**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR 1840/18

In the matter between:

**MKWAAM (PTY) LTD t/a**
**ENGEN BARBEQUE DOWNS** **Applicant**

And

**DISPUTE RESOLUTION CENTRE FOR THE MOTOR**
**INDUSTRY BARGAINING COUNCIL** **First Respondent**

**N RAFFEE *N. O*** **Second Respondent**

**MNGWATO SAM LEKGAU** **Third Respondent**

**Order:** **28 May 2019**

**Reasons for Order:** **29 August 2019**

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**REASONS FOR ORDER**

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**TLHOTLHALEMAJE, J**

[1] On 28 May 2019, this Court issued an order reviewing and setting aside the arbitration award issued by the Second Respondent (the Arbitrator) acting under the auspices of the First Respondent (MIBCO). The arbitration award

was substituted with an order in terms of which the dismissal of the Third Respondent (Mr Lekgau) by the Applicant was found to be substantively fair.[1]

[2] Despite the review application being unopposed since it was initially filed and delivered in September 2018, Lekgau appeared in person at the hearing of the application. Following submissions made by Mr Crawford on behalf of the Applicant, the Court was satisfied that indeed the review application was properly served on Lekgau. The Court further found no basis upon which the proceedings could be postponed to enable Lekgau to file his answering affidavit.

[3] The facts leading to the dismissal of Lekgau are fairly common cause as summarised as follows;

3.1 Lekgau commenced his employment with the Applicant on 10 September 2012 as a Petrol Attendant.

3.2 He was dismissed on 22 March 2018 on account of allegations of misconduct related to his failure to obey an instruction to attend a fuel placement training, which had been rescheduled on at least three occasions over a period of three months.

3.3 The facts leading to the dismissal arose in December 2017, when Lekgau in the performance of his duties erroneously filled incorrect fuel into the vehicle of a customer. The error resulted in damages to the customer's vehicle, necessitating repairs which were borne by the Applicant in the amount of R2 250.00.

3.4 Rather than subjecting Lekgau to discipline, the Applicant gave him an election in December 2017 to either be disciplined and dismissed, or to pay the costs of the repairs and undergo a fuel placement training at his own expense. The training was meant to afford Lekgau an

[1] Court Order dated 25 May 2019:
Having read the documents and having considered the matter:
IT IS ORDER THAT:
1. The arbitration award issued by the second respondent under case number MINT 61202N dated 11 July 2018 is reviewed, set aside and substituted with an order that:
"The dismissal of Mr Ngwato Sam Lekgau was procedurally and substantively fair."
2. There is no order as to costs.

opportunity to enhance his skills in order to prevent any future similar errors when dispensing fuel to customers.

3.5 Despite Lekgau having elected to undergo training and to repay the repair costs, and further despite such training being arranged, he failed to attend it, resulting in a disciplinary enquiry in respect of the charges that led to his dismissal.[2]

3.6 Aggrieved with his dismissal, Lekgau referred an unfair dismissal dispute to MIBCO. The dispute came before the Arbitrator on 11 July 2018.

[4] Evidence on behalf of the Applicant at the arbitration proceedings was led by Mr Banie Buys (Buys), and may be summarised as follows;

4.1 After the incident took place in December 2017, and after Lekgau had made an election, management decided that the training should be scheduled for January 2018. This was also meant to assist Lekgau at that time of the year, so as not place an undue financial burden on him. The fee of R700 (Seven Hundred Rand) was a prerequisite for the commencement of the training, and these terms were explained to Lekgau, who had acknowledged same.

4.2 Towards the end of January 2018, Lekgau approached management and requested that the training be postponed on account of his financial hardship. This request was acceded to and the training was rescheduled for a date in February 2018.

4.3 Before the training could take place in February 2018, Lekgau approached management and again pleaded financial hardship, and requested that the training be postponed yet again. The applicant acceded to the request and postponed the training to a date in March 2018.

[2] Failing to carry out instructions from management. You were told to attend fuel training course due to fuel mix. You did not attend.

