THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 791/2021

In the matter between:

NKOSINATHI FREEDOM MAYISELA **Applicant**

and

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

COMFORT MOKABANE *N.O.* **Second Respondent**

GLENCORE OPERATIONS SOUTH
AFRICA (PTY) LTD – GOEDGEVONDEN COMPLEX **Third Respondent**

Heard: **20 March 2024**

Delivered: **27 March 2024**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 27 March 2024.

JUDGMENT

PRINSLOO, J

<u>Introduction</u>

[1] The Applicant seeks to review and set aside an arbitration award dated 25 April 2021 and issued under case number MPEM3278-20 wherein the Second

Respondent (arbitrator) found that the Applicant's dismissal was fair and his case was dismissed.

[2] The Third Respondent (Respondent) opposed the application for review.

The evidence adduced

[3] The Applicant was employed by the Respondent in November 2014 as an engineering foreman. The Applicant was issued with a notice to attend a disciplinary hearing and the charge levelled against him was "*Failure to keep up set work standards of KPI, file does not meet required standards and no submission".* A disciplinary hearing was held in May 2020 and after the chairperson of the disciplinary hearing found the Applicant guilty of misconduct, he was dismissed on 26 May 2020. Aggrieved by the outcome, the Applicant referred an unfair dismissal dispute to the First Respondent (CCMA).

[4] An arbitration award was issued on 25 April 2021 and the arbitrator found that the Applicant's dismissal was fair and his case was dismissed. The said award is the subject of this review application.

[5] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings, as well as the charge that the Applicant was found guilty of and dismissed for.

The Respondent's case

[6] The Respondent's first witness, Mr Legodi, testified that he is employed by the Respondent as an engineering superintendent and he supervised the Applicant, who was employed as an engineering foreman. Mr Legodi's duties include supporting the Applicant and providing guidance to him in ensuring that he executed his duties efficiently. Mr Legodi testified that the Applicant held a legal appointment in terms of

the Mine Health and Safety Act[1] which required him to *inter alia,* ensure that his direct reports (artisans) are safe; that a safe working environment is provided and that the equipment under his responsibility are maintained and repaired and are safe for use; he must conduct a planned inspection and a plant task observation (PTO); and he must keep a logbook up to date. All these form part of the Applicant's key performance indicators (KPI).

[7] Mr Legodi explained that there is a KPI file, which is a very important file, which contains the PTO and indicates whether an employee is doing his or her duties in accordance with the applicable processes and standards and it indicates whether regular inspection is conducted in respect of specific areas and equipment to detect sub-standard conditions for immediate action. It also records safety interactions to establish whether safe practices are followed, hazards are understood and appropriate control measures are in place.

[8] Mr Legodi explained that if the supervisors do not adhere to their functions in terms of the KPIs, it constitutes serious misconduct and a breach in that machine operators are exposed to high risk, taking into consideration that the environment they work in is a mining area which is a very high-risk area.

[9] The KPI files must be completed and submitted to Mr Legodi on a monthly basis. Mr Legodi issued an instruction to the supervisors, including the Applicant, on 26 May 2017 and 28 August 2019 that the KPI files, containing specific documents, must be submitted to him on the 25th of every month.

[10] Mr Legodi testified that the Applicant was issued with two previous warnings regarding the KPI files on 16 April 2019 and 23 September 2019. The Applicant was charged with misconduct in February 2020 and Mr Legodi explained that his conduct was regarded as very serious misconduct in that it involved safety issues. He tried to coach and counsel the Applicant.

[1] Act 29 of 1996.

[11] The Applicant did not submit his KPI file for December 2019. Mr Legodi conceded that the 25th was Christmas day, but the Applicant went on leave only on 3 January 2020 and he should have submitted his KPI file between 25 December 2019 and 3 January 2020 when he went on leave. He testified that the Applicant had enough time to submit the KPI files and the documentation and data in the file, were to be captured from 1 December 2019, throughout the whole of December 2019.

[12] The KPI file was eventually submitted to Mr Legodi on 6 January 2020, by Mr Coetzee, who was acting in the Applicant's position whilst he was on leave. The KPI file so submitted was "*no way near*" the required standard of a KPI file.

