IN THE LABOUR COURT OF SOUTH AFRICA

Case no: **D575/23**

In the matter between:

NEHAWU OBO LUTHABO DYOLISI Applicant

and

COMMISSIONER P DLODLO First Respondent

EASTERN CAPE DEPARTMENT OF HEALTH Second Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL Third Respondent

Heard: **8 October 2024**

Delivered on: **10 March 2025** (This judgment was handed down electronically)

JUDGMENT

GOVENDER AJ

INTRODUCTION

[1] The Applicant seeks to review and set aside the Arbitration Award issued by the First Respondent (the Arbitrator). The Arbitrator found that the Applicant's dismissal by the employer /the Second Respondent had been substantively fair and accordingly dismissed the dispute referral. The review is undefended, and the onus nonetheless rests with the Applicant to prove that the award is defective and reviewable.

[2] The Arbitrator also found that the Second Respondent had failed to prove that it had complied with the procedural fairness relating to the notice of the hearing and the appeal outcome time limits as prescribed, he nonetheless found that the Applicant had not led any evidence on the prejudice suffered. In light of the gravity of the transgressions, the Arbitrator found that he could not award any compensation for the Respondent's failure to adhere with procedural fairness.

Salient points at Arbitration Hearing

[3] The Applicant was employed as an Emergency Care Officer (Paramedic). He was dismissed on 20 October 2022, after it was alleged that he had repeatedly assaulted a colleague, Mr Majola on 2 October 2020, whilst on duty. The second charge pertained to misuse of the government vehicle, and the last charge was the allegation that the Applicant had failed to attend to a medical case as dispatched.

[4] At the arbitration, the Second Respondent led the evidence of 05 witnesses Mr Quinton Van Der Merwe (Chairperson of disciplinary hearing) , Mr Majola(paramedic) , Mr Khela (supervisor) , Mr Kuboni (dispatch controller) and Mr Mashwabana(district manager)

[5] Mr Van Der Merve, who was the Deputy Director: Labour Relations Unit in the Bisho Provincial Office. He stated that he chaired the internal disciplinary proceedings where the Applicant was dismissed in *abstentia*. He testified that from the evidence led before him, the Applicant had refused to accept the hearing notice and did not respond to WhatsApp messages sent to him. He confirmed that the outcome of the hearing was reduced into writing and the reasons appeared in the Respondent's bundles. Further, he was not involved in the appeal. He recalled the evidence of Mr Madikizela, who testified on the futile attempts made to serve the Applicant with the hearing documents. Van Der

Merwe testified that he had considered all the evidence presented before him at the hearing and accordingly reached his conclusion , finding the Applicant guilty as charged [1].

[6] Majola, testified that he was paired with the Applicant in the dispatched vehicle. He stated that on the day in question they were allocated work in the Mthatha General Nelson Mandela Academic and Bedford Hospitals. His evidence was that the Applicant had simply left him at the base and did not inform him of his whereabouts. Nor did the Applicant answer any of his calls. He subsequently discovered that the Applicant was stuck due to a flat tyre at the Mpindweni Village. Khela, the Supervisor, dispatched the Applicant with another driver to attend to a motor vehicle accident in Mqanduli. His evidence was that the tyre was left at the gate because they had to prioritise the Mqanduli emergency. Majola testified that the Applicant had accused him of being a snitch and this led to an altercation between him and the Applicant. When Majola and the Applicant were dispatched to attend to a patient in the Mthatha General building, the Applicant ignored the call and instead transported his wife to their residence in Northcrest. The Applicant further gave three ladies a lift from the Savoy / Total Garage. Two of the ladies were dropped at the Steers and the other one in Corhana Village.

[7] Majola testified that he expressed concerns about the failure to attend to the Mthatha General Hospital call and the Applicant ignored him and forcibly took his cell phone when Majola had tried to make a call to Khela, their supervisor. Majola testified that the Applicant drove the car recklessly at a high speed during these unofficial trips and finally returned to the hospital. When they reached the hospital, the Applicant opened the door and assaulted him, boasting that there will be no witnesses for this incident. Majola testified that he managed to escape and fled towards the security offices at the gate. From there he called Khela and reported the incident. When Khela arrived he called the Manager, who advised Khela to report the matter to the police station. As he was narrating to Khela what happened, the Applicant forcefully dragged him out of Khela's vehicle and used a fist to punch him in his face. Majola submitted that the punches injured his jaws and his teeth came out. Khela called Mzuzwana to take Majola to the hospital because of the dizziness and his bleeding. The matter was subsequently reported to the police. I note a copy of the J88 report[2] .

