

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 1626/2017

In the matter between:

SHAN'S TRANSPORT AND LOGISTICS

AGENCY (PTY) LTD

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT AND LOGISTICS INDUTRY**

First Respondent

J D SELLO N.O

Second Respondent

KLAAS ISHMAEL MABASO

Third Respondent

Enrolled: 5 May 2020

Delivered: 25 May 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 25 May 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 23 June 2017 and issued under case number GAEK 583-17 wherein the Second Respondent (the arbitrator) found the Third Respondent's (Respondent) dismissal substantively and procedurally unfair and ordered the Applicant to pay him compensation equivalent to ten months' remuneration (R 89 000).

- [2] The Respondent opposed the application.
- [3] The matter was enrolled for hearing on 5 May 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. Both parties submitted supplementary heads of argument.
- [4] I have considered the papers filed as well as the written heads of argument submitted.

Material background facts:

- [5] The Applicant employed the Respondent on 15 September 2015 as a truck driver and he was dismissed on 18 January 2017 on the grounds of incapacity due to ill-health or injury.
- [6] The Respondent referred an unfair dismissal dispute to the First Respondent and he challenged the procedural and substantive fairness of his dismissal.

The evidence adduced:

- [7] The issue to be decided by the arbitrator was whether the Respondent's dismissal on the grounds of incapacity was substantively and procedurally fair.
- [8] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the reason that the Respondent was dismissed for.

The Applicant's case

- [9] The Applicant's first witness, Mr Manyaka, testified that he is the operations manager and he explained that the Respondent was injured when he collected cargo at Makro on 6 August 2016 and fell from the truck. He broke his leg and was hospitalised for a period of a month and thereafter he recuperated at home for another period of three to four months.
- [10] At some point in January 2017, the Respondent came back to the Applicant's premises with a letter from his doctor stating that he was fit for duty and he

wanted to resume his duties. Mr Manyaka was unable to produce a copy of the doctor's letter as the Respondent took the letter back and it was with him. Mr Manyaka testified that he saw that the Respondent could not drive long distance trucks and he offered the Respondent an alternative position to work in the office and to do filing work. Mr Manyaka indicated that he would train the Respondent to work on the computer but he indicated that he would do this at home and come back. Upon his return, the Respondent declined the alternative position and said that he only knows how to drive and he stated that he did not want to work anymore but wanted the Applicant to pay him his money.

- [11] Mr Manyaka testified that he then offered to teach the Respondent how to do filing, but he insisted that he could not accept the alternative position. He referred to the flexibility clause in the Respondent's contract of employment which provides that an employee may be required to perform any reasonable duties and that the nature and scope of the duties may be altered or varied by the employer from time to time. Mr Manyaka stated that he never intended to terminate the Respondent's services, but rather wanted to invoke the flexibility clause and required of the Respondent to work in the office. After the Respondent insisted that he did not want the alternative position and that he instead wanted his money, the Respondent was given a letter of termination, which he had agreed to and signed on 24 January 2017.
- [12] Mr Manyaka testified that after the Respondent had refused to accept the alternative clerical position that was offered to him, he agreed to be paid in full upon the termination of his services. In terms of the letter of termination, the Respondent was to be paid his full salary for January 2017 as his notice period, he was not required to perform any duties after 18 January 2017 and in addition to his notice pay, he was paid a severance package equal to a month's salary. The letter recorded that the payments made were in full and final settlement of all and any claims that the Respondent may have against the Applicant, arising out of his employment or the termination thereof.
- [13] The Respondent signed the letter and agreed to the terms and conditions of termination, as set out in the letter.

- [14] In cross-examination the Respondent disputed that he was offered any alternative position. Mr Manyaka insisted that he had personally offered the Respondent a position to work in the office, as he was not fit to drive the Applicant's trucks. The Respondent's version was that he was not offered an alternative position, but that he was merely handed the letter of termination to sign.
- [15] Mr Manyaka disputed that the Respondent showed him the documents dated 16 and 17 January 2017, from an occupational therapist and the Department of Labour, which he had presented at the arbitration hearing for the first time. The Respondent's version was that he had handed the documents to Mr Manyaka personally.
- [16] The Applicant's second witness was Mr Mthombeni, the maintenance supervisor. He testified that when the Respondent came back to work, a first meeting took place wherein the Respondent said that he had a letter which stated that he was fit to perform light duty and upon that the Applicant offered him office work. The Respondent refused the offer of office work as he indicated that he was not trained to work on a computer.
- [17] A second meeting with the Respondent took place subsequently and he asked to be offered a light vehicle to drive. The Applicant indicated that it would not be possible as the bakkie was not working and the Respondent was unable to drive a big truck as his leg was not fully recovered. The Respondent left the meeting and indicated that he would be back. Mr Mthombeni did not attend any other meetings with the Respondent.
- [18] In cross-examination the Respondent disputed that the meeting took place.

