



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 344/2018

In the matter between:

SISHEN IRON ORE COMPANY LTD

(SISHEN MINE)

Applicant

and

HENTSE KEETSEMANG

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

ZOLISWA TABA N.O

Third Respondent

NATIONAL UNION OF MINEWORKERS

Fourth Respondent

Enrolled: 17 June 2020

Delivered: 24 June 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 for hand-down is deemed to be on 24 June 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 1 February 2018 and issued under case number NC1759-17 wherein the Third Respondent (the arbitrator) found that the First Respondent's (the Respondent) dismissal was substantively unfair and the Applicant was ordered to reinstate him retrospectively.
- [2] The First and Fourth Respondents opposed the application.
- [3] The matter was enrolled for hearing on 17 June 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. I have considered the papers filed as well as the written heads of argument submitted by the parties.

Material background facts:

- [4] The Applicant employed the Respondent as a grade 2 blasting operator in April 2010. He was dismissed in July 2014 for absconding, but he was later reinstated after he had submitted evidence that he was in fact booked off sick.
- [5] In February 2017, the Respondent was dismissed once again for dishonesty related to the misuse of sick leave. He subsequently referred an unfair dismissal dispute to the Second Respondent and challenged the substantive fairness of his dismissal.

The evidence adduced:

- [6] The issue to be decided by the arbitrator was whether the Respondent was guilty of the charge of misuse of sick leave, as levelled against him and if so, whether dismissal was the appropriate sanction.
- [7] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charge that the Respondent faced.

The Applicant's case

- [8] The Applicant's witness, Ms Mothibedi, testified that she is the human resources advisor at Sihlen Mine, responsible for the blasting division, where the Respondent was employed. She testified that on 13 October 2015, she had a discussion with the Respondent because his sick leave was deemed to be out of control, as per the Applicant's policy.
- [9] Ms Mothibedi referred to the Applicant's sick leave policy and specifically clause 7 thereof which provides for 'sick leave out of control'. According to clause 7.1 of the policy, an employee's sick leave will be deemed to be out of control in the following circumstances:
- 9.1 Where an employee with less than six months' service is absent on sick leave three or more times;
 - 9.2 Where an employee with more than six months but less than 12 months' service is absent on sick leave four or more times;
 - 9.3 Where an employee has been absent on sick leave six or more times during the preceding 12 months.
- [10] Ms Mothibedi explained that the Respondent fell in the category of 'more than six months but less than 12 months service' and at the time the aforesaid discussion in October 2015 with the Respondent took place, he had already taken 27 days sick leave on nine instances. She explained that also present in the meeting were the Respondent and his supervisor.
- [11] Ms Mothibedi testified that when the Respondent was reinstated in 2014, it was part of the terms of his reinstatement that his sick leave would be closely monitored. It was only 10 months later when his sick leave was already out of control. As his sick leave was out of control, the Applicant had a discussion with him.
- [12] When an employee's sick leave is out of control, the Applicant will have a discussion with such employee, also to determine whether there is any assistance which the employer could offer to the employee. If, after the discussion, there is no improvement, the case is referred to the occupational health practitioner (OHP) and the occupational medical practitioner (OMP) of

the mine to determine whether there is any serious illness that is causing the employee not to be at work as expected.

