



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR1532/21

In the matter between:

HUMBULANI RICHARD SANDANI

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION ("CCMA")**

First Respondent

COMMISSIONER SUZANNE RAESET JA MOTHAPO

Second Respondent

WESTERN CHROME MINES

Third Respondent

Heard: 27 August 2024

Delivered: 3 February 2025

JUDGMENT

ADAMS, AJ

introduction

- [1] This is a review application in terms of section 145 and/or section 158(1)(g) of the Labour Relations Act¹ (the LRA) wherein the Applicant seeks to review and set aside the Arbitration Award issued on 21 June 2021 under case number NWRB2067/20.
- [2] In terms of the said award, the Second Respondent (the Commissioner) found the dismissal of the Applicant to be both procedurally and substantively fair and accordingly dismissed the Applicant's claim.
- [3] In terms of the Arbitration, the simple nub of the dispute that had to be determined by the Commissioner was whether the dismissal of the Applicant for incapacity: ill health or injury, was procedurally and substantively fair.

Synopsis of the case in terms of the transcript of proceedings

- [4] The Applicant was employed by the Third Respondent as a Mineral Resource Specialist: Geology on 22 February 2017. The Applicant's employment was terminated on 6 July 2020 for reasons related to incapacity – ill health.
- [5] The Applicant was paid a medical separation package of R174 652.85 and a lump sum from RMA to the amount of R63 972.67. At the time of the Applicant's dismissal, the Applicant was earning R56 182.28 per month.
- [6] The common cause facts, as can be seen from the transcript of proceedings, were as follows:
- 6.1. the Applicant sustained an injury whilst on duty on 11 October 2017;
 - 6.2. the Applicant returned to work with restrictions on 6 March 2018;
 - 6.3. the Applicant returned to work, however, he could only work for one week in the position given to him by the Third Respondent;
 - 6.4. the Applicant was then categorized permanently unfit on 29 January 2019;

¹ Act 66 of 1995, as amended.

- 6.5. since the date of his injury being 11 October 2017 to 6 July 2020, the Applicant received his full salary and benefits even though he could not work;
- 6.6. on 10 January 2020, Rand Mutual Insurance compensated the Applicant in the amount of R63 972.67;
- 6.7. on 25 July 2020, the Third Respondent paid the Applicant an amount of R174 652.84 after tax as a medical separation package;
- 6.8. two letters were sent by the General Manager to the Applicant in terms of finalisation of the incapacity case.

The applicant's case at the arbitration proceedings

- [7] The Applicant contended during the arbitration proceedings that he was not afforded a fair procedure in terms of the medical procedure prescribed by the Third Respondent's Disability Management Agreement and that his termination was irregular in terms of the Agreement.
- [8] Much of the Applicant's evidence during the arbitration proceedings was based on the fact that the Third Respondent had allegedly failed to comply with the Disability Management Agreement. To this end, the Applicant testified that he had only had sight of the policy at the arbitration.
- [9] The Applicant further contended in the proceedings that the Third Respondent, through the medical practitioner, did not offer him or consider the medical opinion of the treating specialist.
- [10] The Applicant had been seen to by a number of specialists since his injury, including, *inter alia*:
 - 10.1. Miss Colleen Kgatshe – EWP therapist (Careways);
 - 10.2. Dr P Bezuidenhout – Neurosurgeon;
 - 10.3. Dr L Ledimo – Orthopaedic Surgeon;
 - 10.4. Miss L Pieterse – Occupational Therapist;

- 10.5. Dr L Mashayanombe – Psychiatrist;
- 10.6. Dr M Maku – Spine Orthopaedic Surgeon;
- 10.7. Miss J Seabela – Occupational Therapist;
- 10.8. A Taylor – Physiotherapist;
- 10.9. M De Bruin – Physiotherapist.

