



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR3308/2011

In the matter between:

K M LAWRENCE

Applicant

and

MUTUAL AND FEDERAL (PTY) LTD

First Respondent

L SHEAR

Second Respondent

Heard: 21 November 2013

Judgment: 09 May 2014

Summary: Review of a private arbitration award. Arbitration award not reviewable.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant is seeking to review and set aside a private arbitration award issued in consequence of private arbitration proceedings agreed to between the Applicant and the First Respondent ('the employer'). The parties agreed to the terms of reference for the conduct of the arbitration proceedings and the Applicant is seeking that his dismissal be declared substantively unfair and

that the findings be substituted in respect of the issues that were to be determined as set out in the terms of reference.

Background facts

- [2] The brief history of this matter is as follows: the Applicant was employed as a general manager of Mutual and Federal and after he was found guilty of misconduct, he was dismissed. The Applicant and the employer subsequently entered into a private arbitration agreement and the Second Respondent ('the arbitrator') was appointed as a private arbitrator. He was given the same powers and functions of a commissioner of the Commission for Conciliation, Mediation and Arbitration ('the CCMA') and as contemplated in section 138 of the Labour Relations Act¹ (the Act).
- [3] On 5 October 2011 the Applicant and the employer signed a 'terms of reference' for the conduct of the arbitration and paragraphs 3.1 – 3.4 are relevant to this review application.
- [4] Paragraph 3 of the terms of reference deals with the issues the arbitrator was required to determine and reads as follows:
- '3.1. Whether the employee is guilty of: Gross negligence in that the employee failed to exercise due care and / or gross failure by the employee to implement control and adequate monitoring mechanisms regarding prescribed claims thereby exposing the employer to a financial loss of R5 million to R10 million and causing an unwarranted premium reduction;
 - 3.2. If so, whether the dismissal of the applicant was substantively fair;
 - 3.3. If not, the appropriate legal relief to be awarded to the applicant;
 - 3.4. Whether the applicant is entitled to the deferred payment of his 2009 bonus which is R 165 567 plus interest at the prescribed rate from 16 February 2011 to date of payment, less income tax to be deducted.'
- [5] The arbitrator found that the Applicant was not guilty of gross negligence but was guilty of negligence for failing to take adequate and additional measures, as general manager, to ensure that claims did not prescribe. He ordered the

¹ Act 66 of 1995

employer to pay the Applicant the equivalent of six month's salary as compensation and 50% of his performance bonus for the financial year 2009 plus interest at the prescribed rate from 1 October 2010.

- [6] The Applicant is seeking to review and set aside the arbitration award and the variation of the arbitration award.

The test on review

- [7] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*;² as 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [8] However the arbitration award sought to be reviewed was issued in consequence of a private arbitration agreement between the parties and the award may only be reviewed in terms of the provisions of section 33 of the Arbitration Act³.

- [9] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*⁴ the Constitutional Court held that:

'The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.'

- [10] In *Telcordia Technologies Inc v Telkom SA Ltd* ⁵ the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting

² (2007) 28 ILJ 2405 (CC) at para 110.

³ Act 42 of 1965.

⁴ 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC).

⁵ 2007 (3) SA 266 (SCA).

aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

[11] This Court has made in clear in numerous judgments that the norms that apply in reviews of private arbitrations are those found in the provisions of section 33 of the Arbitration Act and the wider test of review of section 145 of the Act is not applicable to private arbitrations under section 33 of the Arbitration Act.

[12] In *Clear Channel Independent (Pty) Ltd v Savage NO and another*⁶ this Court held that the test as set out in *Telcordia*⁷ applies in reviews of private labour disputes. The test to apply is set out in that case 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 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 I have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court.'

[13] In other words by agreeing to refer their dispute to private arbitration the parties limit interference by court to the grounds of procedural irregularities as set out in section 33(1) of the Arbitration Act. The consequence of agreeing to refer the matter to private arbitration is that the parties waive the right to rely on any further ground of review be it 'common law' or otherwise. The grounds of review as set out in section 33(1) of the Arbitration Act can only be extended by agreement between the parties.

⁶ (2009) 30 ILJ 1593 (LC).

⁷ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

- [14] Section 33(1) of the Arbitration Act provides for the setting aside of an award as follows:

‘(1) Where

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

- [15] It is against this background that the Applicant's grounds for review must be assessed.

Grounds for review

- [16] The Applicant raised four grounds of review and the application for review is opposed.

- [17] The first ground of review is that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by failing to determine the substantive fairness of the Applicant's dismissal.

- [18] Substantive fairness is established by considering a number of aspects, as set out in Item 7 of Schedule 8 of the Act. If it is established that the employee is guilty of misconduct, the question for the arbitrator is whether the dismissal was an appropriate sanction. The consideration of the appropriateness of the sanction is part of the enquiry into the substantive fairness of the dismissal.

- [19] The arbitrator found that the Applicant was not guilty of gross negligence, but that he was negligent. He held that dismissal was not the only and not the appropriate sanction.

- [20] The Applicant's case is that the arbitrator failed to determine substantive fairness. I cannot agree with this as the arbitrator found that the Applicant was not guilty of gross negligence and the sanction of dismissal was too harsh.

