THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO. JR 2111/2014

In the matter between:

EXXARO COAL (PTY) LTD **Applicant**

and

GABRIEL CHIPANA **First Respondent**

DONALD NKADIMENG **Second Respondent**

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **Third Respondent**

Heard: **04 May 2017**

Delivered: **06 September 2017**

Summary: Review application: No basis laid for acceptance of hearsay evidence. Commissioner correctly ruled against admission of such evidence. Application dismissed.

JUDGMENT

BALOYI AJ

Introduction

[1] The arbitration award issued by the Second Respondent is subject matter of this application. The Second Respondent in his capacity as the arbitrator issued an award in which the Third Respondent's dismissal was declared substantially unfair. He went on to award the Third Respondent relief of reinstatement with retrospective effect. The Applicant is seeking the review and setting aside of the award. The reasoning of the Second Respondent coupled with the result in the award formed the nucleus of the Applicant's grounds. In terms of the Applicant's grounds the award is mainly attacked for the First Respondent's failure to apply rules of evidence most particularly in relation to hearsay. The Third Respondent opposed the application and more of this appear hereunder.

Background

[2] The Applicant dismissed the Third Respondent on 14 May 2014 after finding him guilty of dishonesty. The charges emanated from the Third Respondent's claims that he was capable of securing employment for job seekers in exchange of cash payment. Two acts of dishonesty relate to the monies he allegedly collected from Ms Mokgadi Mange (Mange) who sought employment for her niece Ms Beaditse Thobane (Thobejane) and from Mr Jerry Nong (Nong) who sought employment for himself. In respect of Mange R5000-00 was the amount involved and R6000-00 for Nong. The Third Respondent was a full time shop steward but made Mange and Nong to believe that that he was working for the HR department. The Applicant instituted an investigation upon receiving complaints from Mange and Nong. The complaints leading to the investigation were lodged after it became clear to Mange and Nong that the Third Respondent was unable to deliver such promised jobs and not in a position to refund monies paid to him. After conclusion of

the investigation that was carried out by Ernest & Young on behalf of the Applicant, the Third Respondent was charged and dismissed after being found guilty of dishonesty.

[3] The dispute came before the Second Respondent who was tasked with determination of substantive and procedural fairness of the dismissal. He found the dismissal substantively unfair. The Applicant called three witnesses to testify in support of its case, namely, Pieter Steyn (Steyn) and Paul Claasen (Claasen) who both conducted the investigations in terms of the mandate given to Ernest & Young. The third witness was Isaac Chuene Nyaka (Nyaka) who came in his capacity as employee relations manager. He mainly testified about the Third Respondent's policies prohibiting sale of jobs as well as the Applicant's lack of trust on the Third Respondent.

[4] It came out during arbitration proceedings that Mange and Nong did not testify at the disciplinary hearing on reason that they felt intimidated by the Third Respondent. The Applicant relied on some affidavits deposed to by the pair together with Thobane's oral evidence to secure the Third Respondent's conviction. Based on the very same reason they did not testify in the arbitration proceedings and so did Thobane. Their evidence was tendered through Steyn and Claasen. The Second Respondent arrived at his finding on the basis that the evidence tendered on behalf of the Applicant was hearsay. As a result, he went on to exclude same and came to a conclusion that there was no shred of evidence to support the Applicant's allegations against the Third Respondent.

<u>The Applicant's case</u>

[5] The Second Respondent's award is primarily challenged for his decision not to accept evidence contained in the affidavits submitted during arbitration proceedings. He failed to apply his mind to the

provisions of section 3 of the Law of Evidence Amendment Act[1] despite his attention been drawn to same. He failed to take into account the reason proffered for failure on the part of the Applicant's witnesses to testify. The Applicant ignored other evidence over and above the affidavits, namely oral evidence of Ernest & Young investigators, the text messages, voice recording of conversation between the Third Respondent and Mange, copies of the screenshot corroborating Nong's visit to the work place and transcript of the disciplinary hearing. The Second Respondent is further attacked for the use of the word "bribery" in his award which by implication boiled down to misconstruction of the charges. He failed to take into account that the Third Respondent was an unreliable witness as he spent most of his time explaining the adulterous relationship he had with Mange. The Third Respondent's denial of wrong doing did not help his case as there was overwhelming evidence in addition to the affidavits that he committed the misconduct in question.

[6] The Second Respondent's findings towards unfairness of the dismissal are as submitted by Mr Matyolo for the Applicant, not supported by reasons. Instead of the Second Respondent paying attention to the reasons placed before him to consider admission of hearsay evidence, he entirely rested his findings on the absence of consent on the part of the Third Respondent. The award should be found unreasonable as it contains no reasons for such inadmissibility finding. He made no finding as to the reason advanced about witnesses who were intimidated. Nothing in the award is indicative of the Second Respondent's attempt that he applied his mind. This could be seen from the overwhelming evidence in the form of text messages, screen shots and recordings which were not considered by the Second Respondent. Contrary to the principles laid out in *Sidumo and Another v Rusteburg Platinum Mines and Others,*[2] the Second Respondent took no relevant circumstances into account when making a determination in his award.

