

SOUTH AFRICA / JUDGMENT

Vaal Engineering (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration (JR 1317/2021) [2022] ZALCJHB 288 (21 October 2022) [2022] ZALCJHB 288

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1317/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR 1317/2021

In

the matter between:

VAAL ENGINEERING (PTY)

LTD

Applicant

And

COMMISSION FOR

CONCILIATION, MEDIATION

First Respondent

AND ARBITRATION (CCMA)

BEVAN

A

N.O.

Second Respondent

FOUCHE

A.J.H.

Third Respondent

Heard: 20 October 2022

Delivered: 21 October

2022

(This

judgement was handed down electronically by circulation to the

parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 21 October 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] This is an unopposed application in which the applicant seeks to review and set aside an arbitration award issued by the second respondent (the commissioner). In her award, the commissioner held that the third respondent (the employee) had been dismissed by the applicant, and that his dismissal was unfair. The commissioner awarded the employee compensation in a sum equivalent to ten months' remuneration.
- [2] The material facts are captured in the award and do not warrant repetition here. It is sufficient for present purposes to record that the commissioner was faced with a material dispute of fact. The employee contended that he had been dismissed, in derogatory terms and without a formal letter of dismissal, which he had requested. The applicant's representative stated that the employee was called to the office and advised that the applicant's client did not want him on site anymore, and in the absence of alternative work, the employee agreed to leave the applicant's employ.
- [3] In her analysis of the evidence, the commissioner (correctly) recorded that the employee was required to prove the existence of a dismissal, and that the applicant then attracted the onus to prove the fairness of the dismissal. The commissioner considered that on a balance of probabilities, the employee's version should prevail. Specifically, she referred to a letter addressed by the applicant in which it recorded that the employee's probation and service were terminated on 27 May 2016 on account of 'various reasons', including poor working relationships with co- employees. The commissioner found that nothing in the letter indicated any agreement between the parties to terminate the employment relationship; on the contrary, the letter

indicated a reason for dismissal, in the form of a bad working relationship with co-employees. Insofar as the applicant sought to rely on an admission by the employee in an affidavit filed in a prior application for review in the same dispute, the commissioner accepted that the affidavit contained an obvious error, and that she had reason to doubt the veracity of his testimony in that the employee was not comfortable with the English language and had been asked to sign the affidavit as soon as possible. The remainder of the affidavit, the commissioner found, confirmed the employee's version that he had indeed been dismissed. On this basis, the commissioner found that the employee had established that the applicant dismissed him on 27 May 2016. In the absence of any

evidence presented by the applicant to show that the dismissal was procedurally and substantively fair, even in the face of the question posed by the commissioner specifically as to whether the applicant followed the correct process to terminate the employment of an employee on probation, the response was unsatisfactory. The commissioner also considered the applicant's version that it had no choice in the matter of the employee's dismissal since its client did not want the employee on its premises. The commissioner found that nowhere in the letter of termination was there any indication to this effect, and that the letter proffered by the applicant could not be identified as being one from the mine concerned. Further, the author of the letter had not been called to testify at the arbitration. Further, if the true reason for dismissal was a bad working relationship between the employee and co-employees, this ought to have prompted disciplinary action. Instead, the applicant chose to summarily terminate the employee's services without affording him an opportunity to state his case. The commissioner then went on to consider the appropriateness of dismissal as a sanction, and the relief which should be afforded to the employee. The commissioner decided, in the exercise of her discretion in taking into account some sixteen specific factors, including the employee's age and the fact that he had been unemployed for five years, to award the equivalent of 10 months' remuneration in compensation.