4.4 In March 2018, Lekgau approached management for a loan, which was then granted to him. At approximately 11:00 on the date of the scheduled training in March 2018, an official from the training centre telephoned Buys and informed him that Lekgau had arrived late for the training, but was unwilling to pay the requisite training fee to resume training. Attempts by Buys to speak to Lekgau proved unsuccessful.

4.5 At some point, Buys had asked Lekgau about what he did with the loan that was given to him. His response was that he had used it for electricity fitments in his household.

[5] Lekgau's evidence before the Arbitrator was that;

5.1 He had approached the training facility and was informed that a fee of R700.00 was required before he could be permitted to undertake the training. He stated that he was not aware that he had to pay for the training.

5.2 He had then on the same date returned to the Applicant's premises and requested that he be granted a loan to pay for the training. Despite having made an undertaking that he will repay the amount, management refused to grant him the loan on the basis that he still had a debt arising from the repairs done to the customer's vehicle.

5.3 He confirmed that the initial training was scheduled to take place on 12 February 2018, but was postponed at his request due to his financial position.

5.4 He reiterated under cross-examination that he was not aware prior to the training that he had to pay, and contended that he only became aware on the date that he attended at the training venue.

[6] The Arbitrator in the light of the above evidence concluded that the dismissal of Lekgau was procedurally fair but substantively unfair. The Arbitrator had regard to the provisions of section 138(6) [read with section 188(2)] of the

Labour Relations Act (LRA)[3] and the Codes of Good Practice, and accepted that;

a) On the common cause evidence, Lekgau had filled the incorrect fuel into the customer's vehicle which had resulted in damages in the amount of R2 250. 00 which was paid by the Applicant.

b) Following the incident, Lekgau was given an election to attend a fuel placement training as an alternative to dismissal.

c) The Applicant had indeed on no less than three occasions scheduled the training on behalf of Lekgau and that on those occasions, the latter had failed to attend the training.

d) A loan amount R300.00 was granted to Lekgau in respect of his costs for the training, but he had however utilised the loan amount for other purposes.

6.1 The Arbitrator however concluded that the evidence clearly showed that Lekgau had financial difficulties and the Applicant ought to have taken that factor into consideration when deciding to discipline and dismiss him.

6.2 This was because Lekgau had a long service and a *clean* disciplinary record, and therefore a dismissal was not appropriate, particularly since he was not wilful in refusing to attend the training.

6.3 Lekgau did not attend the training in the light of his financial circumstances which ought to have been taken into account, and his dismissal demonstrated a lack of sympathy on the part of the Applicant.

6.4 The Arbitrator further concluded that the fact that another employee in Lekgau's position was able to pay for the costs of the training is not a reason enough to hold that Lekgau could have accomplish the same. The Arbitrator in the end held that the dismissal was substantively

[3] Act 66 of 1995 (as amended)

unfair and further found that reinstatement was an appropriate remedy in the circumstances.

[7] In seeking to have the arbitration award reviewed and set aside, it was submitted on behalf of the Applicant that;

7.1. The Arbitrator committed a reviewable irregularity in concluding that it was not sympathetic to Lekgau's circumstances, considering that evidence was placed before her that demonstrated that Lekgau was paid a 13th cheque in December 2017; had received an incentive bonuses in January and February 2018; the fuel placement training was delayed until March 2018 in order to accommodate his financial circumstances; and lastly, that Lekgau was paid other benefits in December 2017.

7.2. Taking into account this evidence, it was submitted that Lekgau was provided with sufficient opportunities to comply with the training requirements, and there was thus no basis for a conclusion that the Applicant was not sympathetic to his personal circumstances.

7.3. The Arbitrator committed a reviewable irregularity in reinstating Lekgau back into its employ. The contention was that the reinstatement order is tantamount to usurping the Applicant's prerogative in determining its own rules of discipline in the workplace.

7.4. The Applicant further contended that reinstating Lekgau in circumstances where he had failed to comply with the training requirement was unreasonable, taking into account the nature of the work that he was or would be entrusted with, and further the negative effect that the reinstatement would have on other employees in similar circumstances as him.

7.5. The Arbitrator committed a reviewable irregularity in failing to take into account the importance of the rule infringed and the seriousness of the misconduct, in that the incorrect filling of fuel had the potential to cause financial and reputational damage to the Applicant.

