

SOUTH AFRICA / JUDGMENT

Melembe v Commission for Conciliation, Mediation and Arbitration and Others (JR 811/2018) [2020] ZALCJHB 230 (26 October 2020)

[2020] ZALCJHB 230

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

JR 811/2018

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 811/2018

In the

matter between:

JOSÈ
WACHE MELEMBE
Applicant
and
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
MICHAEL LATI MASHEGO
N.O.
Second
Respondent
BOKONI PLATINUM MINES
(PTY) LTD
Third Respondent

Enrolled:

21 May 2020

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 26 October 2020 at 11:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant seeks an order reviewing and setting aside the arbitration award issued under the auspices of the first respondent (CCMA) by the second respondent (Commissioner) on 12 April 2017, in terms of which the Commissioner found that the applicant was not dismissed. He further seeks an order confirming the invalidity of the separation agreement that he had signed on 21 July 2017; and a declaratory that the five year fixed term contract he had entered into was valid and enforceable.
- [2] By agreement, the matter was disposed of on the papers, with the parties having been granted leave to file supplementary written heads of argument. It must be said at the onset that the pleadings, and the written heads of argument delivered by both sides are indeed prolix. The issues for determination before the Court however turned out to be narrow, as shall be illustrated in the course of this judgment.
- [3] The issues in dispute before the Commissioner were whether the applicant was dismissed, and if so, whether the dismissal was fair, or whether the applicant had freely and voluntarily signed a separation agreement with the third respondent (Bokoni Platinum) (Bokoni), thus terminating the employment relationship.

Background:

- [4] The applicant commenced his employment at Bokoni in May 2011. In December 2015 he was promoted to the position of General Manager, which position was tied to a five year fixed term contract. He contends that the contract would have expired on 8 December 2020, but that he was however forced to sign a separation agreement on 21 July 2017.
- [5] Aggrieved, the applicant had referred an alleged unfair dismissal dispute to the CCMA, alleging that his dismissal was procedurally and substantively unfair, and further contending that he was coerced into signing the separation agreement. When attempts at conciliation failed, the matter came before the Commissioner for arbitration.

The evidence before the Commissioner:

- [6] The applicant's testimony was that;

6.1 On the morning of 21 July 2017, there was a meeting of Anglo American Executives which was held with his team at Bokoni, at which they were informed that the Mine was to be placed on care and maintenance.

6.2 Subsequent to that meeting, the Director of Bokoni, who was also in the meeting, Mr Vinogoran Pillay then excused all the participants from the meeting with the exception of the applicant and M. Praisegod Masondo (The Engineering Manager).

6.3 The applicant, Masondo, Pillay, Messrs Etienne Espag (General Manager Process Projects), Mandla Zembe (Head of Protection Services) and Bava Reddy then went to another room, where Pillay again told them of the placement of Bokoni on care and maintenance, and the need to commence a section 189 of the Labour Relations Act (LRA)[1] process with the unions.

6.4 According to the applicant, Pillay told him and Masondo that they were no longer needed because of certain allegations of wrongdoing made against them following upon the completion of a forensic investigation. Pillay said that the trust relationship between them and the employer had broken down. He had thereafter presented him and Masondo with copies of a separation agreement, telling them to sign it so that they could leave on the same day.

6.5 The applicant testified that Pillay their request for two days to consider the matter and consult with family members and their attorneys. Pillay also told them that they only had 15 minutes within which to make a decision, as they did not have a job any more. The applicant further alleged that they were threatened with being put in jail if they did not sign the agreements.

6.6 Pillay had at some point left the meeting, leaving behind Zembe and Espag, who had according to the applicant, held them hostage, refusing to let them use their mobile phones, or discuss the document amongst themselves, or even make copies of those documents, until they had signed the agreement. The applicant contends that they were being treated as common criminals, and had felt threatened and under hostage.

6.7 The applicant testified that as a consequence of being held hostage, being worried about their families, a hostile and threatening environment in the room created by the presence of Zembe who was in charge of security, and the threats of being jailed, they then signed the agreement, as it was the only way for them to leave the room. Having signed the agreement, the two of them were then escorted out of the premises to their respective houses.