[13] In cross-examination, Mr Legodi explained that Mr Coetzee was only acting in the position from 6 January 2020, the Applicant was responsible for the entire December 2019 period and he was at work until 3 January 2020. The Applicant had to ensure that all his safety data was in the KPI file for December 2019 and that it was submitted before he went on leave. The Applicant should have satisfied himself that his KPI file for December 2019 met the standards when someone was acting in his position.

[14] Mr Legodi testified that he had taken time on numerous occasions to provide guidance and coaching to the Applicant to make him aware of how serious his misconduct was, he was issued with two final written warnings, which showed leniency on the part of the Respondent but despite his efforts, there was no improvement from the Applicant's side. He went on leave without submitting a very important document and notwithstanding the seriousness of safety issues, the Applicant never came on board and the trust relationship was damaged as a result of his conduct.

[15] It is evident from Mr Legodi's cross-examination that Mr Serogole for the Applicant took an overly technical approach and lost sight of the important aspects of the case by *inter alia* taking issue with irrelevant or inconsequential issues or aspects. He further put very lengthy statements to Mr Legodi, which he was not afforded an opportunity to respond to or which simply contained no relevant question.

[16] Mr Serogole spent time on the question of whether the charge levelled against the Applicant related to 'misconduct' or 'poor work performance'. Mr Legodi made it clear that the charge was pure misconduct – "*this is not a performance it's a misconduct". Mr Serogole persisted with this line of questioning to a point where Mr Legodi stated that Mr Serogole "*keep on emphasizing the issue around performance [inaudible] put in a document that address (sic) a poor performance but I was not dealing with a poor performance issue. I was dealing with a serious misconduct"*.

[17] Mr Serogole adopted a ridiculous line of questioning when he questioned Mr Legodi on the question of whether he had received the KPI file for December 2019. Mr Legodi conceded that he had received the file from Mr Coetzee, after he started acting in the Applicant's position in January 2020. Mr Serogole's approach was that the charge levelled against the Applicant was misleading as it related to 'no submission', when in fact Mr Legodi received the file from Mr Coetzee, who was authorised to act in the Applicant's position. His proposition was that "*what is important here is that it's not who submitted the file whoever if you want to go that way, it's that [you] did not receive the file. You received the file".* Mr Legodi insisted that the Applicant had not submitted the file to him and he explained that he had not received the file from the Applicant, but it was put together by someone who was acting in the position. Mr Serogole's reaction to Mr Legodi's aforesaid explanation was "*what's wrong with that Mr Legodi?"*

[18] Mr Legodi insisted that it was wrong and constituted serious misconduct in that the Applicant was supposed to put the information and data for the KPI file together from 1 December 2019 and by the time he went on leave in January 2020, he had to submit it. By trying to get information about December 2019 in January to put together a file in January 2020, he was putting the employer and various employees at risk by compromising their safety. Mr Legodi emphasized that from 1 to 25 December 2019 the KPI file had to contain the required information, more so where they operate in a high-risk area and he expected accountability from the Applicant and to submit the file with the information before he went on leave. Systems are put in place to ensure the safety of employees and in this instance, the Applicant failed those systems, putting the employer and employees at risk.

[19] The Applicant's version put in cross-examination was that he had compiled the December 2019 KPI file and gave it to Mr Coetzee to hand it over to Mr Legodi. Mr Legodi disputed this version. He insisted that the KPI file for December 2019, which was submitted in January 2020, was compiled by Mr Coetzee. The Applicant did not compile the said KPI file, nor did he prepare a file to be handed to Mr Legodi. Such a version was also not presented during the Applicant's internal disciplinary hearing.

[20] The Respondent's second witness was Ms Tladi, the Respondent's human resources officer. She confirmed that the Applicant was issued with a written warning on 9 May 2019 and a final written warning on 23 September 2019. She also confirmed that the Applicant's failure to submit the KPI file was misconduct and not poor work performance.

[21] It is trite that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains *dominus litis* in deciding whether an employee is to be charged for misconduct and if so, what the nature of the charges would be.

[22] In the event that an employee is dismissed for reasons related to misconduct, the employer is bound by the election it has made, as was confirmed in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*[2] where the Labour Appeal Court (LAC) held that:

> 'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.'

[2] [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 32.

[23] As a generally applicable principle, this Court is guided by the *dicta* in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and others*[3] where the LAC held that facts must be proven:

> 'The onus is thus on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings, then *cadit quaestio*, the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement.'

