

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Not reportable

Case no: JR 923 /2013

In the matter between:

DANIELSKUIL STEENWERKE

Applicant

and

DAVID BOBBEJAAN N.O

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

VINCENT MOSALAESI

Third Respondent

Heard: 27 January 2016

Delivered: 22 February 2016

Summary: Review application. Arbitrator failed to consider factors he was required to and ignored relevant and material evidence. Award is reviewed and set aside.

JUDGMENT

PRINSLOO J.

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 6 May 2013 wherein the First Respondent (the arbitrator) found the Applicant's dismissal procedurally and substantively unfair and ordered the Applicant to re-instate the Third Respondent (the employee) retrospectively.
- [2] The Third Respondent opposed the application.
- [3] The employee also filed an application in terms of the provisions of section 158(1)(c) of the the Labour Relations Act¹ (the Act) for the arbitration award issued on 6 May 2013 to be made an order of Court.
- [4] I will first deal with the application for review. If the application for review succeeds, there will be no need to consider the section 158(1)(c) application.

Background facts

- [5] The background facts are herewith summarised as follows:
- [6] In February 2008 the employee was employed as a plant operator. In November 2012 he was dismissed for reasons related to ill health after an incapacity inquiry was held.
- [7] The employee subsequently referred an unfair dismissal dispute to the Second Respondent (CCMA). The issue that was to be decided was whether the employee's dismissal for health reasons was substantively and procedurally unfair.
- [8] The employee did not dispute the fact that he was incapacitated, but disputed that the Applicant accommodated him as he was suffering from tuberculosis (TB) which is a curable disease. It was alleged that the Applicant has failed to explore the possibility of putting the employee on unpaid leave to allow him an opportunity to recover as he was not permanently disabled.

¹ Act 66 of 1995.

The arbitration proceedings:

- [9] Ms Barrington, the Applicant's human resources officer testified that the employee was dismissed because he was medically unfit for duty. The Applicant referred the employee for medical examination by certain doctors and he was declared unfit for duty. Ms Barrington testified to the employee's sick leave record and showed that the employee was sick from 8 – 13 January 2011, 14 – 19 January 2011, 31 January – 28 February 2011, 1 – 31 March 2011. During this period the employee submitted a letter to state that he was receiving treatment for TB, that his left lung was not well, it was uncertain what the response to the treatment would be and that he was not fit for duty. During 2012 the employee was also booked off on sick leave on a number of occasions, including 26 – 30 September 2012 and 1 – 15 October 2012 when it was indicated that he was on treatment for TB and could not work in a dusty area until the treatment was done as the condition of his lungs would deteriorate. The Applicant's testimony was that in 2012, the employee took 24 days sick leave and his sick leave was completely depleted.
- [10] The employee submitted a sick note stating that he could work but not in a dusty area. Ms Barrington testified that the Applicant's business is to collect rocks from the Danielskuil Mine and to put the rocks in a crusher where after it is sorted according to size. She explained that the entire workplace is full of dust due to the nature of the Applicant's operations and if the employee required a dust free area, the Applicant's workplace was not suitable as it is very dusty. Ms Barrington testified that it was impossible to find an alternative position for the employee as the entire workplace was dusty and he could not work in dust. The Applicant considered as alternatives the possibility to move the employee from outside to inside or to utilise him at the bag plant but all those alternatives were not feasible as there was dust everywhere.
- [11] Ms Barrington explained that the Applicant has different contracts in place and is required in terms of those contracts to deliver a certain amount of sand and stones per day. If the Applicant does not deliver according to the terms of the contracts, it could lose the contracts and that may result in retrenchment of employees. The employee's absence had a negative impact on production because the Applicant had to hire a replacement worker at an additional cost and production is slower as the replacement worker must first be trained.