6.8 On 26 July 2017, the Mine's Pay Administrator came to his house and presented him with further documents related to his severance pay. He was paid a pre-tax severance/separation package in the amount of R2 626 279.47. On 28 July 2017, the applicant had signed further documentation related to the separation agreement

[7] Masondo also testified on behalf of the applicant and essentially confirmed the latter's testimony insofar as the events of 21 July 2017 were concerned. He however added that Pillay had told them that there were allegations of corruption levelled against them following upon a forensic investigation.

- [8] Pillay according to Masondo did not specify when asked what the nature of the allegations were. Masondo and the applicant had however signed the agreement in the light of the threats and being held hostage. At a later stage after they had signed the agreement, he was told by Bava Reddy (of Atlatsa, one of the shareholders of Bokoni), that there were two allegations against them related to incorrect weighing of steel scrap material, and payment of goods that were not delivered.
- [9] Pillay's evidence on behalf of Bokoni was essentially that there were problems with the sustainability of the business, and a forensic audit was done which had revealed some irregularities having taken place. At the meeting with the applicant and Masondo on 21 July 2017, he had informed them of the irregularities and advised them that they could be suspended and be subjected to a disciplinary enquiry, or they could agree to sign a separation agreement.
- [10] Pillay had not disclosed the nature of the alleged irregularities at the time. He denied having threatened the two with being sent to jail if they did not sign the document, and contended that he had merely informed them of the choices without subjecting them to any duress, and had further told them that the investigations conducted could lead to criminal charges being pursued. He further testified that it was only after the applicant and Masondo were informed of the choices that they were then presented with copies of the agreement. He denied having afforded them 15 minutes to make a decision, and contended that he had only advised them that he needed a response on the same day. Pillay further denied having told the applicant and Masondo not to speak to anyone or barred them from using their phones. He had thereafter left the room to attend another meeting.
- [11] The applicant had according to Pillay, signed the separation agreement voluntarily after he was given options. Pillay further conceded that at some point after the separation agreement was signed and payments duly made, an offer of reinstatement was made to the applicant on condition that he repaid the amounts made to him. The offer was however not accepted.
- [12] Bava Reddy's testimony on behalf of Bokoni was that the purpose of the meeting of 21 July 2017 was to inform management of the plans to place Bokoni under care and maintenance, and to further inform the unions and employees of intentions to commence a section 189 of the LRA process.
- [13] In regards to the applicant and Masondo, and in the light of the forensic investigation that had already taken place in which they were implicated, it was decided that the plans to place Bokoni under care and maintenance should not involve them, and instead, they should be given an option of a voluntary separation or the route of a suspension and disciplinary enquiry.

- [14] Reddy denied that the applicant and Masondo were threatened with jail if they did not sign the agreement, and had testified that all that Pillay had said was that there could be criminal charges against them following the investigations. Reddy further confirmed that Pillay did not specify at the time what the allegations against the two were, and had told them that if they opted for the disciplinary enquiry route, those allegations would be revealed in full at the hearings.
- [15] The applicant was subsequently given a copy of the separation agreement after he had asked to see it. Reddy confirmed that the applicant had requested time until the following Monday to go through the agreement, but Pillay had informed him that a decision needed to be taken on that day. He denied however that Pillay had given the applicant and Masondo 15 minutes within which to sign the agreement, and contended that they had read the agreement in his presence, and even advised them to indicate if they needed clarity on any issue. According to Reddy, the applicant had then told him that he did not need him and the others around when he read through the document, and he, Zembe and Espag had then left the room.
- [16] Reddy denied that Masondo and the applicant were at any time prevented from talking to anyone, or using their cellular phones or leaving the room. He contended that they were not held hostage and that they could have left the room at any time they wished to do so.
- [17] At some point, Reddy went back to the room to establish whether Masondo and the applicant had made a decision, and they told him that they needed more time. He had again left them in the room. Later on, it was indicated to Zembe who was waiting outside the room that the applicant and Masondo were ready to sign the agreement, which they had done. Reddy also signed as a witness. Reddy then took the copies from them and advised them that they would be kept at the Employment Relations office, and were to be made available to them on the following Monday. He denied that Masondo and the applicant were told that they could not be given copies of the agreement.
- [18] Zembe testified that as Head of Protection Services (Anglo American), it was his duty to accompany Pillay to areas regarded as volatile. On 21 July 2017, they went to deliver the news about retrenchments at the Mine, which was also targeted for illegal mining activities, hence the need to protect Pillay whenever he went to Bokoni. He testified that following a meeting with Executives, Pillay informed the applicant and Masondo of a separate meeting to be held with them. Zembe essentially corroborated the evidence of Pillay and Reddy in regard to what took place in the meeting. He added that having been told of the forensic investigations, Masondo and the applicant were informed of the choices as it was no longer tenable for them to be part of the management team.
- [19] According to Zembe, Pillay at no stage told the applicant and Masondo that they would go to jail, and that what he said to them was that the investigations conducted could lead to criminal charges being pursued. He denied that Pillay had told the applicant and Masondo that they had 15 minutes within which to decide, and had in fact told them that a decision had to be made on that day. After the applicant and Masondo were presented with copies of

