THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 1190/16

In the matter between:

AVHAPFANI OSLEY RAMABULANA	**Applicant**
and	
CCMA	**First Respondent**
L NOWESENETZ *N. O*	**Second Respondent**
UNIVERSITY OF SOUTH AFRICA	**Third Respondent**

Heard: 29 August 2019

Judgment delivered: 3 September 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). In his award, the arbitrator held that the applicant had been fairly dismissed by the third respondent (the university).

[2] The applicant was employed by the third respondent (the university) as an employee relations specialist. He was dismissed on 3 July 2014 after being found guilty at a disciplinary hearing of three of the nine charges brought against him. The applicant disputed the fairness of his dismissal and the matter was referred ultimately to arbitration. Both parties were represented by attorneys at the arbitration hearing, which extended over some four non-consecutive days, this after a lengthy disciplinary hearing. The present case, where the record exceeds 1000 pages, is an example of a wasteful allocation of resources to an individual dismissal dispute, and an affront to the statutory purpose of expeditious dispute resolution.

[4] In his award, the arbitrator summarised the evidence of each witness, and dealt with each of the charges against the applicant. I do not intend to repeat that evidence here; it is sufficient to record that the evidence led by the university's witnesses was that the applicant had irregularly hired a vehicle in a category higher than that to which he was entitled for purposes of a business trip to Polokwane, that he deviated from the trip to use the vehicle for personal purposes (specifically, to collect his wife and child and transport them to Pretoria) and that he misrepresented that he was entitled to a benefit intended to compensate relocated employees for bond registration costs.

[5] The arbitrator acknowledged the dispute of fact presented by the evidence. He concluded that no material improbabilities or contradictions emerged from the evidence presented by the university. On the other hand, he found that the applicant was an unreliable and untruthful witness. In regard to the charge relating to the use of a more expensive vehicle than that to which the applicant was entitled, the arbitrator concluded that the probabilities were 'compelling' that the applicant had written "no Eurocar" on the relevant form, that by so doing he intended to acquire a vehicle in a more expensive class, that he had engaged in a telephone call with Mr. Mtungwa regarding the request (a conversation that the applicant had denied), and that given Mtungwa's reliability as a witness and there being no reason for him to create the version he presented, the applicant had

committed the misconduct alleged. In relation to the charge of deviating from the route to Polokwane and back to Pretoria, the arbitrator rejected the applicant's defence that his superior, Mr. Sithole, who was his passenger, had given him permission to do so. The arbitrator held specifically that the applicant had not reported his deviation from the route, nor had he tendered the cost of the additional mileage. The arbitrator drew a negative inference from the applicant's failure to subpoena Sithole. The arbitrator concluded that the applicant had deliberately concealed his trip to Venda from the university, and dishonestly gained the advantage of the free use of the hired vehicle. In relation to the relocation policy, the arbitrator noted that the benefit of a R40 000 payment to assist with mortgage costs was dependent on registration costs being incurred. In the absence of any proof that the applicant had incurred such costs, the applicant was not entitled to the benefit and had misrepresented the facts to the university. The arbitrator held that the trust relationship between the applicant and the university had broken down, that the applicant had shown no remorse, and that the sanction of dismissal was accordingly fair.

[6] The applicant contends that the award stands to be reviewed and set aside on the basis of procedural and substantive grounds. In so far as the procedural grounds are concerned, the applicant contends that the arbitrator denied his representative the right to call witnesses to establish procedural unfairness and secondly, that he intervened in the proceedings to an extent that the applicant was denied a fair hearing. In regard to substance, the applicant contends that the arbitrator failed properly to assess the evidence before him and thus came to a conclusion that cannot be sustained by reference to the evidence.

[7] I deal first with the procedural challenges. The Labour Relations Act (LRA) sought to introduce a dispute resolution system that would resolve labour disputes expeditiously, informally and inexpensively. Section 138 (1) of the Act promotes this purpose and in relation to the conduct of arbitration hearings under the auspices of the first respondent (the CCMA) provides the following:

> 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.

[8] The application of the statutory injunction to determine a dispute fairly and quickly, having regard to the substantive merits but without legal formality, may often be fraught with internal tension. To determine a dispute quickly might require robust intervention by a commissioner, but the obligation to act fairly to both sides must not be compromised and may serve to limit the nature and extent of any intervention. Similarly, the injunction to conduct the proceedings with the minimum of legal formality may justify a decision by a commissioner to conduct proceedings with less regard for the formality that ordinarily characterises a trial in this court or any other civil court, but it is not an invitation or a license to disregard the parties' right to a fair hearing. The broad principle that emerges from the case law is that commissioners (and judges) ought to exercise caution when they intervene in the proceedings over which they preside.

