THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No.: JR1814/2021

In the matter between:

ZACHARI SIPHO MATHABA **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL BARGAINIG COUNCIL (PHSDSBC) **First Respondent**

COMMISSIONER RONNIE BRACKS **Second Respondent**

MEMBER OF THE EXECUTIVE COUNCIL GAUTENG DEPARTMENT OF HEALTH **Third Respondent**

Heard: 27 August 2024

Delivered: 5 December 2024

JUDGMENT

ADAMS, AJ

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Introduction

[1] This is an application for review in terms of section 145(2)(a) of the Labour Relations Act[1] (the LRA) to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under the auspices of the First Respondent under case number PSHS691/20/2021, received on 21 July 2021.

[2] In terms of the said award, the Commissioner found the dismissal of the Applicant to be substantively fair, but procedurally unfair, however, the Applicant's claim was dismissed on the basis that the Commissioner did not find that compensation should be awarded to the Applicant in terms of the procedural unfairness element.

[3] The issue that needed to be determined by the Commissioner was whether or not the Applicant's dismissal was substantively and procedurally fair, and relief if any.

[4] In terms of administrative aspects, the Third Respondent's Answering Affidavit was delivered late and condonation was accordingly applied for. This was not objected to at the hearing of the matter, and the Third Respondent has set out adequate grounds that demonstrate that good cause exists for the condonation of same. Accordingly, condonation for the late delivery of the Answering Affidavit is granted.

Synopsis of the case

[5] The Applicant was employed by the Third Respondent on 2 August 2017. The Applicant was summarily dismissed on 12 November 2020 after the Third Respondent invoked item 4.4 of Schedule 8 of the Code of Good Conduct: Dismissal.

[6] At the time of the Applicant's dismissal, the Applicant was the Chief Executive Officer (CEO) at the Far East Rand Hospital, earning R132 988.99 per month.

[1] No. 66 of 1995, as amended.

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[7] In terms of the Applicant's dismissal letter, the Applicant was informed that he had been summarily dismissed with immediate effect for the following reasons:

7.1. the Applicant had irregularly claimed commuted overtime;

7.2. the Applicant had failed to comply with the regulatory requirements pertaining to the suspension of the HR Manager (Mr Robert Ramoshoane) and an administrative official (Mr Sello Monnakotla) at the Far East Rand Hospital;

7.3. the Applicant had committed an act of gross insubordination by failing to comply with the law for the instruction of the Chief Operations Officer of the department to withdraw a precautionary suspension of one medical specialist, four medical officers and a number of administrative officials employed at the Far East Rand Hospital;

7.4. the Applicant had intimidated a fellow employee at Far East Rand Hospital, (namely Mr Sello Monnakotla) by threatening him in the company of a person who was carrying a gun, despite the hospital being a gun free zone.

[8] In terms of the Award granted by the Commissioner, the Applicant was found guilty of the first charge in having irregularly claimed commuted overtime. This is the only charge that I will therefore deal with in this Judgment.

In Limine Point

[9] The Respondent raised an *in limine* point in its Heads of Argument, contending that the Applicant had failed to file the necessary papers in the review application within twelve months of the date of the launch of the application, and, that as a result the Application had been archived and had been regarded as lapsed. The Applicant further contended that for three years no condonation application had been filed by the Applicant to reinstate the Applicant's review application and therefore the Applicant's review application has been deemed to have lapsed.

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[10] The following time periods, which can be determined from the papers, as well as the Court file are relevant:

10.1. the Application was instituted on 31 August 2021. Accordingly, in terms of the Practice Directives (as they then were and before they were repealed), the Applicant was required to have ensured that all necessary papers were delivered within twelve months from that date being 31 August 2022;

10.2. an answering affidavit was delivered by the Third Respondent on 23 March 2022;

10.3. the Applicant's Replying Affidavit was delivered on 31 March 2022;

10.4. on 15 July 2022 the Applicant requested a set down date with the Registrar and accordingly this was done within twelve months.

[11] There is therefore no merit in this *in limine* point and the *in limine* point is therefore dismissed.

Third Respondent's case in the Arbitration proceedings

[12] The Applicant entered into a committed overtime contract at Thelle Mogoerane Hospital, in terms of which he would perform commuted overtime in respect of Family Medicine.

[13] Derrick Mdluli (Mdluli) testified that he was employed at Thelle Mogoerane Hospital (Thelle) working in the Family Medicine department. He further testified that he was the acting HOD and that at the time the Applicant was in Quality Assurance.

[14] He was stationed in the Department of Family Medicine, Gateway Clinic, for the years 2017/2018 and 2018/2019.

