

SOUTH AFRICA / JUDGMENT

Mkhonto v Mphahluli N.O and Others (JR 1436 / 2020) [2023]

ZALCJHB 134 (10 May 2023)

[2023] ZALCJHB 134

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR 1436 / 2020

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR 1436 / 2020

In

the matter between:

UNITED
NATIONAL TRANSPORT UNION
obo
S
MKHONTO Applicant
and
JOSEPH
MPHAHLULI N.O First
Respondent
TRANSNET
BARGAINING COUNCIL Second
Respondent
TRANSNET
ENGINEERING Third
Respondent

Heard:

4 May 2023

Delivered: 10 May 2023
This judgment was handed down electronically by consent of the parties and by circulation to their legal representatives via email. The date for hand-down is deemed to be 10 May 2023.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 25 November 2019 and issued under case number TCR013429 wherein the First Respondent (arbitrator) found that Mr Mkhonto's dismissal was substantively and procedurally fair and that his case was dismissed.
- [2] The application for review was filed outside the prescribed 6-week period and the Applicant seeks condonation for the late filing of the application. The application for condonation is not opposed. I have considered the explanation tendered and in my view, on a conspectus of all the facts and the requirements, the Applicant has shown good cause and condonation for the late filing of the review application is to be granted.
- [3] The Third Respondent (Respondent) opposed the application for review.

The evidence adduced

- [4] The Respondent employed Mr Mkhonto as a machine operator and he was dismissed on 12 July 2019, following a disciplinary hearing where he was found guilty of misconduct.
- [5] The Applicant subsequently referred an unfair dismissal dispute to the Second Respondent (TBC) and the issue to be decided by the arbitrator was whether Mr Mkhonto's dismissal was fair. The arbitrator found his dismissal fair in all respects. It appears from the grounds for review that the arbitrator's finding in respect

of procedural fairness is not subject to review.

- [6] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charge which Mr Mkhonto was found guilty on and dismissed for. The charge of misconduct was:

'Using a falsified/fraudulent temporary car park-in permit to enter the TE Koedoespoort premises without permission.

In that in your capacity as an operator machinist in the RM business for the period May 2017 to February 2018 you were using a falsified car park permit to enter Transnet Engineering premises without authority. Your behaviour was contrary to Transnet Anti-Fraud policy and Transnet Disciplinary Code and Procedure.’

[7] It is evident from the transcribed record that Mr Oosthuizen, the Applicant’s representative during the arbitration proceedings, made an opening statement wherein he conceded that Mr Mkhonto entered the Respondent’s premises with his own vehicle and he indicated that the issue in dispute was whether Mr Mkhonto did so using a falsified or fraudulent parking permit. Mr Mkhonto was in a lift club with Mr Maaroganye, who usually drove and Mr Mkhonto would only drive his own vehicle when Mr Maaroganye was on leave or off sick, on which occasions he would enter the premises but without a permit. The Applicant’s version was that Mr Maaroganye was the person who had a falsified or fraudulent parking permit and he was the only one using it.

The Respondent’s case

[8] The Respondent’s witness, Mr Xaba, testified that he is employed as the security superintendent since 2011. He explained that there are different types of car park permits that could be issued –

there are permits for rental cars, EXCO members, managers, people with medical challenges, pregnant women and visitors. There is a process to be followed in order to obtain a permit, which entails the completion of an application form. There are two types of application forms, one is a temporary application form, which is completed if the permit is needed for a specific duration and there is a permanent application form, which is used for managers and others, qualifying to park inside the Respondent’s premises.

[9] On the application form, the employee has to state the reasons why a permit must be issued to him or her and has to furnish the vehicle details for which the permit is sought. The security manager alone has the authority to approve an application for a parking permit and once approved, the permit is issued by a person within the security office.

[10] Mr Xaba explained that the primary objective in issuing parking permits is to give a particular person access to the Respondent’s premises and to show that such a person was granted permission to drive into the premises, either on a daily or temporary basis.

[11] On 21 February 2018, a fraudulent parking permit was confiscated from Mr Maaroganye when a security officer, Mr Netshifhefhe, did access control and noticed that the permit was not the same as the permits issued by the security office. Mr Netshifhefhe became suspicious and he confiscated the permit. The permit was brought to Mr Xaba, whereafter he investigated the matter. It transpired that Mr Maaroganye was in a lift club with Ms Lefifi and Mr Mkhonto. Ms Lefifi subsequently confessed that she had created the fraudulent permit and had given it to Mr Maaroganye because they were using one vehicle in their lift club. She confessed that she issued the falsified permit because they were sometimes

struggling with traffic in the morning, driving to work, and she did not want to be late for work. Mr Maaroganye never applied for a parking permit and there was never a permit approved for him, but instead he had a falsified permit.