the separation agreement, Pillay left to attend another meeting. Masondo and the applicant were then left alone in the room whilst they decided on the options. At some point, Masondo and the applicant

had signed the agreement and were told that they would get copies the following Monday from the Employee Relations office. Zembe also denied that the applicant and Masondo were held hostage, or barred from using their phones, or from talking to anyone else, or from leaving the room.

The Commissioner's conclusions and findings:

[20] The Commissioner's starting point in the light of a dismissal being disputed was to point out that the onus was placed on the applicant to prove the fact of a dismissal. Having had regard to the evidence, the Commissioner concluded that;

20.1 Masondo and the applicant chose to leave after various options were put to them, and that had they opted to go the disciplinary route, that would have been the end of the matter.

20.2 The fact that the allegations against the two were not disclosed at the time that they signed the agreement was irrelevant as these would have been made clearer had they opted for a disciplinary enquiry.

20.3 The mere fact that Pillay had made reference to the investigations leading to criminal charges could not amount to coercion, as it was within an employer's right to pursue criminal charges where the misconduct in question also constituted a criminal offence. Thus, an employee had an option to face a disciplinary hearing where he was of the view that he was innocent, and it cannot be said that he was forced out where there was such an option.

20.4 In the light of these considerations, the Commissioner concluded that the applicant voluntarily opted for the separation agreement, and to that end, it could not be said that he was dismissed. Equally so, since the applicant had made that option, there could not have been a retrenchment, and there was no requirement to follow the provisions of section 189 of the LRA.

Grounds of review and the legal framework:

[21] From the prolix pleadings, written and supplementary heads of argument, it can be accepted that at the core of the applicant's grounds of review, are certain factual findings made by the Commissioner in relation to the evidence that was placed before him. It was submitted that the Commissioner failed to take certain material evidence into account in concluding that there was a voluntary separation agreement rather than a dismissal, and thus committed a variety of gross irregularities.

[22] The applicant further takes issue with the Commissioner's conclusions in that he contends that what was referred to the CCMA was an 'unfair dismissal dispute relating to unfair labour practices, and to declare the separation agreement invalid'. Thus to the extent that the Commissioner had recorded that he was not tasked with determining the validity of the separation agreement, or that he did not in any event have jurisdiction to make such a determination, it was submitted that the Commissioner had misdirected

himself on the facts, the law and the nature of the enquiry he was tasked to undertake.

[23] To the extent that the central issue was whether there was a dismissal, this was a jurisdictional point which the Commissioner was enjoined to determine[2]. It is trite that the review test enunciated in *Sidumo* does not find application where a review concerns a jurisdictional finding made by a Commissioner, and that the applicable test is that of correctness, and not reasonableness[3].

[24] In review proceedings therefore, this Court must determine whether the Commissioner's conclusions were right or wrong in finding that the applicant was not dismissed, and that the termination of his services were as a consequence of voluntarily entering into a separation agreement with Bokoni. The enquiry is not whether the finding that the applicant was not dismissed was justifiable, rational or reasonable, nor is it whether the conclusions reached by the Commissioner fall within a band of reasonableness[4]. As further stated in *HC Heat Exchangers (Pty) Ltd v Araujo and Others*[5];

'...where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction on its own accord... In doing so, the Labour Court determines the issue de novo in order to decide whether the determination by the arbitrator is right or wrong'.