- [12] After the employee was sent for medical examination and a report was received declaring him permanently unfit for duty, an incapacity inquiry was scheduled for 28 November 2012. The purpose of the inquiry was to ascertain whether the employee could still perform his duties. The employee did not bring any proof or evidence that he was indeed fit for duty and the Applicant's case is that he could not work as he was sick and the dust was not good for his lungs. Ms Barrington testified that at the incapacity inquiry the employee made no suggestions regarding alternatives on how he could be accommodated.
- [13] The Applicant also called Ms Coetzee to testify. She is a qualified occupational health nursing practitioner. She examined the employee and found him unfit to work in a dusty environment due to his lung functions.
- [14] Ms Coetzee described all the tests performed on the employee and that included a lung function test, an audiogram and a physical ability test. The physical ability test could not be performed due to the employee's poor physical condition. He could not breathe well enough to do the lung function test and he was given a bronchodilator but even with that, he experienced severe restrictions. The damage to the employee's lungs could not improve significantly and to an extent that he would be able to work in a dusty environment again.
- [15] Ms Coetzee testified about the medical report that was compiled in respect of the employee's ill health and fitness to perform normal duties for which he was employed. She testified that the employee was permanently unfit to perform the duties he was appointed for in a dusty workplace. Ms Coetzee explained that a medical doctor would consider the results of the tests that were done and the examination by the occupational health practitioners and the team of medical personnel and would examine the chest x-rays and lung function test and based on that the doctor will make a decision to declare the patient fit or unfit for duty.
- [16] Ms Coetzee conceded that only a qualified medical doctor could declare a person unfit for work and that she did not have the capacity to declare a person unfit for duty. Ms Coetzee signed the medical report and her explanation was that the medical doctor was away on the day the report was

required and that is why she signed it. She made it clear that she did not declare the employee unfit for work, she merely signed the report. The doctor declared the employee unfit for work did that and that was confirmed in the patient file where the doctor indeed signed and confirmed the employee unfit for duty.

- [17] Ms Coetzee testified that the employee could never again work in a dusty environment as he already has a decreased capacity to breathe and even a dust mask would not be enough to protect him because he was going to take the mask off to breath and that will have a huge effect on him.
- [18] The last witness for the Applicant was Mr Koegelenberg, who conducted the incapacity inquiry. He explained the process that was followed and testified that the Applicant was asked about alternative work or positions but indicated that there was none as the employee could not work in a dusty environment and the entire workplace has dust. The employee and his representative were also asked about alternatives but they provided none. They also did not provide any medical reports to rebut the Applicant's version on the employee's incapacity. Mr. Koegelenberg testified that he took a decision based on the evidence and the information that was made available to him during the incapacity inquiry.
- [19] The employee testified and the very first question he had to respond to was what transpired that led to his dismissal. The employee's response was *"It is because I was not always at work. I was most of the time, I'm sick."* The employee testified that the Applicant informed him that he could no longer work for the Applicant as he is sick and cannot work in a dusty environment.
- [20] The employee testified that Mr Koegelenberg never asked him for alternatives and if he were asked, he would have looked for a place that was not dusty and if there was no such alternative available, he would have asked the Applicant for unpaid leave until he was fully recovered and ready to work
- [21] In respect of the medical tests and examination, the employee confirmed that he was sent for tests at the medical centre and that they did all the tests and took x-rays, as per the medical report that he had seen. He confirmed that he

could not do push-ups and weights and that he was still receiving TB treatment. He was in the last month of his treatment.

[22] The employee conceded that at the time of the incapacity inquiry he was unable to work and he conceded that he did not tell Mr Koegelenberg that he was on treatment and would be ill for only six months. The employee also testified that in 2010 he was suffering from TB and he stayed at home and only came back to work after his treatment was completed. He was once again suffering from TB.

[23] A perusal of the transcribed record shows that although the fact that Ms Coetzee could not declare the employee unfit for duty was challenged, her testimony on the medical condition of the employee was never challenged. The testimony that the employee could not work in a dusty environment was not challenged and it was not disputed that the Applicant's workplace is dusty.

Analysis of the arbitrator's findings and grounds for review

[24] The arbitrator found the employee's dismissal substantively and procedurally unfair and ordered his reinstatement.

[25] The Applicant raised a number of grounds for review.

[26] Before dealing with the grounds for review, it is pertinent to consider the arbitrator's analysis and findings based on the evidence before him. The arbitrator correctly identified the question to be determined as whether the employee's dismissal for medical reasons was procedurally and substantively fair.

