

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR502/15

In the matter between:

LEGALWISE INSURANCE SOUTH AFRICA

First Applicant

and

KLEINOT K.L N.O

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

BIFAWU OBO N.P SHEZI

Third Respondent

Heard: 18 February 2019

Delivered: 15 August 2019

JUDGMENT

NORTON AJ

Introduction

- [1] This case concerns a review of an arbitration award in which the CCMA Commissioner found that the employer had unfairly dismissed the employee incapacitated by a fall at work, and ordered backpay of R117 166,95 and reinstatement from 1 March 2016.
- [2] The Applicant is Legal Expenses Insurance South Africa, trading as “Legal Wise” – a legal insurance company.
- [3] The First Respondent is K Kleinot the CCMA Commissioner whose arbitration

award forms the subject of the review application argued before me.

- [4] The Second Respondent is the CCMA.
- [5] The Third Respondent is Ms. Shezi, the injured employee, represented by the trade union BIFAWU.

Factual background

- [6] Ms Shezi was employed by the Applicant as a filing clerk. She struggled carrying files and boxes (some weighing up to 13 kgs) up and down three flights of stairs between her office and the store room. She experienced back pain.
- [7] On 17 January 2014 Ms Shezi fell off a chair at work and was injured (the chair collapsed). She was taken to Flora Clinic, where X rays were taken and she was diagnosed with “lumbar spine strain and muscle spasm”. The fall aggravate a pre-existing injury called “lumbar facet joint syndrome’.
- [8] She returned to work in March 2014, and was given more sedentary tasks such as faxing documents. The Applicant assisted Ms Shezi to apply for a temporary disability benefit from Momentum, the Applicant’s insurer.
- [9] In May 2014 an occupational therapist, Ms Whitlock, assessed Ms Shezi’s functioning at work and concluded, “...*Her functional ability lies in sedentary to light work physical demand range. Hence on account of the step climbing, lifting and carrying demands, Mrs Shezi does not have the functional ability to perform her own job as a filing clerk at the Legalwise hub. The correct decision was made when she was given alternative duties from March 2014.*” Ms Whitlock noted that Ms Shezi continued to struggle with pain management. The occupational therapist recommended a reduction in working hours to 6 hours per day on three days per week, exercise, visiting a chiropractor and biokineticist and significant weight loss.
- [10] In July, Momentum approved the disability claim. Ms Shezi was informed of the need to file further medical reports to sustain the disability benefit.
- [11] The payment of the claim (75% of salary) was discontinued in November, regrettably because Ms Shezi did not submit a medical report updating the insurer on her condition.

- [12] On 9 February 2015 Ms Shezi returned to work. She did not have a doctor's certificate that she was fit to resume her duties. Ms Shezi had been away from work of just over 1 year.
- [13] The employer sent her for a second occupational therapist assessment. The second report showed insignificant change in the condition and medical status of the employee.
- [14] On 25 March 2015, Mr Grobler from Labour Net facilitated an incapacity enquiry as per paragraphs 10 and 11 of the LRA's Code of Good Practice: Dismissal. Mr Grobler considered whether or not Ms Shezi was capable of performing her work, and if not, the extent to which the work could be accommodated. He also considered whether alternative work was available.
- [15] His enquiry revealed that Ms Shezi could no longer perform her filing duties, and there had been little improvement in Ms Shezi's condition. The Applicant needed a filing clerk for 8 hrs a day but Ms Shezi could only work 2 – 3 hours a day. The Applicant offered her an alternative position, as a receptionist in Witbank but the distance was too far.
- [16] On 10 April 2015 the Applicant terminated Ms Shezi's employment. Ms Shezi then referred an unfair dismissal dispute to the CCMA.
- [17] At the arbitration, Ms Shezi, and her representative Mr Nhlapo gave evidence that the Applicant had reported the injury to the Compensation Commissioner late. The pre-existing injury related to her hip and not her back. They argued that she was discriminated against because she had a grade 11 certificate and not a matric. The Applicant's had failed to reasonably accommodate Ms Shezi, and this was discriminatory.
- [18] The employer testified that Ms Shezi could not cope with the demands of her position after the fall. She was required to carry boxes, walk up flights of stairs, and bend over and pick up files. The Applicant employed an additional person to carry out these tasks. The Applicant placed Ms Shezi on light duty which included faxing documents, and reduced her hours of work, but ultimately the employer was in a position where it was paying two wages for one position and that was economically untenable.

[19] The employer could not reasonably accommodate her, and the alternative position in Witbank was simply too far to be considered.

The Arbitration Award

[20] The arbitrator expressed the view that the Code Of Good Practice obliges the employer to adapt and assist an employee who has sustained an injury on duty and adapt the work if possible.¹ The arbitrator submitted that the Applicant should have assisted the Third Respondent by assisting her see a dietician, a bio-kineticist and support her losing weight. The employer should have bought her a new chair.

[21] The arbitrator found that there was no categorical report from a doctor to conclude that Ms Shezi was disabled and permanently so. The employee, the arbitrator held, was not afforded an opportunity to demonstrate what she could and could not do.