7.6. The Arbitrator mis-applied the provisions of the Code of Good Practice particularly since Lekgau was aware of the existence of the rule; that the rule was consistently applied, and that the rule was fundamental to the Applicant's business.

[8] The main enquiry in review proceedings is whether the arbitration award sought to be reviewed and set aside, can be said to fall within the bounds of reasonableness, taking into account the totality of the evidence that placed before the arbitrator.[4] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*[5] it was emphasised that an allegation of an irregularity in the proceedings is not in itself sufficient to sustain a review of an arbitration award, and that the applicant in review proceedings must in addition thereto, demonstrate that the final result reached was unreasonable when considered in the context of the evidence placed before the arbitrator.

[9] Equally so, it has been held that material errors of fact and/or the weight attached to particular facts, is not on its own sufficient to set aside the arbitration award, unless the applicant can show that the consequence of the misdirection resulted in an unreasonable outcome.[6] This principle entails that an arbitration award should not be easily interfered with, unless the outcome reached by the Arbitrator was entirely disconnected from the evidence, or is not supported by any evidence and/or involves speculation on the part of the Arbitrator.[7]

[10] It needs to be reiterated that Lekgau was not dismissed for filling the incorrect fuel into the customer's vehicle, but on the basis that subsequent to that

[4] See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC)
[5] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC)
[6] See *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para [25] where in was held:

> In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[7] See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC)

incident, and despite having elected to undergo training rather than facing a dismissal, he had nonetheless failed to attend that training. What then remained before the Arbitrator was whether there was a fair reason for the dismissal, and whether a sanction of dismissal was appropriate given the circumstances of the case.

[11] It is my view that the grounds of review as submitted on behalf of the Applicant have merit when regard is had to the evidence before the Arbitrator, and what the Arbitrator had accepted as uncontested or probable. Lekgau was afforded a lifeline after the incident related to the filling of incorrect fuel in a customer's vehicle. The training, which he had elected to undertake, was scheduled on no less than three occasions in order to accommodate him. He was further granted financial assistance to undertake the training, and his contention that he was not aware that he had to pay for such training or that he only became aware on the date of the training that he had to make payment was clearly improbable. This was particularly so since Buys' evidence that Lekgau was aware that he had to pay for the training as far back as December 2017 remained uncontested, or at most, the Arbitrator did not appear to reject that evidence.

[12] The fact that Lekgau was granted a loan and had used it for other purposes than intended for at most, evinces willingness on his part not to attend the training, and the Arbitrator's conclusions that his financial circumstances were not taken into account, or that there was no wilfulness on his part in failing to attend the training, are not supported by the evidence placed before her.

[13] It is trite that an Arbitrator is enjoined to consider, evaluate and analyse the evidence placed before him or her. The obligation remains to make credibility and probability findings, to indicate which version was preferred, and why the other version was rejected.[8]

[14] A simple conclusion that Lekgau was not wilful in failing to comply with the instruction to attend and pay for the fuel placement training, or that the Applicant was unsympathetic when the evidence indicates otherwise, can

[8] See *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Kie and Others* 2003 (1) SA 11 (SCA)

clearly not be a reasonable one. This is particularly so since other employees in similar positions had attended the training, which was meant to ensure that similar errors as committed by Lekgau were not repeated in the future, given the consequences of such errors, both in terms of financial costs and reputation to the Applicant.

[15] It further follows that the decision by the Arbitrator to order reinstatement in circumstances where Lekgau had intentionally refused to undertake the training that would have assisted him in the future performance of his duties could not have been a reasonable decision. His failure to attend that training clearly posed an operational risk, which militated against any order of reinstatement.[9]

[16] In the end, the Arbitrator failed to consider the totality of the evidence which was placed before her. This irregularity had culminated in an outcome which does not fall within a band of reasonableness. This had necessitated that the arbitration award be reviewed, set aside and substituted with an order as issued by the Court on 28 May 2019.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant: J.D Crawford of Crawford & Associates Attorneys

For the Third Respondent: In Person

[9] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007)