**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR362/23

In the matter between:

**MOPANI CIVILS (PTY) LTD** **Applicant**

and

**LE ROUX, YOLANDA *N.O.*** **First Respondent**

**THE BARGAINING COUNCIL FOR THE CIVIL ENGINEERING INDUSTRY (BCCEI)** **Second Respondent**

**TSHEPO MAKITI MOKGATHI** **Third Respondent**

**Heard:** **6 December 2024**

**Delivered:** **11 December 2024**

**This judgment was handed down electronically by circulation to the applicant's legal representatives and the third respondent by email. The date for hand-down is deemed to be 11 December 2024.**

---

**JUDGMENT**

---

**MAKHURA, J**

[1] These unopposed proceedings relate to an application brought by Mopani Civils (Pty) Ltd (the company) in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award issued by the first respondent (the commissioner) dated 8 February 2023. In terms of the award, the commissioner found the dismissal of the third respondent, Tshepo Makiti Mokgathi (employee) to be procedurally and substantively unfair and ordered the company to pay him compensation equivalent to four months' remuneration, which amounts to R116 356.00. There was no order of reinstatement.

[2] This review application is making a second appearance in this Court. It was first heard by Chaane AJ on 7 December 2023. On that day, Chaane AJ dismissed the review application with no order as to costs. No reasons were provided. On 11 January 2024, the company filed a request for reasons, dated 12 December 2023. Chaane AJ subsequently passed on before providing the reasons for his order.

[3] In August 2024, the company addressed a letter to the Judge President seeking intervention and/or assistance in the matter due to the fact that the learned acting Judge passed on before giving the reasons for his order. In addition, the company filed the transcript of the hearing of 7 December 2023.

[4] On 22 August 2024, the Judge President wrote to both parties, and presented two options to them – to have the matter re-enrolled before another commissioner for a hearing *de novo* in open Court, or to have the matter re-enrolled before a Judge in Chambers to consider and determine the application afresh on the basis of the record in the file, which includes the record of the hearing of 7 December 2023.

[5] Both parties agreed to the second option – to have the matter determined afresh in chambers. The effect of this agreement is that the order of 7 December 2023 is set aside in favour of a re-hearing of the matter. I was subsequently seized with the matter. Having considered the matter, I considered it appropriate to re-enrol

[1] No 66 of 1995, as amended.

the matter for a hearing. The matter was then re-enrolled virtually on 6 December 2024. Both parties appeared on 6 December 2024 and confirmed the agreement. The matter proceeded with the company presenting its case.

[6] The employee was appointed by the company as a Senior Site Agent or Foreman with effect from 1 March 2021. The employment was for a three-year fixed term contract, due to lapse at the end of 29 February 2024.

[7] On 26 August 2022, the company terminated the employee's employment on one month's notice, on the basis of alleged operational requirements. The employee subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), which later transferred it to the first respondent, the Bargaining Council for the Civil Engineering Industry (BCCEI). The dispute was enrolled for arbitration on 26 January 2023.

[8] At the commencement of proceedings, the company applied for postponement. The company was represented by its Human Resource Manager, Sbongile Masombuka (Masombuka), who moved the application for postponement. Masombuka's application for postponement was as follows:

> '…our Managing Director would like to get a postponement for the date because he had an urgent meeting, a session that he needs to attend today by the time because he needs to be present in that case because he is the one who is familiar with the case (sic). Unfortunately, I can't be the one who represents the company because it's the first time I'm meeting Tshepo, I've just got hired recently, I've never met him and I'm not familiar with the case.'

[9] It is common cause that on the evening prior to the hearing, Masombuka had sent an email to the BCCEI in which she stated that she would like the matter to be postponed because she was new at the company, was not familiar with the case and that the Managing Director (MD) was invited to attend a contractor and consultant engagement session.

[10] In opposition, the employee placed on record that the invitation to attend a contractor and consultant engagement sessions was sent on 14 December 2022 and that a reminder was sent early in January 2023. The employee contended further that the company failed to comply with the rules of the BCCEI which requires that an application for postponement be brought at least 14 days before the hearing.

