THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: DA33/2022

In the matter between:

THAMSANQA MBEJE & 12 OTHERS	**Appellants**
and	
DEPARTMENT OF HEALTH: KWAZULU-NATAL	**First Respondent**
COMMISSIONER KM MOODLEY *N.O*	**Second Respondent**
PUBLIC HEALTH AND SOCIAL DEVELOPMENT	
SECTORAL BARGAINING COUNCIL	**Third Respondent**

Heard: **21 May 2024**

Delivered: **22 August 2024**

Coram: **Van Niekerk, Nkutha-Nkontwana JJA *et* Govindjee AJA**

Summary: Practice and procedure – pre-arbitration minute – binding agreement from which a party cannot unilaterally resile – the purpose of pre-arbitration minute is to refine and limit broader issues to be determined.

Review test restated – mere errors of fact or law may not be enough to vitiate the award.

Appeal does not lie against reasons for an order or decision but against the substantive decision itself.

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This is an appeal against the judgment and order made by the court *a quo* dismissing the appellants' review application impugning the arbitration award dated 2 October 2016 rendered by the second respondent (arbitrator). The second respondent found the appellants' dismissal fair and accordingly dismissed their claim.

Factual background

[2] The facts in this matter are uncomplicated and mostly common cause. The appellants were employed by the first respondent in its Emergency Medical Services (EMS) unit. In 2015, the EMS employees embarked on an unprotected strike. The striking employees were members of the National Union of Public Service and Allied Workers (NUPSAW). The first respondent approached the Labour Court and obtained an interim court order interdicting the strike. It would seem that the strike was suspended, as a consequence of the court proceedings. Notwithstanding the court order, the strike resumed on 22 May 2015 to 29 May 2015.

[3] On 25 May 2015, the first respondent issued the first ultimatum to the striking employees to report back to work on 26 May 2015. That was followed by the notice to attend a disciplinary hearing and the second ultimatum, issued on 26 May 2015. The striking employees who returned to work consequent the second ultimatum were issued with final written warnings. The appellants failed to heed the call to return to work following the second ultimatum and were accordingly dismissed.

In the bargaining council

[4] The appellants, represented by NUPSAW, challenged their dismissal; a dispute that served before the arbitrator. The parties concluded a pre-arbitration minute agreeing on the following terms:

'COMMON CAUSE ISSUES

1) There was a strike held from 22 May 2015 to 29 May 2015.

2) This dispute is solely about the harshness of the sanctioning in relation to the nature of the offence.

3) The final list of the applicants assigned by both parties shall be the final list of the applicants.

ISSUES IN DISPUTE

1) The validity of the sick notes submitted by the applicants.

2) The sanction was/was not too harsh.'

[5] Consistent with the pre-arbitration minute, Mr Dlamini, the NUPSAW official who appeared on behalf of the appellants, stated the following in his opening address:

'MR DLAMINI: … Mr Commissioner. The Applicants are now complaining about the sanction of the dismissal that was imposed, as they are of the view that it was not appropriate because the employer has set a standard of final written warning and leave without pay to visit a strike-related misconduct, including this one of 22 May 2015.'

[6] It is also apparent that Mr Dlamini did not raise the issue of the authenticity of medical certificates in his opening address because the parties had agreed that the sole issue in dispute was the appropriateness of the sanction. In any event, it would not have made sense to persist with this issue because the appellants conceded that they had embarked on an unprotected strike.

[7] The strike was well-orchestrated and it apparently stemmed from several grievances that the EMS employees had against the first respondent. It is common cause that the strike was marked by violence and destruction. Ambulances were burnt; a 60-seater bus conveying patients was attacked and some patients were injured; ambulance services were halted, exposing patients who might have needed emergency services to peril; and property belonging to the third respondent and non-striking employees was damaged.

[8] Mr Kunene, the first respondent's District Manager, testified that the appellants embarked on an unprotected strike knowing very well it was strictly prohibited because they were rendering essential services. NUPSAW failed to

intervene despite being aware that its members had embarked on an unlawful strike and were in contempt of the court order interdicting the strike.

[9] On 25 May 2015, the first ultimatum was issued, directing the striking employees to return to work at the commencement of their respective shifts on 26 May 2015, failing which further steps would be taken that would lead to their dismissal. That was followed by the second ultimatum, dated 26 May 2015, which was preceded by a notice to attend a disciplinary hearing. The appellants were dismissed because they failed to heed the call to return to work consequent to the second ultimatum. Instead, they dishonestly used the medical certificates to mislead the first respondent.

[10] Mr Kunene's cross-examination took a surprising turn. The appellants denied the receipt of the ultimata and the notice to attend the disciplinary hearing. Mr Kunene obstinately averred that the appellants, like all other striking employees, were duly served with the ultimata and the notice to attend the disciplinary hearing. The bulk Short Message Services (SMSes) were sent to all the striking employees respectively; copies of the ultimata were also placed on the notice boards; and copies were served on NUPSAW officials (personally on Nkosi and emailed to Mr Success Mataisane, the Secretary-General). Mr Kunene never thought of bringing proof of service because the appellants did not place the issue of service in dispute.

