THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Not reportable

Case No: JR1405/2020

In the matter between:

NEHAWU obo BUSISIWE NTIMANE **Applicant**

And

COMMISSIONER THOMAS NTIMBANA NO **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) **Second Respondent**

SOUTH AFRICAN REVENUE SERVICES (SARS) **Third Respondent**

Date heard: 14 August 2024

Date of judgment: 5 November 2024

Summary: review of arbitration award – arbitrator relying on hearsay evidence without ruing on admissibility thereof, reaching conclusions not supported by the evidence and unreasonably ignoring employee's plausible defence – such amounting to gross irregularities in the conduct of proceedings directly leading to unreasonable outcome – matter remitted for arbitration *de novo*.

JUDGMENT

HARVEY AJ

[1] This is an opposed review of an arbitration award given by the first respondent arbitrator (appointed by the second respondent CCMA) to determine the applicant employee's unfair dismissal dispute. The application is opposed by the third respondent employer, SARS.

Background

[2] The employee worked for SARS from December 2000 until her dismissal in February 2020. She was a customs inspector at the Lebombo border post (between South Africa and Mocambique), reporting directly to Operations Manager Ms Kgapane, who in turn reported to Branch Manager Mr Vermeulen.

[3] On 28 October 2019 the employer issued to the employee a notice of disciplinary hearing alleging misconduct in the form of '*fraud, in that in or about February 2018 at or near Lebombo Border Post while on duty you wrongfully and with intention stamped and signed 7 blank and incomplete SADC certificates with your SARS stamp No. ROO 002 …* [certificates attached] *whereas in fact and in truth you were fully aware that your actions were wrongful and that you were not allowed do so. And in doing so you prejudiced the administration, discipline and efficiency of SARS*'.

[4] SARS witnesses explained to the arbitrator that blank but certified SADC certificates are used to facilitate 'ghost exports'. Companies benefit from ghost exports because, upon presentation of a SADC certificate stamped and signed by a SARS official, they are able to claim VAT refunds on goods which in fact never left South Africa.

[5] The employee denied the allegations. She agreed that the stamps and signatures on the blank SADC certificates in question (hereinafter 'the Certificates') did indeed look like hers, and she concluded that she had been framed. She was dismissed after a disciplinary hearing. Her trade union on her behalf referred an unfair dismissal dispute to the CCMA, challenging the substantive fairness of her dismissal.

The arbitration

[6] After opening statements and before the first witness was called, the employer's representative placed on record that the parties were in dispute over the status of an affidavit in the employer's bundle. The employer stated that the document in question proved that it was the employee's stamp that appeared on the Certificates, and that in terms of s212 of the Criminal Procedure Act[1] it had to be '*accepted as is*.' The union official representing the employee however insisted that persons whose evidence was brought on affidavit should be called to give oral evidence at the hearing, so that they could be cross-examined. The arbitrator stated that he did not want to '*unnecessarily make rulings that will suggest the conclusion of this particular case before we even start*' and the proceedings commenced.

[7] The employer called three witnesses in support of its case:

7.1 The first witness, Mr van Vuuren, was an internal investigator who had only briefly been involved in that he had sealed the suspect Certificates in an envelope, together with the employee's stamp, in her presence.

7.2 The employee's direct superior, operations manager Ms Kgapane, was the employer's second witness. She described the relevant procedures, including the rules regulating the safekeeping of stamps issued to customs inspectors, and confirmed that the employee was familiar with such rules. The employee had reported to her for six years, and had a clean disciplinary record.

7.3 The employer's third witness was branch manager and Kgapane's direct superior, Mr Vermeulen. He testified that in April 2018 he had received a call from a certain Ms Rhina, the owner of clearing agent Charlo Bridge. She had requested that he come to her office because she had found stamped, signed but uncompleted SADC certificates in the possession of one of her employees. He had gone there as requested and, in the presence of the South African Police Services, had taken possession of the Certificates. He described the forms and procedures, and explained what 'ghost exports' are. He confirmed that

[1] Criminal Procedure Act 51 of 1977.

the employee had a clean disciplinary record and said that she had been an excellent employee.

[8] When the employee testified in her own defence she agreed that the stamp and signature on the Certificates looked like hers but denied signing or stamping the Certificates. She concluded that she had been framed, in support of which assertion she testified that, just two months prior to being confronted with the Certificates, she had intercepted an attempted ghost export involving the very same clearing agent, Charlo Bridge, and that a month after that she had been threatened by the operations manager of another of the employer's teams, who told her '*stop what you are doing*'.

[9] Indeed, in proceedings before the arbitrator it was common cause that the employee had, on 21 February 2018, intercepted what appeared to her to be a ghost export, presented by a runner from clearing agent Charlo Bridge. SARS' witness Kgapane confirmed, when she was cross-examined, that the employee had reported the incident to her, and that the implicated Charlo Bridge runner had subsequently been dismissed.