- [4] The grounds for review are recorded in the founding affidavit and are premised broadly on the conduct of the commissioner. In particular, the applicant states that the commissioner was biased and that she was 'annoyed' with the applicant and demonstrated what appeared to be a 'vendetta towards employers.' Further, the applicant contends that the commissioner went out of her way to assist the employee, that she failed to apply her mind to the facts, resulting in an award which was unreasonable.
- [5] In the practice note filed by the applicant's counsel, she records a summary of the applicant's submissions in the following terms:
- a. 'A court must exercise a judicial discretion in cases.
 - b. A judicial discretion is exercised upon a consideration of the facts of the case and in fairness to both sides.
 - c. The requirements of law and fairness are equally important in the labor court when a case is being reviewed.
 - d. The second respondent made numerous reviewable findings in rendering her award.
 - e. The second respondent acted bias and did not a decision a reasonable decision maker would have made (sic).
 - f. The applicant had no other remedy than to approach the court in search of relief.'

[6] The applicant entirely misconceives the nature of an application for review, and the jurisprudential basis on which an application for review falls to be determined. First, insofar as the commissioner found that the employee had established the existence of a dismissal, a threshold of correctness applies, since the existence of a dismissal is a jurisdictional issue (see *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another*

[2008] ZALAC 3; [2008] 9 BLLR 845 (LAC)). A ruling on the existence of a dismissal is tested on review by reference to objectively justifiable grounds; more particularly, whether, objectively speaking, there existed facts that would give the CCMA jurisdiction to entertain the dispute. In regard to the commissioner's finding on sanction and remedy, these are to be reviewed by the application of a reasonableness threshold. The reasonableness threshold ensures that the line between an appeal and a review is not crossed, and empowers this court to intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it (see *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*).^[1] In *Gold Fields Mining SA (Pty) Ltd v CCMA*,^[2] the LAC cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available

evidence. Specifically, the questions for a review court to ask are whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with substantial merits of the dispute and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence.

[7] Insofar as the basis for the present application is one of bias, bias is a patent gross irregularity, and must be pleaded as such and supported by a proper factual basis rather than speculation and conjecture.

[8] I deal first with the issue of bias. There is nothing in the record that persuades me that the commissioner was biased, or that her conduct gave rise to any perception of bias. The fact of the matter is that the applicant was represented by an official of an employers' organisation; the employee had no representation. In these circumstances, it is incumbent on a commissioner to ensure that justice is done by guiding the unrepresented employee through the arbitration process and ensuring that there is no material disadvantage to be gained by an opposing party solely on account of it being represented. To the extent that the applicant relies on the outcome of the proceedings under review to substantiate bias, these ought more properly to have been reviewed applying the reasonableness threshold. A party cannot complain of bias simply because it disagrees with the terms of an award.

- [9] Insofar as the commissioner's finding that the employee had established the existence of a dismissal is concerned, the applicant has failed to apply the correct threshold, and failed to make any averments or submissions to establish that having regard to the objective facts, the commissioner's decision is incorrect. In regard to the commissioner's finding on sanction and remedy, there is nothing on the record to gainsay her finding that the applicant had failed to produce any evidence to establish that the employee's dismissal was substantially or procedurally fair. The record does not disclose any reviewable irregularity, nor does it sustain basis for a finding that the commissioner's decision falls outside of the band of decisions to which a reasonable decision-maker could come.
- [10] In short, arbitration is a robust process. A commissioner is enjoined by section 138 of the LRA to conduct an arbitration hearing in a manner that she deems appropriate to determine the dispute quickly and fairly, within a minimum of legal formality. The applicant had the advantage of a representative during the course of the proceedings, an advantage not enjoyed by the employee. There is nothing on the record to suggest the arbitrator lending a 'helping hand' extended to bias, at least not in the legal definition of the term, i.e. that a reasonable, objective and informed person would, on the facts, reasonably apprehend bias. In any event, that is not the case pleaded on review. There is also nothing on the record to suggest that the outcome of the proceedings under review fails to meet the threshold of reasonableness. The application has all the hallmarks of an appeal, and thus stands to be dismissed.

Order

1. The application is dismissed.
2. The registrar is directed to forward a copy of the judgment to the third respondent.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: ME Coetzee

Instructed by: Susan Greeff Attorneys

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

[2] [2009] 12 BLLR 1214 (LC).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2022/288.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/vaal-engineering-pty-ltd-v-commission-unknown-topic-alcjhb-2022>

Prepared on 10 October 2026 · Esheria