



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 18/2017

In the matter between:

Mark James MULHOLLAND

Applicant

and

CCMA

First respondent

David WILSON N.O.

Second respondent

DÖHLER SOUTH AFRICA (PTY) LTD

Third respondent

Heard: 11 October 2017

Delivered: 2 November 2017

SUMMARY: Employee summarily dismissed in Germany. Subsequently called to and participating in disciplinary hearing in South Africa. Dismissed for misconduct. On review, employee raising issues of jurisdiction; double jeopardy; and hearsay evidence. Gross misconduct by arbitrator not shown. Award reasonable. Application for review dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Mark James Mulholland, was employed as the General Manager of Döhler South Africa (Pty) Ltd. It is a subsidiary of a German company in the food flavouring business. He was dismissed within a month of taking up employment. His referral of an unfair dismissal dispute to the CCMA found no favour with the arbitrator, Commissioner David Wilson (the second respondent). Mulholland seeks to have the arbitration award reviewed and set aside.

Background facts

- [2] The employee started working for the company as its General Manager responsible for South Africa operations on 18 May 2016. He went to Germany for training, where he spent an extensive period of time with his superior who is based there, Mr Kurt Hufnagel. He stayed in the Ramada hotel in Darmstadt. Within a week of his arrival, Hufnagel dismissed Mulholland after he had left his hotel room in a chaotic state, including leaving cigarette burn marks on the furniture of the non-smoking room; and allegations of sexual harassment by a cleaning woman. He left the hotel by a back entrance without settling his bill for extras such as extensive (and expensive) telephone calls. He returned to the airport, returning a rental car (paid for by the company) without notifying the car rental company of damage he caused to the car by bumping into a column in the hotel parking garage, and without returning one of two GPS devices (a TomTom navigator)¹. It also transpired that he was driving the rental car without a driver's license.
- [3] Upon his return to South Africa, the company sent Mulholland a notice to attend a disciplinary hearing on 13 June 2016. It also informed he that he was suspended pending the hearing. He attended the hearing. An independent chairperson presided. The allegations of misconduct levelled against him were:

¹ One was issued by the car rental company and one by Döhler in Darmstadt.

- "a) Hotel room damages caused whilst staying at the Ramada Hotel in Darmstadt amounting to Eur 904,63 – see invoice and photo evidence attached;
- b) Additional private costs at hotel (laundry, telephone, F&B) amounting to Eur 449,15 – see invoice attached;
- c) Rental car damage caused amounting to Eur 274,99 – see invoice from Car Partner / Buchbinder Rent-a-car and photo evidence attached;
- d) Failing to return navigational system. Had to be replaced – see invoice attached from ProMarkt amounting to Eur 175,00;
- e) Statement from Katharina Klappich reflecting inappropriate behaviour from yourself [sic] during your stay at the Ramada Hotel;
- f) Statement from Volker Schmitz reflecting inappropriate behaviour from yourself [sic] during your stay at the Ramada Hotel;
- g) Statement from Angelo de Luca from Car Partner / Buchbinder Rent-a-car regarding damages caused to the rental car you drove;
- h) Statement from Kurt Hufnagel summarising your inappropriate behaviour in several cases during your visit in Darmstadt during May 2016;
- i) Statement from Mrs du Toit reflecting inappropriate behaviour from yourself during your stay at Zomerlust Guesthouse in Paarl during April 2016 – see invoice and photo attached."

- [4] At the disciplinary hearing, the company presented evidence by way of the statements outlined above. No company witnesses gave direct evidence about the misconduct complained of. Mulholland testified in his own defence. He did not dispute the damage to the Ramada Hotel room, but claimed that a burglar – who stole nothing – may have caused the burn marks. He confirmed that he did not check out and that he left the Ramada Hotel through the basement. With regard to the state of the room, bedding and towels at Zomerlust, he acknowledged that his girlfriend had spent the night with him but claimed that he thought the room rate was a flat rate, regardless of the number of occupants. He admitted that, like in Darmstadt, he did not check out at Zomerlust. He claimed that the damage to the linen and towels was caused by a nosebleed.

