

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1631/20

In the matter between:

CITY OF JOHANNESBURG

Applicant

And

**COMMISSIONER S RAMUSHOWANA N.O
SOUTH AFRICAN LOCAL GOVERNMENT**

First Respondent

BARGAINING COUNCIL

Second Respondent

BETHANI MARIA CHALA

Third Respondent

Heard: 31 October 2023

Delivered: This judgment was handed down electronically by circulation to the parties by email and release to SAFLII. The date of hand down is deemed to be 7 May 2024.

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of Labour Relations Act, 1995 – application of review test set out.

CCMA arbitration proceedings – assessment of evidence by arbitrator – arbitrator unreasonably and irrationally considering and determining evidence – case for review made out – award set aside on review.

JUDGMENT

MAHALELO AJ

Introduction

- [1] This is an application in terms of section 145 of the Labor Relations Act¹ to review and set aside an award of the first respondent dated 12 September 2020 under the auspices of the second respondent in case number JMD111904.
- [2] The arbitrator found that the dismissal of the third respondent was substantively unfair. The arbitrator ordered the applicant to reinstate the third respondent to her original position on the same terms and conditions which existed before her dismissal by allowing her to report for duty on 1 October 2019 and further ordered her backpay in the amount of R39 600.
- [3] Aggrieved by the award, the applicant launched this review application to set aside the award and for the Court to find that the third respondent's dismissal was fair, alternatively to remit the matter back to the second respondent for hearing afresh before an arbitrator other than the first respondent.
- [4] The applicant impugns the award on grounds that the commissioner ignored the material evidence that was before him and consequently rendered an unreasonable decision. The application is opposed by the third respondent.

Background facts

- [5] The third respondent was previously engaged by the applicant as a trainee in its Metropolitan Police Department (JMPD). During 2018, the applicant received a complaint that the third respondent had been soliciting bribes from people to provide them with opportunities to become trainees at the JMPD. The scheme that was reported to the applicant was that the applicant, in conjunction with somebody called Katleho allegedly from JMPD's Human Resource Department, could, on payment of a fee, arrange for the person paying the fee to be engaged as a trainee. A Ms Khubeka (Zanele) is alleged to have paid the applicant in this regard. Ms Evelyn Kalimoni(Mmabatho) is alleged to have been approached in this regard but she had not paid any money.

¹ Act 66 of 1995, as amended.

- [6] Pursuant to an investigation conducted by JMPD, the third respondent was charged with misconduct in that she had “*acted unlawfully and intentionally in that you asked or demanded or solicited*” money in exchange for a job opportunity. At a properly constituted disciplinary hearing, the third respondent was found guilty of misconduct and was dismissed on 19 July 2019.
- [7] The third respondent thereafter referred an unfair dismissal dispute to the second respondent. Conciliation failed and the matter was referred to arbitration. Arbitration came before the commissioner on 26 August 2020. At the arbitration, Mr Motheni a councillor, testified that he was approached by Herbert, the husband of Ms Kubeka in connection with the bribery money which Ms Kubeka had allegedly given to the third respondent. Herbert wanted a refund of the money to his wife. He approached Mr Kgaswane, a senior member, who reported to him that Katleho was unknown at JMPD. He then spoke to the third respondent about the allegations and requested her to meet with Ms Kubeka. The third respondent admitted that she owed Ms Kubeka money which she had borrowed from her. She agreed to refund the money in monthly instalments of R1000. After some time, he was approached by Ms Kubeka who complained to him that the third respondent had not paid all her money as agreed. He advised her to go the legal route.
- [8] Ms Kubeka testified that she had met with the third respondent who told her about a learnership job at JMPD. The third respondent told her that she would have to pay R5000 as she had paid the same amount to get the learnership. She informed her that the amount was for fees, uniform, fingerprints etc. and that she would speak to Katleho, the HR official, who deals with the employment of learnerships at JMPD. Ms Khubeka had become interested in the learnership as she had wanted to be a traffic officer for many years with no success. She received a call from a private number, from a person who called herself Katleho, wanting to know if she was serious about the learnership. Katleho urged her to pay the money or else the spaces would be filled. She gave the third respondent a cash amount of R3000. She further deposited R2050 into the third respondent’s bank account. The extra R50 was for banking fees. After the payment, Katleho called her again assuring her that

she got the position and requested her to be patient as their boss was monitoring them. The third respondent then approached Mmabatho, her colleague, and told her about the same learnership job offer at JMPD. The third respondent told Mmabatho that she needed to pay R6000 for her to get in at JMPD. Ms Kubeka was shocked to hear that the price had changed in just a month. She kept on making enquiries from the third respondent about the learnership and was told to be patient. At some stage, the third respondent collected documents from her for the promised learnership job.

