THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2355/14

NATIONAL UNION OF MINEWORKERS	**First Applicant**
S A WABILE	**Second Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
M SOMAN N.O	**Second Respondent**
FIRST URANIUM EZULWINI MINE	**Third Respondent**

Heard: **10 August 2017**

Delivered: **21 September 2017**

Summary: Review application. No merit in the grounds for review. Application dismissed.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicants seek to review and set aside an arbitration award issued on 15 September 2014 wherein the Second Respondent (the arbitrator) found the Second Respondent's (the employee) dismissal fair and dismissed his case.

[2] The Third Respondent (the mine or employer) opposed the application.

[3] The employee was dismissed in September 2011 and his unfair dismissal dispute was arbitrated in January 2012 and an arbitration award was issued wherein the employee's dismissal was found to be unfair and he was reinstated. The employer successfully reviewed the arbitration award and the matter was remitted for a hearing *de novo.* The dispute was arbitrated *de novo* in August 2014 and an arbitration award was issued on 15 September 2014 wherein the employee's dismissal was found to be fair. The Applicants seek the review and setting aside of the second arbitration award.

<u>The evidence adduced:</u>

[4] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively fair as he did not challenge the procedural fairness of his dismissal.

[5] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the evidence adduced.

[6] The employee was employed in October 2007 as a safety officer and he was dismissed in September 2011 for reasons related to misconduct. The charge levelled against the employee was "Failure to immediately report the contravention of non-negotiable standards determined by the CEO in that on 30 August 2011 during your routine inspection at 50 level 4 South you identified a tip area not barricaded and a substandard grizzly (opening around the tip area) but failed to immediately report it to the safety manager and the CEO as per the CEO's instruction."

[7] The employer's safety manager, Mr Percival Mokone (Mokone), testified and he explained that he is responsible for health and safety issues at the mine. Mokone testified that in 2011 there were a number of fatal injuries at the mine

and the management was duty bound to take action as fatalities not only result in the loss of life, but also monetary losses as the mine has stoppages for a week of two after the incident. The CEO and management documented a procedure that was called 'non-negotiable' standards and five critical issues were identified namely support standards, trucks and tramming standards, winches and rigging, ore pass and box holes, ventilation and explosives. The document was negotiated and the trade unions were part of drawing of the document. Mokone explained that all the employees were made aware of it and the fact that no deviations would be allowed and non-compliance with the standards had to be reported to the CEO immediately so that he could direct action to be taken. This was all in an attempt to increase safety and avoid further fatalities.

[8] Mokone explained that the employee in his capacity as safety officer was part of drawing up the 'non-negotiable document' and this is evident from the attendance register signed by the employee on 24 August 2011. The CEO gave a clear instruction on 24 August 2011 that any person observing non-compliance with a non-negotiable procedure must report it to the CEO immediately and that disciplinary action would be taken against any employee who did not report it to the CEO.

[9] Mokone explained that the employee was dismissed after he conducted an inspection on 30 August 2011 and on 13 September 2011, when they went underground subsequent to another fatal accident at the mine, they found a tip, which is an open excavation of about 3 metres wide where broken ore is put into and transported from, which is normally covered with a grizzly to prevent employees from falling into it and barricaded, not barricaded off and with an opening that a person could fall into. Mokone explained that they went back to the offices to investigate and found that the employee observed the substandard on 30 August 2011, as per his report, but as a non-negotiable standard it was not reported to the CEO immediately and therefore disciplinary action was taken against the employee.

[10] Mokone explained that the employee on 30 August 2011 identified that there was a big opening around the tip area on the grizzly and that the tip area was

not barricaded off. The recommended action to be taken was for the opening to be closed and for the tip area to be barricaded off with chains. The recommended action would have been taken and the issues rectified by 15 September 2011. Mokone testified that a barricade could be fixed on the same day and a grizzly, depending on the availability of the material underground and at the workplace, could be fixed in a day or two. It was highly unacceptable that the life threatening situation identified on 30 August 2011 was only fixed on 15 September 2011.

[11] Mokone reiterated that the instruction from the CEO was that in the event of a non-negotiable standard, it should be reported to him immediately and the employee did not adhere to this clear instruction. The employer has been consistent in applying the non-negotiable document and any employee found guilty of not applying the rule of non-negotiable standards, was dismissed.

[12] In cross-examination it was put to Mokone that the employee formally reported on the fact that the tip area was not barricaded off on 30 August 2011 and that he appropriately reported his safety inspection findings on that date. Mokone accepted that the report may have been written on 30 August 2011, but emphasized that it was never brought to his attention on 30 August 2011, nor was it immediately reported to the CEO. Mokone saw the report for the first time on 13 September 2011, at the time of another accident at the mine.