- [5] The chairperson, Ms Fatima van Toorn (an independent consultant), gave the parties her findings on 20 June 2016. She found that the employee did commit the misconduct complained of. The company dismissed him.

Arbitration award

- [6] The employee referred an unfair dismissal dispute to the CCMA (the first respondent). Conciliation having failed, he referred it to arbitration. The employee was legally represented by Adv Robert Stelzner SC (instructed by his current attorney, Mr O'Dowd); the company was represented by Mr Stephen Kirsten, an official of an employer's organisation. Mr *Stelzner* argued that the CCMA did not have jurisdiction over the dismissal in Germany. Commissioner Dave Wilson (the second respondent) found that the CCMA did have jurisdiction, as the company had corrected the unprocedural dismissal by reinstating the employee – at least tacitly – and calling him to a fresh disciplinary hearing on different allegations of misconduct in South Africa. The employee participated in those proceedings. The arbitrator found that that dismissal was fair.

Grounds of review

- [7] Mr *De Kock*, on behalf of the employee, argued the following six grounds of review:
- 7.1 The arbitrator dealt with the substantial merits of the dispute, whereas the employee's counsel led evidence and intended to deal only with the question of jurisdiction and his prior dismissal in Germany.
 - 7.2 The CCMA had no jurisdiction as the employee was dismissed in Germany.
 - 7.3 The disciplinary hearing and subsequent dismissal in South Africa amounted to double jeopardy as the company had already dismissed the employee in Germany without following any procedure
 - 7.4 The commissioner decided the matter based on hearsay evidence that he should not have allowed.

- 7.5 The commissioner should have found that the employee was entitled to a notice period of nine months.
- 7.6 The employee was entitled to a bonus of €110 000. The commissioner acted unreasonably by not making that finding.

Evaluation

- [8] I shall deal with each of these review grounds in turn.

What did the arbitrator have to decide?

- [9] Mr *De Kock* strenuously argued that the parties all understood that the commissioner would only deal, at first, with the question of jurisdiction and the dismissal in Germany. He argued that, only if the commissioner decided that the CCMA did have jurisdiction, would the question of the fairness of the disciplinary hearing and subsequent dismissal in South Africa come into play. It is for that reason that Mr Stelzner led the evidence of the employee only in regard to what had happened in Germany; he did not lead any evidence to dispute the misconduct that formed the basis of the hearing in South Africa.
- [10] At first blush, that argument appears attractive. Mr Stelzner did, on occasion, express his views accordingly. For example, he said in his address at the start of proceedings:

"But then on the next point, the paragraph, page 4 in the pre-arbitration minute, the issues that the Commission is required to decide then were identified by the parties. Firstly jurisdiction and that's because of the German connection and then what's been identified there as the main issue and we can respectfully submit the only issue that the CCMA can really consider is item 2, whether the dismissal of the employee on 25 May 2016 was procedurally [and] substantively unfair."

...

"Then what happened in South Africa later in June,... Whether that was a foregone conclusion given that there was already a dismissal in Germany on the 25th May, whether the proceedings in South Africa were a sham or not, whether they could do that, the double jeopardy point..."

...
 "We accept that that raises the question of jurisdiction and we will be able to present some evidence on that. We can also present evidence while we were busy on what happened in Germany and to that extent we also agreed that the employee would give evidence first on that aspect, the jurisdictional aspect because I suspect we have to show that the CCMA has jurisdiction and that is then as far as the employee wishes to take the matter. If the employer is going to rely on – well, that which forms the subject of the South African disciplinary hearing then we'll address you in due course as to whether the employer can do that."

[11] But those comments – and Mr *De Kock*'s argument in these proceedings – face two hurdles.