[9] When she did not get positive feedback from the third respondent, she asked her to pay her money back. In Mr Motheni's presence, the third respondent agreed to pay Ms Kubeka back in monthly instalments of R1000. The third respondent gave Mr Motheni the first R1000 to give to her. Thereafter, the third respondent further paid her back a portion of the money, which all amounted to R2000 but refused to pay the outstanding balance. A day before the arbitration, the third respondent's brother settled the balance which the third respondent still owed to Ms Kubeka. Ms Kubeka confirmed that she and the third respondent knew each other and that she used to lend the third respondent small amounts of money (far less than R5000) for transport. Ms Kubeka had lent the third respondent an amount of R600 and could not have done the same with R5000 because she knew that the third respondent would struggle to pay her back as she was not earning much per month. The third respondent still owed her R200 from the R600 that she had borrowed from Ms Kubeka. Ms Kubeka had to take a loan from ABSA Bank in order to give the third respondent the R5000.

[10] The third respondent testified that she knew Ms Kubeka from primary school. She used to borrow money for transport and things from her. She met her and they spoke about the learnership at JMPD, and she got interested as she stated that she had been trying to get through. They became very close and Ms Kubeka would always drive to her house as they stayed at the same location. Ms Kubeka would assist her with things and money. She borrowed money from her which reached more than R5000.

- [11] She was doing a course on NRTA and she decided to keep her distance from Ms Kubeka because she wanted to concentrate on her studies as Ms Kubeka was drinking too much. Ms Kubeka started threatening her that she should pay back the money she owed her. One day, Mr Motheni came to her house to inform her about the money she owed Ms Kubeka and she agreed to pay her in monthly instalments. She disputed that she took money from Ms Kubeka in exchange for a learnership job at the JMPD. She stated that she borrowed small amounts from her until it became R5000. She paid back about R2000 and she was informed that her brother paid the balance to Ms Kubeka but she was not involved. She does not know any person by the name of Katleho. She feels that she was unfairly dismissed as she did not solicit a bribe from Ms Kubeka for a learnership job.
- [12] On 12 September 2021, the commissioner handed down the award which is the subject of this review application.

The award

- [13] The arbitrator summarized the evidence and recorded the issue that he was required to decide as whether or not the third respondent had committed any act of misconduct, and whether the dismissal was the appropriate sanction.
- [14] The arbitrator referred to the first witness of the applicant, Mr Motheni, as having been a hostile witness. He stated that Mr Motheni testified that he was resolving the money issue between Ms Kubeka and the third respondent, not money for the bribe. He said that this differed from the statement which Mr Motheni initially made. The arbitrator found that the applicant had failed to prove misconduct on the part of the third respondent. His reasoning appears from paragraph 18 of the award as follows:

‘where the commissioner is faced with two conflicting versions, a finding on a credibility of a witness should be made. The respondent in this case failed to carry evidentially burden, in that there was no proof that the money given to the applicant was for bribe or the money owed. There were no deposit slips provided. The evidence of the respondent was not corroborated as Mmabatho was not called to give her version. It is absurd that the complainant could pay

such money to a person who is still a trainee, not an officer. On the other hand, the applicants (sic) version was consistent, credible and the applicant was a reliable witness and did not contradict herself in the evidence. The mere fact that other (sic) witness who was part of the disciplinary hearing denied to testify on the fact that the first witness was unwilling to take an oath attracts some concern.'

