



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C 792/2016

**NATIONAL UNION OF MINEWORKERS obo
MOENG AND 15 OTHERS**

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

THEO POTGIETER N.O

Second Respondent

PMG MINING (PTY) LTD

Third Respondent

Heard: 14 November 2018

Delivered: 16 November 2018

**Summary: Review application. No merit in the grounds for review.
Application dismissed.**

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 21 October 2016 wherein the Second Respondent (the arbitrator) found the individual Applicants' (the employees) dismissal substantively and procedurally fair and effectively dismissed their case.
- [2] The Third Respondent (the employer) opposed the review application.

Evidence adduced

- [3] In order to assess the arbitrator's findings and the award he issued, it is necessary to consider the reasons why the employees were dismissed and the evidence adduced at the arbitration proceedings.
- [4] The employees were employed as truck operators and in April 2016 they were issued with an instruction to complete the Dover test. Only two truck drivers completed the Dover test as per the instruction and the remainder of the truck drivers were charged with gross insubordination and failure to obey a reasonable and lawful instruction in that they failed to undergo a Dover test. A disciplinary hearing was held on 15 April 2016 and the employees were all dismissed on 12 May 2016.
- [5] The issues to be decided at arbitration were whether the instruction to do a Dover test was a lawful and reasonable instruction, whether the failure to do the test constituted gross insubordination and whether the sanction of dismissal was fair and appropriate.
- [6] The employer's first witness, Mr Barry van Scheltinga (Mr van Scheltinga), testified *inter alia*, about the process followed when the employees were charged. He referred to a letter written to the union wherein it was explained that the requirement to undergo the Dover test is not a variation of any term or condition of employment, but it was a requirement of the Mine Health and Safety Act¹ (MHSA) and therefore a lawful and reasonable instruction. It was made clear that any driver who refused to undergo the test, would be subject

¹ Act 29 of 1996.

to disciplinary action and NUM was asked not to prevent its members from undergoing the test, but was requested to assist to engage with the NUM members and to encourage them to do the testing. The way forward could be discussed once the outcome of the tests was available.

- [7] Mr van Scheltinga testified that the instruction to the employees was to report to the training centre and to undergo a Dover test. Completion of the Dover test was the first stage of the training programme the employees had to undergo for transition from operating the suspended trucks to become qualified to operate the new trucks the employer procured. A failure or refusal to complete the Dover test would constitute a serious breach of the employer's rules and the applicable health and safety legislation and would lead to disciplinary action, which might lead to dismissal. The written instruction was dated 7 April 2016 and was issued to the employees on 8 April 2016. The employees were requested to sign to acknowledge receipt of the instruction, but they refused to accept it.
- [8] This instruction followed after the employees were informed on 6 April 2016 that they had to do the Dover test on 7 and 8 April 2016, which they refused to do.
- [9] Mr van Scheltinga testified that it was explained to the employees on 6 April 2016, when they were told to go for the Dover test, that the Dover test is a hand eye coordination test and that if a person failed the test, the test cannot be done again for a period of 12 months. The employees were also informed that if they fail the test, they would not be able to operate the trucks and that the employer would engage with such individuals and the union on a way forward. However, the employer made it clear that it was unlikely that anybody would fail the test as the test is not an onerous test, more so where the employees were operating the trucks for a long time. Once an employee passed the test, it opened the door to further training to operate the new trucks at the mine.
- [10] Mr van Scheltinga testified that the employer tried to explain and answer the employees' questions and queries on 6 April 2016, but the meeting

disintegrated into chaos when the employees started shouting and screaming and walked out of the meeting.

