (e) findings inconsistent

with that of a reasonable decision maker. Mazibuko augmented the grounds in a supplementary affidavit. Those augmented grounds are (a) failure to consider and/or ignored the overall viva voce evidence of him as corroborated by Nyambi and Hlatshwayo; (b) introduced Nyambi's disciplinary record; and (c) findings inconsistent with that of a reasonable decision maker.

Evaluation

- [6] It is by now rested law that this Court can only interfere with an arbitration award if it falls outside the bands of reasonableness. The idea of process-related reviews has long been rejected by this Court. Of cardinal importance, a division between an appeal and a review ought to be strictly maintained. Judicial overzealousness has long been rejected.
- [7] Properly considered, in this application, Mazibuko is seeking an appeal which masquerades as a review. I shall in seriatim consider each of the grounds punted for by Mazibuko.

Incorrect admission of hearsay evidence

- [8] In effect, Mazibuko alleges that Mafa committed a mistake of law by incorrectly applying section 3 of the Law of Evidence Amendment

Act[1] (LEAA). It is settled law that an error of law does not per se vitiate an arbitration award. The error must be material enough to distort the outcome. Mazibuko raises what appear to be technical

defects. Mafa admitted sworn statements because witnesses were cowed and others could not be traced. Before doing so, Mafa referenced

section 3 of the LEAA and cited two decisions[2] of this Court. There is simply no merit in the contention that Mafa incorrectly applied the provisions of section 3 of the LEAA. The alternative contention that the sworn statements do not provide evidence that Mazibuko committed the misconduct is nothing but a ground of appeal as opposed to that of review.

- [9] Accordingly, this Court remains unpersuaded that this ground vitiates the arbitration award of Mafa. This Court is unable to observe any error of law material enough to distort the outcome reached by Mafa. Therefore, this ground is doomed to fail.

Did not consider the matter afresh

- [10] This Court fails to fully comprehend this ground. The arbitration proceedings were conducted over a period of three days. If that does not equate a de novo hearing, then this Court is at sea. Arbitration proceedings are hearings de novo. What an arbitrator seeks to do

in a misconduct related dismissal, is to determine whether a dismissal already imposed by an employer is a fair one on two legs; namely (a) substantively (guilty of misconduct that led to the dismissal and the appropriateness of dismissal as a sanction); and (b) procedurally. A transcript comprising over 500 pages was placed before Court. If there was no hearing de novo, what were the parties doing for three days as evidenced by 500 pages of a transcript?

- [11] The answer is plainly a simple one. Mafa conducted a hearing afresh. In his arbitration award he stated that the issue to be decided by him was whether the dismissal of Mazibuko was both procedurally and substantively fair or not. The arbitration award records a summary of a total of seven witnesses.
- [12] It appears to be so that Mazibuko wrongly takes a view that because sworn statements were admitted into evidence, then the hearing was not afresh. What Mazibuko seem to conveniently ignore is that he and his witnesses testified before Mafa in response to the case presented by Eskom. If it was not a hearing afresh, what is it that he and his witnesses were seeking to rebut when they testified? The irresistible conclusion to reach is that Mafa considered the dispute afresh. This ground is bound to fail. Based on the evidence contained in the transcript provided by Mazibuko himself, it is perspicuous that this ground is phantasmagorical.

Did not make a proper credibility finding

- [13] Over and above the fact that this is a disguised ground of appeal, it is pleaded in the most incomprehensible manner. A finding that a testimony of a witness is crucial has nothing to do with credibility. Besides, contradictions, if any, do not entirely mean that the testimony is incredible[3]. This ground is fallible in all respects and ought to be rejected outrightly.

Mistake of law and gross irregularity

- [14] In a review, an error of law must be material enough to distort the outcome reached. In casu, the outcome reached is that the dismissal of Mazibuko is both procedurally and substantively fair. The evidence led before Mafa,

justifies this outcome. It seems to be Mazibuko's case on this front that in admitting hearsay evidence, Mafa committed an error of law and his actions by so doing compromised the audi alteram partem principle. I disagree. As pointed out earlier, the admission of hearsay evidence is regulated by statutory law. Once the statutory requirements are met, which in my considered view were met, the law allows admission of hearsay evidence.

- [15] Gross irregularity arises if a party does not enjoy a fair hearing. The fact that hearsay evidence was admitted lawfully does not imply that Mazibuko did not enjoy a fair hearing. A fair hearing is not orbited by the right to cross-examination. The fact that Mazibuko could not cross-examine the sworn statements does not automatically morph into unfairness. The principle of audi alteram partem simply means 'hear the other side of the story'. Mazibuko and his witnesses presented their side of the story. The fact that Mafa did not find their side of the story to be acceptable and credible does not suggest that he did not afford Mazibuko a

fair hearing.

Inconsistent with findings of a reasonable decision maker.

- [16] A suggestion that a reasonable decision maker would have rejected the sworn statements despite the provisions of section 3 of the LEAA having been met is preposterous in the extreme. The review test of reasonableness simply entails that the decision must be so unreasonable that any other reasonable decision maker may not reach. Effectively it means that the decision is incapable of any justification, when regard is had to the material properly placed before a decision maker. The decision of Mafa is not one such decision.
- [17] On the balance of probabilities, the evidence demonstrated that Mazibuko was present at the pole yard when poles belonging to Eskom were loaded and removed from the pole yard. The fact that later the poles were not found does not render improbable the version of Eskom supported by various witnesses that poles were removed in the presence of Mazibuko. Accordingly, this Court is satisfied that the decision of Mafa falls within the bands of reasonableness and it is constitutionally complaint. This ground is equally foiled.

Ignorance of viva voce testimony of Mazibuko and his witnesses

- [18] Like the other grounds, this ground is placed on a very shaky ground. It is more like trying to fit a square pack in a round hole. Ignorance of evidence is one thing and rejection of evidence is another. Where a decision maker is faced with two conflicting versions, in order to extrapolate the truth, the probabilities are preponderated. Mafa in his award concluded that in view of the above I find that on a balance of probabilities the dismissal of the applicant is substantively fair. Mafa can only engage in the preponderance once faced with two conflicting versions. He cannot do so if he considers only one version. Accordingly, the suggestion that Mafa ignored evidence is unsustainable by all accounts. This ground must fail as well.

Nyambi's disciplinary report

- [19] The report of Nyambi bears no relevance in the present application. The fact that Nyambi was subsequently found not guilty of the charges leveled against him is a red herring. In a review, the reviewing judge takes into account information that was properly placed before an arbitrator. The report in relation to Nyambi became available after the completion of the arbitration proceedings. Since it was not before Mafa, the report cannot be placed before the review Court.

Conclusions

- [20] For all the above reasons, the application for review is bound to fail. The arbitration award of Mafa falls within the bands of reasonableness. It is capable of justification when regard is had to the material properly placed before him. All the grounds punted for by Mazibuko are palpably good-for-naught.

[21] In the results the following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Govender

Instructed by: M Matshiyane Attorneys, Malelane.

For the Respondent: Mr L Siyo

Instructed by: Magagula George Mcetywa Inc, Johannesburg

[1] Act 45 of 1988.

[2] Swiss SA (Pty) Ltd v Louw NO and others

(2006) 27 ILJ 395 (LC) and Minister of Police v M and Others (2017) 38 ILJ 402 (LC).

[3] See Sphanda v S (A607/2017) [2021] ZAGPPHC 186 (26 March 2021)

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