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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR491/2022

In the matter between:

BONGI ERROL MTHIMUNYE	**Applicant**
and	
THE EDUCATION LABOUR RELATIONS COUNCIL	**First Respondent**
COMMISSIONER MARK HAWYES N.O. **(cited in his capacity as arbitrator of the Education Labour Relations Council)**	**Second Respondent**
DEPARTMENT OF HIGHER EDUCATION AND TRAINING	**Third Respondent**
CENTRAL JOHANNESBURG TVET COLLEGE	**Fourth Respondent**

Heard: **29 August 2024**

Delivered: **3 February 2025**

JUDGMENT

ADAMS, AJ

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Introduction

[1] This is an application to review and set aside an award made by the Second Respondent (Commissioner). The Fourth Respondent shall hereinafter be referred to as "the Respondent".

[2] The application is opposed.

[3] In his award, the Commissioner made a finding that the Applicant's dispute was dismissed with no order as to costs.

Grounds for review

[4] In his founding affidavit, the Applicant has contended that the Commissioner made several gross errors of interpreting fact and law in his findings, such that these irregularities created several grounds for review. These grounds comprised of, *inter alia*, the following:

4.1. the Commissioner failed to apply his mind to the fact that the Applicant presented evidence that the Respondent had created spreadsheets that were backdated to apparently show how some employees had submitted Integrated Quality Management System (IQMS) claims in the past;

4.2. the Commissioner failed to consider the fact that the Respondent was arbitrarily denying the Applicant payment of his IQMS benefits, despite his submission of his claim for the outstanding amounts in 2013 in the format and manner required by the Respondent; and

4.3. the Commissioner failed to conduct an enquiry into the fairness of the conduct of the Respondent and whether this amounted to an unfair labour practice, instead of merely adopting a mechanical checklist approach.

[5] In summarising his grounds of review, the Applicant concludes that a defect exists in the arbitration proceedings before the Commissioner set out as follows:

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5.1. the Commissioner did not properly, rationally and justifiably apply his mind to the facts of the law in this instance;

5.2. the First Respondent did not properly, rationally and justifiably apply his mind to the facts of the law in this instance; and

5.3. the First Respondent did not properly, rationally and lawfully discharge the duties imposed on him by the Act.

[6] In the Applicant's supplementary affidavit, the Applicant addresses further grounds for review after having received the transcribed record including, *inter alia*, the following:

6.1. the Commissioner failed to properly apply his mind to the questions of fact and law that were placed before him, with specific reference to the *viva voce* testimony and evidence presented by the Applicant and his two colleagues. In support of this contention, the Applicant has alleged that after having performed a reading of the transcribed record, it can be seen that the Commissioner ignored the evidence presented by the Applicant, Mr Seloane, and Mr Mdanisi that the IQMS had been improperly applied, such that some lecturers were effectively excluded by the maladministration thereof;

6.2. additionally, and as a further ground of review, the Applicant has contended that the Commissioner either ignored, or largely discounted the evidentiary weight, of documentary evidence submitted by the Applicant at arbitration. Included in these documents were screenshots of WhatsApp correspondence between various employees and management staff of the Respondent, as well as circulars disseminated by the Respondent.

<u>Applicant's submissions in terms of the facts of this matter</u>

[7] The paragraphs below deal with the Applicant's submissions in terms of his version pertaining to the facts of the matter.

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[8] The Applicant commenced employment with the Respondent during April 2011 as a lecturer, with gross remuneration of R242 276.88 per annum. The Applicant is still currently employed in this position.

[9] On or about January 2021, the Applicant first became aware that the IQMS benefits existed when he collected his payslip for December 2020, and he observed that there were two separate payslips for some employees; one containing the usual salary, and one containing the IQMS benefit. It was at this time that the Applicant realised that he had not been paid the IQMS benefits since 2013. Furthermore, it was discovered that numerous other employees of the Respondent had also not received the IQMS benefits since 2013. Accordingly, the Applicant attempted to resolve the issue with the Respondent internally, and when those attempts failed, he referred a dispute to the ELRC.

