

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case no: JR600/18**

In the matter between:

BULK MACHINE HIRE

Applicant

And

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER MGAELE ALFRED
MASHIGOANA N.O**

Second Respondent

AMCU obo AMOS MABESA

Third Respondent

Heard: 11 January 2024

Delivered: 26 February 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 26 February 2024.

JUDGMENT

STEENKAMP, AJIntroduction

- [1] The Second Respondent issued an arbitration award dated 15 February 2018 in terms of which it was found that the dismissal of the individual employee, Mr Amos Mabesa, was both procedurally and substantively unfair. The Second Respondent ordered that the employee be reinstated, with back-pay totalling R 25 200.00, to be paid by no later than 1 March 2018. He also ruled that failure to make payment as aforesaid would attract interest from date of the award until date of payment at the prevailing interest rate applicable to judgment debt in terms of section 143(3) of the Labour Relations Act¹ (LRA).
- [2] The employee was ordered to report for duty on 1 March 2018.
- [3] The Applicant received the award via facsimile from the First Respondent on 19 February 2018, and thus only became aware of the award on the aforementioned date.
- [4] The Applicant launched this application to review and set aside the award in terms of section 145, alternatively, section 158(1)(g) of the LRA on 6 April 2018.
- [5] This application was launched 4 days out of time, and the Applicant neglected to include a prayer for condonation in its notice of motion for review. At the date of hearing, the matter was however ripe for hearing, and the parties were desirous for the matter to proceed on the merits. In order to facilitate the expeditious resolution of the dispute between the parties, particularly in view of the fact that the dismissal of the employee dates back to November 2017, the Applicant was afforded an opportunity to apply for condonation on the date of hearing, which it did by way of a notice of motion. For the sake of completeness, sufficient averments were made in the founding affidavit to sustain the application for condonation. The Third Respondent did not oppose

¹ Act 66 of 1995, as amended.

the application for condonation, the period of delay was minimal, and I consequently granted condonation for the lateness of the review application.

- [6] A further issue arose as a result of the record of proceedings. When the First Respondent filed the record of proceedings with the Registrar's office, it only delivered the documentary record of the arbitration. It later became apparent that the audio recordings of the arbitration proceedings were lost.
- [7] The Applicant did not comply with the prescripts of the Practice Manual² insofar as this issue is concerned. Instead, it launched an application to compel delivery of the audio record, whereafter the matter was set down for reconstruction, which took place on 19 October 2018. The transcription of the reconstruction was completed on or about 7 December 2018, and the transcript was filed on or about 14 December 2018. I raised this issue with Mr Berry who appeared on behalf of the Applicant, and he made submissions regarding enquiries that were made with the Second Respondent. These were submissions from the bar which do not form part of the pleadings before the Court. It was noted from the contents of the Court file that from delivery of the Rule 7A(3) note³, the 60-day period within which to file the record as contemplated in paragraph 11.2.2 of the Practice Manual lapsed on or about 11 July 2018. The transcript was accordingly filed some five months late, and the provisions of paragraph 11.2.3 were triggered.
- [8] All of this being said, the representatives of the parties both conveyed the parties' desire to deal with the merits of the review, and Mr Cook in particular, recorded that the Third Respondent had no objection to the matter being dealt with on the merits. Had I strictly applied the provisions of the Practice Manual, I would have been constrained to find that the review application was deemed to have been withdrawn. The Applicant would then have needed to apply for reinstatement of the review, which application would no doubt have perpetuated a further delay in the finalisation of this dispute. I consequently took a pragmatic approach to the matter and proceeded to hear the review

² Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

³ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.

application on the merits thereof, as any further delay in the finalisation of the matter would only compound the period of delay, which is not acceptable given the fact that this dispute arose towards the end of 2017.