[27] The arbitrator further correctly referred to Item 11 of Schedule 8 of the Act and stated that he was required, in determining the fairness of a dismissal arising from ill health, to consider whether or not the employee is capable of performing the work and if not capable, the extent to which the employee is able to perform the work, the extent to which the employee's work circumstances or duties might be adapted and the availability of any suitable alternative work. It was in this context that the arbitrator had to determine the fairness or not of the employee's dismissal.

- [28] On substantive fairness the arbitrator made three main findings. Firstly, he found that the Applicant could not have used Ms Coetzee's report to dismiss the employee due to the fact that she was not qualified to compile such a report and thus the medical report used to dismiss the employee was irregular or flawed.
- [29] Secondly, Item 10 of Schedule 8 places a duty on the employer to make recommendations or find alternative duties for the employee and not the other way round. The arbitrator rejected the Applicant's argument that the employee failed to make recommendations as to where he could be placed alternatively until he recuperated because he held that such duty was on the employer and not the employee.
- [30] Thirdly the arbitrator dealt with the question whether the period of absence would be unreasonably long and warranted dismissal. The arbitrator held that the employee's illness was curable, he would have recovered within six months, which period of absence would not have been unreasonably long, more so since his job was not highly skilled and it would not have been difficult to temporarily replace the employee.
- [31] On procedural fairness, the arbitrator found the employee's dismissal procedurally defective in the absence of any proof that the Applicant followed a fair procedure provided for in a policy, when the medical report was used as the only source to dismiss the employee. The arbitrator further held that the Applicant failed to exhaust all options short of dismissal before it dismissed the employee.
- [32] The arbitrator found the employee's dismissal procedurally and substantively unfair as the Applicant failed to prove that the medical report used to dismiss the employee was legitimate, it failed to submit evidence showing that Ms Coetzee was allowed to make findings regarding permanent disability and even if there was such a policy, Ms Coetzee was not qualified to make such a finding.
- [33] The arbitrator finally ordered the retrospective reinstatement of the employee as he found that no evidence was presented that the circumstances surrounding the dismissal were such that a continued employment relationship

was intolerable or that the employee would not be totally cured after 6 months of treatment.

[34] It is these findings the Applicant seeks to review and set aside. The grounds for review are that:

1. The arbitrator committed a gross irregularity by failing to take all the evidence before him into consideration;
2. The arbitrator misconstrued the evidence by concluding that Ms Coetzee admitted that she was not qualified to make the findings in the medical report and that the report was not a legitimate one;
3. The arbitrator disregarded relevant evidence when he concluded that Ms Coetzee's report was the only evidence used to dismiss the employee. The arbitrator ignored the evidence that there was no alternative work available and the employee's duties could not be adapted due to his health problems, particularly with his lungs and the fact that the entire workplace was dusty, an environment where the employee could not work in.
4. The decision to reinstate the employee, despite the fact that his illness does not allow him to work in a dusty environment and the workplace is dusty, is not reasonable.

[35] In my view there are two main grounds for review. The first three grounds for review are all related to the manner in which the arbitrator dealt with the evidence that was before him, how he assessed the evidence and the findings he made based on that evidence. The second main ground for review is that the decision to reinstate was not reasonable.

The test on review

[36] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² as whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the

² (2007) 28 ILJ 2405 (CC) at para 110.

arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[37] In *Goldfields Mining South Africa v Moreki*³ the Labour Appeal Court held that:

“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.”

[38] Following the Supreme Court of Appeal judgment in *Herholdt*⁴ and the Labour Appeal Court's judgment in *Gold Fields*,⁵ the Labour Appeal Court handed down another important judgment in *Head of the Department of Education v Mofokeng*.⁶ In this judgment the Court 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 the nature of the enquiry so as to lead to no

³ (2014) 35 ILJ 943 (LAC).

⁴ [2013] 11 BLLR 1074 (SCA).

⁵ [2014] 1 BLLR 20 (LAC).

⁶ [2015] 1 BLLR 50 (LAC), paragraph 33.