[10] Subsequently, during the conciliation proceedings between the Applicant and the Respondent, the Respondent proceeded to inform its employees that in order for them to claim the outstanding IQMS benefits from 2013 onwards, employees would have to submit their names and the outstanding years of IQMS benefits that they were claiming with the Respondent's Human Resources official. The Applicant duly performed in terms of this directive by personally submitting his name and his claim for 2013 onwards.

[11] The Respondent, during November 2021, issued an internal memorandum whereby it informed its employees that it was busy with the process of processing and paying the outstanding claims from 2013. This internal memorandum was referred to during the arbitration proceedings.

[12] The Respondent further informed its employees that in order to lodge their IQMS claims for 2021, the employees would have to sign a spreadsheet. The Applicant duly performed in terms of this directive.

[13] However, despite the Applicant having duly submitted his claims for the 2013 to 2021 IQMS benefit, the Respondent has to date failed to pay the Applicant.

[14] In the arbitration award, the Second Respondent found that the Applicant had failed to submit his claim for the outstanding 2013 to 2020 IQMS benefits, and

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as such, he had failed to demonstrate how the Respondent had committed an unfair labour practice.

[15] The Applicant therefore submits that the abovementioned arbitration award is wrong in fact and law, irregularly arrived at, and cannot be justifiable, on an objective basis, either in fact or in law. The Applicant further submits that there is simply no basis that any reasonable decision maker could have arrived at the decision the Commissioner arrived at in the circumstances. It is thus prayed that the arbitration award be reviewed and/or set aside in terms of sections 145 and/or 158(1)(g) of the Act.

Respondent's submissions in terms of the facts of this matter

[16] The paragraphs below deal with the Respondent's submissions in terms of its version pertaining to the facts of the matter.

[17] The Applicant is employed as a PL1 Lecturer at the Ellis Park branch of the Johannesburg Central TVET College. The Johannesburg Central TVET College falls under the Department of Higher Education and Training, the Third Respondent in these proceedings.

[18] In about January 2021, the Applicant filed a grievance of unfair labour practice in essence, complaining about the implementation of the IQMS at the Ellis Park campus of the Third Respondent and his alleged exclusion from the financial benefits arising from the implementation of the IQMS.

[19] The grievance of the Applicant was attended to but unfortunately remained unresolved and the Applicant in or about April 2021 referred a unfair labour practice dispute against the Respondent claiming relief in the following terms:

19.1. backpay of 1.5% of his gross remuneration of R20 189.74 per month from 2013 amounting to R32 707.38; and

19.2. the adjustment of pay progression calculated at 15% for the duration of the dispute from R242 276.88 to R276 618.41 per annum.

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[20] The basis of the Applicant's claim was that the Respondent arbitrarily awarded financial benefits related to the implementation of the IQMS to certain academic members to the exclusion of the Applicant.

[21] The dispute was referred to the First Respondent in terms of section 186(2)(a) of the Labour Relations Act[1] (LRA).

[22] The matter was then conciliated and remained unresolved. A certificate of outcome was issued and the matter was referred for arbitration before the Commissioner who arbitrated the matter and issued an award on 11 February 2022 in which the referral of the Applicant was dismissed.

[23] The Respondent contends that the main defence of the Third and Fourth Respondents during the arbitration proceedings was that the Applicant did not comply with the process set out by the Third Respondent for the implementation of the IQMS in its various colleges duly adopted in terms of the Collective Agreement No. 5 of 2005 (Collective Agreement).

[24] The Third and Fourth Respondents, during the arbitration, contended and led evidence to the effect that the Applicant did not participate in the IQMS during the period of 2013 to 2020 financial years and as such, the Applicant was not entitled to any benefit being a salary grade progression in terms of the IQMS for those years.

[25] The Third Respondent contended that the Applicant did not submit documents required in terms of the IQMS to the Third and Fourth Respondents to evaluate his performance progression due to the fact that he was of the view that the Third and Fourth Respondents were not correctly implementing the IQMS in that he did not participate at all in the IQMS process.

