

SOUTH AFRICA / JUDGMENT

BEMWU obo Lengoasa and Others v Commission for Conciliation, Mediation and Arbitration and Others (JR 2279/17) [2020] ZALCJHB 260 (17 December 2020)

[2020] ZALCJHB 260

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2279/17

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The

Labour Court of South Africa

(HELD AT JOHANNESBURG)

Not

Reportable

case

No: JR 2279/17

In the matter between:

BEMAWU
obo D LENGOASA AND 2 OTHERS
Applicant
and
COMMISSION FOR
CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
C
HAVENGA
N.O
Second
Respondent
SABC
Third Respondent

Heard:

17 November 2020

Delivered: This judgement is delivered electronically, by email addressed to the parties' representatives. The deemed time and date of delivery is 16H00 on 17 December 2020

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 9 October 2017. In his award, the arbitrator held that the dismissal of the individual applicants by the third respondent was fair.
- [2] The individual applicants commenced employment with the third respondent on various dates during 2006. They were all employed as video editors in the video editing department. In December 2005, the video editors raised a dispute concerning a change in their shift roster. In terms of the shift pattern previously worked, video editors worked two days on and two days off, with their hours of work alternating from 28 to 32 hours per week. The new shift roster required the video editors to work five days a week for a total of 40 hours. Matters came to a head in 2012 during a meeting with the then

acting chief operating officer during which a resolution to the effect that the old shift patterns would be restored was signed. The video editors returned to the old shift pattern and continued to work in this manner for about three years. During October 2015, during a staff meeting, the video editors were advised that their shift patterns were changed to comply to a collective agreement regulating time management principles and which provided that employees would be required to work a 40-hour week. A follow-up meeting was held on 17 November 2015 where the implementation of the new shift pattern was challenged. Ultimately, in December 2015, the third respondent's management addressed a letter to the union proposing that the parties engage in a consultative process to agree on the new shift system. That process did not occur and in February 2015, the union ultimately lodged a dispute alleging a unilateral change to the terms and conditions of deployment of its members. On 24 February 2016, the third respondent's management issued an instruction that employees were to comply with the new shift schedule. The video editors responded by stating that the new shift system remained in dispute and that there had been no consultation on the system. A meeting was held on 4 March 2016 when it was agreed that the old shift rosters would apply until management had met with the union. The union was invited to attend a meeting at short notice but was not available to do so. On 10 March 2016, the third respondent issued an instruction to the video editors to comply with the new shift rosters, failing which they would be disciplined. The video editors stated that they would not comply with the instruction since the matter was being addressed by the union. In July 2016, a meeting was held between management and the unions to plan timelines for a consultation process but this was never held. The video editors were again, during September 2016, instructed to comply with the new shift roster. The union recorded that the instruction is not lawful and

reasonable, and that its members were not required to comply with it. During February 2017, the individual applicants were charged with being absent from work without permission and gross insubordination, on account of their refusal or failure to comply with the new shift roster. The individual applicants were similarly dismissed on 5 April

2017. The dispute concerning the fairness of a dismissal ultimately served before the arbitrator.

- [3] In his award, the arbitrator found that the change in the shift pattern did not constitute a change to terms and conditions of employment, since it had been effected in accordance with the collective agreement regulating time management principles. He further found that the change in the shift pattern was necessitated by a genuine operational requirement and that there had been an extended period of consultation on the proposed changes to the shift pattern. He concluded that the implementation of the new shift pattern and the instruction to comply with it was reasonable and lawful and that the individual applicants' failure to comply amounted to serious deliberate and persistent insubordination that warranted the penalty of dismissal.
- [4] The applicant has raised four grounds for review. The first is that the arbitrator committed a gross irregularity in that he misconstrued the nature of the enquiry, in that he considered it necessary for him to determine whether the change in the shift roster amounted to a unilateral change to terms and conditions of employment. The applicant submits that this was not the enquiry that the arbitrator was required to determine – the true nature of the enquiry was whether the instruction to report in terms of the new shift roster remained an issue in dispute under the collective agreement. If the issue remained in dispute, then it was not lawful and reasonable to require the individual applicants to comply with the instruction to work the new shift system. On the facts, the new shift system remained under dispute in terms of the collective agreement, and the third respondent had failed to consult on the proposed changes despite its undertaking to do so. The second ground for review is that the arbitrator committed a gross irregularity in that he found that the change to shift patterns was not a unilateral change to terms and conditions of employment. The applicant submits that this finding is disconnected to the evidence that was led and is thus unreasonable. Had the arbitrator acted reasonably, so the applicant submits, he could not have reached a decision other than that the new shift system amounted to a unilateral change to terms and conditions of employment. The third ground for review is that the arbitrator committed a gross irregularity by finding that there was an extended period of consultation. The applicant submits that on a full conspectus of all the evidence, there was in fact no consultation process at all. Finally, the applicant submits that the arbitrator committed a gross irregularity in that he found that dismissal was appropriate sanction. The applicant, more specifically, submits that the arbitrator did not take into account the totality of the circumstances and that his decision was unreasonable and inappropriate.
- [5] A right of review has been clearly distinguished from a right of appeal. This court is not empowered to intervene simply because it would have come to a different conclusion on the same facts. The failure by an arbitrator to attach particular weight to evidence or

attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).