- [12] Mr Mkhonto also never applied for a parking permit and he was not issued with a permit to park inside the premises or to drive through the gate, yet he had entered the premises on several occasions with his own motor vehicle. The Respondent's access control record showed that Mr Maaroganye was the regular driver of the (lift club) vehicle, but when he was not at work, Mr Mkhonto would be driving his own vehicle through the access gate. Mr Xaba testified that Mr Mkhonto was not found driving a vehicle with a falsified or fraudulent permit, but it was found that he had accessed the premises in circumstances where he neither qualified for a permit nor was one issued to him.
- [13] Mr Xaba explained that Mr Mkhonto was not authorised to access the premises and he was not issued with a parking permit, yet he entered the premises, which meant that he had to produce a permit to get access, but such permit was not authorised. Mr Mkhonto used his own vehicle to access the Respondent's premises, but his vehicle was never authorised to enter the premises because he never applied for a permit and no permit was issued to him to give him authorised access to the premises.
- [14] In cross-examination, Mr Xaba explained that when an employee enters the premises with their vehicle, the procedure to be followed is that the driver of the vehicle must produce their access card to show that they are an employee of the Respondent, thereafter they must show the vehicle permit to show that the vehicle is permitted to be inside the plant. The security officer must verify the information on the vehicle permit with the access card and the vehicle registration number and only if all of this had been checked, the employee will be allowed access. Mr Xaba testified that this procedure was followed, but conceded that there was a possibility that the security officers would allow employees access without checking their access cards or parking permits.
- [15] In re-examination, Mr Xaba explained that even if the security officers were not doing their work as they should, it did not give Mr Mkhonto the right to enter the premises without a permit or by using a fraudulent permit.
- [16] The Respondent's second witness was Ms Matweketsane, an employee relations officer since 2012. She testified that after Mr Xaba compiled a report, he submitted it to the employee relations department, whereafter they called the business manager, Mr Moeng, together with Mr Mkhonto's supervisor to alert them to the recommendations made in the report. They took the file and when it was brought back to the employee relations department, there was an attachment with statements from Ms Lefifi, Mr Maaroganye and Mr Mkhonto. Mr Maaroganye initially gave a false statement, but later changed his statement and explained that he gave a false statement as he was told by Ms Lefifi and Mr Mkhonto to state that he had obtained the permit from one Mpotladi. Mr Maaroganye in his later statement said that he had received a call from Mr Mkhonto to give him his car registration number so that

they could organise a parking permit for him. Mr Mkhonto and Ms Lefifi organised the permit and the reason was for them to enter the premises because they were travelling together in a lift club.

- [17] Ms Matweketsane explained that Ms Lefifi did not have a motor car, but in the lift club, they would change between using the car of Mr Maaroganyane or that of Mr Mkhonto.
- [18] Mr Mkhonto's defence was that although he had entered the Respondent's premises on various days, he did not have a fraudulent permit. He just greeted the security officers and because they were familiar with him driving with Mr Maaronganye, they allowed him to enter as well when he drove his own vehicle, without asking for a permit. This was so because the security officers were familiar with him.
- [19] Ms Matweketsane rejected the defence tendered by Mr Mkhonto for several reasons. She testified that the security officers rotate and that it was not possible to find the same security officers for an entire week. Even if it was possible that the security officers would not ask for the parking permit on one or two occasions, it was not possible that they would never ask for it. The security officers would have asked for a personal permit and a permit for the car and when an employee does not have that, he or she would not be let in. It was therefore impossible that Mr Mkhonto could, for such a long time, enter the premises without having any permit which permitted him to enter the premises. Even if one or two of the security officers knew him and were his friends, the following day a different set of security officers would be on duty and they would not have allowed Mr Mkhonto to enter without a permit. Ms Matweketsane insisted that without a parking permit, Mr Mkhonto would not have been allowed to enter the premises.
- [20] Ms Matweketsane testified that based on Ms Lefifi's statement, the motive for preparing a fraudulent permit was to enter the premises to ensure that they are not late for work. If they did not have a permit, they had to park outside, which was a walking distance from their workstations. The motive was to be at work on time and to not have to walk the distance from outside. Ms Matweketsane testified that it was probable that Ms Lefifi also created a fraudulent permit for Mr Mkhonto, because she had access to the computer on which the permits were created. The motive remained the same, whether it was Ms Maaroganyane driving or Mr Mkhonto.
- [21] Ms Matweketsane testified that when an employee is found guilty of fraud, dismissal is the only appropriate sanction, as the employer cannot continue to trust such an employee. It impacts the trust relationship, more so where the rule is known, where the employee is aware that he is not permitted to enter the premises and the intention is to use a fraudulent permit to enter the premises. Mr Mkhonto knew that he was not supposed to enter the premises, he knew that his vehicle did not have the required permit and he either befriended the security to gain access, which was wrong, or he used a fraudulent permit. It was impossible for Mr Mkhonto to enter the premises over such a long period without having a permit. If the security officers allowed him to enter without a permit, it could have