[24] *In casu,* the Respondent made it clear that the Applicant was dismissed for misconduct and it is unfortunate that the transcribed record reflects that the Applicant's representative spent much time attempting to create confusion as to whether he was indeed dismissed for misconduct instead of poor performance.

The Applicant's case

[25] The Applicant testified that the submission of the KPI file was part of his job description. On 23 December 2019, he submitted the December 2019 KPI file and the handover file to Mr Coetzee, who was appointed to act in his position in January 2020. The KPI file was in a good condition when he handed it over to Mr Coetzee.

[26] In cross-examination, the Applicant agreed that he was employed in a responsible position of trust. He agreed that the KPI file was an important part of his functions and that the said file is very important in the workplace. The Applicant conceded that he knew how to compile the KPI file and he knew what was required to be in the file, which included a number of sections, which are important for the maintenance of *inter alia* the safety of the workplace. If an incident were to happen in the workplace, the KPI file would be relevant and would be checked. If the file is not

[3] [2000] ZALAC 10; (2000) 21 ILJ 1051 (LAC) at para 50.

correctly completed and not up to date, the company could be at risk, should there be an incident in the workplace.

[27] The Applicant further conceded that he was given instructions to compile the KPI file and to submit it by the 25th of each month. He also conceded that he had received a written and a final written warning for issues similar to what he was dismissed for and that both were still valid at the time he was dismissed.

[28] The Applicant agreed that he did not submit the KPI file to Mr Legodi on 24 December 2019, because the mine was closed on that day, but he gave it to the person who was appointed to act in his position on 23 December 2019. He conceded that he signed the instruction that was given that the KPI file had to be submitted to Mr Legodi before the 25th of every month and he agreed that it was a clear instruction. He conceded that he did not give the KPI to Mr Legodi and that to submit a KPI file which is improperly completed would be unacceptable.

<u>Analysis of the arbitrator's findings and the grounds for review</u>

The test on review

[29] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[4] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[30] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[5] affirmed the test to be applied in review proceedings and held that:

[4] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[5] [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) (Gold Fields) at para 16.

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[31] The applicant in a review application is not to take a microscopic view and dissect every finding of the arbitrator, but has to show that holistically, the award is unreasonable or that the arbitrator’s findings led to an unreasonable outcome.

[32] In considering the Applicant’s grounds for review, this Court should not lose sight of the limited scope within which a review application is to be decided.

[33] In *Head of the Department of Education v Mofokeng and others*[6] *(Mofokeng),* the LAC provided the following exposition of the review test:

> ‘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

[6] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at para 33.

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.'

[34] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.[7]

[35] It is within the context of this test that I must decide this application for review.

The arbitrator's findings

[36] The arbitrator had to determine whether the Applicant's dismissal was fair. In deciding the issue, the arbitrator referred to the Code of Good Practice[8] and the issues to be decided in determining whether a dismissal for misconduct is fair.

[37] The arbitrator ultimately found that the Applicant's dismissal was procedurally and substantively fair. He found that the procedure that preceded the Applicant's dismissal was not flawed.

[38] The arbitrator found that the Applicant failed to submit the KPI file for December 2019. This was in breach of the instructions issued by Mr Legodi on 26 May 2017 and 29 August 2019. He further found that the Applicant had ample time to submit the KPI file to Mr Legodi, as his last working day was 3 January 2020, prior to going on leave. Mr Coetzee submitted the file on 8 January 2020. The arbitrator recorded that this evidence was not challenged by the Applicant.

[7] Gold Fields supra at paras 18 and 19.
[8] Schedule 8 of the Labour Relations Act 66 of 1995, as amended.

[39] The arbitrator further considered the fact that the Applicant had a written and final written warning, which were still valid at the time of his transgression for similar misconduct, therefore the Applicant's dismissal was fair.

The grounds for review

[40] Considering the applicable authorities and the test on review, there are obvious difficulties with the Applicant's case, which I will highlight before dealing with the merits of his application.

[41] As a general principle, the applicant in a review application must make out his or her case in the founding affidavit, as may be supplemented by a supplementary affidavit, if necessary, after the transcribed record becomes available. Rule 7A(2)(c) of the Rules[9] provides that the notice of motion must be supported by an affidavit, setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

[42] As to the requirement of setting out the legal grounds upon which the applicant relies in the founding affidavit, this requires the applicant to set out, with sufficient precision and detail, the grounds for review and the bases on which such grounds are relied upon. Vague and unsubstantiated or generic statements are not sufficient.