[9] Even if I am wrong on the score of deemed withdrawal, I made the determination on the basis of the purpose of the LRA as contemplated in section 1(a) read with 1(d)(iv). Furthermore, all other pleadings were filed within the one-year period provided for in paragraph 11.2.7 of the Practice Manual. In my view, whilst the prescripts of the Practice Manual are peremptory, it ought not to be construed to give rise to technicalities which unduly delay matters that are in all other respects ripe for hearing, and both parties are before Court.

[10] This review application was indeed ripe for hearing and was heard as an opposed application.

Background facts

[11] The Third Respondent commenced employment with the Applicant as an ADT Operator on 1 November 2016.

[12] On 28 October 2017, a meeting took place during which the Applicant's intention to implement a 12-hour shift system was discussed. The individual employee, Mr Mabesa, was in attendance.

[13] Mr Mabesa was unhappy with the new shift system, and he "*stormed*" out of the meeting, during which time, he allegedly assaulted his superior, Mr Martin Tredoux by pushing him (out of the way). From the reconstructed transcript, it appears that there was a dispute between the parties as to whether a particular witness testified that Mr Tredoux was "*pushed*" by the Applicant, or "*pushed out of the way*". Whilst this may seem like semantics, it is important to the extent that one of these versions would support either the version that Mr Tredoux was blocking the doorway, or whether he was standing next to the door. The former version supports the Third Respondent's case, whilst the latter supports the version advanced on behalf of the Applicant.

- [14] Still, on 28 October 2017, the Applicant suspended Mr Mabesa and charged him with “*Misconduct 6.6 You assaulted your superior (Martin) by pushing him while going outside from toolbox room and you threw a pen to Charl*”. The disciplinary hearing was scheduled for 31 October 2017.
- [15] The hearing could not proceed on 31 October 2017 due to extraneous factors and was rescheduled for 2 November 2017.
- [16] Mr Patrick Masilela chaired the disciplinary hearing and found Mr Mabesa guilty, and recommended that Mr Mabesa be dismissed effective 6 November 2017.
- [17] AMCU referred an unfair dismissal dispute on behalf of Mr Mabesa, and after unsuccessful conciliation, the dispute was referred for arbitration.
- [18] The arbitration took place on 5 February 2018.
- [19] On 15 February 2018, the Second Respondent issued an arbitration award wherein he found that the dismissal of Mr Mabesa was procedurally and substantively unfair, and he ordered the Applicant to reinstate Mr Mabesa as of 1 March 2018. The arbitration award is the subject of this review application.

Grounds of review

- [20] The Applicant applied to this Court to review and set aside the arbitration award on the following grounds:
- 20.1. The Second Respondent placed an excessive onus on the Applicant by over-emphasizing an alleged contradiction in evidence;
 - 20.2. The Second Respondent demonstrated bias by “*interrupting the valid questions posed by the Applicant’s representative to in fact prove that the Applicant admitted to his misconduct*”;⁴

⁴ This was during the reconstruction proceedings

- 20.3. The Second Respondent failed to apply his mind to the matter and in fact reached a conclusion that *“no other commissioner would have reasonably reached”*;
- 20.4. The Second Respondent failed to *“consider that it was not disputed that Martin was simply standing in close proximity to the door and not in the doorway as subjectively found”*;
- 20.5. The Second Respondent made an *“error in law by accepting the subjective version presented by the Third Respondent, as perpetrator, and ignoring the evidence of the victim, Martin”*; and
- 20.6. The Second Respondent failed to consider the evidence *“addressed during cross-examination of the Third Respondent’s witness, confirming that the door opened from right to left away from where Martin was standing and not towards Martin, as initially claimed by the Third Respondent. Such evidence demonstrates both that the Third Respondent was dishonest when providing his testimony under oath, and secondly demonstrates the particular circumstances strongly confirming the Applicant’s version”*.