[11] Messrs Hlubi and Mbeje readily conceded on behalf of the appellants that the unprotected strike was premeditated; and that it was part of their plan to dishonestly use the medical certificates as a cover-up. Yet, they were insistent that the appellants did not receive the ultimata and the notice to attend the disciplinary hearing, hence, their contention that the first respondent applied the sanction of dismissal inconstantly. Mr Hlubi further testified that the appellants were expecting to be issued with a final written warning, a recommended sanction in terms of the disciplinary code. Mr Kunene disavowed that the disciplinary code applied to the appellants as essential service employees because they were prohibited from striking and, in any event, the appellants failed to respond to the ultimata.

[12] The arbitrator found that "… *the actions of the appellants in embarking on an unprotected strike notwithstanding the court order, and which resulted in violence, injury to patients and extensive damage to the first respondent's property, bus, ambulances, and motor vehicle, were of such a serious nature that they warrant a sanction of dismissal*". Notwithstanding this finding, the arbitrator dealt with the inconsistency claim and found the first respondent's version that the appellants were duly served with the ultimata and notice to attend disciplinary hearing more probable. As a result, he dismissed the inconsistency claim and found the appellants' dismissal fair.

In the court *a quo*

[13] In the court *a quo*, the appellants impugned the reasonableness of the award. They accused the arbitrator of irregularly accepting the first respondent's version that it consistently applied the sanction of dismissal which was based on implausible evidence. Notably, the arbitrator's finding on the appropriateness of the sanction was not challenged. Instead, the appellants persisted with their contention that they did not receive the ultimata and the notice to attend the disciplinary hearing.

[14] The court *a quo* upheld the arbitrator's finding that it was more probable that the appellants were aware of the second ultimatum. Relying on this Court's decision in *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers Union and others*[1] (*County Fair Foods*), the court *a quo* found the arbitrator's finding to dismiss the appellant's inconsistency claim reasonable because, unlike the other striking employees, they failed to respond to the ultimata and continued to defy the authority of the first respondent until they were dismissed.

In this Court

[15] The appellants contend that, since the first respondent bore the onus to prove the fairness of the appellants' dismissal, it had to lead cogent evidence to justify the distinction between the striking employees who had responded to the ultimata and

[1] [2018] ZALAC 9; (2018) 39 ILJ 1953 (LAC).

those who failed to heed the call to return to work. Mr Campton, counsel for the appellants, submitted that the appellants do not dispute that, had the first respondent proved that they deliberately defied the ultimata and the notice to attend the disciplinary hearing, it would be fair to distinguish between the two groups of employees. However, the first respondent failed to prove their defiance. That is so because there was no evidence to prove that the ultimata and notice to attend a disciplinary hearing were properly communicated to the appellants.

[16] The first respondent, on the other hand, contends that the sanction of dismissal is fair as the appellants failed to heed the call to return to work per the ultimata and shunned the invitation to attend the disciplinary hearing. Mr Giba, counsel for the first respondent, submitted that, to the extent that the main issue that served before the arbitrator was about the harshness of the sanction of dismissal, it did not avail the appellants to dispute the receipt of the ultimata and the notice to attend the disciplinary hearing. Even so, the arbitrator correctly accepted the cogency of the evidence led by the first respondent to prove, on the balance of probabilities, that the appellants did receive the ultimata and the notice to attend a disciplinary hearing. Therefore, the court *a quo* cannot be faulted for finding the outcome reached by the arbitrator reasonable.

Analysis

[17] This is one of the many cases in this Court where one party impermissibly veered from the agreed scope of the issues in dispute in the pre-arbitration minute and hauled the opponent and arbitrator along. Resultantly, the matter before the court *a quo* turned on issues that were patently outside the scope of what was agreed upon by the parties in the pre-arbitration minute.

[18] The binding nature of a pre-arbitration minute is well accepted.[2] Like a pre-trial minute, a pre-arbitration minute "…*is a consensual document which binds the*

[2] See: *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Anothe*r (*Driveline*) [2000] 1 BLLR 20 (LAC) at para 16; *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA) at para 6; *South African Breweries (Pty) Ltd v Louw* (*SA Breweries*) [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC) at para

parties thereto and obliges the [arbitrator] (in the same way as the parties' pleadings do) to decide only the issues set out therein"[3]. In *South African Breweries (Pty) Ltd v Louw*[4]*,* this Court, per Sutherland JA, suitably restated the purpose of a minute as follows:

> 'The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pre-trial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pre-trial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the strait-jacket into which the litigants have confined themselves.' [Own emphasis]

[19] The case before us was argued on the same basis as in the court *a quo*. There was no appreciation that the parties had bound themselves to a narrow scope of issues in the pre-arbitration minute. While it is accepted that there may be instances where the appellate court may shirk from interfering with the widened scope of issues pleaded in the court *a quo*, that mostly happens when it is shown that the widening of pleadings was sanctioned by the parties.[5] A pre-arbitration minute is, however, a binding agreement that a party cannot resile from unless there

---

8; *Sibanye Rustenburg Platinum Mine v Association of Mineworkers & Construction Union on behalf of Sono and others* [2024] ZALAC 23; (2024) 45 ILJ 1623 (LAC) (*Sibanye*) at para 11.

