IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 125/2021

In the matter between:

ZIMBINI MAKULENI **Appellant**

and

THE STANDARD BANK OF SOUTH AFRICA LTD **First Respondent**

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

COMMISSIONER ISAAC MILANZI N.O. **Third Respondent**

Heard: **3 November 2022**

Delivered: **8 February 2023**

Coram: **Sutherland JA, Musi JA and Kathree-Setiloane AJA**

JUDGMENT

SUTHERLAND JA

Introduction

[1] Mrs Zimbani Makuleni, the appellant, was employed by Standard Bank, the respondent, as a branch manager. She was suspended on 28 August 2017 and dismissed on 12 January 2018 for misconduct. A commissioner of the CCMA gave an award on 12 October 2018 that she had been unfairly dismissed and

ordered her reinstatement with full retrospectivity. In a review of that decision, the Labour Court on 22 September 2021 set aside the award and declared that she had been fairly dismissed. This appeal lies against that order of the Labour Court. The appeal was heard almost five years after the dismissal.

[2] The test for reviewing and setting aside an award of the CCMA is whether the decision reached by the commissioner is one that no reasonable person could have reached. The proposition has been articulated so often that it is now trite. Nonetheless, this case is an example of the test being misapplied and the Labour Court being misled into treating the case for a review as if it were an appeal. In our view, the Labour Court was in error to have set the award aside. It is therefore appropriate to revisit the leading authorities in order to set out the essentials of the review test.

[3] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of Department of Education v Mofokeng & others*[1] at paras [30] to [33]. The significant passages are emphasized:

> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.
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> [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose,

[1] (2015) 36 ILJ 2802 (LAC) at paras [30] – [33].

basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to *restrict the* scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] 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 the final analysis, it will depend on the materiality of the error or irregularity and

its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[4] The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.

[5] The allegations of misconduct upon which a disciplinary enquiry found the appellant guilty were as follows:

'1. It is alleged that you have conducted yourself in a manner that is in breach of your contract of employment, your duty of good faith towards Standard Bank and your subordinates and have created an environment that is hostile at Centurion Branch, in that:

1.1 You communicate with your subordinates in a manner that is disrespectful, offensive and childish.

1.2 You shout at your subordinates using inappropriate words (vulgar language) in front of their colleagues and the customers of the bank,

1.3 You fail to motivate your team and to value the ideas raised by certain of your subordinates. This has resulted with *[sic]* your subordinates feeling uncomfortable and worthless.'

[6] Some observations about this formulation are appropriate. Plainly, it is composed of generalised conclusions and bereft of a single concrete allegation of fact. A request for further particulars was *de facto* refused in an answer which simply said that the 'offences' occurred since August 2015, i.e. over a two-year period. Such notice to the appellant of discernible facts became available only in statements made by the several witnesses, included in a trial bundle, and upon which they were each led in evidence. The statements variably alluded to some concrete factual allegations and, mostly, to generalised grievances. All the incidents alleged or grievances described therein were in the context of the appellant's role as a manager giving directions or correcting or rebuking staff for performance on the job.

[7] A request by the appellant to allow legal representation was refused, a decision not challenged, but one that the commissioner might well have had reason to regret. Why it is so often glibly imagined that a matter involving only disputes of fact which will require credibility findings will be more appropriately adjudicated without the utility of legal expertise to adduce the cogent evidence coherently and conduct cogent cross-examination eludes me. The hearing took several days. There are 1287 pages of evidence, much of it disorganised and sometimes waffling.

[8] The respondent's case was presented by Mr Abie Phooko, an Employment Relations Manager of the respondent, who cross-examined the appellant. It was apparent that the appellant and Mr Phooko already knew one another, and the evidence is occasionally peppered with asides evidencing this

acquaintance. The leading of the evidence and the cross-examination of the appellant by Mr Phooko was what is to be expected from a layperson. The leading of evidence was reasonably coherent, being structured upon the reading of the statements mentioned into the record, but predictably the witnesses wandered off the point and often, but not always, offered no actual substantiation of the key grievance and were not brought back to the point in issue, leaving it to dangle. The cross-examination of the appellant was largely unhelpful in achieving the legitimate objectives of cross-examination, often descending into arguments and the inappropriate soliciting of opinions.