[22] The arbitrator found that the incapacity hearing procedure was fair, and that she was not discriminated against in terms of the Employment Equity Act.²

[23] The arbitrator found that the dismissal was substantively unfair, in the way the employer had handled the injury on duty, and because the employer did not support Ms Shezi in her recovery. There was no medical evidence, so the arbitrator found, that Ms Shezi was incapable of performing her job.

[24] The arbitrator awarded backpay of R117 186,85 (9 months pay) and reinstatement to 1 March 2016.

[25] The award was handed down on or about 10 February 2016.

The review application

[26] In general, the employer submits that the arbitrator: failed to apply her mind to the evidence before her; exceeded her powers; and failed to justifiably and reasonably determine and assess the dispute fairly.

[27] The Applicant advanced the following grounds of review:

¹ Arbitration award, para 84

² Arbitration award, paragraphs 62 and 63.

- 27.1. The arbitrator's view that the employer should have taken steps to implement recommendations for the well-being of the employee (including weight loss, managing pain medication and consulting a bio-kineticist) was irregular and unreasonable.³
- 27.2. The arbitrator erred by finding that the employer should have bought the employee a chair with lumbar support,⁴
- 27.3. The arbitrator found that there was no "categorical report from a doctor showing that the employee was disabled" and the arbitrator erred in light of the facts which pointed to the employees continued disability.⁵
- 27.4. The arbitrator found that the employer failed to discharge the onus of proving that the employee was incapable of performing her duties. This according to the applicants is at odds with the law of onus, as well as the surrounding factual circumstances.
- 27.5. The arbitrator committed a material misdirection by on the one hand chastising the employer for not assisting the employee implement various medical remedial steps; an on the other hand the arbitrator finds there was a lack of compelling evidence that the employee was incapacitated and incapable of performing her duties. ⁶
- 27.6. The arbitrator found that it was possible to further adapt the workplace. This was according to the employer unreasonable and at odds with the evidence presented.⁷
- 27.7. The arbitrator acted unreasonably and exceeded her powers by ordering the relief of reinstatement and backpay of 9 months.⁸

The nature of review proceedings

³ Founding Affidavit, para 7.3.2

⁴ Founding Affidavit, clause 7.3.4

⁵ Founding Affidavit, clause 7.3.5

⁶ Founding Affidavit, clause 7.5

⁷ Founding Affidavit, clause 7.8

⁸ Founding Affidavit, clause 7.9

[28] The Labour Court may set aside an arbitration award if the arbitrator has committed a defect in the arbitration proceedings. Section 145 (2) of the LRA sets out the types of defects warranting intervention: the arbitrator committed misconduct in relation to his or her duties; the commissioner committed a gross irregularity in the conduct of the proceedings; the commissioner exceeded his or her powers, or the award was improperly obtained.

[29] Our courts have considered these provisions, and the above statutory tests have been interpreted to mean that the court may intervene:

29.1. if the award falls outside of the spectrum of reasonableness as per the Constitutional Court's decision in *Sidumo*⁹;

29.2. If a litigant can establish an irregularity which is material to the outcome of the matter (as discussed in *Gordon v JP Morgan Equities SA (Pty) Ltd & others*)¹⁰.

[30] The Labour Court must establish two issues:

30.1. The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, misconceiving the nature of the enquiry, or assessing factual disputes in an arbitrary fashion.

30.2. The second is whether the applicant has established that the irregularity is material to the outcome of the award - by demonstrating that the outcome would have been different had the arbitrator properly and reasonably assessed the facts in relation to the relevant law.¹¹

[31] These grounds for review may overlap and intersect and are not necessarily discreet.

⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & another* 2008 (2) SA 24 (CC)

¹⁰ (2018) 39 ILJ 393 (LC)

¹¹ The test has been described in *Shoprite Checkers v CCMA* (2015) 36 ILJ 2908 (LC) as follows, "where a commissioner misdirects himself or herself by ignoring material facts, the award will be reviewable if the distorting effect of the misdirection was to render the result of the award unreasonable." Para 10

The Code of Good Practice: Incapacity: Ill health or injury (“The Code”) and case law

- [32] It is trite that the Code establishes the relevant guidelines and principles when determining whether a dismissal for incapacity is fair.
- [33] The relevant provisions, applicable to the case under review in items 10 and 11 of the Code are the following:

10 (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. In an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

(2) ...