- [11] When the Respondent was certified medically unfit for work, he submitted that the medical certificate was issued without the involvement of his line supervisor or the manager of the Department.
- [12] He further testified during the arbitration proceedings that the Third Respondent had failed to offer him reasonable accommodation and sort guidelines in terms of his surface work and responsibilities as per his job profile.
- [13] On 18 March 2018, the Applicant wrote to the Geology Supervisor, Van Staden, that he was experiencing complication and discomfort due to field work exposure.
- [14] On 27 March 2018, a meeting was held between himself, the Geology Supervisor and the occupational medical doctor. The occupational medical doctor issued a notification to the Applicant's Supervisor for further medical referral and rehabilitation intervention. Subsequently, the Applicant remained home with continuous medical treatment. The Applicant did not return to work thereafter.
- [15] Between the period early 2017 to June 2020, several medical processes were recommended by the various experts and continuously submitted to the Respondent.
- [16] On 13 November 2018, the Occupational Therapist wrote a report indicating that the Applicant's rehabilitation programme had been terminated and that the Orthopaedic Surgeon would be conducting an infiltration process during

the month of December 2018. Recommendations were made for Occupational Therapy sessions if needed.

- [17] On 29 January 2019, the Applicant was served with his disability notification. Importantly, this notification was accepted by him and signed for by him.
- [18] Fifteen days after the Applicant was served with the disability notification, he attended a follow-up routine consultation with the Orthopaedic Surgeon, Dr Maku, for feedback.
- [19] The Applicant contends that he attempted to appeal the decision and referred to the Disability Management Agreement policy and procedure set out therein. He testified that he had complied with clause 4.2 but that the Respondent had failed to refer his issue to the medical tribunal or to address his concerns.
- [20] After having received the disability notification, the Respondent refused to sign and submit the necessary forms to the Respondent for submission to his insurer.
- [21] The Applicant, during his testimony, testified that the disability notification was null and void because as per the DNR procedure, the Respondent had made provision for injured employees to appeal the process.
- [22] The Applicant testified that he had suffered severe prejudice and damages as a result of the conduct of the Respondent. If the Respondent had in good faith referred him to all of the medical specialist and considered their inputs, and conducted the categorisation process according to internal company procedures and policy, his medical incapacity would be procedural and finalisation of his medical incapacity would have been substantively fair.

Third respondent's case

- [23] The Applicant was employed by the Third Respondent as the Mineral Resources Geology Specialist on 21 February 2017. On 11 October 2017, the Applicant was injured whilst working underground in a fall of ground incident (the incident) where he sustained back injuries.

- [24] Following the incident, the Applicant consulted with the Third Respondent's occupational medical doctor, Dr Mmakhuto, who referred the Applicant to Ferncrest Hospital for medical examination.
- [25] The Applicant returned to Dr Mmakhuto on 12 October 2017 for review and advised that he had been diagnosed with a soft tissue injury.
- [26] Dr Mmakhuto was not happy with the diagnosis and proceeded to refer the Applicant to a Specialist Neurosurgeon, Dr Bezuidenhout, who diagnosed the Applicant with a compression of vertebral bones from T4 to T6 (severe injuries to the spine).
- [27] Dr Bezuidenhout indicated that the Applicant's condition was stable, and he could return to work on 17 December 2017.
- [28] The Applicant advised that he was still in pain and required further investigation into his condition. Accordingly, Dr Bezuidenhout referred the Applicant to an Orthopaedic Surgeon, Dr Ledimo.
- [29] Dr Ledimo recommended conservative management, which included Rhizotomy, infiltration of the spine and stated that the Applicant's condition would have to be managed conservatively through Centimetric treatment.
- [30] Dr Mmakhuto convened a meeting with the Applicant and his line manager to discuss how the Applicant could be reasonably accommodated.
- [31] On 3 March 2018, Dr Mmakhuto issued the Applicant with a fitness certificate indicating that he was fit to perform his duties on the condition that he did not do underground work for six months.
- [32] The Applicant was further excluded from duties that expect him to crouch, reach and/or do anything that could inflict pressure on his spine.
- [33] Two days after returning to work, and limited strictly to the surface, the Applicant advised Dr Mmakhuto that he was not managing as he could not sit for prolonged periods of longer than thirty minutes.

