Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD IN PORT ELIZABETH

Case No: PR 157/15

In the matter between:

PARMALAT SA (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER M KOORTS *N.O* **Second Respondent**

JERMAINE SCHARNECK **Third Respondent**

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Heard: 25 May 2017

Delivered: 31 May 2017

Summary: (Review – incapacity dismissal – settlement agreement resulting in hearing – dispute originating from failure to retain employee in laboratory assistant post – employment as a general worker not considered – employee working as a general worker prior to incapacity hearing)

JUDGMENT

LAGRANGE J

Introduction and background

[1] This is a review application of an arbitration award in which the arbitrator found that the dismissal of the 3rd respondent (the employee) was substantively and procedurally unfair and *inter-alia* ordered his reinstatement in the position he held at the time of his dismissal namely that of a general worker.

[2] The incapacity hearing had come about after the employee had referred a dispute over his alleged unfair demotion from his previously held position as a Junior Laboratory Analyst (JLA). The referral of this dispute resulted in the conclusion of a settlement agreement in the following terms:

> "1. The applicant on 27 September 2013 referred an ULP dispute relating to demotion. The same dispute had previously been referred to the CCMA that resulted in a process agreements been concluded. Terms of the process agreement concluded under ECPE 3806-12, the applicant would present the respondent with medical reports relating to whether you spent to work as a junior analyst in the laboratory. The agreements did not resolve the substantive nature of the dispute. The applicant's stance has been that he is mentally fit to resume duties in the laboratory.
>
> 2. The applicant prior to a diagnosis of a mental condition was temporarily incapacitated from work for the period November 2010 to 1 March 2012. The applicant prior to the diagnoses was employed in the respondent laboratory as a junior analyst and was remunerated accordingly.
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> 3. On 23 August 2012, the applicant was placed as a general worker and paid at a rate of a general worker that was substantially less than what he received as a junior analyst.
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> 4. Currently, a dispute exists as to whether the applicant is fit to resume duties as a Junior laboratory analyst.
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> 5. In order to resolve this impasse the respondent agrees to convene and commence with them incapacity enquiry as provided for in terms of Item 10 of schedule 8 of the LRA's Code of Good Practice by no later than 11 December 2013. Should the enquiry determined that the applicant is fit to resume duties in the position he was employed for, he shall be reinstated

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and paid as a junior nap analyst. However, should the enquiry determined that the applicant is not fit to resume duties in the post unless an alternative is identified and agreed to, the respondent would have the right to terminate the applicant's contract subject to what is contained in the LRA.

6. The applicant voluntarily withdraws the referral and abandons this dispute against the respondent in settlement of his case at the CCMA."

(Redundant capitalisation omitted-emphasis added)

[3] Pursuant to the settlement agreement, an incapacity enquiry was conducted by the applicant which resulted in his dismissal on 28 February 2014.

The arbitrator's award

[4] The arbitrator concluded that on the evidence, the employee was not fit to be placed in the position of a JLA. The arbitrator also considered whether the applicant had complied with the provisions of the LRA code of good practice regarding termination based on incapacity. In that regard, he considered the steps outlined in *Standard Bank of South Africa v CCMA and others* [2008] 4 BLLR 356 (LC), which may be stated in summary as:

4.1 whether the employee is able to do their work;

4.2 to what extent the employee is able to perform their duties;

4.3 Whether it is feasible to adapt the employees work circumstances so they can continue to perform their duties, and

4.4 if no adaptation is suitable, "the employer must inquire of any suitable work is available".

[5] The arbitrator was satisfied that the applicant had complied with the first three stages and that it had fairly denied the employee an opportunity to work as a JLA. However, the arbitrator found that the applicant had fallen at the last hurdle, namely in considering whether there was any suitable alternative work available. The reasons given by the arbitrator for this finding were:

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5.1 The employee had worked as a general worker for approximately 18 months and the applicant never found this arrangement to be an acceptable to it, even if it created the position for him.

5.2 The applicant only and instituted the incapacity enquiry as a result of the demotion dispute which led to the agreement.

5.3 There was no evidence that there was a problem with the applicant's attendance when he was employed as a general worker at the time he was so employed.

5.4 Cost considerations raised by the respondent in retaining the applicant as a general worker had never been an obstacle to keeping him in that occupation before, nor had it been said that the position was a temporary one.

5.5 The incapacity enquiry was "entirely focused" on whether the employee could be reinstated as a JLA and "there was no debate on alternatives". In so far as consideration was given to the issue by the chairperson of the enquiry, that investigation took place in the absence of the employee which directly contravened the LRA code.

5.6 The fact that the dispute which led to the settlement agreement and the incapacity enquiry arose because the employee was unhappy with being demoted to the position of a general worker and was unwilling to continue working in that position did not "exonerate" the applicant from considering alternatives as required by the code.

5.7 There was no evidence to suggest the applicant could not continue working as a general worker.

[6] The arbitrator concluded:

> "In the premises are of the view that under the circumstances the respondent should have considered alternative positions and offered the position of general worker to the applicant at his incapacity hearing as an alternative to dismissal and it will at the time have been for the applicant to decide whether or not he would accept such a position."

