IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR2783/18

In the matter between:

IDWALA INDUSTRIAL HOLDINGS	**Applicant**
And	
COMMISSIONER DAVID PIETERSON *N.O*	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
BAMCWU OBO M. LEGODU	**Third Respondent**

Heard: 9 July 2019

Delivered: 19 July 2019

JUDGMENT

OLIVIER AJ

Introduction

[1] In this application the applicant seeks to review an arbitration award issued by the First Respondent in which the Commissioner found that the dismissal of the Third Respondent by the Applicant was unfair. The Applicant applied for an order to review and set aside the arbitration award issued by the First Respondent and to have the matter remitted back to the Second Respondent

to convene a fresh arbitration before a Commissioner other than the First Respondent.

[2] The Applicant contends that the First Respondent failed to discharge his duty to deal with the substantial merits of the dispute between the Applicant and the Third Respondent as required by Section 138(1) of the Labour Relations Act[1] (the LRA).

[3] In essence, the Applicant argues that the First Respondent misconceived the nature of the enquiry he was called upon to undertake and that this resulted in there not being a fair trial of the issues between the parties. The Applicant also contends that this manifested in an unreasonable result, and therefore the arbitration award should be reviewed and set aside. .

Background facts

[4] The Applicant conducts open cast mining operations in the Northern Cape.

[5] The Third Respondent was employed on 4 June 2010 in the position of mobile operator. At all relevant times her employment was subject to relevant mining legislation and regulations, in particular mine health and safety legislation which includes a mandatory code of practice for minimum standards of fitness to perform work at a mine ("the DMR Code"). In terms of the DMR Code operators of heavy duty equipment are required to have binocular vision including depth of vision and colour vision. The Third Respondent initially complied with these requirements.

[6] The Third Respondent however started experiencing some vision problems during 2014. During 2015 the Third Respondent sought medical assistance as her eyesight in her left eye had worsened. She was referred to a specialist ophthalmologist Dr. Jackson who referred her for further investigation. It was then revealed that the Third Respondent had a brain tumour that was affecting her vision.

[1] Act 66 of 1995, as amended.

During November 2015 the Third Respondent underwent an operation to remove the brain tumour. She was booked off until January 2016. The operation did however not repair the damage to the vision in the Third Respondent's left eye. When she returned in January 2016 the Third Respondent was placed on light duties in order for her eyesight to recover. The DMR Code requires that a period of at least six months recovery time allowed after an injury.

[8] The Third Respondent was given certain duties in the Human Resources Department in an "accommodated" position which included messenger, filing and administrative work. The Third Respondent was thereafter assessed by an Occupational Therapist and it was determined that she was unable to return to work as mobile operator. The medical specialist again assessed the Third Respondent in August 2016 and his diagnosis was that the loss of vision in the left eye was permanent. As such, the Third Respondent had become permanently incapacitated from performing her job as mobile operator.

[9] During May 2017 a formal incapacity enquiry was held. The Third Respondent was represented by her Trade Union representative from BAMCWU. At this hearing the Third Respondent confirmed that she was unable to perform her job as mobile operator due to the fact that she had lost sight in her left eye. It was decided at this hearing that the Applicant would assist the Third Respondent in applying for disability benefits and that pending the outcome of the disability application the Third Respondent would remain on the Applicant's payroll. She also at the time underwent an exit medical examination in terms of the relevant mine health and safety legislation.

[10] It is common cause that the claim to the insurance provider to provide disability benefits for the Third Respondent was unsuccessful. On 3 August 2018 the Applicant's services were terminated and she was paid until the end of August 2018.

<u>The arbitration proceedings</u>

[11] At the start of the arbitration proceedings, the Third Respondent conducted an exercise to try and narrow the issues in dispute. In his award the First

Respondent however recorded the following material findings in respect of the parties' versions:

11.1 That it is common cause that the Third Respondent's vision problem emanated from the workplace whilst she was performing the duties of a mobile operator;

11.2 That the Third Respondent gave uncontested evidence that her impaired vision problem lasted for a short period of time and that she recovered from it after the operation removing the brain tumour;

[12] The aforesaid findings of the Commissioner are wholly incompatible with the evidence led at the hearing and the common cause facts as set out above.