been once or twice, but not over such a lengthy period of time.

- [22] In cross-examination, not much of Ms Matweketsane's evidence was challenged or disputed and no versions or propositions in respect of Mr Mkhonto's case were put to her. Ms Matweketsane was asked whether either Mr Maaroganyane or Ms Lefifi indicated or acknowledged that they had given Mr Mkhonto a fraudulent permit or that he had used a fraudulent permit to enter the premises. Ms Matweketsane explained that the three of them were in a lift club, meaning that they were travelling together, using Messrs Maaroganyane and Mkhonto's cars, taking turns driving their cars to work with Ms Lefifi, who did not have a car. She explained that there was no way in which Ms Lefifi could make a permit for Mr Maaroganyane and not make one for Mr Mkhonto, as that would mean that the week they came with Mr Mkhonto's car, they would have to park outside. Ms Lefifi created a permit for two cars, as both cars entered the premises.
- [23] The Respondent's last witness was Mr Moeng, a business manager, who was also a witness during Mr Mkhonto's disciplinary enquiry. Mr Moeng explained that the issue of the permit was brought to his attention by the ER department, as Messrs Maaroganyane and Mkhonto and Ms Lefifi were employed in his department. He did his own investigation to find out what was happening and he interviewed the said three employees. Ms Lefifi was his secretary.
- [24] He first interviewed Mr Maaroganye, who first denied the allegations, but subsequently changed his version and informed Mr Moeng that he got the permit from Ms Lefifi. He told Mr Moeng that Ms Lefifi had called Mr Mkhonto, who had worked with him in Bay 45, and he had asked him for his car registration number. Mr Mkhonto was on the phone with Ms Lefifi when he gave Mr Mkhonto his car registration number. Later in the afternoon of the same day, he received a parking permit to use.
- [25] Mr Moeng thereafter interviewed Ms Lefifi, who at first denied any knowledge of the permit, or that she had given a permit to Mr Maaroganye. A week or so later Ms Lefifi changed her statement and conceded that she had given the car permit to Mr Maaroganye for him to enter the premises. Ms Lefifi's motivation was that she was part of a lift club and she did not want to be late for work.
- [26] Mr Moeng lastly interviewed Mr Mkhonto, who denied any knowledge of the car permit and denied that he had accessed the premises with his car. When he asked Mr Mkhonto for his permit, he denied that he had a permit.
- [27] Messrs Maaroganyane, Mkhonto and Ms Lefifi travelled together to work and Mr Moeng explained that they were alternating their cars when they came to work, one car was used the one week and the other car was used the following week, as he testified "this one will be driving this week, the others would be travelling with him".

[28] Mr Mkhonto's defence was put to Mr Moeng as that Mr Mkhonto did not have a permit, but because the security officers knew him because he was travelling with Mr Maaroganyane, on the days he was using his own car, the security officers would just greet him and allow him to enter the premises without a permit. He could enter the premises without being asked for a permit for the car or his ID card. Mr Moeng responded that he was not sure as to what happened at a particular time, but testified that most of the security officers would ask for a permit and an ID card when he wants to enter the premises. That is

what they always do, even though Mr Moeng is known to them. Mr Moeng disputed that Mr Mkhonto would have been able to enter the premises without a permit.

