



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 189/12

In the matter between:

SECURITAS SPECIALISED SERVICES (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

KHUMALO, MDUDZI N.O

Second Respondent

KUNGIWE AMALGAMATED WORKERS

UNION OBO PHEME, EDWARD

Third Respondent

Heard: 02 November 2017

Delivered: 06 November 2018

JUDGMENT

MAHOSI. J

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) in which the applicant seeks an order to review and set aside the arbitration award issued by the second respondent (arbitrator) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAJB21081 dated 22 November 2011. In terms of the award, the arbitrator found the dismissal of the Edward PHEME (the employee) to be substantively and procedurally unfair and ordered reinstatement.
- [2] The applicant seeks that the arbitration award be substituted with a finding that the dismissal of the employee was substantively and procedurally fair. Alternatively, that the arbitration be referred back to the CCMA for a *de novo* arbitration before a different commissioner.
- [3] The key issue that this Court has to determine is whether the arbitrator's decision is one which a reasonable decision-maker could not reach.

Background

- [4] The applicant employed the employee as a contract manager. His duties included rendering security services to the applicant's clients and customers and also managing a team of security officers who reported to him. On 20 July 2011, the employee was served with a notice to attend a disciplinary hearing following allegations of misconduct levelled against him. The disciplinary enquiry was convened on 21 July 2011. At the enquiry, the employee requested a postponement to enable him to prepare for the hearing. The chairperson of the enquiry postponed the disciplinary enquiry to 26 July 2011.
- [5] On 26 July 2011, the employee arrived at the hearing with Mr James Hlatshwayo who was to serve as his representative. However, Mr Hlatshwayo was not permitted to represent the employee. The employee requested the hearing to be postponed to enable him to obtain documents, the chairperson stood down the disciplinary enquiry for that purpose. However, the employee allegedly failed to

¹ Act 66 of 1995 as amended.

use this opportunity and the hearing proceeded on the same date. The employee was allegedly not cooperative in that although he cross-examined the applicant's witnesses, he refused to give evidence, to call witnesses and to be cross-examined. At the end of the enquiry, the chairperson found the employee guilty of the misconduct and recommended a sanction of dismissal.

- [6] The employee was dismissed on 12 August 2011. He did not appeal the chairperson's decision, instead, he referred an unfair dismissal dispute to the CCMA alleging that his dismissal was both procedurally and substantively unfair. Arbitration proceedings were held on the 05, 22 September and 2 November 2011. The arbitrator issued an award, which is the subject matter of this application.

Grounds of review

- [7] The applicant's grounds of review are that the arbitrator committed reviewable irregularities in that he improperly interrupted the evidence presented by the applicant's witnesses (particularly that of Mrs Fritz) by rushing their evidence and cutting them short. Further that he failed to apply his mind to the evidence led at the arbitration and misconstrued such evidence.

Applicable law and analysis

- [8] Arbitration awards are reviewable in terms of section 145 (1) of the LRA, which provides that 'any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award'. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.

[9] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*³ as follows:

‘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 in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 fact, as well as the weight and relevance to be attached to particular fact, 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.’

[10] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,⁴ the Labour Appeal Court (LAC) stated as follows:

‘[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the review court must necessarily consider the totality of the

² 2007 (28) ILJ 2405 (CC) at para 25.

³ 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA) at para 25.

⁴ [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[11] In *Head of the Department of Education v Mofokeng and Others*⁵ the LAC confirmed *Herholdt* and *Mofokeng* judgments and held as follows:

'The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.'

[12] The LAC further held as follows:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the

⁵ [2015] 1 BLLR 50 (LAC) at para 30.

issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[13] The applicant took issue with the arbitrator's conduct during the proceedings on the basis that he allegedly interrupted the evidence presented by Mrs Fritz. The applicant in its founding affidavit quoted this incident and I don't find it necessary to burden this judgment with the said quotation. After having had the benefit of reading the papers and the record I do not find merit in the complaint raised against the arbitrator in this regard. As demonstrable from the record, the arbitrator informed the witness to answer questions put to her. There is nothing, in the record, to show that there was undue interference by the arbitrator in the arbitration proceedings and with the witnesses' testimony. There is therefore no indication that the arbitrator abandoned the rules of natural justice or that he conducted himself in a manner that could have been seen to be irregular or biased.

[14] The applicant further attacked the arbitrator's award on the basis that he inaccurately recorded Ms Fritz's testimony and failed to consider the evidence of Ms Shirindi and Mr Joubert which resulted in him reaching an unreasonable conclusion. It is common cause that although the employee did not testify during the disciplinary hearing, he was given an opportunity to cross-examine the applicant's witnesses. Nothing turns on the arbitrator's recordal that "Ms Fritz contended that the finding was justified as it was based on the respondent's version only" as the arbitrator clearly recorded that Ms Fritz denied that her finding was influenced by the employee's failure to present his side of the story. On whether Ms Shirindi had, acting as an observer, powers to determine the issue of representation, the arbitrator found the question to be academic. It follows that the answer to the question did not affect the outcome he reached in this regard.

