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Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case no: JR 397/09

In the matter between:

NATIONAL UNION OF MINeworkERS

First applicant

LOT ZWANE

Second applicant

and

TOKISO DISPUTE SETTLEMENT (PTY) LTD

First respondent

KATE SAVAGE N.O.

Second respondent

GOEDEHOOP COLLIERY

Third respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an application to review a private arbitration award under the auspices of Tokiso (the first respondent) by the arbitrator, Kate Savage (the second respondent). The arbitrator found that the dismissal of Mr Lot Zwane (the second applicant) by Goedehoop Colliery (a division of Anglo Operations Ltd), the third respondent, was fair.

APPLICATION OF THE ARBITRATION ACT

- [2] The arbitration was conducted under the auspices of Tokiso Dispute Settlement (Pty) Ltd as a private arbitration. The parties – NUM (the first applicant) and Goedehoop Colliery – specified the terms of reference as follows:

“The issue which the arbitrator must determine is whether, in the arbitrator’s opinion,

1. Was the supervision recommended by the doctor provided
2. Was he still fit to perform his duties with that responsibility because of his condition
3. Was the company right to charge him or was it suppose [sic] to send him for assessment knowing his previous condition.”

- [3] The terms of reference are not entirely clear and are poorly drafted, but it is common cause that “he” refers to the second applicant, Lot Zwane.

- [4] In another review application of a private arbitration award involving the same arbitrator, *Clear Channel Independent (Pty) Ltd v Savage NO & another*¹, Molahlehi J held that the norms that apply in reviews of private arbitrations are those found in the provisions of s 33 of the Arbitration Act² and that the wider test of review envisaged in s 145 of the LRA³ is not applicable to private arbitrations.

- [5] This *dictum* is important when considering the grounds of review. Firstly, however, I need to deal with the aspect of condonation.

CONDONATION

- [6] In terms of s 33(2) of the Arbitration Act, an application for review in terms of that Act “shall be made within six weeks after the publication of the award to the parties.”

- [7] According to the union (the first applicant), it received the award on 9 October 2008. The review application should have been filed by 20

¹ (2009) 30 *ILJ* 1593 (LC) para [36]

² Act 42 of 1956

³ The Labour Relations Act, Act 66 of 1995

November 2008. Instead, the union only delivered the application for review, together with an application for condonation, on 24 February 2009 – more than three months outside of the statutory time limit of six weeks.

- [8] I shall deal with the application for condonation in terms of the well-known principles set out in *Melane v Santam Insurance Co Ltd*.⁴ I should add that the third respondent's answering affidavit was also delivered some 25 days late. It has also applied for condonation. I will first deal with the applicant's application for condonation and then with that of the third respondent.

Extent of the delay

- [9] As set out above, the review application was delivered more than three months outside of the already generous statutory time limit of six weeks. To say that this is an excessive delay, is to state the obvious.

- [10] As the Labour Appeal Court stated in *NUM v Council for Mineral Technology*:⁵

"There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, the application for condonation should be refused."

- [11] I therefore have to consider the explanation for the delay and the prospects of success.

Explanation for the delay

- [12] Mr Zwane has been represented by the National Union of Mineworkers (the first applicant) throughout – both at arbitration and in the review application. The NUM, who is itself a party to these proceedings, is entirely to blame for the delay.

- [13] The deponent to the founding affidavit, Mr Rakau, who is the legal unit head of the NUM, says that "the matter only came to my attention in the

⁴ 1962 (4) SA 531 (A) 532 A-F

⁵ [1999] 3 BLLR 209 (LAC)

second week of November 2008." He does not explain why this should be the case, as he also states that the award was received by the union on 9 October 2008.

- [14] As the head of the legal unit, Rakau must have realised in mid-November 2008 that the six-week period for launching a review application was already about to expire. But this factor did not prompt him to act with any haste. Instead, he says: "At the time I had a tied [sic] schedule, and was only able to read the file on the 18th day of November 2008." I should add that, at that stage, the union had not requested a record of the arbitration proceedings. It is therefore not clear what "file" Rakau had to read. In reality, he only needed to read the arbitration award, comprising all of eight pages.
- [15] Rakau goes on to say that he could not decide whether or not there were prospects of success. As will become clearer later, his doubts were well founded. Inexplicably, though, he says that he then "looked for an advocate" to give him an opinion on the prospects of success. Even though he is the head of the legal unit of the union, he could not have briefed counsel directly. He would have had to have instructed an attorney. Yet he does not state when he instructed his current attorneys or anyone else.
- [16] What Rakau does go on to say, is that it could not find an advocate because "all were closing down for the festive season". According to him, he then instructed counsel [apparently directly] who was only going to be able to "attend to the matter" in the third week of January 2009. Neither Rakau nor his putative counsel – whom he does not name – explains why the "festive season" is deemed to last from 18 November to the third week of January, or why no attorney or counsel in South Africa should be available to provide an opinion on the prospects of success of a review application pertaining to an eight page arbitration award for more than two months. This should also be seen against the background that Rakau is the legal unit head of one of the largest trade unions in the country, a

frequent litigator in this court, who must be well aware of the fact that there are no *dies non* during the so-called festive season in this court.