- [11] Three shop stewards later returned to have a discussion with Mr van Scheltinga and Mr Kabaah and they insisted that the matter be discussed with NUM. The employer conceded to the request and a meeting with NUM was arranged for 14:00 on the same day. The outcome was that the employees refused to do the Dover test until such a time that the employer gave them a guarantee that if anybody failed the test, they would be maintained at the level of truck driver, regardless whether they worked in a lower capacity or not. Mr van Scheltinga testified that it was unreasonable for the employer to be held ransom to make a commitment about an event that has not happened yet or was unlikely to happen at all. He described the demand by the union and the employees that the employer must enter into a collective agreement with NUM on 'grandfathering', effectively a guarantee that the employees would not lose any income or benefit, regardless of the outcome of the Dover test, as unreasonable.
- [12] The employer committed in writing to further engagement with the union and employees, should it become necessary in the event that somebody failed the test. The employer anticipated that all the employees would pass the test. The Dover test is a prerequisite and a requirement from the Department of Mineral Resources for the employees to be trained on the new trucks.
- [13] In cross-examination it was asked of Mr van Scheltinga why Mr Ndlovu was dismissed. He responded that Mr Ndlovu was dismissed for gross insubordination and failure to obey a reasonable and lawful instruction in that he failed to undergo the Dover test. It was put to Mr van Scheltinga that Mr Ndlovu was on leave from 11 – 15 April 2016, upon which he responded that Mr Ndlovu was at work on 6 and 8 April 2016 and he received the lawful and legitimate instruction to undergo the Dover test.
- [14] Mr van Scheltinga agreed that Ms Maggie Olyn (Ms Olyn) was not at work on 8 April and that she was on sick leave as from 11 – 12 April 2016, but stated that she was aware that she was required to do the Dover test and she was

dismissed because when she returned from sick leave, she did not approach the employer with a view to do the Dover test.

- [15] Mr Edwin Sefako testified that he was employed as an engineer at Bishop Mine and he explained that section 8(3) of the MHSA requires an employer to prepare and implement a code of good practice. The employer prepared a code of practice for trackless mobile machinery (TMM), which was circulated and once it was signed off, it became the mandatory code of practice for the mine. The said code was signed in October 2014 and was signed by Mr Booysen, the NUM representative.
- [16] Clause 8.12.4 of the code provides that every person who operates trackless mobile machinery will undergo a physical assessment and Dover testing as part of the selection criteria prior to being deemed as competent and authorised to operate any TMM.
- [17] Mr Sefako testified that only two truck drivers did the Dover testing and after they did the test, they received further training and they are deemed competent and they were appointed and authorised to operate the TMM.
- [18] Mr Sefako testified that it had been a requirement for operators of TMM's at Bishop mine to have completed Dover tests since October 2014 to comply with the statutory requirements. It was however only done in April 2016.
- [19] Mr Kwah Kabaah (Mr Kabaah) testified that he is the mine manager at Bishop Mine. He testified that in November 2015 the Department of Mineral Resources suspended the operation of the employer's trucks, as a result of which the employer had to rent other trucks to operate the mine. The employer subsequently purchased a new fleet of trucks. The contract with the company that was contracted to provide the trucks, ended on 25 April 2016 and it was necessary for the employer to train its own employees to use the new wagger trucks so that the employer would no longer incur the extra cost of renting the trucks and operators. On 6 April 2016 a meeting was held with the truck operators so that they could be assisted and trained to be competent and qualified to operate a truck.

- [20] In the meeting of 6 April 2016, the truck operators refused to do the Dover test, where after a meeting was held with the union. The NUM wanted a written guarantee from the employer to the effect that the employees would still receive their salaries and benefits, even if they failed the test and would not be qualified to operate a truck. The employer was unable to provide such a guarantee and explained to the union and employees that for them to operate a truck, they need to follow the process in terms of the instruction from the Department of Mineral Resources and they have to comply with the applicable legislation and be declared competent before they could operate a truck. The employees refused and a written instruction was subsequently issued on 8 April 2016, which they refused to accept. Two truck operators accepted the instruction, went for the test, they were trained and are now qualified.
- [21] Mr Kabaah testified that on 6 April 2016 the Dover test was explained to the employees and he testified that the Dover test is to test an employee's coordination. The employees were not prepared to listen to anyone and they said that they would not do anything until the employer gave them the guarantee that they would retain their salaries and benefits. Mr Kabaah testified that the employees were informed that should they be unsuccessful in the Dover test, there will be a consultation process with human resources to find a way forward. The Dover tests were scheduled for 7 and 8 April 2016 and the employees were instructed to attend those. When they refused, a written instruction was issued for them to attend the Dover test at specified time slots on 11 and 12 April 2016.
- [22] The employer's last witness was Mr Joel Reddy, who testified that at the time of the incident he was the senior human resources officer. He testified that on 8 April 2016 there was a meeting with the truck operators in the boardroom but they were not willing to take their seats and they were unruly. Mr Reddy explained to them that he needed to read out the instruction to them. He read out the instruction in English and a colleague read it out in Afrikaans and it was explained to the employees what the content of the written instruction was. It was explained that the written instruction was addressed to each

