THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1695/2021

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION WORKERS UNION ("AMCU") obo MOTSWADI, NEO Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MARCUS KGOMOTSO MATHIBA *N.O.* Second Respondent

SIBANYE PLATINUM MINE Third Respondent

Heard: 10 August 2023

Delivered: 11 August 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 11 August 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator). In his award, the arbitrator upheld the dismissal of Mr Motswadi (the employee) on a charge of misconduct in the form of breaching a workplace rule against the possession of contraband in a demarcated non-contraband area.

[2] In his award, the arbitrator summarised the evidence and concluded that the employee had breached the rule in question. He found that it was common cause that the employee had entered the workplace through the lamp room and that he had been found with a cell phone on the walkway to the underground area. It was also common cause that there was a notice board at the entrance to the lamp room, notifying employees of the prohibition of contraband. The employee had admitted that while it was not his intention to do so, he had entered a non-contraband zone with a cell phone. In so far as penalty is concerned, the arbitrator recorded that the employee had acknowledged that he was aware of the danger of bringing contraband into the prohibited area, and that this could lead to an explosion.

[3] The applicant contends that the award is reviewable because the arbitrator failed to consider relevant evidence in relation to a company procedure document placed in evidence and regulating contraband and searches for contraband, that he failed to consider evidence relating to what the applicant submits was the inconsistent application of discipline and thirdly, the applicant challenges the arbitrator's finding that dismissal was an appropriate sanction in the circumstances. At the hearing, the applicant pursued only the third ground for review and in particular, submits that the arbitrator erred in failing to consider that a less harsh sanction ought to have been imposed.

[4] The arbitrator's conclusion in relation to sanction as at paragraph of 34 of his award. As I have indicated, the arbitrator held that if the nature of the offense committed by the employee and all the surrounding circumstances are such that a breakdown in the employment relationship is apparent, it is not

necessary for the employer to present evidence to establish any breakdown in the employment relationship. The arbitrator continued as follows:

> 34.2 The Applicant mentioned that he knew the danger of bringing contraband in the prohibited area. He mentioned that contraband could lead to an explosion. The Applicant further mentioned that he knows employees who had been dismissed for this offense and, he mentioned the name of Ntate Maja. The Applicant therefore appreciated the seriousness of the misconduct for which he was dismissed. He also appreciated the repercussions of the misconduct to the respondent and fellow employees. I therefore conclude that under the circumstances, dismissal is an appropriate sanction.

[5] 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. 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.

[6] 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 nit-picking exercise; the focus is on whether the arbitrator appreciated the nature of the enquiry and forwarded 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.

[7] In the case of what has been termed a penalty review (i.e. an attack on a decision by an arbitrator either to uphold or not to uphold the sanction of dismissal after having found the employee guilty of misconduct), the proper approach for the arbitrator to take into account the totality of circumstances, considering the reason that the employer imposed the sanction of dismissal and the basis of the employees challenge to the dismissal. Other relevant factors include any harm caused by the employee's conduct, whether additional training and instruction would result in the employee not repeating the misconduct and the effect of dismissal on the employee and his or her long service record. Ultimately, it is not for an arbitrator to consider afresh what he or she would do in the same circumstances; the arbitrator is required to decide, without any deference to the decision of the employer, whether what the employer did was fair (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)).

[8] The arbitrator clearly appreciated the nature of the inquiry that he was required to conduct. He took into account the evidence before him, considered materially relevant factors, and did not take into account irrelevant factors. The present case falls into the category of what has been termed a 'pure penalty review' (Myburgh & Bosch *Reviews in the Labour Courts* at p 300), i.e. where the dispute concerns the severity or leniency of the arbitrator's sanction *per se*. Decisions on sanction might be patently harsh or patently lenient, but provided the sanction falls within the bounds of reasonableness, this court is not empowered to intervene. The test remains one that requires the applicant seeking to review a disciplinary sanction to demonstrate that no reasonable commissioner could have opted for the sanction in question. Put another way, the applicant 'must establish that dismissal was not amongst the sanctions that could reasonably be imposed' (Myburgh & Bosch p 302).

[9] The evidence discloses that a contravention of the contraband rule is a serious offence, for which the penalty of dismissal is ordinarily the consequence. The rule exists to satisfy stringent safety requirements at the mine, and specifically designed to avoid injury and fatality in an industry that is inherently dangerous. Motswadi was aware of the rule and the impact that a contravention of the rule could have on co-employees and the third respondent's operations. The applicant's case amounts to a plea directed ultimately at a more lenient sanction. While the arbitrator's decision might be described as severe, it cannot be said to fall outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. Given particularly the rationale for the rule and the operational response that it constitutes to risk management in a dangerous working environment, there is no basis to interfere with the arbitrator's decision.

[10] In so far as costs are concerned, neither party pursued the issue of costs with any enthusiasm, and for the purposes of section 162 of the LRA, the requirements of the law and fairness are best served by each party bearing its own costs.

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: AL Cook

Instructed by: LDA Attorneys

For the respondent: Z Navsa

Instructed by: Solomon Holmes Attorneys