DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

27/09/2022
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1738/2019

In the matter between:

TRUDON (PTY) LTD	**APPLICANT**
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1ST RESPONDENT**
COMMISSIONER RAYNOLD BRACKS *N.O.*	**2ND RESPONDENT**
ROBERT GREYLING	**3RD RESPONDENT**

Heard: 02 August 2022

Delivered: 27 September 2022

(In view of the measures implemented as a result of the Covid 19 pandemic, this judgement was handed down electronically by circulation to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 27 September 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 1 August 2019. In his award, the arbitrator found that the third respondent (the employee) had been unfairly dismissed, and ordered his reinstatement with retrospective effect, and payment of back pay in the sum of R1.162 million.

[2] The applicant is the owner of what is referred to as the Yellow Pages Phone Book, and sells advertising on its print and digital platforms. The third respondent (the employee) was employed by the respondent as a regional sales manager.

[3] In June 2018, the employee was notified that he should attend disciplinary hearing on charges of dishonesty and bringing the applicant's name into disrepute. The charges emanated from a meeting with representatives of Eskom, where the applicant contends that the employee was instructed that no further invoices should be submitted against a contract concluded between the applicant and Eskom. The essence of the charges against the employee was that he had put through charges against the contract in September 2016, notwithstanding the verbal request for cancellation from Eskom, thus causing the applicant economic loss in an amount of some R2.5 million.

[4] At the arbitration hearing, a Ms. Cheryl Kannemeyer, the applicant's strategic sales planning manager testified, as did Ms. Gounden, a senior accounts manager. The applicant's head of sales and operations Mr Munetsi also testified, as did the applicant's chief financial officer, Mr Swanepoel. Finally, Mr. Pretorius, Eskom's general manager for strategic marketing and branding testified on behalf of the applicant. The employee then testified as did a Ms. Botes, who had reported to the employee, and was employed by the applicant until her resignation in the face of a disciplinary hearing. All of the evidence is well-summarised in the arbitrator's award, and there is no need to repeat the evidence adduced at the arbitration hearing. For present purposes, it was not disputed that Eskom entered into a contract with the applicant, for a period of five years, in which it offered Eskom

advertisements in its white and yellow pages. The employee was dismissed in circumstances where he continued to debit Eskom in terms of a five year fixed term contract, which Eskom contended had been 'put on hold' in terms of instruction issued at a meeting held on 11 April 2016, at which the employee was present. The applicant contends that Eskom agreed to honour invoices for advertisements already placed as at 11 April 2016, but not thereafter. The applicant claims that during 2017, Pretorius discovered that Eskom was still being billed on the same contract and as a result, disciplinary action was instituted against the employee and Botes.

[5] Despite the thousands of pages that comprise the record of the proceedings under review, the single material dispute of fact that the arbitrator was called on to decide related to what transpired at the meeting held on 11 April 2016 between representatives of the applicant (including the employee) and representatives of Eskom, led by Pretorius. Those present who gave evidence at the arbitration hearing were Pretorius, the employee and Botes. Pretorius's evidence was that the meeting was called to advise the applicant's representatives that after a meeting of Eskom's Exco, he had been instructed to place the five year fixed-term contract between Eskom and the applicant 'on hold'. Pretorius did not dispute the existence of the contract. His interpretation of its terms was that Eskom was entitled to place the contract 'on hold', as opposed to cancelling the agreement. He explained that during March 2018, when a meeting was held to discuss what the applicant contended were unpaid invoices, Pretorius restated his assertions in relation to putting the contract on hold. To the best of his knowledge, he was not challenged by the employee (who was present in the meeting) on the fact that he (Pretorius) had elected not to cancel the agreement but to put it on hold, so that if Eskom's financial situation improved, the contract could be reinstated without having to put the contract out to tender.

[6] The employee denied that at the meeting held on 11 April 2016, Pretorius issued an instruction to place the contract on hold. He testified that the purpose of the meeting was to provide Pretorius with a copy of the signed contract which Eskom

had requested, its own copy having been mislaid. Botes confirmed this version, stating that Pretorius had said that Eskom was cash-strapped and would like to discuss digital options. She was adamant that no instruction had been given to place the contract on hold.

