

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR1062/15

In the matter between

**SYLVIA MAKOKOROPO**

**Applicant**

And

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**MPHO BRENDAH MABIDI N.O**

**Second Respondent**

**COMPASS GROUP AND OTHERS**

**Third Respondent**

**Heard: 14 November 2018**

**Delivered: 14 November 2018**

**Edited: 19 September 2019**

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## EX-TEMPORE JUDGMENT

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**MAHOSI. J**

### Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act<sup>1</sup> (LRA) to review and set aside the arbitration award issued by the second respondent (the arbitrator) under case number LP8786/14, dated 24 May 2015, under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). In her award the arbitrator found the applicant's dismissal to have been both procedurally and substantively fair.

### Background

[2] The background to the dispute is common cause, and may be summarised thus: The applicant was employed as a supervisor by the third respondent from 1 April 2015 and was subsequently dismissed on 26 November 2015 for charges relating to misconduct. Dissatisfied with his dismissal, the applicant referred a dismissal dispute to the CCMA for conciliation. The dispute was conciliated unsuccessfully after which it was referred to arbitration. The arbitration was held on 8 April 2015, 23 April 2015 and 14 May 2015. Subsequent to the arbitration proceedings the arbitrator issued an award, which is the subject matter of this application.

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<sup>1</sup> Act 66 of 1995 as amended.

### Grounds of review

- [3] The applicant brought this application on the basis of a number of grounds. The first one was that the arbitrator overlooked whether the offences that the applicant was charged with were dismissible offences in view of the fact that the second and third charges were a consequence of the first charge. The second ground was that the arbitrator did not only exceed her powers, but she also failed to apply her mind to the matter she was called to consider and adjudicate. The third ground was that the arbitrator fabricated evidence and came to findings that were not supported by the facts and the law, resulting in an award that is not justifiable in relation to the reasons given for it.
- [4] The fourth ground was that the arbitrator placed no rational link between the evidence before her and the factual conclusion, thereby exceeding her powers. The fifth ground was that arbitrator's decision that there is no timeframe to institute disciplinary hearing, and that the third respondent had succeeded in proving on the preponderance of probabilities that the dismissal of the applicant was procedurally and substantively fair was not reasonable based on the evidence before her.
- [5] The sixth ground was that, the arbitrator failed to apply her mind to the matter in failing to find that the third respondent's failure to discipline the applicant promptly is short of its waiver or deemed waiver to institute disciplinary hearing, so grossly unfair that it vitiates the decision to dismiss the applicant. The seventh ground was that the arbitrator failed to make an attempt to assess the credibility of each witness and to make some observations on their demeanour. The eighth ground was that the arbitrator failed to consider the improbabilities inherent in Lindi's evidence, that she could not remember the clothes that the applicant was wearing, as she was drunk.
- [6] The last ground was that the arbitrator failed to apply the principles laid down

in *SFW Group Ltd and Another v Martell et Cie and Others*<sup>2</sup> pertaining to techniques generally employed by commissioners or courts in resolving factual disputes.

#### The third respondent's submissions

[7] In opposing this application, the third respondent raised a point *in limine* relating to the applicant's failure to discover the entire record of the proceedings in this matter. The third respondent further opposes the application on the basis that the applicant failed to make out a case of review in her founding papers. Furthermore, the third respondent submitted that there was simply nothing irregular in the award and that it was certainly a reasonable outcome.

#### Applicable law and analysis

[8] 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.

[9] The principle, as laid out in *Sidumo another Another v Rustenburg Platinum Mines Ltd and Others*<sup>3</sup> is whether a decision reached by a commissioner is one that a reasonable decision maker could have reached. Therefore, the test on review is not whether the commissioner came to the correct decision that the court sitting in its position would have reached. The test is whether the commissioner arrived at a reasonable decision based on the material before him.

[10] On the issue of the incomplete record, the third respondent's submission was that the applicant failed to discover the entire record of the proceedings despite having filed the Notice in terms of Rule 7(a)(8). The documents

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<sup>2</sup> 2003 (1) SA 11 (SCA).

<sup>3</sup> (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

which were not discovered were the respondent's bundle of documents, the commissioner's handwritten notes, exhibit R, constituting 20 pages, and exhibit A, constituting 11 pages.

- [11] It is the third respondent's submission that these documents form an essential part of the evidence before the commissioner. Further that without them, the Court would be unable to properly and fairly determine the applicant's review application. The applicant in this regard has offered no reason or explanation for her failure to discover the missing portion of the record. Her representative has also not been able to offer any reason or explanation, as he was not given proper instructions in that regard.
- [12] The third respondent referred the Court to the LAC judgment in *JDG Trading (Pty) Ltd t/a Russells v. Witcher N.O. and Others*<sup>4</sup>, which is binding to this Court. It is apparent that the applicant disregarded the rules of this Court and has failed to give a reasonable explanation for her failure to file and discover the full record of the proceedings. In so doing, the applicant acted in a degree of derelictness and a manner that is grossly remiss. Consequently, her review application stands to be dismissed on this basis alone.
- [13] Even if the Court were to consider the applicant's grounds of review, the third respondent contends that the review application is defective for want of compliance with the Rules of this Court. In terms of Rule 7A(2)(c) of the Rules of this Court, an applicant is required to state the grounds of review in his or her founding affidavit. The founding affidavit has to set out the factual and the legal grounds upon which the applicant relies on to have the arbitration award reviewed and set aside. Those facts and the circumstances surrounding the review may be further augmented in the supplementary affidavit filed once the record of the proceedings, which are challenged, have been filed. (See *Telcordia Technologies Inc v Telkom SA Ltd*<sup>5</sup>).
- [14] In the current case, the applicant has set out broad and general legal

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<sup>4</sup> [2001] JOL 7842 (LAC).

<sup>5</sup> 2007 (3) SA 266 (SCA) at para 32.

grounds upon which she relies on for her review application. The applicant failed to provide particularity to enable the third respondent to answer thereto. This makes the review application fatally defective. In *MIT Tissue v Theron and Others*<sup>6</sup> this Court held that:

“Rule 7A(2)(c) requires that the application for review “should set out factual and legal grounds upon which the applicant relies”. ...Such failure would normally be fatal.”

[15] From the reading of the record and the award itself, there is a clear indication that the commissioner took into account all the evidence before him, and applied his mind to the issues raised by the parties. As such, the arbitrator took into account the totality of circumstances before arriving at the finding that the applicant’s dismissal was both procedurally and substantively fair, and that a sanction of dismissal would be appropriate. It can therefore not be said that he reached an unreasonable conclusion.

[16] With regard to costs, taking into account the requirements of law and equity, this is a matter in which there should be no order as to costs.

[17] In the premises, I make the following order:

Order

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

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D. Mahosi

Judge of the Labour Court of South Africa

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<sup>6</sup> [2000] 8 BLLR 947 (LC) at para 23.

Appearances

For the applicant                      Advocate M. Sekhethela

Instructed by                              S.O Ravele Attorneys

For the Respondent                      Ms Thandi Moyo of Snyman Attorneys

LABOUR COURT