



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable Case

No: JR 2227/21

In the matter between:

SIBANYE RUSTENBURG PLATINUM MINES

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

PATEL, M N.O

Second Respondent

AMCU obo TOTSWANA, L AND 1 OTHER

Third Respondent

Heard: 15 May 2025

Delivered: 30 May 2025

JUDGMENT

ASMALL, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ to review and set aside the arbitration award issued by the second respondent (arbitrator) under case no: NWRB2846-20, dated 16 September 2021, and substitute the award that the dismissal of the third respondents (Messrs Totswana and Mazambane hereinafter referred to as the respondents) were substantively fair.

[2] The arbitrator found that the dismissal of the respondents were substantively unfair and ordered retrospective reinstatement.

[3] The applicant takes issue with the arbitrator's findings, and I will deal with the evidence to the extent that is necessary to consider the grounds for review.

Background facts

[4] Totswana was employed by the applicant as a rock drill operator from February 2007 and Mazambane as a shift controller from December 2006.

[5] Their positions were critical for the applicants operations.

[6] The applicants HR Procedure Policy on managing desertions states that an employee will be found to have deserted their positions if they fail to report to work for seven or more consecutive days.

[7] The applicant tried to investigate their absence by calling their next of kins but were unsuccessful. In terms of the desertion policy, their employment was terminated on 4 and 7 December 2018 respectively.

¹ Act 66 of 1995 as amended

[8] The respondents reported to work on 16 March 2020, sixteen months later and were notified of their dismissals for having deserted the workplace. They appealed in terms of the policy and their dismissals were upheld, due to them not notifying the employer of their whereabouts, their positions could not be kept open for such a long period as it was critical for the applicants operations to fill their positions due to operational reasons.

[9] The respondents through their union referred an unfair dismissal dispute.

[10] I will now deal with the applicable law and the grounds of review.

The test on review

[21] I must 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 to 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.

[22] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others*³ 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.’

[23] 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 determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach to dealing with the award is improper, as the

² (2007) 28 ILJ 2405 (CC) at para 110

³ (2014) 35 ILJ (LAC) at para 16

reviewing court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced.⁴

[24] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)*⁵, the Supreme Court of Appeal held that:

‘... the test “is a stringent [one] that will ensure that... awards are not lightly interfered with”... the Sidumo test will, however, justify setting aside an award on review if the decision is “entirely disconnected with the evidence” or is “unsupported by any evidence” and involves speculation by the commissioner.’

[25] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁶, the LAC confirmed the test to be applied on review:

The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?” 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 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 arbitrator’s reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[26] 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.’

⁴ Ibid at paras 18 and 19

⁵ (2013) 11 BLLR 1074 (SCA) at para 13

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

[27] The review test to be applied is a stringent and conservative test of reasonableness. The applicant must show that the arbitrator ultimately arrived at an unreasonable result.

[28] It is within the context of this test that I have to decide this application for review.

The arbitrator's analysis of evidence/findings and the grounds for review

[29] The first ground of review is that the arbitrator found that the third respondents had not deserted their employment because they returned to work with a reasonable explanation (incarceration) for not being at work. The arbitrator found that the respondents had intention of returning to work and there was no desertion.

[30] The enquiry before the arbitrator was to establish whether the dismissal for desertion in terms of the policy was substantively fair. The arbitrator needed to consider the desertion policy, the validity and reasonableness of the rule, whether the respondents were aware of the rule, whether it is consistently applied and whether dismissal is an appropriate sanction. The dismissal was based on misconduct.

[31] There is a valid and reasonable rule on desertion in the workplace which the respondents were aware of. It is common cause that the respondents were incarcerated for the 16 month period. The applicant was not aware of their incarceration. Mokati testified that he could not recall being informed of their incarceration.

[32] In the case of *Glencore operations SA (Pty) Ltd v CCMA & Others*⁷, which are similar to the facts *in casu*, the court held that the real enquiry was whether the employee was absent without permission.

“The fact that where an employer dismisses an employee for reasons related

⁷ [2021] ZALCJHB 164, [2021] 10 BLLR 1013 (LC)

to misconduct, the dismissal shall be considered to be fair if the employee is guilty as charged and the sanction of dismissal is appropriate. Nkosi was dismissed for desertion or absence from duty without the necessary permission. Where a commissioner misconstrues the true nature of the enquiry, he or she is bound to reach a decision that a reasonable decision maker would not reach. In other words, the outcome shall be distorted. The following finding demonstrates that Mashego was barking up a wrong tree:

It is common cause that the Applicant was imprisoned from 17 August until 11 December 2018. The Respondent decided to charge and dismiss the Applicant for failure to inform them about his absence on the days stated above and not for absenteeism or excessive absenteeism during the period of his imprisonment that incapacitated the Applicant from honoring his part of the employment contract.

All the documentary evidence point to the fact of absence without permission. On the charge sheet appears the acronym "AWOP", which means absent without being permitted. The misdemeanor was not so much the failure to inform but the absence without permission. Absence without permission is a form of misconduct. In terms of section 188 of the LRA a dismissal for reasons of misconduct is fair. Therefore, the real inquiry should have been whether Nkosi was absent without permission. Fact that he was absent, when he was supposed to be present was common cause. Fact that he was not given permission to be absent was also common cause. The following conclusion indicates that Mashego dismally failed to address the relevant issue:

In short it was impossible for the Applicant to freely without serious hindrances inform the Respondent about his predicament because he was imprisoned and as such cannot be blamed for failing to inform the Respondent about his absence. Therefore, dismissal for failing to inform is unfair."