The Respondent's case

- [19] The Respondent's version was that he went back to work on 3 January 2017 and met Mr Manyaka, who asked him for a medical certificate. He did not have the medical certificate and Mr Mayaka indicated that the Applicant could not allow him to work as they did not know the Respondent's condition and fitness to work. The Respondent went to the doctor to get a medical certificate, but the doctor's rooms were not yet opened after the Christmas holidays.

- [20] The Respondent testified that he went to see his physiotherapist on 16 January 2017 and he issued him with a document indicating that he could go back to work. His doctor also confirmed that he could go back to work on 18 January 2017. He went to work on 18 January 2017 and waited for Mr Manyaka. When Mr Manyaka arrived, he took the documents from the Respondent and said that they have to wait for Ms Sarie du Toit (Ms du Toit). He waited and subsequently he saw Ms du Toit and gave her the papers from the medical practitioners. Ms du Toit read the papers and took them to the 'boss'.
- [21] Mr Manyaka later told him that because of his injuries, he could not drive a truck and that the Applicant had decided to terminate his contract. He was given a document to sign, but requested to be afforded an opportunity to take it to his lawyer. The Respondent was told that without signing the document first, he would not be given the document. He left for home. The next day he went to the bargaining council and he opened a case.
- [22] On 24 January 2017, he went to Ms du Toit and she insisted that he would not be given the letter without signing it. He signed the letter of termination and left. He testified that he was indeed paid the monies as per the termination letter.
- [23] In cross-examination it was put to the Respondent that Mr Manyaka offered him light duty work in the office and the Respondent disputed that.

Analysis of the arbitrator's findings and the grounds for review

The test on review

- [24] I have to deal with the grounds for review within the context of the test that 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*¹ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

¹ 2007 28 ILJ 2405 (CC) at para 110.

- [25] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*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.

- [26] The review Court must 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 based on the facts placed before him / her.
- [27] The review test is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator arrived at an unreasonable result.
- [28] In *Bestel v Astral Operations Ltd and Others*³ the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

'...the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

- [29] It is within this context that the application for review is to be considered.

The arbitrator's findings

² (2014) 35 ILJ 943 (LAC) at para 16.

³ [2011] 2 BLLR 129 (LAC) at para 18.

- [30] In his analysis of the evidence, the arbitrator found that there was no evidence placed before him to show that the Respondent was incapacitated by the injuries he had sustained at Makro on 6 August 2016.
- [31] The arbitrator found that it was undisputed that the Respondent provided a doctor's letter to the Applicant wherein he was declared fit to resume duty and that this was confirmed by Mr Manyaka's evidence when he testified that the Respondent showed him a letter from the doctor, stating that he was fit to resume work.
- [32] In respect of the issue of an offer for alternative employment, the arbitrator found that the Respondent vehemently denied the Applicant's version that he was offered alternative employment. The Applicant failed to tender any documentary evidence in support thereof and even the letter of dismissal made no mention of the alternative employment that was offered to the Respondent. Mr Manyaka was unable to explain why the offer of alternative employment was not mentioned in the letter of termination and absent any explanation, the arbitrator's only inference was that the Respondent was never offered any alternative employment and the evidence in this regard was intended to mislead the arbitrator.
- [33] The arbitrator found that the Applicant's witnesses did not corroborate each other's evidence in that Mr Mthombeni testified that the Respondent indicated that his doctor said that he should be given light duties and the evidence of Mr Manyaka was that he was shown a doctor's letter which stated that the Respondent was fit to resume duties.
- [34] The arbitrator found that the Applicant failed to adduce evidence to show that it had followed the provisions of the Code of Good Practice: Dismissal on ill-health or injury before terminating the Respondent's employment. The arbitrator found that the evidence showed that the Applicant terminated the Respondent's services summarily when he had returned to work and that it failed to follow any due process.
- [35] The arbitrator found the Respondent's dismissal substantively and procedurally unfair.

[36] In determining appropriate relief, the arbitrator referred to the provisions of section 194(1) of the Labour Relations Act⁴) (LRA), which provides for just and equitable compensation and he recorded that in determining appropriate relief, he had considered the Respondent's length of service, the circumstances of his dismissal, loss of income and the fact that he had sustained his injuries whilst performing his duties. The Respondent is an elderly person who would find it difficult to secure another job. The arbitrator awarded compensation equivalent to ten months' remuneration as he found that to be just and equitable in the circumstances.

