

SOUTH AFRICA / JUDGMENT

Ndlovu v Safety and Security Sectoral Bargaining Council (JR1052/20)

[2024] ZALCJHB 207 (13 May 2024)

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COURT

Labour Court Johannesburg

BEFORE

L Steenkamp

CASE / FILE NUMBER

JR1052/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1052-20

In the matter between:

NDLOVU, R
J Applicant
and
SAFETY AND SECURITY
SECTORAL
BARGAINING
COUNCIL First
Respondent
COMMISSIONER L NAIDOO
N.O. Second
Respondent
SOUTH AFRICAN POLICE
SERVICE
Third Respondent
MINISTER OF
POLICE Fourth
Respondent

Heard: 09 January 2024
Delivered: 13 May 2024
This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date of hand-down is deemed to be 13 May 2024.

JUDGMENT

STEENKAMP AJ

Introduction

- [1] The Second Respondent issued an arbitration award dated 23 June 2020 in terms of which it was found that the dismissal of the Applicant was substantively fair, but procedurally unfair. The Second Respondent ordered the Third Respondent to compensate the Applicant in the amount of R 57 000-00 being the equivalent to three months' remuneration for the procedural unfairness of his dismissal, to be paid by no later than Friday, 28 August 2020 (Award).
- [2] The Applicant launched this application to review and set aside the Award on or about 10 August 2020. In his notice of motion, the Applicant sought the review and setting aside of the Award; an order determining that the dismissal of the Applicant was substantively unfair, reinstatement of the Applicant from date of dismissal being 23 May 2017; alternatively, remission of the dispute to the First Respondent for a hearing de novo before an arbitrator other than the Second Respondent and condonation for the late filing of the review application.
- [3] I granted an order condoning the lateness of the review application on date of hearing.
- [4] The procedural unfairness of the Applicant's dismissal is not assailed in the application for review, and I will consequently not deal with the procedural aspects of the Applicant's dismissal, as I do not intend to interfere with that finding.

Background facts

- [5] The Applicant was employed on or about 27 February 2012 at the Silverton Garage of the SAPS as an artisan. An incident took place on 3 February 2017 which culminated in the dismissal of the Applicant on 23 May 2017.
- [6] Briefly, the Applicant was alleged to have been found inside the SAPS pound on the evening of 3 February 2017, when the premises was off limits. The witnesses for the Respondent testified that the Applicant was found inside the pound where four mag wheels with tyres had been removed from a VW Microbus parked inside. The tyres were placed a short

distance away from the vehicle and the Applicant was in possession of some tools which could have been used to remove tyres. He (the Applicant) admitted to the arresting officers that he stole four wheels and pointed out the vehicle and the tyres. He also pointed out a hole in the perimeter fence from where he gained access to the inside of the pound. He apologised for his actions, stating that he needed to supplement his

income by selling tyres.

- [7] The Applicant testified that he had trouble with his vehicle on 3 February 2017. He pushed the vehicle to the barracks where there was light, and he was trying to fix his vehicle. He then went to fetch his spanners, which was on the side of the road when he was confronted by security personnel and accused of stealing. He also testified that he was then forced to go through the hole in

the fence to go inside the pound, and he denied having pointed out the hole.

- [8] The Second Respondent asked questions for clarification, and the Applicant testified in response thereto that he lived approximately 15 km from his workplace. It would have taken him about an hour to go home. He was busy fixing his car until approximately 20h00, and he realised that there was a “major” problem with his vehicle at about 16h00. He did not ask for help or inform anyone that he needed transport. He replied that he did not make contact with anyone as he could manage himself, and the vehicle

was still driveable.

- [9] The Applicant was charged with misconduct and was subjected to an expeditious process in terms of Regulation 9 of the SAPS Disciplinary

Regulations[1].

- [10] Brigadier Magagula was the appointed designated officer who conducted the expeditious process. It is alleged that the Applicant admitted to her that he stole the tyres as alleged in the charge sheet as he had financial challenges, he needed money and he gained access to the restricted area via the hole in the fence. Brigadier Magagula found the Applicant guilty of the charges and imposed a sanction of dismissal.