[9] The appellant, as she was obliged to do by the commissioner's ruling, presented her own case and cross-examined the witnesses called to support the allegations, all of them being her subordinate staff at the branch. The appellant herself gave her evidence in chief in a rambling fashion, often little more than an indignant denial of the import of the criticisms she faced and, although not entirely fair to characterise as stream of consciousness, left the trier-of-fact with a disorganised basket of facts, comment and opinion. Her stout efforts at cross-examination of the witnesses were often ineffective for want of any expertise to engage in such an exercise, but in confronting the witnesses with either a challenge to substantiate the generalised grievance or by introducing the context omitted from the initial complaint by the witness, occasionally succeeded in procuring some concessions which diluted the import of the complaint. These observations are made because it is relevant to take stock of what the commissioner had before him to work with and upon which to render an award.

[10] The multitude of incidents mentioned by the several witnesses were supposed to have occurred during a period of up to two years prior to her suspension and many, but not all, were only vaguely located in time. The tenor of the appellant's defence was threefold: (1) to deny certain alleged incidents occurred at all; (2) to admit certain other incidents but to offer a rebuttal of the interpretation placed on them by the witnesses; and (3) to respond that she had no recollection of an alleged incident but to deny that the spin put on it by the witnesses was appropriate.

The Award

[11] The two critical issues for decision by the commissioner were the credibility and the reliability of the various witnesses. He was conscious that an onus rested on the respondent to prove its case, an important dimension of the overall controversy. Ultimately, the commissioner concluded that the version of the appellant was preferable to that of her nine accusers, because it was, in his assessment, more probable.

[12] In addition, the commissioner was critical of the respondent's attitude towards sanction, even on the premise of the misconduct having been proven, because the personal circumstances of the appellant were not, in his view, properly weighed. This included her 23 years of exemplary service. This aspect is addressed discretely hereafter.

The Review Court

[13] The Labour Court's view of the case differed from that of the commissioner. As shall be addressed hereafter, there are serious flaws in the reasoning articulated in the judgment. However, what is immediately deserving of emphasis is that even if the perspective of the Labour Court is plausible and reasonable, that is an insufficient reason to displace the award in terms of the review test addressed above. To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result. In our view, no material criticism can be advanced of the award that meets the threshold test for review.

[14] Two misdirections by the Labour Court are glaring.

[15] The first misdirection is the notion that it could accept that the appellant's subordinate staff who were witnesses against her had no motive to lie. This is plainly wrong on two grounds.

[16] The first ground is that the absence of an apparent motive to lie is not a helpful tool with which to determine either credibility or reliability. The once too frequent observation, long ago, by courts that a policeman had no motive to lie has been

discredited for generations; it cannot be allowed to leak back into our forensic toolbox in diluted form.

[17] The second ground is that the Labour Court held, on the facts, that there was no evidence of a motive to lie or to distort what had truly occurred and to catastrophize an incident to paint the appellant in a bad light; *ergo*, the nine witnesses were to be believed. This is an untenable conclusion. The facts demonstrate overwhelmingly that the appellant was an unpopular boss. Even by her own reckoning she was exacting, demanding, inclined to micro-manage and be authoritarian. The staff who had been corrected, rebuked, and criticised for minor improprieties were glad to see the back of her. It is common cause that the Centurion branch ranked third in the country for excellent performance. That is a result that was welcomed by the management and not achieved without a high level of performance being sustained, ostensibly by, *inter alia*, exacting and close management. Indeed, the uncontradicted evidence of the appellant is that she was appointed to clean up the branch after the branch had been neglected for several months and ill-discipline had become the norm. A strict regime must have followed as a matter of course.

[18] The second misdirection was that, because there was no proof of a conspiracy among the witnesses, the correspondence of their several tales constituted a type of self-supporting corroboration. This criticism overlooks where the onus lay. Moreover, it is another example of fallacious forensic analysis – a variation of 'where there is smoke there must be fire'. Although it is a valid consideration that where similar fact evidence exists it must be considered and, where appropriate, given weight, it cannot of itself be taken as dispositive of the truth. The commissioner, as the trier of fact, was of the view that, on the probabilities, the onus resting on the respondent was not discharged, and reasoned that the similarities in the tales of grievance were explained by the dislike of the staff for their strict and exacting manager. The fact that a rival view can exist does not mean the commissioner's view was unreasonable.