[10] Both Vermeulen and Kgapane, for the employer, also confirmed, when they were cross-examined, that on 13 March 2018 the employee had reported to them that Mr Khoza, an operations manager from a different team, had called her to his office and warned her that he knows what she is doing, has documents to prove it, and that she should stop. The employee told him that she did not know what he was referring to. She was of the opinion that, if Khoza genuinely had evidence of wrongdoing on her part, he ought to report his concerns to her operations manager, rather than raise it with her in person. She accordingly understood Khoza's remarks to be a threat, and she therefore immediately reported the incident to Kgapane. Kgapane however advised her to approach Vermeulen because she (Kgapane) and Khoza are on the same level of seniority. The employee arranged to meet Vermeulen the following day, 14 March 2018, and she told him about what Khoza had said. Vermeulen confirmed this testimony. He told the arbitrator that he had suggested that the employee arrange to meet Khoza the following day while they were changing shifts, so that he (Vermeulen) could walk in on them and 'get the facts'. However, the employee had not followed

his advice. The employee denied that this was the arrangement (although this denial had not been put to Vermeulen under cross examination); her version was that Vermeulen had simply never reverted to her concerning Khoza's threat. The employer's representative challenged the employee concerning why she did not file a grievance in respect of Khoza's threat, to which she responded that it was because she was suspended soon thereafter.

[11] After the incident with Khoza the employee went on leave and upon her return in April 2018 she was called by Kgapane, who showed her the Certificates. The employee denied signing and stamping the Certificates but acknowledged that the stamp and signature resembled hers. She was not aware of her stamp having been away from her control. She therefore suggested an investigation to verify the authenticity of the signatures and stamp impressions on the Certificates.

[12] It was put to the employer's witnesses that it was suspicious that SADC certificates purportedly signed and stamped by the employee were reported to SARS by Charlo Bridge, just two months after the employee had intercepted an attempted ghost export by the very same clearing agent, Charlo Bridge, and that such suspicion was compounded by the threats made by Khoza just one month before. Kgapane conceded that the timing of these incidents did indeed raise reasonable suspicion.

[13] At the arbitration, the employer's representative referred witnesses to an affidavit from one Anton Luiters, a Lieutenant Colonel in the SAPS and a forensic analyst. Luiters' affidavit stated that he had been asked to determine whether it was the employee's stamp which had been used on the Certificates, and that he had concluded that the stamp impressions on the Certificates had the same 'class characteristics' as the employee's stamp, that there were no individualizing characteristics, and that the probability that a duplicate stamp could be manufactured was 'low'. Luiters was not called to give evidence at the arbitration notwithstanding the hearsay challenge raised at the outset by the union.

[14] No tests were conducted to verify the authenticity of the signatures on the Certificates. The employee had originally indicated that she intended to

engage her own handwriting expert, but later told the arbitrator that she had not been able financially to afford to do so.

[15] It was undisputed that the employee had worked for SARS for twenty years and had received awards as 'best employee'.

The award

[16] In his award, after summarising the evidence, the arbitrator began his analysis by saying that he '*could not find reasons justifying interference with the respondent's decision to terminate the applicant's services*'.[2]

[17] On the facts, the arbitrator accepted that the employee had both signed and stamped the Certificates, and therefore that she had engaged in the fraudulent conduct, as alleged.

[18] The arbitrator rejected the employee's defence that she had been framed, saying he could find no reasons therefore and that it was unlikely that the owner of Charlo Bridge would frame her.

[19] Noting that SARS employees are in a position of trust because they have the opportunity to facilitate fraud (which he described as 'common' at border posts) thus exposing SARS to risk and reputational harm, the arbitrator held that the employee's dismissal was substantively fair.

[20] The arbitrator 'upheld' the dismissal and 'dismissed' the application.[3]

The review

[21] The applicant's overarching review ground is that the arbitrator committed gross irregularities in the conduct of the proceedings. This is because, in concluding that the employee was guilty of the allegations, the arbitrator relied on the Luiters affidavit which (a) was hearsay, the contested

[2] Although this was not a review ground raised by the applicant, it is important to point out that whether there is reason for 'interference' has not been the review test since the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC). The Constitutional Court in that matter authoritatively decided that CCMA commissioners presiding over unfair dismissal disputes must not 'defer' to the employer's decision to dismiss, but must instead determine the fairness of the employer's decision to dismiss the employee based on their own sense of fairness.

[3] Which formulation points to the same defect in approaching the inquiry concerning the fairness of the dismissal as that described in footnote 2 above.

admission of which was not properly considered or determined by the arbitrator and (b) was silent on the authenticity of the signature (being a report on an investigation into characteristics of the stamp only) - meaning that the arbitrator's conclusion that the signatures on the Certificates were those of the employee was disconnected from and unsupported by the evidence.