[17] Only on 2 February 2009 did the unnamed counsel provide the union with an opinion to the effect that the matter had prospects of success on review. It then took another three weeks to file the review application, despite the fact that it was already out of time. Rakau states that: "The earliest date [to consult] suitable to our attorney, Makinta, was the 16th day of February 2009. He then took our instructions on the 16th day of February 2009, and prepared the application from the 17th – 23rd day of February 2009." Why this attorney could not have prepared the application in the first place, and why it should have been necessary to brief counsel, is not explained. Neither does Rakau or his attorney explain why it should take a further week to draft a fairly simple – albeit defective, as will become clearer later – review application comprising 14 pages.

[18] The explanation for the delay is wholly inadequate.

Prospects of success

[19] At the hearing of this application, and with the consent of the parties, I indicated that I would hear full argument on the merits of the review application, rather than deciding the two condonation applications *in limine*, as both parties were fully prepared on the merits and it would have led to an unnecessary delay to decide only the condonation applications on the day of the hearing.

[20] As will become apparent from my view of the merits of the review application, the applicants have no prospects of success. The applicants' application for condonation must therefore be dismissed, given the excessive delay, the inadequate explanation therefor, and the absence of prospects of success. However, I will deal with the merits under a separate heading.

The third respondent's condonation application

- [21] The third respondent applied for condonation for the late filing of its answering affidavit. The applicants' supplementary affidavit in terms of rule 7A(8) was only filed on 10 June 2010. Tokiso delivered the record on 25 February 2009. The applicants do not explain why it took them 16 months to comply with rule 7A(8).
- [22] The answering affidavit was delivered on 2 August 2010, i.e. some 25 days late.
- [23] The explanation for the delay is that Mr Paolos Soviya, the erstwhile employee relations manager at Goedehoop Colliery who was instructing the attorneys, had been transferred and it was difficult to obtain instructions from him. Furthermore, Mr Phethane, the erstwhile shift boss who was also the complainant at the disciplinary hearing, had to advise the attorneys on technical aspects raised in the supplementary affidavit. He had left the employ of Goedehoop and it took some time to find him.
- [24] The explanation for the delay is not unreasonable and should be considered together with the extent of the delay, which is not excessive; the applicants' own excessive tardiness in filing the supplementary affidavit, which has the effect that there can be no real prejudice to them; and the prospects of success, which overwhelmingly favour the third respondent.
- [25] Condonation is granted for the late filing of the answering affidavit.

THE MERITS

- [26] The applicants purport to bring the review application in terms of ss 145, 157 and 158 of the LRA. They submit that the arbitrator "committed misconduct, gross irregularities and exceeded his [sic] powers". The deponent to the founding affidavit, Rakau, goes on to say:

"It is an inevitable and foregone result of the evidence on record, that the arbitration proceedings and the conclusions reached, were defect [sic] and incorrect respectively."

[27] I have already referred to the judgment of Molahlehi J in *Clear Channel Independent (Pty) Ltd*.⁶ There, he made it clear that the review test in s 145 of the LRA is not applicable to private arbitrations, *inter alia* with reference to *Telcordia Technologies v Telkom SA Ltd*⁷, which was in turn referred to by Navsa AJ in *Sidumo*⁸ when he said:

“Compulsory arbitrations in terms of the LRA are different from private arbitrations. CCMA commissioners exercise public power which impacts on the parties before them. In the language of the pre-constitutional administrative law order, it would have been described as an administrative body exercising a quasi-judicial function. I conclude that a commissioner conducting a CCMA arbitration is performing an administrative action.”

[28] Molahlehi J in *Clear Channel* came to the conclusion that the test as set out in *Telcordia* applies in private labour disputes. The test as set out in that case⁹ is as follows:

“By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the [Arbitration] Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, ‘common law’ or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court.”

[29] Molahlehi J went on to say, quite correctly, that the grounds of review as set out in s 33(1) of the Arbitration Act can only be extended by agreement between the parties. They could agree that the grounds of review should include the reasonable decision-maker test as set out in *Sidumo*; but in the absence of such an agreement, the review grounds are restricted to those in s 33 of the Arbitration Act.

[30] Those grounds are the following:

⁶⁶ *supra*

⁷ 2000 (3) SA 266 (SCA)

⁸ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) para [88]

⁹ *Supra* paras [50] – [51]

- “(a) [A]ny member of the arbitration tribunal has misconducted himself in relation to his duties as an arbitrator; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or
- (c) an award has been improperly obtained.”