[26] Due to the non-participation of the Applicant in the IQMS process, the Applicant is not entitled to any progression salary grade or grade progression in terms of the IQMS but that the Applicant only received the annual payment increase of public servants.

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[1] Act 66 of 1995, as amended.

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[27] The IQMS is defined in clause 1.2 of the Collective Agreement:

> 'The IQMS is an Integrated Quality Management System that consists of two programmes, which are aimed at enhancing and monitoring performance of the education system. These are:
>
> - developmental appraisals;
> - performance measurement.
>
> The purpose of Development Appraisal (DA) is to appraise individual educators in a transparent manner with a view to determining areas of strength and weakness, and to draw up programmes for individual development.
>
> The purpose of Performance Management (PM) is to evaluate individual teachers for salary progression, grade progression, affirmation of appointments and rewards and incentives.
>
> These are implemented in an integrated way in order to ensure the optimal effectiveness and coordination of the various programmes.'

[28] The Respondent further contended that there are various roles to be played by the employer and the employee, being in this instance the educator (the Applicant) and the Third and Fourth Respondents. Specifically, the role of the Applicant is set out in clause 2.2 Collective Agreement as follows:

> '2.2 The Educator
>
> - must undertake self-evaluation of his/her performance.
> - Identify his/her personal support group – Development Support Group (DSG).
> - Develop a Personal Growth Plan (PGP) and finalise it together with the DSG.
> - Must cooperate with the DSG.
> - Must cooperate with the external WSE team in line with the protocol when the school is being evaluated.

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- Attend IMSET and other programmes in terms of areas identified for development.

- Engages in feedback and discussions.'

[29] The Respondent further submitted that the roles set out for educators, being the Applicant in this instance, are clear and after having played his role the Applicant will have to submit a self-evaluation of his performance to the Human Resource Department of the Fourth Respondent for their consideration and capturing.

[30] The educators of the Third Respondent at all material times were aware of their roles and were evaluated and those who performed satisfactory received pay progression in terms of the IQMS by participating in the programme by submitting its self-evaluation identifying the Development Group Support and developing their personal growth plan together with their DSGs.

[31] After having been assessed and performed satisfactorily, they would receive their pay progression and grade progression in terms of the IQMS.

[32] The pay progression in terms of the IQMS is not automatic. It depends on scores received by the relevant educator/s after having been assessed by the management team of the Third Respondent.

[33] The Applicant's loss of benefits of the IQMS is self-created because he decided not to participate in it by not submitting any documentation that were required in terms of the IQMS.

[34] The Respondent, during arbitration, produced all captured IQMS scores from other educators who participated in the IQMS during the relevant years between 2014 to 2020.

[35] It is denied that the Applicant was unfairly excluded in the process and the benefits that arise from the IQMS implementation of the IQMS. The Applicant on his own volition decided not to participate in the process and as a result, he did not receive the pay progression and/or any benefit in terms of the IQMS.

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The facts

[36] It follows from the introduction that the facts assume a level of significance in these proceedings. The Applicant was entitled to an IQMS benefit in the event that certain processes and procedures were followed in accordance with the Collective Agreement.

[37] The Applicant claimed that there was no process followed by the Respondent in terms of the IQMS in accordance with the Collective Agreement.

[38] The Respondent, on the other hand, has contended that the Applicant failed to comply with the processes and procedures required in terms of the Collective Agreement in order to receive the IQMS benefit, and this is the basis for him having not received such benefit.

The arbitration award

[39] The Commissioner correctly identified in his award that he was required to ascertain whether the First Respondent had committed an unfair labour practice dispute by failing to pay the Applicant IQMS performance and development benefits.

[40] At the arbitration hearing, the Applicant led the evidence of three witnesses (including himself). The other two witnesses called on behalf of the Applicant were Mr L Seloane and Mr Mdanisi. The First Respondent led the evidence of three witnesses namely Miss L Sikakana, Mr R Spandiel and Mr S Plaatjie. There were, therefore, six witnesses called in total.