[22] *Mr Matshiyane*, who appeared for the applicant, in addition submitted that the arbitrator had disregarded material evidence pointing to the probability that the employee had been framed.

[23] *Mr Mokwala*, who appeared for SARS, argued that the Luiters affidavit was of the variety that is admissible, upon its mere production, to prove a scientific fact as provided for in section 22 of the Civil Proceedings Evidence Act (CPEA).[4] In any event, he says, errors of law are not sufficient to vitiate an arbitration award. The employer therefore contends that the arbitrator reasonably accepted the evidence led by SARS and that he came to a proper and reasoned conclusion.

[24] Legal representatives for both parties left the issue of costs to the discretion of the court.

[4] Section 22 of the Civil Proceedings Evidence Act 25 of 1965 is entitled 'proof of certain facts by affidavit' and provides that:

(1) Whenever any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry, physics, astronomy, anatomy or pathology is or may become relevant to the issue in any civil proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the Republic … and that he has ascertained such fact by means of such examination or process, shall, subject to the provisions of subsections (2) and (3), on its mere production by any party in such proceedings be admissible in evidence to prove that fact.

(2) No such affidavit shall be so admissible unless a copy thereof has been delivered by the party desiring to avail himself thereof to every other party to the proceedings at least seven days before the date of production thereof.

(3) The person presiding at such proceedings may, upon the application of any party thereto, order that the person who made such affidavit be called to give oral evidence in the proceedings or that written interrogatories be submitted to him, and any such interrogatories and any reply thereto purporting to be a reply from such person, given on affidavit, shall likewise be admissible in evidence in such proceedings.

Evaluation

[25] The well-established test for review is whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach.[5] In assessing the impugned decision for reasonableness, this court takes into account the totality of the evidence which was before the arbitrator, and will only set aside an award if irregularities identified had a material effect on the outcome, in the sense that they led directly to the unreasonable result.[6]

[26] The question before the arbitrator was whether SARS dismissed the employee for a fair reason. SARS's reason was that she was dishonest in that she signed and stamped blank SADC certificates. The employee denied the allegations and claimed that she had been framed, and the common cause evidence in support of this defence was sufficient to raise doubt concerning whether she had herself signed and stamped the Certificates (as conceded by Ms Kgapane).

[27] On the central issue, being whether the employee more probably than not intentionally signed and stamped the Certificates, the arbitrator held that the "*Forensic investigation report proved that the signature was that of the employee and I have no reasons to doubt such expert opinion …*".

[28] This conclusion suffers from at least two material gross irregularities: the report relied upon was, firstly, hearsay evidence the admission of which was not ruled upon, and, secondly, provided no support for the conclusion concerning signature.

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96. *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

[6] Herholdt v Nedbank Ltd & another (2013) 34 *ILJ* 2795 (SCA) at para 25; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

Gross irregularity: hearsay evidence

[29] The arbitrator's reliance on the hearsay evidence contained in Mr Luiters' affidavit amounted to a gross irregularity in the conduct of the hearing, because:

29.1 the union expressly objected to the admission of the Luiters affidavit, on the basis that it constituted hearsay evidence;[7]

29.2 the author, Mr Luiters, was not called to give evidence at the arbitration hearing;

29.3 the arbitrator failed to rule on the admissibility of the contested affidavit despite his duty to do so in accordance with the provisions of section 3 of the Law of Evidence Amendment Act (LEAA).[8]

[30] Relying on hearsay evidence, without ruling on the admissibility thereof with regard to the prescribed factors set out in section 3 of the LEAA has been held to constitute a gross irregularity.[9] In the circumstances of this case, the irregularity was material, as it led directly to the impugned result, being that the employee's dismissal was substantively fair.[10]

[31] The employer's submission that the affidavit was admissible in terms of section 22 of the CPEA was raised for the first time in argument before this court. At arbitration, the employer invoked section 212 of the Criminal Procedure Act 51 of 1977 to support reliance on the affidavit, and the

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[7] *Hearsay evidence* means oral or written evidence, the probative value of which depends upon the credibility of a person other than the person giving such evidence.

[8] Law of Evidence Amendment Act 45 of 1988 (LEAA) which at section 3(1) provides that hearsay evidence shall not be admitted unless: (a) the parties agree thereto; or (b) the witness with direct knowledge himself testifies; or (c) the tribunal admits the evidence in the interests of justice after considering (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other relevant factor.

[9] *Exxaro Coal (Pty) Ltd & another v Chipana & others* (2019) 40 ILJ 2485 (LAC); *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC) par 59; *Weavind v Macquire First South Securities (Pty) Ltd & others* [2016] JOL 35650 (LC).