[15] In terms of the commuted overtime policy, the purpose of such policy was to provide for uniform interpretation and application of the overtime policy as well as control measures for the effective management thereof. Mdluli initially

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testified that the Applicant was appointed for Quality Assurance and would not qualify to do the commuted overtime.

[16] Mdluli was referred to the Applicant's contract, which was required to be signed by employees every year when doing commuted overtime, and which contract reflected that the Applicant worked in Quality Assurance yet in the commuted overtime contract the Respondent indicated that he was able to provide commuted overtime services in Family Medicine. The contract spanned from the period 4 August 2017 to 31 March 2018. The Applicant entered into a further Commuted Overtime Contract for the period 1 April 2018 to 31 March 2019, again, for Family Medicine.

[17] In terms of the rosters compiled, Mdluli testified that for the financial year 2017 (being the period 4 August 2017 to 31 March 2018), the Applicant's name did not appear in any of the months in terms of the rosters submitted.

[18] Mdluli was also referred to the salary advices for the Applicant for this period which reflected his additional remuneration for the commuted overtime.

[19] In addition to the period above, Mdluli testified that the rosters for 2018 did not contain the Applicant's name. The Applicant's salary slips, however, showed that he was paid for commuted overtime for each of the months in 2018.

[20] The above exercise was also done for the 2019 period and rendered the same results as above.

[21] Mdluli further testified that in order to prove that commuted overtime was attended to, a Z8 Form was required to be signed by employees. He further testified that there were also patient records, and an overtime book, where all patients that have been attended to by a doctor would have to be recorded under the doctor's name.

[22] Mdluli had no knowledge of the Applicant's schedules that were prepared by him, which the Applicant contended demonstrated his commuted overtime performed.

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[23] Mdluli further testified that usually commuted overtime is for people who work within that same department, Family Medicine, who do overtime and the Family Medicine Department. The Applicant was, however, in the Quality Assurance department so he was uncertain as to how he would be working in the Family Medicine Department.

[24] Mdluli further testified that he did not have any record of the Applicant performing commuted overtime in Gateway Clinic.

[25] It was further Mdluli's evidence that the purpose of a roster was to make sure that at any given time or day there was a doctor available, which would then enable them to work out their hours for the purpose of claiming the overtime payment. Mdluli testified that he was the one that compiled the rosters for all doctors.

[26] The Applicant's name did not appear on any of the rosters that Mdluli compiled.

[27] Mdluli testified that it was obvious that the work was not performed, and the overtime payment should not have been made.

[28] In terms of the policy, Mdluli read part of the policy (paragraph 14.2.6) into the record which stated that,

> "Commuted overtime can only be earned when performing the actual clinical patient related clinical services at the workplace."

[29] When Mdluli was asked what would the conduct be categorized as if a person had claimed overtime which was not performed, he stated that to the best of his knowledge, it would be categorized as fraud.

Applicant's Case in the Arbitration Proceedings

[30] The Applicant testified that the dismissal was procedurally unfair and that no procedure was followed. The Applicant further testified that the Respondent did not provide any evidence that he was dismissed for a fair reason and secondly, that the sanction was appropriate. Hence, the Respondent did not show that exceptional circumstances existed when the Applicant was dismissed.

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[31] The Applicant further testified that when he got to Thelle and when they realised that there was a need in Monitoring and Evaluation, the CEO took a decision that the Applicant would need to do commuted overtime in all areas in the institution and that would be areas such as ICU, Casualty, etc.

[32] According to the Applicant, the decision was taken by the CEO that there was no need to do overtime in Family Medicine, the overtime could be done overall, overlooking all institutions, at a high level.

[33] It was put to the Applicant, during his cross-examination of Mdluli when Mdluli was asked whether he understood that a manager could do commuted overtime, whether he would still say that the Applicant defrauded the department? In response to this, Mdluli informed the Applicant that if it could be proven that he did overtime in other departments then he did not defraud.

[34] The Applicant testified that his material impact function as a medical officer in Monitoring and Evaluation was a management function and that he sat at EXCO, which is the Executive Committee meeting. He reported directly to the CEO, Dr Mqhaye (Mqhaye), and his main function was to assess different divisions within departments and within the hospital and those ranged from clinical to non-clinical.

[35] The Applicant further testified that because he is a medical officer he was then contracted to perform commuted overtime. He further testified that when you contract for commuted overtime you needed to choose a department or a discipline in which you would perform commuted overtime, and that at the time that he signed the contract he had chosen Family Medicine.