[21] The Applicant supplemented the grounds of review in its affidavit in terms of Rule 7A(8)(a). Without repeating the content of the affidavit, the nub of the supplemented grounds was essentially that the Second Respondent failed to apply his mind to the evidence; he placed unnecessary emphasis on technical and/or irrelevant issues and he erred in his determination of probabilities on the evidence.

[22] Finally, the Applicant takes issue with the manner in which the reconstruction proceedings took place, and specifically, with the Second Respondent’s conduct during the reconstruction proceedings. I will deal with this specific ground of review separately hereunder.

Legal framework

[23] It is nearly 17 years since the Apex Court determined that the test on review in this Court is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach.⁵

[24] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*⁶, it was made clear that:

‘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 in 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.’

[25] The Labour Appeal Court (LAC) in *Head of the Department of Education v Mofokeng and others*⁷ (*Mofokeng*) stated:

‘[31] 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

⁵ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

⁶ [2013] ZASCA 97; 2013 (6) SA 224 (SCA) at para 25.

⁷ [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at para 32.

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 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 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. 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 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.⁸

[26] On the score of applying the rules of evidence, Fourie AJ in *Solidarity obo van Zyl v KPMG Services (Pty) Ltd and others*⁹ stated the following:

⁸ *Ibid* at paras 31 - 33

⁹ [2013] ZALCJHB 251; (2014) 35 ILJ 1656 (LC) (*Solidarity*) at paras 16 - 17

‘While arbitrators should always aspire to meet the exacting standard set by the Supreme Court of Appeal in *Stellenbosch Farmers’ Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.’

[27] Fourie AJ further stated that:

‘...[it] is not strictly necessary for an arbitrator to find that a witness was not credible, in order to find that his version was not probable.’¹⁰

[28] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹¹ (*Sidumo*), Navsa AJ (for the majority) stated that an arbitrator ought to impartially determine whether a dismissal was fair or not, taking into account the totality of relevant circumstances, and deference to the decision of the employer is not required. Simply put, a commissioner is not required to rubberstamp the decision of the employer but should make a determination on the fairness of sanction independently within the confines of the factual matrix.

[29] Essentially, an arbitrator is obliged to consider all admissible evidence before him or her, and to assess the probabilities thereof in coming to a conclusion on the issue of guilt. A finding by an arbitrator which is at odds with a full assessment of the evidence and a correct answer to the probabilities thereof, will more often than not be found to be unreasonable. This is particularly applicable in determining whether or not an employee was guilty of the misconduct he or she was charged with.

Analysis

¹⁰ *Ibid* at para 19.

¹¹ *Ibid* at para 78 – 79.

[30] Insofar as applications for review of arbitration awards by this Court are concerned, specifically taking into account the *Sidumo* test (reasonability) and the long line of jurisprudence that followed *Sidumo*, the “formula” for determining reasonableness as set out in *Mofokeng* is useful to determine whether or not an arbitration award passes muster on reasonableness. The authors Myburgh and Bosch put it in the following terms:

‘....one is now required to identify what went wrong; whether the result would have been different but for this; and, if so, whether the objectively wrong decision is capable of reasonable justification.’¹²

- [31] In rudimentary terms, that is the scope of the enquiry by this Court on review.
- [32] The facts of this case are fairly straightforward and are, to a large extent, common cause. The controversy between the parties lies in whether or not Mr Mabesa pushed Mr Tredoux when he was exiting the meeting room, and if so, whether that action constituted an assault.
- [33] The Second Respondent was confronted with mutually destructive versions on this score. The witnesses for the Applicant testified that Mr Tredoux was grabbed and pushed by Mr Mabesa, whilst the witnesses for Mr Mabesa (including himself) proffered that the only contact between Mr Mabesa and Mr Tredoux was Mr Mabesa touching Mr Tredoux’s hand in order to open the door and leave the room, as Mr Tredoux was holding the door handle.
- [34] In amplification of the two versions, it was testified on behalf of the Applicant that the door of the meeting room was open, the door did not have a handle, and Mr Tredoux was standing next to the door and not blocking it. On behalf of the employee, it was testified that the door was closed, the door did have a handle, and Mr Tredoux had his hand on the door handle. That is, on the employee’s version, where and why the physical contact took place, i.e. for him to be able to leave the room, he had to make contact with Mr Tredoux’s hand on the door handle.