[43] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and others (Tao Ying)*[10] where it was held that:

> '…the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court

[9] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.
[10] [2008] ZACC 15; (2008) 29 ILJ 2461 (CC) at para 66.

to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

[44] A party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification namely that the Court is obliged to deal with a point of law apparent from the papers.[11]

[45] In the Applicant's founding affidavit, his grounds for review are vague and unsubstantiated. They are no more than broad statements that the arbitrator failed to consider the Applicant's material evidence or failed to consider all the evidence or to apply his mind to the material evidence and "*thus committing a gross irregularity in relation to his duties as an arbitrator, alternatively, committed a gross irregularity in respect of the arbitration proceedings [and] came to a finding which a reasonable decision maker could not reach under the circumstances".*

[46] The Applicant's case is also that the arbitrator failed to identify the dispute he was required to arbitrate, or he misconceived the nature of the dispute he was required to arbitrate. This ground for review is also vague and unsubstantiated. The Applicant filed a supplementary affidavit wherein the aforesaid ground for review was repeated but remained unsubstantiated. It is not for this Court to guess in what respect the arbitrator misconceived the enquiry, it is for the Applicant to tell the Court, which he dismally failed to do.

[47] In his supplementary affidavit, the Applicant made specific averments as to what evidence the arbitrator ignored or failed to consider and in the main, it relates to the Applicant's version that he submitted the KPI file on 23 December 2019 and that it was indeed received by Mr Legodi. The Applicant's version in argument is that he compiled the KPI file and that Mr Coetzee, who was lawfully appointed to act on

[11] Ibid at para 67.

behalf of the Applicant when he took leave in January 2020, was instructed to hand over the report to Mr Legodi. The argument is that there is no merit in the charge that the KPI file was not submitted or received and that the arbitrator ignored the Applicant's evidence in this regard.

[48] It has to be emphasized that the review test to be applied *in casu* is a stringent and conservative test of reasonableness. The question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. The reasons in the arbitration award must state the arbitrator's material findings of fact and the decision must be made on the basis of the evidence adduced.

[49] The Applicant must show that the arbitrator arrived at an unreasonable result. In fact, the Applicant must show that the decision is one that a reasonable decision maker could not make, based on the evidence presented. The test is not whether the arbitrator came to the best decision or a decision acceptable to the Applicant. A review is not an appeal.

[50] In my view, there is no merit in the Applicant's grounds for review. In cross-examination, the Applicant conceded that he was given instructions to compile the KPI file and to submit it by the 25th of each month. He also conceded that he had received a written and a final written warning for issues similar to what he was dismissed for and that both were still valid at the time he was dismissed.

[51] He further conceded that he did not give the December 2019 KPI file to Mr Legodi and that to submit a KPI file which is improperly completed would be unacceptable. He agreed that he did not submit the KPI file to Mr Legodi on 24 December 2019, because the mine was closed on that day, but he gave it to the person who was appointed to act in his position on 23 December 2019.

[52] The Applicant's version that he had compiled the December 2019 KPI file and gave it to Mr Coetzee to hand it over to Mr Legodi was disputed by Mr Legodi, who insisted that the KPI file for December 2019, which was submitted in January 2020, was compiled by Mr Coetzee.

[53] It was common cause that Mr Coetzee was only acting in the Applicant's position from 6 January 2020, that the Applicant was responsible for the entire December 2019 period and that he was at work until 3 January 2020.

[54] The arbitrator's finding that the Applicant failed to submit the KPI file for December 2019 in breach of the instruction issued by Mr Legodi, is supported by the evidence adduced. In fact, the Applicant conceded that he signed the instruction that was given that the KPI file had to be submitted to Mr Legodi before the 25th of every month and he agreed that it was a clear instruction. He conceded that he did not give the KPI to Mr Legodi.

[55] The Applicant's version that he submitted that KPI file to Mr Coetzee on 23 December 2019 is improbable and the fact that the arbitrator did not accept the said version, is not unreasonable. The version is in fact wholly improbable when the evidence is considered holistically. The undisputed evidence was that the instruction was that the KPI file had to be submitted to Mr Legodi. The Applicant and Mr Legodi were at work at the time and the Applicant only went on leave on 3 January 2020. There was no reason for the Applicant to give the KPI file to Mr Coetzee on 23 December 2019, when he was still at work until 3 January 2020, Mr Coetzee only started to act in his position from 6 January 2020 and the evidence indicated that the Applicant had ample opportunity to submit the KPI file to Mr Legodi, as he was instructed to do. The Applicant did not call Mr Coetzee to support his version and there was no evidence other than the Applicant's to show that he indeed gave the file to Mr Coetzee on 23 December 2019, which version was disputed by the Respondent. Even if that was so, it still would not have complied with the instruction to submit the KPI file to Mr Legodi.