[36] The Applicant conceded that they were required, as a control monitoring tool, to have the individual doctors schedule for overtime in accordance with the policy, as well as the commuted overtime verification form, however, the two controlled tools did not exist in most of the institutions that he had been to. According to the Applicant, the only ones that they had was the normal hour roster.

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[37] The Applicant further testified that he had received information towards the end of 2017 that other clinical managers were not happy with his presence in the institution and therefore they were planning on using the issue of overtime to get rid of him. According to the Applicant, the CEO requested other clinical managers to include him in their roster (being the call roster) however, he was told that they refused to do that.

[38] With this in mind, the Applicant testified that he then decided that the only way to secure himself was to keep his own register of commuted overtime, which was the register submitted by the Applicant in the arbitration proceedings.

[39] Notably, this register had not been seen by Mdluli or the Applicant's own witness, prior to the proceedings.

[40] The Applicant testified that he qualified for commuted overtime because he was a medical officer as well as a manager providing clinical services. According to him, supervision of a clinic is actually patient related services in accordance with the policy.

[41] The Applicant confirmed in his testimony that he did not go to Family Medicine and physically attend to patients.

[42] The Applicant further testified that in January 2019 he was precautionary appointed to Edenvale and from January he worked in the same position. The CEO wanted him to do clinical functions, so he was given Mother And Child And Planning to oversee, until his appointment as CEO on 17 November 2019.

[43] The Applicant contended that he never defrauded the Respondent in respect of commuted overtime and that he did not display any dishonesty in claiming the overtime.

[44] In terms of the Applicant's witness, namely, Nomonde Cleopatra Mqhayi Mbambo (Mqhayi Mbambo), she testified that she previously was the CEO at Thelle. The Applicant was appointed as a medical officer in Evaluation and Monitoring and formed part of the EXCO. He reported to her as the CEO whilst she was still at Thelle.

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[45] Mqhayi Mbambo further testified that there was an individual duty roster which was the Z8, which they had had challenges completing.

[46] She testified that there was a roster demonstrating all who were performing commuted overtime work and that she had asked the clinical manager to place the Applicant on it.

[47] Mqhayi Mbambo could not recall seeing the Applicant's name on any roster but conceded that she needed a roster in order to determine who was performing the overtime.

[48] She further testified that Medical Superintendent/Manager; Medical Services were allowed to perform clinical related duties additional to his or her normal work week and were therefore included in the commuted overtime system and that the Applicant was a medical officer and this is why she had appointed him.

[49] In addition to this, she was referred to the document setting out the withdrawal of the charges by the Third Respondent against the Applicant, prior to the Summary Dismissal Letter sent thereafter.

Analysis

[50] In his Founding Affidavit, the Applicant has contended that the award was subject to review in terms of section 145 of the LRA.

[51] In summary, the Applicant has contended that he relies on the following grounds for review:

51.1. firstly the Commissioner committed a gross irregularity in the manner in which he conducted the arbitration proceedings in light of the following:

51.1.1. the Commissioner had misconceived the whole nature of the enquiry and failed to identify the dispute he was required to arbitrate;

51.1.2. there was a material deviation from the law in the conduct of the proceedings;

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51.1.3. the Commissioner disregarded material facts and submissions placed before him at the arbitration;

51.1.4. the Commissioner did not give the Applicant a fair opportunity to have his say in respect of the dispute;

51.1.5. the Commissioner considered irrelevant facts or evidence that did not form part of the arbitration.

51.2. Secondly, the Commissioner committed misconduct in relation to his duties as the Arbitrator in that he had not conducted himself impartially and independently thus creating an apprehension of bias in favour of the Third Respondent;

51.3. the Commissioner exceeded his powers as the Arbitrator.

[52] In a Supplementary Affidavit, the Applicant embellished upon the themes articulated by him in his Founding Affidavit.

[53] I am required to deal with the grounds for review within the context of the test this Court must apply in deciding whether the Arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[2] as to whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the Arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[54] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[3] affirmed the test to be applied in review proceedings and held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principle issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[2] (2007) 28 ILJ 2405 (CC) at para 110 (*Sidumo)*.
[3] (2014) 35 ILJ 943 (LAC) at para 16.

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[55] The Review Court is not required to consider every factor individually and *"how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piece meal approach of dealing with the award is improper as the Reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make"*.[4]

[56] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (Quest Flexible Staffing)*[5], the LAC confirmed the test to be applied on review:

> '[12] The test that the Labour Court is required to apply in a review of an Arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

[57] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently when the result is reasonably supported by some evidence. Unreasonableness, is, thus, the threshold for interference with an Arbitrator's award on Review.