individual and that it specified a date and time on which they had to do the Dover test, which was scheduled over a period of two days, namely 11 and 12 April 2016. Mr Reddy testified that half way through the meeting the employees became unruly again and he tried to explain what the instruction was. The employees refused to sign acknowledgement of receipt of the written instruction.

[23] Mr Reddy testified that he asked the employees whether they understood what was explained to them and they responded that they understood but they disagreed with the instruction and that was when they walked out. Mr Reddy left the letters on the table for the employees to collect, but only two truck operators signed for their letters. The rest of the employees refused to sign for their letters, they refused to take the written instruction and they refused to do the Dover test.

[24] In respect of Mr Ndlovu, it was testified that he was present on 8 April 2016 when the instruction to attend the Dover test was given and that Mr Ndlovu said he would not take the test. According to him, Mr Ndlovu never indicated that he was unable to do the test on 11 April 2016 because he was on leave, he said he would not do the test.

[25] The employees' version put to the employer's witnesses was that the instruction to do the Dover test was not issued to them. In view of the evidence as per the transcribed record, this version is far-fetched and improbable.

[26] Ms Olyn testified on behalf of the employees. She testified that on 6 April 2016 management called all the truck drivers to a meeting where Mr Kabaah introduced Mr Schletinga as the new human resources manager and where the employees were informed about the Dover test that had to be done the next day. The employees asked questions because they did not know what the Dover test was and Mr Kabaah said that they should not be scared because they have been driving for a long time and the test entailed using your hands, feet and eyes to see how fast one could react. Ms Olyn's complaint was that Mr Kabaah never showed them the machine on which the

Dover test was to be conducted. Mr Kabaah said he did not know what would happen if an employee was to fail the test, but he said that they would see after the results of the test.

- [27] The employees contacted the union and on the same day (6 April 2016) the union had a meeting with the employer wherein the employer was asked to provide a written guarantee that the Dover test results would not affect the employees and their salaries. The employer refused to give such a guarantee.
- [28] Ms Olyn testified that in terms of the employer's disciplinary code, the sanction to be imposed for gross insubordination is a final written warning.
- [29] It is evident from the transcribed record that Ms Olyn had difficulty to respond to questions in cross-examination. Her version was that she had not done the Dover test, but she never refused to do it. She testified that she was not at work on 7 and 8 April 2016. Ms Olyn said that she never raised the issue that she was on sick leave during the disciplinary hearing because she was not asked about it.
- [30] Ms Olyn conceded that she was part of the meeting on 6 April 2016 and that at the meeting the Dover test was explained and that the employees' questions regarding the test were answered. Ms Olyn also testified that if the employer had given the 'grandfathering' guarantee, she would have done the Dover test.
- [31] The last witness was Mr Daniel Riet (Mr Riet) who testified that he was employed as a truck driver. On 6 April 2016 the truck drivers were called to a meeting with Mr Kabaah and Mr van Scheltinga and they told the employees about the Dover test. The employees asked questions about the Dover test, such as what would happen to the truck drivers who fail the test. Mr Kabaah responded that they should not worry as they would remain employees of the employer. The employees asked for a preparation test but Mr Kabaah said it would cost the employer too much money. Mr Kabaah said the testing was a matter of urgency.

