

SOUTH AFRICA / JUDGMENT

Muridzo v Dispute Resolution Centre (MIBCO) and Others (C535/2021) [2024] ZALCCT 35 (12 July 2024) [2024] ZALCCT 35

COURT

Labour Court Cape Town

BEFORE

C de Kock

CASE / FILE NUMBER

C535/2021

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

AT CAPE TOWN

Not

reportable

Case no: C535/2021

In

the matter between:

CEPHAS

MURIDZO

Applicant

And

DISPUTE

RESOLUTION CENTRE (MIBCO)

First Respondent

SEAN

GOLDSCHMIDT N.O.

Second Respondent

ARMS

OBO WILKEN PETRUS ANDRIES HENIQUE

T/A

ZOO PARK MOTORS

Third Respondent

Heard:	2 July 2024 Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be on 12 July 2024
Summary:	application to review – correctness test – found that applicant discharged the onus to prove that he was dismissed – award reviewed and set aside - dismissal unfair both substantively and procedurally – maximum compensation awarded.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by the applicant (hereafter referred to as “Muridzo”) to review and set aside an arbitration award given by the second respondent (hereafter referred to as “Goldschmidt”) in his capacity as a panellist of the Dispute Resolution Centre (hereafter referred to as “MIBCO”). The application has been brought in terms of section 145 of the Labour Relations Act[1] (‘the LRA’).
- [2] The matter arose from the alleged dismissal of Muridzo. The dispute was initially arbitrated on 18 June 2018 and on 20 August
2018. The commissioner, in an award dated 28 August 2018, found that Muridzo failed to prove that he was suspended and dismissed the matter. Muridzo then successfully reviewed the award in the Labour Court. Rabkin-Naicker J delivered judgment on 23 April 2021 wherein the award was reviewed and remitted the matter back to MIBCO for a re-hearing. The matter was then allocated to Goldschmidt and the arbitration proceedings took place on 10 August 2021. Goldschmidt, following the conclusion of the arbitration proceedings, issued an award dated 23 August 2021 wherein he found that Muridzo was not dismissed. It is this determination that gave rise to the current review application.
- [3] The parties agreed that the review application is properly before me, and no jurisdictional issues were raised. The opposed review application was heard on 2 July 2024.

The relevant background

- [4] Muridzo had seven years’ service with the third respondent (hereafter referred to as “Zoo Park Motors”). He was employed as a cashier. Muridzo claims that he was dismissed on 7 March 2018 when he was ordered to leave the premises.

- [5] Muridzo initially claimed that he was either unfairly suspended or dismissed. The Labour Court however found that the commissioner

failed to identify the nature of the dispute, as he did not seek to discover whether the employment relationship had terminated or not. The matter was remitted for a decision to be made regarding whether the employment relationship had terminated or not.

The MIBCO award

- [6] Goldschmidt found that evidence was presented that a message was sent on the WhatsApp group enquiring about Muridzo's whereabouts, and that other employees were continuously asked about his whereabouts. Muridzo disputed this evidence, but Goldschmidt found that this evidence was supported by more than one witness. It was also noted that this was the main form of communication with employees. Goldschmidt therefore found on a balance of probabilities that there was an attempt to contact Muridzo via WhatsApp, and that there were enquires about his whereabouts. This accordingly to Goldschmidt, is not the actions of an employer after an employee is dismissed.
- [7] Goldschmidt noted that, arguably, Zoo Park Motors could possibly have done more to enquire and find out where Muridzo was. It was however found that it was Muridzo's responsibility to report for work and that it would have made sense for Muridzo to follow-up with Zoo Park Motors to confirm whether indeed he had been dismissed.
- [8] Goldschmidt found further that the fact that Muridzo was sent home cannot be confirmation that he was dismissed. The fact that the words "off" next to his name on the roster for the following week indicates that there was either an issue, or that he was given the week off. Either way, it does not confirm a dismissal. Goldschmidt asks, if he was dismissed, surely Muridzo's name would have been taken off the roster. Goldschmidt states further that Wilken explained his thinking on not placing Muridzo on the roster, which thinking was indirectly supported by Muridzo who confirmed that he requested to be off because he was so upset by the provident fund issue.
- [9] Goldschmidt refers to the evidence that Muridzo's name continued to appear on the roster for the next two months, and that this is not the action of an employer that had dismissed someone. He referred to evidence that was presented that paperwork accompanies any suspension or dismissal, and that when an employee is dismissed or suspended their names come off the roster. This was not done in the case of Muridzo, and this suggests that Muridzo was not dismissed.
- [10] Goldschmidt found that he did not have evidence to support Muridzo's contention that he was dismissed because of Zoo Park Motors' reluctance or refusal to register him for the provident fund.
- [11] Goldschmidt therefore found that Mauridzo has failed, on a balance of probabilities, to discharge the onus to show that he was dismissed.

