

SOUTH AFRICA / JUDGMENT

JAMAFO obo Mokgomogane v Commission for Conciliation, Mediation and Arbitration and Others (JR 1007/ 2018) [2022] ZALCJHB 248 (29 August 2022)

[2022] ZALCJHB 248

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1007/ 2018

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR 1007/ 2018

In

the matter between:

JAMAFO
obo TEBOGO MOKGOMOGANE
Applicant
And
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
1st
Respondent
THABE
LAZARUS NKADIMENG N.O.
2nd
Respondent
PICK
'N PAY RETAILERS (PTY)
LTD
3rd
Respondent
Heard: 25 August 2022

Delivered: 29 August
2022
(This
judgement was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLI. The date on which
the judgment is delivered is deemed to be 29 August
2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 29 April 2018. In his award, the arbitrator found that the applicant's dismissal by the third respondent was fair.
- [2] The material facts are captured in the award and do not warrant repetition here. In brief, the third respondent dismissed the applicant after he was found guilty of dishonesty and a dereliction of duty. The applicant's dismissal has its roots in the disappearance of a sum of some R 76 000 from a drop safe at the third respondent's Highveld Supermarket Store on the night of 30 to 31 October 2016.
- [3] At the time, the applicant was employed as a receiving manager at the supermarket. His duties included receiving and checking stock on arrival, his role as what was termed a 'second key carrier' (a person who works with a first key carrier and, amongst other things, opens and locks the store and the drop safe). The first and

second key carriers are allocated and carry different sets of keys to access different locks in the supermarket, the cash office and the drop safe. The applicant's third role was that of a functionary in the cash office, the area in which the drop safe is kept, in relation to the processes of capturing and dropping money handed in by the cashiers for banking. On 30 October 2016, the applicant and another manager, Mr Siboya, were the second and first key carriers, respectively. It is not disputed that in the circumstances, they were the only two employees who had keys for access to the supermarket, the cash office and the drop safe. It is also not disputed that they were responsible for capturing and dropping money handed in by the cashiers into the drop safe, or that they had direct access to the security systems including but not limited to the CCTV camera in the cash office, and that they were the last persons to leave on the day that the theft took place and the first persons to open the supermarket the next morning

- [4] On 31 October 2016, the third respondent became aware of the missing money and initiated an investigation. The applicant and Sibozza consented to undergo a polygraph test, which indicated deception on the part of both. After an internal disciplinary hearing, the applicant was found guilty on both charges and dismissed. Sibozza was charged with misconduct in a separate disciplinary hearing and also dismissed. The applicant contested the fairness of his dismissal, a matter ultimately referred to arbitration.
- [5] The arbitrator concluded that the third respondent had succeeded in establishing, on a balance of probabilities, that the applicant was guilty of dereliction of his duties, that he was dishonest, and that he had contravened the third respondent's procedure on cash management and the use of drop safe. The arbitrator found that the applicant ought to take full responsibility for the loss and that dismissal was an appropriate sanction in the circumstances.
- [6] The test to be applied in review applications is clear. This court may intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed.
- [7] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2007] ZALC 66; [2014] 1 BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach, since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). Specifically, the questions for a review court to ask are whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with substantial merits of the dispute and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence (see paragraph 20). In short, when an arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).
- [8] Precisely how this determination to be made was the subject of guidance provided by the Labour Appeal Court. In *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc . The Court must nonetheless still consider with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence (at paragraph 31)

Further:

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had on the arbitrator’s conception of the enquiry, the determination of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will be hypothesised to be material to the determination of the dispute. The material error of this order would point to at least a *prima facie* unreasonable result.

[9] To summarise: the threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. In this regard, it is not the function of a review court to engage in a nitpicking exercise; the

focus is on whether the arbitrator appreciated the nature of the enquiry, the issues in dispute and afforded the parties a fair

hearing. When an error or irregularity is established, the court must proceed to the second stage of a determination of the reasonableness

of the result. Put another way, the award must be sustained if, by reference to the record and regardless of any error or irregularity

on the part of the arbitrator, the award is one which a reasonable decision-maker could reach. This approach distinguishes a review from an appeal, the latter being a remedy that the legislature specifically denied parties aggrieved by the outcome of arbitration

proceedings under the LRA. In the present instance, it is not for this court to determine the dismissal dispute afresh (as the

applicant's affidavits suggest), as opposed to considering the reasonableness of the award under review.