- [13] Ms Mothibedi explained that during the discussion with the Respondent on 13 October 2015, she recorded that in the Respondent's view, he regarded himself as fit for his job. She further recorded that he was asked whether he needed assistance from the Applicant, that looking at his sick leave record, he was not able to offer his services as expected. She further recorded that the Respondent consulted different doctors during the period of 10 months, he indicated that he had a running stomach, gal, dizziness and sweating but he does not have a chronic illness.
- [14] As part of correctional action, the Respondent was referred to the OHP to evaluate his sick certificates and to the OMP to determine if he had any illness that prevented him from attending work. The Respondent was also referred to ICAS for counselling.
- [15] Ms Mothibedi explained that in terms of clause 7.2 of the sick leave policy, an employee whose sick leave records appear to be out of control, would be referred to a medical practitioner, appointed by the Applicant, for assistance. Rejection of such assistance will be deemed to be an intent to continue abusing the sick leave benefits and may lead to counselling and disciplinary action, should there be no improvement in the employee's sick leave record.
- [16] She testified that an employee is abusing sick leave if there is a clear pattern such as taking sick leave at month end, after or before off days or weekends. This was indeed the case with the Respondent.
- [17] In October 2015, the Respondent was referred to Dr Moeletsi, as part of the outcome of his out of control sick leave discussion he had with the Applicant. Dr Moeletsi confirmed that the Respondent does not have any chronic illness that would impact on him being employable, but rather that he had severe domestic problems.
- [18] Ms Mothibedi testified that the Respondent had a history of sick leave abuse and she referred to a SAP report which showed that the Applicant's Human Resources had the first sick leave out of control discussion with him in 2012. He deserted in 2013 and he tested positive for drugs. In 2014, the Respondent

deserted and he was dismissed. After he was reinstated in December 2014, he was informed that his sick leave would be monitored, but within 10 months his sick leave was out of control and another sick leave out of control discussion took place in October 2015. The Respondent improved for a short period between October 2015 and February 2016 but there after he took a total of 60 days' sick leave within a period of five months (between March and August 2016).

- [19] Ms Mothibedi referred to the Respondent's sick leave record for 2016 and indicated that there was a pattern of abuse as he took his sick leave before or after his off days or weekends or at month end. She testified that he could not be rehabilitated as the Applicant did all it could to provide assistance to the Respondent in terms of counselling, he was referred to the OMP and it was determined that he had no chronic illness that prevented him from being at work.
- [20] The Applicant could not have any further discussions with the Respondent as he did not suffer from a chronic medical condition and all the applicable processes were exhausted. Since the discussion in October 2015 until the Respondent was charged with misconduct in December 2016, there was no improvement in the manner in which the Respondent used his sick leave, notwithstanding the assistance that the Applicant provided to him. That was why the Applicant decided to follow a disciplinary route.
- [21] Ms Mothibedi also referred to the ICAS report, prepared after his referral, wherein it was recorded that the Respondent had a history of excessive absence from work and had taken excessive sick leave which impacted on his productivity. He failed to obtain the necessary authorisation for time off from his workplace and he provided excuses for his absence , which excuses were unsatisfactory.
- [22] She also referred to the minutes of the internal appeal hearing where the union representative on behalf of the Respondent presented his case and stated that the Respondent did not '*deliberately intended to misuse sick leave*', *but unfortunately at every month end, his wife 'beats him even at the private places, kicking him at the private parts. It looked like it is always on month end but that is when there is money, there are problems.'*

- [23] Ms Mothibedi testified that the Respondent knew the rule as the sick leave out of control policy was read to him and he was aware that if he continued to misuse his sick leave, it might lead to counselling or disciplinary action. There was no improvement in the manner that the Respondent used his sick leave and it resulted in a disciplinary hearing on account of misuse of sick leave. The disciplinary code provides for dismissal as a sanction in the event that an employee refuses to improve his use of sick leave, even for a first offence.
- [24] Ms Mothibedi referred to the disciplinary code which provides that misuse of sick leave for purposes other than recuperation or medical treatment is 'dishonesty or attempted dishonesty' and dismissal is the prescribed sanction.
- [25] In cross-examination it was put to Ms Mothibedi that Dr Moeletsi recorded that the Respondent has severe domestic problems leading to depression and a peptic ulcer and he was referred to his surgeon for his ulcers. Ms Mothibedi was asked that in the event that an employee has personal problems and not a medical condition, how such an employee would be assisted by the Applicant. She explained that such an employee would be assisted with counselling and that is why the Respondent was referred to ICAS.
- [26] Ms Mothibedi explained that the ICAS report found that there were safety concerns regarding the Respondent's accident record and his general level of efficiency and productivity. The report found misconduct resulting in disciplinary action. It was important to acknowledge the employee's circumstances and to provide him with support, but it was also important to acknowledge the operational requirements of his role and the effect of his absence on his colleagues and productivity.
- [27] Ms Mothibedi conceded that the Respondent was in need of help and she testified that the Applicant provided him with assistance so that he could be at work as expected, but instead he became a very unreliable employee. There was no improvement in his use of sick leave and that is why the Applicant decided to take disciplinary action against him.