[13] Mokone explained that the employee's duty was to immediately report the non-negotiable standard and he did not do so, resulting in employees being exposed to the hazard related to the tip area for an extended period. The non-negotiable standards had to be reported immediately to the safety manager and the CEO and that was not done.

[14] The employee testified that he was dismissed for not reporting a contravention of a non-negotiable standard. He explained that on 30 August 2011 he went underground and did a routine inspection and found that the tip area was substandard and requested the shift boss to have the tip area fixed. The shift boss indicated that the tip area would be fixed as soon as material was available. The employee finished his rounds and went back to re-inspect the tip

area and found that the one segment of the grizzly that was missing, was replaced. He testified that the chain barricades were installed and the grizzly was fixed and the area was declared safe. The employee then went to Mokone to discuss the report with him and after he was satisfied, Mokone attached his signature to the report.

[15] The employee testified that there was no requirement for him to report to the CEO and at the meeting where such an instruction might have been given, the employee arrived late and nothing was said to him about reporting to the CEO.

[16] The employee testified that the tip area was fixed on 30 August 2011 and it was possible that it was substandard again on 13 September 2011, when Mokone inspected the area, as it was possible that the scrapper which weighs 30 tons, had run over it again after 30 August 2011.

[17] It is evident from the transcribed record that material versions of the employee's evidence in chief had not been put to the employer's witness in cross-examination, for example the fact that the issues identified at the tip area were indeed fixed on 30 August 2011 and that the employee had a discussion with Mokone on the same date and that the report was signed off and that the area was declared safe.

Analysis of the arbitrator's findings and grounds for review

[18] The arbitrator accepted that the employee conducted a routine underground inspection on 31 August 2011, that the employee identified that the tip area was not barricaded and that this was recorded in his report but that it was not reported to the CEO. The arbitrator further accepted that the employee discharged his duties regarding the tip area on 30 August 2011.

[19] In his analysis of the charge the employee was found guilty of and dismissed for, the arbitrator considered that the employee was not charged with failing to discharge his duties, but that he was charged for failing to immediately report the contravention of non-negotiable standards to the CEO.

[20] The arbitrator considered the Code of Good Practice in Schedule 8 of the Labour Relations Act[1](the Act) in determining the substantive fairness of the employee's dismissal. The arbitrator firstly considered whether the employee was aware of the rule to immediately report any contravention of non-negotiable standards to the CEO. The arbitrator found it highly improbable that the employee would not have been aware of the requirement to report contraventions immediately to the CEO. This the arbitrator found to be the case for a number of reasons including that the employee was a safety officer and by virtue of carrying out safety related duties at the mine, the employee would have been aware of any policies, decisions or procedures issued relating to safety in the workplace, there were numerous accidents at the mine in 2011 and it was undisputed that the CEO and management identified non-negotiable standards in an attempt to prevent further accidents in the workplace and the employee's evidence during the previous arbitration proceedings indicated that he never disputed that he received the instruction from the CEO. In fact, it was common cause that the CEO had issued the instruction that the non-negotiable standards had to be reported to him and that the instruction was given at a meeting where the employee was present.

[21] The arbitrator accepted that there was a rule or standard that the employee had to report contravention of a non-negotiable standards to the CEO and that the employee was aware of the rule. The arbitrator accepted that the unbarricaded tip identified by the employee on 30 August 2011 was one of the non-negotiable standards to be reported to the CEO and it was common cause that the employee did not report this to the CEO, which is the nub of the charge the employee was dismissed for.

[22] In considering whether or not dismissal was an appropriate sanction, the arbitrator considered that the rule was introduced as a result of numerous fatalities at the mine and that it was an extraordinary measure taken by the CEO in an attempt to deal with a difficult situation and to prevent the loss of further lives. He found that a tip area that was not barricaded was dangerous as employees could fall into the opening and had the CEO known of the opening

[1] Act 66 of 1995.

of the tip area, he could have intervened immediately and ordered that the area be secured without further delay. The employee was a safety officer and in light of the fatalities at the workplace, he did not act in the best interests of the employer at the time. The arbitrator accepted that the trust relationship has broken down and cannot be resuscitated.

[23] The arbitrator rejected the employee's case that his dismissal was premeditated and held that the employer acted consistently in applying the sanction of dismissal.

[24] I have to deal with the merits of the review application 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*[2] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[25] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[3] affirmed the test to be applied in review proceedings and held that a piecemeal approach should not be followed. It 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."

[26] This Court, sitting as a review Court, should not follow a piecemeal approach but should consider whether the arbitrator dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was adduced.

[27] It is in this context that the grounds for review raised by the Applicants must be decided.