- [32] Mr van Scheltinga informed the employees that the issue whether their jobs and salaries would be affected, was an issue to be discussed.
- [33] Mr Riet testified that he knew what a Dover test was as he had done it before with the companies he was previously employed with and he had a Dover testing certificate. He testified that he was surprised to see that Dover testing was not done at the employer. Strangely enough Mr Riet testified that the issue with Dover testing at the employer was that the reason why Dover testing had to be done was not explained and according to him there was no reason for Dover testing.
- [34] Mr Riet testified that Mr Kabaah said he did not need 25 truck drivers and this was an attempt to get rid of many of the truck drivers. This version was however not put to Mr Kabaah or any of the employer's witnesses.
- [35] Mr Riet explained that there was no explanation on how the Dover test would work and the employees feared for their future and what was going to happen to them should they fail the Dover test. He disputed that Mr Kabaah explained on 6 April 2016 what the Dover test is and what it entails.
- [36] Mr Riet testified that if there was consultation on the Dover test and if the employer was prepared to sign the agreement as requested by the union, he would have done the Dover test.
- [37] Mr Riet testified that the employees did not refuse to do the Dover test, but they requested a guarantee from the employer that their positions and remuneration would not be affected in the event that they fail the test, but the employer failed to provide that. He disputed that he had received a written instruction on 8 April 2016 to go for the Dover test on a specified date and time. In cross-examination he however conceded that the instruction was read out in English and Afrikaans at the meeting on 8 April 2016.
- [38] Mr Riet filed an appeal but it was never considered by the employer. His case is that a final written warning is the prescribed sanction for gross insubordination in the employer's disciplinary code and the sanction of dismissal was too harsh.

The arbitrator's findings

- [39] In respect of procedural fairness the arbitrator found that the employer followed a fair procedure in dismissing the employees. This finding was based on the fact that no evidence was adduced during the arbitration proceedings to support the employees' case that the chairperson of the disciplinary hearing was biased. The arbitrator further found that the union was at all times aware that their shop stewards were part of the employees charged with misconduct and in fact the evidence showed that the union was involved in this matter since it engaged with the employer on 6 April 2016.
- [40] Although the Applicant alluded to the arbitrator's findings in respect of procedural fairness in its founding affidavit, this is not persisted with or addressed in the Applicant's heads of argument.
- [41] In argument I confirmed with Mr Dlamini, acting for the Applicant, that I could accept that the grounds for review as set out in the Applicant's heads of argument are the grounds for review the Applicant was persisting with and are the grounds this Court has to consider. I therefore accept that the Applicant has abandoned its grounds for review relating to the arbitrator's findings on procedural fairness.
- [42] In respect of substantive fairness the arbitrator found that the employees and the employer presented mutually exclusive versions and that the evidence tendered on behalf of the employees was also mutually exclusive in respect of whether the Dover test was explained and the reason for the refusal to undergo the said test.
- [43] The arbitrator accepted that a lawful and valid instruction was given in order to comply with safety legislation. The arbitrator was satisfied that the instruction was given and that it was disobeyed as the employees refused to undergo the Dover test until such time that a written guarantee of job security was given. The employees' evidence was that they would have done the Dover test if the employer had given them a written guarantee that they would retain their jobs and salaries, irrespective of the outcome of the test.

- [44] On the appropriateness of the sanction the arbitrator considered the arguments and authorities referred to by the parties. He held that the employees held the employer at ransom which not only jeopardized their jobs, but the jobs of all workers at the mine in that the Department of Mineral Resources would close the mine due to non-compliance with safety regulations. The continued refusal, even after the employees were suspended and called to a disciplinary hearing, and the manner in which they refused, confirmed that the employees acted grossly insubordinate and failed to accept the authority of the mine manager and those in managerial positions instructing the employees to undergo the Dover test.
- [45] The arbitrator found the employees' dismissal fair and rejected the employees' notion that they could act as they did because the disciplinary code suggested a written warning for insubordination as a misconception of the employment relationship and the duties and obligations emanating from it.
- [46] The arbitrator concluded that the insubordination was gross and that, taking all the circumstances into consideration, dismissal was an appropriate sanction.

The grounds for review

- [47] In the Applicant's heads of argument three main grounds for review are raised.

