THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2023/22

In the matter between:

CINDI ALANI SAMSON Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MASHEGO MAILMELA *N.O.* Second Respondent

REACH SUMMIT (PTY) LTD Third Respondent

Heard: 11 November 2024

Delivered: 14 January 2025 (handed down by email to the parties)

Summary: Application to review and set aside arbitration award relating to alleged unfair labour practice. Failure of the commissioner to apply his mind to the evidence. In the circumstances, applicant denied a fair hearing, and the outcome was unreasonable. Application granted.

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JUDGMENT

DANIELS J

Introduction

[1] The third respondent (the "employer") issued a final written warning (the "warning") to the applicant, who challenged the warning as an alleged unfair labour practice at the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). The second respondent (the "commissioner") found that the warning did not constitute an unfair labour practice.[1]

[2] At some point after the warning was issued, the applicant was dismissed for alleged poor work performance. The fairness of that dismissal was also challenged, and that dispute has followed its own path. There is nothing problematic in the approach.[2] While the unfair labour practice dispute and the dismissal dispute could well have been consolidated, they were not.

[3] This application is brought to review and set aside the arbitration award in which the second respondent found that there was no unfair labour practice.

Material facts

[4] The factual matrix set out below is drawn from the documents before the commissioner as well as the transcript, in particular the evidence of Ms. Anthea Kallis ("Kallis"), the applicant's manager.

[1] Section 186(2)(b) of the Labour Relations Act No 66 of 1995 states unfair disciplinary action of an employee, by an employer, that falls short of dismissal constitutes an unfair labour practice.

[2] *Kock v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 1625 (LC) at para 45

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4.1 On 1 November 2021, the applicant was engaged by the employer as Project Manager: Recruitment and Placement, subject to a three-month probation period. This probation expired on 1 February 2022 without incident.

4.2 A few days prior to the expiry of the applicant's probation period, the recruitment manager, Ms Van Zyl, who reported to the applicant, resigned. In the email communicating her resignation, Van Zyl stated:

> "*There is an unprecedented amount of projects – the first of this scale in the company's history and with more projects to come. You have both mentioned to me that there is no room for error and I agree, but with these large amounts of recruits, incredibly tight deadlines and unpredictable circumstances, human error will inevitably creep in*."

4.3 Very few details, of the targets or deadlines applicable to the applicant and allegedly missed, are clear from the oral evidence.[3] It is necessary therefore to refer to correspondence, which was referred to at the arbitration, and remained unchallenged.

4.4 According to the correspondence[4] emanating from the applicant's attorneys, during mid-February 2022, the employer received an unusually large order for recruits. The target had to be met by the applicant with a reduced recruitment team - given the resignation of the recruitment manager at the end of January 2022. In the letter, the applicant's attorneys indicated that, during February and/or March 2022, the applicant travelled to various sites including Rustenburg, Polokwane, Mokopane, and Thabazimbi. The attorneys stated that the applicant had missed the deadline to provide 825 recruits, by one

[3] However, Kallis did testify that "to the best of her recollection" deadlines for "Amandabult" and "Mokopane" were missed. She was unsure whether a deadline for Rustenburg was missed. She did not clarify the delivery expected, the date of the deadline, or the period by which the deadline was missed. Record Vol 2, transcript p218 lines 302 – 306

[4] Record Vol. 1 pages 25 – 28. Note that the employer did not reply to this letter, dated 28 March 2022, from the applicant's attorneys.

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week. The letter recorded that the applicant was required to execute tight deadlines, with extreme workloads, in different parts of the country. At arbitration, the employer contended that these deadlines were set by the applicant. However, this was vehemently disputed by the applicant.

4.5 Kallis testified:

> "*Cindi Samson was taking care of recruitment for Platinum Encumber*[5] *(sic). Before recruitment had taken place, we sat down and worked out what that recruitment plan would be. We set out the timelines, being four weeks per project. And that was what Cindi Samson was comfortable with. She had agreed to that that was the time that she said that she would need for, to roll out that project. When we were, when it started, there was quite a little, for each site, she would travel to the site and then do the recruitment and the support team would assist in the office. During, I would say her second week, it became, travelling, it became quite evident that she was struggling to meet the deadlines. I then had a conversation with her regarding that and I said to her, since I can see that she's struggling, I'll pull her off the road and she would be office bound. I then took over the rest of the travel, so I travelled from Cape Town to the other areas to make sure that I was then doing the recruitment and she would only be in the office, concentrating on wrapping up the recruitment drives. I also got in two of our contract facilitators, who were quite familiar with our projects and how we work to assist her with recruitment, and she showed me that that was all she needed and then she would be on track.*"[6] (own emphasis)

[5] The oral evidence most likely referred to "Kumba" and was incorrectly transcribed. It was common cause that the applicant was subsequently charged for failing to deliver in relation to two projects referred to by the employer as the Platinum project and the Kumba project.

