



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 2425/22

In the matter between

**IMPERIAL LOGISTICS SOUTH AFRICA
GROUP (PTY) LTD**

Applicant

and

RAYMOND MOKAKATLA LESO

First Respondent

COMMISSIONER LETSEMA MOKOENA N.O

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 11 December 2024

Delivered: 5 March 2025

Summary: Review application: Based on the evidence presented at the arbitration, the commissioner's finding that the First Respondent was substantively unfairly dismissed was reasonable. However, the evidence does not support the decision to grant reinstatement. Accordingly, the reinstatement portion of the award is reviewed, set aside, and substituted.

JUDGMENT

SWARTZ, AJ

Introduction

[1] This is an application to review and set aside the arbitration award dated 9 October 2022 issued by the second respondent (the commissioner) in terms of section 145 and section 158(1)(g) of the Labour Relations Act (LRA).¹

[2] The commissioner found the dismissal of the first respondent (Mr Leso) procedurally fair but substantively unfair. The commissioner awarded Mr Leso retrospective reinstatement with a backpay of R853 531.12, being an amount determined by the commissioner to be equivalent to 36 months' remuneration.

[3] Mr Leso's answering affidavit raised a point *in limine* relating to the *locus standi* of the deponent to the applicant's founding affidavit. At the hearing of this matter, Mr Leso's legal representative abandoned this point.

Factual background

[4] Mr Leso was initially employed by Barloworld as a Fleet Manager. His contract of employment was transferred in terms of section 197 of the LRA to the applicant on 3 November 2014. On 17 September 2019, Mr Leso was dismissed for misconduct.

[5] Initially, the applicant brought five charges against Mr Leso. However, during the disciplinary hearing, charge four was abandoned. Mr Leso was summarily dismissed solely on charges two and five, while he received a final written warning, valid for twelve months, for charges one and three. Therefore, the focus is only on charges two and five.

¹ Act 66 of 1995, as amended.

[6] The relevant charges against Mr Leso were as follows:

Charge 2: Dereliction of Duty in that during the period of 24, 25, 26, 27 June 2019 you failed to take corrective action when the driver Sifiso Shongwe reported the vehicle defects reg. JB67LYGP of brakes and battery fault to start the engine of the vehicle.

Charge 5: Bringing the company name into disrepute, in that you failed on several occasions to make proper arrangements and plan with your junior employees when you will not be at work or arrive late, which was noticed by the client Makro.'

The Applicant's Submissions

Charge two

[7] As the applicant's Fleet Manager, Mr Leso was responsible for overseeing his designated drivers and signing their vehicle inspection checklists. He held a managerial role.

[8] Mr Sifiso Shongwe (Mr Shongwe) was the driver of a vehicle having the registration number JB67LYGP (the vehicle) and was responsible for completing its checklist, which Mr Leso (being Mr Shongwe's manager) was required to check and sign. During the arbitration, Mr Brian Briggs (Mr Briggs) was the applicant's Regional Operations Manager for the Massmart contract, with Mr Leso reporting directly to him. If any issues or faults arose with the vehicle, this would be recorded on the vehicle's checklist. It was Mr Leso's duty to ensure they were either brought to Mr Briggs' attention or promptly rectified.

[9] Mr Leso was charged in relation to four checklists dated 24, 25, 26, and 27 June 2019. According to Mr Briggs' evidence, Mr Shongwe completed these checklists and marked "No" for item 1, which stated: "*Brakes to be effective*". This signalled to Mr Briggs that there was a fault with the vehicle's brakes and the vehicle was not to be operated until this fault was fixed.

[10] Despite being responsible for addressing such issues, Mr Leso signed all four checklists, indicating that the vehicle had no faults, save for a door issue. Furthermore, Mr Leso neither rectified the brake fault nor reported it to Mr Briggs. This severe dereliction of duty posed a significant risk, as faulty brakes could have endangered Mr Shongwe's life.

[11] Mr Briggs testified that he could not recall Mr Leso ever requesting training on how to complete the checklists and stated that drivers had been filling out these checklists for years. Instead of reviewing each individual item on the checklist to identify potential issues, Mr Leso only considered the comments section, neglecting a crucial part of the process for ensuring vehicle safety.

[12] The commissioner committed a gross irregularity by disregarding the applicant's material evidence and accepting Mr Leso's claim that neither he nor the drivers had received training on completing the checklists. This led to the incorrect conclusion that Mr Shongwe's "No" response to item 1 did not indicate a fault with the vehicle's brakes. However, the checklists clearly stated that the brakes were faulty, meaning the commissioner misinterpreted their contents.