[12] Firstly, it is clear that the Commissioner expressed a clear understanding on his part that he would prefer to hear full evidence and arguments on the issues of jurisdiction, the dismissal in Germany and the South African proceedings, as well as the objections to hearsay evidence, and that he would then make a final determination on all the issues. There are a number of examples, but a few will suffice. Mr Kirsten², for Döhler, referred to the fact that Mulholland may have to be recalled. He added:

"And I – the reality is I did raise this at some point, that we were going down the route with this might be a problem and that the applicant might have to come back. But, of course, I'm going to put my version to the applicant now because I'm going to put it in evidence in chief later."

[13] The Commissioner responds, "that's fine", and Mr Stelzner noted that he had no objection. Having dealt with some of the incidents in Germany and at Zomerlust guesthouse, Kirstein added:

"It does become a little bit tricky, Commissioner, in the sense that I will reserve my right to cross question or re-examine the applicant on our version that we would present in evidence in chief if the applicant wishes to refute the testimony. He should be recalled as a witness if he wishes to. But we are going to present – we still have to present our case and our evidence.

² His name is reflected as "Kirstein" in the transcript of the arbitration proceedings.

Commissioner: Yes. So are you going to be relying on the conduct both in Paarl and in Germany?

Mr Kirstein: Hmm, in Paarl and in Germany; that's correct, Commissioner.

Commissioner: Yes, which – and those are issues that were dealt with at the South African hearing?

Mr Kirstein: Yes, they were, Commissioner.

Commissioner: So you are in fact going to be relying on all of those issues to justify the dismissal.

Mr Kirstein: Yes, I am; absolutely, Commissioner. I know that before I enter into that evidence lately will be, you know, an objection because much of it is hearsay evidence. But I will lead argument in the adducing of that evidence and in fact I will just leave it there.

...

So it's our intention to lead evidence regarding the applicant's conduct in Germany and the charges that were put to the applicant at the disciplinary hearing."

- [14] At the close of his cross-examination, the Commissioner ascertained from Mr Kirstein that "the version that you are putting to the applicant is that the reason for his dismissal related misconduct in Germany... As well as's conduct at the guesthouse in [Zomerlust]." And at the end of Mulholland's evidence, dealing with the issue of the hearsay evidence led at the South African disciplinary hearing -- before Mostert was called as a witness at the arbitration -- the Commissioner noted quite clearly that he would allow the hearsay evidence relating to the South African hearing:

"No, I don't think it's an appropriate time to argue it now. I think let's hear the evidence and the parties can argue afterwards about admissibility and about the weight that I should attach to that evidence."

- [15] That is also what the parties – represented by the same counsel in the case of the employee – had foreshadowed in the pre-arbitration minute. Under the heading, "The issues that the Commission is required to decide", the parties recorded:

15.1 Jurisdiction;

15.2 Whether the dismissal of the employee on 25 May 2016 was procedurally / substantively unfair; and also,

15.3 "Whether the local employer could dismiss the employee once again after his services had been terminated in Germany;

15.4 Whether he could be dismissed by the SA company without the German company revoking its decision and reinstating the employee in order for there to be a second hearing; and

15.5 The fairness thereof."

[16] Secondly, and more importantly, Mr Stelzner did not confine his argument to the issues excluding the fairness of the dismissal in South Africa. Nor did he recall Mr Mulholland, despite indications to the contrary during the arbitration. On the contrary, he unequivocally elected not to make use of the opportunity to do so. At the outset of his lengthy written submissions to the arbitrator – comprising 72 pages -- he states in no uncertain terms:

"He [Mulholland] was ultimately not called to present any evidence in respect of the South African dismissal given that the employer tendered no admissible evidence in support of the charges, that which he admitted to was not sufficient to justify his dismissal, whether in SA or in Germany, and for him to have given evidence before the CCMA in order to once again 'prove his innocence' in the face of inadmissible hearsay evidence would simply have been to perpetuate and duplicate the unfairness of the disciplinary hearing in South Africa. ... Mr Mulholland was in any event only going to be recalled if necessary and if the evidence the employer had yet to produce required an answer."