[41] In terms of summarising the evidence of the witnesses on behalf of the Applicant, the Commissioner has simply stated as follows:

> '10. The gist of the testimony of the three witnesses was that the Respondent had not fully complied with the provisions of Collective Agreement No. 5 of 2005 in administering the IQMS system in paying employees benefits from 2013 to 2020.
>
> 11. Basically the Applicant contended that because the IQMS procedures had been improperly applied to the other employees he likewise should

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not be excluded from IQMS payments for 2013 to 2020 when the process was improperly applied to him.'

[42] In terms of summarising the evidence led by the Respondents' witnesses, the Commissioner has simply contended in his arbitration award that:

'13. Sikakana admitted that the process followed to administer IQMS was not perfect but a consistent process to her was applied to all employees who were paid IQMS benefits.

14. The first requirement was for employees to submit an application with supporting documents.

15. It is common cause that the Applicant did not submit applications for IQMS for 2013 to 2021. This was confirmed by all three of the Respondents' witnesses.

16. Both Spandiel and Plaatjie noted that the Applicant had submitted an application for IQMS for 2021.'

[43] After the analysis of evidence, the Commissioner reached the following conclusion:

'17. The onus rests on the Applicant to prove that the Respondent committed an unfair labour practice on a balance of probabilities, in the way it dealt with him in respect of IQMS.

18. I am not called upon to decide whether the college followed Collective Agreement No. 5 of 2005 to the letter of the law.

19. What was required of all the employees that received IQMS payments was to lodge an application with supporting documents with the college for each of the years claimed.

20. As eluded to in paragraph 15 it is common cause that the Applicant did not lodge an application for supporting documents for 2013 to 2020.

21. The only reason for his non-submission that appears apparent from the Applicant's testimony is that he was intent on pointing out to the college

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that the error of their ways ito how they handled the IQMS administration.

22. I find that had the Applicant followed the relatively simple processes that were required of all applicants for IQMS he too would probably have qualified and been paid.

23. The Applicant has failed to prove on a balance of probabilities that the Respondent committed an unfair labour practice against him.'

Analysis

[44] Unfortunately, when one considers the Commissioner's analysis of the evidence, same is unhelpful to this Court and the conclusions that flowed from it.

[45] The Commissioner appears to have followed an approach where, on the one hand, in his analysis he finds that he is not called upon to decide whether the Respondent followed the Collective Agreement to the letter of the law, however, on the other hand, contends that the Applicant failed to comply with the process in terms of how IQMS payments were to be effected in finding that an unfair labour practice had not been committed.

[46] To this end, in the award, the Commissioner finds that had the Applicant followed the relatively simple processes that were required of all employees for IQMS, he would have probably qualified and been paid. This, however, in circumstances where the Commissioner had found that he was not called upon to decide whether the Respondent itself had followed the Collective Agreement in this regard in payment of the IQMS benefits to other employees.

[47] Section 186(2)(a) of the LRA states as follows in terms of the definition of an unfair labour practice:

'(2) 'Unfair Labour Practice' means any unfair act or omission that arises between an employer and an employee involving –

(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a

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> reason relating to probation) or training of an employee or relating to the provision of benefits to an employee ...' [Own emphasis]

[48] It was, therefore, imperative for the Commissioner to consider the conduct of the Respondent. The Commissioner has not done this when one considers his analysis.

[49] For starters, the Commissioner has stated in his award that he is not called upon to decide whether the Respondent had followed the Collective Agreement to the letter of the law, however, when one considers the transcribed record, it is clear that there was testimony from a number of witnesses that the Collective Agreement had not been followed and that the processes required in terms of the Collective Agreement had not been followed.

[50] Furthermore, the Commissioner found, in analysing the evidence, that the only reason for the Applicant's non-submission that appears apparent from the Applicant's testimony is that he was intent on pointing out to the Respondent the error of his ways. When one considers the testimony of the Applicant, however, this was not his testimony during the course of the arbitration proceedings. The Applicant made it clear on a number of occasions in his testimony that he was not aware of the IQMS benefit until he had collected his payslip in December 2020 and observed that there were two separate payslips for some employees, one containing their usual salary and one containing the IQMS benefits.