[29] Mr Moeng came to the conclusion that Mr Mkhonto used a falsified car permit, similar to the one used by Mr Maaroganyane, based on the evidence he had received from Ms Lefifi and Mr Maaroganyane. Furthermore, Mr Mkhonto initially denied that he had a permit and that he had entered the premises at all, just to change that version subsequently to one where he was able to enter the premises without any permit. Mr Mkhonto was part of the lift club and he was involved to arrange a permit for Mr Maaroganyane. They used different cars to drive to work and Mr Mkhonto, when using his car, was also able to enter the premises.

[30] In cross-examination, Mr Moeng was asked about his version that Mr Mkhonto and Mr Maaroganyane rotated cars on a weekly or bi-weekly basis, but his version was not disputed. The proposition was rather that "if I am not always using my car the amount of times that I will be coming in with my car would be less. So it is easier than for me to enter because if I come in on a weekly basis, every second week, chances they would have caught me with the permit would have been much easier". The version put was that Mr Mkhonto did not use his car every second week, he only used his car when Mr Maaroganyane did not come to work. On those occasions, Ms Lefifi would travel with Mr Mkhonto. Nothing really turned on the version put to Mr Moeng.

The Applicant's case

[31] Mr Mkhonto testified that he was a machine operator, working in Bay

45. He was approached by Mr Maaroganyane to join a lift club, as they stayed close to each other. The difficulty was that he was sharing his vehicle with his wife, who was a sales consultant and using the vehicle most of the time. Mr Maaroganyane did not have a problem with that and indicated that they could be using his vehicle for the lift club.

[32] After Mr Maaroganyane was caught with the fraudulent permit, he was questioned as well, but he maintained throughout that he was never in possession of a permit and he got access to the premises because the security officers were familiar with him. He testified that Ms Lefifi never gave him a false permit.

- [33] Mr Mkhonto apologised for the fact that he had gained access to the premises through the security officers. He explained that at the time, he did not see it as a serious offence to enter the premises and to park there, but subsequently, he realised that there was a procedure in place in respect of access to the premises.
- [34] Mr Mkhonto persisted with his version that he never had a permit to enter the premises, but that he did so on the basis that he greeted the security officers, who granted him access due to his close association with Mr Maaroganye, whom they were familiar with.
- [35] In cross-examination, his version was that Mr Moeng was not telling the truth when he testified that Mr Mkhonto initially denied that he had entered the premises at all with his vehicle, as he told Mr Moeng from the onset the reasons why he had entered the premises. It was pointed out to Mr Mkhonto that this version was never put to Mr Moeng, nor was Mr Moeng's version disputed. In fact, Mr Moeng's version was left unchallenged.
- [36] Mr Mkhonto was asked why he had not apologised for entering the premises without a permit when he was asked to write a statement during the investigation phase. The incident occurred on 21 February 2018, Mr Mkhonto submitted his statement on 5 March 2018 and his disciplinary hearing was scheduled for October/November 2018, but only commenced during March
2019. Mr Mkhonto was asked why he did not at any time change his statement to reflect that he was indeed entering the premises without a permit, based on the fact that he greeted the security officers who knew him. Mr Mkhonto responded that "nowhere was I told that are you aware that you are wrong when you are entering" and according to him, there was nothing to change in his statement.
- [37] Mr Mkhonto was questioned about the genuineness of the apology that he had entered for entering the premises without a permit. Mr Mkhonto responded that his apology was genuine because he now realised that it was a serious offence, which he did not realise at the time as the security officers allowed him to enter the premises, which he assumed to be a form of permission. He was questioned about the fact that he had waited so long to tender the apology, it was not tendered during the disciplinary hearing but was only tendered during the arbitration hearing. Mr Mkhonto explained that he could not apologise during the disciplinary hearing because the charge was that he had used a fraudulent permit, which he did not do and could not apologise for.
- [38] Mr Mkhonto agreed that Ms Lefifi's motivation not to report late for work would remain the same, irrespective of whether she was travelling with him or with Mr Maaroganye.

The test on review

[39] I have 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 Ltd and others*[1] (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[40] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[2] 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.’

[41] 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.[3]

[42] In *Quest Flexible Staffing Solutions (Pty) Ltd (A division v Lebogate*[4] (*Quest Flexible Staffing*), the LAC confirmed the test to be applied on review:

‘[12] 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.

[13] 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.’