[1] Act 45 of 1998
[2] [2007] 12 BLLR 1097 (CC)

[7] The essence of the Third Respondent's opposition is that both Steyn and Claasen were unable to attest to all material issues of the matter except conveying what they were told by the complainants. Claasen was unable to certainly identify the voices heard in the recording and was also not conversant with the language used. The Applicant's failure to call witnesses was wilful and had failed to prove the alleged intimidation which the Third Respondent denied. The text messages and computer screen shots were not supported by any testimony. The transcript of the disciplinary hearing cannot make credible evidence as the hearing was based on the very inadmissible evidence.

[8] According to Mr Moloto who appeared for the Third Respondent, no exceptional reason was advanced as to why the witnesses were not brought to testify in the arbitration proceedings. The Third Respondent's denial of allegations against him effectively placed a challenge on the Applicant to tender evidence to prove its case which it did not. Nothing came to record regarding the investigators' efforts to deal with allegations of intimidation. The Third Respondent never contradicted himself and the Second Respondent was not required to rewrite the record in order to show that he took all issues placed before him into account.

<u>Analysis</u>

[9] What is shining through out the Applicant's grounds of review is that the Second Respondent had relied on the fact that hearsay evidence cannot be admitted without the Third Respondent's consent. Its arguments are that hearsay evidence should have been admitted because the witnesses whom their credibility the probative value of such evidence depended could not testify due to intimidation. The Second Respondent should under such circumstances have made a finding that good reasons existed for admission of hearsay evidence. Even if the affidavits were to be excluded, further overwhelming

evidence existed to demonstrate that the Third Respondent was guilty of the misconduct he was charged with.

[10] Since the attack on the Second Respondent's award is heavily rested on his failure to apply the provisions of section 3 of the Law of Evidence Amendment Act, this undoubtedly converts to errors of law. The manner of execution of the arbitrator's mandate towards resolution of disputes are clearly set out in section 138 of the Labour Relations Act (LRA)[3]. In *Swiss South Africa (Pty) Ltd v Louw No. and Others*[4] the Court per Cele J took into account the provisions of section 138 of the LRA (LRA) in circumstances where hearsay evidence was an issue and held in paragraphs 43 – 46 as follows:

> "[43] Depending on circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA. A further aid to the arbitrator in this regard lies in section 138 of the Act. It provides:
>
> > "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".
>
> [44] With this in mind, I now return to the facts before me, to determine if the admission of hearsay evidence in this case would have been in the interest of justice.
>
> The nature of the evidence
>
> [45] A passenger of Singapore Airline lodged a complaint with a staff member in Singapore. This complaint was given to one Mr Richard Lee who in turn reduced the complaint into writing in the form of an e- mail message. Mr Lee sent this e-mail message to one Mr Yekohong Chung,

[3] Act 66 of 1995.
[4] 2006 4 BLLR 373 LC

in Singapore. Mr Chung in turn, forwarded the same e-mail message to one Mr John Murray by e-mail transmission. Mr Murray appeared to be a staff member of the applicant and was based in South Africa. The applicant investigated the matter and that led to the third respondent being charged with misconduct. The first respondent took a cautious approach, in my view, in this regard and he said:

"I could see no documentation or affidavits from the Singapore passenger wherein he directly complained against the actions of the applicant. Singapore Air or Yokehong Chung did not confirm the authenticity of the complaint and that it had in fact been received as a formal complaint".

[46] The admission of this evidence, on this basis would be prejudicial to the third respondent as it goes to the merits of her defence. There is no indication that there was no other way of proving the guilt of the third respondent, if such evidence is excluded. No basis has been laid to support a claim that it would be difficult to get the passenger or to present to him the initial version of the third respondent and invite him to comment thereon, before deciding to charge the third respondent".

[11] In *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[5] the Arbitrator's role was summed up in paragraph 27 with the Court been alive to section 138 of the LRA provisions as follows:

"[27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the

commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their

[5] (2000) 6 BLLR 716 (LC)

case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitration or that conduct of the arbitration proceedings (see section 145(2)(a)(i) and (ii) of the LRA; Mckenzie The law of Building and Engineering Contracts and Arbitration 5ed at 188-189)."

[12] When giving consideration to the above, it appears with certainty that application of discretion on the part of a decision maker plays a pivotal role. It is generally accepted that proper application of discretion encompasses consideration of all factors placed before the decision maker (the Second Respondent in this regard). This point was restated by the Labour Appeal Court with clarity in *Matsekelong v Shoprite Checkers (Pty) Ltd*[6] at paragraph 41:

"[41] Section 3(1)(c) of the said Act confers a discretion on a court (or tribunal)in terms of admitting hearsay evidence if, in the opinion of the court (or tribunal), as the case may be, it is in the interests of justice to admit such hearsay evidence. The fact that the respondent's representative would not have been in a position to cross examine the author of, or deponent to, the affidavit if it was admitted, was not, in my opinion, a legally sound ground to have refused admission of the affidavit, in the light of section 3(1)(c). That aspect of the matter would only be relevant on the question of the evidential weight to be attached to the affidavit evidence concerned. As the matter stood, it did not appear that the commissioner properly applied his mind on this issue, if at all. In my view, the commissioner's failure in this regard constituted a serious misdirection and a gross irregularity, on the commissioner's part, in the conduct of the arbitration proceedings, which rendered the award reviewable and liable to be set aside."