[51] Further to the above, when one considers the transcribed record, the Commissioner has not addressed anywhere in his award the evidence led by the Applicant pertaining to the fact that the Respondent had inconsistently applied the provision of the IQMS benefits by only paying the benefits to some employees and, that it had also back paid employees for IQMS benefits from as far back as 2013, in November 2021 after the Respondent had issued an internal memorandum whereby it informed its employees that it was busy with the process of processing and paying the outstanding claims from 2013. This

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testimony was led, however, it was not dealt with by the Commissioner whatsoever, despite its relevancy to the dispute at hand.

[52] At the commencement of the arbitration proceedings, when this aspect was briefly addressed and the Respondent's representative was asked by the Commissioner whether there were certain employees that had been back-paid their IQMS from 2013, the Respondent's representative simply stated that it was a different issue and that he did not think that it was the same issue.

[53] When he was pushed on this by the Commissioner and questioned as to whether they had been back paid to 2013, the Respondent's representative simply informed the Commissioner that he could only confirm by checking to see if it was relevant to this case.

[54] The Commissioner made it clear to the Respondent's representative that it may be relevant in the sense that there are payments taking place which were backdated to 2013, and that if the issue was the same, then the Applicant may have been entitled to backpay from 2013 as well.

[55] Whilst the Respondent's legal representative said that he was going to check on this aspect, this aspect wasn't fully clarified nor fully addressed by the Respondent during the arbitration proceedings, in terms of the parts of the record that I have been furnished with. I deal with the transcript of proceedings further hereunder in my judgment.

[56] None of these aspects were addressed in the arbitration award.

[57] It is also clear from a reading of the record, as well as the parties' affidavits in this review application, that there are many disputes of fact between the parties and that such disputes of fact existed between the parties at the commencement of the arbitration proceedings.

[58] Despite this, it does not seem that the Commissioner has addressed these disputes of fact whatsoever in his award.

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[59] In *Sasol Mining (Pty) Ltd v Nqgeleni N.O. and others*[2] (*Sasol Mining*), the approach to be adopted by commissioners to decide the balance of probabilities in respect of disputing versions presented was set out therein and the Court held that it was one of the prime functions of an arbitrator to ascertain the truth as to the conflicting versions before him. The following was held in this regard:

> 'What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.'

[60] In accordance with *Sasol Mining*, the Commissioner was required to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

[61] To this end, the Commissioner was required to determine whether an unfair labour practice had been committed in accordance with the definition as set out in the LRA. This included analysing the conduct of the Respondent, as testified to by the Applicant and his witnesses.

[62] What is glaringly absent from the arbitration award is an assessment of the versions of each of the witnesses, of the credibility of the witnesses and the inherent probabilities of the versions presented. In fact, there is no consideration of any of the factors set out in *Sasol Mining* whatsoever.

[63] When one considers the arbitration award, there is no mention made of the balance of probabilities other than that the Applicant had failed to prove on a

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[2] [2010] ZALC 141; (2011) 32 ILJ 723 (LC) at para 9.

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balance of probabilities that the Respondent had committed an unfair labour practice against him.

[64] The finding of the Commissioner is concerning given his failure to consider the evidence holistically, or at all. Whilst the Commissioner has found that the Applicant had failed to prove on a balance of probability that the Respondent committed an unfair labour practice against him, he has not evaluated the parties' evidence in his award nor made any findings in this regard.

[65] There was evidence given by six witnesses in total, and the arbitration proceedings spanned over a number of days. Despite this, there is no consideration or assessment of their testimony other than the findings which I have already addressed above. The evidence given has been summarised to a few paragraphs, specifically one paragraph in respect of the Applicant's witnesses' testimony and four paragraphs summarising all of the Respondent's witnesses' testimony.

