



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J440/17

In the matter between:

DELMAS COAL (PTY) LIMITED

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First

Respondent

COMMISSIONER LIZELLE KRIEL WESSELS

Second

Respondent

DOCTOR SIMON SEHALADI

Third Respondent

Application heard: 5 June 2018

Judgment delivered: 12 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the arbitrator'. In her award, the arbitrator held that the dismissal of the third respondent by the applicant was substantively unfair and reinstated the third respondent with retrospective effect.
- [2] The application was not opposed. On the day of the hearing, the third respondent attended at court and made submissions. I have taken these into account in coming to the conclusion reflected below.
- [3] The material facts are recorded in the award and I do not intend to repeat them here. It is sufficient to note that the third respondent was employed on the applicant's mine as a fitter. He was dismissed on 4 October 2016 on charges relating to the theft of company property, being in possession of stripped cables being the property of the applicant, gross dishonesty, illegally entering the work area and a failure to carry out a legitimate instruction.
- [4] At the arbitration hearing, four witnesses testified for the applicant; the third respondent then gave evidence. The evidence is captured in the award, but in summary, the applicant's second witness, Mr Dlamini, a security officer, testified that he received a report on 9 September 2016 that the third respondent and a co-employee, one Blessing, had been seen the previous day using a mine vehicle, without authorisation, exiting a gate not recognised as a general access gate. Consequent on this report, the third respondent and Blessing were placed under surveillance. Mafastela, also a security officer, testified that on the night of 15/16 September 2016, suspicious activity was reported at a T-junction on a gravel road close to the mine. He testified that while on his way to the mine, he met the third respondent on the road, pulled him over and requested him to

proceed to the mine. There he was informed that the third respondent was on what is known as a fatigue shift, meaning that he was not permitted to be on the mine's premises. The third respondent's vehicle was searched but nothing suspicious was found. Strip cable was later found in bags, dumped next to the gravel road where the third respondent had been seen. The witness testified further that on the night in question, the third respondent was dressed in his mine overalls, which was not allowed outside of the mine area. A further witness, Mr Mafastela, also a security guard, testified that on the night of 15 September 2016, in the early hours of the next morning, he saw a mine vehicle exit the mine premises and turn a T-junction onto the gravel road. He saw a passenger alight from the vehicle and offload bags, assisted by the driver. The two persons returned to the vehicle, which returned to the mine premises. The incident was reported, but the witness could not identify the two persons in the vehicle. The final witness, a Mr Victor Mothlutsi, testified that on the night of 15/16 September 2016 he received a call from the third respondent to assist him underground when he saw the third respondent and Blessing; they asked him to open a gate to load a bin containing rubbish.

- [5] The third respondent's case was that on 15 September 2016 he was granted a fatigue shift and went home and slept. At about 3 am the next morning he was contacted by a friend in Devon. He went to the friend, assisted him and returned home. On his way, he was stopped by Dlamini on a road near the mine. Dlamini searched the vehicle but nothing was found. He contested the charges against him on the basis that there were no access records relating to his alleged presence on the mine on 15/16 September 2015, and further that nothing was found on his person or in his vehicle, nor he was not identified as the culprit.
- [6] The arbitrator considered that the evidence adduced by the applicant was circumstantial in nature. In particular, she concluded that the evidence did not prove that the third respondent had permanently deprived the applicant of strip cable, nor proved that the third respondent was in possession of strip cable. It

was also not proved that the third respondent was in unauthorised use of the mine vehicle, or that he was on the mine at all on the night in question.

- [7] The arbitrator concluded that while the dismissal was procedurally fair, the applicant had failed to prove any of the charges against the third respondent and for that reason, she ordered his reinstatement, with retrospective effect.