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Grounds of review

[7] The applicant submits that the review turns exclusively on whether the arbitrator adopted the correct approach in his reasoning and if he was wrong whether his error led to an unreasonable outcome. There is of course a further leg to the review test which is whether the outcome could reasonably have been arrived at, anyway. The judgement in Head of the Department of Education v Mofokeng and others [2015] 1 BLLR 50 (LAC) illustrates the nuanced nature of the test. The LAC emphasised an interpretation of the test which means that a misdirection which has a material distorting effect on the arbitrator's reasoning is a strong indicator that the result might be reviewable, but it is still necessary that the reasonableness of the result must be evaluated quite apart from the erroneous path of reasoning which lead to the arbitrator to it:

> [30]
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> 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 5 and this court in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and 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.
>
> [31]
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> The determination of whether a decision is unreasonable in its result is an exercise inherently dependant 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, 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 section 6 of the Promotion of Administrative Justice Act8 ("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

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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 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 inquiry or undertake the inquiry 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 section 145 of the LRA, confining review to "defects" as defined in section 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.11 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 inquiry 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 inquiry. 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 inquiry, 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

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> 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."[1]

(emphasis added - footnotes omitted)

[8] The applicant submits that the arbitrator adopted the incorrect approach in deciding that the failure to offer the employee the last position he occupied as a general worker was unfair. The applicant contends that in the context of the history of the matter, the applicant was not obliged to even consider offering the employee that position. Had the arbitrator properly considered the developments which led to the incapacity hearing, he could never have reached that conclusion.

[9] In support of its argument, the applicant rightly points out that the primary object of the incapacity hearing was to address the employee's complaint that he had been unfairly refused the opportunity to return to the JLA position on account of his mental health. It is certainly true that in the incapacity hearing, the focus of the enquiry was on the employee's fitness to resume that occupation. It is also true that even though the employee testified in the arbitration that he would be willing to take the alternative position of a general worker if he was found not to be fit for the JLA position, his acceptance of that as an alternative had to be coaxed out of him and was clearly grudgingly conceded. Even then, he agreed he would accept it only if he could have another opportunity within a few months to demonstrate his suitability for the JLA position. It was also clear from his

[1] At 59-61.

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cross-examination at the arbitration that the employee expressed doubt whether he would have gone back to his position as a general worker at the salary he was earning in that position. The applicant argues that, this indicates that even if he had been offered the post, it is unlikely he would have accepted it and the arbitrator failed to appreciate the implication of that in deciding that the post should have been offered to the employee. The employee retorts that this would amount to an application of the "no difference principle", which has long been discredited as a basis for ignoring procedural unfairness.

[10] The applicant also argues that the arbitrator failed to appreciate that the settlement agreement did not imply that if the employee was unable to continue working as a JLA, the employer was then obliged to offer him a post at a completely different and materially less favourable level such as that of a general worker. In fact, the context in which the agreement was reached was one in which the employee had complained about being relegated to that obviously inferior position. All along his contention had been that he was fit to occupy his former post as a JLA. This argument was succinctly expressed in the applicant's heads of argument in the following terms, with reference to the phrasing of clause 5 of the settlement agreement:

> "The possible "alternative" that had to be "identified and agreed to" before the applicant could exercise its right to terminate the contract could only have been an alternative other than that the employee had already rejected and, presumptively, on a salary level more or less comparable to that of a JLA. The Commissioner accepted that there was no such alternative. To offer the employee that very post which had led to the proceedings from which the agreement float would have been absurd - to do so would merely have revived the dispute that had been initiated by the employee himself."

[11] The applicant argues that in purporting to apply the fourth leg of the test for fairness in incapacity cases as outlined in the *Standard Bank,* the arbitrator ignored the principle that the alternative an employer is obliged to consider must be 'suitable' and it was inconceivable that the position of a general worker at a salary of R 4,300 per month compared with the JLA salary of approximately R 14,000 per month could not be considered

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'suitable alternative work '. To take the argument on principal further, the applicant also points out that the code requires an employer to consider 'similar' alternative work, which the arbitrator also ignored in identifying the job of a general worker as fitting the bill. Accordingly, the arbitrator misconstrued the test in that case and this led him to an irrational conclusion which necessarily fatally flaws his finding. The applicant also points out that in that case the court was considering a situation which was completely different, namely where the employer had completely failed to apply any of the steps which could legitimately lead to dismissal for incapacity.

[12] There is much to be said for the applicant's argument that the arbitrator's conclusion that the employee should have been placed in the last post he occupied as a general worker is at odds with the general test of what constitutes suitable alternative work and in the context of the employee's failure to unequivocally accept that as a suitable alternative to the JLA post he sought, even when he was given the opportunity to deal with that possibility at the arbitration. But before dealing with that aspect of the arbitrator's findings, I will address the arbitrator's findings on whether the applicant conducted the incapacity hearing fairly.