[58] In *Bestel v Astral Operations Ltd and others*[6], the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

> '... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be corrected 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

[4] Ibid at paras 18 to 19.
[5] (2015) 36 ILJ 968 (LAC) at paras 12 to 13.
[6] [2011] 2 BLLR 129 (LAC) at para 18.

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must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

First Ground of Review - The Commissioner committed gross irregularity in the manner in which he conducted the Arbitration proceedings

[59] I have considered the grounds raised by the Applicant both in his Founding Affidavit as well as his Supplementary Affidavit in this regard.

[60] The rule against gross irregularity goes to the integrity of the hearing. The test in this regard is whether the conduct of the Commissioner is so grossly irregular that there was no proper hearing.[7]

[61] In the matter of *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae*)[8], the Supreme Court of Appeal (the SCA) held as follows:

> "For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[62] In the matter of *Makuleni v Standard Bank of South Africa (Pty) Ltd and Others*[9] the Court found that irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In this regard a Court is required to consider whether apart from the flawed reasons or irregularity by the Arbitrator, the result could be reasonably reached in light of the issues and the evidence presented.

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[7] *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (C718/00) [2001] ZALC 140 (7 September 2001).
[8] [2013] 11 BLLR 1074 (SCA) at para 25.
[9] (2023) 44 ILJ 1005 (LAC)

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[63] I disagree that the Commissioner failed to identify the dispute required for arbitration. The Commissioner was required to ascertain whether the Applicant's dismissal was substantively and procedurally fair. He acknowledged as much in his award at paragraph two.

[64] In terms of the findings made, and after considering all the evidence that was placed before him, the Commissioner found on the evidence that:

> "[109] In light of the above evidence it is clear that the Applicant had blatantly violated the policy thereby benefitting for twenty-seven months from commuted overtime without being in a position to show the work he had performed to justify him being paid therefor. This conduct is clearly fraudulent in terms of the policy which states "in this regard cognisance should be taken of Section 81(1)(b) of the Public Finance Management Act in the event of authorising expenditure for overtime not performed; Also persons who make themselves part of fraudulent practices with regard to overtime, are dealt with in terms of the relevant disciplinary measures."
>
> [110] Turning now to the allegation of the victimisation and harassment of Monnakgotla. From the evidence it was clear that there was no love lost between the Applicant and Monnakhotla. There was clearly a volatile relationship between them which stemmed from the fact that the Applicant was from management and Monnakhotla belonged to a union which was not recognised. I accept the evidence of the visit of the Applicant's brother, but I am not persuaded that it was aimed at intimidating Monnakhotla especially a this was an inference drawn by Monnakhotla. So I am unable to conclude that there was victimisation and/or intimidation.
>
> [111] During cross-examination the Respondent's representative tried to introduce a whole issue of the Applicant's insubordination without having led any evidence in that regard. As the Respondent did not raise the insubordination evidence earlier by cross-examining the Applicant, I was of the view that this was ambushing the Applicant as he did not lead evidence on the insubordination which I believe is inadmissible and unfair.

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[112] In light of the above, I am satisfied that the Respondent discharged the onus of showing that the Applicant's conduct in submitting his claims was fraudulent.

[113] The question now arises whether there was justification for dismissing the Applicant. I have considered this and wish to state that dismissal was appropriate. I find support for my view in the following authorities…

[122] For the reasons stated above and when the law is applied to the facts, I find the dismissal of the Applicant to be substantively fair and that dismissal is the appropriate sanction...

[124] ... As I have stated hereinbefore, I find that the conduct of the Respondent in dealing with the Applicant was unfair.

[125] ... From the evidence before me it is evident that the Applicant was not given an opportunity to present his case as he was summarily dismissed...

[130] When the fraudulent dishonesty of the Applicant is considered and that he had unjustly enriched himself to the value of R861 211.60 over a period of twenty-seven months (from September 2017 to November 2019), then compensation cannot be justified."

(Own emphasis)

[65] In addition to contending that the Commissioner failed to identify the dispute required for arbitration, the Applicant has contended that there was a material deviation from the law in the conduct of the proceedings.

[66] The Commissioner was not incorrect in dismissing the Applicant's *point in limine* wherein the Applicant sought that an Order be made that the Commissioner should not allow the employer to request him at arbitration to admit the same evidence that the employer decided not to use in a disciplinary hearing in order to prove his guilt.

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[67] It is trite that an arbitration is a hearing *de novo* and that it calls for a fresh determination as to the fairness or otherwise of the employee's dismissal, based on all the evidential material that is placed before the Commissioner.[10]

[68] What the Applicant sought to do at the beginning of the arbitration proceedings was to apply to prevent the Third Respondent from presenting evidence because it did not present evidence at a disciplinary enquiry and as a result of that aspect the Applicant felt that the Respondent should be prevented from presenting evidence at the arbitration hearing.