[6] Transcript p3 lines 66 – 82. This evidence was extremely vague, and omitted much detail.

For example, the evidence does not disclose the deadline for the "Platinum Encumber" project nor when the project commenced. It does not expressly state that the deadline was missed, and by what period. It fails to state the consequences of the deadline being missed. It suggests that the applicant experienced problems from "her second week" but does not explain whether this was the second week of the project or the second week of her employment (commencing in November 2021). It suggests that the witness (Kallis) took over all the travel, and the applicant was not required to travel, but it does not state the date when this occurred. It states that two external facilitators were engaged, but does not state when they were engaged nor the scope of their work. If this oral evidence were simply accepted at face value, it would appear that Kallis did the vast majority of the work while the applicant (and her team), together with two external facilitators, were unable to complete the "wrapping up of the recruitment drives" from the office. This evidence appears to contradict the letter from the applicant's attorneys which suggests that the applicant was required to, and did, travel to various sites (Rustenburg, Polokwane, Mokopane, and Thabazimbi) to conduct recruitment drives. In addition, Kallis also does not explain why, if she was doing the vast majority of the applicant's work, she (Kallis) was not responsible for the deadlines not being met.

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4.6 Kallis testified that the employer sought to assist the applicant to perform her duties. She testified: "*So that was when I would pull other team members off other aspects or other projects that they were working on to assist. Our placement manager would jump in frequently to help as well, take off his team members to jump in and help. Like I said, we brought in the contractors to help. I took over the travel, so that she could be based in the office. Those were the measures taken*."[7]

4.7 Kallis confirmed[8] that the applicant was required, in addition to the duties she was engaged for, to perform the duties of recruitment manager (Van Zyl) who had resigned at the end of January 2022. Kallis testified that she (Kallis) decided to travel to any places where the former recruitment manager would otherwise have travelled to. She confirmed that two other individuals (Ms Penelope Chauke and Ms Sylivia Sono) who were part of the applicant's team, had resigned and were not replaced. These individuals were referred to by Kallis as Penny and Sylvia. Prior to their resignations, these individuals were recruitment administrators.

4.8 Kallis testified that, initially, the employer opted for a "Performance Management Process" but later switched to a disciplinary process without explanation.[9]

4.9 On 24 March 2022, the employer proposed a mutual separation agreement, which the applicant did not accept.

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[7] Record Vol 2, transcript at p212 lines 126 – 130. The witness testified that it committed the time and resources of several other individuals, including another manager (besides Kallis herself) to assist the applicant to meet her deadline. This is a clear acknowledgment that workload, and expectations of the applicant, were significant.

[8] Record Vol 2, transcript at p216 lines 232 – 241

[9] Record Vol 2, transcript at p221 lines 389 - 402

4.10 On 28 March 2022, the employer issued to the applicant a notice summoning her to attend a disciplinary hearing to face a single charge relating to the poor quality of her work. Under that rubric, the employer charged that the applicant had produced work of poor quality, acted negligently or carelessly, acted inefficiently, acted with lack of interest or loafing, and had refused to carry out an authorized instruction in respect of normal work practices.

4.11 Later that same day, the applicant's attorneys addressed a letter to the employer, to which it did not reply. In the letter, the applicant recorded that:

4.11.1 In mid-February 2022, the employer received an unusually large order for recruits.

4.11.2 This target, set at 825 recruits, had to be met by the applicant, whose team was reduced following resignations.

4.11.3 The applicant travelled extensively to sites including Rustenburg, Polokwane, Mokopane, and Thabazimbi to manage recruitment drives.

4.11.4 The deadlines were reportedly missed by one week, due to extreme workloads and tight timelines.

4.12 The employer contended that these deadlines were self-imposed by the applicant, a claim she strongly disputed.

4.13 On 5 April 2022, the employer emailed the applicant advising her that the notice to attend a disciplinary hearing was retracted. The employer also retracted its offer of a mutual separation agreement, and advised that it no longer intended to engage in a performance management process. Finally, importantly, the email notified the applicant that she had been issued with a final written warning, which

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was attached to the email. The reasons for the warning, set out in the warning itself, related to:

> "***Charge 1: Negligence, carelessness***
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> *Negligence, carelessness and not following company procedure throughout the Platinum and Kumba recruitment process has led to several missed deadlines. This then resulted in several delays and has resulted in the programmes start being delayed. This has a knock on effect and has resulted in a loss of income to the company. As a manager it is imperative that company procedure should be followed.*"