[3] See: *Driveline* at para 16.

[4] *SA Breweries* supra fn 2 at para 8.

[5] See: *Sibiya v SA Police Service* [2022] ZALAC 88; (2022) 43 ILJ 1805 (LAC) at para 30; *Railway Safety Regulator v Kekana* [2023] ZALAC 28; (2024) 45 ILJ 284 (LAC) at para 57.

are special circumstances.[6] Therefore, it calls for an arbitrator to be circumspect and not allow a party to sneak in issues that are beyond what was agreed to in the pre-arbitration minute.

[20] In this case, the arbitrator was solely called to determine the narrowly defined issues. Given the fact the appellant readily conceded that the sick notes were not authentic, the only issue for determination was the appropriateness of the sanction. It follows that the arbitrator's finding that the sanction of dismissal was appropriate, having taken into consideration the nature of the misconduct and the aggravating circumstance, was dispositive of the matter.

[21] Notwithstanding the generous approach to the collateral issues beyond the scope of the pre-arbitration minute, the arbitrator's finding in that regard is inconsequential. The review test of reasonableness is trite and the threshold is stringent.[7] As such, a reviewing court should be extremely hesitant to disturb the arbitrator's findings of fact unless they result in a misconceived inquiry or unreasonable outcome.[8]

[22] A careful reading of the record shows that the appellants' assail is not directed at the outcome reached by the arbitrator. Instead, the appellants staged a nebulous attack on the arbitrator's evaluation of the evidence on issues that are, in any event, beyond the scope of the pre-arbitration minute.

[23] Mr Campton's submission that the appellants would have accepted their fate had the first respondent proved that they deliberately defied the ultimata and the notice to attend the disciplinary hearing has no merit and must be rejected on two grounds. Firstly, he obviously conflates reviews with appeals and, in turn, seeks interference with the arbitrator's findings of fact contrary to the trite notion that mere

---

[6] *Sibanye* above fn 2 at para 11.
[7] See: *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28 (LAC); (2014) 35 ILJ 943 (LAC) at para 19; *Head of the Department of Education v Mofokeng and Others (Mofokeng)* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* [2014] ZALAC 82; (2015) 36 ILJ 1453 (LAC) (*Bafokeng*) at para 12.
[8] See *Mofokeng* above at para 32; *Booi v Amathole District Municipality and others* [2021] ZACC 36; (2022) 43 ILJ 91 (CC) at paras 44 -52.

errors of fact or law may not be enough to vitiate the award.[9] Secondly, it is premised on the collateral issues that fall outside the limited scope of the pre-trial minute. Tellingly, the appellants are not lay or unrepresented litigants. They were represented by NUPSAW, an experienced trade union. Mr Dlamini ably presented the appellants' case and his opening statement shows they were alive to the fact that the pre-arbitration minute trimmed down the scope of the issues in dispute. Yet, they opportunistically and invalidly snuck in the inconsistency challenge.

[24] Mr Giba correctly submitted that, to the extent that the main issue that served before the arbitrator was about the harshness of the sanction of dismissal, it did not avail the appellants to dispute the receipt of the ultimata and the notice to attend the disciplinary hearing.

[25] So, the arbitrator cannot be faulted as he properly dealt with the main issue in dispute (the appropriateness of the sanction) as agreed to by the parties in the pre-arbitration minute and reached a decision that falls within the requisite confines of reasonableness. Moreover, this finding is not impugned.

[26] By the same token, the fact that the court *a quo* equally adopted a generous approach and veered from the agreed scope of issues in dispute per the pre-arbitration minute is not fatal. That is so because an appeal lies against an order and not against the reasoning in a judgment.[10] Significantly, the court *a quo* correctly found the outcome reached by the arbitrator reasonable.

Conclusion

[27] Having regard to all the circumstances, the appeal must fail. Concerning costs, the requirements of law and fairness dictate that each party should pay its own costs.

---

[9] Id.

[10] See: *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E it was held that:

> 'When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment.'

[28] Accordingly, the following order is made:

Order

1. The appeal is dismissed with no order as to costs.

Nkutha-Nkontwana JA

Van Niekerk JA *et* Govindjee AJA concur.

Appearances:

For the appellant: Tomlison Mnguni James Attorneys

For the third respondent: Office of the State Attorney