[69] The Commissioner was not incorrect, in his ruling, in stating that it is clear that from the role of a Commissioner as interpreted in *Sidumo*, that a hearing that appears in front of him as a Commissioner is a hearing *de novo*, in other words whatever evidence was not presented at the disciplinary hearing is not prevented from being presented at an arbitration, as the Commissioner needs to make a determination based on the facts and the evidence that had presented before that Commissioner to give an outcome of the hearing. The Applicant's reliance on the *Sidumo* case, was misplaced, and the Commissioner was not wrong in making the ruling that he made in this regard. It cannot be said that there was a material deviation from the law in the circumstances.

[70] In terms of the Applicant's contentions that the Commissioner disregarded material facts and submissions, the Applicant has contended that the following evidence was not regarded:

70.1. material facts and submissions placed before him that demonstrated that the Third Respondent failed to prove that he was charged for the allegations listed in the dismissal letter before he was dismissed on 12 November 2020;

70.2. objective evidence placed in the arbitration proceedings that show that the charges of dishonesty and fraud proffered by the employer were

[10] *Country Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1999) 20 ILJ 1701 (LAC); *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and others* (2012) 33 ILJ 1081 (LAC).

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withdrawn on 12 November 2020 and replaced with a summary dismissal letter on the same date.

[71] This is not correct, when one considers the award, it is clear that this evidence was taken into account in the final determination made by the Commissioner.

[72] The following findings demonstrate that the above aspects were taken into account by the Commissioner:

> "[77] She was referred to A47 which she identified as a withdrawal of the charges.";
>
> "[123] The Applicant also challenged his dismissal as procedurally unfair on the basis that he was summarily dismissed on 12 November 2020 after the Respondent invoked item 4.4 of Schedule 8 of Code of Good Conduct: Dismissal."
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> "[124] It is our law that a dismissal should be effected in accordance with the fair procedure and should be for a valid and fair reason ... As I have stated hereinbefore, I find that the conduct of the Respondent in dealing with the Applicant was unfair.
>
> [125] ... From the evidence before me it is evident that the Applicant was not given an opportunity to present his case as he was summarily dismissed.
>
> [126] Item 4.4 of the same schedule provides that in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.
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> [127] In view of the above I am bound by the Labour Appeal Court decision in CWIU v Johnson and Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC) where it was held that, in cases of procedural unfairness, the Court may either award no compensation or compensation calculated on the basis of remuneration from date of dismissal to the date of final hearing (in the CCMA or Labour Court). (See also Zaayman v CCMA Gauteng and Others (J1134/98) [1998] ZALC 80 (13 September 1998).

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[130] When the fraud and dishonesty of the Applicant is considered and the had unjustly enriched himself to the value of R961 211.60 over a period of twenty-seven months (from September 2017 to November 2019), then compensation cannot be justified.

...

[132] In the premise, it would be difficult for me to justify granting compensation as the Applicant persisted in showing no remorse, even at the arbitration."

[73] The aspects pertaining to the charges, and the manner in which the Applicant was dismissed, were therefore dealt with by the Commissioner, in detail and comprehensively in his award.

[74] The Applicant has further contended that the following further evidence was disregarded by the Commissioner:

74.1. material facts placed before him that demonstrated a duty-hours register of the individual and the commuted overtime verification forms are the two monitoring tools that confirm whether or not a doctor performed commuted overtime as required by the policy;

74.2. undisputed evidence placed before him that these monitoring tools were not used at Thelle Mogoerane Hospital. It was submitted that the performance of commuted overtime was poorly controlled and monitored throughout the whole institution. The employer provided no documentary evidence, in the form of duty hours register of the individual and the commuted overtime verification forms, that doctors in Family Medicine actually performed commuted overtime during the period in question;

74.3. the only document produced by the employer was the Family Medicine duty roster. A roster does not prove whether or not a doctor has performed commuted overtime. The Commissioner conceded in his cross-examination of Dr Mbambo that a roster is not proof that commuted overtime was performed;

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74.4. it is self-evident that the document that the Commissioner heavily relied on to conclude that the Applicant did not perform commuted overtime is the roster, yet by his own admission a roster does not prove whether or not a doctor performed commuted overtime.