[19] A third questionable criticism of the award, by the Labour Court, is the notion that the commissioner examined the evidence piecemeal and failed to weigh it holistically. The award traversed the high points of the evidence in a cursory

vein, but nevertheless, the commissioner articulated his conclusion as being dictated by his assessment of the probabilities. The contention is advanced that the commissioner focussed on technicalities and adopted a piecemeal approach. The Review Court's traverse of the scope of the evidence differed little from that of the commissioner and reached the opposite conclusion. In my view, a fair reading of the award does not bear out the criticism that the commissioner did not evaluate the body of evidence appropriately. Self-evidently, the testimony of each witness was remarked upon, but the whole also enjoyed attention.

[20] A particular passage in the award drew spirited condemnation from counsel in the appeal. In para [57], dealing with the allegation of being disrespectful, offensive and childish, the commissioner wrote this:

> 'The evidence … was replete with *innuendo, opinion and speculation*. The witnesses failed to succinctly state how and when the [appellant] treated them in a manner that is disrespectful offensive and childish…'

The italicised words were the focus of criticism; the argument is that it constituted a conclusion inconsistent with the body of evidence. This is misdirected. First, a fair reading of the passage shows that the italicised phrase is a mere flourish, indeed, an example of the increasingly fashionable *rhythmic-triple-word-flourish* seen often in public writings and speeches, the function of which is to dramatize what is said rather than illuminate the point being made. Second, the balance of the quoted passage is a fair comment on the evidence. These remarks, in the context of the evidence given, should be understood to be an expression of a view about the interpretation or spin by the witnesses on the alleged incidents. In truth, the flourish adds nothing to the material findings. Seizing on the semantic peculiarities of a given commissioner's articulation of an issue is seldom of any real value. The standard of articulation applied to commissioner's awards makes allowance for a degree of clumsiness and obscurity and weaponizing such examples to undermine the award is unhelpful.

[21] A fourth aspect is the question of why the witnesses did not complain at the time the incidents occurred. This notable omission was treated quite differently

by the commissioner and by the Labour Court. The excuse given by the witnesses was that they were too scared to come forward, being intimidated by the appellant. The commissioner rejected that as unconvincing. In this regard, the commissioner took into account, *inter alia*, the example of the appellant calling Ncedi Sithebe 'stupid' because her team member committed a serious and embarrassing error about a client's overdraft where Sithebe did, indeed, complain to Steven Blom, the Regional Manager. Moreover, having complained to him and he stating he would take it up with the appellant, Sithebe asked him not to. The appellant thereafter also apologised for the jibe. Blom testified that when he followed up with Sithebe, she told him the issue had been resolved. In addition, in regard to another incident, Sithebe testified that when a co-employee, Yashna, (who did not testify), wanted to complain about the appellant upsetting her by asking her to pay for a replacement nametag, Sithebe went to great lengths to stop her doing so. Both these examples tend to contradict the notion that there was no space to lodge a grievance. Moreover, of considerable importance, the formal grievance process in a business of the size and sophistication of the respondent was at all times available to be used but was not. Why would the commissioner's view, giving weight to these factors, be unreasonable?

[22] On the other hand, the Labour Court was heavily impressed by this excuse. No refutation of the commissioner's reasoning is offered in the judgment. This clash of perspectives is simply an example of two rival interpretations, but the preference of the Labour Court does not displace that of the commissioner, unless the award falls foul of the threshold of the review test. It is not apparent how, on these facts, a conclusion could be reached that the commissioner's award was unreasonable.

[23] Fifth, it was argued in the appeal that the commissioner exhibited a bias by interfering in the presentation of the case. This is an unjustified perspective of the commissioner's conduct. Commissioners are expected to assist an unrepresented litigant. In my view, he did no more than that. Mr Phooko was singularly defensive of the witnesses he called and came close to being contemptuous towards the commissioner on occasion. The efforts by the

commissioner to assist in the articulation of the appellant's case and to exact details from the witnesses deserved no criticism.