- [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 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 have committed.
- [12] The applicant has raised nine grounds of review, all concerned in one way or another with the contention that the arbitrator failed to consider material evidence presented during the hearing.
- [13] The applicant avers that the arbitrator failed to have regard to evidence regarding the third respondent's prior suspicious conduct. In this regard, Dlamini gave undisputed evidence that at the time of the incident that led to the third respondent's dismissal, he was being monitored on account of suspicious conduct. The third respondent did not dispute that his conduct on the night of 8 September 2016 had been suspicious. Further, Dlamini gave direct and uncontested evidence that when the third respondent was pulled over in a vehicle close to the mine, he was wearing his mine-issued protective overall at the time. This version is supported by Mafastela's evidence under cross-examination when he testified that he saw two people wearing mine overalls. Further, Dlamini's undisputed evidence was that 'nobody is allowed to leave the mine with a uniform.' It was only during the third respondent's cross-examination that he averred that the overalls that he was wearing on the night in question were not mine issued overalls. This version had never been put to any of the applicant's witnesses. Under the pressure of cross examination, the third respondent changed his version on this issue more than once, and when he was ultimately confronted with uncontested evidence that he had been found in close proximity to the mine in his mine issued overalls while he should have been at

home on a fatigue shift, coupled with Mothlutsi's direct evidence that he saw the third respondent on the mine, any reasonable decision-maker would have concluded that the evidence was not circumstantial but instead demonstrably indicative of the fact that the third respondent was in fact on the mine on the night of 15 to 16 September 2016.

- [14] Further, in relation to Dlamini's uncontested evidence that strip cables were found in bags on the gravel road close to the mine, this version was borne out by the third respondent's own version in his evidence in chief, but ignored by the arbitrator.
- [15] In relation to the arbitrator's finding that it had not been proved to the third respondent was on the mine on the night in question, Dlamini gave direct and uncontested evidence that when questioning Mothlutsi on the night of 15/16 September 2016, Mothlutsi confirmed that he had seen the third respondent and Blessing on the mine. This version was corroborated by Mothlutsi when he gave evidence. He gave direct evidence of having seen the third respondent and Blessing on the mine on the night of the incident. This corroborating evidence was ignored by the third respondent.
- [16] During his evidence in chief, Dlamini testified that when Blessing had made a statement that implicated the third respondent in stealing cable from the mine. He further stated that he had seen the third respondent on the mine and in response to a question as to what he was doing there, he replied that he had come to collect his tools. While it is correct that Blessing was not called as a witness at the arbitration hearing, Dlamini was present when Blessing gave the statement. He confirmed that the handwritten statement produced was indeed that made by Blessing. This evidence was ignored by the arbitrator. Insofar as the arbitrator rejected Mothlutsi's evidence on the basis that no mine access records had been produced, it was the direct and uncontested evidence of the applicant's witnesses (as well as the third respondent's own testimony) that the mine could be accessed without an access card. There was further uncontested evidence before the arbitrator that one could access the mine premises and the

underground operation without an access card; this much was conceded by the third respondent during cross-examination. Dlamini testified that if one had a key to the rack-lift, it could be opened without a clock card, allowing access to the underground operation. It was not disputed that Blessing, the employee who maintained that the rack lift, had a key to the lift.

- [17] The arbitrator also ignored the fact that Mafastela's evidence corroborated both Blessing's statement and Dlamini's evidence. He testified that when he was at the T-junction, a car emerged from the mine premises, and that he observed the driver and passenger offloading goods from the rear of the car. This direct evidence directly corroborated Dlamini's version.
- [18] To the extent that the arbitrator found that it had not been proved that the third respondent was on the mine, this finding ignores the fact that Victor gave evidence that the third respondent and Blessing requested him to transport them from underground. At no point during cross examination did the third respondent put his version to Mothlusi that he was not on the mine and underground on the night in question. In short, the arbitrator failed to consider Mothlusi's material direct and uncontested evidence in conjunction with Dlamini's direct evidence of the third respondent's close proximity to the mine at the time when he pulled the third respondent over, his evidence that the third respondent ought to have been at home on a fatigue shift and not driving around anywhere in close proximity to the mine, Dlamini's evidence that the third respondent was wearing his mine-issued overalls at the time when he was pulled over, and Dlamini's evidence that the third respondent had been involved in suspicious activity on 8 September 2016, which gave rise to him being monitored. Had the arbitrator properly considered the material evidence of the applicant's witnesses, as well as the fact that much of that evidence was uncontested, she would have arrived at the conclusion that the evidence was not circumstantial but that it demonstrably indicated that the third respondent was in fact on the mine of the night of 15/16 September 2016, and that the third respondent was guilty of the offences with which he was charged..