[1] See transcripts page 88 to 89
[2] See Transcripts page 82

[8] The next witness to testify was Khela, the Applicant's Supervisor Shift Leader. His responsibility, amongst others, was the allocation of emergency vehicles to the ambulance assistance. He testified that he had allocated the Applicant and Majola in one vehicle. He stated that he received a call from Majola at around 20:15 in the evening, reporting that he was assaulted by the Applicant. On arrival at the guard room, he witnessed Majola in a shocked state with slap marks, red eyes and he was crying. He testified that Majola explained to him that the Applicant left him and left with the ambulance after the alleged assault. Further, on the way to the police station both realised that they did not have masks and returned to the ambulance base. Khela testified that he parked the vehicle and was about to call the Storeman for the issue of face masks when the employer opened the door demanding Khela to walk to the office with him (the Applicant). He testified that another argument ensued between the Applicant and himself. He testified that the Applicant pulled Majola towards him and that he tried to pull him inside. He testified that the Applicant assaulted Majola with fists as he was pulling him outside, but he managed to close the door for Majola's safety. Further that the Applicant also banged his vehicle as he drove away. He testified that he was astounded to witness the incident as the Supervisor.

[9] The Applicant, on the other hand, denied the allegations against him and challenged the employer to produce the OB entries, the J88 reports or the police reports where Majola had laid these charges against him. He further requested that the CCTV footage cameras at the base be made available, as he points blank denied the allegations against him.

Grounds of Review

[10] The Applicant contends that since there was no other evidence to implicate him in the assault charges other than the evidence of Majola and Khela, the Arbitrator failed to apply his mind to the evidence and to properly determine the dispute. The Applicant contended that he was shocked by the Arbitrator's findings, in particular, paragraph 82, because he interpreted the finding as if the Arbitrator was expecting more from him and less from the employer during the arbitration. He stated that this expectation is against the spirit of the Labour Relations Act, in particular section 192, and that the employer had the onus to prove the fairness of the dismissal and not the Applicant. The Applicant contended that the Arbitrator had shown lack of knowledge on law or its application.

[11] The Applicant contended that the First Respondent did not see medical records and other listed evidence, yet she was convinced that there was an assault. He contends that the Arbitrator concluded that he is simply denying the assault without any merit. The Applicant averred that this contradicts paragraph 83 of the Award as paragraph 83 of the Award mentions that there were no records and supporting documents before the Arbitrator to support the employer's case. The Applicant further contends that despite recording the lack of documentary evidence, the Arbitrator "absolves" him for lack of records. Therefore, this is a gross misconduct or gross irregularity and thus renders the Award reviewable. Further, that the reason for the Arbitrator's conclusion seems to be that the Applicant's evidence had been consistent, and he contends that she deliberately and irrationally ignored the Applicant's arguments relating to the lack of credibility and consistency.

[12] Further, in respect of the Arbitrator's finding on the issue of procedural fairness, the Applicant contends that throughout the arbitration the Applicant did not have the intention of proving prejudice because that was considered irrelevant. He alleges that the Arbitrator's findings on the issue of prejudice were incomprehensible and extremely contradictory and therefore the Award stands to be set aside. This finding on the issue of prejudice, he avers amounts to a gross irregularity.

[13] In *casu* the Applicant contends that the Arbitrator failed to apply his mind to the evidence and to properly determine the probabilities and credibility of the witnesses in the circumstances where his conduct amounted to a gross irregularity in the proceedings. Since the Applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed.

Relevant Case Law

[14] The test on review is well established and it is whether the decision under review, is one that a reasonable maker could not reach on the evidential material that was before him at the hearing. On this test, an arbitration award based on defective reasoning can still pass the muster required in reviews, provided that the result is one that a reasonable decisionmaker could have reached.

[15] In **Goldfields Mining SA (Pty) Ltd v CCMA** [2014] 1 BLLR 20 (LAC), the Labour Appeal Court held that a Review Court is not required to take into account every factor individually, consider how the Arbitrator treated and dealt with each factor and then determine whether a failure by the Arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the Award. The LAC has cautioned against adopting a piecemeal approach, since a Review Court must necessarily consider the totality of the available evidence. When an Arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, when an Arbitrator fails to follow proper process, he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis.

