THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2426/2021

In the matter between:

ANELE MTYALA **Applicant**

and

MOTOR INDUSTRY BARGAINING COUNCIL **First Respondent**

ELSABE MAREE *N.O.* **Second Respondent**

G & J AUTOBODY (PTY) LTD **Third Respondent**

Heard: **29 February 2023**

Delivered: **8 March 2023**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 8 March 2023.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 16 October 2021, issued under case number MIPT32658, wherein the Second Respondent (arbitrator) found that the Applicant failed to prove the existence of a dismissal and his case was dismissed. The Third Respondent (Respondent) opposed the review application.

Background facts

[2] The Applicant was employed by the Respondent as a panel beater, since September 2026. He referred an unfair dismissal dispute to the First Respondent in March 2021, claiming that he was dismissed on 28 September 2021.

[3] The dispute was arbitrated on 13 October 2021. The Respondent was absent from the arbitration proceedings and the Applicant was legally represented by Advocate Serogole.

[4] The arbitrator recorded that section 192(1) of the Labour Relations Act[1] (LRA) places the onus on an employee to establish the existence of a dismissal. If the existence of the dismissal is either established or not disputed, section 192(2) provides that the employer must show that the dismissal was substantively and procedurally fair. After an analysis of the evidence, the arbitrator concluded that the evidence did not show a dismissal, but rather a decision by the Applicant not to return to work. The Applicant failed to establish the existence of a dismissal and his case was dismissed.

[5] The arbitration award that was issued on 16 October 2021 is the subject of this application for review.

[6] Before I deal with the grounds for review and the merits of this application, I deem it prudent to set out relevant principles applicable to review applications.

General principles and the test to be applied

[1] Act 66 of 1995, as amended.

[7] Affidavits in review applications serve two primary purposes: to define the issues between the parties and to place the essential averments and evidence before the court.

[8] Rule 7A of the Labour Court Rules[2] (Rules) provides for the delivery of four sets of affidavits in review applications, to wit a founding, supplementary, answering and replying affidavit. In recognition of the fact that the record obtained by an applicant in a review application may reveal that averments made in the founding affidavit were erroneously made or omitted, Rule 7A(8)(a) permits the applicant to deliver a supplementary affidavit within 10 days after the record is made available. This affords the applicant the opportunity to supplement and/or amend the factual and legal grounds upon which he or she relies in light of the record. A weak founding affidavit can be augmented by a supplementary affidavit.[3]

[9] As a general principle, the applicant in a review application must make out his or her case in the founding affidavit, as may be supplemented by a supplementary affidavit, if necessary, after the transcribed record becomes available. Rule 7A(2)(c) of the Rules provides that the notice of motion must be supported by an affidavit, setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

[10] As to the requirement of setting out the legal grounds upon which the applicant relies in the founding affidavit, this requires the applicant to set out, with sufficient precision and detail, the grounds for review and the bases on which such grounds are relied upon.

[11] In short: it is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review, supported by the evidence adduced at the arbitration proceedings.

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[2] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.
[3] C Bosch, A Mybrugh, '*Reviews in the Labour Courts'*, LexisNexis at p 438 – 441.

[12] Grounds for review cannot be formulated for the first time in heads of argument. In *Northam Platinum Ltd v Fganyago NO and others*[4] it was held that:

> 'In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.'

[13] The test to be applied on review, as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] *(Sidumo),* as whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach, is well known and established.

[14] However, it is now settled law that the test a reviewing court will apply to decisions on whether there was indeed a dismissal for purposes of the LRA, is different to the *Sidumo* test. The test to be applied when reviewing an arbitrator's decision relating to the existence of a dismissal is whether the decision was, objectively speaking, correct.

[15] The question as to whether there was a dismissal or not has to be determined before the enquiry into the fairness thereof. The question of whether a dismissal had taken place goes to jurisdiction and this Court has confirmed on numerous occasions that the review test as laid down in *Sidumo* does not find application in reviewing such a finding. [6]

[16] In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others*[7] the Labour Appeal Court (LAC) held that:

[4] [2009] ZALCJHB 55; (2010) 31 ILJ 713 (LC) at para 27.
[5] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[6] *SA Rugby Players Association and others v SA Rugby (Pty) Ltd v others* [2008] ZALAC 3; (2008) 29 ILJ 2218 (LAC) (*SA Rugby*), *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and others* [2008] ZALC 161; (2009) 30 ILJ 2093 (LC) (*Odendaal*), *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC) (*Asara*), *Majatladi v Metropolitan Health Risk Management and others* [2013] ZALCCT 15; (2013) 34 ILJ 3282 (LC) (*Majatladi*).
[7] (2013) 34 ILJ 1427 (LAC) at para 24.