The test for review (existence of a dismissal)

[12] The review test applicable in matters where the existence of a dismissal is in dispute is not the test as referred to in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, [2] where the Court held that ‘the reasonableness standard should now suffuse section 145 of the LRA’, and that the threshold

test for the reasonableness of an award was: ‘...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...[3]. In *Herholdt v Nedbank Ltd and Another*[4] the Court applied this reasonableness consideration as follows:

‘... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[13] The applicable test is the correctness test, as endorsed by the court in *SA Rugby Players’ Association (SARPA) and others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd and Another*[5]. The Labour Appeal Court per Tlaletsi JA, held that where jurisdiction is in issue, the test to apply is the following:

“39. The issue that was before the arbitrator was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the LRA.

40. The CCMA is a creature of statute and is not a court of law. As a general rule it cannot, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & Others* (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependant upon any finding which the Industrial Court may make with regards to jurisdictional facts but upon their objective existence. The court held further that any conclusion to which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The Court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdictions which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter, provided it is understood that it does so for the purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon’s case the

court said:

“In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.” At 804C-D. “In my view, the same approach is applicable to the CCMA”.

[14] It was held in *Limpopo Legislature v Gumani Robert Matodzi*[6] that:

“The correct approach in reviewing the arbitrators ruling on the jurisdictional issue is whether or not the arbitrator was right or wrong in deciding if a dismissal took place not whether the arbitrator’s finding was one that no reasonable arbitrator could reach.”

[15] I will now proceed to consider the review application by Muridzo against the above principles and test applicable to review

applications concerning jurisdiction.

Grounds of review

[16] The first ground of review is that Muridzo has no knowledge of Zoo Park Motors having submitted their closing arguments, whether

verbally or written submissions, whether it was submitted on time or even submitted at all. It is alleged that this remains a closely

guarded secret between Goldschmidt and Zoo Park Motors.

[17] Muridzo’s second challenge is Goldschmidt having entertained and accepted testimony that his name continued on the duty roster for about 2 months. Muridzo states that it was important for a commissioner with a balanced view of the matter to check the facts first. The matter of an alleged unfair suspension was opened at MIBCO on 20 March 2018, and notification of this case was served on Zoo Park Motors on 21 March 2018. Notification of con/arb was sent to the parties on 2 April 2018. All parties attended the con/arb on 17 March 2018 (should read 17 April 2018). Muridzo then asks how it is possible for Goldschmidt to agree that Zoo Park Motors had no knowledge of his whereabouts. This is a complete biased analysis of facts and matter before Goldschmidt.

[18] Muridzo states further that Wilken admitted, on record, that he removed Muridzo on duty on 7 March 2018 for safety reasons. The question that is asked whether this is fair considering that Muridzo posed no threat to anyone at any given time.

[19] Muridzo takes issue with Goldschmidt’s acceptance of Wilken’s evidence that he has no reason not to register foreign nationals for provident fund, when the evidence shows the contrary. This is the centre of the whole dispute.

- [20] Muridzo also takes issue with Goldschmidt's finding that there is always paperwork during suspensions/dismissals, and he then questions where his paperwork is. Muridzo states that he was finally dismissed for absconding according to Zoo Park Motors, but despite asking for proof of absconding, none was provided. There was never a hearing for his absconding, as he was removed from duty for insisting that provident fund is a right.
- [21] Muridzo takes issue with Goldschmidt's decision that it was expected for him to go back to Wilken for clarity, when it was clear that they do not register foreigners for provident fund.
- [22] Muridzo also challenges the finding that WhatsApp was the means of communication, and he asks where the policy in this regard is, and when the WhatsApp group was created.

