THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 720/18

In the matter between:

IMPALA PLATINUM LIMITED **Applicant**

and

AMCU obo GADLA AND 6 OTHERS **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) **Second Respondent**

KENNETH DLAMINI *N.O.* **Third Respondent**

Heard: **8 August 2023**

Delivered: **18 October 2023**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 18 October 2023.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 22 March 2018 and issued under case number NWRB1676-17, wherein the Third Respondent (arbitrator) found the dismissal of the individual respondents, all former employees of the Applicant (the Respondents or employees) substantively unfair and ordered that they be reinstated retrospectively.

[2] The record in the application for review was filed outside the prescribed period and the Applicant seeks the reinstatement of the application and condonation for the non-compliance with the provisions of the Practice Manual. The application for reinstatement and condonation is not opposed. I have considered the explanation tendered and in my view, on a conspectus of all the facts and the requirements, the Applicant has shown good cause for the review application to be re-instated and for condonation to be granted.

[3] The First Respondent (AMCU), acting on behalf of the individual respondents, opposed the review application.

Background facts

[4] The individual respondents were employed at the Applicant's 16 Shaft section 164 as the production crew 7574D (day shift crew) and they were working on the establishment of a pane underground at 24C23 panel 5 North (the panel). Mr Monyatsi, one of the individual respondents, was employed as a miner, responsible for two production crews on day shift, namely 7574D and 0374D.

[5] On 6 March 2017, the employees were issued with a notice to attend a disciplinary hearing scheduled for 10 March 2017. The charge levelled against them was:

> 'Gross safety and health misconduct in that: You were found working in place 24C23 panel 5 North which was not to standard on 03/03/2017, this followed after the same working place was stopped by the Rock Engineering Department on 27/02/2017 for similar sub standards. On 02/03/2017 the same working area was again issued a stop note for similar sub-standard conditions by the safety officer. On both occasions the crew along with you were

counselled first by the mine manager and then the mine overseer. You also failed to adhere to sect 22 and sect 23 of the MHSA.'

[6] Mr Monyatsi was issued with a notice to attend a disciplinary hearing scheduled for 9 March 2017. The charges levelled against him were:

'Gross safety and health misconduct in that:

1. You allowed your team 7574 to work in working in place 24C23 panel 5 North which was not to standard on 03/03/2017, this followed after the same working place was stopped by the Rock Engineering Department on 27/02/2017 for similar sub standards. On 02/03/2017 the same working area was again issued a stop note for similar sub-standard conditions by the safety officer. On both occasions the crew along with you were counselled first by the mine manager and then the mine overseer. You also failed to adhere to sect 22 and sect 23 of the MHSA.

2. Gross negligence in that on your TARP documents for 01, 02 and 03 March 2017 you indicated that your working place 24C23 panel 5 North the support is up to standard at the start and at the end of the shifts, but on three occasions it was found to be sub-standard.'

[7] A disciplinary hearing was held and after the employees were found guilty of misconduct, they were dismissed with effect from 15 and 16 March 2017. They subsequently referred an unfair dismissal dispute to the Second Respondent, challenging the substantive fairness of their dismissal.

[8] The only issue to be decided by the arbitrator was whether the employees' dismissal was substantively fair, as procedural fairness was not disputed. It is evident from the arbitration award that the issues were narrowed down at the commencement of the arbitration proceedings and that substantive fairness was challenged on the grounds that the employees did not contravene any rule or standard, that the Applicant acted inconsistently in the application of the rule with reference to the night shift crew and that dismissal was not appropriate.

[9] The arbitrator found the employees' dismissal substantively unfair, and he ordered their retrospective reinstatement.

Analysis of the arbitrator's findings and the grounds for review

The test on review

[10] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[1] (*Sidumo)* as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[11] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[2] affirmed the test to be applied in review proceedings and held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[12] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.[3]

[1] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[2] [2013] ZALAC 28: (2014) 35 ILJ 943 (LAC) at para 16 (*Gold Fields*).
[3] Ibid at paras 18 and 19.

[13] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Lebogate,*[4] the LAC confirmed the test to be applied on review:

> '[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?" Our courts have repeatedly stated that in order 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 justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.
>
> [13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.'

[14] The review test to be applied *in casu* is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator arrived at an unreasonable result.