[11] The commissioner, in her clarity seeking questions, enquired whether the company, in this case Masombuka as the HR Manager and the MD were prepared for the arbitration, which became clear that these two individuals did not prepare for the proceedings. Masombuka also clarified that she only started working for the company on 16 January 2023, which was 10 days before the scheduled arbitration.

[12] The commissioner dismissed the company's application for postponement and proceeded with the proceedings. The ruling is contained in the transcript of the proceedings and also in the arbitration award. In her ruling, the commissioner considered the test for an application for postponement with reference to case law[2], the company's unpreparedness for the arbitration, the company's failure to explain why the meeting the MD chose to attend was more important than the arbitration proceedings and why no other employee from the company could not attend that meeting, the fact that the company was notified of the hearing more than a month prior and found that the company failed to show good cause and that it was not in the interest of justice to postpone the matter.

[13] Having afforded Masombuka one hour to take instructions, who thereafter left the hearing, the arbitration proceeded unopposed. As the dismissal was for operational requirements, the company had the onus to prove that it was fair both procedurally and substantively. The company did not lead any evidence and therefore did not discharge its onus, or at least place any evidence before the commissioner to show that the dismissal was fair. Further, the company's decision

[2] *Psychological Society of South Africa v Qwelane and others* 2017 (8) BCLR 1039 (CC) at paras 30 – 31; see also *Lekolwane v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) at para 17.

to not participate in the arbitration proceedings meant that it elected not to place any evidence on record regarding the appropriate remedy or amount of compensation to be paid to the employee. The company was aware, per the referral form, that the employee sought compensation. The unfairness of the dismissal was conceded by the company in October 2022.

[14] The employee took the witness stand. His evidence was that he was employed on a three-year fixed term contract from 1 March 2021, that he was dismissed, as per the company's letter of dismissal dated 26 August 2022, for operational requirements and was paid until 23 September 2022. However, there was more work on the site and the company employed a new Site Manager and more employees after his dismissal.

[15] The employee met with the MD in October 2022 where the MD accepted that the decision to dismiss him was irrational and offered the employee reinstatement. The employee rejected the offer of reinstatement. He cited the humiliation and trauma he suffered as a consequence of the dismissal, that he was called from Mpumalanga and when he arrived at the office, he was presented with a dismissal letter, the fact that the MD was of view that the employee was in cahoots with other employees and did not trust him. The employee however assisted the company on its projects, including the project he was working on before his termination.

[16] The employee testified further that when he received his Unemployment Insurance Fund (UIF) documents, the company had recorded the reason for his dismissal as the expiry of the contract, which was not true. The second UIF form issued in January 2023 recorded the reason for his dismissal to be the expiry of the contract.

[17] After the referral of the dispute, the MD sent other employees to represent the company and he insisted during conciliation proceedings that the dispute must proceed to the arbitration stage.

[18] The commissioner, having heard the employee's evidence and considering the onus of proof in the unfair dismissal dispute for operational requirements, found

that the employee proved that he was dismissed and the company failed to discharge its onus to prove that the dismissal was fair. She declared the dismissal to be procedurally and substantively unfair. She thereafter considered the appropriate remedy. In this enquiry, she considered that the employee was terminated 18 months into his 36 months contract, the company subsequently acknowledged the unfairness of his dismissal, the company's non-cooperation during conciliation proceedings and the employee's refusal to take up the offer to be reinstated. She also considered the manner in which the employee was dismissed and concluded that the equivalent of four months' remuneration would be just and equitable.

[19] The company applied to review and set aside this award. There are three grounds advanced. First, the company contends that the referral of the dispute to the BCCEI was made outside the prescribed 30 days period without an application for condonation and the BCCEI lacked jurisdiction to arbitrate the dispute. Second, it attacks the commissioner's decision to refuse an application for postponement as unreasonable. Third, the company contends that considering the circumstances of the case, it was unreasonable for the commissioner to award the employee compensation.

