THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR846/16

In the matter between:

THE COURIER & FREIGHT GROUP **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT & LOGISTICS INDUSTRY **First Respondent**

ANEAS L D PIETERS N.O. **Second Respondent**

NHLANHLA CLEMENT NCUBE **Third Respondent**

Heard: 31 January 2019

Judgment delivered: 6 February 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 26 February 2016. In his award, the arbitrator found that the third respondent (the employee) had been unfairly dismissed. The arbitrator ordered that he be reinstated with retrospective effect.

[2] The material facts are not in dispute. The employee was employed in terms of a series of fixed-term contracts of employment, the last of which commenced in June 2013 and was to terminate on 31 May 2018. The employee was dismissed in December 2014 after being found guilty of a number of charges relating to certain contracts which the applicant alleged had been irregularly concluded. In particular, the applicant had appointed W2 Vehicle Consultants to deliver brokerage services at what was referred to as its Millside in-house, situated in the main Transnet Infrastructure Depot near Randfontein. In November 2012 the applicant launched a forensic audit into alleged irregularities with regard to the appointment of W2 in the absence of any proper procurement process and service level agreements. The report implicated the employee who after a protracted hearing was ultimately dismissed for amongst other things, a failure to ensure compliance with the relevant policies and procedures. The employee disputed the fairness of his dismissal and the matter was ultimately referred to arbitration under the auspices of the first respondent and before the arbitrator.

[3] During the course of the arbitration proceedings, a dispute arose about the pre-arbitration minute. That dispute has its roots in a draft minute forwarded by the applicant's attorney to the respondent's attorney on 28 May 2015. The minute was sent under cover of an email in the following terms:

> Please find attached hereto the draft minute for your consideration.
>
> Should you be satisfied with same, we kindly request that you sign and return same to write to hear of via email.

[4] Paragraph 2.7 of the draft, included under the heading 'Facts that are agreed between the parties in terms of Rule 20(2) (b)', reads as follows:

2.7 That, until July 2012, Reddy, Moses and/or Igsaan were primarily responsible for the procurement, management and/or dealings with the respondent suppliers including, but not limited to, W2?

[5] On to June 2015, the respondent's attorney sent a signed minute to the applicant's attorney under cover of an email that reads as follows:

> A copy of the pre-arbitration minute is attached hereto for your perusal and records. I trust that you will find the above in order.

[6] The minutes attached to the email contained certain changes made by the applicant's attorney, including changes to paragraphs 2.5, 2.6 and 2.7. For the purposes of these proceedings, the controversial amendment was made to paragraph 2.7 of the minute. In terms of the signed minute forwarded to the third respondent's attorney, paragraph 2.7 reads as follows

> However, from around July 2012, the applicant became primarily responsible for the procurement, management and/or dealings with the respondent suppliers to the in houses including but not limited to W2.

[7] This is obviously a material change to terms of the minute and places primary responsibility for the management of the contracts concerned on the employee. However, when he received the signed minute, the third respondent's attorney believed that the minute had remained unchanged and that the applicant was satisfied with the draft previously sent to it. He signed the minute received on to June 2015 from the applicant's attorney on this basis. The amendment to the minute came to the knowledge of the third respondent's attorney only on the first day of the arbitration hearing.

[8] At the outset of the proceedings, the issue was raised by the parties. The employee's representative submitted that the applicant's representative had inserted the amendments to close 2.7 without his knowledge or agreement, and that the minute should in those circumstances be declared non-binding. The applicant objected, and contended that the signed minute was binding in its totality. The arbitrator ruled that he would deal with the issue at the stage of

argument, and that the parties were to address them on this point. The arbitration hearing proceeded on this basis.

[9] The arbitrator's ruling on the issue is contained in the following paragraphs in his award:

> [9] The parties compiled a pre-trail (sic) minute prior to the arbitration dated 25 May 2015. At the first sitting the applicant raised a point of concern with regards to the content of clause 2.7 of the minute. More pertinently the applicant submitted that the respondent inserted and (sic) additional sentence into the clause that it did not sanction neither agree with and that each should be declared non-binding. The respondent objected and argued that the minute is binding in its totality to all signatories to it. I made a ruling that the parties address be on this point in closing arguments. What follows is a summary of the two arguments made in support of the parties' respective positions and my reading on this preliminary point.
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> [10] The applicant argued that between 27th of May 2015 and 1 June 2015 is representative, Mr. Anestidis, and the respondent's representative, Mr. Mosebo, exchanged via email draft copies of the minute and an agenda. On one July 2015 Mr. Anestidis emailed to what the applicant perceived as a "final "draft of the minute for Mr. Mosebo to sign off on behalf of the respondent should he be in agreement with it. At this junction paragraph 2.7 of the minute to read:
>
> > "That, until July 2012, Reddy, Moses and/or Igsaan were primarily responsible for the procurement, management and/or dealings with the respondent suppliers including, but not limited to, W27."
>
> Mr. Mosebo responded on to June 2015 emailing a signed minute with the following addition to paragraph 2.7:
>
> > "However, from around July 2012, the applicant became primarily responsible for the procurement, management and/or dealings with the respondent suppliers to the in-houses including but not limited to W27."
>
> Without notification to the applicant or his attorney, the respondent's attorney deceitfully made certain changes to the minute, including paragraphs 2.5, 2.6 and 2.7. The applicant [and his attorney] truly believed and trusted that the