[16] Therefore, in Goldfields the threshold to be met by an Applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first state is to determine the existence or otherwise of any error or irregularity on the part of the Arbitrator. If the Applicant is unable to establish any error or irregularity, that is the end of the enquiry.

[17] The second stage is one in which the Review Court must establish whether despite any reviewable irregularity, the Award nevertheless falls within a band of decisions to which a reasonable decision-maker could arrive on the available material. It is trite that when the Arbitrator is faced with a resolution of factual disputes then due regard must be held to the case of **Stellebosch Farmers Winery Group Ltd & Another v Martel et CIE & Others** 2003 (1) SA 11 (SCA) applies. An Arbitrator seeking to resolve factual disputes is required to make findings on the credibility of the various factual witnesses, their reliability and the probabilities. With regard to credibility, the relevant factors such as candour and demeaner, any bias, internal and external contradictions in the evidence, the probability or improbability of particular aspects of the witness's version and of the calibre and cogency of the witness's performance compared to that of other witnesses, testifying about the same incident or events. In regard to reliability, relevant factors extend to the opportunities that the witness had to experience or observe the event in question, and the quality, integrity and independence of the witness's recall. As to the probabilities, what is required is an analysis of the probability and improbability of each parties' version.

[18] The Arbitrator must, in light of its assessment of the credibility of the various witnesses, their reliability, and the probabilities of each parties' version, and as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging. The question to be asked is whether the Arbitrator's preference for the version put forward by the Applicant over that of the employer as in *casu*, was a decision that a reasonable decision-maker could not reach.

Analysis

[19] Majola testified that the Applicant assaulted him. He called Khela to tell him that to come as the Applicant had beaten him.[3] Khela testified that he saw finger slaps on the face of Majola. This he observed as a seasoned paramedic himself. Further he denied any fight between the Majola and the Applicant. He was adamant in his evidence that he witnessed only Majola being beaten[4].

[20] I find that that the Arbitrator considered all the material evidence before and assessed the two contradictory versions with due regard to the credibility of the witnesses and the probabilities and improbabilities, if any inherent, in their evidence.

[21] The Arbitrator clearly recognised the material dispute of facts between the parties in their evidence and he adopted the proper approach to resolve and determine the factual disputes. The arbitrator found that Khela and Majola concurred on the version that the Applicant pulled Majola out of the vehicle and also assaulted him behind the emergency vehicle. Further, the Arbitrator did provide substantive reasons as to why he preferred the version of the employer over that of the Applicant. It is my view that the Arbitrator properly interrogated the evidence of the witnesses and his assessment of the credibility of the witnesses were well reasoned, with due regard to the probabilities of the competing versions before him. In my view, the Arbitrator did not commit any reviewable irregularity when he made these findings. Afterall, if Majola was the instigator of the fight with the Applicant and indeed was the person who assaulted the Applicant, it begs the question why he would call Khela to report the assault and seek help. It is also highly improbable that Khela would be part of an elaborate fabrication to falsely implicate the Applicant in this

[3] See Transcripts Page 236 to 240
[4] See Transcripts Page 298 Line 15to 16

assault. The version that the Applicant reported the assault at the Madiera police station was not corroborated by and other evidence.

[22] The Arbitrator was correct when he found that the Applicant's simple denial in light of the overwhelming evidence against him lacked merit. The applicant testified that Majola followed him and assaulted him, but there was no corroboration of his eversion. The Applicant was a single witness.

[23] It is my considered view that the Arbitrator also correct when he concluded that the insistence of the Applicant in his closing argument on the production of the Majola's medical records and reports relating to his injuries, the J88 medical report information, including the date stamp, CCTV footages, all the entries and patient records was not necessary to find the Applicant guilty of the assault , as Khela corroborated Majola's evidence on the actual incident of the assault . Khela was a reliable eyewitness. Hence, the arbitrator cannot be faulted on his finding, that the lack of documentary evidence such as a J88 report or even the lack of production of the CCTV recordings ,did not negatively impact on the consistent evidence presented by both Majola and Khela in respect of the assault. He was therefore correct to conclude that the version of the Applicant that he did not assault Majola was highly improbable in the circumstances.