The sanction

- [48] The first ground for review as set out in the Applicant's supplementary affidavit and heads of argument relates to the issue of sanction.
- [49] Specific issue is taken with paragraph 31 of the arbitration award wherein the arbitrator found that *"The applicants by saying that they could act as they did, because the code of practice suggested a written warning for insubordination, is a complete misconception of the employment relationship and duties and obligations emanating therefrom. I find that the respondent has shown that the*

misconduct (insubordination) was gross and that dismissal was the appropriate sanction taken all the circumstances into consideration.”

- [50] The Applicant's case is that the arbitrator failed to appreciate that the employer's disciplinary code recommended a final written warning for a first offence of gross insubordination. It was no answer to this point to find that the insubordination was gross.
- [51] There are a number of difficulties with this ground for review. The disciplinary code specifically provides for 'misconduct and guidelines to appropriate action' and it listed a final written warning for a first offence and dismissal for a second offence as recommended sanctions in the event of gross insubordination. On the Applicant's own version these were recommended sanctions.
- [52] It is evident from the wording of the disciplinary code that the sanctions to be imposed for the listed acts of misconduct are nothing more than 'guidelines' and recommended sanctions. The disciplinary code further stipulates that 'depending on the circumstances, the below could be viewed as gross misconduct if the employer / employee relationship is adversely impaired or PMG Mining (Pty) Ltd's property and / or operations are jeopardised or any lives are endangered.'
- [53] The sanctions listed in the disciplinary code are no more than recommendations or guidelines and an appropriate sanction has to be determined depending on the circumstances.
- [54] *In casu*, the arbitrator considered the circumstances and he recorded the following factors before concluding that dismissal was an appropriate sanction:
- 54.1 That a lawful and valid instruction was given in order to comply with safety legislation;
 - 54.2 The instruction was disobeyed and would only be obeyed if the employer gave a written guarantee as to job security;

54.3 The refusal was persisted with;

54.4 The employees held the employer at ransom which not only jeopardized their jobs, but the jobs of all workers at the mine;

54.5 There was a possibility that the Department of Mineral Resources would close the mine due to non-compliance with safety regulations and the employees failed to accept the authority of the mine manager and those in managerial positions.

[55] Under the said circumstances the arbitrator found the employees' dismissal fair and an appropriate sanction.

[56] The Applicant's case seemingly is that because the disciplinary code recommended a final written warning, they should have received no other sanction than a final written warning and because there was deviation from the recommended sanction, their dismissal is unfair. The complaint is that the arbitrator failed to appreciate the recommended sanction of a final written warning.

[57] There is no merit in the first ground for review. Firstly because the disciplinary code merely provides guidelines on sanction, depending on the circumstances, and secondly, the arbitrator has considered the relevant factors and circumstances in deciding the appropriateness of the sanction of dismissal and he evidently applied his mind to the question of sanction. Based on the circumstances that prevailed in this case and the conduct of the employee, dismissal was appropriate and such a finding is not unreasonable.

Mr Ndlovu and Ms Colyn

[58] The second ground for review relates to Ms Olyn and Mr Ndlovu.

[59] The Applicant's case is that the arbitrator failed to deal with the fact that Ms Olyn and Mr Ndlovu were not at work on 11 and 12 April 2016 as they were on sick leave and vacation leave respectively and that the arbitrator acted unreasonably when he confirmed the dismissal of the said individuals, who were not at work on 11 and 12 April 2016. The arbitrator provided no reason

for finding the dismissal of Ms Olyn and Mr Ndlovu fair in circumstances where they could not have been found guilty of the offence for which they were dismissed.

[60] A perusal of the arbitration award shows that the arbitrator indeed made no separate findings in respect of Ms Olyn and Mr Ndlovu. The question is whether the failure to make specific findings on the said individuals renders the arbitration award reviewable.

[61] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*² affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[62] The Court further held that a piecemeal approach should not be followed when it said³:

‘In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing 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 reviewing 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.

To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly.’

[63] This Court, sitting as a review Court, should not follow a piecemeal approach but should consider whether the arbitrator dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was adduced.