The main findings in the award: is there a demonstration of unreasonableness?

[24] Are the commissioner's 'credibility and probability' findings egregious? My reading of the award is that the references by the commissioner to 'credibility and probability' elides 'reliability' under that rubric, a not uncommon feature in judgments of the courts, no less than in awards. The critical issue in this analysis is what the commissioner found '*acceptable evidence upon which he could safely rely*'. The high points are addressed.

[25] Did the appellant call Mojau Maleke a 'bum' in isiXhosa, supposedly a grave insult? The commissioner believed the appellant that this did not happen. The review court held she did say it. The episode itself is bizarre. Maleke had made no reference to this insult in his pre-hearing statement. He does not speak isiXhosa. He claimed that only later, but before the CCMA hearing, by chance, he was told what the word meant, many months after it was allegedly used. He then testified about it at the CCMA hearing. The appellant denies using it at all and questions how Maleke could not have learnt from the isiXhosa speakers on the staff of its meaning straight away. Certain obvious questions arise: Is the allegation a fabrication? Is the evidence a sincere recollection of a word he thinks he accurately recalls from many months ago? Was the word explained to him by an isiXhosa-speaking person really the word he heard much earlier? Even assuming sincerity, the probabilities are fraught with the risk of error. Assuming sincerity, at best, why would the commissioner's rejection of the allegation in the face of a denial be unreasonable?

[26] The 'stupid' remark made to Sithebe, alluded to earlier, was dredged up a year after it occurred when, at the time it occurred, it had been reported to the regional manager, Blom, and his intervention had been refused. Why would the commissioner's take on this episode that there was a trawl for dirt to blacken the appellant's name be inappropriate? Indeed, how could it be unreasonable, especially when Blom's unchallenged evidence was that Sithebe told him that the spat was resolved between them? Moreover, why

would an inference of *mala fides* be inappropriate which, in turn, contaminates the reliability of other claims the appellant refutes?

[27] The charges about failing to motivate the staff were, even on their own terms, puerile. On appeal, they were not pressed and correctly so. However, the efforts that were gone to vilify the appellant are a pertinent consideration. Two aspects bear specific attention.

27.1 First, no evidence was led about the respondent's managerial ethos. Other than the usual generalised motherhood-and-apple-pie expressions of good leadership and mentoring, the commissioner was presented with no useful standard to examine and consider whether the appellant's style of management was so incongruent with it that she was in breach of her contract of employment.

27.2 Second, the case rested on two examples of suggestions made about work process issues; the filling of ATMs with more cash than was the practice and using shutters at ATM machines.

27.3 The gravamen of the "cash" complaint was that the suggestion by Mr Maleke was shot down which upset him. The appellant said she did not recall the suggestion being made, but in any event, addressed the proposal as inappropriate because of the undue risk of having too much cash in an ATM.

27.4 The 'shutter' issue was complicated by the claim by Ms Tyukwana that the appellant stole her suggestion, made in 2015, and passed it off as her own. This version was rebutted by the appellant who related that she was familiar with the shutter idea from her experience at another branch, a claim that stood unrebutted.

27.5 Why would the commissioner's finding to prefer the appellant's version be unreasonable on these facts?

[28] A curious and unfortunate omission in the evidence is information about what proportion of the staff at the branch held pejorative views about the appellant.

Mr Phooko indicated in the course of the hearing that there were various staff members who refused to be part of the case. In her defence, the appellant called two senior managers. Admittedly their day-to-day exposure to the staff must have been relatively limited. However, both expressed ignorance of any of the appellant's alleged patterns of bad behaviour. Thus, how overt could it have been?