[13] A further ground for review that the applicant contends is that the commissioner denied it the opportunity to deal with the disciplinary hearing evidence at the arbitration, which the applicant contends shows that Mr Leso changed his version.

Charge five

[14] Mr Briggs testified that Mr Leso damaged the company's reputation with Makro. He stated that he had multiple telephone discussions and face-to-face meetings with Makro's senior managers regarding Mr Leso's negative impact on Makro's service delivery.

[15] Page 60 of the bundle contains an email exemplifying Makro's complaint about Mr Leso. Dated 23 May 2019, the email was sent by Mr Andre Human, who was Makro's General Sales Manager at the time, to Mr Reagan Watson, Massmart's

Senior Manager. It concerns Mr Leso's conduct regarding undelivered goods and states, among other things, that: "*We cannot continue to do business in this manner, we will lose our customer's trust*". Mr Briggs also testified that there were other instances where Makro had complained to him about Mr Leso.

[16] When Leso was off or not at work he failed to properly hand over his duties to his subordinates.

The First Respondent's Submissions

[17] The commissioner's award is reasonable as there is a material connection between the evidence and the result of the award.

Charge two

[18] According to Mr Leso, there was no fault with the vehicle's brakes. Mr Leso testified that he would not allow the vehicle to be driven if it had brake problems and that there was only a problem with the vehicle's door.

[19] He and Mr Shongwe would check the checklist together. If there was a "yes" on the checklist about the brakes and there was a comment about the brakes not working that would have meant there was a fault with the brakes. The checklists in the bundle did not show that there was any fault with the brakes. Moreover, the dashboard of the vehicle did not show there was any fault with the brakes.

[20] The applicant's failure to call Mr Shongwe to testify, both at the disciplinary hearing and during arbitration, regarding the alleged brake fault was a significant oversight. This omission severely weakened the applicant's case, especially as Mr Leso testified that the brakes were not faulty and that Mr Shongwe had marked "No" next to item 1 solely due to his lack of proper training on how to complete the vehicle checklist correctly.

[21] The checklists for the vehicle, which he was accused of neglecting, covers the period of 24 to 27 June 2019. However, he was only charged on 5 September 2019.

The applicant should have informed him of any issues earlier and issued warnings if necessary. Instead, the applicant waited three months before bringing charges against him.

Charge five

[22] Mr Leso always informed Mr Briggs or his Fleet Controller if was not going to be at work. If he was not at work that day, he instructed his colleagues to perform his work.

[23] Mr Leso testified that Mr Briggs was attempting to trap him out of anger by raising "backward charges". He also stated that the email dated 23 May 2019 was never brought to his attention, and he was unaware that there were any issues between him and Makro.

[24] Mr Leso was not aware that Makro had any problems with him.

Test for review

[25] It is trite that the reviewing court will be justified to interfere with the outcome of an arbitration award in an instance where the commissioner failed to identify the real issue(s) between the parties or mischaracterised the nature of the dispute between them. A failure to properly characterise the nature of the dispute between the parties is regarded as gross irregularity.

[26] In other words, The test for review is this: "*Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?*"² To maintain the distinction between review and appeal, an award of a commissioner will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of a commissioner's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the commissioner's reasoning is found to be unreasonable, the result is, nevertheless,

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ilj 2405 (CC) at para 110.

capable of justification for reasons other than those given by the commissioner. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the commissioner.³

[27] The Labour Appeal Court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding “*whether the decision made by the arbitrator is one that a reasonable decision-maker could make*”.⁴

Analysis

[28] Regarding the applicant’s claim that the lack of training defence was raised for the first time during arbitration, this is incorrect. The disciplinary finding (paragraph 5.1.4) clearly states that Mr Leso had already presented this defence during the disciplinary hearing.

[29] What is clear in this matter is the timeline of the charges. The evidence for charge two dates back to June 2019, while the evidence for charge five is from May 2019. The applicant, however, claimed that additional verbal complaints from Makro were made in June and July 2019. Despite this, Mr Leso was only charged on 5 September 2019.

[30] Regarding charge two, the applicant declined to call Mr Shongwe, the vehicle’s driver, to give evidence. I agree with Mr Leso’s argument that Mr Shongwe’s testimony was crucial in determining whether he had informed Mr Leso about the vehicle’s faulty brakes. Furthermore, the applicant failed to provide any additional evidence to confirm that the alleged brake fault was later repaired.

