



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2504/12

In the matter between:

NORTHAM PLATINUM LTD

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

JN MATSHEKGA N.O.

Second Respondent

NUM obo RAKOMA, ALEX

Third Respondent

Heard: 25 April 2017

Delivered: 8 February 2018

JUDGMENT

MAHOSI AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act ("LRA")¹ for an order reviewing and setting aside an arbitration award issued

¹ Act 66 of 1995.

by the second respondent (“arbitrator”) acting under the auspices of the first respondent (“CCMA”), on 28 August 2012 under case reference number LP5061-12 in terms of which the arbitrator found that the dismissal of Alex Rakoma (“the employee”) was substantively unfair.

Background

- [2] The employee was employed by the applicant on the 23 May 2003 as a human resources officer. On the 3 February 2012, the employee was subjected to a disciplinary hearing for an alleged misconduct. The charges against the employee were as follows:

‘Charge 1

It is alleged that during January 2012, you are dishonest in your dealings with the company in that you gave an instruction to Ms Mathaba, to make out a leave form to cover the absence of Mr T Mohlomi for 28/11/2011, knowing that Mr. T. Mohlomi was supposed to be referred to formal disciplinary hearing for AWOP and misrepresentation of information.

Charge 2

It is alleged that during January 2012, you are dishonest in your dealings with the company in that you connived with the shift boss Mr A.J. Jordan to sign a leave form of Mr. T. Mohlomi to cover the absence of 28/11/2011, and as a result the signature of the M/O Mr. P. Hatting was forged.’

- [5] At the end of the disciplinary hearing, the employee was found not guilty of charge 1 and guilty of charge 2. As a result, the employee was dismissed. The employee then lodged an internal appeal which was dismissed on 2 April 2012. The employee subsequently referred a dispute to the CCMA where a conciliation meeting failed and the matter was referred for arbitration.
- [4] The arbitration was held on 20 August 2012. On 28 August 2012, the arbitrator issued an award in terms of which he found that the employee’s dismissal was substantively unfair and ordered the third respondent to reinstate the employee with effect from 2 April 2012 and to pay him back pay in an amount equal to the salary he would have earned between 2 April 2012

and 10 September 2012. Dissatisfied with the outcome of the arbitration, the applicant launched this review application.

The arbitration award

- [12] It is common cause that the applicant was unable to transcribe the record of the arbitration proceedings as the tapes were inaudible. A reconstruction meeting was held on 8 October 2013 during which the parties agreed that the arbitrator's record of the evidence in his award was accurate. The applicant, therefore, relies on the evidence as stated in the arbitration award and the documentary bundles presented before the arbitrator.
- [13] The arbitrator identified the dispute before him to be whether the employee's dismissal by the applicant for the alleged misconduct was for a fair reason. The only issue that was in dispute was whether the employee breached the applicant's rule relating to dishonesty in that he connived with Jordan to sign a leave form of Mohlomi to cover his absence of 28 November 2011. The applicant relied on the oral testimony of Tumelo Mothoni and Precious Mathaba. The employee relied on his own testimony.
- [14] In his analysis, the arbitrator found that the applicant dismally failed to prove the allegation for which the employee was dismissed. The basis for the arbitrator's finding was that the testimony of the applicant's witnesses was completely irrelevant to the misconduct that the applicant was dismissed for. The arbitrator took into consideration the respondent's witnesses testimony that they did not witness any conniving that took place between the employee and Jordan to sign the leave form and further Jordan's undisputed statement that no discussion took place between himself and the employee about the generation of the leave form and the signature thereof to arrive at the conclusion that he cannot find that there was any conniving that took place between the employee and Jordaan.
- [15] The arbitrator rejected Tumelo's testimony that Jordan told him that he granted Mohlomi casual leave on the employee's instruction on the basis that it was unreliable and fabricated. This was because Jordaan made no mention of such an instruction in his written statement. Further that Tumelo led no

such testimony in the disciplinary hearing and never mentioned it in his written statement. In the circumstances, the arbitrator found that the applicant failed to prove that the applicant breached any rule.

Grounds for Review

- [16] The applicant contends that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers and/or acted unjustifiably and reached a decision that no other reasonable decision-maker could have reached.

Applicable law and analysis

- [17] The 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.
- [18] 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

² 2007 (28) ILJ 2405 (CC) at para 25.

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

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

[19] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁵ the 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.

[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.’

[20] In *Head of the Department of Education v Mofokeng and Others*,⁶ the LAC confirmed the *Herholdt* and *Mofokeng* judgments 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.

⁴ At para 25.

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

⁶ [2015] 1 BLLR 50 (LAC) at para 30.

[21] 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 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]

[21] 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. 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.

[22] It is my view, none of the grounds of review raised by the applicant falls within the applicable test of reasonableness. In this case, the arbitrator's award is not only clear but it contains the detailed

⁷ At para 33.

exposition of the evidence and documentation presented before him during the arbitration, followed by an equally detailed analysis of the evidence and argument.

- [20] It is abundantly clear from the applicant's founding affidavit that the applicant has not established any basis upon which the court could find that the first respondent's award was reviewable. The applicant fails to discharge the *onus* of establishing that the first respondent either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers.
- [21] 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.
- [22] 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.
- [23] Considering the depth of his treatment with the evidence, it cannot be said that the arbitrator misconceived the nature of the enquiry, or 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.
- [24] 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:

Advocate R.G. Beaton SC

Instructed by Van Zyl Le Roux Inc

FOR THE RESPONDENT:

Mr K Maimane, NUM official