¹² A Myburgh, C Bosch, ‘Reviews in the Labour Courts’, LexisNexis at p 39.

- [35] The entire case turns on which of the two versions is the most probable. If it is the version of the Applicant, then it may very well be that the actions of the employee constituted an assault. Conversely, if the events transpired as advanced by and on behalf of the employee, then his actions did not constitute an assault.
- [36] With regard to the resolution of factual disputes, the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*¹³ (*Stellenbosch Farmers' Winery*) said the following:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an

¹³ [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5.

analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[37] In *First Garment Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*¹⁴ (*First Garment Rental*), the LAC (with reference to *Stellenbosch Farmers' Winery*) put it much more simplistically. The evidence tendered by the parties must be weighed, the probabilities thereof must be assessed, and if necessary, the credibility of the witnesses may be taken into account.

[38] The Second Respondent did not make any outright credibility finding. However, it is not required that such an outright finding be made in order to find that the evidence is improbable.¹⁵

[39] This is essentially what the Second Respondent did in his analysis of the evidence. He found the evidence of Mr Tredoux to be improbable. This was mainly due to the fact that Mr Nkomo gave evidence which contradicted the evidence of Mr Tredoux¹⁶ and corroborated the version of Mr Bhuda in that the door was closed, and the door had a handle.

[40] Having established that there was corroboration between Mr Nkomo and Mr Bhuda, even if they did not agree on whether or not Mr Tredoux was pushed, the version of the employee is far more probable than that of the employer. If the door was shut, it fits in neatly with the narrative of the employee in that he

¹⁴ [2015] ZALAC 38; [2015] 11 BLLR 1094 (LAC) at para 11 and footnote 2.

¹⁵ *Solidarity supra* at para 19.

¹⁶ This was specifically with regard to whether or not the door was open, whether the door had a handle, and where Mr Tredoux was situated. See in this regard paras 29 – 32 of the Award.

reached for the door handle to open the door, and that he did not assault Mr Tredoux.

- [41] A brief summary and analysis of the evidence is necessary in order to determine this issue.
- [42] The Second Respondent's manuscript minutes of the arbitration indicate that Mr Tredoux testified that Mr Mabesa "*physically pushed me out of the way*" and "*he grabbed me and pushed me out of the way*".
- [43] The reconstructed record reflects that the Second Respondent repeated this evidence during the reconstruction process.
- [44] The Applicant's representative took issue with the words "*out of the way*" and stated that according to his notes, Mr Tredoux testified that he was "*pushed*" and not "*pushed out of the way*".
- [45] The Second Respondent requested Mr Mabesa's representative to check his notes, ostensibly to resolve the impasse, and Mr Tsotetsi responded that "*Martin's evidence say [sic] that he was pushing [sic] out of the way because he was closer to the door*".
- [46] In the outcome report of the disciplinary hearing, Mr Masilela, who chaired the hearing, recorded that: "*...Amos Mabesa stormed out of the meeting swearing that he will not be part of the 12-hour shift roster and pushed the site manager, Martin Tredoux aside...*"
- [47] On the other hand, the version of Mr Mabesa and Mr Bhuda was that Mr Tredoux's hand was touched when Mr Mabesa reached for the door handle, which was being held by Mr Tredoux.
- [48] If all of these versions, together with the words used by Mr Masilela in the outcome report are considered, the evidence suggests that when Mr Mabesa attempted to leave the meeting room, Mr Tredoux was in the way. That is why the words "*pushed aside*" or "*out of the way*" were used. Furthermore, during the reconstruction proceedings, it was the recollection of both Mr Tsotetsi and the Second Respondent that the words "*out of the way*" were used by Mr

Tredoux during his evidence. This accords with what is recorded in the award, and it is further consistent with the words used by the Applicant's own witness, Mr Masilela, when he chaired the disciplinary hearing.