[43] In *Bestel v Astral Operations Ltd and others*,[5] the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator’s

finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

‘... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’

[44] It has been emphasized by the Courts that a review is not an appeal. This was confirmed in *Duncanmec (Pty) Ltd v Gaylard NO and others*[6] (*Duncanmec*) where the Constitutional Court held that:

‘[40] As is apparent from *Sidumo*, the genesis of the reasonableness standard of review is section 33(1) of the Constitution which confers on everyone the right to administrative action that is lawful, reasonable 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 LRA. 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.

[41] *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.

[42] 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.

[43] 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.’

[45] The review test to be applied in casu is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator arrived at an unreasonable result.

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

Analysis

of the arbitrator's findings and the grounds for review

The arbitrator's findings

- [47] In his analysis of the evidence, the arbitrator recorded that the issue was whether Mr Mkhonto had accessed the Respondent's premises with a fraudulent car park permit or whether he was given a free pass by the security officers, in which event there was no fraud.
- [48] The arbitrator found that the Respondent had a strict policy against unauthorised parking on its premises. He assessed the evidence of the Respondent's three witnesses and found their evidence to be highly consistent with the conclusion that Mr Mkhonto was complicit in or a direct participant in the act of fraud. The undisputed evidence was that Mr Mkhonto used his vehicle to access the Respondent's premises, that he did not have a valid permit, that he was in a lift club in which only two cars were used, being that of Mr Maaroganye and Mr Mkhonto. Ms Lefifi, who benefitted from the use of Mr Maaroganye and Mr Mkhonto's cars would have every reason to also issue a fraudulent permit to Mr Mkhonto and it is highly unlikely that he would have been oblivious to the fact that Mr Maaroganye was using a fraudulent permit. It was inconceivable that Mr Maaroganye would have fabricated an unfounded allegation of wrongdoing on the part of Mr Mkhonto and thereby putting his job in jeopardy.
- [49] The arbitrator further held that Mr Mkhonto had the opportunity to call his lift club mates to rebut the Respondent's case of fraud against him and his failure to call on their testimony, was suspect.
- [50] The arbitrator found Mr Mkhonto's version that the security officers gave him the right to free passage on the ground of familiarity, was far-fetched and not convincing. The balance of evidence favoured the respondent's version.
- [51] The arbitrator found that Mr Mkhonto's conduct seriously undermined the Respondent's access control measures, the offence was grave and dismissal was an appropriate remedy.

The grounds for review

- [52] It is trite that a party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification namely that the Court is obliged to deal with a point of law apparent from the papers.[7] It is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review. An applicant is bound by the grounds for review raised in the papers before Court.

- [53] The Applicant filed a founding affidavit wherein his grounds for review were set out in very brief terms and no supplementary affidavit was filed. As such, the Applicant is bound by the limited grounds for review raised in the founding affidavit.
- [54] In casu, the arbitrator was clearly faced with two conflicting versions on a material aspect he had to decide. On the one hand, the Respondent's witnesses testified that Mr Mkhonto used a fraudulent parking permit to access the Respondent's premises, which was regarded as a serious transgression. Mr Mkhonto, on the other hand, conceded that he had entered the Respondent's premises and that he was aware of the rule against entering the premises without a permit, but submitted that he did not have a fraudulent permit to enter but instead, he was permitted to enter without a permit because he greeted the security officers and they were familiar with him.
- [55] The arbitrator found Mr Mkhonto's version far-fetched and not convincing and he accepted that the balance of evidence favoured the Respondent's version.
- [56] The Applicant's case on review, as per the founding affidavit, is that there was no direct evidence to find Mr Mkhonto guilty of the misconduct he was dismissed for and that the arbitrator had relied on circumstantial evidence to find that he was indeed guilty. The Applicant's ground for review is that the arbitrator should have come to the conclusion that the Respondent's witnesses had not established that Mr Mkhonto had committed the misconduct he was dismissed for and he should have accepted Mr Mkhonto's version.
- [57] In my view, there is no merit in the Applicant's grounds for review, for reasons I will deal with infra.

Circumstantial evidence

- [58] It is evident from the Applicant's grounds for review that issue is taken with the fact that there was no direct evidence in respect of Mr Mkhonto's misconduct and that the arbitrator accepted circumstantial evidence. By accepting the Respondent's version, the arbitrator misdirected himself and failed to apply his mind to the evidential material before him, so the Applicant submitted.
- [59] Circumstantial evidence refers to indirect or associated facts from which an inference can be drawn about the facts in issue. There is a difference between drawing an inference and making an assumption or mere speculation. In *Caswell v Powell Duffryn Associated Collieries Ltd*,^[8] it was said that:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But, if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

- [60] In civil proceedings, the onus of proof is on a balance of probabilities and with regard to circumstantial evidence, the court held in *Macleod v Rens*^[9] that:

‘The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.’