[75] These contentions made by the Applicant are not correct for the following reasons:

75.1. the Commissioner went into detail in his award as to what the policy contained insofar as commuted overtime is concerned, which included a duty-hours register and commuted overtime verification form as a monitoring tool to confirm whether or not a doctor performed commuted overtime as required by the policy;

75.2. there was no undisputed evidence that the monitoring tools were not used at Thelle Mogoerane Hospital. In fact, the evidence of Mdluli clearly stipulated that this was required, especially in the Department of Family Medicine, to which the Applicant had contracted for commuted overtime;

75.3. the Commissioner could not have made concessions nor admissions, as the Commissioner was not a witness in the proceedings. Whilst the Applicant had contended that these monitoring tools were not used at Thelle Mogoerane Hospital, such evidence was not unchallenged as claimed by the Applicant and the Commissioner fully set out an analysis of the evidence in his award in justifying why he had accepted various versions of the different witnesses, and rejected others;

75.4. evidence was led by Mdluli when one considers the transcript of proceedings, to the effect that rosters were kept of doctors that performed commuted overtime and that the Applicant was not on those rosters;

75.5. whilst the Applicant testified that he had kept his own rosters, his own witnesses being his own supervisor, could not confirm the rosters and had not seen them before the arbitration proceedings;

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75.6. in fact, it is clear from the transcript of the proceedings that the Applicant had provided no substantial and admissible proof that he had performed the commuted overtime that he had claimed which supported the Third Respondent's contentions that the Applicant had irregularly claimed commuted overtime;

75.7. accordingly, the Applicant did not provide evidence that he had performed commuted overtime in the face of the allegations made by the Third Respondent that he had irregularly claimed commuted overtime;

75.8. it was not for the Third Respondent to prove that the Applicant had performed commuted overtime in the face of the allegations that he had irregularly claimed for commuted overtime. It was for the Applicant, in his evidence to show that he had performed commuted overtime, which as is clear from the transcript of proceedings, the Applicant did not do.

[76] Having read the transcript of proceedings, I do not agree with the Applicant's contentions that the Commissioner failed to give the Applicant a fair opportunity to have his say and prevented a fair trial of the issues. It is clear from the entire transcript of proceedings that the Applicant was given a fair opportunity to have his say and was not prevented from having a fair trial of the issues.

[77] In terms of the closing arguments and the aspect pertaining to the closing arguments, it was within the Commissioner's discretion as to how closing arguments were to be submitted, and in this instance, he required the parties to provide written closing arguments.

[78] In terms of this ground of review, the Applicant has further contended that the Commissioner considered irrelevant facts or evidence that did not form part of the arbitration. In the matter of *Quest Flexible Staffing*[11], the Court held that if an Applicant is able to identify some irregularity, misconduct or misdirection on the part of the Commissioner, this will not, in itself, give rise to review for want of reasonableness. Unless an Applicant can establish that such error or

[11] Id fn 5 at para 15.

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misdirection caused the award to be unreasonable, it will be of no consequence.

[79] In the matter of *Telcordia Technologies Inc. v Telkom SA Limited*[12], the Supreme Court of Appeal held that:

> "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator "has the right to be wrong" on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the enquiry – there may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the enquiry. To adapt the quoted words of Hookster JA: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a Court."

[80] In the matter of *Palabora Copper (Pty) Limited v Motlokwa Transport and Construction (Pty) Limited*[13] the SCA held:

> "[8] This provision was the subject of detailed consideration by this Court in Telcordia. It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues that constitute a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct inquiry, but errs either on the facts of the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, Courts endeavour to uphold their choice and do not likely

[12] 2007 (3) SA 266 (SCA) at para 85.
[13] 2018 (5) SA 462 (SCA) at para 8.

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disturb it. The attack on the award must be measured against these standards."

[81] It has further been held in the matter of *Herholdt*[14] that even material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside.

[82] In the matter of *Manghena v Minister of Police and Others*[15], the Labour Court held that:

> "[43] Considering the test I have to apply, there is an obvious difficulty with the Applicant's case in that she seeks to attack each and every finding of the arbitrator on every piece of evidence. The Applicant has taken a microscopic approach and dissected and set out every fact she believes was either not considered by the arbitrator or incorrectly accepted by her.
>
> [44] The test on review and the context within which it is to be applied is that the review Court is not required to take into account every factor individually but must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make based on the facts placed before him/her."

[83] The Applicant's submission that the Commissioner was persuaded by irrelevant evidence and failed to consider relevant evidence adduced by the Applicant, as such the Commissioner has failed to apply his mind to the evidence that was presented before him, is a misplaced submission. The Commissioner was called to determine whether the decision of the Third Respondent to dismiss the Applicant was based on the facts presented before him and whether such dismissal was justifiable. The Third Respondent has submitted that the Commissioner executed his duties properly and as such no reviewable irregularity was committed which I fully agree with when considering the evidence that was led and the award ultimately made by the Commissioner.