signed minute [as received by them on to June 2015 from the respondent's attorney] was the minute as sent to Mr. Mosebo attorney on one June 2015. As such, the applicant's attorney proceeded to sign the minute on to June 2015 in the bona fide and honest belief/understanding that the minutes remained unchanged on the basis that the respondent was satisfied with the draft minute as sent to them on two prior occasions. Inserted sentence was only discovered by the applicant and his representative at the arbitration hearing.

[11] The applicant denies the content of the inserted sentence as it is in direct conflict and contradiction with paragraph 3.5 of the minute [dealing with the identified facts in dispute] which clearly dispute "*Whether the applicant was responsible for ensuring that W2 was compliant with the new procurement policy, as amended in 2012."* Relying on case law authority, the applicant argued that the pretrial minute is not determinative of a dispute and the eventual outcome as "*the pretrial minute had to be read and understood holistically and not in a calm compartmentalized and restrictive fashion",* and that "*the pre-arbitration minute signed between the parties does not limit the issues for determination by (this) arbitration."*

[12] The respondent argued that the legal representatives of both parties signed the minute on 25 May 2015 and there was no objection from the applicant prior to the arbitration. The applicant on (sic) raised a complaint at the hearing, without prior notice and seemingly seeking to unilaterally to resign from the minute. The respondent, relying on a litany of long-standing and recent authorities, argued that admissions of fact made at the pretrial conference constitute sufficient proof of those facts; that a party mainly result from the pre-trail (sic) minute under special circumstances; that special circumstances me that the applicant must establish a basis for doing so in the contract; and that the minutes of a pretrial son by a party always representative is binding. It follows that the content of the pretrial minute inclusive of paragraph 2.7 is binding on the applicant and that the admissions made by the applicant's attorney there in constitute sufficient proof of the facts admitted there of and is binding on the applicant.…

[10] The arbitrator went on to consider various authorities, and the issue of rectification. He concluded as follows:

> [14] Applying the above mentioned principles and having holistic regard to the provisions of the pre-arbitration minute, the evidence adduced in this case, the historical background and context to the matter, I am of the view that the pretrial minute, although binding on the parties in its totality, is not exclusively determinant of the issues raised in dispute in this matter.

[11] In relation to the merits of the charges brought against the employee, the arbitrator says the following, at paragraph 35 of the award:

> A major point in dispute concerning this matter is whether or not the applicant assumed responsibility for the brokerage services rendered by W2 at the respondent's Millside in-house on July/October 2012. This serves as the applicant's primary and most vital defense to the charges preferred against him by the respondent and is proven correct, absolves him from responsibility for ensuing policy compliance of W2 for the periods identified in the charges. The respondent, as the onus bearing party in these proceedings, a link to the applicant's responsibility for W2 to a concession made to this effect in clause 2.7 of the arbitration minute to which the applicant objected and the matter (legal binding effect of the minute) was left to be dealt with in arguments. The respondent's belated application half way through these proceedings to reopen its case and need fresh evidence to address this crucial point was denied see preliminary points above). I must determine this issue taking into account holistically the provisions of the arbitration minute (minute) as well as the evidence led by the respective parties.

[12] The arbitrator referred again to the provisions of the minute and in particular, paragraphs 2.7 and 3.5. He noted that in terms of paragraph 2.7, it was recorded as an agreed fact that the employee became primarily responsible for procurement, management and other dealings with the applicant's suppliers and that in terms of paragraph 3.5 of the minute, under the heading 'Facts in dispute' it was recorded that the arbitrator was to decide whether the employee was responsible for ensuring that W2 was compliant with the new procurement policy, as amended in 2012. At paragraph 35 of the award, the arbitrator goes on to draw the following conclusion:

> It is the applicant's contention in argument that this paragraph [paragraph 3.5] is in direct contradiction to paragraph 2.7 of the minute; that these provisions are the fall, mutually destructive/exclusive and create significant ambiguity in the minute and that there is no rational or other reason why paragraph 2.7 of the minute should supersede/override paragraph 3.5 or vice versa. The same arguments emerges under the provisions of paragraph 4.2 of the minute where the parties identify the issues to be decided by the Commissioner to include where the "the applicant should have been found guilty of the charges he was found guilty of at his disciplinary hearing." Given the inherent contradictions identified in the minute, and noting that the view that to the pretrial minute is not determinative of a dispute and the eventual outcome, I now turn to the evidence adduced in this case in determining the point.