(3) The degree of incapacity is relevant to the fairness of any dismissal.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11 Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

- (a) whether or not the employee is capable of performing the work;
and*

(b) if the employee is not capable –

- (i) The extent to which the employee is able to perform the work;*
- (ii) The extent to which the employee’s work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee’s duties might be adapted; and*
- (iii) The availability of any suitable alternative work.*

[34] Molomela AJA in the Labour Appeal Court in *IMATU obo Strydom v Witzenberg Municipality*¹² comments

My reading of items 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee’s capability or otherwise can only be reached once a proper assessment of the employee’s condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee’s work circumstances so as to accommodate the incapacity, or adapt the employee’s duties, or provide him with alternative work if same is available.”¹³

[35] In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*¹⁴ quoted in *Parmalat SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*¹⁵ the Labour Court, having considered items 10 and 11 summed up the steps as follows:

35.1. Is the employee able to do his or her work?

35.2. To what extent is the employee able to perform his or her duties?

¹² (2012) 33 ILJ 1081 (LAC)

¹³ At para 6

¹⁴ (2008) 19 ILJ 1239 (LC)

¹⁵ (2017) 38 ILJ 2586 (LC)

35.3. Is it feasible to adapt the employee's work circumstances so he or she can continue to perform his or her duties?

35.4. If no adaption is suitable, has the employer enquired about whether or not there is any other suitable work?

[36] In *Paraxel International (Pty) Ltd v Chakane*¹⁶ the Labour Court held that the onus of proving the incapacity in order to justify the dismissal rests with the employer.

Discussion and Analysis

[37] Mr Grobler asked the right questions in light of the Code and the *Imatu* and *Standard Bank* cases, when he conducted the incapacity enquiry and weighed up the evidence.

37.1. Is the employee able to do her work?

37.1.1. He ascertained that Ms Shezi was not able to fully perform her duties as a filing clerk in the work environment.

37.1.2. The employer had given her lighter duties and taken on another employee, but in the end could not justify keeping her in employment

37.2. To what extent is the employee able to perform his or her duties?

37.2.1. Ms Shezi could perform at around 30% of the capacity required.

37.3. Is it feasible to adapt the employee's work context?

37.3.1. The employer initially gave Ms Shezi lighter duties such as faxing, and employed an additional person for the filing, but that was uneconomical (2 employees for 1 job).

37.3.2. Adapting the work environment was not feasible.

37.4. If no adaption is suitable, has the employer enquired about whether or not there is any other suitable work?

¹⁶ (2018) 39 ILJ 644 (LC)

37.4.1. An alternative position was available in Witbank as a receptionist but was too far away for Ms Shezi

37.4.2. An alternative was considered but found to be unsuitable.

[38] Noting that Ms Shezi could not continue in her previous position, and bearing in mind that there were no other suitable alternatives, the arbitrator should have found that the dismissal was fair.

[39] With respect to the grounds raised in review, we agree with the Applicant that the arbitrator did not properly apply her mind to the evidence which gave rise to an unreasonable result.

39.1. Ms Shezi had been off work for 10 months. Her physical functioning as indicated by the Occupational Therapists reports did not indicate that her condition had improved or that she had made the necessary life style changes.

39.2. The arbitrator materially erred when she found that the employer should have taken positive steps to ensure that the employee loses weight, sees a biokineticist and adapts her pain medication. There is no onus on an employer to do so, and would cast an unreasonable burden on an employer in such circumstances.

39.3. The arbitrator erred by finding that the employer should have bought the employee a chair with lumbar support. Such a chair would not have assisted the employee with her job which entailed walking up and down stairs, bending over and carrying files.¹⁷

39.4. The arbitrator found that there was no “categorical report from a doctor showing that the employee was disabled”. Again the arbitrator misconstrues the evidence – two Occupational therapists pointed to the need for reduced physical activities – in essence indicating that Ms Shezi did not have the physical strength and health to continue in her position as a filing clerk.

¹⁷ Founding Affidavit, clause 7.3.4

39.5. Whilst the employer bears the onus to show on a balance of probability that the employee is incapable of performing her duties as contemplated in the *Paraxel* case, the onus does not extend to a criminal test of proving beyond reasonable doubt that the employee is incapacitated. That appears to be the degree of proof required by the arbitrator. In this respect she was misconceived.

[40] I agree with the Applicant that the arbitrator committed a material misdirection by on the one hand chastising the employer for not assisting the employee implement various medical remedial steps; and on the other hand finding that there was a lack of compelling evidence that the employee was incapacitated and incapable of performing her duties. That contradiction surely is an indication that the arbitrator was not properly applying her mind to the evidence before her.¹⁸

[41] I am satisfied that the Applicant has established that the arbitrator committed a reviewable defect which warrants interference from this court.

[42] The arbitrator acted unreasonably by ordering reinstatement, when the evidence showed that the employee was incapable of performing her duties, and the employer was not prepared to accommodate her to work a shorter day. In *Exarro Coal t a Grootgeluk Coal Mine v Maduma & others* (2017) 38 ILJ 2531 (LC) the court held that reinstatement was not an appropriate remedy for an incapacitated employee to return to a workplace which exacerbated an employee's health vulnerabilities.

[43] In the circumstances I find that the review application succeeds, as the arbitrator misdirected herself by ignoring or giving little weight to relevant evidence, and failing to apply her mind properly to the issues before her.

Order

[44] I make the following order:

44.1. The review application is upheld

44.2. The dismissal was fair

¹⁸ Founding Affidavit, clause 7.5

44.3. There is no order as to cost

NORTON AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For Applicant: Mr R Orton, of Snyman Attorneys

For Third Respondent: Mr Nhlapo, of BIFAWU