- [34] Subsequently, Dr Mmakhuto convened a further meeting with the Applicant and line manager to communicate that the Applicant could not sit for prolonged periods and had requested withdrawal of reasonable accommodation.
- [35] Dr Mmakhuto withdrew the Applicant from surface, and the Applicant was booked off sick and scheduled to continue with rehabilitation with the Occupational Therapist.
- [36] On 29 January 2019, Dr Mmakhuto did a categorization of the Applicant to be medically boarded as he was found to be permanently disabled. The meeting was attended by Dr Mmakhuto, the Applicant and his trade union representative, the Applicants line manager and the Human Resources representative.
- [37] The Applicant signed the disability notification where he was declared unfit to work underground or on surface and was accordingly categorised as E (which category means that he is not fit to work in the mining environment or other environments out of the mine).
- [38] On or about 18 February 2019, Dr Ledimo referred the Applicant to a Spine Orthopaedic Surgeon, Dr Maku, for an opinion. Dr Maku also recommended conservative management which is analgesia and physio.
- [39] Dr Mmakhuto subsequently referred the Applicant for counselling to be treated for possible post-traumatic stress to deal with the impact of his diagnosis on his mental health.
- [40] The Applicant's injuries were reported to Rand Mutual Assurance (RMA), an insurance company accredited by the Department of Labour to function in terms of the Compensation for Occupational Injuries and Diseases Act² (COIDA) which covers all medical costs for occupational injuries that take place in the mine.

² No. 30 of 1993.

- [41] On assessment of the Applicant's injuries, RMA allocated a permanent disability number of 6% to his case. A permanent disability number of less than 30% means that the Applicant would be paid a once off lump sum, not monthly payments. A permanent disability number of over 30% would mean that the Applicant would be paid a monthly income of approximately 75% of his salary at the time of the injury up until the time that he reaches the age of 63.
- [42] To assist the Applicant, Dr Mmakhuto drafted a letter for the Applicant to appeal the 6% permanent disability number because the assessment had been only considering the fractures, and not the Applicant's mental wellbeing because RMA had been advised prior to the Applicant being referred to a psychiatrist.
- [43] The RMA appeal was successful, the Applicant received a total estimated permanent disability of 50% which would be granted when the psychiatrist finalised the Applicant's diagnosis. This meant that the Applicant would become legible to receive a monthly stipend of approximately 75% of his salary up until the age of 63.
- [44] In October 2019, the Third Respondent submitted medical boarding documents to its insurer, Sanlam, for the Applicant to be medically boarded as he was not fit to continue working and his condition had not improved in over two years and six months. However, the Applicant refused to sign and submit his employee declaration documents as required by Sanlam.
- [45] The Applicant's employment was terminated on 6 July 2020 for reasons related to incapacity – ill health.
- [46] The Applicant was paid a medical separation package of R174 652.85 and a lump sum from RMA to the amount of R63 972.67.

The arbitrator's findings

- [47] In the arbitration award, the Arbitrator recorded that the issue to be decided was whether or not the dismissal of the Applicant based on incapacity was

procedurally and substantively fair and if his dismissal was found to be unfair, whether he should be reinstated.

[48] The Commissioner found that:

“100. I would like to revert back to the guidelines. Was the employee capable of performing the work. After the injury, the employee had never been capable of performing his work. Hence, he was referred to different specialists for treatment, rehabilitation, counselling and psychiatrist evaluation, which included his wife. The extent to which the employer is able to perform the work. The Applicant would totally not have been able to perform the work. He received full salary for a period of two years, nine months without making any efforts to return to work. His medical expenses were covered by RMA, and in addition, the Respondent was giving him petty cash to cover some shortfalls on his medical bills. The extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted. The Applicant was certified fit to work, with restriction in March 2018. This resulted in the OMP affording him six months of on surface duties. In less than a week, the Applicant could not perform the work that he was accommodated in. He complained of inability to sit for prolonged periods, to be specific, for more than thirty minutes, and driving on uneven roads. This statement was corroborated by the Occupational Therapy report. As the Applicant, was employed as a Mineral Resources Geologist Specialist, to work underground and on surface, which was a professional work with needed adequate skills, accompanied by the necessary qualifications to perform. Placing him on surface work only was the adaption and reasonable accommodation. The availability of any suitable alternative work. It was common cause that the Respondent had to undergo a Section 189A where approximately 1 800 employees had to be given severance packages.

102. The Applicant could not perform the adapted function, for reasons like driving a vehicle for more than thirty minutes or on uneven road standing and walking. Further, in the arbitration process the Applicant

could not sit for more than two hours without requesting for a leg stretch break. At some point he would request to continue with the process standing. With the calibre of his duties, if he could not sit or drive for a prolonged period, I could safely believe that the possibility of alternative work was zero.