[17] Having elected not to recall Mulholland, Mr Stelzner then dealt at length with the allegations of misconduct that formed the basis of the disciplinary hearing and dismissal in South Africa – evidence that the employer led (albeit by way of hearsay and documentary evidence) and that Mulholland elected not to dispute by way of his own evidence. The employer's argument simply remained that all of this evidence was inadmissible and that, therefore, Mulholland was not called upon to answer.

[18] It does not lie in the mouth of the employee to complain after the fact that he did not have the opportunity to state his case. He did, but elected not to

make use of that opportunity. And he had the benefit of representation and advice of a senior attorney and senior counsel throughout – unusually in misconduct proceedings at the CCMA, especially where the employer had no legal representation. The admissibility of the employer's evidence is the subject of another ground of review; but the employee did have a full opportunity to state his case and was clearly well aware of the fact that the arbitrator would decide on the South African dismissal if he decided that he had jurisdiction and he would attach sufficient weight to the employer's evidence.

[19] This ground of review must fail.

Jurisdiction

[20] Did the CCMA have jurisdiction?

[21] The arbitrator found that it did. That is not an unreasonable finding; indeed, I think it is the correct one.

[22] It is common cause that Kurt Hufnagel dismissed Mulholland in Germany. Hufnagel, a German citizen, is not acquainted with South African labour law or the procedures outlined in the LRA. Faced with that situation, the South African company called Mulholland to a properly constituted disciplinary hearing chaired by an independent outsider. That is something that an employer can do to remedy a procedural irregularity.³ It informed him that he was suspended pending that hearing. He participated in the hearing. He was paid until the date of his dismissal on 20 June 2016 (albeit belatedly) and accepted that payment. It beggars belief that Mulholland – a senior and well educated employee, and clearly no shrinking violet – would have been under the impression that he was no longer employed and that a hearing would serve no purpose. The arbitrator's finding that the company had, at the very least, tacitly withdrawn the German dismissal, cannot be faulted.

³ *Rawlins v Kemp t/a Centramed* (2010) 31 ILJ 2325 (SCA).

- [23] In any event, both parties agreed that the CCMA did have territorial jurisdiction. The real question was whether the arbitrator should have dealt with the South African dismissal.

Double jeopardy

- [24] Related to the jurisdictional point is the argument that the arbitrator should have found that the employer could not subject Mulholland to a disciplinary hearing in South Africa, having already dismissed him in Germany, based on the principle of double jeopardy.
- [25] There are two answers to this argument. Firstly, Mulholland was not called upon to answer to the same allegations twice – the allegations of misconduct that formed the subject of his disciplinary hearing in South Africa hardly overlapped with the reasons why Hufnagel fired him in Germany. And secondly, the employer realised that Hufnagel – not being familiar with South African law – had acted unfairly, and took immediate steps to rectify that unfairness. Doing so, it gave Mulholland a full opportunity to be heard and ensured that an independent outsider, who cannot be said to have presented Mulholland with a decision already taken, chaired the disciplinary hearing.
- [26] This scenario is akin to that in *Semenya & Ors v NUMSA*⁴, a case where the employer had also offered the employee a fresh disciplinary process chaired by an independent person after she had been dismissed. Zondo JP noted:

"[21] The [employee's] contention that the opportunity to be heard was not good enough because it was offered after the decision to dismiss her had been taken requires close examination. It is not our law that an opportunity to be heard that is given after the relevant decision has been taken is never good enough. Although generally speaking such an opportunity should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable. Where the opportunity to be heard is given after the decision has been taken and it is one of those situations where it is acceptable and

⁴ [2006] 6 BLLR 521 (LAC) paras 21-26.

the person concerned spurns that offer or does not make use of it, it cannot lie in such person's mouth to say that he was not given an opportunity to be heard. In such a case an opportunity to be heard has been given and rejected. The *audi alteram partem* rule has been complied with in such a case.