> 'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 I (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)*(b)* involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.'

[17] It is within the ambit of the aforesaid principles and the test to be applied on review, that the Applicant's application for review is to be considered.

<u>This application</u>

[18] *In casu,* the Applicant filed a founding affidavit but no supplementary affidavit. There are a number of difficulties in the Applicant's case, which I will deal with in turn.

<u>The test to be applied</u>

[19] The first difficulty relates to the test to be applied. I have already alluded to the fact that the test to be applied *in casu* is the one of correctness. The Applicant must show that ultimately, considering the evidence placed before her, the arbitrator's decision was wrong.

[20] The question of whether a dismissal had taken place or not, goes to the issue of jurisdiction and it has been confirmed on numerous occasions that the review test as laid down in *Sidumo*[8] does not find application in reviewing a jurisdictional ruling or finding.[9]

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[8] *Sidumo supra* at paras 78 and 79.
[9] *SA Rugby supra*, *Odendaal supra*, *Asara supra*, *Majatladi supra*.

[21] This Court has to decide whether the arbitrator was right or wrong in finding that the Applicant was not dismissed. The question is not whether the finding that the Applicant was not dismissed was justifiable, rational or reasonable[10] and it is also not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach.

[22] In considering whether an employee was dismissed or not, this Court has to consider the evidence that was placed before the arbitrator during the arbitration proceedings and has to decide the existence of dismissal and the issue of jurisdiction *de novo* and of its own accord.[11]

[23] In the Applicant's founding affidavit, his grounds for review are summarised that the arbitrator reached an unreasonable conclusion. The Applicant specifically stated that the arbitrator *"arrived at an unreasonable/unfavourable result. I submit that the commissioner's decision is one a reasonable decision maker could not reach and falls to be reviewed"*.

[24] It is evident that, on a conspectus of the grounds for review raised by the Applicant, the Applicant's case is premised on the challenge that the outcome of the arbitration is unreasonable.

[25] 'Reasonableness' finds no application *in casu*. In *NUMSA obo Zahela and 3 others v Volkswagen SA (Pty) Ltd and others*[12] *(Zahela),* an application for review was dismissed where the applicant incorrectly relied on 'reasonableness' instead of 'correctness' and it was held that:

> '[6] In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner's decision was correct.

[10] *SA Rugby supra* at para 41.
[11] *Trio Glass t/a The Glass Group v Molapo NO and others* (2013) 34 ILJ 2662 (LC) at para 22, *Kukard v GKD Delkor (Pty) Ltd* [2014] ZALAC 52; (2015) 36 ILJ 640 (LAC) at para 12 footnote 2, *Pecton Outsourcing Solutions CC v Pillemer NO and others* (2016) 37 ILJ 693 (LC) at para 16.
[12] Unreported judgment under case no: PR 137/13 handed down on 16 November 2016 at para 6.

[7] It follows that in a matter such as the present, where the proper right of review is one based on correctness that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.

[8] There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry that she was to conduct and that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of action.'

[26] I am inclined to follow *Zahela*.

[27] The Applicant's application is interspersed with allegations which would go to the issue of reasonableness and the grounds for review are clearly seeking a review of the arbitration award because it falls short of 'reasonableness'. All those allegations are irrelevant as the test to be applied is correctness.

[28] The review application was brought on the basis of 'reasonableness' which is different from an application challenging the correctness of an arbitration award. The Applicant's case was not properly pleaded.

[29] It is trite that an applicant's case should be made out in the founding affidavit and *in casu,* the case made out is for the review of an arbitration award on the basis that it is unreasonable. This application was based firmly on the reasonableness test and it admits no scope for a correctness argument.

[30] I re-iterate: reasonableness has no place in a review such as this one and the grounds for review relating to reasonableness cannot be considered. The Applicant has failed to make allegations to sustain its application as he clearly approached this Court on the basis of the incorrect test. This is fatal to the Applicant's case and on this ground alone the application should be dismissed.

