



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 1499/17

In the matter between:

BELLOORD 28 CC

Applicant

and

CCMA JOHANNESBURG/J D SELLO
Respondent

First

LUCKY M MASELESELE
Respondent

Second

Application heard: 13 March 2018

Judgment delivered: 15 March 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application to review and set aside an arbitration award issued by commissioner JD Sello on 11 July 2017, under case number GAJB 3343-17. In his award, the commissioner held that the second respondent's dismissal by applicant was procedurally fair but substantively unfair. The commissioner went on to order the second respondent be reinstated, with retrospective effect.
- [2] The application for review has been prepared by one of the applicant's employees. The application does not comply strictly with the format that is ordinarily used in this court and applications of this nature, and I have had some difficulty discerning precisely what the basis for the review might be. The application referrals interchangeably to the internal disciplinary hearing and the arbitration proceedings under review and neither were the founding affidavit nor the supplementary affidavit clearly articulate the applicant's grounds for review.
- [3] Be that as it may, the relevant facts are recorded in the commissioner's award and I do not intend to burden this judgment with their repetition. It is sufficient to record for present purposes that the second respondent was employed by the applicant with effect from 1 September 2016. He was dismissed less than two months later, after a disciplinary hearing, on 24 November 2016. The charge levelled against the second respondent was one of gross insubordination in the form of a refusal to comply with the instruction given by his manager, a Mr de Beer, to wear protective clothing. The defence proffered by the second respondent during his disciplinary hearing was that he had been excused from any obligation to wear protective clothing by the owner of the business, a Mr Bezuidenhout, since he was a supervisor. The disciplinary hearing was chaired by Mr Botha, who also prepare the papers in this application and appeared on the applicant's behalf. Botha from the second respondent are guilty of the charge against him and dismissed him some relief. The reasons for dismissal were extended to include reasons that were not the subject of the original charge

sheet and which related to the second respondent's conduct after he had been charged.

- [4] The case that served before the commissioner was one that concerned the substantive and procedural fairness of the second respondent's dismissal. The arbitration proceedings were preceded by points in limine raised by the applicant. These related to a request previously directed to the management of the CCMA to move you arbitration to Randfontein, and a point relating to a second referral that had been initiated by the second respondent. The applicant's representative also raised the fact of that one of his key witnesses, De Beer, had been hospitalised and was unable to give evidence. In a most commendable fashion, the commissioner dealt with all of the preliminary issues and resolve them on the basis the arbitration would commence with Botha giving evidence as to the procedural aspects and that the matter would be postponed if necessary for further evidence.
- [5] In the result, Botha testified as to the disciplinary hearing that he had conducted and then inexplicably, closed the applicant's case. The second respondent then testified, and gave evidence as to Bezuidenhout's advice to him that it was not necessary for him to wear protective clothing given his status as a supervisor. The second respondent also gave evidence as to the conduct of the disciplinary hearing, but none of that evidence is material for present purposes.
- [6] In his award, and his analysis of the evidence, commissioner rejected all of the second respondent's challenges to the fairness of the procedure adopted prior to the second respondent's dismissal. As I have indicated, the commissioner concluded ultimately that the second respondent's dismissal was procedurally fair. That decision and the commissioner's reasoning leading to it have obviously not been challenged in the present proceedings and I need say no more about them. In so far as substantive fairness is concerned, the commissioner noted the definition of insubordination as a deliberate refusal to obey a reasonable and lawful instruction by an employer. The commissioner went on to note that the second respondent's undisputed evidence was that he had only taken umbrage

at the manner in which De Beer had addressed him and that Botha, to the extent that he gave evidence as to what transpired was not present and therefore unable to proffer direct evidence regarding the alleged incident. The commissioner went on to pursue that he had offered to adjourn the arbitration in order to afford the applicant the opportunity to call all of its witnesses but that for 'some strange reason' the applicant had closed its case after Botha's evidence. As such, the commissioner noted that there was no evidence before him that the second respondent had in fact refused to carry out De Beer's instructions, or that he had challenged De Beer's authority.