Procedural fairness

103 Under the procedure the Applicant contested that he was not afforded a fair procedure in terms of the medical procedure prescribed by the Respondent's Disability Management Agreement. He contested that his termination was irregular in terms of the same agreement. The Applicant was adamant to use quotes from an outdated agreement of 11 November 1997 despite the Respondent arguing that the outdated agreement was replaced in 2013, which caters for medical claims to be paid by RMA. There was no dispute that RMA paid him a lump sum and catered for his medical bills in conjunction with the Respondent. I believe that the Applicant deliberately ignored the amended agreement as the outdated one favoured his plans to hold Respondent accountable for his refusal to accept, reasonable accommodation. I struggle to understand why the Applicant would accept separation package, thirty-three months salary and contest that proper procedure was not followed. The Applicant could not produce any evidence of his appeal to Human Resources Practitioner, instead he referred to an email.

a The Mine Health and Safety Act 29 of 1996 and regulation stipulates in Section 20(2) that:

"An appeal under sub-section (1) must

- (a) be lodged with the medical inspector within 30 days of the relevant decision or finding, or such further period as may be prescribed; and
- (b) state the grounds of the appeal. The Applicant failed to follow the law, which was above any internal processes of the Respondent, as they are guidelines only. Notwithstanding that he preferred to follow an outdated process, the Act is very clear, that no one had an option to do anything else, but must appeal to DMR.

104. I believe he was aware that he had nothing to appeal as the Respondents had tried all available avenues to accommodate and paid him for prolonged period, but the Applicant failed to co-operate. I believe he deliberately frustrated the Respondent's processes as alleged, for his financial gain. Lerato testified that the Applicant did not need the incident/accident report to complete Sanlam forms, and he was informed about this and remained defiant. The Applicant strategized to frustrate any attempt to help him because he was comfortable to receive a huge salary without working. As a result, I find that the Respondent followed a fair procedure, accompanied by a fair remuneration to dismiss the Applicant due to disability.

Substantive fairness

105. The Applicant, for a considerable period, focused on the incident/accident investigation and report submitted to DMR. I believe that this was irrelevant to the current matter as it was not in dispute that the Applicant was seriously injured and was categorised by OMP. His categorisation was justified by his inability to perform in an accommodated position. There were contradictions in the Applicant's testimony, in that he initially submitted that the OMP had given him reasonable accommodation without consulting his line manager, later he said he was only informed by the OMP, after he (OMP) discussed it with Greta Van Staden, who was his line manager. The Applicant nevertheless, could not dispute the clarification by OMP that it could not have decided on the alternative job for the Applicant without consulting and getting approval from his line manager.
106. This contention made sense as the protocol had to be followed. In *Kievits Kroon Country Estate (Pty) Limited v Mmoledi and Others* (2014) 35 ILJ 406 (SCA) - it has been recognised by our Courts "that employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it be fair in the circumstances, exercise an election to end the employment relationship". The Applicant confirmed that his services were only terminated a year and six months after he was initially categorised as permanently disabled. I find this time considerably long for any procedure and plausible reason to have him floored. It was further

common cause that he was paid for two years nine months after his injury.

107. In *Parexel International (Pty) Limited v Chakane and Others* [2019] 11 BLLR 1245 (LAC), the Court held that: "It is self-evident that whether an employee is willing and able to work and when he or she may be in a position to do so are material considerations to which regard must be had when considering an employee's incapacity, whether she has been absent from work for an unreasonably long period of time and whether alternatives to dismiss exist." The Applicant was never able to work. He could not cope with alternative work provided. It was almost four years since the Applicant was injured. Even after that prolonged period, the Applicant could still not sit for more than two hours, he requested on several occasions, time for leg stretch. He further requested to participate in the process standing. The Applicant had never attempted to return back to work in two years nine months that he was paid. These are all evident that the Applicant would not be able to work.