- [21] In finding that dismissal was not an appropriate sanction, the arbitrator made a finding on the substantive fairness of the Applicant's dismissal. If the Applicant's expectation was that the arbitrator should have dealt with the issue of substantive fairness separately and specifically, that is understandable but that expectation *per se* cannot render the award reviewable.
- [22] The arbitrator made a finding on substantive fairness and this ground for review has no merit.
- [23] The second ground for review is that the arbitrator committed gross irregularity in the conduct of the arbitration proceedings by disregarding material evidence and argument, alternatively failed to apply his mind to evidence and argument in finding that the Applicant was guilty of negligence. In this respect the Applicant's case is that the arbitrator's decision is irrational and not one that a reasonable decision maker could make. Alternatively that he acted *ultra vires* the powers given to him by the private arbitration agreement in that he was not required to determine whether the Applicant was guilty of negligence. The arbitrator was to determine whether the Applicant was guilty of gross negligence.
- [24] The 'reasonable decision maker' test does not apply and I cannot accept the first part of this ground for review as a basis to interfere with the decision.
- [25] The alternative ground for review goes to the question of the powers given to the arbitrator by the agreement and as set out in the terms of reference. The arbitrator was tasked to determine whether the Applicant was guilty of 'gross negligence'. The arbitrator found that he was not guilty of gross negligence, but that he was negligent.
- [26] I am of the view that the arbitrator did not exceed his powers and that he did not commit a reviewable irregularity by considering that the Applicant was guilty of lesser misconduct. He determined that the Applicant was not guilty of 'gross negligence' and in that respect he carried out the mandate the parties had given him. He was further mandated to determine that in the event the Applicant was not guilty of 'gross negligence' and his dismissal substantively unfair, what would be the appropriate legal relief.

- [27] The employer's case is that since the arbitrator found the Applicant's dismissal substantively unfair, the finding as to the negligent conduct of the Applicant is irrelevant to the issue of substantive fairness but relevant to the issue of an appropriate remedy and the arbitrator was entitled to take that into account in determining the remedy.
- [28] It is trite law that not every irregularity in the conduct of an arbitration would invite interference from the court. The court will interfere where the irregularity is so gross that the affected party can be said to have been denied a fair hearing as a result. I cannot find that the Applicant was denied a fair hearing simply because a finding of negligence was made.
- [29] The arbitrator had to determine appropriate relief and I agree with the employer's argument that he was entitled to consider the issue of negligence in determining an appropriate remedy.
- [30] Therefore the second ground for review is without merit.
- [31] The third ground for review is that the arbitrator failed to consider the prescripts of section 193(2) of the Act regarding re-instatement or re-employment as an obligatory remedy.
- [32] The Applicant's case is that once the arbitrator found that the Applicant's dismissal was substantively unfair, he had no option but to re-instate the Applicant. I cannot agree with this submission.
- [33] It is evident from the award that the arbitrator considered the appropriate remedy and in doing so he found that re-instatement is not the appropriate remedy and he awarded compensation. The reasons for not re-instating the Applicant and for determining the amount of compensation had been set out in the arbitration award.
- [34] The terms of reference required the arbitrator to determine if the Applicant was guilty of 'gross negligence' and whether his dismissal was substantively fair and if not, what the appropriate legal relief would be.
- [35] I cannot find that the arbitrator failed to take account of or consider the prescripts of section 193 of the Act. He considered the facts and his finding that the Applicant was indeed negligent and came to a finding that re-

instatement would not be appropriate but compensation should be awarded. The arbitrator provided reasons why he did not re-instate the Applicant and in awarding compensation, he carried out his mandate to determine the appropriate legal relief.

- [36] There remains one ground for review to be considered and that is whether the arbitrator failed to provide any cogent reasons for awarding payment of only 50% of the Applicant's 2009 bonus and failed to determine the date for interest on the amount to be paid.
- [37] It is evident from the variation ruling that the arbitrator found that the Applicant was to be paid his performance bonus plus interest at the prescribed rate as from 1 October 2010. There is no merit in the allegation that the arbitrator failed to determine the date for interest to be paid.
- [38] The arbitrator was specifically mandated to determine whether the Applicant was entitled to payment of his 2009 bonus. He found that the Applicant was not guilty of gross negligence but negligence and he should receive only a portion of the bonus.
- [39] The employer conceded that the arbitrator did not provide reasons for only awarding 50% of the bonus and submitted that it is implicit in the award that the Applicant was only awarded 50% of his bonus because he found the Applicant negligent in discharging his duties and responsibilities.
- [40] In my view this amounts to speculation and calls for inferences to be drawn.
- [41] The arbitrator should have provided reasons why the Applicant was not entitled to his full bonus and making reference to his negligence almost in passing, does not constitute a reason for awarding 50% of the bonus. The arbitrator was specifically mandated to determine this issue and his award should be clear on all the issues requiring determination and should not require any inference to be drawn.
- [42] In my view, the arbitrator's failure to provide reasons for awarding only 50% of the bonus is reviewable.
- [43] This ground for review is upheld.

[44] Mr Campanella for the Applicant submitted that the matter should not be remitted *de novo* but should be determined by this Court.

Conclusion

[45] In reviewing the arbitration award, the ground for review as raised by the Applicant must be assessed and this Court must apply the norms found in the provisions of section 33 of the Arbitration Act. The test to be applied is a strict one.

[46] The Applicant raised four grounds for review. Three of the grounds so raised are without merit and the last ground for review is upheld.

[47] With regard to costs, I take into account the fact that the Applicant is an individual who feels prejudiced and wanted this Court to consider his matter. I do not in law and fairness consider a costs award to be appropriate.

Order

[48] In the premises, I make the following order:

48.1 The application for review on the ground that the arbitrator failed to determine the substantive fairness of the Applicant's dismissal that he acted *ultra vires* the powers given to him by the private arbitration agreements and that he failed to consider the prescripts of section 193(2) of the Act is dismissed;

48.2 The Applicant is entitled to his full performance bonus for the 2009 financial year being R 165 567 plus interest at the prescribed rate from date of accrual to date of payment, less income tax deductions;

48.3 There is no order as to costs.

Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

Applicant: Advocate Campanella

Instructed by: Stan Dewey

Second Respondent: Advocate van As

Instructed by: Moni Attorneys

LABOUR COURT