<u>The arbitrator's findings and grounds for review</u>

[15] The Applicant raised a number of grounds for review and submitted that ultimately, the arbitrator made findings a reasonable decision maker could not have reached. The gist of the review relates to the way the arbitrator dealt with the evidence, more specifically, how he disregarded evidence, failed to assess

[4] [2014] ZALAC 136; (2015) 36 ILJ 968 (LAC) at paras 12 - 13.

the mutually destructive versions presented and to resolve factual disputes and failed to decide the second charge that was levelled against Mr Monyatsi.

[16] The question that this Court must ask on review is whether the way the arbitrator dealt with the evidence, constituted an irregularity or error which was material and if it was material, whether it impacted on the determination of the question of whether the employees' dismissal was substantively fair and whether it ultimately distorted the arbitrator's decision and the outcome of the proceedings.

The evidence adduced

[17] In deciding the aforesaid, this Court must consider the evidence that was adduced and the findings made by the arbitrator to determine whether they are reasonable.

[18] This is where a great difficulty lies.

[19] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the charge(s) which the employees were found guilty of and dismissed for and the evidence adduced at the arbitration proceedings.

[20] It is evident from the arbitration award that the Applicant has led the evidence of four witnesses and that Mr Monyatsi was the only witness who testified on behalf of the employees. It is recorded in the award that evidence in the arbitration proceedings was adduced on 31 July 2017, 13 September 2017, 27 November 2017, 8 January 2018 and 1 March 2018.

[21] The Applicant's witnesses were Mr Beyneveldt, a shift supervisor; Ms Mabala, a strata control officer, who issued a stop note to the production crew 7574D for sub-standard conditions she found on 27 February 2017; Mr Baleseng, who issued a stop note to the production crew 7574D for sub-standard conditions he found on 2 March 2017; and Mr Laubscher, a shift supervisor appointed on 2 March 2017 and taking over from Mr Beyneveldt.

[22] It is standard practice for this Court to peruse the transcribed record of the evidence and to provide its own summary of the evidence as it was presented and as it is relevant to consider the grounds for review raised by the Applicant. *In casu* this Court is not able to do so.

[23] The transcribed record provided starts with the proceedings on 28 November 2017, recording the arbitrator saying: *"Okay we proceed with case NWRB1676-17. We are still having the fourth witness of the employer on the stand".* It is a recording of the testimony of the Applicant's last witness, Mr Laubscher, and the transcript is a continuation of his evidence in chief. The next transcribed portion of the record is Mr Monyatsi's evidence, as it was adduced on 19 February and 1 March 2018. There is no transcript for the proceedings of 31 July and 13 September 2017 and the transcript of 28 November 2017 is incomplete.

[24] The Applicant filed a typed version of the arbitrator's handwritten notes, which record this Court found not helpful in deciding the material issues, more specifically, where the grounds for review relate to specific factual findings.

The record

[25] Rule 7A (3)[5] provides that the arbitrator and the CCMA or bargaining council must timeously comply with the direction, as set out in an applicant's notice of motion, which will call on them to dispatch, within 10 days after receipt of the notice of motion, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide and to notify the applicant that it has been done.

[26] If the record is not dispatched within the required time period, the applicant or any other interested party may file an application to compel in terms of Rule 7A(4).

[27] The keeping of a record of the arbitration proceedings is not only practical and required by the CCMA Rules but is also necessary as it provides objective material about what transpired at the arbitration proceedings, which assists the

[5] GN 1665 of 1996: Rules for the conduct of proceedings of the Labour Court.

court in the proper exercise of its review powers. As a general rule, it will always be necessary to have the record of the arbitration proceedings available to this Court when arbitration awards are reviewed under section 145 of the Labour Relations Act[6] (LRA).

[28] In instances where the record is lost or inaudible, the first step for the applicant is to assess whether the entire recording or only a portion of it is lost or inaudible. This is necessary and of relevance because Rule 7A(5) requires an applicant to make available copies of such portions of the record as may be necessary for the purposes of the review. Where the issue on review is limited or on a point of law only, the entire transcript of the proceedings may not be necessary for purposes of the review. The applicant should assess its grounds for review and consider whether the available portion of the record is sufficient to proceed with the review and whether this Court would be in a position to consider and determine the review on such a limited portion of the record.