[20] The first ground has not been pleaded with sufficient particularity. The company simply states that the referral was made outside the 30 days period. It makes no mention of the date when the dispute was referred and the basis upon which it says the date was outside the 30-day period. The company therefore failed to make out a case in this regard. In any event, the dismissal of the employee became effective on 23 September 2022. On the record, the dispute, which was referred to the CCMA and subsequently transferred to the BCCEI, was declared and referred on 22 October 2022. The ground falls to be rejected.

[21] With regard to the decision to refuse postponement, the company contends that this decision is unreasonable because *"enough evidence was placed before the Commissioner to show good cause"*. The company contends that the MD had to

attend an engagement session called by the Department of Public Works, North West and that this session *"was for all contractors and consultants and was to be attended at the highest level"*. The MD alleges in the papers that he could not have delegated the responsibility to attend this meeting *"as the client concerned is the lifeblood of the [company's] business"*. The company contends that it applied for a postponement before the date of arbitration.

[22] There is no merit in this ground. The application was not supported by evidence as there was no affidavit placed before the commissioner nor was there any oral evidence led in support of the application. The company sent an email on the eve of the hearing requesting a postponement. The email and its attachment simply placed on record that the MD would be attending the engagement session. Nothing was said about the nature of the meeting and when the company became aware of the meeting considering that the BCCEI notified the parties of the hearing more than a month in advance. The employee said that the company knew about the engagement session as early as 14 December 2022 and despite this knowledge, failed to formally apply for postponement on notice supported by an affidavit. That the client, Department of Public Works, was the company's lifeblood was not placed on record for consideration by the commissioner and the significance of this point was equally not emphasised, even in these proceedings. The commissioner was not informed why no one else could not attend that meeting on behalf of the company. That information is still not contained in this application. The CCMA, bargaining councils and this court cannot decide cases based on speculation, which is what Mr Ntshaba, appearing for the company, invited this Court to do and to upset the award based on what the commissioner should have speculated about the engagement session, its significance and why no one else could attend on behalf of the company This ground of review falls to be rejected.

[23] The third ground is that the commissioner's decision to award compensation was unreasonable. The company contends that there was a genuine offer of reinstatement which was rejected by the employee and that this is sufficient to have deprived the employee of compensation. The employee's response to not

take the offer of reinstatement was that the manner in which he was dismissed was humiliating and traumatising and that the MD thought that he (the employee) was in cahoots with other employees which made him lose trust in the employee. The upshot is the employee's decision is that the MD, based on unfounded allegations, dismissed him because he could not trust him, and dismissed him without affording him an opportunity to state his case.

[24] Mr Ntshaba submitted that the employee unreasonably refused a genuine offer of employment and therefore compensation should have been denied. Section 194 of the LRA deals with the limits of compensation that may be awarded to the employee. It is clear that the commissioner has been given discretion in determination of the amount of compensation, which must be just and equitable. In her award, the commissioner took into account the fact that there was an offer of reinstatement, and other factors, including the alleged financial predicaments and the manner in which the employee was dismissed. She rejected the employee's request to be paid for the remainder of the period and awarded him four months' compensation.

[25] There is no suggestion before this Court that the commissioner materially misdirected herself in the sense that in awarding compensation, she was influenced by wrong principles or a misconception of the facts or that her decision is one that could not reasonably have been made by a commissioner on the material before her and properly directing herself to the relevant facts and legal principles. The decision has been supported by reasons. In *Duncanmec (Pty) Ltd v Gaylard NO and others*[3], the Constitutional Court reminded us that:

> 'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[3] (2018) 39 ILJ 2633 (CC) at paras 42 - 43.

> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[26] Accordingly, applying the review test[4] to the application, I am not persuaded that the commissioner's decision is one that a reasonable decision maker could not reach. The review application stands to be dismissed.

[27] In the premises, the following order is made:

Order

1. The review application is dismissed.

_____

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. S. Ntshaba of Voyi Inc. Attorneys



[4] Ibid; See: *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 100; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 31 – 33.