THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR752/21

In the matter between:

MOTSHWENE OPERATIONS **Applicant**

and

NUMSA obo DESMOND MACKAY **First Respondent**

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **Second Respondent**

MONICE ROODT N.O. **Third Respondent**

Heard: **5 February 2025**

Delivered: **24 February 2025**

This judgment was handed down electronically by emailing a copy to the parties. The 24th of February 2025 is deemed to be the date of delivery of this judgment.

Summary: First respondent awarded re-instatement - applicant seeks to review the award - Held, the third respondent, confronted with two different versions, did not consider the probabilities of the conflicting versions - award is not one that a reasonable decision maker would have made.

JUDGMENT

SEEDAT, AJ

Introduction

[1] On 5 March 2021 the third respondent (the commissioner) found the dismissal of the first respondent's member (Mr Mackay) both without a fair reason and procedurally defective and ordered his reinstatement on terms and conditions no less favourable than those which governed the employment relationship prior to the dismissal, effective from 1 April 2021, together with backpay in an amount equivalent to seven months' salary.

[2] The applicant (the employer) seeks to review and set aside the award as unfair The employer, in its arguments, conceded that the dismissal was procedurally flawed.

[3] In opposition to the review application, Mr Mackay disputes that the award is reviewable on any basis at all. He further raised a preliminary point in his papers but elected not to pursue this point at the hearing.

Background

[4] Mr Mackay had asked the employer for his severance pay which he claimed was not paid nine years earlier when he was retrenched by Cochrane Steel.[1]

[5] Mr Mackay then lodged a formal grievance demanding that the employer pay him his severance package and followed this up with a referral of a dispute to the second respondent to claim his severance pay. A commissioner of the

[1] It would seem that Cochrane Steel is an associate of the employer. It was not canvassed in evidence the reasons for Mr Macay wanting to claim severance pay from the employer in circumstances where he had been retrenched by Cochrane Steel.

second respondent found that he had been paid and dismissed the matter (the first arbitration).

[6] The employer then charged Mr Mackay with attempted fraud and dishonesty in that he had tried to defraud the employer by demanding payment of the 'severance package' which Cochrane Steel allegedly had not paid him when he was transferred to the employer.

[7] Mr Mackay was dismissed on charges of gross dishonesty and attempted fraud.

[8] He referred a dispute to the second respondent where the commissioner ruled the dismissal to be unfair and ordered Mr Mackay's reinstatement with backpay.

The commissioner's findings

[9] The commissioner accepted Mr Mackay's evidence that he had disclosed the bank statements for both ABSA and Capitec to the employer to show that no moneys for severance were paid to him in either account.

[10] The commissioner also accepted that the last payment Mr Mackay received on his retrenchment was for his full salary only.

Grounds of review

[11] In general terms, the applicant contends that the commissioner erred in the correct interpretation and the proper evaluation of the evidence. This amounted to a gross irregularity to reach a decision that no reasonable decision-maker would have reached.

[12] In particular, while the employer delineates a number of grounds for the review of the award, effectively they can be compacted into the following:

12.1 the commissioner committed misconduct, alternatively a gross irregularity in finding that there was no factual dispute about Mr Mackay showing bank statements from the two banks, ABSA and Capitec, to the employer

12.2 the commissioner did not consider and attach proper weight to the fact that Mr Mackay raised the issue of severance pay nine years after he was retrenched by Cochrane Steel

12.3 the commissioner exceeded her powers by reinstating Mr Mackay to a date (1 April 2021) beyond the date of the award (8 March 2021).

Analysis of the award[2]

[13] The conclusion of the commissioner that Mr Mackay's evidence on the disclosure of the two bank statements from ABSA and Capitec was not disputed by the employer, is not correct. The employer consistently maintained that it was shown only the ABSA statement by Mr Mackay. This was a material dispute of fact. Incongruously, while acknowledging that there were two versions *apropos* the bank statements[3], the commissioner found that the employer did not dispute seeing the two statements.[4]

[14] The commissioner finds it *'improbable that [Mr Mackay] switched to another bank with an intention to defraud the [employer], as his full salary for the month of April 2010 was deposited into that account'*. The commissioner makes a finding on probabilities without a comparator. It was not put in issue that Mr Mackay's last payment was more than his usual salary, yet the commissioner concludes that the money Mr Mackay received was for his *full* salary.

[15] The commissioner posits that, *'[t]aking into account all evidence, I am not convinced that [Mr Mackay] intentionally acted fraudulently and with any intent to deceive'*. The commissioner does not detail, or even adumbrate, on the evidence she used to make this determination.

[2] In the light of the employer's concession that there was a flaw in procedure, I will not traverse the evidence or the arguments on the procedural aspect of the dismissal.
[3] Transcript art page 114.
[4] Award at para 35.

[16] In these circumstances, for Mr Mackay to argue that there is nothing to suggest that the arbitration award is entirely disconnected with the evidence and does not render the award reviewable is fallacious.

[17] Furthermore, the commissioner noting that Mr Mackay's last pay slip dated 25 April 2010 (which was more than his normal pay) does not specify '*service pay/severance pay*', concludes that Mr Mackay '*had no way of knowing that his severance pay was included in that payment*'.

[18] Mr Mackay, in his evidence, did not dispute that he received more than his normal wage[5] when he was retrenched:[6]

> 'RESPONDENT [EMPLOYER] REPRESENTATIVE:
>
> Oh alright. How could you forget that you receive many thousands, more than R17 000?
>
> MR DESMON MACKAY:
>
> I didn't forget I wanted the proof, I wanted clarity that I got that money.'