[22] I do not propose to set out a list of situations where an opportunity to be heard that is given or offered after the decision has been taken is acceptable. Probably it is not advisable to attempt to give an exhaustive list of such situations. However, it seems to me that, where it can be said that the opportunity to be heard that is given after the decision has been taken is no less fair than the opportunity that should have been given before the decision could be taken, it ought not to make a difference that it was offered after the event. In this regard I have in mind that the basis for the proposition that the opportunity to be heard should be before the decision can be taken is that, once the decision has been taken, it may be difficult for the decision-maker to change his mind even when the representations made to him by or on behalf of the affected person are such that his decision should be one favourable to the affected person. However, where the opportunity to be heard is offered after the decision has been taken but the person who will consider the representations and decide on whether the decision should be in favour or against the affected person is a different person from the one who initially made the decision and is independent of him or his organisation and can act impartially and make a fresh decision on the matter, there is no reason in principle why an opportunity to be heard given after the decision had been taken should not be accepted as satisfying the *audi alteram partem* rule. It seems to me that in such a case that opportunity to be heard satisfies the *audi alteram partem* rule because, though given after the decision, it is as fair as, if not in fact fairer than, the opportunity that should have been given before the decision.

[23] If an opportunity to be heard that is offered after the decision has been taken is that fair, the affected person is not prejudiced, and if he, nevertheless, spurns that offer, he ought not to be allowed to complain. Let me give an example. A foreigner commences business in South Africa and employs a number of employees. Within the first two or three months he is unhappy with the conduct of one of the employees. He dismisses him without first affording him a hearing. He is then told that the dismissal is

procedurally unfair because in South Africa an employee has a right to be heard before he can be dismissed. He then says that he did not know that and offers that there be a hearing which will be chaired by a person that both he and the employee can agree upon and that person will make the decision whether the employee is guilty of misconduct and, if so, whether dismissal is an appropriate sanction in that case. That opportunity to be heard that that employer will be offering is, without doubt, either as fair as, or even fairer than, the opportunity to be heard that the employee was entitled to be afforded before the decision was made. Why should such an obviously fair opportunity to be heard not be good enough simply because it was offered after the decision had been taken? I cannot see any reason why that should be so.

[24] It is true that, where a person or official has made a decision and only hears the other party after the decision has been made, he may well be inclined not to change the decision that he has already made. That is why the general rule is that the opportunity to be heard should be before the decision can be made. However, that concern does not arise where another person – particularly if he is independent of the first one – hears the representations of the affected person and makes a fresh decision on the matter.

[25] It may be argued that in the example I have given, the fact that the opportunity to be heard is given after the decision has been taken is understandable because the employer is a foreigner and is unfamiliar with the laws of our country. It would be argued that this is different from a case such as the present one where the employers are lawyers who are in practice. My answer to this is: provided the opportunity to be heard that they offer after the decision is as fair as, or, even fairer than, the opportunity to be heard that she was entitled to before the decision and a fresh decision can be taken, that is good enough. In my judgement in such a case it matters not that the employer may not have had any acceptable explanation for not giving the opportunity to be heard before the decision. Form must not be observed for its own sake. Effect must be given to substance. Accordingly, I am of the view that, if a person was offered such an opportunity to be heard after the decision had been taken and he spurned such an offer simply on the basis that it was made after the decision had been taken and with no regard to how fair an opportunity to be heard it was, such a person cannot be heard to complain.

[26] With regard to the observance of the audi rule before or after the decision has been taken, Goldstone J had this to say in *Momoniati v Minister of Law & order & others; Naidoo & others v Minister of Law and Order and others* 1986(2) SA 265 (W) at 274 D:

'Failure to observe the audi alteram partem principle before the decision is taken, as a general rule, will lead to invalidity.'