[61] Circumstantial evidence is permissible. In assessing circumstantial evidence, the arbitrator should consider the cumulative effect of all the evidence as the value of circumstantial evidence does not lie in each individual piece, but in the combination of all the pieces of evidence, viewed together. The arbitrator should consider the cumulative effect of all the evidence and weigh it on a balance of probabilities.

[62] In *Komape v Spoornet (Pty) Ltd and others*, [10] the Court held in respect of circumstantial evidence that:

‘[28] In assessing circumstantial evidence the arbitrator should always consider the cumulative effect of all the items of the evidence before him or her. In this regard the commissioner should look at the totality of the evidence and weigh it on a balance of probabilities...[11] The inference must be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been committed by the employee. To this extent the court in *Smit v Arthur* 1976 (3) SA 378 (A), when dealing with circumstantial evidence held:

“All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom.”

...

[30] The onus in civil cases is discharged if the inference advanced is the most readily apparent and acceptable from a number of other possible inferences.’

[63] The undisputed evidence was that Messrs Maaroganye, Mkhonto and Ms Lefifi were in a lift club, Ms Lefifi had access to the computer on which the parking permits were created, she created a fraudulent permit for Mr Maaroganye to enter the premises and her motivation was that she did not want to report late for duty, which might have been the case if they had to park outside of the premises, as that was some walking distance from the offices. On the days Mr Maaroganye did not use his car, Mr Mkhonto used his car with Ms Lefifi and they entered the premises. Mr Mkhonto conceded that irrespective of whether Ms Lefifi was getting a lift with him or Mr Maaroganye, her motivation to park inside the premises would remain the same.

[64] It is not disputed that there was no direct evidence to the effect that Mr Mkhonto used a fraudulent permit. The Respondent presented circumstantial evidence in support of its case and the arbitrator had to consider the cumulative effect of all the evidence before him and weigh it on a balance of probabilities.

- [65] The arbitrator considered the evidence of the Respondent's witnesses and held that the evidence favoured the Respondent's version. The arbitrator rejected Mr Mkhonto's version and found the Respondent's version more probable, albeit that there was no direct evidence to the effect that Mr Mkhonto used a fraudulent permit.
- [66] The Applicant's case is that the arbitrator should have accepted Mr Mkhonto's version that he was on good terms with the security officers, who had given him permission to park on the Respondent's premises. This was a very reasonable and plausible explanation, which should not have been rejected, but more weight should have been attached to it.
- [67] Mr Mkhonto's version was not reasonable and plausible and there are no convincing grounds to show that the arbitrator should have accepted his version or that it was unreasonable to reject it.
- [68] The Respondent's witnesses rejected Mr Mkhonto's version and they explained that it was not possible to get access to the premises without a permit and even if the security officers would allow that, it would happen on one or two occasions and not all the time. They further disputed the version that the security officers knew Mr Mkhonto and that based on that, they would open for him. Mr Moeng testified that he is asked for a parking permit by the security officers, notwithstanding the fact that he is a senior manager and well-known. Furthermore, it was undisputed that the security officers rotate and that one would not find the same, familiar ones all the time at the entry gates.
- [69] In cross-examination, Mr Mkhonto could not substantiate the version that he gained access on the basis that he greeted the security officers and because he was known to them. In respect of the Respondent's version that the security officers changed and that the same ones would not always be on duty, Mr Mkhonto testified that "so as to they were different or they were not different, the ones that were posted at that particular time, that certain time when I came actually, allowed me access". When pressed on his version that he was allowed access because the security officers were familiar with him and that he was effectively exempted from following the Respondent's rules on the basis of the security officers being familiar with him, he was asked whether all of them were familiar with him. Mr Mkhonto's responses were "I would not know when you say all of them, because I do not know how many of them are there" and "so as to the rules I do not know. They gave me permission to come in" and that according to Mr Mkhonto, was the bottom line.
- [70] Mr Mkhonto's version was indeed not convincing and far-fetched. It is improbable that all the security officers, whether they knew him or not, would give him access to the premises, merely because he greeted them, in circumstances where a parking permit was required and without him producing a permit.
- [71] Evidently, the cumulative effect of all the evidence is that on a balance of probabilities, there is no other explanation as to how Mr Mkhonto had accessed the Respondent's premises for which a parking permit was required. The reasonable inference from the evidence