[10] The employers representative raised in argument, for the first time, that the affidavit was admissible in terms of section 22 of the CPEA. The arbitrator cannot have been expected to determine this question given that it was not raised before him, the proposition at arbitration instead having been that the affidavit was submitted in terms of s212 of the Criminal Procedure Act 51 of 1977.

arbitrator cannot be expected to have engaged with the provisions of the CPEA.

Conclusion as to authenticity of signature unsupported by the evidence

[32] The arbitrator's reliance on what he termed the '*expert opinion*' contained in the Luiters affidavit as the basis for his conclusion that the signature on the Certificates was authentic is furthermore wholly unreasonable, given that Mr Luiters was requested only to investigate whether the stamp used on the Certificates was the stamp issued to the employee. He did not investigate, and made no finding concerning, the signatures on the Certificates.[11]

[33] This irregularity - making a finding of fact which was without foundation in the evidence before him – also directly informed the impugned decision, and was accordingly a material irregularity.

Unreasonable conclusion regarding the 'framing' defence

[34] Given the plausibility of the framing defence, a reasonable arbitrator would wish to satisfy himself that the employer acted fairly by ensuring that it was not dismissing the wrong employee. It was SARS that bore the onus to satisfy the arbitrator that it had a fair reason to dismiss the employee. SARS accordingly had the responsibility to produce some evidential basis for its conclusion that it was more probable than not that the employee indeed stamped and signed the Certificates, and that this was less probable than that she was framed by other persons colluding to facilitate ghost exports (whether Khoza and/or other SARS employees, together with persons associated with Charlo Bridge).

[35] On this issue, the arbitrator's reasoning is:

35.1 at paragraph 32 of the award: '*from the evidence presented, I could not find reasons how the applicant could be framed for such fraud by either the clearing agent or her colleagues*'; and

[11] This was in fact acknowledged and confirmed by the employer's witnesses at the arbitration hearing.

35.2 at paragraph 33 of the award: '*If such owner [of Charlo Bridge] framed the applicant, she would not have called SARS managers and police and also have one the employees arrested* …'.

[36] The arbitrator's reasoning failed to take cognisance of the evidence concerning Khoza's threat, which clearly points to the possibility that other SARS officials had both a motive and the opportunity to frame the employee. The arbitrator's focus on the owner of the clearing house Charlo Bridge is wholly irrational, in light of the fact that Charlo Bridge is an agent, not an exporting company: a business willing to pay a kick-back for a ghost export arrangement would need only to contract with an individual 'runner' employed by a clearing agent, whose task would be to procure the relevant documentation (whether alone, or in collusion with a SARS official).

[37] On a proper consideration of the transcript of the oral testimony led before the arbitrator, it is to my mind possible that the employee was assisting runners from Charlo Bridge with fraudulent certificates (with or without the knowledge of its owner) and it is equally possible that someone other than the employee was involved in facilitating ghost exports, and that such person arranged to have the employee framed after she intercepted the ghost export in February, thus posing a risk to that person's fraudulent endeavour.

[38] The arbitrator's conclusion that the employee was not framed is one that a reasonable decision maker could not reach.

[39] I am accordingly satisfied, for all of the above reasons, that the decision of the first respondent arbitrator falls to be reviewed and set aside

Remedy

[40] The matter is obviously of some importance. Because it is in the public interest that SARS customs officials perform their work honestly, the outcome of this dispute has an impact extending beyond the relationship between the employer and the individual employee, to the wider South African public in general.

[41] Put differently, if the employee is an honest and excellent customs official who served SARS loyally for 20 years it would be a travesty to uphold her

dismissal – more especially if her dismissal was engineered by those who are the real fraudsters, who, by the very device of having falsely implicated her, themselves remain employed (and therefore able to continue to perpetuate fraud on the fiscus). On the other hand, if the employee is indeed herself involved in customs fraud, it would be a grave mistake to reinstate her.

[42] This court is unable, on the evidence on record, to determine the fairness of the disputed dismissal. In any event, the admissibility or otherwise of Mr Luiters' evidence is something which falls to the discretion of the arbitrating commissioner. Therefore, notwithstanding the regrettable delay which has already occurred in finalising this matter, it must be remitted.

[43] In light of the conclusion to which I have come and having regard to the stance adopted by the parties' representatives I am satisfied that there should be no order as to costs.

Order

[44] The arbitration award issued by the first respondent under case number MPMB819-20 dated 18 August 2020 is reviewed and set aside.

[45] The matter is remitted to the second respondent for arbitration afresh before an arbitrator other than the first respondent.

[46] There is no order as to costs.

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Harvey AJ

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the applicant:	Mr Matshiyane of Matshiyane Attorneys
On behalf of the third respondent:	Mr M R Mokwala instructed by Maponya Inc