In this regard it is important to draw attention to the fact that Goldstone J there said 'as a general rule'. He therefore did not say that the audi rule must always be observed before the decision is taken failing which the decision would be invalid. Indeed, soon thereafter Goldstone J referred with approval to a passage in *Sachs v Minister of Justice* 1934 AD 9 at 22 which was approved on appeal (see 1934 AD at 38) where Tindall J inter alia said: 'But the fact that the persons to whom the decision is entrusted has (sic) in the first instance acted *ex parte*, without affording the person affected such opportunity, does not necessarily make his order invalid if he thereafter affords such opportunity' (underlining supplied)."

[27] This is exactly such a case.

[28] This point of review also fails.

Hearsay evidence

[29] The employer's case was almost entirely based on hearsay evidence in the form of statements taken in Germany from the following people:

29.1 Angelo de Luca, an employee of Buchbinder Rent-a-Car, who confirmed (with photographic evidence) the damage that Mulholland had caused to the rental car in Darmstadt;

29.2 Angelika Schmitt, employee of the Company in Darmstadt, regarding his failure to return the TomTom GPS unit;

29.3 Katharina Klappich, an employee of Ramada Hotel Darmstadt, with regard to the sexual harassment;

29.4 Volker Schmitz, Ramada hotel manager, concerning the damage to the furniture in the hotel and his surreptitious exit via the emergency exit; and

29.5 Oumie du Toit, Zomerlust guesthouse manager, regarding the extra unpaid guest in his room; his leaving the guesthouse without booking out or settling the bill; and the damage to bedding and linen.

- [30] The only direct evidence that the company led was that of Mr Mostert and Ms van Toorn, both of whom could only testify as to the disciplinary proceedings in South Africa. But that evidence included their testimony regarding Mulholland's evidence at the disciplinary hearing in which he hardly disputed the factual allegations against him; and that testimony was not challenged at the arbitration.
- [31] The company could undoubtedly have gone to more trouble to elicit direct evidence. Ms du Toit lives in Paarl – she could have been called to testify. Hufnagel regularly visits South Africa. And the employee's counsel expressed his willingness to cross examine the company's other German witnesses via Skype. It did not take up the invitation.
- [32] Despite this, the arbitrator accepted the arbitrator accepted the hearsay evidence. Does that make his award reviewable?
- [33] I think not. The arbitrator applied his mind to the relevant legal principles. He conducted the hearing in a manner that he considered appropriate, dealing with the substantial merits "with a minimum of legal formalities", as he is enjoined to do by s 138(1) of the LRA.
- [34] It seems to me that the arbitrator conducted the process fairly, in line with the Constitutional Court's guidelines when it interpreted the provisions of s 138(1) in *CUSA v Tao Ying Metal Industries*⁵.

"This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate' But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so

⁵ (2008) 29 ILJ 2461 (CC) par 64.

expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.”

[35] The commissioner in this case resolved the real dispute between the parties, being the question whether Mulholland was fairly dismissed. He did so expeditiously in circumstances where most of the employer’s witnesses were in Germany. And to my mind, he acted fairly, even though he allowed hearsay evidence.

[36] Mulholland disputed very little of the factual allegations contained in the statements that were allowed into evidence. He elected not to testify as to the veracity of those allegations. He had a full opportunity to do so but did not make use of it. He cannot persuasively complain after the fact that he was not given a fair hearing.

[37] As the LAC stated in *Satani v Department of Education, Western Cape*⁶:

“Conducting proceedings ‘with the minimum of legal formalities’ suggests that arbitration proceedings are not a court of law and do not follow a system of binding precedents. Their proceedings are strictly speaking not required to mimic rules and procedures adopted in courts of law. To this end, the commissioner has a discretion to elect among others, an inquisitorial or adversarial approach in conducting arbitration proceedings. Such a choice, in my view, should be dictated by the nature of the dispute, the parties to the dispute as well as all other factors that might be relevant in order to achieve the goal of dealing with the substantial merits of the dispute fairly, even-handedly, quickly and with minimum of legal formalities.”