4.14 It was common cause that the applicant was not given a hearing before the warning was issued to her. Instead, Kallis testified that she had several prior conversations with the applicant regarding her alleged non-performance.[10]

4.15 The applicant did not appeal against the warning. The employer testified that the applicant was aware of, and had been informed of, her right to appeal. However, Kallis conceded that, regardless of the reasons why the applicant failed to perform to the standard expected, the employer would not have retracted the warning.[11]

4.16 The applicant testified that she did not require training to do her job because she possessed the necessary skills.[12] However, she testified that her recruitment team reduced from 8 to 3 individuals.[13] She also testified that "*it was the running joke in the department about the deadlines, and how it's, it's really not going to be possible*."[14] On another occasion, she stated that the deadlines were

[10] Record Vol 2, transcript at p226 lines 531 – 542. The implication is that the conversations were about assisting the applicant and her team to meet the deadlines, as opposed to disciplinary action.

[11] Record Vol 2, transcript at p224, lines 466 – 478

[12] Record Vol 2, transcript at p 253 lines 1346 - 1354

[13] Record Vol 2, transcript at p 248 lines 1234 – 1235, 1242

[14] Record Vol 2, transcript at p254 lines 1377 – 1378

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ridiculous.[15] She testified that she was unaware that she could appeal the warning, and she had not been informed that she could appeal.[16] She testified that she was not given an opportunity to make representations as to why she should not be given a warning.

Legal principles

Misconduct and poor work performance (incapacity)

[5] There is a fine line between misconduct related to negligence and poor work performance related to incapacity, but the distinction remains important. The distinction boils down to culpability. As this court has stated, two simple questions should be asked where an employee has failed in his or her duties:

> "*In my view, the distinction between poor performance and misconduct (negligence) can be established by the asking of two simple questions when it has been established that an employee indeed failed. The first question is 'Did the employee try but could not?' and the second question is 'Could the employee do it, but did not?' If the first question is answered in the affirmative, then it has to be poor performance, because an employee that honestly (for the want of a better word) seeks to achieve what is expected of him or her but is unable to do so is incapacitated and would not behave wilfully or indifferently or fail to apply the necessary care. If the second question is answered in the affirmative, then it has to be misconduct, as this would be a situation where the employee is fully able to do what is required not to fail, and such failure could therefore only be because of indifference or wilfulness or a failure to take care*."[17] (own emphasis)

[6] Before taking action, employers must examine the reasons for the non-performance carefully. Unattainable targets, inadequate resources, or unreasonable expectations all align more closely to incapacity than misconduct.

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[15] Record Vol 2, transcript at p256 at lines 1433 – 1434

[16] Record Vol 2, transcript at p258 lines 1481 – 1488

[17] *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO* (2013) 34 ILJ 2347 (LC) at para 78

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[7] The reasons for non-performance would, ordinarily, emerge from the investigation for the non-performance or the disciplinary process, where the employer has chosen to follow that process. However, these reasons might only emerge at an arbitration following the employer's response to the non-performance.

[8] The CCMA has issued Guidelines for cases of dismissal related to poor work performance. The Guidelines requires the employer, where a performance standard has not been met, to consider *inter alia* whether the employee was aware of the standard, and whether the employee was given a fair opportunity to meet the performance standard.

Grounds of review

[9] It is trite that the grounds of review must be pertinently set out in the applicant's founding and supplementary affidavits.[18] These grounds may not be extended in the replying affidavit or in heads of argument.

[10] The grounds of review pertinent to this judgment are as follows:

10.1 It is alleged that the commissioner acted unreasonably by failing to properly consider the material evidence.

10.2 It is alleged that the commissioner considered that a number of material issues were common cause whereas they were disputed. In this regard, the commissioner erred by considering it common cause that: (a) the applicant was careless, negligent and had missed deadlines which caused financial harm to the employer, (b) the applicant failed to show any improvement in her performance even after the disciplinary hearing was abandoned, (c) the applicant and

[18] *Communication Workers Union and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 at paras 35 and 39

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the employer met to discuss the disciplinary charges against her before a final written warning was issued to her.

10.3 In the final analysis, the applicant contends that the outcome was not one which a reasonable decision maker could reach on all the evidence properly before the commissioner.

[11] It is necessary to make a preliminary remark which is that the parties and the commissioner blurred the boundaries between incapacity related poor work performance and poor work performance arising from negligence. This court has made it clear that different criteria and considerations apply to these distinct areas.[19] A clear example of this misunderstanding, in this matter, is that the commissioner and the parties both considered whether the applicant was granted an opportunity to improve her performance. This was irrelevant given that the applicant was disciplined for misconduct.