The Respondent's case

- [28] The Respondent testified that he was employed by the Applicant from April 2010 until his dismissal in December 2016. He testified that from 2013, he

experienced problems at home as he was beaten by the women he stayed with and it only ended in 2016 when he had moved away to Kathu. On 24 October 2016, he applied for a protection order in terms of the Domestic Violence Act¹ and his evidence was that since he obtained a protection order, his attendance at work improved. He testified that he was not informed about the recommendations made by the ICAS counsellor.

[29] In cross-examination the Respondent conceded that there was a trend in his sick leave pattern in that it was always at the end or beginning of the month when he got his salary and his girlfriend would get drunk and would beat him. His girlfriend was breastfeeding for six months after October 2015 and she could not drink, therefore his attendance improved during that period.

[30] The Respondent explained that the 60 days' sick leave that he took in 2016 was the result of his girlfriend beating him, he was bitten by a dog and he was mugged and stabbed with a knife. He went to a medical doctor and obtained sick notes and he testified that he did not expect to be dismissed for going to the doctor and taking sick leave.

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

The test on review

[31] 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*² (*Sidumo*) 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.

[32] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³ affirmed the test to be applied in review proceedings and held that:

¹ Act 116 of 1998.

² 2007 28 ILJ 2405 (CC) at para 110.

³ (2014) 35 ILJ 943 (LAC) at para 16.

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.

- [33] 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.
- [34] The test and the context within which it is to be applied is thus that the review 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 it is sufficient to set the award aside. A piecemeal approach of dealing with the award is improper as the reviewing 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 make⁴.
- [35] The LAC has confirmed to do it differently or to evaluate every factor individually and independently is to defeat the very requirement of section 138 of the Labour Relations Act⁵ (LRA) which requires the arbitrator to deal with the substantial merits of the case and to do so expeditiously and fairly.
- [36] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.

The arbitrator's findings on substantive fairness

- [37] The issue to be decided by the arbitrator was whether the Respondent was guilty of misuse of sick leave and if so, whether the sanction of dismissal was appropriate.
- [38] In her analysis the arbitrator referred to Item 7 of Schedule 8 of the LRA to determine whether the Respondent's dismissal for misconduct was substantively fair.
- [39] The arbitrator considered the question whether there was a rule, was it known to the Respondent and was it reasonable. The Respondent was found guilty of

⁴ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

⁵ Act 66 of 1995, as amended.

and dismissed for a dishonesty charge emanating from the misuse of sick leave, which is provided for in item 3.1 of the disciplinary code. Item 3.1 indicates that dishonesty or attempted dishonesty includes misuse of sick leave, which is described as sick leave for purposes other than recuperation or medical treatment.

- [40] The arbitrator accepted that the Respondent knew or ought to have known that a rule against dishonesty existed and she found the rule to be reasonable as employees have a fiduciary duty to act honestly towards their employers. She held that the fact that there was a rule, that it was reasonable, and known by the Respondent was not enough to accept that he was guilty of the charges levelled against him.
- [41] The arbitrator stated that it was necessary to consider whether the Respondent indeed broke the rule and made himself guilty of dishonesty. The Respondent's case was that his actions did not fall within the ambit of the charge which he was dismissed for.
- [42] In considering whether the Respondent indeed broke the rule, the arbitrator had regard to the rule relating to dishonesty and found that the Applicant had to prove that the Respondent used the sick leave for purposes other than recuperation or medical treatment and that in doing so, he had the intention to deceive or cheat.
- [43] The only evidence adduced as proof that the Respondent acted dishonestly and misused his sick leave, was the pattern of his sick leave and the fact that he consulted different doctors. The Applicant's whole case against the Respondent revolved around the pattern or the trend of his sick leave.
- [44] The Respondent submitted medical certificates which were issued by registered medical practitioners, which certificates were never rejected by the Applicant when they were submitted in support of the Respondent's sick leave.
- [45] The arbitrator accepted that a pattern or trend in the way sick leave is taken raised a suspicion of dishonesty, but held that such does not prove dishonesty or misuse of sick leave, nor does the fact that the Respondent went to different doctors for different treatments. It reasonably raised grounds for an investigation to be conducted.