[7] In his analysis, the arbitrator concluded that the applicant had failed to discharge the onus of proof, on a balance of probabilities, that the employee was guilty of the offences with which he had been charged. The arbitrator records Pretorius's concession that the correct process would have been to cancel the contract in writing, but that no written confirmation of the cancellation had been found. In his consideration of which of the versions that served before him was the more probable, the arbitrator came to the following conclusion:

> 110. Pretorius stated that the cancellation was done verbally at the meeting. There were several other people at the meeting. The applicant denies that such an instruction was given. This is supported by Botes. There is no similar collaboration on the part of Pretorius. No reason was given why Dell or anyone else who was at that meeting was not called. I'm not persuaded by Pretorius's evidence.
>
> 111. The other reason why I am not persuaded by Pretorius's evidence is that Eskom was insistent that their contracts should be used, so he was well aware that the contract stated that it was focused on all things being in writing. In fact, he confirmed the city's evidence and hence he was looking for the written confirmation. It begs the question why he would have expected that the contract would be pulsed. There was no provision to that effect in the contract; cancellation was the only option.
>
> 112. Interestingly Pretorius was adamant that there was no request for the contract to be canceled but for it to be paused. Even if he had made such a request, he would have had to make such a request in writing, as this was an unusual request. The respondent was at

pains to argue that there were several occasions when other clients requested to cancel the contracts. The applicant and the witnesses conceded this, but what was important to note was the fact that in the other cases the contract was for one year whereas in the case of is come it was a five-year contract which had different terms and conditions.

113. The respondent was at pains to focus on the fact that the applicant had not denied at the meeting that there was ever such a requested to pause the further contracts. The applicant was very clear that he was not going to argue with the client of the respondent. In fact, what the respondent did was in line with the thinking of the respondent to took a business decision not to sue as come in order not to interfere with the business relationship and yet they expected the applicant to challenge Pretorius who was the client at the meeting. This does not make sense!

114. In the light of the above, I'm not persuaded that such an instruction was ever given by Eskom and even if it was, it should have been given in writing to have any effect as the contract that Eskom got the respondent to sign was persistent in this regard. There was no proof to that effect.

115. Furthermore, the respondent having failed to discharge its onus in respect of the first part of the charge must also fail on the rest of the charges, as it was dependent on the first part succeeding this aspect of the charge. The loss which the company suffered resulted from a business decision not to sue Eskom and that the blame can hardly be placed on the shoulders of the applicant. This became clear from the evidence of the various witnesses.

[8] The applicant avers in the founding affidavit that the award is sought to be reviewed '*as it is unreasonable. Another commissioner ceased (sic) with the same material evidence could have arrived at a different conclusion*'. That is manifestly not the threshold to be applied, and to the extent that this is the primary ground for review,

the application is misguided. The test to be applied in review applications is clear. This court may intervene by way of review 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.

[9] In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the arbitrator's assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is respected. In *National Union of Mineworkers & another Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 *ILJ* 1618 (SCA), the court observed that it is trite that there was no appeal against an arbitrator's award, and that even if the reviewing court believed the award to be wrong, there were limited grounds on which it was entitled to interfere (at paragraph 5 of the judgment). In *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC), the LAC stated 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.*' This approach was again affirmed by the SCA in *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA), where the court held that material errors of fact, '*as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but only of any consequence if the effect is to render the outcome unreasonable.*'

[10] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [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 LAC 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).

[11] 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).

[12] In a matter such as the present, it should be borne in mind that ultimately, the arbitrator was called on to determine which version was the more probable and

given that determination, whether the applicant had discharged the onus of establishing that the employee's dismissal was substantively fair.

[13] The founding affidavit records the arbitrator was faced with two contradictory versions, the first being the applicant's version that Pretorius had informed the third respondent on 11 April 2016 that he should stop or suspend the placing of further advertisements until Eskom's finances had improved; the second being the employee's version that Pretorius did not request him or Botes to stop or suspend the running of further advertisements.

[14] The applicant contends that in these circumstances, faced as he was with a material dispute of fact, the arbitrator was required to inquire into the credibility, reliability and probabilities associated with all the evidence given and decide material dispute of fact that the evidence disclosed. Further, the applicant contends that had the arbitrator applied the correct tests, he would have arrived at the inevitable conclusion that the employee and Botes 'were unreliable as their evidence was riddled with contradictions, lies and improbabilities'.