presented is that Mr Mkhonto indeed accessed the Respondent's premises by using a permit. The undisputed evidence was that he never applied for a permit, he did not qualify for a permit and a valid permit was not issued to him. The only inference is that he used a permit which was fraudulent. This inference is supported by the evidence that he was in a lift club with Ms Lefifi and Mr Maaroganye and Mr Maaroganye accessed the premises with a fraudulent permit, created by Ms Lefifi. Ms Lefifi's motivation to park inside the premises remained, irrespective of whether she drove with Mr Maaroganye or Mr Mkhonto. On the days Mr Maaroganye did not use his vehicle, Mr Mkhonto was still able to access the premises and the overwhelming probability is that he did so on the strength of a fraudulent parking permit. The evidence adduced showed that the Respondent indeed discharged its onus to prove that Mr Mkhonto was dismissed for a fair reason.

[72] The arbitrator drew the obvious inferences from the evidence presented and he made findings based on what was placed before him.

Conclusion

[73] In Quest Flexible Staffing,[12] the LAC confirmed that an arbitration award will 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.

[74] This Court can review an arbitration award if the arbitrator's finding is unsupported by any evidence, if it is based on speculation or is disconnected from the evidence. An award will only be set aside on review if both the findings and the result are unreasonable. Even where the arbitrator's findings or reasoning may be unreasonable, the result could nevertheless be capable of justification, and therefore be reasonable and not be interfered with on review.

[75] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.

[76] In Duncanmec, the Constitutional Court considered the question of whether an arbitration award was unreasonable and held that:[13]

'The issue that remains for consideration is whether the impugned award was vitiated by unreasonableness. In determining this question the Court is required to examine the award for the reasons motivating the decision reached. If the reasons advanced rationally support the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified. This would be the position even if the Court does not agree with the reasons furnished. Section 33 of the Constitution does not guarantee a perfect or correct administrative action but a reasonable one.'

[77] I have considered the aforesaid question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. Considering the evidence before the arbitrator holistically, the arbitrator's findings are not disconnected from the evidence and fall within a band of reasonableness based on the evidence that was placed before him.

[78] There is no basis for this Court to interfere with it the award on review and it follows that this application fails.

Costs

[79] The Court has a broad discretion to make orders for costs according to the requirements of the law and fairness.

[80] Neither of the parties sought a cost order and therefore no order as to cost is made.

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

Order

1. The late filing of the review application is condoned;
2. The review application is dismissed;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr

D O Pretorius from Fluxmans Incorporated

For the Third Respondent: Mr A F van Wyk from A F Van Wyk Attorneys

[1] (2007) 28 ILJ 2405 (CC) at para 110.

[2] (2014) 35 ILJ 943 (LAC) at para 16.

[3] (2014) 35 ILJ 943 (LAC) at paras 18 – 19. [4] (2015) 36 ILJ 968 (LAC) at paras 12 - 13.

[3] (2014) 35 ILJ 943 (LAC) at paras 18 – 19.

[4] (2015) 36 ILJ 968 (LAC) at paras 12 - 13.

[5] [2011] 2 BLLR 129 (LAC) at para 18.

[6] [2018] 12 BLLR 1137 (CC) at paras 40 – 43.

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- [7] Commercial Workers Union of SA v Tao Ying Metal Industries and others (2008) 29 ILJ 2461 (CC) at para 67.
- [8] [1939] 3 All ER 722 at 733.
- [9] 1997
- (3) SA 1039 (E) at 1049.
- [10] (2008) 29 ILJ 2967 (LC) at paras 28 and 30.
- [11] See NUMSA v Kia Motors (2007) 28 ILJ 2283 (LC) and SA Nylon Printers (Pty) Ltd v Davids [1998] 2 BLLR 135 (LAC) at 1369. [12] Quest Flexible Staffing supra at paras 12 and 13.
- [11] See NUMSA v Kia Motors (2007) 28 ILJ 2283 (LC) and SA Nylon Printers (Pty) Ltd v Davids [1998] 2 BLLR 135 (LAC) at 1369.
- [12] Quest Flexible Staffing supra at paras 12 and 13.
- [13] Duncanmec at para 50.
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