- [11] The Applicant referred an unfair dismissal dispute to the First Respondent, and after unsuccessful conciliation, the dispute was referred for arbitration. The arbitration took commenced on 06 July 2018 and continued on 19, 20 and 21 September 2018, 7 November 2018, 27 March 2019 and 12 June 2020.

- [12] On 23 June 2020, the Second Respondent issued the Award, which is the subject of this review application. As already mentioned hereinabove, only the finding of substantive fairness is assailed in the review application, and accordingly only substantive fairness will be dealt with on review.

Grounds of review:

[13] The Applicant applied to this Court to review and set aside the Award, essentially on the following grounds:

13.1 The Second Respondent committed a gross irregularity when she concluded that the Applicant is guilty of theft;

13.2 The Second Respondent failed to apply her mind to the issues before her;

13.3

The Second Respondent failed to determine the material facts before her and to apply the provisions of the Labour Relations Act[2] (LRA) to those facts in answering whether the dismissal was fair or not;

13.4 The Second Respondent failed to conduct a fair trial of the issues; and

13.5

Whether there are any latent irregularities committed by the Second Respondent[3].

[14] The Applicant supplemented the grounds of review in his affidavit in terms of Rule 7A(8)(a), and contended that the Award is reviewable on the following supplementary grounds, which can be summarised as follows:

14.1 The Second Respondent committed a gross irregularity when she concluded that the second witness for the Third Respondent was consistent in her version which was corroborated the first, third, fourth and fifth witnesses for the Third Respondent;

14.2. The Second Respondent was satisfied that the Applicant intended to deprive the Third Respondent of possession of the tyres because he admitted to four witnesses who testified as such, that he was there [at the pound] to remove tyres; and

14.3. She failed to apply her mind in that there were material contradictions in the evidence for the Third Respondent and there were numerous improbabilities.

[15] The Applicant unpacked these grounds of review further with reference to various parts of the transcript.

[16] The Third Respondent opposed the review application essentially on the basis that the Second Respondent analysed and considered all the evidence placed before her; the conclusions reached by her is reasonable and rational, it constitutes a decision that a reasonable decision-maker faced with the same facts would reasonably arrive at; the standard of proof was correctly applied on a balance of probabilities to the facts; the record of the arbitration does not support the ground of review that there were material contradictions between oral testimony and witness statements in the criminal proceedings; the Applicant has conflated a review and

appeal process in his review application; no irregularity arose due to the failure of the Third Respondent to call a witness to

demonstrate that the trust relationship has broken down; the Applicant has not advanced grounds which demonstrate that there were

flaws in reasoning by the Second Respondent. Finally, the Third Respondent submits that the Award is well reasoned and is supported

by the evidence. The upshot thereof is an Award that is reasonable and rationally connected to the facts.

Legal Framework

[17] It is trite that the test on review in this Court is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach[4].

[18] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*[5], it was made clear that:

‘In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the

proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[19] It has been held that a mere failure to have regard to material facts is insufficient to set aside an award on review. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[6] the Labour Appeal Court (LAC) said the following:

‘Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts

must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork.’ (own emphasis)

[20] The LAC, in *Head of the Department of Education v Mofokeng and others*[7] stated:

‘The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues...

However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning

of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material

factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken

the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

.....The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the

nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’[8] (own emphasis)

[21] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[9], Navsa AJ (for the majority) stated that an arbitrator ought to impartially determine whether a dismissal was fair or not, taking

into account the totality of relevant circumstances, and deference to the decision of the employer is not required. Simply put, a commissioner is not required to rubberstamp the decision of the employer but should make a determination on the fairness of sanction

independently within the confines of the factual matrix.

[22] Essentially, an arbitrator is obliged to consider all admissible evidence before him or her, and to assess the probabilities thereof in coming to a conclusion on the issue of guilt. A finding by an arbitrator which is at odds with a full assessment of the evidence and a correct answer to the probabilities thereof, will more often than not be found to be unreasonable. This is particularly applicable in determining whether or not an employee was guilty of the misconduct he or she was charged with.