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[14] Id fn 8 *supra*.
[15] (JR 612/2020) [2023] ZALC JHB 233 (10 August 2023) at para 43.

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[84] In the matter of *S v Civa*[16], the Court held as follows:

> "The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors. It is in the context of this overall scrutiny of the evidence that demeanour, if there are sufficient indications thereof to be significant, must be assessed."

[85] As a general proposition, it is submitted that the Commissioner, in declaring that the Applicant's dismissal was substantively fair, properly determined the evidence before him, and the finding is fully supported by the evidence presented. There is simply no reason to interfere with his arbitration award.

[86] In the matter of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*[17] *the Court held that:*

> "[19] Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in Section 145 of the Act more especially where the Commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view. (Shoprite Checkers (Pty) Ltd v Ramdaw N.O. and Others (2001) 22 ILJ 1603 (LAC) para [26], Pharmaceutical Manufacturers Association of SA and Others: In re: Ex Parte Application of the President of the RSA and Others 2000(3) BCLR 241 (CC)) or if it is not justifiable as to the reasons given. See Carephone (Pty) Limited v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC); (1998) 11 BLLR 1093 (LAC) at 1103 C. By rationale I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense

[16] 1974 (3) SA 844 (T) at 846 H to 847 A.
[17] (2002) 23 ILJ 863 (LAC) at paras 19 to 20.

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that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to its Order.

[20] A gross irregularity can occur patently where for example the right to cross-examination is denied or latently where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues. See Toyota SA Motors (Pty) Ltd v Radebe and Others (2000) 21 ILJ 340 (LAC)."

[87] In the matter of *Naidoo v National Bargaining Council for the Chemical Industry and Others*[18], this Court held that:

'[17] In the matter of Morgan Fashions SA (Pty) Ltd v CCMA and Others to which the Third Respondent's counsel referred, Marcus AJ said the following:

"The "grounds" of review advanced by the Company are stated in stark and unsubstantiated terms. Although the Company's standpoint was that it required the record of proceedings in order to motivate the review, the Company was at least in possession of the arbitration award. The award runs to some eleven pages typed in single spacing. It is extremely detailed and, on the fact of it, appears to represent a careful and lucid analysis of all the issues in dispute. In the review proceedings, however, there is no attempt whatsoever to analyse the award or to point to any defect in reasoning, error of fact or error of law. The award reflects a consideration by the Commissioner of the documentary evidence that was placed before her."

[88] When one considers the Commissioner's award in this matter, it can only be said that the Commissioner properly applied his mind to the evidence that was presented before him. The Commissioner was persuaded by relevant evidence and he properly considered the relevant evidence that was adduced before him. There are therefore no acts of gross irregularity on the part of the Commissioner rendering his award reviewable.

[18] [2012] 9 BLLR 915 (LC) at para 17.

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[89] The Commissioner thoroughly interrogated the versions of the respective parties and their witnesses and reached a reasonable conclusion that any Commissioner would have arrived at. The Commissioner's primary duty was to resolve the factual controversy between the parties, as he was faced with mutually destructive versions tendered by the Applicant and the Third Respondent. The Commissioner properly assessed the credibility of both the Applicant and Third Respondent's witnesses in the arbitration herein.

[90] On the facts placed before him, the Commissioner correctly found that the Respondent discharged the onus of showing that the Applicant's conduct in submitting his claims was fraudulent which goes to the heart of the Applicant's dismissal in having irregularly claimed commuted overtime. In arriving at this conclusion the Commissioner has not only addressed the evidence of all of the witnesses involved, but the case law pertaining to this aspect too.

[91] Accordingly, I do not find merit in this ground of review.

Second Ground – The Commissioner committed misconduct in relation to his duties in that he had not conducted himself impartially and independently thus creating an apprehension of bias in favour of the employer

[92] In the matter of *Manghena v Minister of Police*[19] the Labour Court held as follows:

> "[53] In Sepheka v Du Point Pioneer (Pty) Ltd, the Court threw caution as follows in respect of allegations of bias:
>
> (1) Any allegation of bias, especially on the part of a Judge of this Court, must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias."

[93] It is a trite principle of law that in order to succeed with a claim of bias, more than mere conjecture must be shown. It happens under the normal course of events that litigants could harbour a sense of apprehension against those

[19] Id fn 15 at para 53.

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administering justice. This of course does not mean that anytime a litigant is not happy with the proceedings or that the judgment or outcome is not in that party's favour, that a claim of bias would suffice.