[38] This Court has dealt with the admission of hearsay evidence in arbitrations on many occasions, but the *locus classicus* probably remains *Naraindath*⁷ where Wallis AJ noted:

“It would stultify the entire purpose of the legislation if this court were, in the face of such clearly stated intentions⁸, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those proceedings in slavish imitation of the procedures which are adopted in a

⁶ (2016) 37 ILJ 2298 (LAC) par 14.

⁷ *Naraindath v CCMA* (2000) 21 ILJ 1151 (LC) paras 26 and 31.

⁸ [in the explanatory memorandum].

court of law and subject to the technical rules of evidence which apply in those courts: Such an approach is also in my view contrary to the express provisions of the LRA. Section 138(1) is the decisive provision in this regard. It empowers the commissioner to conduct the arbitration in such manner that the commissioner considers appropriate in order to determine the dispute both fairly and quickly. Lest the commissioner is under any apprehension as to what is required the section goes on to direct that he or she discharge his or her functions "with the minimum of legal formalities".

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 a 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 case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.

...

If that is the approach in our courts of law then it follows *a fortiori* in my view that reliance by an arbitrator upon hearsay evidence which he or she is satisfied on proper grounds is reliable does not constitute a reviewable irregularity."

[39] In his award, the arbitrator referred to the well-known case of *Avril Elizabeth*⁹ where the Court held that "there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of rules of evidence, legal arguments, and the like." He also had regard to *Matsekoleng v Shoprite Checkers*¹⁰ in which the LAC confirmed that the

⁹ *Avril Elizabeth Homes for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC).

¹⁰ [2013] 2 BLLR 130 (LAC).

Law of Evidence Amendment Act¹¹ conferred a discretion on a tribunal to admit hearsay evidence if it considered it to be in the interests of justice. The late Ndlovu JA held¹²:

"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."

[40] In this case, the arbitrator exercised his discretion to allow hearsay evidence. This Court or another arbitrator may have decided differently; but that is not the test. In my view the arbitrator did not act arbitrarily or capriciously in exercising that discretion; on the contrary, he applied his mind and came to a conclusion that another reasonable arbitrator could have reached, especially in the exercise of discretion. And then, when weighing up the credibility of the evidence before him, he came to a reasonable conclusion that the employer had shown on a balance of probabilities that the employee had committed most of the misconduct complained of. It is also indicative of the careful way in which the arbitrator assessed the evidence that he concluded on a balance of probabilities that the employer had not proven that Mulholland had failed to report the damage to the rental car.

Bonus

[41] Mulholland claims that he was entitled to a guaranteed bonus of €110 000. The agreement on which he relies speaks of subterfuge that does not reflect well on either party. His contract of employment provides for "an annual performance- and result-based bonus based on the remuneration structure of the Döhler Group in the amount of €25 000". That is reiterated in a covering letter from Hufnagel dated 2 March 2016 in which he says:

¹¹ Act 45 of 1998.

¹² Par 41.

"Your monthly fixed salary is € 7500. In addition, you can receive a results-based, target-dependent annual bonus of € 25 000 per annum on the basis of our remuneration system."

- [42] But Mulholland relies on a so-called 'side letter' that was not disclosed to the authorities or the management team in South Africa. That letter, dated the same day and signed by Hufnagel and the HR Business Partner, Philipp Moermann, states:

"This letter is to confirm our joint agreement to guarantee you a total bonus pay out of at least € 110 000 in April 2017. Further we agree to on [sic] a minimum salary level of € 12 500 base pay per month and € 50 000 target bonus as of May 2017."

- [43] The employee was paid a pro rata share of a bonus on termination. The arbitrator found that he should have been paid a pro rata share of a €75 000 bonus, based on three months' service, and that he was short paid € 6 250. He ordered the employer to pay Mulholland that amount.

- [44] The arbitrator accepted that Mulholland was due a pro rata share of bonus of €75 000 and not of € 110 000. He based that finding on the explanation proffered by Moermann in an email of 7 April 2016 in which he discusses a way "to avoid making your total cash visible" with Mulholland and in which he proposes:

"We could – provided you agree – set up a contract that we can forward to Johan that reflects a lower base and bonus (eg $7\,500 \times 12 + 25k = 115k$) that would temporarily leave an amount of 85k out of the equation (roughly double Johan's salary).

