THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 129/2020

In the matter between:

MARULA PLATINUM PROPRIETARY LIMITED Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

COMMISSIONER DONALD KGLALAKE MKADIMENG *N.O.* Second Respondent

KGOBOKO VICTOR MASHUPJE Third Respondent

Heard: 12 October 2023

Delivered: 13 October 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 13 October 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 found that the dismissal of the third respondent by the applicant was substantively unfair, and ordered that he be reinstated with retrospective effect.

[2] The material facts are not in dispute. The applicant was employed in June 2012 as a minor. In May 2019, he was charged with insubordination and gross health and safety misconduct in relation to an incident that occurred on 7 and 8 January 2019. After a disciplinary hearing, the applicant was dismissed. He disputed the fairness of his dismissal, a matter that was referred ultimately to arbitration.

[3] The applicant was dismissed for insubordination for failing to carry out instructions to reinstall a brow support and secondly, for failing to install support in circumstances where the applicant had the responsibility to ensure that the working place was safe. The charges were brought in a context where the respondent's management and geologists had visited the applicant's work site in December 2018 and found a brow, or a portion of the roof which could fall down and which required support, which was accordingly installed. 'Sweepings' still had to be done, a process in which the ore was removed by a winch scraper. During January 2019, the applicant's shift supervisor returned to the same panel and found that the sticks used for the brow support installed in December 2018 had been pulled out. A brow is supported by three clusters of timber every 2 m. A winch scraper would only pull out the support during the course of sweeping. The shift supervisor instructed the applicant to attend to the brow support, left the workplace in the belief that the applicant would attend to the reinstallation of the brow support. The next day, the supervisor went underground and found no one at the panel. The applicant's explanation for the failure to install the support was that he had in fact done so, but when another sweeping took place, the sticks were pulled out in the process.

[4] In his award, the arbitrator recorded the following findings:

6.4 The respondent's witnesses confess that after giving the applicant instructions on 7 January 2019, he did not wait to see if the instructions were carried out, but assumed that they would. The applicant testified that he carried out the instructions, but that when another sweeping by the winch scraper was done, the support sticks were pulled out.

6.5 The testimony of both opposing witnesses was that the support sticks would be pulled out during the process of 'sweeping' by the winch scraper. Although it was not clear at what stage on 7 January 2019 the 'sweeping' took place, the respondent's witnesses confirmed that after giving the instructions, such sweeping had still to be done. I find it probable that the brawl support was removed when sweeping took place after instructions were given.

6.6 Considering the totality of the evidence before me, it's probabilities and cogency, my conclusion is that the applicant was probably carried out the instructions on 7 January 2019 to reinstall the brow support, but that when a sweeping process took place, some of the sticks came out.

6.7 The respondent carried the burden to prove, on a preponderance of probabilities that the applicant was guilty of the charges brought against him. The applicant denied the charges against him and testified that he and his crew worked for the whole of the shift until 17h30 on 8 January 2019. The respondent made no attempt to find evidence and corroboration of the version of its only witness even when it knew that the applicant would deny working under or creating unsafe conditions at the workplace.

6.8 I cannot, at the mere *ipsi dixit* of the respondent's sole witness, make a finding that the respondent has proved its case on a balance of probabilities.

6.9 My finding is that the respondent failed to prove the charges against the applicant, and that consequently the dismissal was not for a further reason.

[5] The applicant's first ground for review is that the arbitrator committed a gross irregularity in his assessment of the evidence in that he failed to consider relevant evidence placed before him and in particular, the evidence of the shift supervisor. That evidence, as indicated above, was that according to his observation, the holes where the support sticks were supposed to be were empty, indicating that the support sticks had not been installed the previous day as the employee had been instructed. Had the support sticks been installed and subsequently removed by the scraper winch, there would be marks in the ground to establish this fact. The evidence given by the supervisor supported the proposition that the support sticks had never been installed. The absence of support sticks created a dangerous environment, to the extent that no employee should have been working in the area until the brow was supported. The employee failed to take proactive measures to ensure that the area was safe, further, he had no regard to applicable health and safety measures and permitted employees to work in the area. The applicant submits that there was no rational basis for the arbitrator to disregard this evidence.

