IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D296/15

In the matter between:

MUNIRA ABDULREHMAN **Applicant**

and

COMMISSIONER NICKY WHITEAR **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

GOLDEN HORSE CASINO **Third Respondent**

Heard: **28 May 2020. The matter was considered on the papers as agreed by the parties. Both parties were given an opportunity to file further written argument in addition to their Heads of Argument.**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on June 2020.**

Summary: Review of Arbitration award-principles restated.

JUDGMENT

GUSH, J

[1] The applicant seeks to review and set aside the arbitration award handed down on 1 March 2015 under case number KNDM2326/14 and for the award to be substituted with an order that her dismissal by the third respondent was unfair.

[2] At the time of the dismissal, the applicant was employed by the third respondent as a roulette "table" supervisor. It is apparent from the pleadings and the transcript that the function of a table supervisor was essentially to oversee and supervise the conduct of the dealers at the various gambling tables. Each gambling table is operated by a dealer who is responsible for management and control of the gambling chips used by the gamblers at each table. The dealer is responsible for taking cash and issuing gambling chips to the gamblers at the table. Each dealer is required to comply with the third respondent's operating procedures and the applicant's role was to observe and manage the dealers at the tables for which she was responsible in order to ensure the dealers' compliance with the third respondents operating procedures and to prevent irregularities. The operating procedures were to prevent fraud and irregularities from taking place at the various tables.

[3] It is common course that the applicant had received "tables procedures" training and was aware of the "Rules of Conduct – Gaming and the Standard Operating Procedures for Gaming Tables" that formed part of the terms and conditions of her contract of employment.

[4] The third respondent had ascertained that certain dealers were stealing gambling chips and as a result scrutinized the conduct of the dealers' supervisors. This investigation led to the applicant being charged with misconduct. The misconduct alleged that the applicant was guilty of:

> 'Gross misconduct and stroke or gross negligence in the course of your employment and/or gross breach of the duty of care, honesty and integrity by you to the company and/or breach of company policies and procedures in that on 1 June 2014 at approximately 00H27 TO 00h31 on AR01 you failed to:

1. Enforce clean hands procedure whilst supervising a dealer on 1 June 2014 at approximately 00H27 on AR01;
2. Verify cash and transactions on AR01 on 1 June 2014 at approximately 00H29;
3. Track chips accurately on AR01 on 1 June 2014 at approximately 00H30;
4. Make mandatory announcements consistently on AR01 on 1 June 2014 at approximately 00H27;
5. Correctly allocated chips to the rightful players and instead allocated 2X R1000 stolen chips randomly to a patron playing on AR01 11 June 2014 at approximately 00H4 and 00H31

Such conduct resulting in a gross breach of your position of trust, causing an actual alternatively a potential, financial loss to the company, thereby leading to the company's confidence and property, effectively honestly portfolio responsibilities. These circumstances constitute a material breach of your contract of employment, causing irreparable damage to the trust required between employee and employer and resulting in irretrievable breakdown of the employment relationship.'[1]

[5] The applicant was found guilty of misconduct and was dismissed. Dissatisfied with her dismissal, the applicant referred a dispute to the second respondent that in turn appointed the first respondent to arbitrate the dispute.

[6] At the conclusion of the arbitration, in an award dated 1 March 2015[2] the first respondent was satisfied that the applicant was guilty of counts one, three and four, that dismissal was the appropriate sanction and that accordingly the applicant's dismissal was fair. The first respondent dismissed the applicants case.

[7] It is this award that the applicant seeks to review.

[8] In her founding affidavit under the heading 'Grounds For Review' and supplementary affidavit, the applicant avers that the first respondent: "… in conflict of the behests of the Act, failed to apply her mind, misconduct herself, committed a gross irregularity, handed down a finding which is not the finding

[1] Pleadings page 4 – 5; Bundle B page 8 and the award pleadings page 21 – 22 para 3.3.
[2] Pleadings Pages 20 – 29.

of an objective decision maker, or acceded her powers by acting unreasonably and unjustifiably.."(sic).

[9] In amplification of this averment, the applicant accuses the first respondent of failing to distinguish the different forms of misconduct and that she did not apply her mind to the nature of the charge. The supplementary affidavit avers that the first respondent misconducted herself, alternatively committed a gross irregularity by *inter alia* failing to consider whether the application of the rule was reasonable; to whom the rule applied; did not consider the evidence and failed to "undertake a full assessment of the applicant's overall credibility and probabilities".[3]

[10] In stark contrast with the averments made in the applicants founding and supplementary affidavits, the first respondents award sets out in some detail the background to the issue; and a survey and analysis of the evidence and argument (in respect of each charge of misconduct); analyses the evidence and argument before concluding that the dismissal was fair and dismissing the applicants case.

[11] It is abundantly clear from the award that the first respondent was alive to the issue to be decided and understood the background to the charges of misconduct and the applicant's dismissal.

[12] Despite the attempts by the applicant to couch averments within the ambit of a review, it is clear that the averments made by the applicant are more akin to an appeal than a review.

[13] The test applied in determining a review has been dealt with by the Labour Appeal Court (LAC) in both the matters of *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [4] and *Head of Department of Education v Mofokeng and Others*.[5] In these matters the court considered both the issue of the distinction between an appeal and a review.

[3] Pleadings page 33.
[4] (2014) 35 ILJ 943 (LAC).
[5] [2015] 1 BLLR 50 (LAC),

[14] In the *Goldfields*[6] matter the court said:

> '[16] In short: A review 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 which was reasonable to justify the decisions he or she arrived at.
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> [17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.
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> [18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, 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 one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily 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.
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> [19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.[7]
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> [20] Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue

[6] Ibid.

[7] 2009 (2) SA 204 (CC) at paragraphs 64 and 65 where the court held that: '…commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties.

in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[8]

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must aactually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork. '

[15] Likewise, in the *Mofokeng*[9] matter the Court emphasised that it was only in circumstances where the decision of the arbitrator falls outside a band of decisions which a reasonable decision-maker could come to, based on the evidence or material placed before her. The Court held:

[9] Id n 5.

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

[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 inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. 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 inquiry, 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 hypothesi* 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, if 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.'

[16] A careful consideration of the award in this matter reveals that the first respondent gave both parties a full opportunity to be heard. The arbitrator granted leave to both parties to be legally represented at the arbitration. The first respondent clearly identified the dispute, understood the nature of the dispute and dealt with the substantial merits of the dispute. As far as the outcome is concerned, the decision reached by the first respondent is a decision to which another decision-maker could reasonably have arrived at.

[17] I am not persuaded that any of the so-called irregularities, defects referred to by the applicant in her affidavits in any way suggest or establish that the first respondent pursued "the wrong enquiry, undertook the enquiry in the wrong manner or arrived at an unreasonable result."[10]

[18] As far as costs are concerned I am not satisfied that there is any reason why an order for costs should be made.

[19] In the circumstances I make the following order:

Order

1. The applicant's application is dismissed;
2. There is no order as to costs.

[10] page

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D H Gush

Judge of the Labour Court of South Africa