[13] The Commissioner further found that the Third Respondent's dismissal was procedurally fair, but substantively unfair as he was of the view that the Third Respondent had been utilised by the Applicant to provide administrative work and that the Applicant did not lead any evidence on how it concluded to terminate the Third Respondent's services.

The test on review

[14] In *Sidumo and another vs Rustenburg Platinum Mines Limited and others*[2] (*Sidumo*), the Constitutional Court held that :

> "In the light of the constitutional requirement (in section 33(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the reasonableness standard should now suffuse s145 of the LRA … the threshold test for the reasonableness of an award or ruling is the following:
>
> Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[2] (2008) 28 ILJ 2405 (CC).

[15] Following on *Sidumo* the Supreme Court of Appeal in the Judgment of *Herholdt vs Nedbank* (*Herholdt*)[3] held as follows:

> "[A] review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. 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 are only of any consequence if their effect is to render the outcome unreasonable." (emphasis added).

[16] Following the *Herholdt* and *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[4] judgments, the Labour Appeal Court handed down the judgment of *Head of Department of Education v Mofokeng and Others*[5] (*Mofokeng*). In this judgment, Murphy AJA, writing for the unanimous court, provided the following exposition of the review test:

> "[32] Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors .etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
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> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling

[3] [2013] 11 BLLR 1074 (SCA).
[4] (2014) 35 ILJ 943 (LAC).
[5] [2015] 1 BLLR 50 (LAC).

indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesis be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination." (emphasis added).

[17] The dictum in *Mofokeng* highlights many important things about the review test. The dictum provides for the following analysis:

17.1 The first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;

17.2 if this is established, the (objectively wrong) result arrived at by the commissioner is prima facie unreasonable;

17.3 a second enquiry must then be embarked upon — it being whether there exists a basis in the evidence overall to displace the prima facie case of unreasonableness; and

17.4 if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and vice versa).

The Commissioner misconceived the nature of the enquiry and his duties in connection with it

[18] Having regard to the findings that the First Respondent had made, particularly relating to his patently incorrect findings that the Third Respondent had "recovered" from her condition and that it was "work related", it is clear that the Commissioner misconstrued the enquiry that he had to embark upon.

[19] The Commissioner also began from a premise that a permanent alternative position was available that the Third Respondent could be placed into on a permanent basis. This finding is also not supported by the evidence.

[20] Due to the misconceptions in relation to the material before him and the question that he had to investigate and determine, the Third Respondent did not appreciate the true nature of the enquiry he was required to undertake. He for instance failed to properly assess the evidence before him relating to the following:

20.1 The evidence demonstrated that the Third Respondent's vision did not improve after the brain surgery and that her visual impairment was permanent.

20.2 It was furthermore clear from the evidence that the Third Respondent was not placed in a permanent alternative position, she was accommodated in *ad hoc* functions and from 22 May 2017 she was not required to work and was merely paid a salary whilst the applications were made to the insurance providers for disability benefits.

20.3 Instead of dealing with the substantial merits and investigating to what extent the Applicant should have conducted an investigation in order to accommodate the disability of the Third Respondent, he merely

concluded that she should have been appointed to a permanent alternative position.

20.4 The First Respondent made a material error of fact by concluding that the Third Respondent's visual impairment was caused by a workplace injury.

[21] It is the court's view that the Commissioner had ignored material evidence and had made a material error of fact which he then had taken into account and arrived at a conclusion that a reasonable Commissioner could not have made. A reasonable Commissioner would have concluded that the Third Respondent was permanently incapacitated from performing her role as a mobile operator. This resulted in the Applicant not being afforded a fair hearing and ultimately a result that is not reasonable.

[22] The Applicant can however be faulted for not placing sufficient evidence before the First Respondent to properly consider why alternative positions could not have been suitable to accommodate the Third Respondent's incapacity.

[23] In the premises, the following order is made:

Order

1. The arbitration award issued is reviewed and set aside.
2. The matter is remitted to the Commission for Conciliation, Mediation and Arbitration to be heard afresh by a Commissioner other than the First Respondent.
3. There is no order as to costs.

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G. J. P. OLIVIER

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Zinhle Ngwenya
Instructed by: Joubert Galpin Searle