[13] The essence of this is that attaching weight to a particular piece of hearsay evidence sought to be admitted cannot be used as an instrument to determine the admissibility of such hearsay evidence. In this instant case the Second Respondent relied only on consent as a

[6] (2013) 2 BLLR 13 LAC

reason for his finding. That there was no consent on the part of the Third Respondent was definitely not an issue placed before the Second Respondent for determination. The issue for determination in so far as the admission of hearsay evidence is concerned, is the Applicant's witnesses' failure to testify due to intimidation as pointed above. The Second Respondent did not deal with the issue and the Applicant's calls for interference with the award are largely based on this.

[14] His failure in my view to decide on whether good reason existed for witnesses' failure to testify does not ordinarily render the award unreasonable. What needs to be considered, particularly where the full record is available before the Court, is whether in the light of all material placed before the Second Respondent can his decision be the one which reasonable decision maker could not reach[7].

[15] The Second Respondent's omission to deal with reasons for the Applicant's witnesses' failure to testify does establish an irregularity. The next question to be asked alongside the *Sidumo* test is whether such irregularity is so gross to such an extent that it was calculated to prejudice the aggrieved party, if so proved, the decision is then liable to be set aside.[8] In dealing with this question in so far as this matter is concerned, I sought guidance from the Labour Appeal Court's *Fidelity Cash Management Service v CCMA and Others*[9] judgment where the following was paragraph 98 said:

> "[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the *commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in*

---

[7] In Sidumo and another v Rustenburg Platinum mines Ltd & Others: the reasonableness upon which the award may be assessed on review was formulated at paragraph 110 on the question whether the Commissioner's decision. *"is the one that a reasonable decision maker could not reach".*

[8] See De Van Loggerenberg, Erasmus Superior Court Practice (2nd Edition) @A2 - 134

[9] (2008) 3 BLLR 197 LAC

terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."

[16] It is thus imperative to enquire at this point whether a good reason existed from the reading of the record for complainant witnesses not to testify. The reason proffered on a number of occasions from the evidence tendered by Steyn and Claasen is that the witnesses felt intimidated. This surely founded on the affidavit deposed to by Thobane on 02 April 2014 which the following is revealed in paragraphs 4 and 6 that:

"4

After Mr Chipana learned that my aunt and myself provided affidavits to the Exxaro risk department that will be used in a disciplinary against him he started to intimidate my aunt and our family that he will take revenge by killing us if we testify against him in the disciplinary. That is why my aunt does not want to testify in the disciplinary due to the threats made against her and her family.

6

I however would like to state that we are very scared to testify as we feel that our lives are in danger. My aunt and myself however feel that by giving us these threats is a way of them to avoid us from testifying. The people who threatened us was Mr Chipana."

[17] This affidavit was preceded by those made by Thobane herself, Mange and Nong in February 2013 regarding the merit of their complaints against the Third Respondent. It bears mention that it was made shortly prior to the disciplinary hearing. Interestingly, Thobane attended the hearing and testified. What deserves noting is that nothing came out

during arbitration proceedings to indicate that the alleged intimidation was still ongoing. No credible evidence was tendered to suggest that the execution of the alleged threat was imminent. It further bears mention that Nong's only affidavit before the Second Respondent dated 27January 2014 contains no allegation of intimidation. The cumulative effect of the above is that the Applicant has failed to genuinely establish a compelling case for the admission of such evidence. This is irrespective of whether a reason was given by the Second Respondent for not admitting hearsay evidence to the Applicant's satisfaction or not.

[18] The next question to be asked on assumption that I am wrong in my finding above, which is unlikely, is whether the evidence sought to be admitted was of value towards proving fairness of the dismissal had same been admitted? The contents of the affidavits were placed in dispute. Weighing such contents against the Third Respondent's denial of commission of misconduct together with his undisputed version that he had a relationship with Mange who did not want to testify, the Applicant's case was bound to crumble for lack of evidence in rebuttal of his version. The evidence tendered by the Applicant's investigators was based on untested allegations received from the complainants. For the irregularity to be susceptible to the court's interference, the Supreme Court of Appeal in *Herholdt v Nedbank*[10] at paragraph 25 held as follows:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of

[10] [2013] 11 BLLR 1074 (SCA).

> fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[19] In conclusion I do not find any reason for interference with the Second Respondent's award. In the circumstances the Applicant's application is bound to fail. Both parties argued for costs against each other. There is no reason for deviation from the parties' view in this regard. The costs should accordingly follow the order.

[20] I am in the premise constrained to make the following order:

<u>Order</u>

1. The review application is dismissed with costs.

____

M M BALOYI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate. X Matyolo

Instructed by: Shepstone & Wylie Attorneys

For the Respondent: Mr B M L Moloto of Guy Gumbo Attorneys