---

[2] (2007) 28 ILJ 2405 (CC) at para 110.
[3] (2014) 35 ILJ 943 (LAC).

[28] The Applicants' founding affidavit contains a number of allegations in respect of the arbitrator and the arbitration proceedings, but it is difficult to glean from the averments what the Applicants' grounds for review are. In my view much of the allegations are more akin to an appeal than a review, other allegations are unsubstantiated and vague and other allegations made are inappropriate and do not belong in an application for review. For instance, the Applicants submitted that 'the love the commissioner displayed in her awards towards the Respondent' is a cause for concern. This submission is not only unsubstantiated but shows that the Applicants have no idea what the test on review is and what allegations should be made in a proper review application. The Applicants have taken an immature and emotional approach, which is evident in the language used and the averments made, which is of not much assistance to their application.

[29] Be that as it may, Mr Msimeki on behalf of the Applicants, filed heads of argument wherein the grounds for review were dealt with. It is evident from the Applicants' heads of argument that there are three main grounds for review.

[30] The first ground for review is in respect of the arbitrator's finding that the employee was aware of the instruction issued by the CEO to report all contraventions of non-negotiable standards to him immediately. The Applicants' case is that this finding stems from a number of gross irregularities and misconduct committed by the arbitrator. Those are that the arbitrator was influenced and or relied on testimony given at the first arbitration held on 25 January 2012, the arbitrator placed reliance on the Labour Court judgment which was not introduced as evidence in the arbitration proceedings and the arbitrator ignored the employee's evidence in respect of the reporting of non-negotiables to the CEO.

[31] The Applicants' case is that the versions presented were mutually destructive and that the arbitrator failed to appreciate the weight of the employee's evidence when she made a finding that he was aware of the CEO's instruction. The arbitrator should have concluded that the employer had failed to discharge the onus to prove on a balance of probabilities that the employee was aware of

the rule to immediately report all contraventions of non-negotiable standards to the CEO.

[32] The second ground for review relates to the arbitrator's finding that she accepted Mokone's version that he signed the report on 13 September 2011 and that the incident was not reported to Mokone on 30 August 2011 to be more probable. The Applicants' case is that the arbitrator committed a gross irregularity and or misconduct by accepting evidence from the previous arbitration award and by placing reliance on the Labour Court judgment, which was not adduced as evidence.

[33] The Applicants' case is further that the versions presented were mutually destructive and the arbitrator should have concluded that the employer has failed to discharge the onus to prove on a balance of probabilities that Mokone only signed the report on 13 September 2011 and that the employee failed to report the incident to Mokone and to the CEO.

[34] In my view the gist of the first and the second grounds for review is essentially the same and in summary it is that the arbitrator committed a gross irregularity or misconduct by accepting evidence from the previous arbitration proceedings and by placing reliance on the Labour Court judgment and by ignoring the Applicants' evidence in certain respects.

[35] *In casu* the arbitration that took place in August 2014 was the second arbitration as the same matter was arbitrated in January 2012. In respect of the first arbitration, evidence was adduced and an arbitration award was issued wherein the evidence so adduced was recorded. It is an acceptable principle in the law of evidence that contradictions in testimony could be canvassed during cross-examination and evidence adduced in previous arbitration proceedings, is evidence under oath and may be relied upon to test credibility. The arbitrator is entitled to consider the portions of the record that were introduced by witnesses, either in evidence in chief or cross-examination, as evidence.

[36] *In casu* the version presented at the January 2012 arbitration was put to the employee in his cross-examination and the employee was specifically asked whether he agreed with the proposition that was put to him in respect of the

evidence and version presented at the previous arbitration proceedings. It is evident from the transcribed record of the proceedings that instead of allowing the employee an opportunity to respond to the proposition, his representative, Mr Zwane, intervened and unjustly so and the arbitrator dealt with the issue and the employee never disputed the correctness of the version that was put to him in respect of the previous arbitration proceedings.

[37] The mere fact that the arbitrator considered or had regard to the evidence adduced during the previous arbitration proceedings does not constitute a gross irregularity or misconduct and does not render the award reviewable.

[38] The Labour Court judgment was included in the employer's bundle of documents used at the arbitration and it formed part of the evidence placed before the arbitrator. The arbitrator was entitled to accept the contents of the documentary evidence placed before her, more so where the document is a Labour Court judgment which is a public document that needs no evidence to support or justify its contents. Equally so can the mere fact that the arbitrator considered the content of a Labour Court judgment that was placed before her not constitute a gross irregularity or misconduct that renders the award reviewable.

[39] It is evident from the arbitration award that the arbitrator did not solely rely on the evidence of the previous arbitration proceedings and the content of the Labour Court judgment to make her findings, but it was part of many factors that the arbitrator considered and it was not the only consideration that informed her decision.