108. I believe that the Applicant deliberately attempted to stall the finalisation of his medical boarding process as he continued to raise frivolous points of contention, such as bonus, incident investigation reports, which if he wanted to get, were available at DMRE. I also believe that the Applicant refused to sign the Sanlam form in order to frustrate the process, as he was still benefitting by receiving a full salary, accompanied by benefits. Therefore, I find the dismissal of the Applicant substantively fair. The Respondent followed all of the requirements and guidelines of the Code of Good Practice."

[49] In the Applicant's Application, the Applicant has effectively raised six grounds for review:

49.1. the Applicant has contended that the Commissioner gave the Third Respondent's version preference and that she had failed to take into account the Applicant's version when rendering the award;

- 49.2. the Commissioner failed to take into account the fact that the Applicant could not rely on the new policy if he was not even aware that same existed;
- 49.3. in terms of the Disability Management Agreement, the Applicant had the right to have his case referred to a medical tribunal. The Third Respondent failed to refer his matter to a medical tribunal and this fact was not considered by the Commissioner when rendering her award;
- 49.4. the Commissioner failed to consider the fact that the Applicant's categorisation was done prior to him being referred to a psychiatrist and therefore Dr Mmakhuto did not consider all medical and rehabilitation opinions of all treating medical specialists prior to issuing the disability notification (categorisation) as a psychiatrist's opinion was not available at that time. Further, Dr Mmakhuto confirmed that he only referred the Applicant to a Urologist after his categorisation. The Applicant's line manager was not present during the meeting to discuss his work accommodation and this was evident from the minutes of the meeting held on 27 March 2018. According to the Applicant this rendered the process flawed, however, this was ignored by the Commissioner;
- 49.5. the Commissioner erred in deciding that the dismissal was procedurally and substantively fair as the Third Respondent failed to discharge its onus in this regard.

[50] I am required to deal with the grounds for review within the context of the test 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 Limited and Others*³ 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.

[51] The Labour Appeal Court (LAC) in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁴ affirmed the test to be applied in review proceedings and held that:

“In short: A reviewing court must ascertain whether the arbitrator considered the principle issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”

[52] The Review Court is not required to consider every factor individually and 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. This 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 make.⁵

[53] In *Quest Flexible Staffing Solutions (Pty) Ltd (a Division of Adcorp Fulfilment Services (Pty) Ltd) vs Lebogate (Quest Flexible Staffing)*⁶, the LAC confirmed the test to be applied on review:

“[12] The test the Labour Court is required to apply in a review of an arbitrator's award is this: “is the decision reached by the commissioner (1) that a reasonable decision maker could not reach?”

[54] Our courts have repeatedly stated that in order to maintain the distinction between Review and Appeal, an award of an arbitrator will only be set aside if

³ (2007) 28 ILJ 2405 (CC) at para 110 (*Sidumo*).

⁴ (2014) 35 ILJ 943 (LAC) at para 16.

⁵ *Goldfields* (Id fn 4) at para 18 to 19.

⁶ (2015) 36 ILJ 968 (LAC) at paras 12 to 13.

both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrators reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator.

[55] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness, is, thus, the threshold for interference with an arbitrator's award on Review.

[56] In *Bestel v Astral Operations Limited 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 corrected 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."

[57] It has been emphasised by the Courts that a Review is not an Appeal. This was confirmed in *Duncanmec (Pty) Limited v Gaylard N.O. and Others*⁸ (Duncanmec) where the Constitutional Court held that:

"[40] As is apparent from Sidumo, the genesis of the reasonable standard of review is Section 33(1) of the Constitution which confers on everyone the right to administrative action that is lawful, reasonable

⁷ [2011] 2 BLLR 129 (LAC) at para 18.

⁸ [2018] 12 BLLR 1137 (CC) at paras 40 to 43.

and procedurally fair. Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in Section 145 of the LOA. However, to some extent the latter grounds may overlap with the Constitutional requirements. But the reasonableness standard is sourced from Section 33 of the Constitution alone. It does not form part of the overlap.”

- [58] *Sidumo* cautions against the blurring of the distinction between Appeal and Review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between Review and Appeal, this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision maker.
- [59] This test means that the Reviewing Court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a Court in review proceedings. Whether the Court disagrees with the reasons is not material.
- [60] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.
- [61] The review test to be applied in *casu* is a stringent and conservative test of reasonableness. The Applicant is required to show that the arbitrator arrived at an unreasonable result.