[7] As I have indicated, the applicant's grounds for review are difficult to discern. The applicant does not make out a case based on the reasonableness threshold, to which I refer to below. The applicant filed a statement of case, which I was advised I could ignore - quite rightly, since a statement of case has no place in motion proceedings. The founding affidavit is focused less on the commissioner's award than on the disciplinary hearing but be that as it may, the applicant appears to contend that because Botha was a witness to the disciplinary hearing, his evidence regarding substantive issues was not hearsay. When pressed during the hearing of the present application is to precisely what gross irregularities or misdirections the applicant asserted, Botha submitted that the case referred to arbitration by the second respondent was one that only concerned procedural fairness and that to the extent that the commissioner had found against the applicant on the issue of substantive fairness, that constituted a material misdirection.

[8] The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. *In Gold Fields Mining*

SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; it is incumbent on an applicant to establish that the result was unreasonable or ‘*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material*’. In other words, the review court must consider whether despite the arbitrator’s reasoning, the result is nevertheless capable of justification on the available material. Thus, material errors of fact on the part of the arbitrator, as well as the weight and relevance to be attached to particular facts or a failure to have regard to particular facts are not in themselves sufficient grounds for review; their effect must be to render the outcome unreasonable.

- [9] Precisely how this determination is to be made was the subject of recent guidance provided by the Labour Appeal Court. In head of the *Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. . The Court must nonetheless still consider with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence (at paragraph 31).

Further:

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 enquiry. 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 on the arbitrator's conception of the enquiry, the determination 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. The material error of this order would point to at least a *prima facie* unreasonable result.

- [10] What this analysis requires is that the review court determine first whether the arbitrator perpetrated any 'defect' or irregularity contemplated by s 145 (2). Secondly, the court must have regard to the distorting effect that the error may have had on the outcome of the arbitrator's award. Thirdly, if it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then the award is *prima facie* an unreasonable award. Finally, the court must have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test. Put more plainly, the review court must ask whether but for the defect, a reasonable decision-maker could have come to the conclusion reached in the award on the same material.
- [11] When conducting this analysis, the review court must avoid falling into the trap of what the Labour Appeal Court in *Gold Fields* referred to as a 'piecemeal analysis' of each of the arbitrator's findings. The question to be answered ultimately is whether on the totality of the evidence, a relationship of reasonableness exists between that evidence and the result reached by the arbitrator.
- [12] A useful summary of the test to be applied was the subject of a recent decision by the LAC in *South African Breweries v Hansen & others* (unreported 25 May 2017 CA 6/2016) where the court stated:

[10] The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*. It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* as follows:

'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) ...the Arbitrator must have misconceived the nature of the inquiry 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, 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.'

[11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields)*, this Court refined the *Sidumo* test by introducing a two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result (footnotes omitted).

- [13] As I have noted above, the applicant's grounds for review are so imprecisely expressed, they are insufficient to provide a case for any respondent to answer. Even if I accept the applicant's contention that the commissioner made a decision on substantive fairness, an issue that had not properly been referred to arbitration, there is no merit in this submission. First, this is not a ground for review disclosed in either the founding or supplementary affidavits. Second, the Constitutional Court has made clear that provided the dispute referred is one that is alleged to concern an unfair dismissal, the nature and extent of the dispute is a matter for determination by the commissioner if necessary. As I indicated above, the commissioner during the course of the proceedings made the observation that the dispute concerned both substance and procedure. This was never challenged during the course of the arbitration, and indeed, the arbitration was conducted on the basis that the second respondent disputed that there was a substantively good reason for his dismissal. In these circumstances, in my view, the applicant has failed to establish the existence of any gross irregularity or misdirection on the part of the arbitrator.
- [14] Even if I am incorrect in coming to this conclusion, and to the extent that the court is nonetheless obliged to satisfy itself that despite any misdirection on the part of the arbitrator the award is nonetheless sustainable by reference to the reasonableness threshold, I am satisfied after a perusal of the record that the arbitrator's decision is one to which a reasonable decision-maker could come having regard to the evidence. On an application of the principles established in *Goldfields*, the arbitrator clearly understood the nature of the enquiry before him, and afforded the parties an opportunity to be heard. His reasons for finding that the version advanced by the second respondent had not been challenged and ought to be sustained are not capricious, irrational or arbitrary.
- [15] For the above reasons, the commissioner's award states to be appealed and the application for review dismissed.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Employee

Labour Court