- [19] Further, the arbitrator failed to consider the fact that the following versions emerged for the first time in the third respondent's evidence in chief, and that these were versions never put to any of the applicant's witnesses. First, that at approximately 3am on the morning of the incident, the third respondent drove to Devon to assist a friend to change a wheel. Secondly, that he did not go to the mine and that his access card was not used to access any of the turnstiles on the mine. The third respondent could not satisfactorily explain why these versions had not been presented at any earlier stage. During his cross-examination, for the first time, the third respondent disputed the contents of Blessing's statement. It is trite that if a party intends to lead evidence to contradict a witness and to argue that a witness's evidence should not be accepted, there is a duty to cross-examine the witness on the disputed facts by putting to the witness as much of the case that concerns that witness, so as to give the witness fair warning of an opportunity to explain the contradiction, and defend his or her own character. The third respondent's failure to cross-examine the applicant's witnesses on material issues that he ultimately challenged in his own evidence in chief or cross-examination, ought to have prevented him from later disputing the truth of the witnesses' evidence. Had the arbitrator properly assessed the evidence of the parties, she would have arrived at the conclusion that the material evidence of the applicant's witnesses ought to be accepted on the basis that it was never meaningfully placed in dispute by the third respondent, and that the challenge to their evidence emerged only for the first time during the third respondent's evidence in chief and his cross-examination.
- [20] To the extent that the arbitrator rejected the evidence given by the applicant's witnesses on the basis that it was circumstantial, it is trite that affected issue may be proved by direct or indirect (circumstantial) evidence and that circumstantial evidence is provided from associated facts from which the facts are inferred. It requires the decision-maker to draw inferences. Where the onus of proof is on a balance of probabilities (as it was in the present instance) the proved facts should be such to render the inference sought to be drawn more probable than any other reasonable inference. The evidence of the applicant's witnesses, but

for the statement of Blessing which may be construed as hearsay, was not circumstantial but direct. Mothlusi gave undisputed and direct evidence that he saw the third respondent and Blessing underground; Mafasetla's direct and uncontested evidence corroborated Blessing's statement, and the only inference that could be drawn from the evidence (coupled with the fact that the third respondent's contrary evidence was never put to the applicant's witnesses) is that the third respondent was guilty of the offences with which he was charged.

[21] In short, in my view, the only decision that a reasonable decision-maker could reach on the available evidence is that the uncontested evidence of the applicant's witnesses, together with the Blessings statement, demonstrated that the third respondent and Blessing were being monitored for suspicious behaviour on the night of the incident, that they were on the mine that night, that a mine vehicle was seen leaving the mine and the driver and passenger of that vehicle seen offloading something into the grass area where stolen cables were later found, that the vehicle returned to the mine and shortly thereafter another vehicle was seen leaving the mine, that the other vehicle was seen slowing down close to the area where the cables were later found, that the third respondent was pulled over his personal vehicle) close to the mine shortly after the other vehicle was seen leaving the mine, that the third respondent and Blessing were responsible for the theft of the cables, that it is possible to enter and exit the mine without an access card even though this was not permitted by the mine, that the third respondent ought to have been on a fatigue shift and not anywhere near the mine at the time. An holistic evaluation of all of the evidence points only toward the undeniable conclusion that the third respondent was guilty of the misconduct with which he was charged.

[22] In summary, had the arbitrator properly considered and assessed the evidence before her, she would have arrived at the conclusion that the third respondent was guilty of the misconduct that he was alleged to have committed. It is the only decision to which a reasonable decision-maker could come on the available

material. For these reasons, the arbitrator's award stands to be reviewed and set aside.

[23] Finally, there is little merit in remitting the matter for rehearing. All of the available evidence is before the court, and the court is in as good a position as any arbitrator would be to make a decision. I intend therefore to substitute the award with one to effect that the third respondent's dismissal was substantively fair.

I make the following order:

1. The arbitration award issued by the second respondent on 5 February 2017 under case number MP 9398-16 is reviewed and set aside.
2. The award is substituted by the following:
 'The applicant's dismissal was substantively and procedurally fair.'

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. A Mosam instructed by Stein Scup Attorneys

For the respondent: In person