- [10] The applicant has raised a number of grounds for review. One of them is a challenge extended to the arbitrator's finding on the procedural fairness of his dismissal. In essence, the applicant contends that his dismissal was procedurally unfair because the third respondent contravened its own policies by subjecting him to a disciplinary hearing outside of the prescribed time frames and that he was not permitted to be represented by a union official in the course of the investigation. At the hearing, the applicant's representative abandoned this challenge, correctly so, in circumstances where the parties had in the course of pre-arbitration proceedings agreed that the applicant would not be challenging the procedural fairness of his dismissal and where the arbitrator confirmed in the course of the hearing that the issue of procedural fairness was not in dispute.
- [11] To the extent that the applicant complains about the arbitrator's decision not to admit a document (referred to in the record as annexure MT5) into evidence, at paragraph 60 of his award, the arbitrator records that at the outset of the proceedings, the applicant submitted a bundle of documentary evidence. Later, on 5 October 2017, his representative submitted additional documents and undertook not to submit any additional documentary evidence'. The arbitrator records that on 23 February 2018, the applicant submitted document TM5 as additional documentary evidence in circumstances where the third respondent's representative objected, on account the fact that previous witnesses who testified on the documents were no longer available. At the hearing on 4 December 2017, the arbitrator did not expressly disallow the introduction of TM5; he stated that he would at a later stage decide what weight and relevance to attach to the document. The applicant's representative then indicated that he would provisionally withdraw the document and did not place reliance on it to cross-examine the third respondent's witness. On 23 February 2018, in the middle of the re-examination of the third respondent's final witness, the applicant's representative again sought to introduce TM5. The arbitrator's ruling is reflected in his award where he states that it was not permissible, at that late stage, to rely on a document in circumstances where the third respondent's witnesses could not be cross-examined on it. The arbitrator further recorded that he had refused to accept the document on the basis of the subjection and 'the fact that it was becoming a trend for Moqechane to introduce new evidence in every setting'.
- [12] I fail to appreciate what is irregular about this ruling. The applicant had submitted its bundle of documents at the outset and had the applicant's representative peruse the bundle, he would have found the document and could have relied on it. In these circumstances, there was no irregularity or other reviewable conduct on the part of the arbitrator.

- [13] In relation to the applicant's complaint that the arbitrator misconducted himself or committed a gross irregularity by failing to grant what the applicant terms 'a request or application to continue cross-examining Ms Mushi', this submission must necessarily be viewed in the context of the record. On 4 December 2017, the third respondent's final witness, Mushi, commenced giving evidence and was cross-examined by the applicant's representative. On the same day, the applicant's representative completed his cross-examination at about 15h45. On the same day, the third respondent's representative commenced his re-examination, which had not been completed by the end of the day. On 23 February 2018, at the reconvened proceedings, the third respondent's representative was in the process of re-examining the witness, when the applicant's representative requested that he be permitted to once again cross-examine. The arbitrator records that the reasons cited by the applicant's representative were that he had been placed under pressure to conclude his cross-examination on 4 December 2017. The arbitrator records further that he advised the representative that he had never put him under pressure to conclude his cross-examination, which is why the third respondent's representative did not complete his re-examination (at paragraph 61 of the award).
- [14] Again, I fail to appreciate on what basis it can be contended that the arbitrator's ruling was irregular. In the affidavits deposed to by the applicant in these proceedings, and indeed in the heads of argument filed on his behalf, the applicant makes no reference to any specific exchanges with the arbitrator that could be construed as pressure. The furthest that the arbitrator went was to express a concern that the parties would not finish the arbitration, this in the light of all of the procedural delays occasioned at the instance of the applicant. The arbitrator's ruling was entirely warranted and did not, as the applicant's representative appear to suggest at the hearing of the present application, indicative of the presence of any bias or undue interference. Further, the applicant fails to explain why it took some three months between the respective sittings for his representative to allege that he somehow felt rushed to complete his cross-examination and that there were additional questions that he wished to put to Mushi.
- [15] To the extent that the applicant submits that the arbitrator failed properly to apply his mind to the evidence when he found that on a balance of probability that the applicant was guilty of the offences with which he was charged, the applicant's primary contention is that the arbitrator failed to appreciate that the elements of the charge of theft had not been established on the evidence. It should be recalled that the first charge against the applicant was one of dishonesty, in that he took nine drop bags from the drop safe, thereby enriching himself. In terms of the applicable disciplinary policy, dishonesty, whether in the form of attempted or actual theft, fraud, forgery unauthorised possession or removal of company property, is a serious transgression for which a disciplinary hearing must be convened. The arbitrator's conclusion that the applicant was guilty of dishonesty was sufficient, and it was not necessary for the third respondent to establish the elements of theft.