[94] The Courts have time and time again warned against litigants making unfounded allegations of bias on the part of presiding officers tasked to decide disputes, without cogent proof to substantiate the allegation. It is a natural result of adversary litigation that one party would be successful and that the other party would fail. The mere fact that the outcome went in favour of the other party, does not render the presiding officer or decision maker biased. More is required.

[95] In considering the transcript of proceedings, as well as the award, I do not find that there has been misconduct on the part of the Commissioner in the form of bias.

[96] In terms of the purported conflict of interest raised, I do not find that there is sufficient evidence to demonstrate that there was indeed a conflict of interest and/or that this played any role in the proceedings.

[97] In terms of the Commissioner's award and the contention that the Commissioner removed substantive evidence and written arguments from his arbitration award, I do not agree with the contentions made herein. It is not for a litigant to dictate what is and what is not to be contained in an arbitration award.

[98] Furthermore, when one considers the arbitration award, it is clear that many portions of the arbitration award unconditionally favoured the Applicant. For instance, the Commissioner dismissed the charges of intimidation/victimisation levelled against the Applicant and further found that there was some type of ambushing of the Applicant during his cross-examination.

[99] It is trite that a presiding officer is not required to take into account every factor individually in presenting their awards. When one reads the Commissioner's arbitration award, which is comprehensive and detailed, it is clear that the

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Commissioner took into account all evidence that was presented before him, and made a finding in regard thereto.

[100] In terms of the Applicant's contentions that the Commissioner cross-examined his witness, Mlambo, I do not agree with these contentions either.

[101] In the matter of *AMCU obo Msiza v CCMA and Others*[20] the Court held that:

> '[10] The CCMA and the arbitrator, through their legal representative, Miss Leboga, have asked this Court to take into account that the LAC encouraged, in Impala Platinum Limited v Jansen and Others [2017] 4 BLLR 325 (LAC), that arbitrators are sometimes more like investigators in arbitration hearings as they may ask clarity seeking questions (as Judges do), are not expected to sit back but are entitled to solicit more information from the witnesses, if necessary. This Court is also aware that in long trials and/or when during examination in chief it becomes clear that the evidence leader seems to miss the gist of the issues to be determined a decision maker may lose their cool (which is not encouraged, but they are human beings too), see S v Basson 2007 (3) SA 582 (CC); but it is still necessary to determine what such decision maker said, for example in soliciting information or guiding such evidence leader, as this Court do hereinafter."

[102] When one considers the transcript of proceedings, it is clear that the Commissioner was not cross-examining Mlambo but asking clarity seeking questions, after her testimony had been completed. Further to this, both parties were given the opportunity to ask further questions following from the Commissioner's questions in this regard. I do not find that the Commissioner misconducted himself on this ground.

[103] Accordingly, the grounds of review stipulated under this ground, stand to fail.

<u>Third Ground – The exceeding of the Commissioner's powers</u>

[20] (JR 720/721) [2023] ZALC JHB 45 (9 March 2023).

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[104] In the matter of *Anglo Operations Limited (Kriel Colliery) v Commission for Conciliation, Mediation and Arbitration and Others*[21] the Court held that:

> "[17] In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such a duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Case should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise, we would be opening the flood gates and allowing every lay representative who has bungled his or her case to seek its reopening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of S138 of the Labour Relations Act. That question can be best answered by considering the conduct of the arbitration proceedings as a whole rather than "nitpicking through every piece of evidence that was considered or not considered", as was stated in Coin Security Group (Pty) Ltd v Machago (2000) 5 LLD 283 (LC)."

[105] Importantly, the contentions made in terms of this ground, are contentions that do not demonstrate that the Commissioner has exceeded his powers. The Applicant had remedies at his disposal, one being to ask for the Commissioner's recusal after the conciliation process had been finalised and prior to the arbitration proceedings commencing if he was dissatisfied with the Commissioner at that stage. The Applicant did not do so.

[106] I do not find, upon reading the grounds pertaining to this ground, the transcript, and the Award, that the Commissioner exceeded his powers.

[107] Accordingly, I find that this ground for review should fail.

CONCLUSION

[21] (2014) 35 ILJ 1520 (LC) at para 17.

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[108] Accordingly, I do not find that the Applicant has demonstrated any grounds for the reviewing and setting aside of the arbitration Award.

[109] In the premise the following order is made:

Order:

1. The late delivery of the Third Respondent's Answering Affidavit is condoned;
2. The Third Respondent's point *in limine* is dismissed;
3. The review application is dismissed;
4. There is no order as to costs.

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R. S. Adams

Acting Judge for the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Kgaogelo Maponya
Instructed by:	Sitsula Attorneys
For the Respondent:	Advocate D Moodliyar
Instructed by:	State Attorney

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