Grounds for review

First Ground – Commissioner gave preference to the Third Respondent’s version and failed to take into account the Applicant’s version when rendering the award

- [62] When one considers the Award, this is not correct. The Commissioner set out in detail the evidence presented by all of the witnesses, including the Applicant.
- [63] At paragraphs 24 to 45 of the Award, the Commissioner deals with the evidence of the Respondent's first witness, Dr Mmakhuto. At paragraphs 46 to 57 of the Award, the Commissioner deals with the evidence of the Respondent's second witness, Lerato Masiu.
- [64] At paragraphs 58 to 94 of the Award, the Commissioner deals with the Applicant's evidence and arguments which spans over ten pages of the Commissioner's award. At paragraphs 95 to 102 of the Award, the Commissioner then does a full analysis of the evidence and the arguments, with the application of the law.
- [65] It is clear that the Commissioner considered all of the evidence presented. In *Goldfields*⁹ the LAC held the following on the manner of assessing evidence before a Commissioner to determine the reasonableness of the result reached in the award:

"In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court does not require to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determined whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the Reviewing Court must necessarily 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."

- [66] The LAC emphasised the importance of a holistic assessment by finding that:

"[20] This is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumed the form of an appeal. A fragmented analysis rather than a broad-based

⁹ *Goldfields* (Id fn 4) at para 18.

evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guess work.”

[67] Accordingly, this ground of review must fail.

Second Ground – Commissioner failed to consider that the Applicant was not aware of the Disability Management Policy

[68] The Applicants contention that the Commissioner failed to consider that the Applicant was not aware of the Disability Management, is not correct.

[69] When one considers the Award, the Commissioner did consider that the Applicant had testified that he was not aware of the Disability Management Policy. This is borne out at paragraphs 69 - 88 of the Award.

[70] The Commissioner then made the findings that she did at paragraphs 103 to 104 (already dealt with above) which findings are reasonable, on the evidence that was presented to the Commissioner.

[71] There was nothing before the Commissioner to demonstrate that the Disability Management Policy had not been implemented by the Third Respondent, when one considers that such policy was in line with the provisions of the Mine, Health and Safety Act¹⁰ (MHSA) and the Regulations stipulated in section 20(2) thereof.

[72] The Commissioner also made it clear in her finding, which is reasonable, that the Applicant had failed to follow the law in terms of section 20 of the MHSA, which was above any internal processes of the Respondent.

[73] The contentions by the Applicant that the disability notification specifically stated that, *“I hereby acknowledge the disability process for WCM has been explained to myself subject to the conditions of the Disability Management*

¹⁰ No. 29 of 1996.

Agreement and Policy” specifically makes reference to the Policy which incorporates the legislation, and which the Applicant was required to follow.

- [74] The Applicant’s further contentions in his Heads of Argument that the disability notification states that the appeal process must be commenced within thirty days of being categorised and that this demonstrates that the appeal process that was explained to the Applicant on 30 January 2019 was the appeal process contained in the Disability Management Agreement, also cannot be accepted.
- [75] In terms of the MHSA, an appeal must be lodged with the Medical Inspector within thirty days of the relevant decision or finding, or such further period as may be prescribed. Therefore, it could have only been with reference to the MHSA, in the Third Respondent and its employees being bound by the legislation.
- [76] Accordingly, this ground of review must also fail.

Third Ground – The Commissioner failed to consider that the Third Respondent did not comply with the procedure as it failed to refer the matter to a medical tribunal as required in terms of the Disability Management Agreement

- [77] The Commissioner correctly and reasonably found that the Disability Management Agreement was replaced by the Disability Management Policy which does not require that the matter be referred to the medical tribunal for appeal.
- [78] During the testimony of the Third Respondent, evidence was led that the Disability Management Agreement was established at a time when mining employers were permitted to conduct appeals internally, however, when the MHSA was amended to include section 20, all mining employers were legally mandated to utilise the appeal process as provided for in the legislation.
- [79] It was the testimony of the Third Respondent that the Applicant was advised by Dr Mmakhuto to follow the appeal process provided for in section 20 of the

MHSA, available to employees through the Department of Mineral Resources and Energy (DMRE).