Grounds for review

[37] The arbitrator found that the Respondent's dismissal was unfair for mainly three reasons: firstly because he accepted that it was common cause that the Applicant had a letter from the doctor which declared him fit for duty, secondly the arbitrator accepted that the Respondent was never offered an alternative position and thirdly because the Applicant failed to adduce evidence to show that it had followed the provisions of the Code of Good Practice: Dismissal on ill-health or injury before terminating the Respondent's employment.

[38] The Applicant's case is that due to the Respondent's incapacity, the parties agreed to terminate the Respondent's employment contract and in terms of the agreement, the Applicant paid severance pay equivalent to one month's salary. The termination agreement reflected the salient points and both parties duly signed it. The Respondent signed the termination document, confirming that it correctly reflected the terms of the settlement reached between the parties. The Respondent agreed to this and the Applicant acted in accordance with its obligations in terms of the agreement by paying the Respondent the monies as per the agreement.

[39] The Applicant raised a number of grounds for review in its founding and supplementary affidavit. I will deal with the material grounds for review in turn.

[40] The first ground for review is that the arbitrator failed to apply his mind to the issues before him and he failed to identify the true nature of the dispute when he failed to pay attention to the content of the termination agreement signed

⁴ Act 66 of 1995 as amended.

by the parties. Linked to this is the Applicant's ground for review that the arbitrator misdirected himself by finding that the Respondent's dismissal was procedurally unfair because incapacity procedures were not followed. This finding failed to take into account that the Applicant paid the Respondent in terms of and as a result of the settlement of all issues and therefore there was no need to proceed with an incapacity process.

- [41] In my view, there is merit in this ground for review.
- [42] It is evident from the transcript that Mr Manyaka testified that the Respondent declined an alternative position to work in the office and that he had agreed that his services be terminated by signing the letter of termination. Mr Manyaka went further and read the entire contents of the letter into the record, which included that the payments recorded in the letter were in full an final settlement of all and any claims that the Respondent may have arising out of the termination of his employment. The Respondent signed and confirmed that he agreed to the terms and conditions of termination as outlined in the letter.
- [43] It is evident from the transcript that the Respondent did not dispute that he had signed the termination letter or that he disagreed with the terms thereof.
- [44] The question that this Court must ask on review is whether the contents of the termination letter were material to the determination of the dispute and whether the arbitrator's failure to consider it, distorted the ultimate decision made by the arbitrator.
- [45] In *Head of the Department of Education v Mofokeng*⁵ the LAC provided the following exposition of the review test:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a

⁵ [2015] 1 BLLR 50 (LAC), para 33.

different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.' (My emphasis).

- [46] In my view, the termination letter was a material piece of evidence and it was incumbent upon the arbitrator to have considered it as such. In the analysis of evidence, the arbitrator's only finding in respect of the termination letter is that it did not make reference to any alternative employment. The arbitrator dismally failed to apply his mind to the content of the letter and the consequences of a document signed in full and final settlement of any claim arising out of the termination of the Respondent's employment.
- [47] As a result of the arbitrator's failure to consider material evidence and to determine the real nature of the dispute, he found that no incapacity procedure was followed. The obvious question the arbitrator failed to determine is whether it was necessary to follow a procedure in view of a full and final settlement to terminate employment by agreement and upon payment of an agreed severance package.
- [48] The arbitrator's failure to apply his mind to material facts indeed had a distorting effect upon his conception of the enquiry, the issues to be determined, the ultimate outcome and it distorted his ultimate decision.
- [49] The second main ground for review is that the arbitrator's decision was based on the fact that he had found that the Applicant was unable to show that the Respondent was offered an alternative office position. On this aspect, the arbitrator was faced with mutually destructive versions and he failed to apply the rules of evidence.
- [50] In my view, there is merit in this ground for review.
- [51] It is evident from the transcript that the Applicant's witnesses testified that the Respondent was offered an office position, which he declined. The Respondent on the other hand denied that such a position was offered to him.
- [52] In dealing with the issue of an alternative position, the arbitrator recorded that it was denied by the Respondent and because the Applicant could not support its version by producing any documentary evidence to this effect and because

this was not referred to in the termination letter, the only inference was that the Respondent was never offered any alternative employment.

- [53] The approach to be adopted by arbitrators when faced with two conflicting versions was set out in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others*⁶, where it was held that the arbitrator must conduct an:

‘. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.’