[29] The Constitutional Court and the LAC confirmed that the Court is not precluded from determining a matter on less than a complete record in appropriate cases where the matter can be decided on the material before Court. Where the interests of justice demand it, a pragmatic approach is appropriate despite the inadequacies of the record.[7]

[30] The review Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence that was adduced.[8]

[31] If the Labour Court is not placed in possession of necessary portions of the record or the entire and complete recording, where such is necessary for the Court to decide the review application, the question arises whether the Court should, in the absence of the record, dismiss the review, grant the review for

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[6] Act 66 of 1995, as amended.
[7] *Papane v Van Aarde NO and others* [2007] ZALAC 27; (2007) 28 ILJ 2561 (LAC), [2007], *Toyota Motors (Pty) Ltd v CCMA and others* [2015] ZACC 40; [2016] BLLR 217 (CC), *Baloyi v MEC for Health and Social Development, Limpopo and others* [2015] ZACC 39; (2016) 37 ILJ 549 (CC), *Intellectual Democratic Workers Union on behalf of Linda and others v Super Group and others* [2017] ZALAC 17; (2017) 38 ILJ 1292 (LAC).
[8] *Gold Fields supra* at paras 18 - 19.

want of record or undertake the determination of the review on the material available.[9]

[32] Although it is the duty of the applicant in a review application to furnish the other parties and the Registrar with a copy of the record, necessary for purposes of the review, there is a distinction to be drawn between a scenario where the record is available, yet the applicant did nothing to have it transcribed and filed and a scenario where the applicant made serious attempts to file the record, but cannot do so because the record either does not exist, is not made available or what is available, is incomplete.

[33] In *Department of Transport, North West Province v Sebotha No and Others,*[10] the Court, considering the test to be applied in an application for review, held that in the absence of a proper record, it is unable to determine whether or not there is a basis for the criticism against the commissioner's findings and said that:

> '[17] In order to apply the above test the court needs to have before it the record of the arbitration proceedings. As a general rule the complete record of everything that transpired during the arbitration proceedings needs to be placed before the court…
>
> [18] The responsibility to ensure that a proper and complete record is placed before the court rests with the applicant. Failure to place before the court a complete record by the applicant could result in the dismissal of the review application on that ground alone.'

[34] In *Fountas v Brolaz Projects (Pty) Ltd and others*[11] *(Fountas)* the LAC was faced with an appeal where the Labour Court dealt with a review application, despite the absence of relevant portions of the record and held that:

> '[31] In my view there can be no doubt that the Court a quo should not have proceeded to consider the merits of the review application in this matter when there was material evidence missing in the record. What the Court

[9] A Myburgh, A Bosch, '*Reviews in the Labour Courts'*, (LexisNexis South Africa) at p 445.
[10] [2009] ZALC 53; (2010) 31 ILJ 97 (LC) at paras 17 – 18.
[11] [2016] JOL 35703 (LAC) at paras 31 -33.

a quo was required to have done was to consider whether the first respondent as the applicant in the review application had taken all reasonable steps to search for such evidence and or to reconstruct the record. If the first respondent had taken all reasonable steps to either find the missing evidence or to reconstruct the record and these had been to no avail, it could then have had to deal with the question of what should be done. If, however, it was of the view that the first respondent had not taken all reasonable steps that it could and should have taken, it would have had to choose one of two options.

[32] The one would be to dismiss the application on the basis that the first respondent had had ample opportunity to take those steps and had no acceptable explanation for not having done so. This is not an option that the Court a quo could have taken lightly because it would have shut the door in the face of the first respondent who would not have been able to have set aside an arbitration award that may well not have deserved to stand. However, it is a decision that a Court may take in an appropriate case.

[33] The other option that the Court a quo could take would have been to postpone the review application or to strike it off the roll to enable the first respondent or all parties to take such steps as might not have been taken earlier to search for the missing evidence or to reconstruct the record. The latter option is one that a Court will usually adopt unless it is dealing with a case where considerations of fair play between the parties, finality of litigation and others demand that the application be dismissed without the consideration of the merits. This would occur where, for example, the matter had dragged on for a long time and the relevant party had had ample opportunity to reconstruct the record but had, for no acceptable reason, failed to do so.'

[35] The principles had been set out by the LAC in *Palluci Home Depot (Pty) Ltd v Herskowitz*[12] as follows:

'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice

[12] [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at para 58.

> dispute such that the court "is in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself.'

This review application

[36] In view of the difficulties alluded to in respect of the incomplete record, this Court is in no position to consider all the grounds for review raised by the Applicant. I am however inclined to review the arbitration award and to set it aside, for reasons I will deal with *infra*.

[37] In his analysis of the evidence, the arbitrator recorded that there are material factual differences between the parties' respective versions.