I would then prepare a side letter signed by Kurt and myself [sic] that...

- 1) guarantees you a payout in April 2017 of at least 85k + 25k (that is a higher guarantee than agreed up to now)
- 2) and defines a shift back to 12 500 fixed and 50 000 bonus as of April '17."

- [45] The arbitrator explained the cumulative effect of these negotiations and the subterfuge that the parties agreed on as follows:

"The initial proposal was that the applicant's South African salary would be reduced from €50 000 to €25 000, with the balance in both cases to be

placed in a separate account. The reduced amounts were reflected in the final contract of employment, with the additional amounts intended to be covered in the side letter. Mr Moermann explained that this would not solve the problem, as the company would need to report the payments in a way that would be transparent to the South African subsidiary. He therefore explained that the 'shortfall' – i.e. €5000 per month x 12 months (equal to €60 000) and the missing half of the bonus of €25 000 would be paid as a bonus in April 2017, together with an additional amount of €25 000 (possibly to compensate for the fact that the amount of €5000 would only be paid at the end of the year rather than monthly, although this is not stated). The full amount of the 'bonus' would then be €110 000. This was in fact a fiction; however the effect of this proposal was that the guaranteed bonus was increased from €50 000 to €75 000, with €25 000 paid transparently, and the balance as part of an additional 'guaranteed bonus'. It is clear that this was the intention, and that the side letter was simply badly worded, possibly because of the drafter's unfamiliarity with the English language."

- [46] This appears to me to be a reasonable construction of what was intended. The arbitrator clearly applied his mind to the issue. He concluded that the company short changed the employee by €6 250 and ordered it to make good the shortfall (an amount of R88 506, 25). That conclusion is not so unreasonable that no other commissioner could have come to the same conclusion. This ground of review must fail.

Notice

- [47] Mulholland claimed nine months' notice despite the fact that he had been summarily dismissed.
- [48] The contract of employment caters for summary dismissal "for extraordinary reasons":

"In case of severe infringements of the obligations as general director, especially of the obligation to seek the approval of the Board of Directors meeting in accordance with § 2 of this agreement, this agreement can be terminated immediately for extraordinary reasons."

- [49] The word "especially" clearly denotes that the parties did not foresee a *numerus clausus* – the contract could be terminated without notice for any

'extraordinary reasons'. And gross misconduct must surely be such a reason.

- [50] The arbitrator found that Mulholland was not entitled to notice pay. Summary dismissal was justified for his gross misconduct. That is not an unreasonable finding. This ground of review also fails.

Sanction

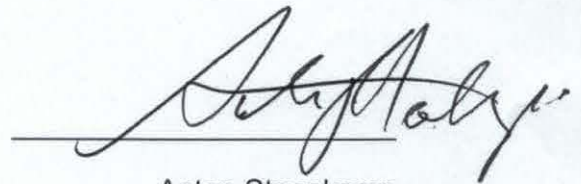
- [51] On the probabilities, and taking into account that Mulholland "did not make a good impression as a witness" and contradicted himself several times, the arbitrator found that he did commit the misconduct outlined above; and that he brought the company's name into disrepute. He was, the arbitrator found, "a most unsuitable choice" for the position of general manager. He took into account the nature of the misconduct and the seniority of the position and found that dismissal was a fair sanction. That conclusion is not so unreasonable that no other commissioner could have come to the same conclusion.

Conclusion

- [52] The award is not reviewable.
- [53] Both parties have asked for costs to follow the result. I see no reason in law or fairness to disagree.

Order

The application for review is dismissed with costs.



Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Coen de Kock

Instructed by Sean O'Dowd of Carelse Khan Inc.

FOURTH RESPONDENT: Glen Cassells of Maserumule Inc.

LABOUR COURT