

SOUTH AFRICA / JUDGMENT

# Shoba v Commission for Conciliation, Mediation and Arbitration and Others (JR 1047/19) [2021] ZALCJHB 161 (28 June 2021)

[2021] ZALCJHB 161

## COURT

Labour Court Johannesburg

## BEFORE

G N Moshwana

## CASE / FILE NUMBER

JR 1047/19

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## Source record

In  
the labour court of South Africa, JOHANNESBURG  
Not reportable  
case  
no: JR 1047/19  
In

|                     |                                                                                                                                                                                                                                     |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| the matter between: | ZININGI<br>SHOBA<br>Applicant<br>and<br>COMMISSION FOR<br>CONCILIATION,<br>MEDIATION<br>AND ARBITRATION<br>First Respondent<br>COMMISSIONER<br>ELSABIE HARMSE N.O.<br>Second Respondent<br>TELKOM<br>SA SOC LTD<br>Third Respondent |
| Heard:              | 10 June 2021                                                                                                                                                                                                                        |
| Delivered:          | 28 June 2021                                                                                                                                                                                                                        |

**Summary:** Opposed review – finding that Telkom SA has not committed an unfair labour practice is one that a reasonable decision maker may reach. The applicant failed to perform according to an acceptable standard and it was not an unfair conduct not to confirm her permanent appointment. A finding that the termination is not substantively and procedurally unfair is one that a reasonable decision maker may reach. Held: (1) The application for review is dismissed. Held: (2) There is no order as to costs.

## JUDGMENT

MOSHOANA, J

### Introduction

- [1] This is a review application in terms of which Ms Ziningi Shoba (Shoba) seeks to review and set aside an arbitration award in terms of which Commissioner Elsabe Harmse (Harmse) found that Shoba failed to prove that Telkom SA Soc (Telkom) has committed an unfair labour practice in relation to the provision of benefits and that the dismissal of Shoba was substantively and procedurally fair. The application is duly opposed by Telkom.

### Background

#### facts

- [2] Effective from 1 October 2016, Telkom employed Shoba as a Specialist Enterprise Risk Manager (S5) in the Enterprise Risk Management (ERM) and Compliance division of Open Serve. Shoba was employed on a six month probationary period. Weeks before the conclusion of her probationary period issues of poor performance cropped up. Instead of terminating her employment, a decision was reached by Telkom management to extend her probationary period in order for her to improve her performance. This was after a performance assessment which indicated that the required achievement was not met. Shoba was not happy with the assessment score given to her by her supervisor, Kgoele. This of course soured the relationship between Shoba and Kgoele. During the extended probationary period,

Telkom took a view that Shoba was not achieving the required performance.

- [3] Various attempts were made to meet with Shoba to no avail. Each time she will fall sick and become unavailable. Ultimately on 26 June 2017, Shoba was notified in writing that on 30 June 2017 her employment shall end since Telkom will not be confirming her success on the probationary period.

- [4] Aggrieved thereby, Shoba referred two disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA). The first dispute alleged unfair labour practice in relation to the provision of benefits; namely; bonuses and salary increments, that she would have earned had her probationary period been confirmed. The second dispute alleged that her termination on 30 June 2017 amounted to an unfair dismissal. Upon the request of Telkom, a ruling was issued consolidating the two disputes to be heard as one. After hearing both disputes, Harmse issued the impugned arbitration award.

#### Grounds for review

- [5] As a point of departure, Shoba contends that the decision reached by Harmse is not one that a reasonable decision maker may reach when regard is had to the material placed before her. Shoba in substantiation contends that Harmse ignored her evidence and her submissions before reaching the conclusion she reached. She raised a catalogue of criticisms against the reasoning of Harmse and alleged that she committed misconducts and sought to hide behind a partial shadow of uncertainty. Allegedly Harmse applied wrong case law on the matter.
- [6] A barrage of salvos were made against almost every finding of fact made by Harmse, which salvos when properly considered amounts to an appeal masquerading as a review.

