

SOUTH AFRICA / JUDGMENT

Sasol Mining (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others (JR2279/21) [2024] ZALCJHB 436 (8 November 2024) [2024] ZALCJHB 436

COURT

Labour Court Johannesburg

BEFORE

B M Sono

CASE / FILE NUMBER

JR2279/21

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR2279/21

SASOL MINING (PTY) LTD Applicant And THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent COMMISSIONER JOHN MASHIKA N.O Second Respondent THE ASSOCIATION MINEWORKERS AND CONSTRUCTIVE UNION obo OUPA RADEBE Third Respondent

Heard: 26 June 2024

Delivered: 06 November 2024

JUDGMENT

SONO, AJ

Introduction

- [1] This is an opposed review application[1]. The Applicant, Sasol Mining Proprietary Limited, seeks to have the arbitration award dated 21 September 2021 (Award) issued by the Second Respondent, Commissioner John Mashuka, under the auspices of the First Respondent, the CCMA, reviewed and set aside.

Background facts

- [2] The relevant background facts to this dispute are largely common cause. The Applicant is a private company which, as a business, conducts operations in Secunda, Mpumalanga. The Third Respondent is an erstwhile employee of the Applicant. At the time of his dismissal, the Third Respondent was employed as an artisan.
- [3] On 14 December 2020, the Third Respondent entered the premises of the Applicant under the influence of alcohol. On the same date, the Applicant preferred charges against him alleging that he had contravened Rule 6.9(d) of the Applicant's Disciplinary Code which prohibits employees entering the Applicant's premises under the influence of alcohol.[2] At the time the charge was preferred the Third Respondent was on a final written warning for the same offence having committed the same offence on two previous occasions.
- [4] On 19 December 2020, and pursuant to a formal disciplinary hearing, the Third Respondent was dismissed by the Applicant. The Applicant appealed the dismissal internally and the appeal was unsuccessful.
- [5] Aggrieved by the dismissal, the Third Respondent referred an unfair dismissal dispute to the CCMA. Conciliation was however unsuccessful, following which the Third Respondent referred the matter to arbitration.
- [6] The arbitration came before the Second Respondent on 14 September 2020. Procedural unfairness and misconduct were not in dispute.[3] What was in dispute was the substantive fairness of the dismissal.
- [7] Pertinently, the Third Respondent contended that there had been inconsistent application of the disciplinary action in that another fellow employee, Mr DK Nwendzani (Comparator), who was similarly on a final written warning and who had committed the same misconduct as him had not been dismissed by the Applicant.
- [8] On 21 September 2021, the Second Respondent found that the dismissal of the Third Respondent was substantively unfair and ordered the Applicant to reinstate the Third Respondent without any back pay.

Grounds of review

- [9] The Applicant seeks to review the aforementioned decision on the following grounds -

9.1 The decision reached by the Second Respondent is not one that a reasonable decision-maker could have reached having regard to his

reasoning on the material before him;

9.2 The Award contains numerous material misdirections and defects which contributed to an outcome that is irrational, unreasonable and unjustifiable; and

9.3 That the Second Respondent failed to apply his mind to the matter before him and committed several gross irregularities in reaching a conclusion that falls outside the band of reasonableness.

[10] What is clear, from a perusal of the Applicant's papers, is that the Applicant attacks not only the Second Respondent's finding that the dismissal was substantively unfair but also the Second Respondent's reasoning in concluding that the dismissal was unfair.

The law

[11] The test to be applied in this application is trite. It is the reasonableness test as set out in *Sidumo*.^[4] More recently, the Labour Appeal Court (LAC) in *Makuleni v Standard Bank of South Africa Ltd and Others*^[5] restated the principles applicable in review proceedings as follows -

'[3] The critical approach to reviews that turn on "unreasonableness" was articulated by Murphy AJA in *Head of Department of Education v Mofokeng & others*^[6] at paras [30] to [33]. The significant passages are emphasized:

'[30] The failure by/an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curia)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an 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.

[31] 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 envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 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 whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is/subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the

issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA,

confining review to “defects” as defined in S145(2) being misconduct, gross irregularity, exceeding powers and improperly

obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something, more is required. To repeat flaws in the reasoning of the arbitrator evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] 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 upon the arbitrator's conception of the enquiry, the delimitation 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 ex hypothesis be material to the determination of the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the

nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed

to address the question raised for determination.’

[12] The LAC further stated that -

[4] The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a

fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted.’[7]

[13] The parity principle, on which this matter centres, has been described as follows by the LAC in *Burton and Others v MEC for the Department of Health Eastern Cape Province and Others*[8] -

‘[28] The parity principle requires that like cases be treated alike which is an element of disciplinary fairness... [u]nfairness flows from the principle that like cases should, in fairness, be treated alike.’