[66] In *Sasol Mining*, the Court, in dealing with a similar scenario to the one before me, found that:

> '[7] Regrettably, the commissioner's logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this Court. Some commissioners appear wholly incapable of dealing with disputes of fact – their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems

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appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'

[67] Unfortunately, the same has been done in this matter when one considers the arbitration award in totality.

[68] In *Stellenbosch Farmers' Winery* Group *Ltd and Another v Martell et Cie and Others*[3], the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms:

> 'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on summarised as a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one

[3] [2002] ZASCA 98; 2003 (1) SA 11 at para 5.

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direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[69] In *casu*, the Commissioner did not take cognisance of the material evidence placed before him and he failed to assess the totality of the evidence that was presented by the six witnesses that testified. It was incumbent upon the Commissioner to make credibility findings and to state why he had accepted one version and rejected another, which he dismally failed to do.

[70] One of the Commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. It is clear that there were many disputes of fact when one considers the testimony given by the various witnesses. The Commissioner was, thus, obliged to at least make some form of an attempt to assess the credibility of each witness and to make an observation on their demeanour.

[71] The Commissioner also ought to have considered the prospects of any partiality, prejudice or self-interest on the witnesses' parts, and determine the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The Commissioner manifestly failed to resolve the factual disputes before him on this basis.

[72] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[4], Ngcobo J stated:

> '... [W]here a commissioner fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of *Ellis*, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but

[4] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 268.

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because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[73] The Commissioner was required to make a factual adjudication on the issue of an unfair labour practice, and he had to do that by considering and assessing all of the facts placed before him by the different witnesses who testified. The Commissioner did none of that in his award.

[74] There were a number of disputes of fact, in terms of the evidence led by the various witnesses, which were not dealt with in the Commissioner's award whatsoever, and which were required to be dealt with in ascertaining whether an unfair labour practice had indeed been committed by the Respondent. Further to this, there were a number of facts that remained unchallenged and or undisputed, but which were not addressed by the Commissioner. By way of just a few examples this included, *inter alia*, the following:

74.1. the Applicant presented evidence that the Respondent had created spreadsheets that were backdated to apparently show how some employees had submitted IQMS claims in the past. It would have been necessary to have evaluated this evidence and made a finding thereon as same would demonstrate whether due processes had been followed by the Respondent or not;

74.2. the Commissioner failed to consider the evidence led by the Applicant that the Respondent was arbitrarily denying the Applicant payment of his IQMS benefits despite him having submitted his claim for the outstanding amounts from 2013 in the format and manner required by the Fourth Respondent;

74.3. the Commissioner did not deal with the evidence led by the Applicant that the Respondent did not comply with its own processes and procedures in terms of the IQMS benefit. Whilst this version was not challenged during the Applicant's testimony, it was not considered by the Commissioner;

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74.4. the Commissioner did not consider the testimony that a number of employees who allegedly were out of work due to COVID-19 comorbidities have received the benefit. According to the Applicant, they would not have been able to comply with the processes in terms of the Collective Agreement if they were off work due to COVID-19 comorbidities if the Collective Agreement was followed to a tee;

74.5. the Commissioner did not deal with any of the evidence led pertaining to the conduct of the Respondent in terms of the IQMS process and the fact that evidence had been led demonstrating that the Collective Agreement had not been followed by the Respondent in terms of the IQMS benefit. In fact, at a stage in the arbitration proceedings, the Commissioner put to the Respondent's representative that it seemed to be common cause that the correct or normal process as set out in the Collective Agreement had not been followed by the Respondent. In response to this, the Respondent's representative conceded this and informed the Commissioner that it was only the procedure that was wrong. This was not taken into consideration by the Commissioner in his arbitration award whatsoever;

74.6. the Commissioner failed to take into consideration the evidence led that the provision and evaluation for the payment of IQMS benefits by the Respondent was inconsistent with its own Collective Agreement;

74.7. the Commissioner did not take into consideration that Mr Mdanisi testified to the failure of the Respondent to apply the provisions and procedure of the Collective Agreement regarding the incentives of IQMS. This aspect was an important aspect that was required to be dealt with by the Commissioner in assessing the conduct of the Respondent insofar as the contentions are concerned pertaining to an unfair labour practice; and

74.8. the Commissioner did not take into consideration that some employees had been back paid their IQMS benefits from the period 2013, some 8 years later, and that this was even addressed in an internal

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memorandum which formed part of the documentary evidence presented.