The Applicant's case

[15] The applicants contended that the award was reviewable on a variety of grounds namely:

- a) The commissioner failed to take into account material aspects of evidence;
- b) The commissioner was influenced by his finding that no deposit slips were provided;
- c) The commissioner made no attempt to analyse the evidence placed before him and simply assumed, without foundation, that the applicant had not discharged the onus of proof;
- d) The commissioner failed to appreciate the evidential weight that should have been attached to the incriminating response of the third respondent;
- e) The commissioner was entitled to consider inconsistencies in the affidavit of Motheni and his testimony at arbitration proceedings; and
- f) Alternatively, the commissioner committed an irregularity in the conduct of the proceedings by failing to extend a helping hand to the applicant's representative who was simply a Labour Relations official and not well versed in arbitration procedures.

[16] The applicant contended that the commissioner failed to properly analyse the evidence presented before him in that he failed to take into account, let alone

properly consider, that the scheme of which the third respondent was accused was not that the third respondent, as a trainee, could provide job opportunities at JMPD but that she had connections with people that could arrange it. Accordingly, there is nothing upset in the person soliciting the bribe as they are not the person that arranges the gratuity. Further that the commissioner was correct to be suspect of the credibility of Mr Motheni and his evidence should have been rejected as unreliable. Ms Kubeka's evidence was required to be judged for its own credibility. The applicant furthermore contended that, because it was common cause that money had been paid by Ms Kubeka to the third respondent, there was no relevance as to whether deposit slips had been provided to prove the payment as the payment was not in dispute. According to the applicant, the commissioner took into account irrelevant evidence by questioning the presence of the deposit slips. The applicant submitted that the commissioner once more failed to properly analyse the evidence before him because he did not even consider that it was strange that the last amount owing to Ms Kubeka was repaid a day before the arbitration. According to the applicant, the commissioner failed to appreciate the evidential weight that should have been attached to the incriminating response of the third respondent because he failed to consider that, at the disciplinary hearing, the third respondent's version was that she had received only a total amount of R2200 from Ms Kubeka and that this amount had already been repaid before the disciplinary hearing. The applicant therefore contended that the commissioner failed to apply his mind to all the relevant factors when resolving conflicting versions before him, thereby committing a gross irregularity and the award he rendered is unreasonable.

- [17] Alternatively, the commissioner committed an irregularity in the conduct of the proceedings by failing to extend a helping hand to the applicant's representative who was simply a Labour Relations official and not well-versed in arbitration procedures.

The third respondent's case

[18] The third respondent's contention is that the arbitrator was correct in his findings, and based on the material before him, he made a decision that a reasonable commissioner could have reached.

[19] According to the third respondent, the charge against her is that on 25 April 2018, she acted unlawfully and intentionally by asking or demanding R5000 from Ms Kubeka in exchange for a job opportunity as a JMPD intended to recruit and not that she had connections with people who could arrange the job for Ms Kubeka. Therefore there is no proof that she had someone who could arrange the job for Ms Kubeka as Katleho was unknown at JMPD. Furthermore, Ms Kubeka had created a fictitious person by the name of Katleho to create the impression that a third person who was supposed to provide the job was involved.

[20] According to the third respondent, the contention that the commissioner failed to reject the evidence of Mr Motheni in order to implicate the credibility of Ms Kubeka is curious because the applicant failed, in its papers, to lay the basis for why the evidence of Mr Motheni should have been rejected by the commissioner or to have him declared a hostile witness. There is no justifiable reason for the commissioner to have rejected Mr Motheni's evidence as his evidence and that of Ms Kubeka are immensely interwoven, particularly with regard to the events that led to the report by Herbert and the investigation carried out by Mr Motheni. Such evidence cannot be separated.

[21] In the circumstances, the third respondent submitted that this review application stands to be dismissed with costs.

Legal principles, evaluation and analysis

[22] The review test is comprehensively spelt out in *Sidumo and another v Rustenburg Platinum Mines and others*² and subsequently expounded in various *dicta* of both the Supreme Court of Appeal (SCA) and the Labour

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at paras 78 - 79.

Appeal Court (LAC).³ Pertinently, in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*⁴, LAC underscored the fact that:

[15] ...the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision maker could reach on all the evidence that was before him or her.