- [15] On the submission that the arbitrator placed undue consideration on the evidence and allegations, which were not the subject matter for determination at the arbitration, being that one Myburgh had referred to the employee, using a derogatory word “kaffir”. The relevant part of the award that relates to this ground appears on paragraph 4.2 where the arbitrator summarised the employee’s evidence which part reads as follows:

‘4.2.6 he asserted that charge 1 related to his relationship with one Myburg who had previously called him a kaffir. He claimed the respondent failed to address this issue and it had become an Achilles for the parties.’

- [16] There is no merit to this ground as there is no proof that the arbitrator placed any weight or consideration on such evidence before arriving at his decision.

- [17] A further ground for review is that the commissioner failed to appreciate or attach weight to the glaring inconsistencies, contradictions and/or improbable versions placed before him by the employee that he was not allowed time to obtain documentation which would have assisted him from his laptop and his contradictory version that he was denied access to his laptop. The respondent submits that the employee testified that he was denied access to his computer (not the time of the disciplinary hearing) and that the one-hour that was given to him to get documents from his computer was insufficient. It is apparent that these statements are not contradictory at all. In any event, the reading of the award shows that the arbitrator applied his mind to this evidence and rejected the employee’s version that he was deprived of an opportunity to obtain documentary evidence and to prepare for the disciplinary enquiry.

- [18] The applicant further submitted that the arbitrator failed to consider the adverse evidence presented by Mr. Isaac Ganta that if no visit to customers had taken place for seven months this would amount to a serious problem for that contract manager. Further that the arbitrator ignored both the provisions of the applicant’s disciplinary code and the testimony of Mr. Henning Joubert in making a finding on the gravity of the rule transgressed. In this regard, the arbitrator found that the employee failed to visit clients as required in terms of his contract.

However, arbitrator assessed the appropriateness of the sanction and found dismissal to be too harsh in light of the fact that the applicant adopted a progressive discipline on all transgressors. As a result, he concluded that a written warning for the employee's transgression would be appropriate. It is apparent that the arbitrator considered the evidence led by the applicant's witnesses.

- [19] The last ground of review was that in arriving at a conclusion that the dismissal was procedurally unfair, the arbitrator ignored the evidence that one Prince was only represented by an outside party as a result of a deception as to the identity of his representative; the charge sheet which provides that employees are entitled to representation by a trade union representative or by a co-worker of their choice; and the concession by the employee that he had read the charge sheet. On procedural fairness, the arbitrator found as follows:

'5.2 I wish to deal with the procedural challenge first. I have two mutually destructive versions of whether the employee is entitled to outside representation. I need to state from the outset that this right is not automatic. This would be the case if contained in a collective agreement, or practice at a particular establishment.

5.3 In this case the contention of the applicant is that it existed because of a closed shop agreement entered into between the union representing the applicant at this hearing and the respondent. The employer denied its existence and the union did not testify to its existence or present the document for my consideration. It is an acceptable legal principle that he who alleges must prove and the union has failed to do so, it is therefore my conclusion (on) that the union has failed to establish the existence.

5.4 There was also the version that a practice to this effect existed at the respondent even though the respondent seriously challenged its existence. I am convinced it does. This is based on the evidence tendered that demonstrated that Prince and other employees in management positions were so represented, the respondent gave different versions as to why certain people were represented by the union, to choose one of these versions presented by the Human Resources

Director (is) she was not at that hearing and the chairperson was not a trained Human Resource person. This argument is neither here nor there as it is the company's responsibility to streamline processes to ensure consistency, therefore not sustainable. This had a serious impact on the applicant's preparation and I would assume he relied on the Union Official to assist him in the disciplinary enquiry only to be told it was not to be. This in my view prejudiced the applicant in his ability to present his case.'

[20] The reading of the award shows that the arbitrator did not ignore any evidence in this regard. He assessed all the evidence before him and it is clear that he was not persuaded by Ms. Shirindi's evidence that she had been deceived in respect of the case of Prince. He found that there was a practice of allowing employees who were at management positions outside representation at the disciplinary enquiry and that failure to allow the employee outside representation amounted to inconsistency in the application of the rules by the applicant.

[21] It is apparent that the arbitrator dealt exhaustively with the evidence before him and considered all the factors before him prior to coming to the conclusion that the employee's dismissal was procedurally and substantively unfair. Taking into consideration the depth of his treatment of the evidence, it cannot be said that he committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. As such it is my view that the decision of the arbitrator, in this case, is not a decision that a reasonable decision-maker could not reach. It is a reasonable decision that is justified by the evidence that was placed before him. There is, therefore, no reason for this Court to interfere with the award.

[22] With regard to costs, taking into account the requirements of law and equity, I believe that this is a matter in which there should be no order as to costs.

[23] In the circumstance, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate M.A Lennox

For the Third Respondent: Mr A Goldberg of Goldberg Attorneys

LABOUR COURT