- [80] The Commissioner reasonably found at paragraph 103 of her award that the Applicant had failed to follow the law, which was above any internal processes of the Respondent. The Commissioner, further, reasonably found that MHSA is very clear and that no-one had an option to do anything else, but to appeal to DMR.
- [81] It was further reasonably found by the Commissioner in terms of the evidence led that the Applicant could not produce any evidence of his appeal to Human Resources Practitioner and that he had instead referred to an email.
- [82] Accordingly, this ground of review stands to fail.

Fourth Ground of Review – the Commissioner did not consider that the Applicant's categorisation was premature and not properly conducted as it was done prior to the Applicant being referred to a Psychiatrist

- [83] When one considers the evidence led in the proceedings it is clear that at the time of the Applicant's categorisation the Applicant had already met with various specialists and had been given over a year to improve his physical conditions. However, on the Applicant's own version, the Applicant could not even perform his duties even when they were limited to the surface only. In this regard, it was not disputed that the Applicant was only able to do surface work for a period of approximately a week, and that was the last time that he rendered any services to the Third Respondent.
- [84] The evidence further demonstrated that the referral of the Applicant to a psychiatrist was intended to assist the Applicant mentally with the diagnosis that he had received. There was no evidence, thereafter, to demonstrate that the Applicant was medically fit to return to work, and the Applicant has not done so since March 2018.
- [85] At the time that the Applicant was categorised as "E", such decision was taken after Dr Mmakhuto had considered all the medical interventions that the

Applicant had undergone and medical reports from the specialists the Applicant had attended to. At that stage, and in accordance with the evidence, the Applicant had been on the Third Respondent's payroll for two years and nine months following the incident, without being able to render any services to the Respondent as a result of his incapacity.

[86] It was also made clear during the arbitration proceedings both in the transcript, as well as the Commissioner's award, that the Applicant's physical unfitness had persisted as even during the arbitration proceedings the Applicant could not sit still for prolonged periods and requested to stand on several occasions during the proceedings.

[87] Accordingly, I find no merits in this ground of review which ground of review should also fail.

Fifth Ground of Review - The Applicant's accommodation meeting was convened in the absence of the Applicant's line manager, between the Applicant and Dr Mmakhuto which rendered the process flawed and which was not considered by the Commissioner

[88] In terms of the evidence led in the arbitration proceedings, it was the testimony of the Third Respondent that Dr Mmakhuto convened a meeting with the Applicant's line manager, Greta Van Staden before advising the Applicant of its decision to accommodate him on the service.

[89] Whilst the Applicant's version was that the meeting was convened in the absence of the Applicant's line manager, it is clear from the evidence led in the arbitration proceedings that:

89.1. the Applicant was accommodated for surface work and his duties were reduced, however, he still complained of back pain and could not tend to any duties in the accommodated work;

89.2. the Applicant was thereafter on 29 January 2019 declared permanently incapable of working in his own or any other occupation;

- 89.3. the Third Respondent had undertaken a mass retrenchment of approximately 1 800 employees, two months before the Applicant's employment was terminated and the Third Respondent was unable to accommodate the Applicant elsewhere;
- 89.4. whilst the process followed by the Third Respondent during the Medical Incapacity Process usually takes four months, as testified to by the Third Respondent's witness during the arbitration proceedings, the Applicant was accommodated for a period of two years and nine months on his full salary and benefits, after having been employed by the Third Respondent only seven months prior to incurring his injury;
- 89.5. further to this, the evidence demonstrated that the Applicant was terminated a year and a half after he was categorised, during which time he did not only receive medical support, but assistance with insurance claims related to his injury, reasonable accommodation in the work place, and his full salary and benefits from the Third Respondent;
- 89.6. the evidence also demonstrated that the Third Respondent engaged with the Applicant on numerous occasions between March 2020 and July 2020 on termination of his employment due to incapacity and attempted to assist the Applicant by requesting the Applicant to complete the Sanlam insurance documents, which the Applicant refused to attend to.

[90] Over and above the Third Respondent having taken the steps set out above, the Applicant was also paid a medical separation amount on the termination of his employment. This amount was never paid back by the Applicant to the Third Respondent.