[31] Ultimately, the applicant’s interpretation of the checklist is subjective and does not prove that the vehicle’s brakes were faulty or that Mr Leso was guilty of dereliction of duty. Moreover, before being charged on 5 September 2019, Mr Leso

³ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2012] BLLR 1074 (SCA); (2013) 34 ILJ 2795 (LAC) at paras 12 and 13.

⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 17 and 18.

was not warned about his alleged dereliction of duty concerning the June 2019 checklists.

[32] Accordingly, I find the commissioner's reasonings in relation to charge two reasonable especially in light of his conclusion pertaining to charge two where he states that:

'[52] In dealing with the allegation of dereliction of duty which simply dealt with the driver checklist, it is probable in my view that maybe the drivers did know what they were filling or the drivers together with the Applicant needed training on how to complete the drivers checklist.⁵

[53] I find it somewhat in probable that a driver would continue to operate or drive a vehicle with brakes that are not operational. This is compounded by evidence which I accept on the balance of probabilities that whatever main issue or concern will also be jolted down on the comments section. It is unfortunate that no one was called by the Respondent to clarify the issue...'

[33] Regarding charge five, I agree with the commissioner's finding as outlined in paragraphs 46 to 49 of the award. Once again, the only evidence, apart from Mr Briggs' testimony, relating to this charge is the 23 May 2019 email. This raises the question: why, at that stage when the company's reputation was at risk, did the applicant not address the issue with Mr Leso sooner?

[34] Considering the evidence presented by both parties on both charges, as well as the applicant's lack of supporting evidence, it is clear that the commissioner thoroughly examined the evidence and carefully considered all relevant factors before concluding that Mr Leso's dismissal was substantively unfair. Given the depth of his assessment, it cannot be said that he committed misconduct in his duties as a commissioner, acted with gross irregularity in the arbitration proceedings, or exceeded his powers. Therefore, in my view, the commissioner's finding that Mr Leso was substantively unfairly dismissed is one that a reasonable decision-maker

⁵ It is obvious that there is a typo in this paragraph and it should have read "...it is probable in my view that maybe the drivers did not know what they were filling..." ("not" being omitted).

could reach. It is a reasonable and justified conclusion based on the evidence before him.

[35] There is, therefore, no reason for this court to interfere with the finding that Mr Leso was substantively unfairly dismissed.

[36] However, the compensation that was awarded to Mr Leso stands to be reviewed, set aside and substituted.

[37] This aspect is in relation to the award for reinstatement is dealt with below, however first I have also considered other evidence presented in the arbitration bundle, which I am permitted to take into account in accordance with the *Fidelity Cash* ruling, *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others*.⁶

[38] This other evidence relates to Mr Leso's email dated 12 August 2019 titled "*Unfair: Working Relationship*" in which he complains about Mr Briggs's conduct towards him. The date of this email is the same date relating to charge three which states: "*Gross Negligence in that on the 12th of August 2019 a company vehicle was left unattended the whole night in Nelspruit CBD due to battery fault which was reported to you on several occasions by the driver of the vehicle*".

[39] There appears to be a correlation between charge three and Mr Leso's email. As mentioned earlier, the dates for charge two relate to June 2019, and the date for charge five is 23 May 2019. Mr Briggs did not provide any details regarding the dates of the telephone conversations or the face-to-face meetings he had with Makro about Mr Leso's conduct. Therefore, 23 May 2019 is the only date that can be attributed to charge five.

[40] Throughout his testimony, Mr Leso repeatedly emphasised the delay in the applicant bringing the charges and the fact that he had never been previously warned about any of the conduct referred to in the charges. However, when

⁶ (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 102.

considering this delay in the context of the events of 12 August 2019 and the charges being issued on 5 September 2019 (approximately three weeks later) it is possible that Mr Leso was charged in response to his email dated 12 August 2019..

[41] This version was not expressly verbalised by Mr Leso during the arbitration save for a portion in the transcript where Mr Leso testified that:

‘And tell me Raymond here is my problem with Makro because it indicates on that email that. This is what they have told you from May, but you decided to keep quiet from May until the day I'm gonna send the e-mail to the Senior Manager whose John Bricks⁷ to complain about you. And then it's whereby you started to take all these things from backwards and then you put it to my case. Why didn't you tell me from that day?’

[42] The above are merely my observations and do not alter the reasons previously stated for why I have found the commissioner's award, insofar as Mr Leso's dismissal being substantively unfair, to be reasonable.