[29] The greater part of the evidence was that the staff were subjected to a barrage of rebukes about poor performance, said to be often made in the company of others, delivered rudely or shouted, which upset the witnesses. Included in this were allegations of jibes aimed at the person; criticism of the alleged breach of the dress code, not standing when serving a customer, late-coming and derision at what was said to be inadequate excuses, and many more. The principal difficulty with this sort of grievance is to furnish sufficient details so that the occurrences could be properly addressed by the person accused of causing the upset to be either rebutted or explained. The charges were plainly drafted in vague terms because very few such episodes could be identified as to time and context. Ms Hlongwane's evidence, for example, is replete with the repeated mantra that the appellant harangued the staff with 'do that or don't do this' without any actual example of an instruction being described. The implication of this lack of detail when recalling supposed happenings from years before does not necessarily mean that nothing occurred but, *upon the application of the onus,* the denial by the accused person has to be cogently overcome, and if it is not, the accusation fails to gain traction. The commissioner elicited evidence that staff meetings were recorded but no tapes or transcripts were offered as objective corroboration of the rudeness alleged to have taken place at such times. Offensive behaviour, allegedly in the presence of customers, supposedly an aggravating circumstance, was not corroborated by any customer taking the trouble to record the scene in the complaints book. An adverse inference was drawn by the commissioner from not adducing such objective corroboration as might have been available. Why would the decision of the commissioner to be unimpressed by such generalised evidence be unreasonable? Why would the acceptance of the appellant's denials, given the onus, be unreasonable? Moreover, when this

evidence is considered together with the absence of grievances being lodged at the time of occurrence, why could the rejection of the version be criticised as unreasonable?

Conclusions

[30] The evaluation of factual disputes is hard work and different triers-of-fact often have different assessments. The less coherent the evidence, the more likely it is that there will be divergences in the assessments.

[31] The degree of robustness which characterises the reality of CCMA arbitrations is exactly the rationale for subjecting them to a review and not an appeal. The courts must be cautious not to undermine the legislative intent.

[32] The review court's rationale for setting the award aside cannot stand.

The unaddressed question

[33] An aspect of the case that warrants an elaborated *obiter dictum* is the question, nevertheless now moot, of what would have been a proper sanction were the appellant to have been found to have conducted herself inappropriately in the manner in which she dealt with her staff. In my view, it is far from apparent that a summary dismissal would have been appropriate. Two obvious considerations should have dominated the evaluation required.

[34] The first consideration is that an employee who has 23 years of unblemished service ought not to be discarded lightly. The appellant worked for the respondent from 1 February 1995: i.e., she had been an employee of the respondent for almost the whole of her adult life. No serious weight was given to this elephant in the room.

[35] The second consideration is a peculiar aspect of the case. The appellant was appointed to a branch that was in need of rehabilitation owing to it having been neglected and ill- discipline having set in. Under her leadership, the branch was recognised as the third best performing branch in the respondent's business.

[36] If her style of management was inconsistent with what the respondent wanted, the results certainly were what they wanted.

[37] It seems to me that the appropriate response upon an incongruence in managerial style and respondent's ethos being revealed would have been to consider sending her for advanced management training.

[38] If one were to speculate that the appellant's interpersonal style was un-reformable, then the prospect of another post where she was not over-seeing staff ought to have been explored.

[39] Ultimately the impropriety of a dismissal is manifest.

The appropriate relief

[40] Because of the lapse of time and the need to manage the transition to give effect to the reinstatement order in the award, it is appropriate to amplify the order to cater for such circumstances as the potential of the appellant having to give notice to another employer in order to resume *de facto* employment.

[41] In the light of the appellant's evidence that she does not insist on being restored to the post of manager, Centurion branch, and the logistics of selecting another post, a provision should be made for the time necessary for interaction between the parties.

[42] As to costs, it is fair that the appellant who has had to personally bear the costs of the proceedings in the Labour Court and in this Court that the respondent pay those costs.

[43] In the premise, the following order is made:

The Order

1. The appeal against the order of the court *a quo* is upheld.

2. The award is confirmed.

3. The costs of the appellant in the Labour Court and in the Labour Appeal Court shall be borne by the respondent.

4. The appellant shall report for duty to resume her employment with the respondent upon receipt by her of a notice, in writing, of at least two calendar months.

5. The restoration of the appellant's entitlements in respect of the retrospective effects of the award shall be calculated and be paid or reinstated, as the case may be, in full, not later than 120 days calculated from the date that this judgment is handed down.

Sutherland JA

Musi JA and Kathree-Setiloane AJA concur.

APPEARANCES:

For the Appellant: Adv. T Govender
Instructed by Ian Levitt Attorneys.

For the Respondent: Adv. A Redding SC
Instructed by Cliffe Dekker Hofmeyr Inc.