Ordinarily, an employee has an obligation to fully place his or her services at the disposal of the employer. Once an employee absents himself or herself, he or she is in breach of the obligation. Whether an employee informs an employer about his or her whereabouts that does not detract from the fact that an employee has breached his other obligations to place his or her services to the disposal of an employer. Where an employee is absent from duty, the employer suffers operationally and unless permitted to be absent that

employee commits misconduct even if he or she can inform the employer that he or she is at home or elsewhere and not at work, where he or she is obligated to be. By concentrating on the informing part and ignoring the common cause facts of absence from work and lack of permission, Mashego failed to appreciate the real dispute and the real reason that led to the dismissal of Nkosi.

In light of the undisputed evidence, by being absent for a period of six days without the necessary permission, Nkosi committed a misconduct. The fact that Nkosi was arrested serves as a justification for his absence but does not detract from the fact that he was absent without permission. If an employer does not accept the justification, it does not follow that the dismissal that ensues is bereft of an acceptable reason in terms of section 188 of the LRA. Nkosi was not dismissed for incapacity but for misconduct.

In light of the above, the conclusion I reach is that the award does not fall within the bounds of reasonableness thus reviewable in law.”

[33] In terms of section 145 (4) of the LRA this Court, on reviewing an arbitration award, has discretionary powers to determine the dispute in the manner it considers appropriate. On the common cause evidence, the respondents are guilty of being absent from their duties without the required permission. As pointed out above, such amounts to a misconduct. With regard to the sanction of dismissal, being absent from duty for a period of over 7 days without permission is serious enough to warrant a dismissal. The respondents conceded that their work is important to the applicant.

[34] *In casu*, the respondents were dismissed for their absence from work after a period based on the applicant's desertion policy. The definition of deserter in the applicant's policy *is a person who fails to report to work or clock for duty for seven consecutive working days*. The respondents alleged to have given the chair of AMCU, *Doctor*, a message to relay to the applicant that they were incarcerated, which was not proved. The applicant's efforts to contact their next of kins to find out their whereabouts were in vain.

[34] Applying the principles in *Glencore supra*, whether the respondents informed the applicant or not of their incarceration, does not detract from the fact that the

respondents were absent for a long period of time without permission and this

aligns with the desertion policy which the applicant correctly and appropriately applied as the respondents were deemed to have deserted their workplace.

[35] The respondents submit in their answering affidavit, in essence, that the respondents had intention to return to work, had a good reason (incarceration) for not being at work and that the applicant failed to investigate their absence properly. The arbitrator found that the respondents had not deserted because they did not intend to desert. This is unreasonable and she misdirected the enquiry before her. Although she set out the test for misconduct correctly in her award, she failed to apply the facts of the matter to the test. It is common cause that the respondents were incarcerated but this not detract from the fact that were absent without permission. This ground of review is upheld.

[36] The second ground of review is that Mokati who was the HR Officer of the applicant, should have taken steps when he heard rumors about their incarceration. Mokati testified that he did not know about their incarceration and nobody informed him of their incarceration. The rumors were just hearsay and this version was not challenged by the respondents.

[37] The applicant submits that there was no obligation on the applicant to take further steps after they tried to contact the respondents next of kins. It is further submitted that that since the respondents were members of AMCU, there was no evidence that AMCU took any steps to ascertain their whereabouts or that the respondents took steps to inform AMCU either directly or through their next of kins that were incarcerated. This ground has been addressed in paragraph 34 *supra*.

[38] The arbitrator found that on “humanitarian grounds’ the applicant was required to take steps to ascertain their whereabouts. This is an unreasonable finding and is not founded in law. The evidence of Tlou, who was the ER assistant of the applicant, where she testified that she tried to contact the next of kin numbers provided by Mazambane, without success, was not challenged by the respondents. This ground of review is upheld.

[34] The third ground of review is that the retrospective reinstatement of the

respondents were unreasonable. It is common cause that the respondents were unable to render their services from 26/28 November 2018 until 14 March 2020 but the arbitrator reinstated them for this period. This finding is unreasonable and this ground of review is upheld.

[35] The fourth and fifth ground of review is repetitive and should be read with the second and first ground of review, respectively.

[36] With regards to the issue of consistent application of the rule, the arbitrator did not deal with it in the award and it is not a ground of review pleaded before me. The respondents raise it very briefly in their answering affidavit in conclusion. It is not necessary to deal with this issue as it is not properly before this Court.

[36] I have considered the case law submitted by the respondents and I do not consider the legal principles applicable to the facts of this case.

Conclusion

[49] The applicant has merits in their grounds of review raised and there is a basis for this Court to interfere with the findings of the arbitrator.

[50] The arbitrator failed to evaluate the issue in dispute, evaluate the evidence and the probability of versions and came to an unreasonable decision.

[51] The common cause facts were that the respondents were absent from work without permission for more than seven days.

[52] There is a rule in the workplace confined to a desertion policy that if an employee fails to report to work for more than seven consecutive days, the employee is deemed to have deserted his workplace.

[53] The respondents were aware of this rule and the reasonableness of this rule. The applicant has established that the arbitrator's findings was a decision that a reasonable decision maker could not reach on considering the totality of evidence

and not piecemeal.

[52] The arbitrator's decision is disconnected from the evidence presented. The dismissals of the respondents were substantively fair.

Costs

[53] It is trite that cost do not follow the result in this Court.

[54] This is a matter where the interest of justice will be best served by making no order as to costs.

[55] In the premises, I make the following order.

Order

1. The review application is upheld.
2. The award by the arbitrator dated 16 September 2021 under case number NWRB2846-20 is hereby reviewed and set aside.
3. The award is replaced with an order that the dismissal of the respondents were substantively fair.
4. There is no order as to costs.

Asmall AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Ngwenya Instructed by: Solomon Holmes Attorneys

For the First Respondent: Advocate Cook Instructed by: AMCU