THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR2501/09

In the matter between:

SOLOMON MULIBANA **First Applicant**

OWEN MPHALA **Second Applicant**

and

SEA WORLD (PTY) LTD **First Respondent**

COMMISSIONER, THULANI AKIM **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 30 January 2019

Judgment delivered: 31 January 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 20 August 2009.

[2] This matter has a sorry history. The first and second applicants were dismissed in 2009. The arbitration hearing that forms the subject of these proceedings were conducted in 2009, and the award under review issued on 20 August 2009. The record was made available to the applicant in October 2009. Since then, the matter has been litigated at leisure with the only delay capable of clear explanation that occasioned by the rescission of a prior order of this court in which the review was dismissed. It is simply unacceptable that this court be asked to review and set aside awards that have their roots in events that occurred almost a decade ago and that the prejudice to parties occasioned by the delay be regarded as of little or no account.

[3] At some unfathomable point along the way, the union (and the second applicant) appear to have abandoned these proceedings. They were not present when the matter was called, and the court was advised that they no longer pursued the review application. The first applicant persists with the application.

[4] The factual background is not disputed. The applicants were employed by the respondent as a driver's assistant and driver respectively. The respondent employs a security protocol in relation to the delivery of its products. Delivery vehicles are loaded the night before delivery, and both padlocked and sealed. The driver and assistant verify that the locks and seals are in place, and thereafter assume responsibility of the load. On 4 June 2009, the applicants were scheduled to make a delivery that included two bags of chicken. A security guard

who had been on duty at the respondent's premises the previous night was found in possession of two bags of chicken, which he said when he was arrested that he had obtained from the driver of truck number 5.

[5] At the arbitration hearing, the applicants presented a joint defence to the effect that an unidentified third party had gained unauthorised access to the loaded truck and stolen the chicken. The first applicant testified that on the morning in question, he was delayed on account of his not having the key to his locker, which contained his uniform. When he arrived at the vehicle, the second applicant had already checked the seal numbers and route sheet and that he only checked whether the vehicle was in good condition. In particular, under cross-examination, the first applicant conceded that the missing stock had been loaded onto his truck and that the stock that he was responsible for delivering had disappeared. At no stage did the first applicant contend that the second applicant was the guilty party.

[6] In her award, the arbitrator noted that it was common cause that the two bags of chicken were part of the stock loaded onto truck number 5 on the night of 3 June 2009. It was also common cause that the bags of chicken were found in possession of a security guard who had been on duty at the respondent's premises on the night of 3-4 June. The system of checking seals numbers and their verification was also not disputed, nor was the fact that the driver and van assistant assumed responsibility for the stock once the route sheet had been signed. The arbitrator came to the conclusion that '*both of the Applicants took the responsibility of the stock and no report was made in relation to the seal it is probable that the two bags of chicken was inside the truck when they took the truck*.' The arbitrator held that on a balance of probabilities, the applicants had been fairly dismissed.

[7] The first applicant persists with the review application. He does not rely on the grounds for review recorded in the founding affidavit. The application was argued on the basis of the grounds set out in a supplementary affidavit filed on 27 July 2017. That Rule 7A (8) permits the filing of a supplementary affidavit within 10

days of the date on which the registrar makes the record available. The affidavit was filed some six years late, with no application for condonation, and in the face of an objection by the respondent. In these circumstances, the affidavit is not admissible and the court is not empowered to have regard to any of the grounds for review that have been asserted in it. The application for review stands to be dismissed on this basis.

[8] Even if I were to have regard to the supplementary affidavit, there is no merit in the application. In essence, the first applicant contends that the arbitrator committed a reviewable irregularity by concluding that the first applicant had committed the misconduct with which he was charged without there being any evidence on which to draw that conclusion. Specifically, the applicant contends that while there was evidence to sustain the finding that the second applicant had misappropriated the two bags of chicken, there was no evidence to implicate the first applicant in the same misconduct. Further, and to the extent that the arbitrator accepted that the evidence of the security guard was hearsay, it was not, at least to the extent that he testified as to how and where he received the bags of chicken.

[9] 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 threshold established by *Sidumo & another v Rustenburg Platinum mines Ltd & others* [2007] 12 BLLR 1097 (CC) has been 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.

[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] I am unable to find that the arbitrator committed any reviewable irregularity. The arbitrator assessed the evidence, and came to a conclusion based on what she considered the more probable version of events. The evidence before her disclosed that the applicants were jointly responsible for the products loaded for delivery. It is not sufficient to say, as the first applicant does, that the applicants were charged with misappropriation of the bags of chicken and not a breach of

the loading procedures. The undisputed facts that the first applicant was responsible for the stock loaded in the delivery vehicle and that the two bags of chicken were found in possession of the security guard in circumstances where both applicants were in the vehicle when the stock went missing is sufficient, in my view, for the arbitrator reasonably to have concluded that that the chicken had been misappropriated by the first and second applicants. Of some significance here is the fact that the first applicant, until the day on which argument was presented in this court, had never sought to suggest that it was the second applicant who had misappropriated the chicken and that he was unaware or ignorant of that fact. The case made in argument is not one that finds reflection in the papers and smacks of opportunism. It is also incorrect to suggest, as the first applicant does, that it was common cause that the chicken had been stolen on the night of 3 June. That is not what is reflected in the record. On the contrary, it was common cause that the chicken had been loaded on the 3rd; the respondent's version (which was accepted by the arbitrator) was that the chicken had been removed after the applicants had signed the route sheet and accepted responsibility for the load. As I have indicated, I am unable to find that the arbitrator committed any reviewable irregularity in coming to this conclusion.

[13] Finally, and in terms of the broad discretion conferred on the court by s 162 of the LRA, there is no reason why the interests of the law and fairness should deprive the respondent of the costs of opposing these proceedings. At every level, the application has been dealt with other than in accordance with the statutory imperatives of efficient and expeditious dispute resolution. It is simply unconscionable, given the many warnings issued by this court on the tardy prosecution of review application, to present an application some ten years after the events giving rise to it. The practice manual specifically records that a review application must be treated with the same degree of urgency and diligence as an urgent application. The applicants' conduct warrants sanction. The union and the second applicant have not formally withdrawn from these proceedings. In these circumstances, an order for costs against all of the applicants, jointly and severally, is appropriate.

I make the following order:

1. The application is dismissed.
2. The Food and Allied Workers Union, and the first and second applicants are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

André van Niekerk
Judge

REPRESENTATION

For the first applicant: Adv. Rali, instructed by Kwala Attorneys

For the respondent: Adv. AL Cook, instructed by Kevin Allardyce Attorneys