



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 815/15

In the matter between:

DUNCANMEC (PTY) LTD

Applicant

and

WILLIAM, ITUMELENG N.O

First Respondent

THE METAL AND ENGINEERING INDUSTRY

BARGAINING COUNCIL

Second Respondent

**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA**

Third Respondent

MATITI, SIYAKUDUMISA

Fourth Respondent

Heard: 5 April 2017

Delivered: 8 February 2018

JUDGMENT

MAHOSI. AJ

Introduction

- [1] This is an application in terms of section 158(1)(g) and/or section 158(1)(g) of the Labour Relations Act (LRA)¹ for an order reviewing and setting aside an arbitration award issued by the first respondent (arbitrator) acting under the auspices of the third respondent second

¹ Act 66 of 1995 as amended.

respondent (Bargaining Council), on 9 March 2015 under case reference number MEGA 43423 in terms of which the arbitrator found that the dismissal of fourth respondent (the employee) was substantively unfair.

- [2] The key question is whether the arbitrator's decision is one which a reasonable decision maker could not reach.

Background

- [3] The applicant employed the employee as a welder from 14 June 2014. On 8 May 2015, the employee was subjected to a test to determine whether he was under the influence of alcohol. The employee refused to take a breathalyser or blood test. On the same day, he was issued with a notice of suspension and a notice to attend a disciplinary hearing. A disciplinary enquiry was held on 12 May 2015 and at the end of it, the employee was dismissed. As a result, the employee referred a dispute of unfair dismissal to the Bargaining Council.
- [4] The dispute was conciliated unsuccessfully before it could proceed to arbitration. The arbitration was held on 6 November 2015 and 9 March 2015. At the end of the arbitration, the arbitrator found that the dismissal of the employee was substantively unfair. The arbitrator ordered the applicant to retrospectively reinstate the employee to a position he occupied prior to his dismissal. The arbitrator further ordered the applicant to pay the employee back pay, amounting to R55 145.62. Dissatisfied with the arbitrator's award, the applicant lodged this application.

Arbitration award

- [5] The arbitrator identified the substantive issue between the parties as whether the observation made by the applicant's witnesses conclusively proves that the employee was under the influence of alcohol at the workplace.

- [6] The applicant relied on the testimony of four witnesses, namely Mr Sejake who chaired the disciplinary enquiry; Mr Mazibuko who is also employed by the applicant as the Human Resource Manager; Mr Mthethwa who is the applicant's safety officer and Mr Aswegen who was the employee's supervisor. The employee relied on his own testimony and that of Mr Jonas who is the applicant's health and safety officer and a shop steward.
- [7] It was common cause that the investigation on whether the employee was under the influence of alcohol consisted of an observation test and the breathalyser test. Mr Mthethwa noted in the observation form that the employee smelt of alcohol, his eyes were bloodshot, his speech was not normal and he was aggressive. Mr Mazibuko, Mr Mthethwa and Mr Aswegen signed the said observation form to confirm its accuracy.
- [8] In his analysis, the arbitrator rejected the testimony of the applicant's witnesses that the employee had bloodshot eyes on the day in question. Instead he accepted the employee's version that he had sustained an eye injury at work which was reported to the applicant. The arbitrator found that the condition of employee's eyes could not be taken into the equation in determining his state of sobriety on the basis that his eyes were even bloodshot during the arbitration although he was sober.
- [9] On the question of whether the employee smelt of alcohol, the arbitrator accepted the employee's version that he did not smell of alcohol. The basis of the arbitrator's acceptance of the employee's version was that it was corroborated by Mr Jonas and was unchallenged by the applicant.
- [10] The arbitrator took into consideration the fact that Mr Mthethwa did not make an entry on the observation form on the steadiness of the

employee's feet as required and further that he denied observing uncoordinated movement on the part of the employee. This was corroborated by Mr Jones who testified that the employee walked properly on the day in question which evidence was not challenged by the applicant. It was on this basis that the arbitrator rejected the applicant's version that the employee was unsteady on his feet.

- [11] The applicant's submission that the employee's refusal to submit to the breathalyser test justifies an inference that he was under the influence of alcohol was rejected by the arbitrator, as not being consistent with the proven facts. The arbitrator found that the applicant failed to discharge its onus to prove that the employee's dismissal is for a fair reason. It was for this reason that the applicant challenged the arbitration award.