[25] It is further appreciated as was stated in *Jonsson Uniform Solutions (Pty) Ltd v Brown and Others*[6] that we have a bifurcated review standard viz reasonableness and correctness, and that there will be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied. In instances however, where the fact of the dismissal is not proven, and thus the Commissioner lacked jurisdiction, on the application of the correctness test, if it is found that the Commissioner was correct, that ought to be the end of the matter. However where the Commissioner had found that a dismissal was established, and had on the facts found that such a dismissal was for some reason unfair, the test of reasonableness will find application.

Evaluation:

- [26] It was submitted on behalf of Bokoni that the applicant had posited the reasonableness rather the correctness test in seeking a review, and that this was fatal to the entire application. In my view however, even if the applicant's approach may incorrect (which it was denied in the supplementary written heads of argument), it is doubted that this could be fatal to the entire review application in that in any event, it is still the task of this Court to pronounce on the issue of jurisdiction de novo.
- [27] Furthermore, it is apparent from the pleadings that the applicant's grounds of review are indeed a mixed bag, as he relied on the grounds set out in section 145 of the LRA, or 'unjustifiability' and 'incorrectness', in contending that by finding that he was not dismissed in the light of the severance agreement, the Commissioner committed a gross irregularity.
- [28] In regard to the evidence that was placed before the Commissioner, it is common cause that the applicant had signed the separation agreement. The relevant clauses of the agreement are;

'2. AGREEMENT

2.1 Pursuant to the discussions, the Company and the Employee hereby

agree to terminate the employment relationship between them on terms and conditions set out herein. The Employee has agreed to accept a separation package (Severance Package). It is also noted that the termination of the employment relationship is by mutual agreement and that it will be processed internally as a retrenchment or early retirement with the termination date being 21 July 2017 (the Termination Date)

7. FULL AND FINAL SETTLEMENT

7.1 The nett payment to the Employee made after all statutory required

deductions, in terms of clause 3 above, incorporates all payments due to the Employee. This Agreement constitutes the full and final settlement of any and all claims which the Employee may have against the Company in relation to the termination of the Employee's employment with the company, whether such claims arise ex contractu, ex delicto or from any statutory provision.

7.2 The Employee acknowledges and agrees that the termination of his/her

employment does not constitute a dismissal, constructive dismissal, automatically unfair dismissal, or a residual unfair labour practice as defined in the LRA'

- [29] The Labour Appeal Court stated in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another*[7] that contractual principles apply to any agreement entered into between an employer and employee, including an agreement of compromise in terms of which parties agree to settle any dispute, or claims, that may exist between them.

[30] The basis upon which separation agreements may be set aside include evidence on a balance of probabilities of extraneous factors such as duress, coercion, unconscionability, misrepresentation, fraud or mistake, that can be said to have induced a party into entering such agreements. It was again stated in Gbenga-Oluwatoye that;

‘A contract may be vitiated by duress where “intimidation or improper pressure renders the consent of the party subjected to duress no true consent”. Compulsion may be exercised by way of physical force, or indirectly, by way of a threat of harm. In order to obtain an order setting aside a contract on the grounds of duress, actual violence or reasonable fear must be shown. The fear must be caused by the threat of some “considerable evil” to the person concerned, or to his, or her, family. The threat or intimidation must be unlawful, or contra bonos mores and the moral pressure used must have caused damage. The burden of proving the existence of duress rests on the party raising it’[8] (citations omitted)

[31] The principle of caveat subscriptor is equally applicable to such agreements insofar as they are entered into in full and final settlement of disputes/claims, with an express limitation having been agreed to regarding redress being obtained from either the CCMA, or the courts regarding the matter, and further flowing from the intention of the parties, which can be gleaned from the language of the agreement in its context[9].

[32] Applying the above legal principles to the facts of this case, a point needs to be made that the facts of this case and the versions of the applicant and Masondo are indeed extraordinary. In my view, this review application ought to be disposed of purely on their versions without more, in determining whether the applicant had discharged the onus placed on him under section 192(1) of the LRA to prove a dismissal, or that indeed he was coerced into signing the separation agreement.

[33] In this case, there can be no doubt that the applicant was a highly senior, and might I add, a sophisticated employee who was a General Manager at Bokoni, and who was or ought to have been aware of his rights. Masondo is equally senior as Engineering Manager, and there can be no doubt that he is equally sophisticated. Both of them were then confronted with separation agreements and informed that flowing from a forensic investigation, there were allegations of corruption or misconduct against them. Bokoni’s witnesses had refuted any mention of both of them being taken to jail, and had testified that all that Pillay had said was that the investigations could lead to criminal charges against them. It is not in dispute that various options were made available to them, including a suspension, a disciplinary enquiry or the separation agreement.