[19] Later, in his testimony, Mr Mackay again does not deny receiving more money than what he should but declares that *'I wanted proof'*.[7] Clearly, Mr Mackay did receive moneys in excess of his normal wage.

[20] A document which reflects Mr Mackay's name, date of termination and the amounts paid for bonus, leave and notice also shows a payment for 'service R4,787.20'. Mr Mackay says he saw this document for the first time at the first arbitration. Had he known about this document he would not have referred a dispute claiming severance pay. Yet, inexplicably, Mr Mackay, after becoming aware of this document, still persisted in his claim in the first arbitration. The commissioner makes no evaluation of this evidence.

[5] His normal wage was R3,146.08 per week (award at para 6).
[6] Transcript 107.
[7] Transcript 113.

[21] In *Murray and Roberts Cementation (Pty) Ltd v Association of Mineworkers and Construction Union on behalf of Dube and others*[8] the Labour Appeal Court said:

> '… a court of review is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside.'

[22] There were disputes of fact between the versions of the employer and Mr Mackay and the commissioner was impelled to decide between the two versions before her. The resolution of factual disputes was explained in *SFW Group Ltd and another v Martell et Cie and others*[9] as follows:

> '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.'

[23] The commissioner was obligated to consider the probabilities of the conflicting versions before her. The credibility of the witnesses would have been an aid in weighing up the probabilities and coming to a conclusion that would be reasonable in the factual context. This the commissioner did not do.

[24] It was common cause that Mr Mackay had approached Mr Motshwene claiming that he was owed severance pay by Cochrane Steel. The date of this meeting is not mentioned by either party. However, the documents in the bundle show that there was a grievance lodged by Mr Mackay with the employer on what appears to be 18 July 2019 and a second grievance on 31 July 2019. In her award, the commissioner does not discuss the delay of nine years by Mr Mackay in seeking payment of an alleged entitlement.

[8] (2024) 45 ILJ 276 (LAC) at para 15.
[9] 2003 (1) SA 11 (SCA) at para 5.

[25] As to the challenge on reinstatement, Mr Mackay correctly argued that in terms of section 193(1) of the Labour Relations Act (LRA)[10] if a commissioner orders reinstatement of an employee, it will operate from the date of the award unless the commissioner elects to make the reinstatement retrospective. While section 193(2) prescribes reinstatement or re-employment of an employee who was unfairly dismissed, it lists certain instances when reinstatement should not be granted.[11]

[26] The employer, as we saw, challenged the ruling of the commissioner reinstating Mr Mackay from a date beyond the date of the award. However, for reasons that follow, it is not necessary for me to decide the legality of this order though I am in agreement with the tenor of the decision in *Coca Cola Sabco (Pty) Ltd v Van Wyk*[12] that a '*commissioner may not order that the reinstatement will start from a date after the issuing of the arbitration award'*.

[27] In deciding whether the decision of the arbitrator is reviewable, I must consider whether the commissioner's award is one that falls 'within a band of reasonableness' as espoused by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others:*[13]

> 'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or gross irregularity during the proceedings under review and a party is likely to be prejudiced as a

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

[11] 193(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
(a) the employee does not want to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.

[12] (2015) 36 ILJ 2013 (LAC) at para 16; *Themba v Mintroad Sawmills (Pty) Ltd* (2015) 36 ILJ 1355 (LC); *Ludick v Vodacom (Pty) Ltd and others* (2021) 42 ILJ 2621 (LC).

[13] (2010) 31 ILJ 452 (LC) at para 17.

> consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, the result is nonetheless capable of justification.'

[28] The Labour Appeal Court in *Herholdt v Nedbank Ltd*[14] approved of this approach of Van Niekerk J and concluded:

> 'One of the duties of the commissioners 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. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were.'

[29] The Constitutional Court in *CUSA v Tao Ying Metal Industries and others*[15] reminded us:

> '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.'

[30] Because the commissioner arrived at her decision without properly considering the evidence, her conclusion was not justifiable in relation to the evidence presented at the arbitration. The commissioner did not apply her mind to all the material issues before her and as a result she committed gross irregularities in the conduct of the arbitration. I must find that that the award is not one which a reasonable decision maker could have made.

[31] The employer has conceded that it had faulted on procedure in dismissing Mr Mackay. Section 193(2)(d) of the LRA specifically says that re-instatement may not be made where the dismissal was only procedurally unfair.[16]

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[14] (2012) 33 ILJ 1789 (LAC) at para 39.
[15] (2008) 29 ILJ 2461 (CC) at para 76.
[16] *Malelane Toyota v Commission for Conciliation, Mediation and Arbitration and others* [1999] 6 BLLR 555 (LC); *Mzeku and others v Volkswagen SA (Pty) Ltd and others* (2001) 22 ILJ 1575 (LAC).

[32] I am of the view that no purpose would be served in remitting this matter back to the second respondent.

[33] This then leaves me with the task of awarding compensation to Mr Mackay for the procedural unfairness of the dismissal. Balancing the seriousness of the misconduct and the significant departure by the employer from what would be required for the procedure to be fair, I consider an amount equivalent to five months' salary as just and equitable.

[34] This is a matter where it will not be appropriate to make a cost order.

[35] In the premise the following order is therefore made:

Order

1. The arbitration award of the third respondent given under case number MEGA55742 dated 8 March 2021 is reviewed and set aside in its entirety and substituted with an order that the dismissal of the first respondent by the applicant was for a fair reason.
2. The employer is to compensate Mr Mackay in an amount equivalent to five months' salary within 14 days of this order for its failure to comply with procedural fairness.
2. There is no order as to costs.

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S. Seedat

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant:	Advocate C S Bosch
Instructed by:	Kirchmanns Inc
First Respondent:	Union Official – X Mnyandu