Analysis

of the grounds of review

- [23] The correct test, as referred to above, is the correctness test. The question that must be asked and answered is whether Muridzo

discharged the onus to prove that he was dismissed. This court is therefore not required to determine whether Goldschmidt's

finding that Muridzo failed to discharge the onus is one that a reasonable decision maker could not reach. This court is required to decide, based on the evidence presented, whether Muridzo discharged the onus that he was dismissed and whether Goldschmidt's award was correct.

- [24] The evidence shows that the issue that led to the disagreement between the parties is Zoo Park Motors' failure to register

Muridzo for provident fund based on the absence of a work permit. I find it quite concerning that Zoo Park Motors refused to register

Muridzo for provident fund, as they were allegedly not in possession of a work permit. If this was indeed true, why did Zoo Park Motors employ Muridzo for some 7 years whilst they were not in possession of a valid work permit. On a balance of probabilities, Muridzo's version that Zoo Park Motors was in possession of his permit, which allowed him to work, must be accepted as the most probable version. Muridzo's evidence was that when Wilken wanted to open his file, he was stopped by his father. The only other probability is that Zoo Park Motors illegally employed Muridzo, as a foreigner without ensuring that he was in possession of a valid work permit.

- [25] Muridzo testified that he was angry about Zoo Park Motors' refusal to register him for provident fund. This anger led to him not reporting for work on Monday, 5 March 2018. He did however come into the office to meet the owner and the manager at 14h00. Muridzo was informed during this meeting that Zoo Park Motors will not register foreigners for provident fund. Muridzo, after this meeting, communicated his unhappiness with the Department of Labour. Zoo Park Motors did not dispute that the meeting took place on Monday, 5 March 2018.

- [26] Muridzo did not report for duty at the commencement of his shift on Tuesday, 7 March 2018. He testified that he did however communicate with Wilken via WhatsApp, and asked whether he should come in to work, as he was only 30 minutes away from work. The undisputed evidence is that Wilken told him to come to work on Wednesday, 7 March 2018. Although the WhatsApp messages between Wilken and Muridzo were not disputed, neither party presented the WhatsApp messages as evidence. This is despite the fact that Wilken said he would present it. No evidence was presented that Muridzo was instructed to report for work at a specific time on 7 March 2018 and only for purposes of submitting his work permit.
- [27] Muridzo then reported for duty on Wednesday, 7 March 2018 at 05h30am. He performed his duties until around 07h00am when Wilken called him to the office. This version was not disputed. Muridzo's evidence was that Wilken was upset with him, as he viewed the sudden intention of the Department of Home Affairs to visit companies as coincidental following the concerns expressed by Muridzo.
- [28] What happened next during this meeting is in dispute. Muridzo's version was that Wilken ordered him to leave the premises, which he did. Wilken's evidence was that he asked Muridzo to leave the premises, as Muridzo was angry. Wilken's further evidence was that he told Muridzo to return to work on Friday, 9 March 2018 at 12h00 and that he must return with his work permit. Muridzo denied that he was instructed to return to work on the Friday.
- [29] I find Wilken's evidence that he instructed Muridzo to return to work on Friday at 12h00 improbable and not supported by the evidence. Muridzo's evidence was that his permit, which allowed him to work, was in the file in the office. I find it highly improbable that Muridzo would not have returned to work on the Friday, as allegedly instructed, if all he was required to do, to be registered for provident fund, was to bring in a copy of his work permit. This would have resolved his unhappiness with Zoo Park Motors' failure, or refusal to register him for provident fund. In any event, Muridzo did not require a work permit when he was granted asylum.
- [30] Muridzo in fact testified and gave context to the discussion that was held between him and Wilken on 7 March 2018. He testified that Wilken informed him that the Department of Home Affairs would probably visit Zoo Park Motors' premises on Thursday, 8 March 2018, or Friday, 9 March 2018. Wilken asked him to tell the Department, when they visit the premises, that Muridzo was the only Zimbabwean working there. Muridzo responded by asking whether this is not too much to ask, as he was requested to lie to the Department of Home Affairs. After having said this, Wilken became angry, he was bitter, and he ordered Muridzo to leave 'then you must go home'. Muridzo's evidence in this regard was not denied during cross-examination, nor during Wilken's evidence. The record shows Wilken's response as follows:

"Okay, now or you say on Wednesday all of these things about Home Affairs and all of that but did you not, did I not talk to you on Wednesday."

