



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1293/16

In the matter between:

EXXARRO FERRO ALLOYS (Pty) LTD

Applicant

and

LESIBA KEKANA

First Respondent

COMMISSIONER MALUBANE BUTI

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Delivered: 5 February 2019

JUDGMENT

MAHOSI J

Introduction

- [1] This is an application by the applicant in terms of section 145 of the Labour Relations Act (LRA)¹ in terms of which the applicant seeks an order to review and set aside an arbitration award (award) issued by the second respondent (the commissioner) under the auspices of the third respondent (CCMA) under case number GATW13336-15 dated 08 June 2016. In his award, the commissioner found that the dismissal of first respondent (the employee) was procedurally fair but substantively unfair. The commissioner ordered that the employee be retrospectively reinstated.
- [2] The issue is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.
- [3] In his opposing affidavit, the employee took issue with the applicant's alleged late filing of the supplementary affidavit. Having had regard to the pleadings filed as well as the record, I am of the view that this matter deserves a full determination and I, therefore, consider all the pleadings filed and the record of the arbitration proceedings.

Background

¹ Act 66 of 1995, as amended.

- [4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.
- [5] The employee started working for the applicant on 1 August 2014 as a Receiving Clerk. The applicant employed the employee on the strength of his Curriculum Vitae and his prior working experience having worked as a Receiving Clerk.
- [6] Shortly after employing the employee, the employer allegedly received complaints from its suppliers as well as that of its production staff indicating that the employee was making several errors that impacted on the applicant's operations. Upon receipt of these complaints, the applicant investigated the matter and found that the employee was not meeting the required performance standard on a number of tasks. The employer consequently commenced with a formal poor work performance process. A meeting with the employee was held on 31 March 2015 wherein his performance shortfalls were articulated and he was advised on what was required of him in order to achieve the required standard. The applicant attests that the employee agreed to and signed an action plan on 01 April 2015 aimed at meeting the required standard.
- [7] The applicant further attests that the employee was further given formal on the job training, on a full-time basis for two weeks, in order to assist him to reach the required performance standard. The employer further submits that the employee was given additional support measures, assessments, guidance, feedback, tests and counselling sessions. It is the applicant's contention that the employee continued to perform below standard despite these interventions.

[8] The applicant subsequently conducted a poor performance enquiry and terminated the employee's employment on 07 October 2015 with one month's notice pay. Aggrieved by his dismissal, the employee referred an unfair dismissal dispute to the CCMA, according to which he challenged both the substantive and procedural fairness of his dismissal. At the arbitration hearing, both parties submitted bundles of documents in support of their respective cases.

The arbitration proceedings and award

[9] The arbitration hearing was set down for 8 June 2015 and both parties were duly represented. It was common cause that the employee was dismissed. The issue before the commissioner was whether his dismissal was procedurally and substantively fair. The applicant called its Human Resource business partner, Ms Refilwe Mongale, to testify in support of its case. The employee testified in support of his case.

[10] On 13 June 2016, the commissioner issued an award dated 6 June 2016 in terms of which he concluded that the employee's dismissal was procedurally fair but substantively unfair. He summarised his reasons as follows:

[78] In this case the evidence shows that there were complaints about the work of the applicant, management investigated and decided to start a poor work performance with the applicant. Looking at the fact that the applicant was observing Mrs Eleen Van Der Westhuizen as from 1 August 2014 and that he was taken off his duties from 5 November 2014 till 30 January 2015. Since he started on 1 August 2014 he was only given the work instructions on 31 March 2015. It cannot be fair to

conclude that the applicant failed to meet the performance standard or he was aware of the required performance standard.

[79] It is common cause that the poor work performance reviews or counselling in this case were preceded by the two weeks training which took place on 7 to 21 April 2015. In this training the applicant requested to be trained on GRV's and service entries. This was mainly because while he was working at Grootegeluk Exxaro Mine he was using a scanner SAP system and at Exxaro Alloys he was expected to use a computer SAP system. The evidence on page 31 of bundle B shows that the applicant was able to do the transactions successfully without assistance.