Dishonest ground for review

[31] Although I am not inclined to deal with the Applicant's grounds for review, for reasons dealt with *supra,* I deem it necessary to address a few more difficulties in the Applicant's case.

[32] I already alluded to the fact that Rule 7A of the Rules provides for the delivery of a supplementary affidavit after the record is made available, in recognition of the fact that the record may reveal that averments made in the founding affidavit were erroneously made or omitted. This affords the applicant the opportunity to amend the factual and legal grounds upon which he or she relies in light of the record.

[33] The Applicant was well aware of this when he stated in his founding affidavit that *"I have set out the scene, but reserves the right to add, amend or vary these grounds when the first and second respondents have issued the record of the proceedings..."*

[34] The arbitrator found that *"...the applicant submitted that he was dismissed on the 28th of September 202 but failed in his evidence to show how the*

dismissal occurred in this date. His version, despite being assisted by [a] legally trained professional, was vague and unsubstantiated and contained no specifics such as dates".

[35] In his founding affidavit, which the Applicant deposed to under oath, he stated that *"the Applicant never mention (sic) that he was dismissed on the 28 September 2020 (sic). The commissioner misdirected or misconstrued herself to the facts available before her that's committing gross irregularity (sic)".*

[36] Considering the Applicant's statement made under oath on face value, a finding of gross irregularity in the conduct of the proceedings on the part of the arbitrator seems possible. However, review applications are not decided on face value, they are decided on a consideration of the totality of the facts and evidence placed before the arbitrator. It is for this reason that parties in a review application are required to file a record of the proceedings, to enable the court to consider and assess what was placed before the arbitrator.

[37] From a perusal of the transcribed record, a different picture emerges, one that is in stark contrast with the narrative created and presented by the Applicant in his founding affidavit. The transcript shows that the following transpired:

'Arbitrator:	Sir, what was the date of your dismissal?
Mr Mtyala:	28 September.
Arbitrator:	What year?
Mr Mtyala:	2020.'

[38] The Applicant's averment that he never mentioned that he was dismissed on 28 September 2020 is not supported by the transcribed record. The Applicant's legal representatives drafted the papers in this application and formulated the grounds for review. In the event that the legal representatives' recollection of the evidence was incorrect, which probability I find highly unlikely, as Mr Serogole represented the Applicant and was present when the evidence was adduced, this discrepancy should have been picked up when the transcribed record became available. It was incumbent upon the Applicant to file a supplementary affidavit, after the record was available, to deal with the discrepancy that arose between the said ground for review and the

transcript of the proceedings and to abandon the said ground for review as it was not supported by the evidence.

[39] This ground for review is contrived and dishonest and should have been abandoned. Instead, after the record became available, the Applicant did not file a supplementary affidavit to correct this, but the ground for review was persisted with.

[40] Mr Serogole, as an admitted advocate, is an officer of the court and as such his first duty is to the Court. This principle has significant implications as it requires that legal representatives conduct themselves in a manner that ensures that the legitimacy, dignity and decorum of the Court is maintained.

[41] In a recent article[13] by Judge Seegobin, he quoted from '*The Duty owed to the Court – Sometimes Forgotten*'[14] and highlighted a practitioner's duty to the court:

> 'The lawyer's duty to the court is an incident of the lawyer's duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to assist the court in the doing of justice according to law.
>
> The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers must do what they can to ensure that the law is applied correctly to the case.

[13] Judge Rishi Seegobin of the KwaZulu-Natal High Court, "*Restoring Dignity to our Courts: The Duties of Legal Practitioners*", GroundUp, 14 September 2022.
[14] A speech from the Hon. Marilyn Warren AC, speaking at the judicial conference of Australia colloquium in Melbourne in 2009.

> The lawyer's duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states,'[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society.'

[42] In persisting with this ground for review, which ground is dishonest and cooked up, in the face of a transcribed record which reveals a different set of facts, Mr Serogole did not act with honesty and candour and he failed his in duties to this Court. In fact, he enabled the Applicant to commit perjury in his founding affidavit when he failed to correct this obvious dishonest ground for review after the record became available.

Evidence not adduced

[43] It is trite that a reviewing court must ascertain whether the arbitrator considered the principal issue before him or her, evaluated the facts presented at the hearing and came to a conclusion that is reasonable. The Applicant cannot introduce new facts, documents, evidence or challenges that were not placed before the arbitrator and expect the Court on review to consider those and make findings on aspects never placed before the arbitrator. Such an approach cannot be adopted in a review process.