- [46] The arbitrator also accepted that an employer has the right to investigate sick leave certificates submitted to confirm their authenticity before approving sick leave. *In casu*, the Applicant accepted the medical certificates submitted by the Respondent as valid and never investigated their authenticity. The Applicant could therefore not prove that the Respondent was not sick on the days that he was off sick and for which he had submitted medical certificates.
- [47] In respect of the Applicant's policy on sick leave, the arbitrator found that the Applicant's investigation was whether the Respondent had a chronic illness which could have affected his attendance. From the start, the Respondent's contention was that he had problems at home, which affected his health and attendance, not that he suffered from a chronic illness. He co-operated with the Applicant and was seen by the OMP, chosen by the Applicant. The report from Dr Moeletsi confirmed that the Respondent did not have a chronic illness but that he was suffering from severe domestic problems leading to depression and causing him peptic ulcers. The ICAS report also indicated that the Respondent's problems could be solved.
- [48] The Respondent did not reject the assistance that the Applicant offered him in terms of the applicable policy. The Applicant referred the Respondent to ICAS for counselling as it was aware of his personal problems. The arbitrator found that the Applicant provided assistance to the Respondent, but no other discussion was held and no follow-up was made with him or ICAS and the recommendations made by the ICAS counsellor were ignored. Instead of seeing the process and the assistance to its end, the Applicant charged the Respondent with misconduct.
- [49] The Respondent's case that his attendance at work improved drastically since October 2016 after he had obtained a protection order up to December 2016 when he was charged with misconduct, was undisputed. The arbitrator found that disciplinary action should have been taken only in the event when there was no improvement. *In casu*, the Respondent's attendance improved at the time when he was charged and instead of recognising that the assistance that was given finally bore fruit, the Applicant dismissed the Respondent on a charge relating to dishonesty, which it was unable to prove.

- [50] The arbitrator further considered that the Respondent was not entirely without fault as he had to safeguard his job, he had lost his job earlier due to similar issues, he was warned that his attendance would be monitored and he knew he was treading on thin ice. He should have obtained the protection order earlier.
- [51] In conclusion the arbitrator found that the Respondent's hands are not entirely clean, but that the Applicant ultimately failed to show that the Respondent was dishonest and used his sick leave for any other purpose than for medical treatment or recuperation.
- [52] The Respondent's dismissal was found to be substantively unfair and he was reinstated retrospectively, but the arbitrator awarded only partial retrospective reinstatement with effect from 3 November 2017 and the Applicant was ordered to pay him backpay from November 2017 until February 2018.

Grounds for review

The arbitrator's findings are unreasonable

- [53] The Applicant's first ground for review is that the arbitrator's finding that the Respondent was unfairly dismissed is unreasonable.
- [54] This is so because the arbitrator failed to apply her mind to material issues and facts. The Applicant submitted that the arbitrator overly emphasized the need for the employer to prove dishonesty and did not focus on the extended nature of the charge which is dishonesty relating to misuse of sick leave. The arbitrator's finding that there was nothing to prove dishonesty because the Applicant did not investigate the medical reports, is unreasonable.
- [55] The Applicant submitted that the arbitrator failed to consider that:
- 55.1 The Respondent's behaviour had been classified as misuse of sick leave;
 - 55.2 The pattern of sick leave may not have proved a form of dishonesty, but it strongly pointed to it;
 - 55.3 There was a clear pattern of sick leave and this pattern alone impacted on the trust relationship;

55.4 The outcome of the OMP report was that the Respondent did not suffer from any serious medical condition that prevented him from attending work and he could have done more to ensure his attendance at work.

