

SOUTH AFRICA / JUDGMENT

UNTU obo Motheng v Mafa N.O and Others (JR285/21) [2024] ZALCJHB 411 (25 October 2024) [2024] ZALCJHB 411

COURT

Labour Court Johannesburg

BEFORE

Ngwenya

CASE / FILE NUMBER

JR285/21

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FLYNOTES:

LABOUR –
Appointment – Psychometric
assessment –
Impact upon appointment
and determination of suitability for position – Not
appointed – Review – Unfair
labour practise relating
to promotion alleged – Commissioner focussed assessment on
question he was required to undertake
– Dismissed case –
Failure to determine admissibility of psychometric assessment did
not impact result –
Result and content of psychometric
testing was not an issue before commissioner – Result is
ultimately reasonable –
Application dismissed.
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
No: JR 285/21
In

the matter between: UNTU
 OBO MALAPELA RINA MOTHENG
 Applicant
 And
 NGOAKO
 MAFA N.O
 First
 Respondent
 TRANSNET
 BARGAINING COUNCIL
 Second
 Respondent
 TRANSNET
 SOC T/A TRANSNET FREIGHT RAIL
 Third
 Respondent

Heard: 4 November 2023
 Date
 Delivered: 25 October 2024
 This judgment was
 handed down electronically by consent of the parties’ legal
 representatives by circulation to them via email.
 The date for
 hand-down is deemed 25 October 2024

JUDGMENT

NGWENYA, AJ

Introduction.

- [1] The Applicant, has approached this Court seeking to review and set aside an arbitration award issued by the First Respondent, the Commissioner, which was issued under the auspices of the Third Respondent, the Bargaining Council.
- [2] The arbitration award, which is the subject of the review application, concerns an unfair labour practice dispute which the Applicant had referred to the Bargaining Council concerning a recruitment process undertaken by the Third Respondent.
- [3] The review application, while initially pleaded more broadly, was in the heads of argument and argument in court pursued primarily on the grounds concerning the treatment of a Psychometric Assessment Report by the Commissioner.
- [4] The review application was opposed by the Third Respondent.

The Relevant Factual Background

- [5] Malapela Rina Motheng (“Motheng”), is a member of the Trade Union UNTU, which referred a dispute to the Bargaining Council, alleging an Unfair Labour Practice had been committed by the Third Respondent by not appointing its Motheng to a position she had applied for, namely Section Manager Train Traffic.
- [6] Ms Motheng, is employed by the Third Respondent as Train Driver. Ms Motheng applied for a position of a Section Manager Train Traffic. It is not in dispute between the parties that Ms Motheng’s appointment in the position would be a promotion.
- [7] Ms Motheng was shortlisted and undertook a written assessment and was interviewed for the position.
- [8] The dispute turns on the fact that Ms Motheng, and all other applicants for the position, were sent to undertake a Psychometric

Assessment, and the outcome of the Psychometric assessment impacted upon her appointment and the determination of her suitability for the position. Ultimately, Ms Motheng was not appointed.

- [9] As a consequence of the decision not to appoint, UNTU referred the dispute to the Bargaining Council. The evidence of two witnesses was presented. Motheng testified on her own behalf and the Third Respondent presented the evidence Bright Shabangu (“Shabangu”).
- [10] Following the arbitration proceedings, the Commissioner issued the arbitration award, in terms of which the Commissioner found that: “The Applicant, Malapela Rina Motheng, failed to make out a case for an unfair labour practice relating to her promotion against the Respondent, Transnet Freight Rail Mpumalanga Region.”
- [11] As a consequence the Commissioner dismissed the Applicant’s case and made no order as to costs.

The Test on Review

- [12] The review application is launched in terms of Section 145 of the Labour Relations Act, 66 of 1995 (“LRA”), and the Applicant contends that the Commissioner committed gross irregularities in the conduct of the arbitration proceedings, which gross irregularities concerns the treatment of the Psychometric Assessment Report by the Commissioner.
- [13] The test for review to be applied is well known.
- [14] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1], the Court held that ‘the reasonableness standard should now suffuse s 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?...’.

[15] This means that the award in question is tested against all the facts before the Commissioner to ascertain if it meets the requirement of reasonableness. In conducting this test, it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.

[16] In *Herholdt v Nedbank Ltd and Another*[2] the Court said:

“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. ...”

[17] While the review application was pursued principally based on the treatment of the Psychometric Testing, it does not mean that the balance of the evidence presented before the Commissioner must not be considered by this Court, rather in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[3] the Court held that:

‘... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review ...

[18] It is against this backdrop that the review application should be considered.

Analysis

[19] It is appropriate to quote the grounds of review which the Applicant relies upon.