[38] The arbitrator held that:

> 'When one assesses and weighs the entire evidence presented including credibility and reliability of witnesses in respect of the allegation which was (sic) levelled against the Applicants it becomes evident that the only conclusion which can be drawn from the evidence presented is that the Applicant's version is more probable that [sic] the version of the Respondent.'

[39] The Applicant took issue with the arbitrator's findings and stated *inter alia* that the arbitrator, in resolving the factual disputes, made findings only on the credibility of the Applicant's witnesses and he failed to conduct an enquiry into the reliability of the evidence and the probabilities of the versions presented to him. The arbitrator based his findings on unsubstantiated credibility findings against the Applicant's witnesses and he failed to evaluate the content of their evidence.

[40] The approach to be adopted by arbitrators when faced with two disputing versions was set out in *Sasol Mining (Pty) Ltd v Ngqeleni NO and others*[13] (*Sasol*), where it was held that the arbitrator must conduct an

> '… assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the

[13] [2010] ZALC 141; (2011) 32 ILJ 723 (LC) at para 7.

witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhanji Municipality v Nonxuba NO & others…* while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'

[41] In *Sasol,* the Court also held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

> 'The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.'[14]

[42] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and he had to assess the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him. It was within this context that the evidence presented had to be assessed.

[43] As this Court is not in possession of a complete transcribed record, it is impossible to consider the totality of the evidence and determine whether the arbitrator properly considered the conflicting versions, assessed the evidence and resolved the disputes and whether the credibility findings he made, were reasonable and supported by evidence.

[14] *Sasol supra* at para 9.

[44] I am not inclined to dismiss the application for lack of a complete record. This is not a case where the record was available, but the Applicant just took no steps to file it. The arbitrator or CCMA failed to file a complete record that could be transcribed and as the LAC held in *Fountas: "This is not an option that the Court a quo could have taken lightly because it would have shut the door in the face of the first respondent who would not have been able to have set aside an arbitration award that may well not have deserved to stand".*[15]

[45] In his analysis of the evidence, the arbitrator also recorded that the employees *"…were charged and dismissed for a similar charge and that the miner was further charged for gross negligence".*

[46] The Applicant raised as a ground for review the fact that Mr Monyatsi, who was employed as a miner, faced a further charge of misconduct, on which evidence was adduced. It is evident from the arbitration award that the arbitrator was aware of the fact that Mr Monyatsi had faced a second charge of misconduct, which he had to consider, but the arbitrator failed to make any finding on that. This failure indeed constitutes a gross irregularity and renders the award reviewable.

The relief

[47] *In casu,* the Applicant seeks an order that the arbitration award be reviewed and set aside and be substituted for a finding that the employees' dismissal was fair, alternatively for the matter to be remitted for a hearing *de novo.*

[48] As already alluded to, I am not inclined to dismiss the application for lack of a complete record. In any event, there is merit in the application as the arbitrator failed to consider a material issue, namely whether Mr Monyatsi's dismissal was fair, considering both charges of misconduct. This is not an issue that was decided at all and it is not an issue for the review Court to decide.

[49] In *Sidumo,*[16] it was held that:

[15] *Fountas supra* at para 32.
[16] *Sidumo* supra at para 268.

> '[W]here a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of *Ellis*, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)*(a)* (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[50] The most appropriate relief would be to remit the matter for a hearing *de novo.* I am of the view that it will be improper to substitute the outcome of the arbitration with a finding that the employees' dismissal was fair. This would be an order that will be prejudicial and averse to the employees, and it is not one this Court is prepared to make on an incomplete record that is of very little to no assistance to this Court. I am not in a position to decide and finally determine the matter on the record as it is before me.

[51] It would not be in the interest of justice to substitute the outcome of the arbitration proceedings, based on the record before this Court, as this Court is just not "*in as good a position*" as the arbitrator to make a determination on the fairness of the employees' dismissal.

[52] This Court has a wide discretion in respect of costs and in my view, this is a matter where the interest of justice will be best served by making no order as to cost.

[53] In the premises, I make the following order:

Order

1. The review application is re-instated and the Applicant's non-compliance with the provisions of the Practice Manual of the Labour Court is condoned;

2. The arbitration award issued on 22 March 2018 under case number NWRB1676-17 is reviewed and set aside;

3. The dispute is remitted to the Second Respondent for a hearing *de novo* before a commissioner other than the Third Respondent;

4. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Ms P Mohlahlo from ENS Attorneys
For the First Respondent:	Advocate A L Cook
Instructed by:	LDA Attorneys