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.”

[39] This *dictum* in *Mofokeng* was further interpreted and in *Shoprite Checkers v CCMA and others*⁷ this Court considered the guidance *Mofokeng* provides for determining when the failure by an arbitrator to consider facts will be reviewable. The Court accepted the following mode of analysis:

- a. the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;
- b. if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;
- c. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and
- d. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

[40] In summary: Where it is alleged in review proceedings that an arbitrator ignored certain material facts, the enquiry is whether indeed this was the case, and if so, whether these facts were material. If it is found that they were indeed ignored as alleged, and were material, it follows that the arbitrator would have come to a different conclusion had he taken them into account, and therefore the result arrived at would *prima facie* be unreasonable⁸.

[41] Essentially the Applicant's case is that the arbitrator failed to take all the evidence before him into consideration; he misconstrued the evidence and disregarded relevant evidence.

⁷ (2015) 36 ILJ 2908 (LC).

⁸ [2015] 1 BLLR 50 (LAC). See also *Shoprite Checkers v CCMA and others* (at paragraph [10] where it was held that; “The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable”

- [42] The complaints mainly relate to the medical report and the arbitrator's findings on that.
- [43] In this regard, the first issue to be decided is whether the arbitrator ignored relevant evidence.
- [44] The arbitrator found that Ms Coetzee was not qualified to compile the medical report and as a result the medical report was irregular and flawed. In finding this, the arbitrator misconstrued the evidence. Ms Coetzee testified that she is a qualified occupational health nursing practitioner. Ms Coetzee could not declare a patient unfit for duty, only a doctor could do that. Her testimony was that she did not declare the employee unfit for duty but a medical doctor did and she explained the circumstances that prevailed at the time she signed the report.
- [45] Ms Coetzee never conceded that she was not qualified to compile the report. This misconstruing of the evidence caused the arbitrator to consider a host of other relevant facts. After he found the medical report irregular, he ignored all the evidence adduced by Ms Coetzee, which was material for the issues he had to decide.
- [46] Ms Coetzee, as a qualified occupational health nursing practitioner, examined the employee and she did a lung function test but the employee could not breathe and even with the help of a bronchodilator he had severe restrictions. She testified that the damage to the employee's lungs was such that it could improve only a little bit but due to the condition of his lungs, he would be permanently unable to work in a dusty environment. Ms Coetzee stated that the employee's condition would deteriorate and his ability to breathe would decline further if he worked in a dusty environment, even a dust mask would not protect him. The condition of his lungs were determined by a number of tests, including a lung function test and chest x-rays.
- [47] The testimony in respect of the tests Ms Coetzee performed and the results of those tests was not disputed. Not once in his award did the arbitrator make mention of the undisputed evidence that was adduced to show that the employee had a serious lung condition and was unfit to work in a dusty environment.

- [48] Ms Barrington explained that the entire workplace is full of dust due to the nature of the Applicant's operations and if the employee required a dust free area, the Applicant's workplace was not suitable as it is very dusty and it was impossible to find an alternative position for the employee as the entire workplace was dusty. She explained that the Applicant considered as alternatives the possibility to move the employee from outside to inside or to utilise him at the bag plant but all those alternatives were not feasible as there was dust everywhere. This testimony was not disputed.
- [49] The employee's own testimony was that he was never at work as he was always sick, he confirmed that he was sent for tests at the medical centre and that they did all the tests and took x-rays, as per the medical report that he had seen. He confirmed that he could not do push-ups and weights and that he was still receiving TB treatment. The employee conceded that at the time of the incapacity inquiry he was unable to work and he conceded that he did not tell Mr Koegelenberg that he was on treatment and would be ill for only six months. The employee suffered from TB in 2010 and he stayed at home and only came back to work after his treatment was completed. He was once again suffering from TB.
- [50] This evidence as well as Ms Coetzee's undisputed evidence on the employee's lung condition was ignored when the arbitrator found that the employee would have been cured in six months.
- [51] It is evident from the transcribed record that material parts of the employee's evidence were not put to the Applicant's witnesses in cross-examination and they never had an opportunity to respond to that. The arbitrator could not have accepted a version that was not put to the Applicant's witnesses as an 'undisputed' version.
- [52] In considering procedural fairness, the arbitrator once again considered the fact that Ms Coetzee's report should not have been used. The arbitrator completely ignored the evidence adduced by the chairperson and the concessions made by the employee in respect of the procedure. He misdirected himself when he failed to consider relevant evidence that was adduced on the procedure and instead found that the Applicant should have recommended that the employee take leave without pay and directed him to