[56] The Applicant's case is that had the arbitrator applied her mind, she would have found that the Respondent misused his sick leave in that he had developed a pattern of taking sick leave during suspicious periods, he was fit to perform his duties and he could not prove that he had used his sick leave days for medical treatment or recuperation. Although the arbitrator accepted that the Respondent was also in the wrong, she failed to adequately weigh his contribution to the prevailing circumstances.

[57] In my view, there is no merit in this ground for review.

[58] The arbitrator had to consider whether the Respondent was indeed guilty of the misconduct he was dismissed for. In considering this question, the obvious starting point would be a consideration of the charge.

[59] The Applicant charged the Respondent in terms of clause 3.1 of its disciplinary code, which provides for dishonesty or attempted dishonesty, which includes 'misuse of sick leave for other purposes than recuperation or medical treatment.'

[60] The question which leaps out is whether the Applicant produced evidence to support the charge of misconduct for which the Respondent was dismissed and whether the arbitrator made an unreasonable finding when she found that the Applicant had failed to do so.

[61] It is trite and has been accepted by this Court that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains *dominis litis* in deciding whether an employee is to be charged for misconduct and if so, what the nature of the charges would be.

[62] In the event that an employee is dismissed for reasons related to misconduct, the employer is bound by the election it has made, as was confirmed in

*Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*⁶ where the LAC held that:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.’

- [63] The arbitrator found that the Applicant has to prove that the Respondent used his sick leave for other purposes than recuperation or medical treatment and that he did so with a dishonest intention.
- [64] The facts before the arbitrator were that the Respondent submitted medical certificates when he was off sick, issued by registered medical practitioners, which were accepted by the Applicant. There was not a shred of evidence adduced to show that the Respondent used his sick leave for any purpose other than recuperation or medical treatment and it was evident that the Applicant's case was firmly based on what it believed to be a trend or pattern in taking sick leave. The arbitrator found that such pattern does not prove dishonesty or misuse of sick leave.
- [65] The arbitrator approached the question of whether the Respondent's dismissal was substantively fair by first considering the charge of misconduct for which he was dismissed, thereafter the elements which the Applicant had to prove to succeed with its case that the Respondent was indeed guilty of the misconduct and lastly she considered the facts placed before her.
- [66] The issues which the Applicant complains of, stating that the arbitrator did not consider, were not material to the issue she had to decide. The Applicant's submission that the arbitrator should have found that the Respondent misused his sick leave in that he could not prove that he had used his sick leave days for medical treatment or recuperation is misplaced. Firstly, the Applicant had to prove the charge against the Respondent and there was no onus on him to prove the converse and secondly, the Applicant accepted medical certificates for the days when the Respondent was off sick. Had the Applicant dealt with the matter differently or had it charged the Respondent differently, the outcome might have been different, but on the charge as it was formulated by

⁶ (2008) 29 ILJ 964 (LAC) at para 32.

the Applicant and on the evidence adduced in support thereof, the arbitrator could not have come to the conclusions, as per the Applicant's submissions.

- [67] It is evident from the transcript that the Applicant had failed to adduce evidence to support the charge and the arbitrator's finding to that effect, is not unreasonable and is not disconnected from the evidence that was placed before her.

Gross irregularities in the conduct of her duties

- [68] The second ground for review is that arbitrator committed gross irregularities in the conduct of her duties and the Applicant's complaint in this regard is two-fold. Firstly, the arbitrator made findings disconnected from the evidence which was presented and secondly she failed to have regard to the fact that the Applicant was only required to prove its case on a balance of probabilities.

- [69] I will first consider whether the arbitrator made findings disconnected from the evidence.

- [70] In support of this ground for review, the Applicant submitted that the evidence was that the Respondent was cautioned that his sick leave would be monitored and because of this the arbitrator ought to have reasoned that at all times when the Respondent took sick leave, he should have been cognisant and cautious of the amount of sick leave he took in light of the fact that he was expressly warned. The arbitrator should have found that the Respondent was aware that his sick leave was excessive and it was rational for his employer to assume that it was being abused or misused. The Applicant's case is that it was not possible to be sick for the number of days on which the Respondent was off sick without some serious or chronic illness and that the arbitrator failed to apply her mind to the fact that the Respondent did not suffer a chronic illness.