- [54] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

- [55] In *Ngqeleni*⁷ the Court also held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

‘What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party’s version. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant’s witnesses on grounds that defy comprehension.’

⁶ (2011) 32 ILJ 723 (LC) at 727C-F.

⁷ Ibid.

- [56] It is within this context that the evidence presented and the arbitrator's assessment of the evidence placed before him, should be considered.
- [57] Glaringly absent from the arbitration award is an assessment of the conflicting versions, of the credibility of the witnesses and the inherent probabilities of the versions presented. In fact, there is no consideration of any of the factors set out in *Nggeleni*⁸.
- [58] The arbitrator failed to take cognisance of the material evidence placed before him and he had failed to assess the totality of the evidence presented. The arbitrator's findings contain no assessment of the probabilities and he made no credibility findings, in circumstances where he was faced with conflicting versions. He simply concluded with an 'only inference' which is not supported by any proper assessment or finding.
- [59] It was incumbent upon the arbitrator to make credibility findings and to state why he accepted one version and rejected another, which he dismally failed to do.
- [60] I have no intention to deal with all the remaining grounds for review raised by the Applicant because the award is to be reviewed and set aside on any one of the grounds for review that I have already alluded to *supra* and that seals the ultimate fate of the award. It is not necessary to consider and decide each and every one of the remaining grounds for review as it will not render the award more or less reviewable and would not change the ultimate fate thereof.

Conclusion

- [61] I have to consider the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him.
- [62] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed

⁸ Ibid.

record, the arbitration award and the grounds for review raised by the Applicant.

[63] The arbitrator's findings are unreasonable and cannot survive on review.

Costs

[64] This Court has a wide discretion in respect of costs.

[65] This matter was enrolled on the unopposed motion Court roll on 16 October 2018 when the matter was postponed *sine die* to the opposed roll and it was ordered that the record must be served on the Respondent's attorneys. It was also ordered that "*The costs of today shall stand-over*". Mr Goldberg for the Respondent submitted that the Applicant must be ordered to pay the costs in that it had failed to serve its notice in terms of Rule 7A (6) and (8) of the Labour Court Rules (the Rules) on the Third Respondent and went ahead as if the matter was unopposed. He submitted that the Third Respondent could only oppose the application after he had received the Applicant's notices in compliance with Rule 7A (8).

[66] Mr Baloyi for the Applicant filed supplementary submissions and although he did not specifically address the issue of costs, he stated that the matter was initially set down on the unopposed roll on 16 October 2020 and was removed as it had become opposed. Despite the late opposition by the Respondent, the Court was not satisfied with the proof of service of the record and the supplementary affidavit. This was caused by insufficient particularity in the service affidavit.

[67] I could not find any service affidavit from the Applicant in the Court file to show that the record as well as a Rule 7A(6) and (8) of the Rules notice had indeed been served on the Respondent prior to enrolment of the matter on the unopposed roll of 16 October 2018.

[68] In my view, the Respondent is entitled to the wasted costs occasioned by the postponement of the matter on 16 October 2018.

[69] As for the remainder, my view is that this is a matter where the interest of justice will be best served by making no order as to costs. The Respondent

had an award in his favour and when it was taken on review, he had the right to defend the award and he should not be punished for doing so.

Relief

- [70] In the notice of motion, the Applicant seeks for the arbitration award to be reviewed and set aside and for an order that the award be substituted with a different order or alternatively, that the dispute to be remitted for a hearing *de novo*.
- [71] In the event that the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.
- [72] *In casu*, the arbitrator misconceived the enquiry, he failed to consider and decide the conflicting versions and he failed to apply his mind to material evidence. In those circumstances, the arbitrator effectively deprived the Applicant of a fair hearing and it is not appropriate to substitute the award, but rather to remit the matter for a hearing *de novo*. I am not inclined to substitute the award where principal and material issues were not properly determined.
- [73] I am of the view that it would be in the interest of the parties and of justice to have the matter properly ventilated and decided.
- [74] In the premises, I make the following order:

Order

1. The arbitration award dated 23 June 2017 and issued under case number GAEK583-17 is reviewed and set aside;
2. The dispute is remitted to the First Respondent for a hearing *de novo* before an arbitrator other than the Second Respondent;
3. There is no order as to costs, save for an order that the Applicant is to pay the Third Respondent's wasted costs occasioned by the postponement of the matter on 16 October 2018.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Mr Baloyi of M M Baloyi Attorneys

For the Third Respondent: Mr Goldberg of Goldberg Attorneys

LABOUR COURT