- [49] On the probabilities, the version captured by the Second Respondent as aforesaid appears to be correct. In my view, there was no misdirection by the Second Respondent in this regard.
- [50] The Second Respondent would furthermore have been best placed to assess the demeanour of the witnesses at arbitration, and he gave brief reasons why he preferred the version of Mr Mabesa and his witness, Mr Bhuda. The Second Respondent found the evidence of Mr Tredoux improbable. There is nothing in the record or in the award itself which suggests that the Second Respondent erred in this regard. His conclusions in this regard are neither far-fetched nor unreasonable.
- [51] It does not appear to me that there was any material misdirection by the Second Respondent in favouring the version of the employee. In *First Garment Rental*, the LAC said the following:

‘From a reading of the arbitrator’s award, it is clear that the arbitrator was alive to the fact that in dealing with mutually destructive versions, he had to determine the probabilities of the parties’ versions... Consequently, after weighing all the evidence before him, the arbitrator concluded that the fourth and fifth respondents’ version was more probable than that of the appellant. The fact that the award was not as detailed as the appellant would have liked does not imply that the arbitrator did not apply his mind to the facts before him and that he did not take into account the credibility of the witnesses. I am of the view that the arbitrator correctly found that the probabilities favoured the version of Mlangeni and Morare and that the appellant’s complaint in this regard has no basis.’¹⁷

¹⁷ *Ibid* at para 14

- [52] The nature of the contradictions between the respective versions of the parties are of such nature, that only one version could, reasonably assessed, be true. The Second Respondent accepted the version of the employee, and in doing so, he acted reasonably and justifiably.
- [53] The Second Respondent was alive to the fact that he was required to determine the fairness of Mr Mabesa's dismissal by taking into account the totality of the circumstances including the reasons why the Applicant imposed the sanction of dismissal. He also indicated that he was aware that he also had to consider the employee's basis for challenging his dismissal, the harm caused by the employee's alleged conduct, the effect of dismissal on the employee and his service record as well as consistent application of the sanction.¹⁸
- [54] The corollary is that if the employee is not guilty of the misconduct he was charged with, then dismissal cannot be justified as a fair sanction.

The reconstruction process

- [55] Insofar as the Applicant takes issue with the reconstruction process undertaken by the Second Respondent, any defect in those proceedings could have been addressed in accordance with Section 158(1)(g) of the LRA. That being said, this Court is not requested to set aside the reconstruction process. Even if it was, a reading of the record does not paint a picture of an overbearing and biased arbitrator determined to undermine the Applicant's representative, as advanced by the Applicant's representative before this Court.
- [56] In the final analysis, this Court is required to determine whether or not the award should be reviewed and set aside, and either remitted to the First Respondent for a hearing *de novo* before a commissioner other than the Second Respondent or that the award be substituted with a "*result in favour of*" the Applicant.

¹⁸ Paragraph 26 of the award

[57] This Court is bound by the manner in which a party elects to formulate the relief sought. *In Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation & Arbitration and Others*¹⁹ the LAC said the following:

‘It is trite that the notice of motion or application and the founding affidavit in application proceedings constitute both the pleading and the evidence. They serve to define the issues which are to be adjudicated upon by the court. An applicant is to not only state the relief sought, but to make out a case for such relief. In this instance, Mr Rantsieng specifically did not ask for reinstatement in those founding documents, and thus did not raise it as an issue that was to be adjudicated upon by the court. A pleading is intended to enable the other party to fairly and reasonably know the case it is called upon to meet.’