- [71] The arbitrator placed undue weight on the fact that the Respondent suffered from domestic problems and depression and ignored the fact that his attendance improved over the period October 2015 until March 2016, which means that the Applicant could have reasonably assumed that the Respondent's illness had subsided.

- [72] This ground for review and the submissions made in support thereof are astonishing.
- [73] What the Applicant effectively seeks is for the court to find that the arbitrator's findings are disconnected from the evidence and in support thereof the Applicant made submissions that are entirely disconnected from the issue that the arbitrator had to decide and the evidence that was presented. There is no merit in this ground for review.
- [74] The Applicant lost sight of the charge it formulated and dismissed the Respondent on and lost sight of the issue that the arbitrator had to consider when raising this ground for review. The issue was not whether the Respondent's sick leave was excessive or whether it was rational for his employer to assume that it was being abused or misused. The issue was whether the Applicant was able to adduce evidence to prove the charge of misconduct.
- [75] The Applicant's case in support of this ground for review is supported by assumptions, as it submitted that it was rational to assume that the Respondent's sick leave was being abused or misused and that it could have reasonably assumed that the Respondent's illness had subsided during October 2015 until March 2016.
- [76] There was no assumption to be made regarding the subsiding of an illness, as the Respondent's undisputed evidence was that he was beaten by his girlfriend when she was under the influence of alcohol and that she did not drink during the aforesaid period as she was breastfeeding.
- [77] Secondly, the Applicant's case is that the arbitrator failed to have regard to the fact that the Applicant was only required to prove its case on a balance of probabilities and in doing so, she ignored factors which tipped the scale of probability in favour of the Applicant's version.
- [78] The Applicant's case is that the Respondent's sick leave patterns raised suspicion and the arbitrator ignored the fact that the Applicant visited different doctors on different occasions. This fact was not ignored by the arbitrator, she found that it raised grounds for an investigation but was not proof of dishonesty or misuse of sick leave.

[79] The Applicant further submitted that the Respondent failed to justify how his attendance improved from October 2015 until March 2016 in circumstances where his girlfriend, who abused him when she was drunk, drank a lot over the festive season, yet that was when his attendance improved. During December when his girlfriend abused him the most, his attendance was good. These submissions are not supported by the evidence in the transcribed record and once again the Applicant's case is based on an assumption and not on the facts as they were presented. The Respondent's undisputed evidence was that his girlfriend did not drink during the period October 2015 until February 2016 as she was breastfeeding.

[80] This ground for review is also without merit.

[81] There is no merit in the Applicant's complaint that had the arbitrator borne the standard of proof in mind, she would have reached the conclusion that the Applicant had proved its version on a balance of probabilities.

Conclusion

[82] 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 her.

[83] The Applicant has to show that the arbitrator arrived at an unreasonable result.

[84] In *Bestel v Astral Operations Ltd and Others*⁷ 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

⁷ [2011] 2 BLLR 129 (LAC) at para 18.

must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[85] Considering the evidence before the arbitrator holistically, the arbitrator's findings are not disconnected from the evidence, but in fact it is based on the evidence presented and her findings fall within a range of reasonable findings.

[86] I must ascertain whether the arbitrator considered the principal issue before her, evaluated the facts presented and came to a conclusion that is reasonable.

[87] I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. The arbitrator's findings fall within a band of reasonableness based on the evidence that was placed before her and there is no basis for this Court to interfere with it on review. The arbitrator did not misconceive the enquiry but indeed determined the principal issue that she was required to determine.

[88] This Court has a wide discretion in respect of costs. In view of the fact that there is an ongoing relationship between the parties and given the specific facts of this application, the interest of justice will be best served by making no order as to cost.

[89] In the premises, I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Cliffe Dekker Hofmeyr Attorneys

For the First and Fourth

Respondents: Cheadle Thompson & Haysom Attorneys

LABOUR COURT