[80] It was decided that the applicant should have a further week of counselling and support and his line manager Mrs Helena Lourens was expected to do a mini audit on Friday of 4 September 2015. It is the applicant's unopposed evidence that on this week he compiled his work on a file and the file was approved by his line manager Mrs Helena Lourens, but she used the questions he was asking her during his daily feedback with her against him in her feedback. Surprising enough Mrs Helena Lourens was asked by Miss Refilwe Mongale if she did a mini audit for that week as expected and Mrs Helena said no. The meeting found that the applicant did well in that week, but an audit which was not part of the meeting confirmed that the applicant wasn't competent.

[81] Looking at the evidence above, it cannot be concluded that the applicant failed to meet the required performance standard or was given a fair opportunity to meet the required performance standards.

[82] Looking at the flaws of the poor work performance reviews or counselling and taking into account the mitigations and aggravating circumstances of both parties it is my view that the respondent's decision to dismiss the applicant is substantively unfair.'

[11] It is this award that is the subject matter of this application. The grounds on which the applicant seeks to have the commissioner's award reviewed and set aside are considered below.

Grounds of review

[12] The applicant's first ground was that the commissioner's decision to reject Miss Refiloe Mongale's evidence that the applicant started receiving complaints about the employee's errors shortly after her appointment is disconnected from the evidence that was placed before him at the arbitration.

[13] The Second ground was that no reasonable arbitrator would have arrived at the conclusion that the employee was not aware of the required performance standard, did not fail to meet the required performance standard and was not given a fair opportunity to meet the required performance standard.

- [14] The Third ground was that it was unreasonable for the arbitrator to conclude that the employer did not provide the employee with sufficient training.
- [15] The Fourth ground was that the applicant's witness was not accorded the opportunity to challenge the allegation that the employee was taken off his duties from 5 November 2014 to 30 January 2015 during the arbitration proceedings.

Applicable law

- [16] Arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2)(a) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.
- [17] The applicant's contention is, in essence, that the commissioner committed material irregularity in law and fact and that he failed to apply his mind to the evidence thereby misconceiving the nature of the inquiry. The legal position applicable to reviews brought in terms of section 145(2)(a) of the LRA was aptly summarised in the case of *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*² as follows:

² 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA).

[25] 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 in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 fact, 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.³

[18] Item 9 of Schedule 8 outlines a guideline in cases of dismissal for poor work performance and it provides as follows:

'Any person determining whether a dismissal for poor work performance is unfair should consider –

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not –
 - (i) the employee was aware, or could reasonably be expected

³ At para 25.

to have been aware, of the required performance standard;

- (ii) the employee was given a fair opportunity to meet the required performance standard; and
- (iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

[19] The principles to be applied by the commissioner in considering the fairness of dismissal for poor work performance were summarised by the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others*⁴ as follows:

'In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counseling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.'

Evaluation of arguments

⁴ [2014] 1 BLLR 20 (LAC) at para 25.

- [20] The applicant took issue with the commissioner's findings that the employee was not aware of the required performance standard, did not fail to meet the required performance standard and that he was not given a fair opportunity to meet the required performance standard. Item 9 of Schedule 8 requires the commissioner to firstly consider whether the employee failed to meet a performance standard. In a case where he has not failed to meet the required performance standard, that should be the end of the enquiry. It is only after it has been established that he failed to meet a performance standard that the commissioner is required to consider whether he was aware or could have reasonably been expected to be aware of the required performance standard, whether he was given a fair opportunity to meet the required performance standard and whether dismissal was an appropriate sanction for not meeting the required performance standard.
- [21] In this case, the commissioner's award stands to be reviewed and set aside for three reasons. Firstly, although the commissioner referred to Item 9 of Schedule 8, he seemed not to have been aware of what was required of him. After finding that there was no poor work performance, the commissioner proceeded to consider whether the employee was afforded a fair opportunity to meet the required performance standard. In so doing, the commissioner failed to have had regard to all the material facts before him and to take into consideration Item 9 of Schedule 8, which resulted in him misconstruing the enquiry before him. For this reason, his award stands to be reviewed on this ground alone.
- [22] Secondly, the commissioner's finding that the employee was not aware of the required performance standard is clearly unreasonable. The commissioner based this finding on evidence that the employee was given the work instruction on 31 March 2015. It is not apparent for the award, why the commissioner ignored the undisputed evidence that the employee asked for two weeks training.