It is clear from this response that Muridzo's evidence that he refused to lie, and which led to Wilken getting angry, was never disputed.

- [31] Wilken released the roster for the next working week, starting from Thursday, 8 March 2018, on Wednesday, 7 March 2018. It must be accepted that the roster was released after Muridzo was ordered to leave the premises. If Muridzo was indeed instructed to return on Friday at 12h00, why was he marked as "off" for the full week ending on Wednesday the following week. Another question is why he was not informed to return the following day, i.e. 8 March 2018 and to bring his work permit so that the whole saga surrounding the provident fund could be resolved.
- [32] Wilken's explanation was that he normally conducts his hearings on Fridays at 12h00. Why was there a need for Muridzo to attend at a time when hearings are normally held when all that was required was for Muridzo to return with a work permit to allow Zoo Park Motors to register him for provident fund and put an end to the provident fund saga.
- [33] Wilken's version is even more improbable when one considers his failure to directly communicate with Muridzo, as he did on Tuesday, 6 March 2018 via WhatsApp. One would surely expect that he would have done so if there was a clear instruction for Muridzo to return on Friday, 9 March 2018, and Muridzo failed to report for duty. Instead, there was no direct communication with Muridzo whatsoever. I do not accept the evidence presented that employees were asked whether they knew the whereabouts of Muridzo, and that WhatsApp messages were sent on a WhatsApp group. These messages were not presented as evidence. And even if such messages were sent, Zoo Park Motors knew Muridzo's place of residence, and no effort was made to visit Muridzo's house to determine his whereabouts despite Silalha (supervisor) testifying that he knew where Muridzo stays. I also found the evidence of the witnesses called by Zoo Park Motors to be contradictory. This court is unable to place any reliance on their evidence as confirmation that proper enquiries were made to find out why Muridzo did not report for work.
- [34] Muridzo was marked as "off" on the roster commencing 8 March 2018 until Wednesday, 15 March 2018. The roster was not disputed. Muridzo can therefore not be blamed for not reporting for duty after 9 March 2018, as he was clearly not required to report for duty. It is unreasonable under these circumstances to expect Muridzo to contact Zoo Park Motors, and to place any burden on him to do so. The burden to advise Muridzo to return to work, during this week, rested with Zoo Park Motors. This is especially so given the alleged instruction to Muridzo that he must return to work on 9 March 2018 at 12h00, and the fact that Muridzo was marked as "off" on the roster.
- [35] Insofar as it was alleged that Muridzo absconded from work during the period 8 March 2018 to 15 March 2018, this cannot be if one considers the roster for the week of 8 March 2018 to 15 March 2018. An employee cannot be regarded as having absconded when he was rostered as "off". To make things worse for Zoo Park Motors, they then issued further rosters from the second week onwards which, although having Muridzo's name on it, the shifts that Muridzo

was required to work were not identified. Insofar as reliance was placed on these further rosters to disprove the existence of a dismissal, I reject the evidence. Zoo Park Motors became aware that Muridzo referred a dispute to MIBCO after two weeks, alleging that he was either dismissed or unfairly

suspended. Despite the referral, and the further processes by MIBCO, Muridzo was still retained on the roster. There was a live dispute whether Muridzo was suspended or dismissed. The reliance on the further rosters containing Muridzo's name to disprove the existence of a dismissal is without merit.