² (2014) 35 *ILJ* 943 (LAC) at para 16

³ *Id* n 3 at para 18.

- [64] The Applicant, relying on the wording of the charge sheet, seeks to limit the case to the events of 11 and 12 April 2016 and for those events to be considered in isolation and as events independent from any other. The Applicant's case is that Ms Olyn and Mr Ndlovu were not at work on 11 and 12 April 2016, the days on which the test was scheduled to take place, and as such they could not be found guilty of gross insubordination, as they were not there to refuse to take the test and thus they were not insubordinate.
- [65] The approach adopted by the Applicant is over technical and not consistent with the applicable authorities, which made it clear that the review Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence that was before the arbitrator.
- [66] The record shows that the evidence before the arbitrator was that the truck operators were instructed on 6 April 2016 to do a Dover test on 7 and 8 April 2016, but they refused to obey the instruction in the absence of a written guarantee from the employer that their positions and remuneration would not be affected, irrespective of the outcome of the Dover test. The employer was unable to give such a guarantee but indicated to the employees that they would remain employees and depending on the outcome of the Dover test, they would be engaged on a way forward. If the employees passed the test, they would be taken for further training and the employer clearly anticipated that all the employees would pass the Dover test, which was a prerequisite for them to be trained and be declared competed to operate the new fleet of trucks acquired by the employer.
- [67] As a result of the refusal to obey the instruction given on 6 April 2016, the employer issued a written instruction on 8 April 2016, instructing the employees to go for Dover testing on specific dates and times between 11 and 12 April 2016. The tests to be conducted on 7 and 8 April 2016 were rescheduled to 11 and 12 April 2016.
- [68] In my view it is evident that the instruction the employer issued on 6 April 2016, namely that the truck operators should go for Dover testing, remained

the same instruction that was issued in writing on 8 April 2016. The instruction remained consistently the same, namely that the employees should go for Dover testing. The instruction *per se* never changed. What changed was the variable of the date on which the testing was to be conducted. Initially the testing was scheduled for 7 and 8 April 2016, but as the employees refused to go for testing on the said dates, it was rescheduled to 11 and 12 April 2016.

- [69] The employees' refusal, including that of Ms Olyn and Mr Ndlovu, to do the Dover test remained consistent and the reason for their refusal remained the same, namely that until and unless the employer gave a written guarantee or agreed to a grandfathering agreement that the employees' positions and remuneration would remain the same, they would not agree to take the Dover test.
- [70] The reason for dismissal was the failure to obey a lawful instruction, namely to do the Dover test, and to tie this to a specific date namely 11 and 12 April 2016 and say that because a specific individual was not at work on that specific date, is opportunistic, given the specific facts and the context of this case. The thrust of the charge was that the employees failed, neglected and / or refused to undergo the Dover test and the date on the charge was merely inserted as the date on which the test was scheduled. The date is not the essence of the charge and the employees' conduct should be viewed in a proper context.
- [71] Ms Olyn and Mr Ndlovu were present in the meeting on 6 April 2016 when the instruction was given and it is evident from Ms Olyn's evidence that she was well aware of the instruction that was given on 6 April 2016 and that she was told what the Dover test entailed. It is further evident from her testimony that she would have done the Dover test only if the employer gave the guarantee that the union demanded as on her own version, she was afraid to do the test without the guarantee. Up to the arbitration she maintained this stance and at no point did she tender or indicate a willingness to do the Dover test in the absence of a guarantee by the employer. In my view this is nothing but a refusal to comply with a lawful instruction and Ms Olyn's absence on a specific date, does not change the fact that she refused to obey the

instruction. Ms Olyn's refusal was not linked or limited to a specific date, but it was a generic refusal to do the test, absent a guarantee from the employer.

[72] In respect of Mr Ndlovu the undisputed evidence was that he was present on 6 and 8 April 2016 when the instruction was issued and he received the lawful and reasonable instruction to undergo the test. Even if Mr Ndlovu was on leave on 11 and 12 April 2016, there is no explanation why he did not comply with the instruction given on 6 April 2016 to go for the test on 7 or 8 April 2016, prior to the commencement of his leave and the only reasonable inference is that he never had the intention or inclination to comply with the instruction. His refusal too was not linked to or limited to a specific date.