[75] It is evident that the Commissioner failed to consider the real issues before him.

[76] As found in *Sasol Mining*, the Applicant's grounds for review are process-related. In other words, this Court is ceased to set aside the award on the basis of process-related reasons rather than the result of the award. As found in *Sasol Mining*, with reliance on the Industrial Law Journal:

> '... If the act of process related unreasonableness equates to a latent gross irregularity, then, in order to succeed on review, the Applicant would have to establish no more than that the result of the award may (and not would) have been different if the Commissioner had properly acquitted him or herself.'[5]

[77] In *casu*, had the Commissioner properly acquitted himself, he would have applied his mind to the material contradictions between the different witnesses' testimony in terms of the IQMS processes and procedures. He would have also taken into account that the Respondent did not follow its own Collective Agreement, however, the Commissioner attempted to rely upon same in depriving the Applicant of the IQMS benefit. He would have taken into account that other employees were back paid their IQMS benefits from 2013, some 8 years after the fact, however, the Applicant was not. Had the Commissioner dealt with this aspect, the result of the award may well have been different.

[78] The Commissioner's failure to have any regard to the credibility and reliability of any of the witnesses as well as the inherent probabilities of the competing versions before him, coupled with the fact that the award clearly may have been different had the Commissioner properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the Commissioner in the conduct of the proceedings.

[79] I accordingly find that there are grounds for review *in casu* and that the Applicant has succeeded in demonstrating that such grounds should succeed.

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[5] *Sasol Mining supra* at para 11.

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[80] In terms of the relief sought by the Applicant, the Applicant seeks an order reviewing and setting aside the arbitration award and substituting it with a new order.

[81] In the event that an arbitration award is set aside on review, this Court has a discretion whether or not to finally determine the matter.[6]

[82] In *casu*, the outcome of the arbitration proceedings was ultimately distorted by the Commissioner's failure to consider the evidence holistically and his failure to determine the real dispute. I am not inclined to substitute the award where the principle and material issues were not properly determined and where the evidence was not considered at all by the Commissioner.

[83] Further to this, I am not in a position to make any findings based on demeanour or aspects pertaining to the credibility of witnesses when one considers that this analysis was not done by the Commissioner. This has placed this Court in a very difficult position to finally determine the matter.

[84] Additionally, when one considers the record of proceedings, it is clear that there are parts of testimony from various witnesses missing.[7] The transcript commences at Part 3 of the testimony on 28 January 2022 and it is clear therefrom that the testimony starts in the middle of Miss Sikakana's testimony and that there are, accordingly, parts of the transcript that are missing. Accordingly, and further to my reasons already supplied above, the record is not in a state for me to make any detailed assessment on the merits.

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

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[6] *Platinum Mile Resources (Pty) Ltd v CCMA and Others* (JR427-20) [2023] ZALC JHB 52 (1 March 2023).

[7] The missing parts include: including Parts 1 and 2 of the transcript for 28 January 2022. Page 157 of Volume 2 of the Record, ends with the testimony of the witnesses on 2 December 2021. At page 158 of Volume 2 of the Record.

Order

1 The arbitration award issued by the Second Respondent, Commissioner Mark Hawyes of the First Respondent, under case number ELRC647/20/21GP, dated 10 February 2022, pursuant to the arbitration proceedings between the Applicant and the Third and/or Fourth Respondent, is reviewed and set aside;

2 the matter is referred back to the Education Labour Relations Council for a hearing *de novo* before another commissioner, other than the Second Respondent.

3 There is no order as to costs.

R Adams

R Adams

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the applicant:	Chantelle Bensch
Instructed by:	Higgs Attorneys
For the Respondent:	Adv. L Kalashe
Instructed by:	State Attorney

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