#### Evaluation

- [7] It is by now settled law that this Court does not have review powers over an arbitration award that falls within the bands of reasonableness. The test is that an arbitration award must be so unreasonable to a point that no reasonable decision maker may reach it. This test decisively draws a perspicuous distinction between a review and an appeal. This Court is bereft of appeal powers over arbitration awards except as provided for in the Labour Relations Act[1] (LRA).
- [8] In relation to the alleged unfair labour practice, the dispute referred by Shoba was couched in the following terms in the request for arbitration form:
- “The employer committed an unfairly (sic) labour practice related to benefits. Respondent arbitrarily and unfairly decided not to award the applicant performance bonuses”*
- [9] Mr Mongwe appearing for Shoba submitted that at the pre-arbitration meeting, the parties agreed that the alleged unfair labour practice dispute did not relate to benefits only but also related to probation and Harmse failed to arbitrate that part of the dispute. The primary difficulty with this submission is that it is not a ground foreshadowed in the papers. Nowhere did Shoba allege that Harmse failed to resolve the referred unfair labour practice dispute or part thereof.

[10] A party is not entitled to argue a ground of review not foreshadowed in the founding papers. The secondary difficulty is that the submission is at odds with the material placed before Harmse as to the nature of the unfair labour practice dispute. The referral documents as quoted above tell a different tale. So does the transcripts. The following emerges from the transcripts:

*“COMMISSIONER: The unfair labour practice dispute that you have referred.*

MS ZININGI SHOBA: It was not about the warning, it was about the ... (intervenes)

APPLICANT REPRESENTATIVE: The benefits.

MS ZININGI SHOBA: The benefits. It was a question of a bonus, me not getting a bonus.

COMMISSIONER: Oh yes.”

[11] Notably, Shoba was ably represented by Mr Mongwe at arbitration proceedings. Section 186 (2) (a) of the LRA defines an unfair labour practice to mean an unfair act or omission arising from an employer and an employee relationship involving unfair conduct by the employer relating, amongst others, to probation. In other words in relation to probation any unfair conduct excluding dismissal for reasons related to probation, amounts to an unfair labour practice. Shoba testified that by giving her a score of 4 during the performance assessment Telkom acted unfairly. According to her she was assessed unfairly on a 70% of her work as opposed to

100% and since she achieved 65% she has met the requirements and ought to have been confirmed as a permanent employee. This evidence

was of course not led in support of a case alleging unfair conduct in relation to confirmation of a probationary period but in relation to the provision of benefits – payment of bonuses. In dealing squarely with the dispute referred by Shoba, Harmse stated the following:

*“[31] Did the Respondent [Telkom] commit an unfair labour practice relating to benefits by not paying the Applicant [Shoba] her performance bonus? The onus in an unfair labour practice dispute is on an Applicant to prove that the failure of the Respondent to do so constituted an unfair labour practice.*

[36] The Applicant brought an unfair labour practice dispute to the CCMA which relates to benefits. She claimed that her final rating of 4 was unfair, this [the rating of 4] deprived her of benefits such as a bonus and additional

increases etc....”

[12] Harmse reached a conclusion that based on the evidence presented before her, Shoba failed to discharge the onus of proving that Telkom committed an unfair labour practice. This conclusion is in pari passu with the evidence tendered. Shoba suggested that the chairperson of the assessment process was biased. In the main, because the

chairperson was copied an email of an intention to extend the probationary period. The extension of the probationary period was in fact a decision beneficial to Shoba. An adverse decision would have been one that does not extend the probationary period, in which case Shoba's employment would have terminated much earlier. A finding by Harmse that the chairperson was not biased as alleged is one that a reasonable decision maker may reach. Ultimately, a reviewing judge must not like the decision but must accept it if it falls within the bands of reasonableness. It was not by accident that the chairperson was copied the email. The chairperson was an integral part of the assessment of Shoba. It ought to be borne in mind that there is no legal obligation on the part of an employer to extend a probationary period. In terms of item 8 (1) (f) of Schedule 8 of the LRA an employer may either extend the probationary period or dismiss the employee. Prior to the meeting chaired by the implicated chairperson, it was clear that Kgoele was not happy with the conduct of Shoba and she was toying with two possibilities – either to dismiss or extend. There was never an indication that any confirmation of employment was possible nor in the offing. The decision that the chairperson made is not the worst off as compared to a dismissal. Thus no adverse decision was reached against Shoba.