- [16] To the extent that the applicant contends that the arbitrator erred in concluding that there was sufficient circumstantial evidence to justify his finding, there is no merit in this submission. What the arbitrator was required to do was select the most plausible or probable influence from the evidence before him. The undisputed evidence was that the applicant and Sibozza were the only two employees who had keys for and access to the cash office and the drop safe during the relevant period, and that they were responsible for capturing and dropping the money handed in by cashiers to the cash office for banking on the day that the theft took place. Further, they were the only two employees who had direct access to the security system and were the last persons to leave and lock up the supermarket on the day that the theft took place and the first persons to open the supermarket the next morning. The evidence led by the applicant did not establish facts which would result in an equally possible inference to be drawn by the arbitrator, or a more plausible or probable inference. The arbitrator appreciated that he was obliged to have regard to the totality of the evidence presented and to select the most plausible probable inference. This he did.
- [17] Insofar as the second charge of dereliction of duty is concerned, the applicant appears to suggest that the arbitrator erred in the sense that the applicant's failure to adhere to a policy was the consequence of inadequate training to perform the functions in the cash office, given that the applicant's role is limited to that of receiving manager. Put another way, the applicant contends that he could not be guilty of the dereliction of duty, negligence or a breach of policy if the duties in question were not his to perform. The third respondent's case at the arbitration hearing was that in addition to being a receiving manager, the applicant was a second key carrier, which entailed certain functions that he was required to perform in the cash office. The applicant was required in this capacity to take responsibility for amongst other things sealing

money in the presence of a cashier, placing the money into clear bags and depositing the money into the drop safe in accordance with the applicable procedures. By signing the drop sheet, the applicant accepted full responsibility for the sealed bags. The applicant had been aware of the cash office policies and procedures, because he had been trained on it and had disregarded his duty to deposit the money into the drop safe and permitted cashiers to do so. The arbitrator clearly considered the evidence that training provided to receiving managers who are key carriers is primarily 'on the job' training, that the relevant policies were available on the internal database, and that the applicant's testimony in regard to the number of times that he had worked in the cash office was inconsistent and thus stood to be rejected. I fail to appreciate how any of these conclusions can be called into question.

- [18] Finally, the applicant submits that in regard to sanction, the arbitrator did not take into account all relevant factors. There is similarly no merit to this submission. The case law is consistent – it is not unfair for an employer to impose a penalty of dismissal in cases of dishonesty, regardless of the nature of that dishonesty or where shrinkage or theft is concerned, the amount involved. In the present instance, the applicant was found guilty of dishonesty and dereliction of his duties to deposit the drop bags into the drop safe. These

responsibilities are central to the proper functioning of the cash office and the loss occasioned by the third respondent, suffered as it was as a result of the applicant's misconduct

and in circumstances where an element of dishonesty is involved, has the consequence of irreparably destroying the trust relationship

between the parties. In any event, this court's capacity to interfere with decisions by arbitrators in relation to sanction is limited – the reasonableness threshold permits a range of decisions and the court must necessarily defer to the arbitrator

where it is persuaded that the decision on sanction falls within a band of decisions to which a reasonable decision-maker could come.

[19] Finally, the applicant raises a number of complaints with regard to the evidence of a Mr Venter, who conducted a polygraph test which he testified indicated deception on the part of the applicant. These include but are not limited to what is contended to be a failure to call Venter to testify at the disciplinary hearing, an assertion to the effect that Venter was not an expert, and that the arbitrator placed insufficient weight on articles tendered by the applicant in support of his representative's submissions on polygraph testing. A perusal of the record and the award under review indicate that while the arbitrator accepted Venter's evidence, that evidence was not pivotal and appears to have played a relatively minor role in the arbitrator's reasoning. The arbitrator clearly did not rely on the polygraph test results as the conclusive or only basis on which to find the applicant guilty of the charge of dishonesty. In any event, he correctly analysed the applicable legal principles and had regard to all of the corroborating evidence led by the third respondent. In short, this complaint takes the review application no further.

[20] In summary: the arbitrator appreciated the nature of the enquiry that he was to conduct, he appreciated the issues that he was called on to decide and did so without committing any material irregularity. The applicant thus fails at the first stage of review. In any event, the outcome of the proceedings under review is one that falls within a band of reasonableness, having regard to the material that served before the arbitrator.

[21] In so far as costs are concerned, the third respondent submitted that the application was an abuse of the process of this court and that an order for costs against the applicant was appropriate. I am inclined to agree. The LRA establishes a dispute resolution structure that has as its purpose the efficient and expeditious resolution of labour disputes. In the present instance, the proceedings, which at the end of the day concerned an individual dismissal dispute, extended over six days; this after a full internal disciplinary hearing. The record extends over three lever arch files and the founding and supplementary affidavits collectively span some 170 pages. The proceedings under review, and these proceedings, have been conducted

by the applicant's representative without regard to the statutory purposes to which I have referred. There has been no attempt, at any stage, to narrow the issues in dispute and to address those issues in clear and concise terms. Indeed, the applicant's

representative sought to extend the grounds for review to procedural fairness, an act entirely impermissible given the applicant's

concession in the pre – arbitration meeting. The result was a waste of time, energy and costs. However, I cannot lay these

shortcomings at the door of the applicant. But representatives, be they legal representatives or officials from trade unions or

employers' organisations, should be cautioned that in similar circumstances, orders for costs de bonis propriis will be seriously entertained.

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:

Union official

For the third respondent:

Z Dlamini, Bowman Gilfillan Inc.

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Prepared on 12 October 2026 · Esheria