[20] First the Applicant contends that “the Commissioner committed a gross irregularity in the conduct of arbitration proceedings by admitting hearsay evidence (the Psychometric Assessment Report), without making a ruling as to the admissibility of such hearsay evidence, before concluding that Transnet had not committed an unfair labour practice by not promoting Ms Motheng into one of the vacant positions of Section Manager Train Traffic”[4]. [The First Ground of Review]

[21] The second ground of review is that: “The Commissioner committed a gross irregularity in the conduct of the arbitration proceedings by failing to determine a material issue, namely whether the psychometric testing should have been as a selection criteria in determining suitable candidates for grade G appointments, before concluding that Transnet had not committed an unfair labour practice by not promoting Ms Motheng.”[5] (sic) [The Second Ground of Review]

[22] I have quoted, for convenience, the grounds of review as summarised in the Applicant’s heads of argument, however, the grounds of review are as pleaded in the Applicant’s supplementary affidavit.[6]

The First Ground of Review

- [23] The first ground of review concerns the Commissioner's admission of the Psychometric Report, in the absence of the assessor having been called to testify. I did not understand there to be a dispute between the parties that the Psychometric Assessment Report, on its own, amounted to hearsay evidence. Even if there was a dispute, it is in my assessment, self-evidently hearsay evidence.
- [24] In support of the first ground of review, the Applicant placed considerable weight on the Labour Appeal Court ("LAC") judgment in *Exxaro Coal (Pty) Ltd v Chipana*[7] in which the LAC considered the question of admission of hearsay evidence, and fundamentally, the stage at which a determination, if any, is made by a Commissioner concerning the admissibility of hearsay evidence.
- [25] The LAC confirmed the legal position, on the treatment of hearsay evidence and the application of the Law of Evidence Amendment Act, 45 of 1998 ("the EEA") and held that:
- [19] It is accepted that this section essentially means that if there is no agreement to receive hearsay evidence it is to be excluded unless the interests of justice requires its admission. Hearsay evidence that is not admitted in accordance with the provisions of this section is not evidence at all." [8]
- [26] Concerning the Commissioner's obligation to identify and be alive to hearsay evidence the LAC held that:
- [20] Hearsay evidence is a common form of evidence encountered in disciplinary proceedings. In many cases, it might be the only evidence available to supplement other direct evidence in making out a case of misconduct or to sustain a defence to a charge of misconduct. It is therefore not unreasonable to expect Commissioners to be familiar with it and to be in a position to identify it readily. That the provisions of the section are not a novelty or mystery to Commissioners or Arbitrators, is evident from reported decisions.[9]
- [27] As to the timing of a ruling concerning hearsay evidence, the LAC held that:
- "[29] The timing of the ruling and the Commissioner's relative passivity during the arbitration when the hearsay evidence was being adduced is not consonant with a Commissioner's duty to determine a dispute between parties fairly, or quickly. If the issue of admissibility of the evidence been addressed promptly when it was sought to be adduced or adduced, the ruling in respect thereof would not only have assisted both sides to know what the ambit of the cases were that they had to meet respectively, but could possibly have led to a quicker and cheaper resolution of the dispute."*

- [28] The Applicant relying on Exxaro[10] contends that (i) the Psychometric Assessment Report was hearsay evidence and it was therefore incumbent upon the Commissioner to rule on its admissibility before admitting same as evidence at the arbitration proceedings; and (ii) Ms Motheng had indicated her dissatisfaction with the Psychometric Report. Ultimately, the Applicant contends that the admission of the Psychometric Report had a material effect on the arbitration proceedings.
- [29] As a starting, it is important in my view to understand the Exxaro judgment in its factual context. The LAC criticised the Commissioner's late determination of the admissibility of hearsay evidence in this context:
- a. A substantial portion of evidence produced by Exxaro to prove the charges of misconduct was hearsay evidence. [paragraph 2 of Exxaro Judgment]
 - b. Exxaro relied on affidavits allegedly made by complainants in the matter, as well as Mr Chipana's official phone records, to prove the allegations of misconduct. [paragraph 8 of Exxaro Judgment]
 - c. The Commissioner, in the Exxaro case, at the end of the case and for the first time in the award did not admit the "evidence" Exxaro presented and in paragraph 6.7 of the arbitration award held that: "Once hearsay evidence against the applicant is excluded, which I hereby do, there remains no shred of evidence in support of the respondent's allegations against him" [paragraph 9 of Exxaro Judgment]
- [30] The ratio of the LAC in Exxaro is binding on this Court, however, in a review application, the effect of irregularity by a Commissioner must be determined in the context of the result. Indeed, the LAC in Exxaro held that the Commissioner's error, concerning the admission of the hearsay evidence, had a material effect on the result, because the Commissioner found that there was "not a shred of evidence" to find that the dismissal was fair.
- [31] In *Head of Department of Education v Mofokeng & others*[11] the LAC held: '...
- "[32] 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 enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her."
- [32] I accept that the Commissioner, in his arbitration award, does not at any stage deal with the issue of the admissibility of the Psychometric Testing. However in my view the Commissioner's award and the treatment of the Psychometric Testing does not meet the test to vitiate the award.