[40] The Applicants' case is also that the arbitrator ignored evidence and should have found that it was not shown that the employee was aware of the rule to immediately report all contraventions of non-negotiable standards to the CEO and should have found that there was no evidence to prove that Mokone only signed the report on 13 September 2011 and that the employee failed to report the incident to Mokone and to the CEO.

[41] This Court should not follow a piecemeal approach but should ascertain whether the arbitrator considered the principal issue before her, evaluated the

facts presented, dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was placed before her.

[42] I do not intend to follow a piecemeal approach. A perusal of the transcribed record, read with the findings made by the arbitrator, shows that the arbitrator considered the evidence that was adduced and that her findings are not disconnected from the evidence, but holistically viewed, the arbitrator's findings are reasonable and supported by the evidence.

[43] The third ground for review is bias and in the heads of arguments the Applicants did no more than to refer to a number of paragraphs in the Applicants' founding and supplementary affidavits and to submit that having acted as stated in the said paragraphs, the arbitrator created a reasonable apprehension of bias.

[44] This Court should not entertain unsubstantiated allegations of bias.

[45] In their heads of argument reference is made to additional grounds for review as set out in certain paragraphs of the Applicants' founding affidavit. The only submission made in this regard is that the additional grounds for review would be 'addressed during argument.' The submission so made indicates that the Applicants' representative had no appreciation for the purpose of filing heads of argument.

[46] In *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and others*[4] the Labour Appeal Court held that:

> "In this appeal the respondents' attorney was required to file heads of argument succinctly setting out the points to be argued at the hearing of the appeal. A document purporting to be heads of argument was timeously filed on behalf of the respondents. However, it was of such poor quality that it can hardly be described as heads of argument. This court

[4] (2004) 25 ILJ 2135 (LAC) at para 50.

> could not derive any assistance from that document nor was the attorney helpful to the court at the hearing of the appeal. Properly prepared heads of argument play an important role in the adjudication of a matter - especially in an appeal court. Useful heads of argument cannot be prepared unless the person preparing them has taken the trouble to study the record and has done such research on the legal issues raised by the matter or appeal as may be necessary. Where heads of argument are drawn without the necessary understanding of the facts or the evidence in the record and/or without doing the necessary research on the legal issues that arise in the appeal, such heads - and it is very easy to recognize this in heads of argument - are bound to be of no assistance to the court hearing the appeal. That kind of conduct on the part of a practitioner is unacceptable. A practitioner should not accept instructions or a brief in a matter if he does not have the time to do justice to a client's case. It is inexcusable for a practitioner to file heads of argument the contents of which bear no relation to the issues raised.
>
> In this case the document purporting to be heads of argument filed by the respondents' attorney was totally unacceptable".

[47] In *Minister of Safety and Security v Mashego and others*[5] it was held that

> "Its is not acceptable that practitioners should merely send up heads which are not helpful, which do not cite authorities and which suggest hurriedness of preparation. Counsel draw heads for the purpose of assisting the court".

[48] *In casu* the heads of argument prepared by Mr Msimeki showed that he has not properly researched the topics he addressed, he has not put in any effort to substantiate the grounds for review and in this regard the heads of argument were of little or no assistance to this Court. I have already alluded to the fact that the Applicants' review application was drafted in a manner that made it difficult to understand what the grounds for review were and this is a case where the heads of argument should have assisted this Court in analyzing and

[5] (2003) 24 ILJ 1690 (LC).

addressing the grounds for review. The grounds for review that were identified in the heads of argument, were merely mentioned without any legal argument to support and substantiate the grounds for review.

[49] In respect of the issue of bias as well as 'additional grounds for review' no submissions of substance are made. In fact, the heads of argument contained no more than references to paragraphs in the Applicants' affidavits, which is not acceptable. In heads of argument one would expect well formulated legal arguments, references to the transcribed record and relevant authorities and not references to paragraphs in affidavits. More bizarre is a statement that these would be addressed in argument, when the heads of argument are supposed to be the argument.

[50] The grounds for review relating to bias and the other unidentified 'additional grounds for review', are unsubstantiated and without merit.

[51] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.

[52] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicants, I am satisfied that the arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make.

[53] The award and the findings contained therein are reasonable and are not to be interfered with on review.

[54] In respect of costs, the Applicants left the issue in the hands of this Court and the Third Respondent submitted that costs should follow the result. I can see no reason to deviate from the general rule that the costs should follow the result.

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

<u>Order:</u>

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate Nyangiwe

Instructed by: Msimeki Attorneys

For the Third Respondent: Ms Mthalane of Solomon Holmes Attorneys