- [36] Muridzo also testified, which evidence was not disputed, that Zoo Park Motors agreed at MIBCO that Muridzo could return to work, but as a new employee and that he will have to start working in the forecourt and work his way up. The relevance of this evidence is that Zoo Park Motors was aware of the dispute and that they were aware that Muridzo did not leave for Zimbabwe. Despite this knowledge, Zoo Park Motors failed to call Muridzo to a disciplinary hearing regarding his alleged absconding from work and simply allowed the MIBCO process to proceed to arbitration.
- [37] Muridzo also testified that, despite being marked as "off" on the roster, Zoo Park Motors failed to pay him for the week that he was rostered as "off". He also testified that he was not paid for the one and a half hours that he worked on the morning of 7 March 2018 before being called into the office.
- [38] When there are two contradictory versions regarding the existence of a dismissal, a finding must be made on the credibility of the witnesses and on the probabilities of the two versions to determine where the truth lies. The balance of probabilities in this matter clearly favours the version of Muridzo. Insofar as credibility is concerned, Muridzo's testimony, on the record, remained consistent throughout his evidence. His evidence is supported by the probabilities that he was never instructed to return to work on Friday, 9 March 2018 and that he never absconded.
- [39] I am therefore satisfied that the only conclusion that can be reached from the evidence presented is that Wilken's actions in ordering Muridzo to leave the premises on 7 March 2018 constituted a dismissal as envisaged in section 186(1)(a). Muridzo therefore discharged the onus of proving that he was dismissed, and Goldschmidt's award was clearly incorrect.
- [40] Having discharged the onus to prove that there was a dismissal, I am required to consider whether this court is in a position to determine whether the dismissal was fair both substantively and procedurally. I have taken into consideration that the dismissal was more than 6 years ago following two successful reviews having been brought by Muridzo. The delay is most unfortunate.

[41] Be that as it may, having perused the transcribed record it is clear that Goldschmidt informed the parties that the question that he must decide is whether Muridzo was dismissed, and if so whether the dismissal was fair or unfair. Both parties were therefore afforded a fair opportunity to present their respective evidence regarding the fairness of the dismissal in the event that it was found that there was a dismissal. Goldschmidt at no stage advised the parties that the arbitration will be split in two processes where he will first determine the existence of a dismissal and if there was a dismissal, for the parties to return on a different date to address the fairness of the dismissal. It will therefore serve no purpose to refer this matter back to MIBCO.

[42] Given the manner in which Muridzo was dismissed, there can be no doubts that his dismissal was both substantively and procedurally

unfair. No procedures were followed. Muridzo was simply ordered to leave the premises. There was further no fair substantive reason for the dismissal. Muridzo raised a very important issue regarding Zoo Park Motors' failure to register him for provident fund, and this is the very same reason that led to his dismissal. An employee cannot be dismissed for enquiring and insisting on his rights. An employee cannot be dismissed for refusing to lie to the Department of Home Affairs. And lastly, an employee cannot be dismissed for being angry about an employer's refusal to register him for provident fund. Muridzo's dismissal was clearly substantively unfair as well.

[43] Muridzo did not seek reinstatement. I must therefore decide whether compensation should be awarded, and the quantum. I see no reason why Muridzo should not be awarded the maximum compensation allowed for in terms of section 194(1) of the LRA. It took Muridzo more than 6 years, and two successful reviews in the Labour Court to enforce his right not to be unfairly dismissed.

Conclusion

[44] Muridzo discharged the onus of proving that he was dismissed. The dismissal was unfair both substantively and procedurally, and Muridzo is entitled to maximum compensation of 12 months' salary.

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

Order

1. The award is reviewed and set aside.
2. The Third respondent is ordered to pay to the Applicant 12 months' compensation in the amount of R103,488.84 (R8,624.07 per month x 12 months).
3. The payment in 1 above must be made to the Applicant within 14 days of the date that this judgment is delivered.
4. There is no order as to costs.

C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

In Person

For the Respondents:

E Vermeulen (ARMS)

[1] Act 66 of 1995 (as amended).

[2]

(2007) 28 ILJ 2405 (CC).

[3] Id at para 110.

[4]

(2013) 34 ILJ 2795 (SCA) at para 25.

[5]

[2008] ZALAC 3; [2008] 9 BLLR 845 (LAC)

[6] Unreported decision. Case number: JR2530/14

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