[23] The applicant's contention was that at no stage during the formal poor work performance process did the employee say anything to the management to indicate that he disputed that he was underperforming. In fact, the transcript reveals that the commissioner narrowed down the issues at the beginning of the arbitration proceedings and stated that:

'Under substantive fairness, this is a poor work performance dispute. Now under substantive fairness the applicant is alleging that he was not aware of the performance standard and that he was not trained properly or the training that he received was not adequate...'⁵

[24] The minutes of the counselling meetings dated 15 May 2015 reveals that the employee acknowledged the mistakes he made and appreciates the need for corrective measures that were discussed with him. Had the employee met the required performance standard, there would have been no reason for him to have requested further training. It follows that the employee was aware of his underperformance and appreciated the need to improve his performance.

[25] It is apparent that the commissioner ignored and/or failed to consider this evidence. Had he done so, he would have not have arrived at the finding that the employee was not aware of the required performance standard and that he did not fail to meet the said standard.

⁵ Transcribed record, Vol 1 page 1 para 13 to 16.

- [26] Thirdly, the commissioner's finding that the employee was not afforded a fair opportunity to meet the required performance standard was not supported by the evidence before him. In his award, the commissioner arrived on this finding on the basis that the employee was given two weeks training which training, according to him, was not enough. This finding seems to suggest that the applicant took no further steps and/or failed to provide the employee with further assistance in reaching the required performance standard.
- [27] However, the evidence before the commissioner was that in addition to the two weeks training, the applicant provided the employee with additional ad-hoc training, guidance, assistance, tests, mini audits to assess improvement and regular feedback. These were provided over a period of six months.
- [28] The employee clearly continued to underperform despite being provided with on-the-job training, supervision, guidance and feedback. Further evidence before the commissioner was that the employee was consulted in every step of the process and was given an opportunity at every meeting, review session and feedback session to comment on and suggest more training, which he did and which was provided to him. This was in addition to the two weeks training and his purported experience from his previous job, as reflected in his CV.
- [29] It is apparent that the commissioner failed to consider the above evidence. Had he taken into account all the evidence before him, he would not have arrived at the conclusion that the employee did not fail to meet the required performance standard, that he was not aware of the required performance standard and that he was not afforded a fair opportunity to meet the required performance standard. Instead, he would have arrived at the conclusion that the employee's dismissal was fair in that he was underperforming, he was aware or at least he

ought to have been aware of the performance standard required of him and that the applicant provided him with enough guidance, assistance and training in order to assist him in reaching the required standard of performance.

[30] In light of the above, I am of the view that the employer succeeded in making out a case that the commissioner's decision was unreasonable and that he committed a gross irregularity in failing to appreciate the material evidence before him either properly or at all.

Conclusion

[31] As such, the outcome the commissioner arrived at cannot be reasonable. His decision does not fall within the range of possible justifiable decisions that could be reached based on the facts before a decision-maker. Therefore, the commissioner committed a reviewable irregularity and his award stands to be set aside. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

Order

[32] I, therefore, make the following order

- a) The arbitration award issued by the third respondent (the commissioner) under the auspices of the second respondent (SALGBC) under case

number GATW13336-15 dated 08 June 2016 is reviewed and set aside and substituted with the following order:

- (i) The dismissal of the employee, Mr Lesiba Kekana, was substantively and procedurally fair.
 - (ii) The employee's referral of arbitration to the third respondent is dismissed.
- b) There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT

Mr. M. G. Maeso of Shepstone & Wylie Attorneys

FOR THE RESPONDENT

Mr. M. J. Maringa of Maringa Attorneys