[58] In my view, the reconstructed record together with the documentary record and the award itself provides sufficient detail to enable this Court to make a determination. The matter is neither so complex nor nuanced that reasonable and correct deductions cannot be made from the available record. Despite much lament by the Applicant regarding the reconstruction process, this Court is not called upon to set aside the reconstruction proceedings, no order in this regard can be made.

[59] Finally, it is unfortunately necessary to make a remark about the state of the court file. The transcript of the reconstructed record filed contained manuscript notes as well as highlighted words and/or paragraphs. This is entirely improper. I raised this issue with the Applicant’s representative at the hearing of the matter, and he did not have a cogent explanation for this. A clean copy of the transcript was also not available at the hearing. It is incumbent upon parties to ensure that the documents in the Court file are in a proper state, and it certainly should not be marked up in any way.

[60] Insofar as the record is concerned, pages 23 – 25 thereof, which document purports to be the minutes of the disciplinary hearing is entirely illegible, and it

¹⁹ [2022] ZALAC 7; (2022) 43 ILJ 1642 (LAC) at para 25.

is consequently of no assistance to the Court. Parties should take the necessary care when preparing the Court files.

Conclusion

[61] The Applicant has not demonstrated sufficient grounds for this Court to interfere with the award.

[62] The award falls within a band of reasonableness, the outcome is reasonable, and it does not constitute a decision that no reasonable decision-maker could reach. The application for review thus stands to be dismissed.

[63] This review application is nearly seven years in the making. It is unfortunate that labour disputes take this long to be resolved and it was certainly not the legislator's intention to have any labour dispute pending for such an inordinate amount of time. The Applicant is not fully to blame for the delay, as the reconstruction of the record took some time. However, had the prescripts of the Practice Manual been followed by the Applicant once it became apparent that the audio record was lost, this matter could have been remitted for arbitration *de novo*, which would probably have been set down for a new hearing long prior to the hearing being set down in this Court. The Practice Manual has been in existence for approximately 11 years, yet parties still pay it no mind.

[64] In *Matsha and others v Public Health and Social Development Sectoral Bargaining Council and others*, Snyman AJ said the following regarding the Practice Manual:

'The Practice Manual is not just some sort of guideline which litigating parties may or may not comply with at their leisure, but has binding force, just like the Labour Court Rules.'²⁰

[65] Compliance with the Practice Manual is not optional, and this Court has on many occasions expressed the need for parties to adhere to its prescripts.²¹

²⁰ [2019] ZALCJHB 128; (2019) 40 ILJ 2565 (LC) at para 22.

There is good reason for this. The Practice Manual is a set of additional rubrics of practice and procedure in this Court, in amplification of the Rules, and it instructs practitioners on how litigation in this Court ought to be undertaken in order to ensure that the Court functions efficiently, and that the purpose of the LRA is advanced, being the expeditious resolution of labour disputes.

- [66] Of import *in casu*, is the fact that there is a specific mechanism included in the Practice Manual to deal with lost records. One simply has to approach the Judge President and seek a directive regarding the missing record. The Judge President is empowered to remit the matter back to the CCMA for a hearing *de novo*. Had the Applicant followed the prescripts of paragraph 11.2.4 of the Practice Manual, the matter could have been dispensed with expeditiously and not only seven years down the road.
- [67] Any prejudice suffered by the parties due to the protracted time that this matter took to reach finality could have been avoided, had the Practice Manual been complied with.
- [68] Inasmuch as the Applicant prayed for a cost order against, not only the Third Respondent, but also the Second Respondent, there is no good reason to depart from the *Zungu*²² principles, and no cost order in the current matter is justified.
- [69] In the premises, I make the following order:

Order

1. The review application is dismissed;
2. There is no order as to costs.

²¹ *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11.

²² *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) at paras 23 – 26.

L Steenkamp

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Instructed by:

Mr D Berry

Guardian Employers Organisation

For the Respondent:

Instructed by:

Advocate A L Cook

LOA Incorporated

LABOUR COURT