[13] In his analysis of the evidence, the arbitrator found that it was more probable that the applicant was responsible for the strategy to grow brokerage at the in-houses but that he did not assume responsibility to source suppliers in accomplishing this objective, 'as he left it to the experts.' These persons were Reddy and Els. On the facts, the arbitrator considered that the employee did not become responsible for brokerage, including W2, when he took over the applicant's in-houses in October 2012. On this basis, the arbitrator concluded that the employee had not breached a workplace rule and that his dismissal was therefore substantively unfair. As I have recorded above, he arbitrator concluded that the third respondent had been unfairly dismissed and ordered that he be reinstated with retrospective effect (a sum of R 1 241 891) to be paid within 30 days.

[14] The applicant has raised a number of grounds for review, all of them based on the events surrounding the pre-arbitration minute. First, the applicant attacks the arbitrator's findings in relation how the pre-arbitration minute came to be concluded. Secondly, the applicant contends that the arbitrator permitted rectification of the minute; thirdly, that he erred in finding that there was a contradiction in the minute; and finally, that neither the arbitrator nor the third

respondent had raised the issue of the contradiction during the arbitration proceedings.

[15] Turning to the first ground for review, the arbitrator's conclusions, as reflected above, were to the effect that the minute was binding and that any concessions and admissions made were proof of such, and that although binding in its totality the minute was not exclusively determinant of the issue raised in dispute. The arbitrator then proceeded to determine the key issue in dispute (i.e. whether the employee had assumed responsibility for the brokerage services rendered by W2) taking into account the terms of the minute and the evidence before him. In effect, the arbitrator held that the terms of the minute were inconclusive on the point, and determined the matter on the basis of the evidence. Contrary to what the applicant contends, the arbitrator did not make a finding regarding the manner in which the minute was concluded. That part of the award of which the applicant complains is a summary of the evidence and submissions placed before the arbitrator, and not a finding on his part. In the absence of any finding of the nature complained of, the first ground for review stands to fail.

[16] The second ground for review suggests that the arbitrator permitted a rectification of the minute. There is no indication in the award that rectification was indeed granted. On the contrary, the arbitrator determined the issue in dispute by reference to the evidence, without any rectification of the minute (see paragraph 36 of the award). The second ground for review has no foundation in the award and stands to be dismissed.

[17] The third ground for review is that the arbitrator erred in finding that there was a contradiction in the pre-trial minute. Paragraph 36 of the award, referred to above, sets out the arbitrator's reasoning. Given the terms of the minute, the arbitrator could not but draw attention to the tension between paragraphs 2.7 and 3.5, which on the one hand amounted to an admission of responsibility and on the other, specifically placed this issue in dispute. .

[18] In so far as the applicant contends that neither the applicant nor the third respondent had raised the issue of a contradiction in the minute, this is not borne

out by the record. There are a number of passages that indicate that the parties were acutely aware that was reflected in the minute, in paragraph 2.7, as a 'common cause fact' was always in dispute.

[19] In short, none of the grounds for review establish any reviewable irregularity on the part of the arbitrator, or any denial of a fair hearing. The genesis of the dispute was clearly the terms of the interaction between the parties' respective attorneys. Had the applicant's attorney more pertinently drawn the employee's attorney's attention to the amendments that he had effected to the draft minute forwarded to him, this dispute would never have arisen. Equally, had the employee's attorney scrutinized the minute (as he had been invited to do) prior to signing it, these proceedings would not have been instituted. What exacerbates matters is that on discovering that there had been no meeting of the minds on crucial elements of the pre-trial minute, both representatives sought to entrench their positions. The applicant's attorney argued that the employee was bound by the minute as signed; the employee's attorney sought to have the minute declared invalid and set aside. Had both attorneys, in a gesture of collegiality, recognised what had happened for what it was and sought to resolve the issue prior to the commencement of the hearing, they would have discharged their respective obligations to the integrity of the dispute resolution process rather than their clients' narrow interests.

[20] In short: the present application is premised on the arbitrator's dealing with the terms of the pre-arbitration minute. At the end of the day, while the arbitrator can be criticised for failing to ensure prior to the commencement of the hearing that a pre-trial minute properly reflecting what was in dispute and what was not, both parties were aware that the status of the minute would only be determined at the end of proceedings and that they would be required to present their respective cases on that basis. In so far as the result of the proceedings is concerned, the terms of the minute ultimately made no difference – the arbitrator made a finding on the evidence that had been led, and the reasonableness of that outcome has

not seriously been called into question. In these circumstances, the application stands to be dismissed.

[21] Finally, there is no reason why costs ought not to follow the result. The court has a broad discretion in terms of s 162 of the LRA to make an order for costs according to the requirements of the law and fairness. In my view, those interests are best satisfied by an order indemnifying the third respondent against the costs that he has been applied to incur in opposing this application

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. P Mokoena SC, with him Adv. M Mokoti, instructed by Werksmans Attorneys

For the third respondent: Adv. M Lennox, instructed by Eversheds Sutherland SA Inc.