- [6] The Labour Appeal Court recently affirmed this principle and held that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, while a failure properly to assess the evidence is indicative of an unreasonable outcome, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.
- [7] By way of primary observation, there is a material contradiction between the first and second grounds of review. The applicant contends in the first that the arbitrator committed a gross irregularity by determining that it was necessary for him to assess whether the change in the shift roster amounted to a unilateral change in terms and conditions of employment; in the second, the applicants contend that had the arbitrator properly considered the evidence, he would have reached no other decision but that the new shift system was a unilateral change in terms and conditions of employment. The award makes clear that the applicant had contended at the arbitration hearing that the introduction of the new shift pattern constituted a unilateral change to terms and conditions of employment, which rendered any subsequent instruction to comply with the new shift pattern unreasonable and unlawful (see paragraph 69 of the award). The arbitrator recorded that the three individual applicants, after initially adhering to the new shift pattern for 12 days during February 2016, refuse to do so after being advised by the union. It was also not in dispute that they were instructed on 30 September 2016 to comply with the revised shift pattern from 1

October 2016, and that they refused to carry out this instruction. The arbitrator observed (correctly) that an employer may not

unilaterally alter the terms and conditions of an employee, but that an employer may change working practices, provided that those changes do not alter an employee's contractual rights. In other words, employees do not have a vested right to preserve their working obligations as if they were cast in concrete; only if the changes are "so dramatic that the employee undertakes an entirely different job than there is a right to refuse to do the job in the required manner" (see *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* (1995) 16 ILJ 349 (LAC)). On this basis, the arbitrator held that the change in the shift pattern introduced by the third respondent did not constitute a change to the individual applicants' terms and conditions of employment, and that reliance on that argument to justify a refusal to work in compliance with the instruction was not valid. The third respondent had the prerogative to arrange working time in accordance with the

operational requirements of its business and in the present instance, the new shift system was introduced in accordance with the time management principle as per the collective agreement and did not exceed the maximum contractual hours per week which the employees were obliged to work. In addition, there was a sound business rationale for the amendment to the shift pattern, being the introduction of a 24-hour news service. Insofar as the issue of consultation was concerned, the arbitrator found on the evidence that not all decisions about work arrangements were required to be consulted in the manner that the applicants asserted. The evidence did not disclose that the applicants were deprived of a proper consultative process; indeed, the negotiation of the new shift pattern was protracted and the union had been less than forthcoming in response to invitations to meet and discuss the issue.

[8] These conclusions cannot be faulted on the available evidence. The arbitrator clearly considered the issues that had been raised during the course of the proceedings, applied his mind to them and made a decision, as he was required to do. The fact that the applicants disagree with the decisions to which the arbitrator came does not mean that the arbitrator committed any reviewable irregularity in his assessment of the evidence, or that the conclusion to which he came

was unreasonable.

[9] In regard to the issue of sanction, the arbitrator considered the matter at some length and correctly recorded that he was afforded a discretion which he was required to exercise reasonably, honestly and with due regard to the general principles of fairness. The arbitrator clearly took into account the interests of both parties and noted that the applicants had shown no remorse but continued to deny any wrongdoing. Again, the arbitrator was keenly aware of the nature of the enquiry that he was required to conduct, he took into account all relevant factors and made a decision. The fact that the applicants

disagree with that decision is of no consequence.

[10] In short, none of the applicant's grounds for review have any merit. I am unable to find on the record of the proceedings under review that the arbitrator committed any reviewable irregularity in his assessment of the evidence, or in drawing the conclusion that he did from that evidence. The applicants thus fail at the first hurdle of establishing any irregularity on the part of the arbitrator that brings his conduct within the purview of review. In any event, having regard to the record and the outcome (in the form of the arbitrator's decision) the decision clearly falls within a band of decisions to which a reasonable decision-maker could come on the available material. The application for review thus stands to be dismissed. No order for costs was sought.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: A Kruger, Webber Wentzel Attorneys

For the third respondent: N Dawlal, Gildenhuys Malatji Attorneys

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