[15] Contrary to what the applicant submits, the arbitrator provided reasons why he accepted the employee's version that of the applicant. The extract from the award quoted above demonstrates first, that the arbitrator appreciated that Pretorius was a key witness and his version that the purpose of the meeting was to advise the applicant representatives that Eskom's budget had been cut by 19%, that the existing contract to be put on hold, and that the contract would be reviewed in the event of any amendment to the budget. The arbitrator notes Pretorius's concession that it would have been proper to cancel the agreement in writing and that no written confirmation of his instruction could be found. The arbitrator found it anomalous that given Eskom's insistence on adherence to the terms of the contract, which included the requirement that notices to be given in writing, that Pretorius could state that the contract was to be paused and not cancelled, there being no provision in the contract for the pausing of a contract. The arbitrator further records the employee's version, supported by Botes, that no instruction to

pause the contract was given by Pretorius. In any event, so the arbitrator observed, this request, which was unusual given the applicable contractual terms, was not reduced to writing. The arbitrator noted that there had been no corroboration of Pretorius's version, despite the availability of other persons who had been present at the meeting, nor had the applicant proffered any reason why those persons, including Pretorius's assistant Dell, had not been called to testify. All of these factors persuaded the arbitrator to decide that the probabilities fell in the employee's favour.

[16] In essence, the applicant submits that the probabilities for which it contended at the hearing fall in its favour and that the arbitrator erred in coming to a contrary conclusion. These include a submission to the effect that the employee and Botes were not credible witnesses. Nothing in the record persuades me that any internal contradiction in the evidence of either the employee or Botes, or any contradiction between them, was sufficiently material to warrant a credibility finding against either of them. Both witnesses stood up to lengthy cross-examination, and there is no basis to conclude, as the applicant submits, that their evidence was 'riddled with contradictions, lies and improbabilities'. In any event, an adverse credibility finding does not in itself render an award reviewable (*Solidarity obo Van Zyl v KPMG Services (Pty) Ltd* (2014) 35 *ILJ* 1656 (LC)). There is nothing in the record or the award which indicates that the arbitrator's assessment of the probabilities is so manifestly unreasonable that the award cannot be sustained. None of the reasons that the arbitrator records for preferring the employee's version over those advanced by the applicant is unreasonable, capricious, arbitrary or irrational.

[17] The threshold for review recognises that not every decision-maker might come to the same decision on the basis of the evidence, but as I have indicated, it is one that permits a degree of tolerance that admits that prospect. In short, the conclusion reached by the arbitrator that the employee's version was, on the probabilities, more likely, is a finding that falls within a band of decisions to which a reasonable decision-maker could come on the totality of the evidence. Even if the probabilities had been evenly balanced, the outcome of the proceedings would

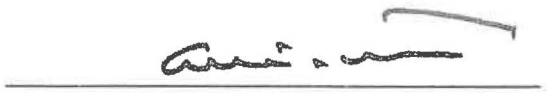
have been no different given that the award would have gone in favour of the employee on the basis of the application of the onus of proof. The application for review thus stands to be dismissed.

[18] In relation to costs, section 162 of the LRA provides that the court may make orders for costs according to the requirements of the law and fairness. This formulation has the consequence that costs do not ordinarily follow the result, as is the case in the civil courts in the absence of any exceptional circumstances. In the present instance, I must necessarily take into account that the employee has been obliged to meet the costs of opposing the attempt to set aside the award granted in his favour. There is no reason why he should not be reimbursed for those costs, to the extent that in order for costs on the ordinary scale can do so. Excluded from any costs order are the costs associated with the notices filed by the employee's attorney during December 2020, which seek to have the application deemed archived or withdrawn in terms of paragraph 11.2.7 of the practice manual. There was never any factual basis to justify the filing of that notice or the accompanying affidavit of service, and its filing amounted to an abuse.

[19] Finally, I would observe that the present dispute concerns an individual dismissal, a matter that in terms of the purpose underlying the LRA is to be resolved informally, expeditiously and inexpensively. The record of the arbitration hearing exceeds 1500 pages. Together with the notices and copies of the arbitration bundles, handwritten notes and a record of the disciplinary hearing, the record exceeds 2000 pages, not including the affidavits and heads of argument filed in the review application. The only beneficiaries of what amounts to unnecessary time, resources and costs for the resolution of what at the end of the day is a single factual dispute are the legal representatives engaged at each stage of the process.

I make the following order:

1. The application is dismissed with costs, such costs to exclude any notice issued by the third respondent in terms of paragraph 11.2 of the practice manual, and associated documents.



André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	B Ford, with him S Cooper and L Mukome
Instructed by:	Qina and Sekhabisa Inc.
For the respondents:	A Goldberg, Goldberg Attorneys