Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 243/16

In the matter between:

MATHOME FOSTER MOHLALA	**Applicant**
and	
MEIBC	**First Respondent**
L C SHANDU (*N.O.*)	**Second Respondent**
RAYTOKO ELECTRICAL & MECHANICAL CC	**Third Respondent**

Heard: 24 April 2018

Delivered: 3 May 2018

Summary: (Review – grounds mainly based on evidence not before arbitrator – award is reviewed on the basis of the evidence that was before the arbitrator at the arbitration hearing – on that basis award findings not unreasonable)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant has applied to review an arbitration award handed down on 8 February 2016, in terms of which is dismissal was found to be substantively fair. The application is opposed.

[2] The review application was launched timeously on 18 March 2016, but the record was only filed nearly a year later. In terms of the Labour Court Practice Manual, the record should have been filed within 60 days of launching the application unless leave to file it later had been granted and the application should have been finalised within twelve months. The applicant applied for condonation for his non-compliance with the requirements. Notwithstanding the merits, I am prepared to accept that the applicant did not have the means to file the transcript of the proceedings and was only able to do so on obtaining assistance from the SASLAW pro bono clinic. In the circumstances, I am willing to condone the applicant's non-compliance with the practice manual.

Background

[3] He was dismissed on 7 September 2015 for refusing instructions to leave the premises when told to do so on account of being under the influence of alcohol.

[4] The evidence is reasonably summarised in the arbitrator's award. In essence, the arbitrator found that the applicant had refused to clock out despite being instructed to do so after he had failed a breathalyser test. He only left the premises at the instance of the employer to have a blood sample taken. He had claimed that he was on his way to leave the premises but had gone to fetch his lunchbox from the workshop when he was told to stop and go to the hospital because he was refusing to leave the premises. The arbitrator accepted the version of the employer's witnesses that the applicant had become argumentative when told to leave and, after refusing to leave, had been found working at a height of nearly 5 metres on new building premises at the workplace.

[5] In part, the arbitrator accepted the employer's version as more probable because there would have been no reason to require the applicant to have a blood test if he had been willing to leave after the breathalyser test.

Grounds of review

[6] In summary, the applicant's main grounds of review relates to:

6.1 The reliability of the blood test results in determining whether that indicated he was under the influence of alcohol. In this regard, he presented detailed written submissions in his review papers attempting to cast doubt on the reliability of blood sample which had revealed a level of .05% alcohol in his blood, equivalent to the maximum legal limit for driving.

6.2 The arbitrator failed to take account of the toxins which he was exposed to in the workplace which indicated that the employer had a double standard when it came to workplace safety.

6.3 The arbitrator also failed to consider that other employees who drink beer who were never sent for blood tests.

[7] At the arbitration hearing, the employer's representative made it clear that the applicant would not have been dismissed simply on account of being under the influence of alcohol. It was his refusal to leave work despite being instructed to do so twice in circumstances where it was reasonable in accordance with the employer's obligations under the Occupational Health & Safety Act (No. 85 of 1993).

[8] The parties also agreed that it was common cause that the applicant was tested for alcohol and alcohol was found in his blood, though that did not mean he was drunk. During the arbitration, most of the evidence concerned whether he was going to fetch his lunchbox on his way to leaving the premises or whether he had refused the instructions to stop working which caused the employer to demand that he go for a blood test. There was no evidence presented about inconsistent safety practices or disciplinary action against employees under the influence at the workplace.

[9] Unfortunately for the applicant, a review of an arbitration award is not an opportunity to lead fresh evidence and the court is limited to consider only the evidence place before the arbitrator. Even then, the court can only consider if the arbitrator's decision is one that no reasonable arbitrator could have reached on that evidence. In ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others***[1] the LAC summarised the test for review applications under s 145 of the LRA thus:

> (1) In terms of his or her duty to deal with the dispute with the minimum of legal formalities, did the process used by the commissioner give the parties a full opportunity to have their say?
>
> (2) Did the commissioner identify the dispute he or she was required to arbitrate?
>
> (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate?
>
> (4) Did the commissioner deal with the substantial merits of the dispute?
>
> (5) Is the commissioner's decision one that another decision maker could reasonably have arrived at based on the totality of the evidence?

Even if the court might have taken a different view of the evidence that is not enough to overturn the arbitration award.

[10] Although the applicant is unfamiliar with the wording used in review applications, essentially he challenges the rationality of the arbitration award, but he based his criticism mainly on evidence that was not placed before the arbitrator, which a review court cannot consider. On the question of whether it was reasonable of the arbitrator to conclude that he probably had refused to leave when he was first instructed to do so, I do not think it was farfetched of the arbitrator to conclude that the employer would not have sent him for a blood test if he had been willing to leave the premises after the breathalyser test.

[11] The inferences drawn by the arbitrator from the evidence, which led him to conclude that the applicant was guilty as charged and that his dismissal

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[1] (2014) 35 *ILJ* 943 (LAC) at para 20

was fair were perfectly plausible inferences for him to draw and cannot be said that his assessment of the probabilities of the respective versions was inherently irrational. In the circumstances, the review application must be dismissed. Although there is an element of vexatious in this way the applicant has conducted his case, in view of his apparent indigent circumstances, I declined to make an adverse cost award against him.

Order

[1] The applicant's late filing of the transcript of the arbitration proceedings and non-compliance with the Labour Court practice manual is condoned.

[2] The review application is dismissed.

[3] No order is made as to costs

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	In person
RESPONDENT:	Mr Z Might of SEIFSA