[73] Ms Olyn and Mr Ndlovu, as the other employees, were instructed to undergo the Dover test, they were aware of the instruction and they failed or refused to comply with the instruction. There is no basis to differentiate between Ms Olyn and Mr Ndlovu on the one hand and the rest of the employees on the other and the arbitrator's failure to deal with them separately and individually, does not render the arbitration award unreasonable and reviewable.

Gross irregularities

[74] The Applicant submitted that the arbitrator committed gross irregularities in the conduct of the proceedings, failed to apply his mind to the issues before him and issued an award that no reasonable arbitrator could have issued.

[75] This ground for review is no more than a 'catch all' ground for review and does nothing more than to tabulate conclusions without substance. In the heads of argument no argument is advanced in support of this ground for review and a perusal of the founding and supplementary affidavits show that no grounds, apart from what had been dealt with *supra*, are advanced to support and substantiate this ground for review. There is thus no merit in this ground for review.

[76] I have to deal with the merits of the review application within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg*

*Platinum Mines Ltd and Others*⁴ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[77] The test is thus whether the decision reached by the arbitrator is one that a reasonable decision maker could have reached based on the material and evidence placed before him or her during the arbitration proceedings.

[78] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I am satisfied that the arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make.

[79] In conclusion: the grounds for review raised by the Applicant, have no merit as the award and the findings contained therein are reasonable and are not to be interfered with on review.

Costs

[80] The Court has a broad discretion to make orders for costs according to the requirements of the law and fairness.

[81] Mr Badenhorst for the employer submitted that the employer was not persisting with a cost order due to the ongoing relationship between the employer and NUM. Mr Badenhorst however highlighted the sad state of affairs as the employees are left unemployed in an industry with excessive job losses, in circumstances where their dismissal could have been avoided *in toto*. There is something to say about this.

[82] *In casu* I am faced with an employer that operates under the provisions of the MHPA and under the supervision of the Department of Mineral Resources, who had issued a notice to halt mining operations, pursuant to section 54 of the MHPA, regarding the particular trucks used on the mine. When the employer purchased a new fleet of trucks to be compliant, the truck operators

⁴ (2007) 28 ILJ 2405 (CC) at para 110.

had to be declared as competent and the first step in that process was the Dover test, where after further training would follow. When the employer issued an instruction for truck operators to undergo the Dover test, only two drivers complied and they were trained and are competent to operate as such. The employees on the other hand, refused to comply with the instruction and literally held the employer at ransom and demanded a written 'grandfathering' agreement, absent which they would not comply with the instruction.

- [83] The worst part is that the NUM became involved in the matter on 6 April 2016 and notwithstanding the employer's pleas with NUM to engage with the employees and to encourage them to do the Dover test, it did none of that, but instead demanded a 'grandfathering' agreement from the employer. This conduct was not only unreasonable, as the NUM never disputed that the employer had to comply with safety legislation and the Dover test was provided for in the code of good practice, signed by NUM in October 2014, but it was also irresponsible. It was never open to NUM and the employees to demand the guarantee as they did from the employer.
- [84] In my view the union has a lot to answer as the dismissal of the employees could have been avoided had they acted differently, reasonably and responsibly with the interest of the workers in mind and with due observation of the employer's obligation to comply with safety legislation and the employees' obligation to comply with lawful instructions. Instead, the attitude adopted placed the employer at risk and jeopardized the employees' future employment.
- [85] The refusal to undergo the Dover test until the employer assured them that if they failed the test, they would continue to be employed as truck operators, was outrageous and ill-advised. This indeed resulted in a sad and unfortunate state of affairs, for which the union and the employees are to be blamed.
- [86] In the premises I make the following order:

Order

1. The review application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B Dlamini of NUM

For the Third Respondent: Mr W J J Badenhorst of Hogan Lovells Inc Attorneys

LABOUR COURT