[13] Turning to the finding that the dismissal is substantively and procedurally fair. Sadly for Shoba, the same review test applies. On this score, the issue is simply whether Shoba performed satisfactorily or not. On that score Harmse was faced with the version of Shoba and that of Kgoele. The testimonies of Malapa and Valentine were not particularly helpful on this score. Kgoele testified extensively with regard to the performance of Shoba, which fell below the required standard. To a large degree, Shoba placed huge store on the unsavoury relationship between her and Kgoele, whilst the evidence of Kgoele was directed to the agreed and missed

deadlines and targets. Missing targets and deadlines is a performance below par in another name. Thus, a conclusion that the dismissal was for a fair reason substantively, is one that a reasonable decision maker may reach given the largely uncontested evidence of Kgoele. Harmse was spot on when she concluded that when it comes to performance, liking or disliking plays no role at all. It was never suggested in evidence that because of the unsavoury relationship, Kgoele had a motive to lie that Shoba missed targets and deadlines. That she missed the targets and deadlines became common cause.

[14] With regard to procedure, Harmse is correct in her conclusion that Shoba was given ample opportunity to participate in a process leading to her dismissal. Shoba seeks to argue that the collective agreement relevant to incapacity procedure was applicable to her and was not applied. This argument is devoid of merit. Shoba was on probation. The purpose of a probationary period is to establish whether an employer has the right fit. Item 9 (1) (b) of Schedule 8 of the LRA aptly puts it thus: the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. Once an appointment is confirmed, which was not the case for Shoba, unsatisfactory performance is dealt with differently. Item 9 (2) of Schedule 8

clearly states that unless certain aspects are met no dismissal can happen.

- [15] Telkom adopted a policy known as Performance and Development Management (PDM). Its contents clearly demonstrate that it is a long term policy in terms of its application. For instance, a final assessment is based on the full 12 month period. Clearly, for a probationary employee like Shoba the full 12 month period will not apply. In addition, Telkom and Communication Workers Union (CWU) concluded a collective agreement to be applied in an incapacity situation. Textual reading of the collective agreement does demonstrate that it finds no application during a probationary period. The collective agreement requires three stages to happen. The first stage sets in when a promoter identifies the incapacity. In a probationary period the purpose to evaluate performance is to confirm appointment. Accordingly, the collective agreement was not intended by the parties to apply in a probationary period.
- [16] Harmse concluded that the requirements of item 9 of schedule 8 of the LRA found application. Although this finding was beneficial to Shoba, the correct procedure is as set out in item 8 (1) (h) of Schedule 8 of the LRA, which provides that an employer may decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee. Once the above is established, the dismissal of a probationary employee will be procedurally fair. The uncontested testimony is that Shoba was invited to make representations. The fact that she was admitted to hospital is neither here nor there. Most of the invitations happened before the admission and it became clear that Shoba was deliberately playing hide and seek. She spurned the opportunity to make representations. Accordingly, the conclusion that holistically, Telkom followed due process in dismissing Shoba is one that falls within the bands of reasonableness.

## Conclusion

- [17] In summary, it is my finding that the review application must fail. The award of Harmse is one that a reasonable decision maker may reach. Shoba has failed to demonstrate that the arbitration award does not meet the constitutional test of reasonableness.
- [18] In the results, I make the following order:

### Order

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

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G. N. Moshoana

Judge of the Labour Court of South Africa

**Appearances:**

For the Applicant: Mr T B Mongwe of Blessed Mongwe Attorneys, Daveyton.

For the Third Respondent: Mrs. T Makamu of Maserumule Attorneys, Randburg.

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

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