Grounds of Review

- [12] In essence, the applicant's submission is that there was evidence on which a reasonable arbitrator could find that the employee was guilty of the misconduct for which he was dismissed.
- [13] The applicant further submits that the arbitrator failed to apply his mind to the relevant evidence and consequently made an award which no reasonable arbitrator could make.

Applicable law and analysis

- [14] Arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration

proceedings, exceeding the commissioner's powers or improperly obtaining an award.

- [15] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*³ as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁴

- [16] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁵ the Labour Appeal Court (LAC) stated as follows:

'[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

² 2007 (28) ILJ 2405 (CC) para 25.

³ 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA).

⁴ At para 25.

⁵ [2014] 1 BLLR 20 (LAC) at para 17 and 18.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, 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 one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review 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.'

[17] In *Head of the Department of Education v Mofokeng and Others*⁶ the LAC confirmed *Herholdt* and *Mofokeng* and held as follows:

'The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an 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.

[18] The LAC further held as follows:

'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

⁶ [2015] 1 BLLR 50 (LAC) at para 30.

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.⁷

[Footnotes omitted]

[19] The question is whether the arbitrator evaluated the facts presented before him and arrived at a conclusion that is reasonable. The reading of the record shows that the employee testified that he has a problem with his eyes and that they are red and painful.⁸ Under cross-examination, the employee testified that evidence to prove that he went to the doctor after the accident was with the applicant.⁹ The applicant took issue with the arbitrator's submission that according to his observation the employee's eyes were bloodshot during the arbitration, even though he was sober. In this regard, the applicant submitted that, in effect, the arbitrator introduced evidence to corroborate the employee's version without giving the applicant an opportunity to test it.

[20] The applicant further took issue with the arbitrator's acceptance of the employee's version, which was corroborated by Mr Jonas, that he did not smell alcohol. The issue raised was that Mr Jonas' evidence was

⁷ At para 33.

⁸ Index to record page 83, line 1-2

⁹ Index to record page 92, line 23

tainted with bias as he was a shop steward and represented the employee at the disciplinary enquiry. I find no merit to this submission.

- [21] On the question whether the employee's refusal to take the breathalyser test justifies an inference that he was under the influence of alcohol, the third respondent submitted that the employee testified on the reasons he refused to be subjected to the breathalyser test. The employee testified that he asked the shop steward to explain that the reason he did not want to take the breathalyser test was that his eyes were painful and red and as a result people were mocking him.¹⁰ He further testified that it was not for the first time he was taken from other employees in order to subject him to the breathalyser test and that this was done in the presence of other employees.¹¹
- [22] The third respondent's submission was further that an inference that the employee refused to take the breathalyser test because he was under the influence of alcohol could not be drawn as the applicant did not put that version to the employee. The arbitrator considered the evidence before him before coming to the conclusion that such an inference was not supported by the facts before him.
- [23] It is my view that none of the grounds of review raised by the applicant muster the applicable test of unreasonableness. In this case, the arbitrator's award is not only clear but it contains the detailed exposition of the evidence presented before him during the arbitration, followed by an equally detailed analysis of the evidence and argument.
- [24] It is abundantly clear from the applicant's founding affidavit and its supplementary affidavit that the applicant has not established any basis upon which the Court could find that the

¹⁰ Index to record page 83 line 9-13.

¹¹ Index to record page 83, line 21-24.

first respondent's award was reviewable. The applicant failed to discharge the onus of establishing that the arbitrator either committed misconduct in relation to his duties as a commissioner, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers.

[25] It is apparent from the reading of the award that the arbitrator took into consideration all the evidence that was led before him, and applied his mind to the issues before him. In my view, the arbitrator dealt exhaustively with the evidence before him, and considered all relevant factors before coming to the conclusion that the employee's dismissal was substantively unfair.

[26] Considering the depth of his treatment with the evidence, it cannot be said that the arbitrator failed to apply his mind to the issues before him or even that he reached an illogical and unjustifiable conclusion or reached an unreasonable conclusion. There is, therefore, no reason for this Court to interfere with the arbitrator's award.

[27] With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[28] In the premise, I make the following order:

Order

1. The applicant's review application is dismissed.
2. There is no order as to costs.

D. Mahosi

Acting Judge of the Labour Court (then)

Appearances

For the Applicant: Mr RUBEN J.C. Orton of Snyman Attorneys

For the Respondent: Mr. Express Mtshali, NUMSA official.

LABOUR COURT