[34] What is therefore extraordinary is that without having established what those allegations against him were, and clearly being fully aware of his rights, the applicant then put pen to paper, on a document which he alleges not to have read and digested. In my view, the Commissioner was correct in concluding that; ‘An employee who is innocent can always say I will keep my job, face the disciplinary hearing and the criminal charges in order to prove my innocence. If and when an employee decides to leave because of fear that the employer

can later prove the charges in the disciplinary hearing and in the criminal court and that would be disastrous for the employee and it cannot be said he was forced out (Sic)'[10] The Commissioner cannot in my view have expressed this in more simpler terms than these.

- [35] It therefore follows that even if it were to be accepted that the applicant was not given sufficient time to think about the matter, or informed of possible criminal prosecutions, this was even more cause not to put pen to paper, especially since he did not know what the nature of the allegations against him were. The applicant's version surrounding being subjected to intimidation, coercion or duress is clearly red herring in the context of the options available to him. The applicant's version that Zembe was there with them as a security official as a measure of coercing him into signing the agreement is equally red herring. Zembe's testimony, which was supported by Reddy was that after Pillay had left the meeting room, the applicant had told them to also leave and give them space whilst they went through the agreement. Zembe and the others had then left the room, and in these circumstances, I fail to appreciate how the applicant could have been prevented from using his mobile phone to call anyone, including the Police or his legal representatives, especially given his contention that he felt under threat and was being held hostage.
- [36] I also fail to appreciate how the applicant can be said to have been subjected to duress, coercion, intimidation or improper pressure when the evidence did not point to any exercise of physical force, whether directly or indirectly. Any apprehension of fear claimed by the applicant to him or his family arising from being told of the possibility of criminal charges is clearly imagined and far-fetched. The Commissioner was correct in pointing out that the mere fact that threats were made by Pillay that the alleged misconduct in question could be criminally investigated could not have induced the applicant to sign the agreement. Any sophisticated and highly senior employee in the position of the applicant in the same position confronted with a similar situation would have called the employer bluff, invited the employer to suspend him and subject him to a disciplinary enquiry, refused to sign the agreement, and face and answer any allegations against him at the disciplinary enquiry. This would have been so, unless of course the applicant knew that there might be merit in the mere mention of allegations of corruption or misconduct against him.
- [37] In the end, this review application can be disposed of based on the remarks made by the Constitutional Court in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*[11] as follows;

'[23] ... It was then that he (Employee) entered into a final agreement to put a present dispute to bed. He did so full knowingly, with his eyes open to his own future interests. It may have been different if he had agreed to abjure recourse to the courts in future disputes. But here the dispute was hot and fresh, and present. He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably. That finality included an agreement that the courts would not be involved. The parties would go their ways without more.

[24] The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.'

[38] In the light of the above, it follows that the Commissioner's finding that the applicant was not dismissed, but that he had voluntarily signed a binding separation agreement is unassailable, as it was correct in the light of the evidence that was placed before him. That conclusion, contrary to the submissions made on behalf of the applicant, was not self-standing, in that it was based on all the evidence that was based before him regarding whether he was coerced into signing the agreement or not. To the extent that the Commissioner had made a conclusion that the applicant was not dismissed, that was end of the matter, as the CCMA

lacked jurisdiction.

[39] The applicant in his Notice of Motion also sought an order confirming the invalidity of the separation agreement that he had signed on 21 July 2017, and a declaratory that the five year fixed term contract he had entered into was valid and enforceable.

[40] The question of whether the separation agreement was invalid or not was not even decided by the Commissioner, as he had stated that he did not have jurisdiction in the first place to deal with that issue. In any event, even if it was an issue that was referred for arbitration, once the Commissioner had found that there was no dismissal based on the facts placed before him, and once a finding was made that the separation agreement was voluntarily entered into, the question of its invalidity became irrelevant.

