THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2731/16

In the matter between:

INDICO RISK SERVICES CC **Applicant**

and

CCMA **First Respondent**

LR MATLOGA *N.O*. **Second Respondent**

TG HLONGWANE **Third Respondent**

Heard: 27 November 2018

Reasons given: 4 February 2019

JUDGMENT

VAN NIEKERK J

[1] On 27 November 2018 I dismissed this unopposed application to review and set aside an arbitration award issued by the third respondent (the arbitrator). Due to a power failure, I was unable to deliver an *ex tempore* judgment, which I had intended to do. These are my brief reasons for making the order that I did.

[2] First, the applicant has provided a satisfactory explanation for the late filing of the record and the application for condonation filed in that regard is granted.

[3] In so far as the merits of the application are concerned, the applicant dismissed the third respondent (the employee) on 7 November 2016, after he was found guilty of charges of gross negligence, bringing the company's name into disrepute and intimidation.

[4] At the arbitration hearing, Mr Karel Botha, the applicant's site manager, testified that between 19 and 23 September 2016 he received an anonymous call advising him of misconduct at the Distell site in particular, that security officers and supervisors were drinking and taking alcohol from the premises. He and a Mr Marais visited the site at 3am on 23 September, when the employee was on duty. All employees (including the third respondent) were found awake and at their posts. Breathalyser tests were conducted with no positive results.

[5] During the next week, Botha said that he received a call from one of the applicant's managing members and was advised of an incident at the Distell site in which the employee and another employee on the site, Kgotso, were suspected of taking or wanting to take alcohol from the site. A witness Millicent had said that she saw the employee go into and leave a toilet area, after which Kgotso went into the same area. Millicent said that she heard a banging noise. Marais and another employee Justice were called to the scene, and found two 440ml Hunters Extreme in the toilet. Botha testified further that prior to the incident, he had had a discussion with the employee and told him that Kgotso was not permitted to go on patrols, because he was a weigh bridge operator.

Since the employee was the supervisor on site, he was to be Botha's 'eyes and ears'. On the morning of 30 September, Kgotso was not at his post. He later explained that he had taken papers to the goods area. After further investigation, both Kgotso and the employee were suspended.

[6] The evidence of negligence from Botha can be summarized by the following assertion that he made during his evidence:

> Okay, from my side and the company side, we feel that you grossly neglected on the site that you didn't look after Kgotso. I told you in directly and directly that you must look and keep an eye on Kgotso.

[7] The arbitrator concluded that there was no evidence to suggest that the employee was guilty of negligence. The arbitrator considered that since the employee had been required as part of his duties to do routine patrols at the site, this would have meant that he would necessarily have to leave Kgotso alone on occasions. On this basis, there was no evidence that the applicant had been negligent in the performance of these duties on the day in question. To the extent that the applicant had contended that the employee 'had a hand' in the theft of alcohol from the warehouse, there was insufficient evidence to establish this charge. There was no basis therefore to find that the employee had brought the company's name into disrepute. In so far as the charge of intimidation was concerned, there was similarly insufficient evidence to establish the charge. In short, the arbitrator found on a balance of probabilities that the applicant had failed to establish that it had a fair reason to dismiss the employee. The arbitrator awarded the employee compensation in an amount equivalent to four months' remuneration. In arriving at this amount, the arbitrator considered the employee's dismissal had been found to be unfair, that he had only been employed for four months, and that he had secured alternative employment. The total amount of compensation marginally exceeds R 22 000.

[8] The applicant records various findings by the arbitrator and disputes the arbitrator's conclusion that it had failed to present sufficient evidence to establish, on balance, that the employee was guilty of the offences with which he had been

charged. During argument, it emerged that the applicant's primary complaint is the quantum of the award. Indeed, the applicant submits that 'a more appropriate award would have been one amounting to approximately one months' salary.

[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] The hurdle placed before an applicant in a review application is purposely set high, and is not easily cleared. As the Labour Appeal Court has observed, the line between an appeal and a review must be strictly maintained, and given the nature of the test, it is not often that an applicant will succeed in a review application.

[13] In so far as the arbitrator's findings of fact are concerned, there is no basis for the contention that the arbitrator either had regard to irrelevant evidence or failed to have regard to relevant evidence in coming to the conclusion that he did. A reading of the record discloses that the applicant manifestly failed to prove the charges against the employee. There is no evidence of negligence or involvement by the employee in any theft of alcohol. To the extent that the applicant's case would appear to be that the employee failed to act as Botha's 'eyes and ears' as he had been instructed to do, on the face of it, this is not gross negligence, and it is hardly conduct that would ordinarily warrant the penalty of dismissal. The charge of bringing the applicant's name into disrepute was fanciful, and as the arbitrator observed, in the absence of a finding against the employee on the main charge, it is not a charge that in any event is capable of being sustained. Similarly, there was simply no direct evidence before the arbitrator to establish the charge of intimidation. It should be recalled that the applicable test is not whether the arbitrator's factual findings are correct – they

must be arbitrary, fanciful, or so disconnected from the evidence before interference is warranted.

[14] In so far as the applicant's challenge to the amount of compensation awarded is concerned, the amount of compensation to be awarded for an unfair dismissal lies within the arbitrator's discretion, subject to the limit imposed by the LRA, being the equivalent of 12 months' remuneration. The arbitrator is required to take into account all relevant facts and circumstances when determining a fair award. In the present instance, the arbitrator took into account the brief period of the employee's employment, the fact that he had obtained alternative employment and the fact that his dismissal had been found to be substantively unfair. There is no basis in terms of which an award of a months' salary is appropriate, as the applicant contends. The employee was found to have been unfairly treated, and he was entitled to be compensated for that. The fact that his length of service was relatively short does not in itself dictate that a lesser amount should be awarded – it is a factor that must be taken into account with all others. In my view, there is simply no basis to contend that an award of four months' remuneration falls outside of a band of decisions to which a reasonable decision-maker could come. Indeed, having regard to all of the circumstances, I would not even describe the award as generous, let alone so unreasonable that intervention is warranted.

[15] In summary: I am unable to find that the arbitrator committed any reviewable irregularity. The arbitrator rationally assessed the evidence, and came to the conclusion that the applicant had failed to prove its case against the employee. When regard is had to the totality of the evidence disclosed in the record, that finding is clearly one to which falls within the bounds of reasonableness. Similarly, the award of compensation is not so unreasonable that no reasonable-decision maker could have awarded the quantum of some R 22 000 for a dismissal found to be unfair.

[16] For the above reasons, the application was dismissed.

André van Niekerk

Judge