[44] It is evident from a perusal of the transcribed record and the Applicant's founding affidavit that the Applicant introduced evidence on dates and events and submitted that the arbitrator erred in concluding that he did not return to work when the evidence shows that he returned to the workplace on several occasions and was returned by the employer. In fact, the evidence adduced by the Applicant, assisted by Mr Serogole, was extremely limited and the Applicant's evidence on record was that *"I took the papers back I did not go back."*

[45] In the founding affidavit, the Applicant introduced evidence regarding events that transpired on 30 September 2020, 7 October 2020, 22 October 2020, 9

November 2020 and 12 December 2020. No such evidence was placed before the arbitrator and it is improper to introduce it for the first time in the founding affidavit in a review application and to expect the review court to consider evidence that was not adduced as evidence to be considered by the arbitrator during the arbitration proceedings.

Costs

[46] The last issue to be decided is the issue of costs.

[47] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[48] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[49] In *Zungu v Premier of the Province of KwaZulu-Natal and Others,*[15] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[50] This is a matter where this Court has to strike a balance.

[51] Ms Pillay for the Third Respondent submitted that a cost order should be made in favour of the Respondent. She submitted that the review application had no merit and even if the Applicant is unemployed, he still had a duty to ensure that there is merit in his case. The Respondent had to incur unnecessary costs in defending the review application.

[15] (2018) 39 ILJ 523 (CC) at para 24.

[52] Mr Serogole submitted that the Applicant is unemployed and he would be prejudiced if a cost order is granted. He further submitted that the Court must not close the door for employees who want to enforce their rights.

[53] In my view, this is a case where a cost order is warranted. This is more so as the Applicant sought legal assistance from his lawyers. He did not approach this Court as an unrepresented layperson, but he was assisted by lawyers. The Applicant was not responsible for the drafting of the papers or the formulation of the grounds for review. Those are legal aspects left to his lawyers to attend to. Furthermore, when the record became available it should have been evident to the legal representatives that the grounds for review were not supported by the transcribed record and that there were no sustainable grounds for review set out in the founding affidavit, yet this application was persisted with.

[54] In *South African Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others*,[16] the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:

> 'An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.'

[55] In *Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services,*[17] the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

> 'I am also mindful of the fact that an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has

[16] 2009 (1) SA 565 (CC) at para 54.
[17] (2010) 31 ILJ 956 (LC) at para 39.

acted *bona fide* or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of *bona fides* or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.)'

[56] *In casu,* it is evident that the Applicant's attorneys filed a review application without any reflection as to the content of the transcript, the provisions of the LRA, the applicable authorities and the possible prospects of success. One could reasonably accept that a practising advocate or attorney assisting a paying client should at least consider the aforesaid when an application for review is filed and other parties are dragged to Court. In this instance, there was no regard for any of the aforesaid. There was clearly a need to file a supplementary affidavit once the transcribed record was made available, which was not done, to the severe prejudice of the Applicant.

[57] The way in which this review application was drafted and pursued, is not merely an error of judgment. The Applicant's legal representatives acted in a manner that constitutes a departure from their office by drafting papers that pursued a dishonest ground for review, by pursuing litigation in circumstances where no case had been made out and thereby burdening this Court, with limited resources and a substantial backlog. This Court's displeasure should be known to the legal representatives.

[58] This is an exceptional case where the Applicant's representatives acted in a reprehensible manner, not only towards their client, but also towards this Court, with no regard to their duty as officers of the Court, and which would justify an order for costs *de bonis propriis.*

[59] Unfortunately, the Respondent did not ask for a cost order *de bonis propriis,* otherwise, this Court would have no hesitation to grant such an order.

[60] Although this is a case where a cost order would be justified, I am not inclined to make a cost order against the Applicant, who is a layperson and instructed lawyers to act on his behalf. The Applicant is unemployed and even if a cost order is granted, he would in all probability not be able to pay the Respondent's costs.

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

Order

1. The application for review is dismissed;

2. The Applicant's legal representatives are not entitled to charge a fee for the institution and prosecution of the review application and any fees already paid to them by the Applicant, should be reimbursed to him within 14 days of the date of this order;

3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant:	Advocate P F Serogole
Instructed by:	Mashifane Moswane Attorneys
On behalf of the Third Respondent:	Advocate L Pillay
Instructed by:	Yusuf Nagdee Attorneys