[24] I find that the Applicant was afforded a fair hearing and that the Second Respondent did dismiss the Applicant for a fair reason. The conduct of the Applicant in assaulting another colleague, especially in the presence of their shift leader , amounts to serious misconduct and is most disturbing . Further, the conduct of the Applicant in failing to attend medical calls from the despatch controller is also serious misconduct considering the nature of the Applicant's employment as a paramedic. working in vulnerable communities. The conduct of the Applicant certainly warrants a dismissal. Therefore, I agree with Arbitrators finding that the dismissal of the Applicants was substantively fair.

[25] On the issue of procedural fairness , the Arbitrator found that that the employer failed to lead evidence relating to service of the notice of the disciplinary hearing on the Applicant and also on the appeal outcome time periods and whether or not the time periods were adhered to by the employer. Despite this finding, the Arbitrator concluded that since the Applicant did not present any evidence on the prejudice that the suffered as

a result of the procedural defects, given the gravity of the transgressions levied against the applicant he could award the Applicant any compensation.

[26] It has been held in Avril Elizabeth Homes for the mentally handicapped v CCMA , (2006)27 ILJ 1644(LC) , that the core of procedural fairness is that there should be dialogue and an opportunity for reflection before a decision to dismiss is taken. In any other words, the core purpose of procedural fairness is to afford an employee facing dismissal to state a case in response to the allegations and charges levied against him.

[27] Now the evidence of Van Der Merwe was that he recalled numerous attempts were made by Mr Madikizela to serve these notices on him. He testified that as the Chairperson the disciplinary hearing he had to satisfy himself that attempts were made to serve the notice on the Applicant. He said he was satisfied because he had seen a screen shot of Watsapp message sent to the Applicant and that it had two blue ticks on it indicating that it was read. Further he testified that in this instance the supervisor testified before him that he attempted to hand over the notice of hearing but the Applicant refused to accept receipt of it the document and choose to leave the meeting.[5] He testified that he was satisfied that attempts were made to serve the Applicant and proceeded with the disciplinary hearing in his absence. This was the third sitting of the disciplinary hearing. None of the sittings was attended by the Applicant , he always requested proof of service and he was met with the same answer that the Applicant refused service . The documents attempting service are part of the bundle of documents but the applicant having refused to sign such documents .

[28] Van der Merve testified that he found the Applicant guilty as charged and communicated his finding to the employer together with his recommendation of a sanction of dismissal . This recommendation was subsequently implemented by the employer. He also confirmed that an employee should be informed of his right to appeal within 05 days of the sanction but he was not involved in the appeal process. Mr Madikela did not testify at the arbitration.

[29] The employer relied on the evidence of the Chairperson to proof that service was attempted on the Applicant. Considering all the facts, I find that the evidence led by the Chairperson was cogent and satisfactory on the point of service. He was a credible witness who confirmed that he was satisfied with the testimony before him on the issue of

[5] See Transcripts Page 154

service. He was an impartial witness who had no reason to mislead the arbitration. Even though the person who attempted to affect the service was not called , the evidence of the chairperson was that this evidence was lead before him and he confirmed that he accepted such evidence at the hearing .

[30] The underlying principles of all labour disputes is that they are resolved as expeditiously as possible, affording both parties a fair hearing. Further, PSBC Res 1/2003 clause 2.2 states that discipline must be applied in a prompt , fair, consistent and progressive manner . According to the uncontradicted evidence, there were 3 sittings that the applicant did not attend. The applicant cannot dispute this evidence because on his version he was not aware of the hearings. It seems highly improbable that the employer would convene 03 hearings without a genuine attempt to serve on the applicant.

[31] I am not persuaded that the applicant has been treated unfairly in this regard. It is in my view more probable than not that the Applicant refused service and the evidence by the Chairperson was satisfactory in this regard as he personally satisfied himself on the issue of service and the attempts made to serve the notices as presented on oath before him. I do not find any prejudice suffered by the Applicant. Even if outcome of the appeal was finalised outside the prescribed period of 30 days, this too I do not find amounts to any procedural unfairness deserving of a compensation .

[32] In light of the above, I find that this award is not one that a reasonable decision maker could not reach on the material before him and this review application thus falls to be dismissed .

[33] In the premises, I make the following Order:

i) The review application is dismissed.
ii) No order as to costs.

Nalini Govender
Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Thabiso Damoyi

NEAHWU

RESPONDENT: N/A