[23] The golden thread running through the jurisprudence on review in this Court is that an arbitrator must make a determination based

on a consideration of all the relevant facts, or an objective conspectus of all available evidence. It is not a fragmented, piecemeal evaluation of evidence, but a wholistic approach.

Analysis

[24] Theft as a disciplinary transgression is no doubt one of the most serious forms of misconduct. It is a manifestation of dishonesty. The conundrum which a disciplinary charge of “theft” often presents, is what the appropriate standard of proof is, and what the elements are that need to be proven in order to fairly dismiss an employee charged with theft.

[25] The learned author Grogan[10] opines that:

‘Theft therefore requires proof of intention to deprive the owner of use and possession and knowledge that the act was unlawful. It must also be proved that the employee committed an act by which the owner is actually deprived of possession. The necessary mental element is present if the employee was aware that the goods did not belong to him or her and the employee intended to remove the property permanently from the owner, knowing that he or she was not entitled to do so.....

The physical element of theft is proved if the employee’s act gives rise to the conclusion that the employee intended to deprive the owner of possession of the goods. Both elements need to be proved on a balance of probabilities.’

[26] I agree with his approach. As such, it is not necessary for an employer to prove theft by the standards one would expect of a criminal Court, beyond a reasonable doubt. To expect such a burden of proof from an employer would be unreasonable.

[27] What is required, is, as the author suggests, to establish that the employee was aware that the goods did not belong to him, and that he intended to deprive his employer of possession of those goods, on a balance of probabilities.

- [28] On the evidence at arbitration, it is clear that the requirements were met. Particularly in view of the fact that the Applicant admitted to some of the witnesses that he intended to remove the wheels from the yard and to sell them. The argument that it had not actually been removed and therefore “theft” was not proven fails to appreciate that there is a difference, as rightly suggested by Grogan, in how the elements of theft are established in the employment context as opposed to the criminal context.
- [29] The Applicant conflated the requirements to prove theft in the workplace with theft in criminal cases. It is perhaps due to this issue that the Applicant’s review application was more akin to an appeal. Of course, in the final analysis, I can only consider and determine genuine issues of review.
- [30] In my view, the Second Respondent undertook the correct enquiry in dealing with the misconduct that the Applicant was charged with, and her findings are not unreasonable given the totality of circumstances and the evidence at arbitration. It is clear that the Second Respondent undertook a process of inferential reasoning on the basis of all the available evidence, and the probabilities thereof. The decision taken to dismiss the Applicant is also entirely justifiable on the evidence at arbitration.[11]
- [31] Turning to the issue of sanction, in Sidumo, the Apex Court said that an arbitrating commissioner must consider the totality of circumstances in reaching a conclusion on whether or not the sanction imposed was reasonable.
- [32] More recently, in *Booi v Amathole District Municipality and Others*[12], the Constitutional Court said the following:

‘One of the main grounds of appeal in this matter relates to Mr Booi’s averment that the Labour Court, in deciding to order compensation rather than reinstatement, raised the issue of the intolerability of the continued employment relationship *mero motu*. I must say that I am wholly unpersuaded by this argument: it is perspicuous that the question, and quality, of the relationship between Mr Booi and Ms Mniki was a feature of the record, and Mr Booi himself had, at various times, alleged that it had soured. It was even the subject of oral argument before the Labour Court. It is a total stretch, then, to suggest that the Labour Court raised it out of the blue. However, even if the Labour Court did raise the issue *mero motu*, it would have been justified in doing so, as I demonstrate below.

It is trite that courts are bound by the issues that the litigating parties raise. However, a court can raise an issue *mero motu* where (i) raising it is necessary to dispose of the matter, and (ii) it is in the interests of justice to do so, which depends on the circumstances at hand.