[43] The other aspect of the review, is the commissioner's award to reinstate Mr Leso. In terms of section 145(4)(a) of the LRA this court may determine a dispute in a manner it considers appropriate.

[44] At no stage during the arbitration did Mr Leso seek reinstatement. I explicitly raised this point during argument on 11 December 2024 with Mr Sehunane (Mr Leso's attorney) and Maharaj-Pillay (counsel for the applicant). In response, Mr Sehunane submitted that, as Mr Leso was a layperson and did not have legal representation during the arbitration, this explained why he did not explicitly seek reinstatement.

[45] However, despite Mr Sehunane's contention, the evidence from the transcript clearly shows that Mr Leso was solely seeking financial compensation, did not seek reinstatement and that the employment relationship between the applicant and Mr

⁷ Typo or confusion with evidence – seems name should have been John Donalson.

Leso had become intolerable. In this regard, the following portions of the transcript are noted:

‘COMMISSIONER: Relief sought? What is it that you are seeking in terms of this matter? Reinstatement, re-employment, financial compensation?

MR LESO: I need a financial compensation;⁸

MR LESO: I did report the matter to my Senior Manager before regarding the bad attitude that I was getting from my Regional Manager;⁹

Mr Leso refers to his email dated 12 August 2019 titled “Unfair: Working Relationship”;¹⁰

MR PAULSON: And the Applicant’s alleged conduct. Did that impact the trust relationship between the Respondent and the Applicant.

MR BRIGGS: I would say that it has...;¹¹

MR LESO: And I’ll email it to the Senior Managers whereby I was complaining about the leadership of Mr Brian Biggs...;¹²

MR LESO: So, I was not even happy for the company system according to the way they did. I prefer to work with the company that when they said we have a problem. They have to discuss with me immediately in time so that we can fix the matter and have the way forward... I was working in the company whereby they were bunking all my problems and my faults. Of which when I read on the protocol there is no such a thing. Whereby the company of the applicant must always bank your problems and the last dismiss you;¹³ and

MR LESO: So, I’m looking forward for the positive result of this case. From CCMA to take their right decision whereby they can pay me my money from where I started to stay until today. Therefore, I will be happy for that thing if the CMMA can do that.’¹⁴

[46] The above evidence falls within the provisions of section 193(2) of the LRA, which set out the circumstances in which reinstatement should not be awarded. However, the commissioner failed to consider and properly assess this evidence.

⁸ Transcript p 11 l:6-9.

⁹ Transcript p 12 l:15-17.

¹⁰ Transcript p 31 l:10-13.

¹¹ Transcript p 108 l:3-6.

¹² Transcript p 57 l:3-5.

¹³ Transcript p 191 l:14-20, p 191 l:1-3.

¹⁴ Transcript p 192 l:16-19.

[47] In circumstances where the employee does not seek an order for reinstatement, it is improper for the CCMA or court to order such remedy.¹⁵ In *Standard Bank of SA Ltd v Leslie and others*¹⁶ it was noted that the commissioner may not adopt a mechanical approach to ordering reinstatement as the primary remedy, but must consider the circumstances surrounding the dismissal to determine whether a continued employment relationship would either be intolerable or not reasonably practicable.

[48] The commissioner failed to recognise that Mr Leso was solely seeking monetary compensation and that a continued employment relationship would be intolerable for both parties.

[49] It is accordingly only this aspect of the award that stands to be reviewed, set aside and substituted.

Costs

[50] The last issue to be decided is the issue of costs. This Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[51] For the reasons stated above, the reinstatement portion of the award stands to be reviewed, set aside and substituted. However, on the other hand Mr Leso's compensation stands to be considerably reduced.

[52] For these reasons and in accordance with fairness I make no order as to costs.

[53] In the circumstances, the following order is made:

¹⁵ *Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation and Arbitration and others* [2022] 6 BLLR 524 (LAC); [2022] ZALAC 7.

¹⁶ (2021) 42 ILJ 1080 (LAC); [2020] ZALAC 69.

Order

1. The review application is granted only to the extent that paragraph [2] on the page 9 of the award dated 9 October 2022 under CCMA case number MPMB1049-19 is set aside and substituted with the following:

‘The First Respondent was substantively unfairly dismissed and is awarded compensation of 12 months’ salary being R23 709.20 x 12 = R284 510.40.’

2. There is no order as to costs.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms P. Maharaj-Pillay
Instructed by: Cliffe Dekker Hofmeyer Inc.

For the First Respondent: Mr M.V. Sehunane
Instructed by: Sehunane Inc.