[56] In *Mofokeng,* the LAC confirmed that an irregularity or error must be material and must be assessed 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. The error or irregularity must thus be material to the determination of the dispute.

[57] The question that this Court must ask on review is whether the way the arbitrator dealt with the evidence constituted an irregularity or error which was material, whether it impacted on the determination of the question of whether the Applicant's dismissal was fair and whether it distorted the arbitrator's ultimate decision. The Applicant failed to state how those impacted the determination of the fairness of his dismissal and he made no averment to the effect that it distorted the ultimate outcome. It is evident that the Applicant, in formulating his grounds for review, had lost sight of the stringent test to be applied on review.

<u>Conclusion</u>

[58] In *Quest Flexible Staffing Solutions (Pty) Ltd (A division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate,*[12] the LAC confirmed the test to be applied on review:

'[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.'

[59] In *Bestel v Astral Operations Ltd and others,*[13] the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an

[12] [2014] ZALAC 55; (2015) 36 ILJ 968 (LAC) at paras 12 and 13.

arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

'…the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[60] Let it be clear: this is an application for review and not an appeal. This is a difference that this Court must maintain. An award will only be set aside on review if both the findings and the result are unreasonable. Even where the arbitrator's findings or reasoning may be unreasonable, the result could nevertheless be capable of justification, and therefore be reasonable and not be interfered with on review.

[61] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether, holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. Considering the evidence before the arbitrator holistically, the arbitrator's findings are not disconnected from the evidence, but in fact, it is based on the evidence presented. The arbitrator's findings fall within a band of reasonableness based on the evidence that was placed before him. The arbitrator did not misconceive the enquiry but indeed determined the principal issue he was required to determine.

[13] [2010] ZALAC 19; [2011] 2 BLLR 129 (LAC) at para 18.

[62] In my view, the arbitrator's findings fall within a band of reasonableness based on the evidence that was placed before him and there is no basis for this Court to interfere with it on review.

Costs

[63] The last issue to be decided is the issue of costs.

[64] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the Labour Relations Act[14] (LRA) to make orders for costs according to the requirements of the law and fairness.

[65] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[66] In *Zungu v Premier of the Province of KwaZulu-Natal and Others,*[15] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[67] This is a matter where this Court has to strike a balance.

[68] Mr Woodhouse for the Respondent submitted that a cost order should be made in favour of the Respondent. He submitted that the review application had no merit and that the Applicant's case was undermined by the common case facts. The Applicant should have withdrawn the application, once he received the transcribed record and the Respondent's opposing papers, yet he persisted with this meritless

[14] Act 66 of 1995, as amended.
[15] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

application. There is no ongoing relationship between the parties and the Respondent had to incur unnecessary costs in defending the review application.

[69] Mr Serogole submitted that the application has merit and that the Applicant is unemployed.

[70] In my view, this is a case where a cost order is warranted. This is more so as the Applicant was legally represented and did not approach this Court as an unrepresented layperson. When the record became available it should have been evident to the Applicant's legal representatives that the grounds for review were not supported by the transcribed record and were not sustainable, yet this application was persisted with.

[71] *In casu,* it is evident that the Applicant persisted with a review application without any reflection as to the content of the transcript, the provisions of the LRA, the applicable authorities and the possible prospects of success.

[72] Although this is a case where a cost order would be justified, more so where the Applicant instructed lawyers to act on his behalf and where a meritless application was persisted with, I am mindful of the fact that the Applicant is unemployed and even if a cost order is granted, he would in all probability not be able to pay the Respondent's costs. Having said that, it should not be understood to mean that being unemployed is a license to pursue meritless applications without any consequences. More so when lawyers are instructed to act.

[73] In the premises, I make the following order:

<u>Order</u>

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

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate P F Serogale

Instructed by: Mashifane Moswane Attorneys

For the Third Respondent: Mr D Woodhouse from Pinsent Masons Inc. Attorneys