[31] In the present case, the parties have agreed to terms of reference for the private arbitration, as set out above. They have not agreed to include the *Sidumo* test. The grounds of review are therefore limited to those set out in s 33 of the Arbitration Act.

[32] The applicants have framed their review application in terms of ss 145 and 158 of the LRA. The third respondent has submitted that the review application is fatally defective for that reason alone. I take into account, though, that the applicants have alleged in their pleadings that the arbitrator has committed misconduct, gross irregularities and that she has exceeded her powers. Insofar as those grounds of review are included in s 33 of the Arbitration Act, I shall consider them in that context.

Misconduct

[33] For misconduct to have taken place, there must have been some wrongful or improper conduct on the part of the arbitrator which may be categorised as mishandling the arbitration tantamount to a substantial miscarriage of justice.¹⁰ Examples of misconduct would be to ignore the principles of natural justice or to be careless in the manner in which the arbitration is conducted.

[34] It is not clear from the applicants' pleadings or their heads of argument what misconduct is alleged. They make sweeping statements that the arbitrator “made mistakes so gross that they could not have been made without some degree of misconduct.” In oral argument, Mr *Maunatlala*, for the applicants, argued that the arbitrator should have found that Zwane had a medical condition that incapacitated him, in the sense that he did not have the mental judgment to carry out his duties properly.

¹⁰ *Naraindath v CCMA* (2000) 21 ILJ 115 (LC)

- [35] It emerged in evidence before the arbitrator that Dr Alberts, of the Anglo Coal Highveld hospital, recommended that Zwane “work under supervision / with a co-worker” for one month, from 26 March to 26 April 2007. This was because he had been diagnosed with meningitis.
- [36] Almost a year later, on 11 March 2008, Zwane pleaded guilty (in a disciplinary enquiry) to misconduct of working under an unsupported roof. He was dismissed for this misconduct. Zwane never complained of mental instability or illness, nor was any such instability noted by his supervisor, Petlane.
- [37] The arbitrator found on this evidence that the company was entitled to discipline Zwane. She also found that his misconduct was serious, given its potentially fatal consequences; and that the ultimate decision to dismiss him, after the disciplinary hearing, was fair.
- [38] There is nothing in the award, in the typed record of the arbitration proceedings or in the arbitrator’s handwritten notes that suggest any form of misconduct. The arbitrator conducted the arbitration process fairly and she considered all the evidence, properly presented, before coming to an entirely rational finding. Even if the parties had incorporated the *Sidumo* test in the terms of reference, I would have found that the award was reasonable.

Gross irregularity

- [39] The applicants have not made out any grounds for a gross irregularity in the arbitration proceedings. The arbitrator considered her terms of reference and the evidence before her. She came to the conclusion that Zwane was fit to perform his duties and that the company could charge him for misconduct. There is nothing irregular about the process or, indeed, her conclusions. Neither did she exceed her powers under the arbitration agreement.

Award improperly obtained

[40] The applicants have not alleged that the award was improperly obtained. Neither is there any evidence to that effect.

[41] It follows that the application for review must fail. In the context of the condonation application, it is axiomatic that the applicants had no prospects of success.

COSTS

[42] The applicants have dragged their feet in pursuing this application for review and the accompanying application for condonation, in spite of the fact that the NUM has been representing Mr Zwane throughout. When they eventually did deliver the review application, it was legally flawed. The application never had any prospects of success. This much must have been clear to the head of the legal unit, Mr Rakau, when he declined to express a view on the prospects of success in November 2008.

[43] The third respondent also filed its answering affidavit late. Although I have condoned the late filing, the applicants should not be held liable for any costs related to the late filing of that affidavit and the third respondent's subsequent application for condonation.

[44] With regard to the rest of the ill-considered application, though, it is my view that, in law and fairness, the NUM should be held liable for the third respondent's unnecessary costs. The third respondent submitted that the applicants should be ordered to pay its costs jointly and severally. I do not agree. Mr Zwane has not been well served by his union. He should not be held jointly liable. Despite the ongoing relationship between NUM and Goedehoop Colliery, though, the union should pay the company's costs on a party-and-party scale.

CONCLUSION

[45] The applicants' application for condonation is dismissed.

[46] The third respondent's application for condonation is granted.

[47] The application for review is dismissed.

[48] The first applicant is ordered to pay the third respondent's costs, save for the costs occasioned by the late filing of the answering affidavit and the third respondent's application for condonation.

STEENKAMP J

Date of hearing: 18 February 2011

Date of judgment: 22 March 2011

For the applicants: Adv MI Maunatlala

Instructed by ES Makinta attorneys

For the respondent: Adv AL Cook

(Heads of argument having been drawn by

Adv F Venter)

Instructed by Cliffe Dekker Hofmeyr Inc