[41] Equally to be disposed of is the declaratory relief that the applicant sought. The Court's powers to grant such orders are in any event located under the provisions of section 158 of the LRA. The applicant brought this review application under the provisions of section 145 of the LRA, and the mere fact that further or alternative relief was sought in the Notice of Motion cannot be extended to matters not properly pleaded. In any event, and in the light of the conclusions reached above, the validity and enforceability of the year fixed term contract he had entered into became academic.

[42] It follows in the light of the above conclusions that the applicant's application ought to fail. Furthermore, having had regard to the requirements of law and fairness, and the facts and circumstances of this case, it is deemed appropriate that the applicant be burdened with the costs of this application. Accordingly, the following order is made;

Order:

1. The application to review and set aside the arbitration award issued by the Second Respondent on 9 April 2018 under case number LP6168-17 is dismissed with costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:

Pheelo Dikane INC Attorneys.

For the Third Respondent: Shepstone & Wylie Attorneys. Heads of arguments drafted by Adv. L Hollander

[1] Act 66 of 1995, as amended

[2] See *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others* (2013) 34 ILJ 1427 (LAC) at para 24, where it was held; ‘Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 ILJ 2218 (LAC) [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)(b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.’

[2] See *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others* (2013) 34 ILJ 1427 (LAC) at para 24, where it was held;

‘Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 ILJ 2218 (LAC) [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)(b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.’

- [3] See authorities referred to by the Third Respondent, viz Enforce Security Group v Fikile & others
- (2017) 38 ILJ 1041 (LAC); Eskom Holdings SOC Ltd v National Union of Mineworkers on behalf of Coetzee and others
- (2018) 39 ILJ (LC); Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others
- (2018) 39 ILJ 903 (LC). And also Jonsson Uniform Solutions PTY LTD v Lynette Brown and others (DA10/2012)
- [2014] ZALCJHB 32 (13 February 2014), where it was held; “[33] The generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness.” The test for reasonableness of a decision was stated in Sidumo and another v Rustenburg Platinum Mines LTD and others as follows: “Is the decision reached by the commissioner one that a reasonable decision maker could not reach”.
- [34] In assessing whether the CCMA or Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse an objective fact to determine whether the CCMA or bargaining council had the necessary jurisdiction to entertain the dispute. See SARPA v SA Rugby PTY LTD and others; SA Rugby PTY LTD v SARPU. [35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied. [36] It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied...”(All citations omitted)
- [3] See authorities referred to by the Third Respondent, viz Enforce Security Group v Fikile & others
- (2017) 38 ILJ 1041 (LAC); Eskom Holdings SOC Ltd v National Union of Mineworkers on behalf of Coetzee and others
- (2018) 39 ILJ (LC); Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others
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- [35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.
- [36] It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied...”(All citations omitted)
- [4] See SA Rugby (Pty) Ltd v SA Rugby Player' Association and Another at para 41; Kukard v GKD Delkor (Pty) Ltd (2015) 36 ILJ 640 (LAC) at para 12 footnote 2.

[5]

- [2007] ZALC 72; [2020] 3 BLLR 280 (LC) at paras 35 to 39. See also Ukweza Holdings (Pty) Ltd v Nyondo and Others [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC) at para 12, where it was held; ‘The appellant is correct. When it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively

justifiable grounds. The test is that of correctness and not one of reasonableness...’

[5]

[2007] ZALC 72; [2020] 3 BLLR 280 (LC) at paras 35 to 39. See also *Ukweza Holdings (Pty) Ltd v Nyondo and Others* [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC) at para 12, where it was held;

‘The appellant is correct. When it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively

justifiable grounds. The test is that of correctness and not one of reasonableness...’

[6] *Supra* fn 1

[7] (JA95/2014)

[2016] ZALAC 4; (2016) 37 ILJ 902 (LAC); [2016] 5 BLLR 425 (LAC)

[8] At para 15. See also *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305 – 306C as referred to on behalf of the applicant

[9] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* at para 26. See also *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at p472, where the principle of caveat subscriptor was described as follows; ‘When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. In cases of the type of which the three I have mentioned are examples, the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent...’.

[9] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* at para 26. See also *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at p472, where the principle of caveat subscriptor was described as follows;

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[10] At para 46 of the Arbitration award.

[11] (CCT41/16)

[2016] ZACC 33; (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC);

[2017] 1 BLLR 1 (CC)

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