

SOUTH AFRICA / JUDGMENT

Tactical Reaction Services v Thompson and Others (JR 1054/2018) [2023] ZALCJHB 187 (19 June 2023) [2023] ZALCJHB 187

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1054/2018

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THE LABOUR COURT OF
SOUTH AFRICA

Not Reportable

Case No: JR
1054/2018

In the matter between:

TACTICAL
REACTION SERVICES
Applicant
and
THOMPSON,
COLLEEN CLEVIS
First
Respondent
COMMISSIONER
NONCEBA CAROLINE HLABA N.O.
Second
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION HELD AT JOHANNESBURG
Third
Respondent

Heard:

14 June 2023

Delivered: 19 June 2023
(This judgment 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 19 June 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 22 May 2018. In the award, the arbitrator found that the first respondent's dismissal was substantively unfair and awarded her compensation in a sum equivalent to four months' remuneration, being R48 000.
- [2] The factual background is recorded in the award. The first respondent (the employee) was dismissed on 19 December 2017 after an altercation with a co-employee. Specifically, the employee was dismissed for unbecoming behaviour, assault, insolence and untoward behaviour towards her superiors, in that she had made disparaging remarks and comments toward a co-employee and then attempted to assault the co-employee with a stapler. Further, the employee was alleged to have refused to back down from the assault following instruction from her superior, and screamed and shouted at her superior following an attempt to resolve the issue.
- [3] In her award, the arbitrator found that the evidence of two of the applicant's witnesses was not credible. They had testified that the employee had sworn at her fellow employee; one of them testified that the employee had called her co-employee a bitch. Further, the arbitrator found that there were contradictions as between witnesses for the applicant. The employee had not denied that she stood up when confronted by her co-employee, that she had a stapler in her hand, had removed her spectacles. She felt angry because she had been sworn at by her co-employee. The supervisor intervened. The arbitrator found, on the facts, that the employee had stood up to defend herself against the approach of her co-worker, who had already sworn at her. The arbitrator accepted that the employee acted out of frustration. Specifically, she found that the employee did not break any rule that warranted dismissal; she had stood up to defend herself against the approach of her co-employee who had already sworn at her. The basis of the finding of substantive unfairness is the provocation that the arbitrator found to exist, and the fact that the co-employee who provoked the employee was given a lesser penalty.

- [4] The applicant has raised three grounds for review, all of which concern the arbitrator's assessment of the evidence. In particular, the applicant contends that the arbitrator disregarded or misconstrued material evidence. First, the applicant submits that there was no inconsistency between the applicant's witnesses and no basis to disregard their evidence. Secondly, the applicant contends that the employee, on her own version, displayed an intention to commit assault and thirdly, the applicant contends that on the evidence, there was no inconsistency in the application of discipline given that the co-employee who received a final written warning for her misconduct had faced less severe charges.
- [5] The test to be applied on review is well-established. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) at para 110, the Constitutional Court held that the outcome of the proceedings under review, in the form of the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 ILJ 943 (LAC), the court held that the review court must ascertain whether the arbitrator considered the principal issue in dispute, evaluated the facts presented at the hearing, and came to a conclusion that is reasonable. In essence, the test is a two-stage test. To succeed, an applicant must establish some reviewable irregularity on the part of the arbitrator and given the existence of any such an irregularity, establish that the outcome of the proceedings in the form of the arbitrator's ruling or award, falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.
- [6] More recently, in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC) restated the review test in the following terms:

The test for review is this: "Is the decision reached by the arbitrator wonder that a reasonable decision maker could not reach?" 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 justifications for reasons other than those given by the arbitrator.

The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make."

- [7] What these authorities make clear is the line between an appeal and a review. It is not for this court to intervene only because it would have come to a different conclusion on the same evidence. In the present instance, the arbitrator took the view that the evidence

proffered by two of the applicant's witnesses was unreliable, and that the employee's version was to be preferred. On that version, the employee had not committed assault, and what action she did take was justified by provocation. Again, the issue is not whether that conclusion is right or wrong, what matters is whether the arbitrator's conclusion falls within a band of decisions to which a reasonable decision-maker could come on the available evidence. Again, the arbitrator's conclusion that the employee and her co-employee were similarly circumstanced and that the harsher penalty of dismissal suffered by the employee was thus an inconsistent application of discipline, need only fall within a range of reasonable decisions. In my view, the arbitrator's

conclusions cannot be said to be so unreasonable that they fall outside of the range of reasonable responses to the evidence. The

application to review and set aside the arbitrator's award thus stands to be dismissed.

[8] In regard to costs, the court is a broad discretion in terms of section 162 to make orders for costs according to the requirements of the law and fairness. The employee has had to incur costs in order to oppose the application and there is no reason to deny the employee her costs.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv AJ Nel Instructed by: Roy Ramdaw and Associates Inc For the respondent:
Adv V Mndebele Instructed by: Lee and McAdam Attorneys

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