

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1953/2019

In the matter between:

TSHEPO EZEKIEL RABOROKO

Applicant

and

NANCY KEKANA N.O

First Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL (MEIBC)**

Second Respondent

POLYOAK PACKAGING (PTY)LTD

Third Respondent

Heard: 4 July 2023

Delivered: 21 February 2024

JUDGMENT

MAKOPO, AJ

Introduction

[1] This application is in terms of Section 145 of the Labour Relations Act¹ (LRA) and the Applicant seeks to review and set aside the arbitration award issued by the First Respondent (Commissioner).

¹ Act 66 of 1995, as amended.

[2] The application is opposed, the Applicant duly represented by Attorney Mr Khumalo (Themba Khumalo Attorneys) and the Third Respondent duly represented by Mr Lee (Anton Bakker Attorneys).

[3] The following grounds are noted for the review application:

3.1 The arbitration award is not justifiable in terms of the reasons given to it and more broadly having regard to the evidence placed before the Commissioner during arbitration.

3.2 There is no rational objective basis justifying the connection between the Commissioner's decision sought to be reviewed herein and the material properly available to her.

3.3 The Commissioner's decision is irrational and therefore not justifiable.

3.4 The Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

3.5 The Commissioner failed to apply her mind to the evidence of the Applicant and did not examine the probabilities of his version nor test it against the dispute of facts raised by the Third Respondent.

Background facts

[4] The Applicant was employed by the Third Respondent as a Truck Loader.

4.1 He clocked in and out without authorisation on the 22nd and 23rd of October 2018.

4.2 It is common cause, at the time there was a legal strike and the Applicant was not a member of the Union.

4.3 It is common cause that the Applicant was charged with dishonesty in that he failed to comply with the above contractual provisions and that he breached this rule, however, he disputes this and alleges that he had tried to inform his supervisor and that he could not return back to the premises as he was fearing for his life.

[5] The Third Respondent contends that the Arbitrator reached her decision that is both reasonable and fair and the one that any reasonable Arbitrator could reach.

5.1 The Third Respondent contends that the Arbitrator conducted a proper assessment of the evidence and weighed the probabilities of the different versions presented to her.

5.2 The Third Respondent contend there is no merit in any of the Applicant's contentions, which are more related to an appeal than a review, and that the review application should be dismissed with costs.

[6] In *Nedcor Bank Ltd v Frank and Others*², the court described dishonesty as follows in paragraph 15:

'Dishonesty entails lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently.'

6.1 Dishonesty is normally used to describe an act where there has to be some intent to deceive or cheat.

6.2 The Applicant clocked in at work and did not clock out on two occasions while there was a legal strike, which the Applicant was not a part of that strike. The intention was clearly to deceive the employer that he had worked on those particular days, whereas he did not do so.

[7] The Arbitrator clearly analysed the evidence led as well as the evidence led by the Applicant.

7.1 The Arbitrator took into account the seriousness of the offence and the element of misrepresentation and dishonesty.

7.2 The Arbitrator was faced with two mutually exclusive versions and having assessed the evidence she preferred the Third Respondent's version and found the dismissal of the Applicant was substantially fair.

Law and analysis

[8] The test to review an arbitration award is whether the decision is one that no reasonable Arbitrator could reach and the grounds listed in Section 145 (2) of the LRA. The test for review which has been stated in *Sidumo and Another v*

² [2002] ZALAC 11; (2002) 23 ILJ 1243 (LAC) at para 15.

*Rustenburg Platinum Mines Ltd and Others*³ was reiterated in *Herholdt v Nedbank Ltd*⁴ as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds of s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[9] The Court in *Assmang Limited (Assmang Chrome Dwarsrivier Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁵ (*Assmang Limited*) found one of the duties of a Commissioner, when faced with mutually destructive versions is to not only look at the credibility of the witness but also the probabilities as well⁶. Further in the matter of *Satani v Department of Education, Western Cape and Others*⁷, the Court reiterated that not all inconsistencies and errors made by a witness affect that witness' credibility. The trier of fact ought to look at the evidence as a whole and determine the probabilities.

[10] On the full reading of the record and in light of the above, I am satisfied that there are no grounds to justify the review of the award.

[11] Therefore, based on all the reasons set out above, I conclude that the First Respondent's arbitration award is simply not reviewable. I am satisfied that the First Respondent's finding of facts is properly supported by the evidence before her. The Applicant's review application thus falls to be dismissed.

³ [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

⁴ [2013] 11 BLLR 1074 (SCA) at para 25.

⁵ [2015] ZALCJHB 4; [2015] 6 BLLR 589 (LC).

⁶ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

⁷ [2016] ZALAC 38; (2016) 37 ILJ 2298 (LAC).

[12] In the result, I make the following order:

Order

1. The applicant's review application is dismissed.
2. There is no order as to costs.

N Makopo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr T Khumalo of Themba Khumalo Attorneys

For the Respondent: Mr H Lee of Anton Bakker Attorneys