[16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in *Head of the Department of Education v Jonas Mohale Mofokeng and Others*, "for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result". Thus, as recognised in *Mofokeng*, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator "must not misconceive the inquiry or undertake the inquiry in a misconceived manner", as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

"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, evidence 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 inquiry, undertaken the inquiry 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 inquiry or a decision which no reasonable decision-maker could reach on all the material

³ See: *Head of the Department of Education v Mofokeng* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA).

⁴ [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at paras 15 - 16.

that was before him or her”.’ (Emphasis added and footnotes omitted)

[23] Based on the aforesaid, the first enquiry is to establish if there is a failure or error on the part of the arbitrator. Secondly, where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed. As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*⁵:

‘.... 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.’

[24] The applicant challenged the commissioner's reasoning for finding the dismissal an inappropriate sanction in almost all respects. It contends that the commissioner failed to take into account material aspect of the evidence that was before him in that he adopted an armchair approach and made no attempt to question why a person in Ms Kubeka's financial position would pay out a considerable amount of money to assist the third respondent with food and her sick mother. According to the applicant, it could hardly have been suggested that Ms Kubeka was a person of means. She was aspiring for a position that only paid a stipend of R3600 per month. It was not disputed that she would lend the third respondent small amounts of money to attend classes and buy food which the third despondent would pay back at the month's end. According to the applicant, this is a far cry from the ludicrous suggestion that Ms Kubeka would be willing to lend the third respondent R5000 for no rhyme or reason. At no stage did the third respondent explain why it was necessary for her to borrow such a big amount before the end of April 2018.

⁵ [2014] ZALAC 82; (2015) 36 ILJ 1453 (LAC) at para 12.

- [25] There is merit in the applicant's contentions. I find it hard to believe that Ms Kubeka would have gone out to make a loan of R5000 just to lend the money to the third respondent. In all probability, Ms Kubeka knew that if it was a 'goodwill' loan, she would never recover it from an indigent third respondent who was only earning R3600 per month and who at times could not even afford transport costs to attend classes.
- [26] Ms Kubeka took a loan of R5000 from ABSA Bank which clearly indicated that she did not have funds of her own. Moreover, she had to pay a substantial interest on the loan which put her further out of pocket. If it was money lent to the third respondent, there were no repayment terms agreed to. There wasn't even any agreement regarding the interest to be charged on the R5000. The repayment agreement came into existence only after Mr Moteni's intervention. Even then, the third respondent did not keep to the agreement. Given the circumstances of this matter, the material that was presented before the commissioner and the disputed facts raised therein, there was no basis for the commissioner to conclude that the third respondent had demonstrated that she had not solicited the amount of R5000 from Ms Kubeka for a learnership job.
- [27] It is improbable that Ms Kubeka would have borrowed the third respondent small amounts of money until it reached more than R5000 as the third respondent would want the Court to believe, taking into account the financial position of Ms Kubeka. She had to make a loan of R5000 because she was desperate to get the learnership job. On the whole, the commissioner failed to have regard to the probabilities in that he failed to consider that as soon as Ms Kubeka started demanding her money for a bribe back from the third respondent, she started to distance herself from Ms Kubeka because she could not pay her back. The commissioner also failed to consider that the third respondent's brother paid the outstanding money that the third respondent owed Ms Kubeka a day before the arbitration, and it cannot be correct that the third respondent was not involved. All the probabilities are stacked against the third respondent.

[28] Consequently, the Commissioner did not properly apply his mind to the evidence and the probabilities and in the end, his decision is one that another decision-maker could not reasonably have arrived at.

[29] In the result, the review stands to succeed.

Costs

[30] In this case, and considering the dictates of fairness to both parties, I can see no legitimate reason to depart from the general principle that costs do not follow the result in employment disputes before this Court. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

[31] In the premises, the following order is made:

Order

1. The award of the first respondent dated 12 September 2020 under case number JMD 111904 (Award) to the effect that dismissal of the third respondent by the applicant is substantively unfair, is reviewed and set aside, and substituted with an award that the dismissal was substantively fair.
2. There is no order as to costs.

M B Mahalelo
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. Hutchinson

Instructed by:

Moodie & Robertson

For the Third Respondent:

Adv B K Hlangwane

Instructed by:

T Chiloane Attorneys