Review applications in general

[12] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court fashioned the appropriate review test[20] in relation to CCMA arbitration awards in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her*? The test has come to be known as the "*Sidumo* test" or the

[19] *Midas Group Komatipoort v NUMSA and others* [2018] ZALCJHB 83 at para 42 where Snyman AJ stated: "It is clear from all that I have set out above that the concepts of a dismissal for misconduct on the one hand, and dismissal for poor work performance (as a species of incapacity) are incompatible. This means, in short, that an employee cannot be 'charged' for poor performance, subjected to disciplinary process, and then dismissed applying misconduct considerations. In the case of poor performance, the process has other objectives, which can broadly be described as being to identify the poor performance, establish what is required to resolve it, providing the employee with assistance to resolve it, and then allowing the employee a reasonable opportunity to achieve what is required."

[20] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

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"reasonableness test." The court must itself consider whether the outcome is unreasonable in light of all the evidence.

[13] Subsequently, in *CUSA v Tao Ying Metal Industries and Others*[21] ("*Tao Ying*") the Court held at para 76:

> "*76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:*
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> > *"Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues*." (Own emphasis)

[14] Thus, following *Tao Ying*, it is clear that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

[15] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[22] the court clarified that the *Sidumo* test did not extinguish the procedural grounds for reviews contemplated in section 145(2)*(a)* of the LRA. However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry, or arrived at an unreasonable result.

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[21] (2008) 29 ILJ 2461 (CC) (18 September 2008)

[22] (2013) 34 ILJ 2795 (SCA)

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[16] In *Bestel v Astral Operations Ltd & others*[23] the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that:

> '*… the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected*.' (Own emphasis)

[17] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*[24] the court held that the concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

[18] In *Head of the Department of Education v Mofokeng and others*[25] the court again confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[19] In paragraph 46 of the award, the commissioner found that a meeting was held between Kallis and the applicant where the "*intention to issue out a*

[23] [2011] 2 BLLR 129 (LAC) at para 18

[24] (2014) 35 ILJ 943 (LAC) at para 14

[25] [2015] 1 BLLR 50 (LAC)

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final written warning was communicated to her and was in the same meeting afforded an opportunity to state her case before such warning was eventually issued out." Having perused the record, it is clear that no such evidence was presented by the third respondent, or the applicant. This incorrect finding had a distorting effect on the award, and the ruling that there was no procedural unfairness.

[20] The commissioner's finding that the warning was fairly issued relied strongly on what the commissioner perceived to be common cause facts. The analysis of the commissioner, set out in paragraphs 43 to 46 of the award, demonstrate that the commissioner regarded these critical matters as common cause. The commissioner states as much, and made no attempt to resolve the material disputes necessary to ensure a fair hearing. In the circumstances, the conclusion is inescapable that the applicant was denied a fair hearing.

[21] In this context, where the commissioner treated it as common cause that the applicant conducted her duties in a careless, negligent, and inefficient manner it is unsurprising that the commissioner found that the employer committed no unfair labour practice. However, the applicant made no such concession. In fact, at arbitration, the employer did not even put such version to the applicant. This error of fact clearly had a significant distorting effect on the outcome. In my view, considering all the evidence before the commissioner, the outcome falls well outside the range of reasonable outcomes.

[22] If anything, it was common cause that the workload (of the applicant) was extreme and the team to whom the work was assigned was significantly reduced. In such circumstances, it would have been proper for the commissioner to consider whether the applicant's alleged failure to meet deadlines was simply the result of indifference or wilfulness. This was not explored in evidence, and was not explored by the commissioner either.

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On the evidence before the second respondent, regardless of whether deadlines were actually missed, no conclusion is warranted that the applicant was negligent or careless in the execution of her duties.

Conclusion

[23] In my view, the outcome is one no reasonable decision maker could have reached on the evidence. There is no point in referring the dispute back to the first respondent, when there is a clear record of all the evidence. It is in the interests of justice, and the effective resolution of labour disputes, that the court determine the outcome itself. I note that neither party has pursued costs with any vigour and, in any event, in labour disputes, costs do not follow the result as a matter of course.

[24] In the circumstances, for the reasons set out above, I make the following order:

24.1 The arbitration award issued by the second respondent, on 22 July 2022, under case number GATW 4834-22, is reviewed and set aside,

24.2 The final warning issued to the applicant is declared an unfair labour practice and is set aside.

24.3 There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Mr C Higgs
Higgs Attorneys

For the Third Respondent
Mr Jonathan Jones
MacGregor Erasmus Attorneys

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