[13] The interpretation of paragraph 5 of the settlement agreement is plainly critical to the dispute between the parties. I accept that to some extent, it might be capable of different interpretations, but it is clear that it does refer to items 10 and 11 of the LRA Code and anticipates that the enquiry will be conducted in accordance with those provisions. One of those provisions is item 11(3)(iii) which requires an employer to consider the availability of suitable work. The settlement agreement reaffirmed the applicability of item 11 to the incapacity procedure that was going to be followed. The agreement further anticipated that the enquiry could result in the applicant's dismissal if he was not fit for the JLA post, but this was subject to there being no alternative identified and agreed to. The right to terminate even if no alternative was identified and agreed to was still subject to the LRA. Undoubtedly, there are ambiguities in paragraph 5 of the settlement agreement, but it cannot be said that it is an implausible or unreasonable interpretation to infer that the applicant would still consider

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the existence of suitable alternatives and that any possibilities that existed would be discussed with the employee since the settlement agreement only envisaged an alternative being implemented if there was agreement on it.

[14] I agree that under ordinary circumstances, the prospect of the general worker's post at a third of the rate of a more specialised and skilled job such as a JLA could not reasonably be considered "suitable alternative work". However, in the context of the history of the dispute and given that the employee had worked in that low position for 18 months already, it was not unreasonable of the arbitrator to conclude that this alternative employment or to have been offered to the employee before deciding to dismiss him. It is common cause that, to the extent that any alternatives were contemplated they were not canvassed with the employee during the incapacity hearing nor were they put to him before the decision was made to dismiss him. In the context, I cannot say that was unreasonable of the arbitrator to find that this failure was procedurally unfair.

[15] Nonetheless, it is difficult to understand how the arbitrator could have confidently reinstated the employee in the alternative position of a general worker given the absence of any evidence that he unconditionally accepted and agreed to, that as an alternative. When he was pressed on the issue, he either hedged his answer with concerns about the salary or implied it would only be acceptable on a temporary basis. Mr *Unwin* for the employee contended that this ambivalence was to be understood in the context of the employee's natural reluctance to accept something less than the JLA position in case he might have been misconstrued as accepting that he was not fit for that position, but there was nothing in the way the questions were put to him to suggest that any willingness on his part to accede to reverting to being a general worker might suggest that he conceded the merits of his claim that he was not incapacitated. It is difficult to understand how the arbitrator could reasonably believe that the employee would genuinely accept the position of a general worker at a lower salary as a suitable alternative if he was found unfit for his preferred occupation. It is one thing for the arbitrator to have inferred that the employer acted unfairly in not dealing with the existence of an alternative

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in the enquiry: it is quite another to have concluded on the evidence before him that the position of a general worker at the existing wage was something that the employee accepted would be a suitable alternative.

[16] In the circumstances, I accept that the arbitrator was not unreasonable in finding that the employees dismissal for incapacity was procedurally unfair, but on the evidence before him, there was no rational basis for him to conclude that the general worker position was suitable alternative employment, even allowing for the context of the dispute, given that the employee did not unconditionally accept that if he was found unfit for the JLA post, the general worker position was acceptable. Had the employee emphatically asserted his willingness to accept the lower position, the arbitrator's finding that it was substantively unfair of the employer to offer it to him would have been one that could be justified on the evidence.

[17] Accordingly, the arbitrator's finding that the employee's dismissal was procedurally unfair withstands the standard of reasonableness on review, given the somewhat unusual factual context of the case, but the finding that the dismissal was substantively unfair cannot be sustained on any reasonable basis. I appreciate that, often the questions of substantive and procedural unfairness in cases of incapacity are inextricably linked, but in this instance, on the facts, each aspect of unfairness demands its own justification.

[18] The question then arises what relief is appropriate. In the circumstances an award of compensation for procedural unfairness should be substituted for the relief awarded by the arbitrator, bearing in mind that the applicant was employed for approximately 5 years and that the need for the applicant to canvass possible alternatives in the enquiry ought to have been obvious even if the prospects of reaching consensus on that issue might rightly have been perceived to be minimal.

[19] On the matter of costs, neither party pressed this question and that, both parties have been partially successful. Consequently, fairness and equity demands in my view that each party pay their own costs.

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Order

[1] The second respondent's finding in his award issued on 15 September 2015 under case number ECPE 1096-14 that the third respondent's dismissal was substantively unfair is reviewed and set aside and substituted with a finding that the third respondent's dismissal for incapacity was substantively fair.

[2] The relief set out in paragraphs 91 to 94 inclusive of the award, is substituted with an order that the applicant must pay the third respondent 6 months' remuneration as compensation for his procedurally unfair dismissal amounting to R 25800-00, within 15 days of the date of receipt of this judgement.

[3] Each party must pay their own costs.

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Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

APPLICANT:	J Grogan instructed by Joubert Galpin & Searle
THIRD RESPONDENT:	C Unwin of Kaplan Blumberg Attorneys

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