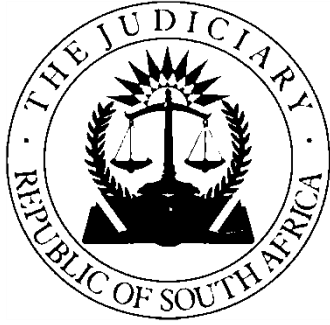




**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case no: JR 772/15

OSESILE VINCENT MOOKI

Applicant

and

CCMA

First Respondent

COMMISSIONER LAZARUS MATLALA

Second Respondent

ROYAL BAFOKENG ADMINISTRATION

Third Respondent

Heard on: 1 February 2017

Delivered: 3 February 2017

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the respondent (the commissioner). In his award, the commissioner found that the applicant had been fairly dismissed by the third respondent.

- [2] The applicant was employed by the third respondent during March 2013 as a publications officer. He was dismissed in September 2009, after having been found guilty of four of seven charges of misconduct levelled against him. I do not intend to burden this judgment with a repetition of the conduct of the applicant, or the precise nature of the charges on which he was found guilty. These are fully canvassed in the commissioner's award and it is sufficient to state for present purposes that the applicant was dismissed for his failure to carry out instructions given to him in relation to his duties as a publications officer in respect of two publications produced by the third respondent or under its auspices, as well as charges of disclosing organisational and/or confidential information to third parties in circumstances where the applicant had no right to disclose that information in the third party no right to receive it. As appears from the commissioner's summary of the evidence, the applicant's primary defences were not so much as to deny the conduct that formed the subject of the charges, but to put up explanations and reasons that he considered should exculpate him.
- [3] Given the nature of the grounds for review, to which I refer in some detail below, the present application turns largely on the commissioner's assessment of the evidence and whether sufficient evidence served before him to sustain the conclusions to which he came, given the applicable legal principles. These also discussed in some detail below.

The grounds for review

- [4] The grounds for review are broadly stated. In essence, the applicant's complaint is directed at the commissioner's assessment of the evidence before him, and his failure to have regard to particular evidence, is misconstruing the evidence of certain witnesses and a misdirection in the form of the nature of the enquiry. In regard to the letter, the applicant had previously succeeded at an arbitration hearing and been awarded compensation. That award was reviewed and set aside on account of an incomplete record in the matter remitted for rehearing, resulting in the award under review.

The relevant legal principles

- [5] The test established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and affirmed by the Supreme Court Of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) empowers this court to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. What this amounts to is an outcomes-based enquiry, a stringent test aimed to ensure that this court is not likely to interfere with arbitration awards. The Labour Appeal Court has made clear that reasonableness does not equate to correctness and that a decision made by an arbitrator that is wrong will pass muster provided it is not so wrong as to be unreasonable (see *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) per Davis JA, who at paragraph 18 of the judgment emphasised the need to distinguish between reviews and appeals).
- [6] The manner in which the review court should assess the evidence that served before an arbitrator to determine the reasonableness of the result was the subject of a judgment by the Labour Appeal Court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 197 (LAC). The LAC (per Waglay JP) held as follows:
- In a review conducted under section 145(2) (a) (ii) of the LRA, the reviewing 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 one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award as improper as the reviewing court must necessarily 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] In other words, even if an applicant in a review application is able to identify some misdirection on the part of the arbitrator (for example, as in the present instance, a failure to consider material facts or to attach weight to relevant evidence or attach weight to irrelevant evidence and the like), that is not in itself a basis for a review for want of reasonableness; the resultant decision must fall outside of a band of decisions to which a reasonable decision-maker could come on the same material.
- [8] The LAC more recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In this judgment, Murphy AJA said the following:

[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.