approach the Department of Social Development for a temporary disability grant. This lost sight of the fact that the employee conceded that he did not tell the chairperson that he was on medical treatment and would be ill for 6 months. To expect of the employer to grant leave without pay when nothing informed it of the period of such leave, is not reasonable.

- [53] It follows that the arbitrator ignored a host of relevant facts.
- [54] Having found that relevant facts were ignored by the arbitrator, the *Mofokeng* analysis should now be undertaken. To begin with the first enquiry, the relevant facts that were ignored by the arbitrator constitute material facts, because if they had been considered by the arbitrator, he would (on the probabilities) have come to a different conclusion. In the result, the award is *prima facie* unreasonable.
- [55] Turning to the second enquiry, the question is whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness. To my mind, no such basis exists in this case, with the result that the award is unreasonable and there is merit in the first three grounds for review as raised by the Applicant.
- [56] The arbitrator, in determining the fairness of the employee's dismissal, had to consider whether or not the employee was capable of performing the work and if not capable, the extent to which the employee is able to perform the work, the extent to which the employee's work circumstances or duties might be adapted and the availability of any suitable alternative work. Glaringly absent from the arbitration award is a consideration of these factors. What is astonishing is that the arbitrator was able to identify the factors he had to consider, but then dismally failed to consider it in view of the evidence that was placed before him.
- [57] In respect of procedural fairness, it is not for the arbitrator to prescribe to the employer what should have been done but rather to assess the process that was followed and to decide if it was fair. The arbitrator dismally failed to do so.
- [58] The last ground for review relates to the relief of reinstating the employee.
- [59] In my view there is merit in this ground for review.

- [60] The arbitrator failed to consider material facts, because if they had been considered by the arbitrator, he would have come to a different conclusion. For instance, the undisputed evidence that the employee could not work in a dusty environment as his lung condition would further deteriorate and even a dust mask would not protect him, should have been considered in deciding whether reinstatement would be appropriate. The undisputed evidence was that the Applicant has no alternative position that would be 'dust free' as there is dust everywhere due to the nature of the Applicant's operations.
- [61] In finding that the employee should be retrospectively reinstated because no evidence was presented that the circumstances surrounding the dismissal were such that a continued employment relationship was intolerable or that it was not reasonably practicable to reinstate the employee, the arbitrator ignored material evidence and misdirected himself. Had he considered the evidence properly, he could not have ordered the reinstatement of the employee.
- [62] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable.
- [63] Viewed cumulatively, and in line with *Mofokeng*, the arbitrator's failure to apply his mind to issues, which as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry. The arbitrator failed to address the issue he had to determine, as alluded to *supra*. It cannot therefore be said that the arbitrator's decision was one that a reasonable arbitrator could have reached on the full conspectus of all the facts before him.
- [64] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review. It follows that the application in terms of section 158(1)(c) of the Act to make the arbitration award an order of Court fails.
- [65] This is a case where the interests of justice and fairness would be best served by no cost order.

Order

[66] In the premises I make the following order:

66.1 The arbitration award issued on 25 March 2013 under case number NC3007-12 is reviewed and set aside;

66.2 The arbitration award is substituted with an order that the Third Respondent's dismissal was fair;

66.3 The application in terms of section 158(1)(c) of the Act to make the arbitration award an order of Court is dismissed;

66.4 There is no order as to costs.

C. Prinsloo

Judge of the Labour Court

Appearances:

Applicant: Advocate S Roelofs

Instructed by: De Villiers Du Plessis Attorneys

Third Respondent: Mr N. Cloete of Neville Cloete Attorneys