[14] Our law also distinguishes between two forms of inconsistency the first being contemporaneous inconsistency and the second being historical inconsistency.[9] This case involves the latter in that the inconsistency is raised as a basis to challenge the fairness of the sanction.[10] The LAC has aptly described historical inconsistency as follows -

‘[30] The other context is where historical inconsistency is raised as a basis to challenge the fairness of the sanction of dismissal. In this instance, there would be no dispute that what the employee was charged with was indeed valid and proper to constitute misconduct, of which the employee is guilty. However, the issue would be that the dismissal of the employee for such misconduct is inconsistent with the sanction imposed by the employer for similar and related misconduct, in the past, in respect of other employees...’[11]

[15] Lastly, the LAC has made it clear that the parity principle must be applied with caution and not "willy-nilly".[12]

Analysis and

conclusion

[16] Early in the arbitration proceedings, the Third Respondent raised the issue of inconsistency. In fact, inconsistency was the sole issue before the Second Respondent. Furthermore, the Third Respondent identified the comparator employee expressly and documentation related to the Comparator's disciplinary sanction was placed before the Second Respondent.

[17] The employer knew of the Comparator and knew that he had been given a different sanction for the same misconduct committed by the Third Respondent.

[18] The Applicant stated that the sanction meted out to Mr Nwendzani was done in error. This assertion however cannot hold weight. Firstly, it is the Applicant's own disciplinary code that provides for an alternative sanction to dismissal in the case of the misconduct the Third Respondent has been dismissed for. Therefore, the chairperson in that disciplinary hearing did not thumb-suck the sanction but applied the provisions of the Applicant's Disciplinary Code. I therefore agree with the Second Respondent's assessment in this regard as a reasonable conclusion based on the evidence presented before him.

- [19] Furthermore, there was no credible evidence placed before the Second Respondent to differentiate the misconduct of the Third Respondent and that of the Comparator. The Applicant called only one witness who testified that he had no personal knowledge of the Comparator's disciplinary process. Furthermore, the Applicant's one witness could not have had any personal knowledge of the disciplinary hearings of the other two employees who had been dismissed for the same misconduct.
- [20] The effect of the afore-going is that there was very little, before the Second Respondent, to justify why the Applicant opted to mete out a lesser sanction in the case of the Comparator and mete out the sanction of dismissal in the case of the Third Respondent.
- [21] This is especially so, as objectively, there is nothing that differentiates the two employees. Both the Comparator and the Second Respondent were rendering their services at the workplace. Further, both were found guilty of the same misconduct. Both were on a final written warning at the time they committed the misconduct. Both are subject to the same Disciplinary Code yet different sanctions were meted out to them.
- [22] The Second Respondent correctly identified that the primary issue before him was whether the Applicant had applied the sanction of dismissal consistently in relation to a breach of clause 6.9(d) of the Code. Furthermore, the Second Respondent was correct that this is an issue that falls within the determination of the appropriate sanction.[13] There is nothing in the Award that says he incorrectly applied the principles of inconsistency.
- [23] In my view, the decision reached by the Second Respondent is one that a reasonable decision-maker could reach on the evidence before him. I must reiterate that the test is not whether he was wrong or right but whether the conclusion reached falls within the bands of reasonableness.

Costs

- [24] The general rule that cost follows suit does not apply in labour law this was confirmed by the apex court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[14]. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court.
- [25] Furthermore, the parties are still very much in an employment relationship with one another and that for me is a factor that militates against the awarding of costs.
- [26] I exercise my discretion not to award costs. This is not a matter where a cost order is appropriate.
- [27] In light of the above, I make the following order –

Order

1. The review application is dismissed.

2. There is no order as to costs.

B M Sono

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv P H Kirstein

Instructed by: Johanette Rheeder Attorneys Inc.

For the Third Respondent: Adv Ashley Cook

Instructed by: LDA Inc. Attorneys

[1] This review application is brought in terms of section 145 of the Labour Relations Act (LRA), Act 66 of 1995, as amended.

[3] At the arbitration hearing held on 14 September 2021 the Second Respondent, during the narrowing of issues, asked the Applicant's

Representative whether or not (i) he stands by the fact that the allegation levelled against the Applicant is not in dispute i.e that the Applicant tested positive and (ii) that the issue of consistency would be the only issue before him. The Applicant's representative replied "Yes, Commissioner".

[4] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)

[2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

[5] Makuleni v Standard Bank of South Africa Ltd and Others (JA125/2021)

[2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) (8 February 2023)

[6] (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 30 - 33.

[7] Ibid at para 4.

[8] [2022] ZALAC 101; (2022) 43 ILJ 2284 (LAC).

[9] Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2010) 31 ILJ 452 (LC); [2009] ZALC 68 at para 10.

[10] Ibid Burton.

[11] Ibid Burton.

[12] See Absa Bank Limited v Naidu and Others

(2015) 36 ILJ 602 (LAC); [2014] ZALAC 60 at para 36.

[13] See para 94 of the CCMA's Guidelines on Misconduct Arbitration.

[14] [2018] ZACC 1; (2018) 39 ILJ 523 (CC).

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