Analysis

- [9] In the present instance, the applicant's grounds for review are not cast in terms that reflect the enquiry that the court must undertake. In particular, the grounds articulated both in the founding and supplementary affidavits do not make out a case to the effect that the outcome of the proceedings under review was one that fell outside of the band of decisions to which a reasonable decision-maker could come on the available material. It is not sufficient, as the applicant has done, to record a litany of complaints that amount to no more than assertions that the commissioner came to conclusions that were wrong. Commissioners are allowed to be wrong; the review test affords them this latitude, provided that the outcome is not compromised in the sense that is an unreasonable one. The two-stage test referred to above preserves the all-important distinction between appeals and reviews. Further, in an application such as the present, the basis on which the outcome of arbitration proceedings subject to review is alleged to be unreasonable must be specifically pleaded - a failure to do so reflects a failure to establish a cause of action. The applicant's failure to frame his grounds for review on the proper basis and to rely in piecemeal fashion on a series of alleged misdirections, in my view, is in itself a reason to dismiss the present application.
- [10] Be that as it may, even if I were to have regard to the grounds for review articulated by the applicant, the result would be no different. I do not intend to canvass each and every ground for review – some of them while more directed at the conduct of the commissioner than others. My conclusions in regard to all of the grounds for review raised by the applicant, as would appear from those canvassed below, is that none of them properly found the basis for intervention by this court. I deal first with the contention that the commissioner irregularly treated the proceedings as *de novo*. As I understand the submission, the applicant contends that the commissioner misdirected his enquiry by determining whether the applicants dismissal substantively procedurally fair instead of determining whether the compensation award previously granted ought to have been substituted by an award of

reinstatement. The applicant has mistaken the purpose of the arbitration proceedings and overlooked the terms of the order granted by this court on 11 September 2014 when the matter was remitted for rehearing. The terms of that order specifically contemplate a *de novo* hearing – in other words, the commissioner was required to determine at the arbitration whether the applicants dismissal substantively procedurally fair. That is exactly what he did.

[11] In regard to the applicant's contention that the commissioner failed to have regard to his assertion that the charges brought against him were duplicated, vague and embarrassing, the commissioner's award, from paragraph 52 to 54, reflect that the commissioner indeed had regard to the nature of the charges brought against the applicant and their formulation. It is also clear from the commissioner's analysis that he took into account all material evidence concerning those charges. In so far as the applicant's contention that the commissioner failed to have regard to the third respondent's delay in bringing charges against him, this is simply not so. The evidence regarding that delay is reflected in paragraphs 37 to 41 of the award and the commissioner's conclusion, that the delay in instituting disciplinary proceedings was acceptable, is reflected in paragraph 48. It is clear from the award and the record of the proceedings under review that the commissioner considered all of the relevant evidence concerning the reasons for the delay in charging the applicant, and based on the evidence before him, he found that the third respondent's delay was not unreasonable. The commissioner's conduct is consistent with what is required in terms of the relevant test, i.e. to have regard to the material evidence and to arrive at a conclusion which is reasonable having regard to the evidence. Again, the applicant's complaint appears to be that the commissioner's decision was incorrect, a complaint that is insufficient to sustain a case on review.

[12] Next, having regard to the disciplinary proceedings, the applicant contains that the commissioner failed to consider that he did not understand the charges against him and that he did not have a reasonable opportunity to prepare his defence. The evidence before the commissioner was that the applicant had received a notice to attend the disciplinary hearing and that he had a

reasonable opportunity to prepare for the hearing and understood the chances against him. At paragraph 42 of the award, the commissioner makes reference to the testimony of a Mr Makgale, who conducted the disciplinary hearing. His evidence was that the applicant had received a notice to attend the hearing within a reasonable time, that he was represented by two union officials, that the charges were read out to him and that he confirmed that he understood them. The applicant pleaded not guilty to the charges and his representative was allowed to cross-examine the third respondent's witnesses and the applicant was given an opportunity in every sense to state his case. This evidence is clear and uncontested. The finding by the commissioner that there were no procedural defects in the proceedings is thus a finding to which a reasonable decision-maker could come.

[13] In regard to the sanction of dismissal itself, and in particular the applicant's contention that the commissioner failed to have regard to the applicant's clean disciplinary record, the evidence which is recorded at paragraphs 60 and 61 of the award clearly reflect that the commissioner gave due consideration to all of the circumstances of the case. While it may be correct that the third respondent's witness Ms Huma did not herself specifically state that the applicant's conduct would destroy the trust relationship, the commissioner had regard to the context in which the applicant's misconduct had occurred and properly considered all of the relevant factors in reaching his conclusion that dismissal was an appropriate sanction. In my view, the conclusion by the commissioner cannot be said to be so unreasonable that no reasonable decision maker could come to it.

[14] In my view, the applicant has failed to establish that the commissioner misdirected himself, or that the conclusion to which he came is one that is so unreasonable that no reasonable decision maker could come to it. The applicant may well consider that the commissioner came to conclusions that were wrong, but for the reasons stated above, that is not sufficient for this court to intervene.

For the above reasons, I make the following order:

1. The application is dismissed.

Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANT: Mr Nadeem Mahomed, Nadeem Mahomed Attorneys

THIRD RESPONDENT: Mr. Ludwig Frahm Arp, Fasken Martineau

LABOUR COURT