



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR329/16

In the matter between:

NUMSA OBO MAKGAE AND 3 OTHERS

Applicant

and

**CIVIL AND POWER GENERATION
PROJECTS (PTY) LTD**

First Respondent

MEIBC

Second Respondent

DAVID G LEVY

Third Respondent

Heard: 21 November 2018

Delivered: 30 November 2018

Summary: An opposed review application – An award issued in terms of section 188A has the same status as an arbitration award – the test for review remains that of a decision falling within the bounds of reasonableness. Held (1) The application is dismissed. (2) Each party to pay its own costs.

JUDGMENT

MOSHOANA, JIntroduction

- [1] This is an application seeking to review an award issued in terms of section 188A of the Labour Relations Act¹ (LRA). The applicant contends that the arbitration award is not one that a reasonable arbitrator may arrive at. It is an award tainted with defects. The application is opposed by the first respondent.

Background facts

- [2] The first respondent is subcontracted to Mitsubishi, one of the primary contractors at the Eskom SOC (Pty) Ltd - Medupi Power Station construction site. It provides scaffolding, insulation and sheet metal work. It employed the applicant's members, namely, Makgae, Sindane, Sibiya and Shabalala (hereinafter referred to as the dismissed employees). On or about 25 March 2015 employees at Medupi Power Station embarked on some industrial action and submitted a memorandum of demands to Eskom.
- [3] Following the above, the dismissed employees were charged with acts of misconduct; involving participation in an unprotected industrial action (25 March-30 April 2015); failure to comply with the Labour Court order served on 17 April 2015 and continued refusal to follow a direct and lawful instruction in that the dismissed employees ignored ultimatums issued on 24 and 25 April 2015 instructing them to report for duty.
- [4] Following an arbitration conducted in terms of the provisions of section 188A of the LRA, the dismissed employees were found guilty and dismissed. Aggrieved by their dismissal, the applicant launched the present application on their behalf.

¹ 66 of 1995, as amended.

Grounds of Review

- [5] The applicant alleges that in returning a finding of guilty on the charge of participation in an unprotected strike action for the duration in question, the third respondent committed a gross irregularity since there was no evidence presented proving participation. The third respondent failed to take into account the evidence tendered in defence by the dismissed employees, thereby committing misconduct. Certain of the findings by the third respondent were unreasonable and irrational. The award is not one that a reasonable arbitrator faced with the same facts and evidence could have made. In supplementing the grounds already submitted, the applicant alleged that the third respondent descended into the *arena* and such affected his impartiality. During argument, Mr Ngako fashioned a further ground not properly² foreshadowed in the papers to the effect that the third respondent did not invite mitigating factors. He simply ordered dismissal without more.

Evaluation

- [6] By now it is trite what the test for review in this Court is. The allegation that there was no evidence that the applicants participated in an unprotected strike action seem to ignore the evidence of Mr Weideman, Mr Wilkins, Mr Hart and Mr Schutte. All of them testified before the third respondent with regard to the events of the strike action. Further, the dismissed employees gave an account of what happened, such is evidence. It is one thing to argue that there was no evidence, it is another to argue that the evidence was not sufficient. It seems to me that because the dismissed employees denied participation, the applicant is concerned about the sufficiency of the evidence “disproving” their denial.

² In the supplementary affidavit an allegation was made that there was an absence of evidence of trust relationship having deteriorated.

- [7] Arbitration proceedings are civil proceedings. The standard of proof is that of the preponderance of probabilities. As such hearsay and circumstantial evidence is admissible in arbitration proceedings. Where a decider of facts is faced with conflicting versions, in order to arrive at a conclusion, he or she must weigh the probabilities. The exercise of weighing probabilities may include making of credibility findings. If a decision maker makes credibility findings *en route* conclusions, he or she does not commit any irregularity nor misconduct.
- [8] Perusal of the detailed award by the third respondent reveals that the third respondent conducted a careful and detailed analysis of the evidence presented before him in order to resolve the conflicting versions. His findings were supported by the evidence presented before him. I have no basis to fault this finding:
- “100. I find the argument difficult to accept in the light of the testimony of Weideman and Schutte to the effect that the march had the obvious blessing of the full time NUMSA shop stewards (Lebone) and that Modike himself signed the memorandum of demand in which it was expressly stated that there would be a “*total withdrawal of labour*” in the event that the demands were not met by 27 March 2015.”
- [9] It is crystal clear that the third respondent was actuated into the decision by weighing the balance of probabilities. Makgae himself testified that he joined the march. On the balance of probabilities, the third respondent rejected the evidence of Makgae that he had no option but to join the march. He found that he acted voluntarily on the probabilities.
- [10] The duty of a court of review is to assess that a decision is one that falls within the bounds of reasonableness. As a court of review, I peep into the merits, not to substitute the decision of the decision maker, but to establish whether the decision is consistent with the evidence led. I may not like the finding, but I cannot usurp the powers of the decision maker.

Accordingly, the third respondent did not commit a gross irregularity as alleged. This ground of review is bound to fail.

[11] Rejecting evidence as being false does not suggest that the evidence was not considered. A proper reading of the award reveals that the third respondent took the trouble of considering each of the dismissed employees' defences. If he does not accept the defences for reasons of improbability and or credibility, it is not the duty of this Court to force, as it were, the decision maker to accept the defences. The third respondent did not commit any misconduct which would vitiate his award in law. Equally, this ground is doomed to fail.

[12] The allegation of descending into the *arena* is more a matter of opinion than fact. Section 138 of the LRA, behooves an arbitrator to resolve a dispute fairly, quickly, deal with the substantial merits and with the minimum of legal formalities. Therefore, any approach adopted by an arbitrator that conforms with the requirements of s 138 is beyond scrutiny. It is, in my view, actually inappropriate to dictate the approach to be adopted by an arbitrator. Of course, if the approach is tainted by elements of unfairness, it shall not meet with the approval of the supervisory body – the Labour Court. To my mind an arbitrator is entitled to question the witnesses that testify before him or her.³

[13] Accordingly, I am not satisfied that the alleged descent is one that is unfair and unjustifiable. It is in order for an arbitrator to show incredulity to a witness. After all it is his or her duty to arrive at the truth. This ground must fail too.

[14] The ground that the third respondent was obligated to invite mitigating factors depends largely on whether such is commanded in the LRA. Section 188A (9) provides that an arbitrator conducting an inquiry in

³ See: *Impala Platinum Ltd v Jansen* [2017] 38 ILJ 896 (LAC) at paras 23-29.

terms of the section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, rule as to what action, if any, may be taken against the employee. The section does not prescribe that mitigating factors must be invited. Schedule 8 of the LRA does not make such a requirement. Participating in an unprotected strike for any duration is a serious misconduct. In terms of Schedule 8, dismissal as a sanction is appropriate for a serious misconduct. It is not always the case that before a sanction of dismissal can be viewed as being fair, evidence of a broken trust relationship must be led. A serious misconduct by itself breaks a trust relationship.

[15] In summary, the first respondent did not commit any irregularity nor misconduct. His findings fall within the bounds of reasonableness. The award is free of any defect and is thus not reviewable in law.

[16] Regarding costs, I am of a view that an appropriate order is for each party to bear its own costs.

[17] In the results I make the following order:

Order

1. The application is dismissed;
2. Each Party to pay its own costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr X Ngako of Ruth Edmonds Attorneys Inc,
Observatory.

For the 1st Respondents: Mr D Pretorius of Fluxmans Inc, Rosebank.

LABOUR COURT