To the extent that it can be said that the Labour Court raised the question of the intolerability of the working relationship *mero motu*, it was in the interests of justice for that Court to do so, that issue being so fundamental to the question of whether reinstatement, as a remedy, would be appropriate. In *Moodley*, the Labour Appeal Court emphasised that an arbitrator’s failure to take cognisance of section 193(2) and to consider whether reinstatement might be inappropriate

constituted a reviewable irregularity. This fortifies my view that section 193(2) requires a court to consider the intolerability of the working relationship prior to making an order of reinstatement, a position also crisply captured in Toyota:

‘Once the Labour Court or an arbitrator has found a dismissal unfair, it, she or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2). Considering both the provisions of section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).’

It cannot be said then, that just because the charges of misconduct could not be proven, the intolerability of a continued employment relationship could not still be examined.

In fact, the Labour Court would have had to have raised the issue even in the absence of any specific evidence or pleadings to that effect, as held in *Mediterranean Textile Mills*—

‘even in a situation . . . where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant to the determination of whether or not such conditions exist.’

(own underlining, footnotes omitted)

- [33] Having found that the dismissal of the Applicant was only procedurally unfair, the Second Respondent was bound by the confines of the LRA, and was precluded from ordering reinstatement of the Applicant. As such, the issue of specific evidence on the breakdown of the employment relationship does not genuinely arise in *casu*.
- [34] The Second Respondent, in my view, did not commit any reviewable irregularity by deciding not to order reinstatement of the Applicant. On the contrary, given the finding of substantive fairness, the Second Respondent correctly ordered compensation only in respect of the procedural unfairness of the Applicant’s dismissal.
- [35] The Award thus also cannot be assailed on this score.
- [36] The corollary is that the Applicant did not make out any genuine case for review of the Award. As I already alluded to hereinabove, the application was more akin to an appeal than a review in terms of section 145 of the LRA.
- [37] The Applicant did not demonstrate that the Second Respondent’s conclusion on the issue of substantive fairness was unreasonable or that it was a decision that no reasonable decision-maker could reach.

[38] Accordingly, the Award passes the test on reasonableness and all the different permutations thereof which has been crystalised out over time in the applicable jurisprudence, and the Award should not be set aside.

Conclusion

[39] In conclusion, the award falls within a band of reasonableness, the outcome is reasonable, and it does not constitute a decision that no reasonable decision-maker could reach.

[40] The Applicant has not demonstrated sufficient grounds for this Court to interfere with the award. The application for review thus stands to be dismissed.

[41] Insofar as costs are concerned, there is no rationale justifying a departure from the principles laid down in *Zungu v Premier of the Province of Kwa-Zulu Natal and others*[13], and consequently, I will not award any costs in the matter.

[42] In the premises, the following order is made:

Order

1.The review application is dismissed;

2.There is no order as to costs.

L Steenkamp

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr J M Gouws

Instructed by:

Johan Gouws Attorneys

For the Respondent: Advocate B T Moeletsi

Instructed by:

The State Attorney

[1] Regulation 9(2)(b) of the South African Police Service Discipline Regulations, 2016, promulgated under Section 24(1) of the South African Police Service Act, 38 of 1995

[2] No. 66 of 1995, as amended.

[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

- [5] 2013
- (6) SA 224 (SCA) at para 25.
- [6] (2014) 35 ILJ 943 (LAC) at 950.
- [7] (2015) 36 ILJ 2802 (LAC) at para 32.
- [8] Head of Department *supra* at paras 31 – 33.
- [9] (2007) 28 ILJ 2405 (CC) at para 78 – 79.
- [10] John Grogan : Dismissal (Juta) 3rd Edition 2017 (reprint 2019) at p. 307.
- [11] See also: SA Post Office v De Lacy and Another 2009
- (5) SA 255 (SCA) at para 35 and Minister of Safety and Security and another v Madikane and others
- (2015) 36 ILJ 1224 (LAC) at paras 44 – 46.
- [12] (2022) 43 ILJ 91 (CC) at para 34 onwards.
- [13] (2018) 39 ILJ 523 (CC) at paras 23 – 26.
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