[6] The second ground for review is that the arbitrator failed to consider or attach sufficient weight to the applicant's health and safety obligations and the potential consequences of the unsafe environment created by the employee. In particular, the arbitrator failed to consider evidence that the crew could continue working only in circumstances where it was safe to do so, and that regardless of whether the employee installed the support sticks or not, he had identified that they were not installed yet took no action to install them, thus acting in breach of the applicant's health and safety obligations.

[7] Thirdly, the applicant contends that the arbitrator failed properly to resolve the material fact that served before him.

[8] 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. The LAC has 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). 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).

[9] To summarise: 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. The second stage is one in which the review court must establish whether despite any retrievable irregularity, the award nonetheless falls with a band of decisions to which a reasonable decision – maker could come on the available material.

[10] The arbitrator clearly made his decision on the basis that the applicant had failed to discharge the onus of proof of the substantive fairness of the dismissal. He does so only on the basis that in his view, it was more probable than not that the employee carried out the instruction given to him to install a brow support, a conclusion reached with no assessment of the evidence or of which version was inherently more probable. The arbitrator found against the applicant because in his view, the evidence of its witness was uncorroborated. It is not necessary in law for the evidence, even that of a single witness, to be corroborated. This is a misdirection – the test for probability does not rely on quantity, rather, a qualitative assessment is necessary to determine which of the versions is the more probable. Had the arbitrator considered the supervisor's evidence, it was clear that all of the signs that one might expect

to be present if the sticks had been pulled during sweeping, were simply not there. The evidence was that in such an event, the hole that had been drilled could be damaged, that sticks would be left to lie at the side of the passage and that when a stick was pulled, it would leave a mark. The uncontested evidence was that there had been no scraper around, and that the sticks that were supposed to have been reinstalled had not been reinstalled. Had the arbitrator considered this material evidence, he would have found that the applicant's version was the more probable since if the support sticks had indeed been installed (as contended by the employee) the shape of the hole would have been damaged, there would have been new markings in the holes, the sticks were on the ground as they had not been installed, and the sticks would have been cut if they had been installed. Further, the arbitrator failed to appreciate that in the absence of support sticks, a dangerous working environment was created, to the extent that no one should have been working in the area until the brow was supported. There was no rational basis for the arbitrator to disregard clear evidence that the employee had acted in violation of an important safety instruction that had been issued to him. On this ground alone, the arbitrator's award stands to be reviewed and set aside.

[11] In summary: the arbitrator was confronted with a material dispute of fact. He failed to resolve that dispute in accordance with the test to be applied, and mistakenly assumed that a failure by the applicant to call further witnesses to corroborate the evidence given by its only witness necessarily tipped the balance of probability in favour of the employee. The arbitrator failed to assess the evidence to determine which of the versions before him was the more probable and instead, moved directly to a determine of the dispute by the application of the onus of proof, a mechanism ordinarily resolved for application when the probabilities are equally poised. The arbitrator thus committed reviewable irregularities, with the result that the outcome of the proceedings, in the form of his award, fell outside of a band of decisions to which a reasonable decision-maker could come on the available material.

[12] At the hearing, the third respondent proffered no substantive grounds for opposition to the relief sought by the applicant. The submissions made in the

heads of argument (which were not drawn by counsel who appeared to argue the application) are largely meaningless and, as I have indicated, none of them were seriously pursued. In regard to remedy, the applicant submitted that the arbitrator's award ought to be substituted for a finding that the employee's dismissal was substantively fair. No purpose would be served in remitting the matter for a rehearing. The record is complete and the court is in as good a position as any commissioner would be to make a determination. The record discloses clearly that the employee was guilty of misconduct. Insofar as the appropriateness of sanction is concerned, compliance with health and safety legislation and in particular, mining safety rules and procedures, are fundamental requirements and any breach of any rule or policy or any disregard of any health and safety obligation is by definition a matter of serious misconduct that would ordinarily justify dismissal. In the circumstances, the conduct of employees who disregard safety measures poses a potential danger to the safety of others. I intend therefore to substitute the arbitrator's decision with one to the effect that the employee's dismissal was substantively fair.

I make the following order:

1. The arbitration award issued by the second respondent on 10 December 2019 under case number LP 3714-19 is reviewed and set aside.

2. The award is substituted by the following:

   'The dismissal of the applicant was substantively fair.'

3. There is no order as to costs.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: V Mndebele

Instructed by:	Webber Wentzel
For the third respondent:	N Matlala
Instructed by:	MS Lethuba Inc Attorneys