[33] My starting point is that the record reflects that the Commissioner spent considerable time with the parties to narrow the issues as well as determine the issues in dispute. At the sitting on 28 October 2020, the Applicant's representative explained that following, what appears to be a previous adjournment, the Applicant had a conversation with the external service provider who had conducted the Psychometric Testing and relayed the outcome of the conversation to the Commissioner as follows:

"MR SAMBO: ... Then the ... Is it the psychologist or the psychiatrist? We managed to get hold of the psychiatrist or psychologist and then over the phone she explained whatever she explained.

But I think part of it is what really got us not to find each other with regard to the perspective of the employer in terms of that she actually sat with the HCP/HR practitioner, Mr Simon Manzini. And without whatever she gave us, we felt concluded the fact that something did not go up with regard to the Applicant's case. So hence we decided that we are not happy with what the employee has given us."

[34] Following an adjournment, the arbitration proceeded on 3 December 2020, and again the Commissioner engaged with the parties and during this engagement Mr Sambo explained to the Commissioner the ambit of Motheng's dispute:

"COMMISSIONER: There are two issues. We are back on record. So we will be proceeding on the basis that the Applicant is only challenged the fact that a female candidate should have been appointed on any of the positions of the further Respondents that have been joined in terms of the policy. That is on the policy.

MR SAMBO: That is correct.

COMMISSIONER: But all other issues are not in dispute.

MR SAMBO: No. The rest of the issues that we might have are not in dispute."

[35] In Motheng's evidence in chief, Mr Sambo asked "[A]fter all the process that has led us to where we are did you feel somehow an injustice was done?"

[36] In her response to her representative, Motheng responded concerning the Third Respondent not following its own process based on gender equities and that the appointment would be based on the requirements set out in the advertisement

[37] The Commissioner therefore focussed his assessment on the whether the Third Respondent was entitled, in terms of its Policies and Procedures and determination of the selection panel to require all applicants for the position to undergo psychometric testing, that was clearly the question he was required to undertake.

[38] While the Commissioner did not determine the admissibility of the Psychometric Assessment, I am not of the view that it impacted upon the result. The question and the dispute that the Commissioner was called upon to answer was whether the Third Respondent had committed an unfair labour practice, in breach of its own policies and

procedures, by requiring applicants for the post to undergo psychometric testing. The result and content of the psychometric testing, was not an issue which was disputed before the Commissioner. This is because, on the Applicant's version, the psychometric testing is null and void, as a consequence of their contention that the psychometric testing was not permitted by the Third Respondent's policies and procedures.

[39] The dispute before the Commissioner understood properly in that context, I do not find that the Commissioner, committed a reviewable irregularity which would rise to the Exxaro and Mofokeng tests and vitiate the arbitration award.

[40] The Commissioner's failure in his award to deal with the admissibility of the Psychometric Assessment does not vitiate the arbitration award. The first ground of review cannot succeed.

The Second Ground of Review

[41] The second ground of review concerns the Commissioner's findings in relation to whether Psychometric Testing could be used for the positions in question because the vacant positions were grade G positions and Clause 7.4.1 of the Employer's policy only applied to Grade A to E positions.

[42] The starting point is to consider the Commissioner's findings in this respect, it is clear from the Commissioner's

arbitration award, at paragraphs 80, 81 and 82, that the Commissioner was alive to the question that there are differences in the

interpretation and application of the Recruitment and Selection Policy, particularly in relation to clause 7.4.1 and Step 5.

[43] The Commissioner deals with this aspect by having reference to the undisputed fact that the interview panel agreed on a criterion which included subjecting all candidates to psychometric assessments.

[44] In my view, there is no basis for this Court to interfere in this respect, as the determination by the Commissioner and the result is ultimately reasonable. There was no evidence before the Commissioner that the decision to require psychometric testing, other than the dispute concerning the application of the Recruitment Policy, was irrational, capricious, grossly unreasonable or malafides.

[45] The second ground of review can equally not succeed.

Conclusion

[46] In the circumstances, the arbitration award is reasonable and the review application must be dismissed.

[47] Costs

[48] This is not a case in which a cost order is warranted.

[49] In the premise I make the following order:

Order:

[50] The application is dismissed.

[51] No order as to costs

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate M Van As Instructed by: Fluxmans Attorneys For the Respondent:
Advocate X Matyolo Instructed by: Malebye Motaung Mtembu Inc

[1] (2007) 28 ILJ 2405 (CC)

[2] (2013) 34 ILJ 2795 (SCA) para 25

[3] (2015) 36 ILJ 1453 (LAC) para 12

[4] The Applicant's Heads of Argument; para 3.1

[5] The Applicant's Heads of Argument; para 3.2

[6] Pleadings Bundle: page 28 – 32 [The supplementary grounds are as pleaded]

[7] [2019] 10 BLLR 991 (LAC)

[8] Exxaro

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[9] Exxaro

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[10] FN 4

[11] (2015) 36 ILJ 2802 (LAC) para 32

[12] Transcript; p 14; ln 1 - 14

[13] Transcript; p 50 ln 19 – 25; p 51; ln 1

[14] Transcript; p 67; ln 11 - 12

[15] Transcript; p 67; ln 11 - 25

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