[91] All of the aforementioned aspects have been addressed in the Commissioner's award and have led to the findings that have ultimately been made by the Commissioner, which findings I find to have been reasonable in the circumstances.

[92] Accordingly, there are no merits in this ground for review which ground should fail.

Sixth Ground of Review – the Commissioner erred in deciding that the dismissal was procedurally and substantively fair as the Third Respondent failed to discharge its onus in this regard

[93] When one considers the award rendered by the Commissioner, it cannot be said that the Commissioner erred in deciding that the dismissal was procedurally and substantively fair and that the Third Respondent had failed to discharge its onus in this regard.

[94] The Award made by the Commissioner runs to some thirty-three pages typed in single spacing. It is extremely detailed and, on the face of it, appears to represent a careful and lucid analysis of all the issues in dispute. The Award reflects a consideration by the Commissioner of the documentary evidence, as well as the oral testimony of the various witnesses, that was placed before her.

[95] Further to this, when one considers the Commissioner's Award in totality, the necessary authorities and statutes are cited therein, and it is clear that the Commissioner has considered the necessary material evidence of the employee and employer's evidence, including the Applicant's defences and the Commissioner has further justified how she arrived at the finding that she arrives at the end of her Award.

[96] The Commissioner's finding that the dismissal was procedurally and substantively fair was, therefore, reasonable.

[97] Accordingly, this ground of review has no merit and should fail.

Analysis of the Award

[98] In terms of Schedule 8 of Good Practice: Dismissal – Item 10 – Incapacity: Ill health or injury stipulates that:

- “1. Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternative short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties of work circumstances of the employee to accommodate the employee’s disability.
2. In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
3. The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
4. Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.”

[99] Item 11 of the same Code provides that:-

“Any person determining whether a dismissal arising from ill health or injury is unfair should consider:-

- (a) Whether or not the employee is capable of performing the work;
- (b) If the employee is not capable –

- (i) The extent to which the employee is able to perform the work;
- (ii) The extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
- (iii) Availability of any suitable alternative work.

[100] Section 188(2) of the LRA, as amended, further provides that: *"any person considering whether or not the reason for the dismissal is a fair reason or whether the dismissal was effected in accordance with a fair procedure must take into account any relevant Code of Good Practice issued in terms of the LRA, as amended."*

[101] There is a rational connection between the evidence that was before the Commissioner and her finding that the dismissal of the Applicant was procedurally and substantially fair, as such reasonable finding is anchored in the guidelines set out in the Code of Good Practice and the LRA aforementioned.

[102] That the above is the case is, *inter alia* borne out by paragraphs 96 to 102 of the Commissioner's Award.

[103] Based on the above, the Commissioner did not misconceive the nature of the enquiry that was before her, as she dealt with the determination of the substantive and procedural fairness of the Applicant, within the corners of the guidelines provided for above.

[104] In line with these guidelines, the Commissioner made the findings that she did at paragraph 100 to 102 of her Award.

[105] The Commissioner then found that the dismissal of the Applicant was procedurally and substantively fair.

[106] Based on all the reasons above, the Court is persuaded that the Commissioner arrived at a reasonable finding that the dismissal of the Applicant was substantively and procedurally fair under the circumstances.

Conclusion

[107] When one considers the test that this Court is required to apply in a review of an arbitrator's award, as contained in *Sidumo*¹¹, it cannot be said that the arbitration award in this instance is reviewable. The decision reached by the Commissioner was one that a reasonable decision maker could reach when one considers the facts of this matter.

[108] As a general proposition, I find that the Commissioner, in declaring the Applicant's dismissal procedurally and substantively fair, properly determined the evidence before her, and the findings which is fully supported by the evidence. There is simply no reason to interfere with her arbitration award. Reference is made to the following extract from *Crown Chickens (Pty) Limited t/a Rocklands Poultry v Kapp and Others*¹²:

"[19] Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in Section 145 of the Act more especially where the Commissioner has committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view ... By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to Order."

[109] In the premise the following order is made:

Order:

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

¹¹ Supra.

¹² (2002) 23 ILJ 863 (LAC) at para 19.

R. Adams

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Sabelo Khanya
Instructed by : Ismail and Dahya Attorneys

For the Respondent: Advocate Mike Van As
Instructed by : Lawtons Africa Inc.