[9] In *Vodacom Service Provider Co (Pty) Ltd v Phala No & others* (2007) 28 ILJ 1335 (LC), this court reviewed and set aside an arbitration award in circumstances where the court held that amongst other things, that the commissioner concerned had questioned a party's witnesses in a way that amounted to cross-examination and thus overstepped the boundaries of fair procedure in the conduct of arbitration proceedings. The court went on to note that a commissioner has a discretion about how an arbitration should be conducted and that the commissioner may decide to adopt an adversarial or an inquisitorial approach but that irrespective of the approach adopted, the commissioner is required to conduct arbitration proceedings in a fair, consistent and even-handed manner. At paragraph 15 of the judgment, the court said the following:

> A commissioner cannot assist or be seen to assist, one party to the detriment of the other. A commissioner cannot put to witnesses his propositions, should not interrupt the witness's answers, challenge the consistency of a witness with his

> own evidence, indicated that he doubted the witness's credibility, or make submissions regarding the construction of evidence.

[10] The Constitutional Court has held that when commissioners conduct arbitration hearings, they perform an administrative function. While there are awards the requirements of fairness, consistent with the LRA and the Constitution, dictate that CCMA arbitration proceedings should be conducted in a fair manner are not reviewable in terms of the Promotion of Administrative Justice Act, 3 of 2000 the CCMA is an administrative body (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC). Ngcobo J made the point in the following way:

> [266] The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by s 138 (1) of the LRA 'to determine the dispute fairly and quickly'. Second, in terms of s 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Court is well-established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in s 34 of the Constitution. The right to fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a pre-requisite for an order against an individual and this is fundamental to a just and credible legal order. A tribunal like the CCMA is obliged to ensure that proceedings before it always fair. And finally, 23 of the Constitution guarantees to everyone the right to fair labour practices.

And further:

> [267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined.

[11] The LRA spells out the nature and content of the right to a fair hearing in CCMA arbitration proceedings – these are established primarily by s 138(1), referred to

above. A commissioner is required to 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. Subsection (2) provides that subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner. In *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC), the Constitutional Court (per Ngcobo J) placed the following gloss on s 138:

> [65] Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. 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 expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

[12] In the present instance, in my view, and after a careful perusal of the record, the arbitrator's conduct was not such that he overstepped the mark. The transcribed record reflects that the commissioner respected the roles of the parties' respective representatives and did not assume to himself the role of leading evidence and conducting cross-examination. The high-water mark of the applicant's case is the arbitrator's intervention during the cross-examination of the witness Gilbert, in an exchange that concerned the calculation of a reasonable mileage from Pretoria to Polokwane. The applicant's representative complained of being 'frustrated' by the arbitrator's intervention. The record discloses the following:

> COMMISSIONER: What is it that you did not understand about the evidence when she testified?
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> MR RAMARUMO: You know, Commissioner, I am frustrated.
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> COMMISSIONER: I know why you are frustrated. It is because your questions have got no purpose. I would also be frustrated if I ask questions like this.
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> MR RAMARUMO: I am frustrated in the sense that I am made to feel that I cannot ask any other questions without the Commissioner interjecting and directing me to ask…[intervenes]
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> COMMISSIONER: If you want to question her and how she calculated those fixed distances, go ahead. We will go through it. Yes, proceed. You may go ahead. Yes, what is it you want to ask?

[13] Two observations are warranted. First, the above extract must necessarily be seen in a context where the record extends to 693 pages. At best for the applicant, it is an isolated expression of (justifiable) impatience and frustration on the part of the arbitrator. Secondly, to the extent that the complaint that the arbitrator's conduct denied him a fair hearing, the passage discloses that despite the intervention about which the applicant complains, the applicant's representative was permitted to put his question. I fail to see in these circumstances there can be said to be any prejudice to the applicant.

[14] In so far as the applicant contends that his representative was denied the opportunity to challenge the procedural fairness of his dismissal, the record makes clear that during the opening address by the applicant's representative, the arbitrator enquired of him was precisely was procedurally unfair. The representative answered:

> MR RAMARUMO: There was an instance where, if I am not wrong, where there was no cross-examination on the part of the employer and I do not understand where the applicant had led evidence and the employer does not rebut his evidence but find against him. We feel that is unprocedural at most. So that is one of the biggest procedural was occasioned during the disciplinary hearings.

COMMISSIONER: Are you saying that there is a duty to cross-examine? I have never heard of that.

MR RAMARUMO: The assertion is that the employer…[intervenes]

COMMISSIONER: Did not cross-examine?

MR RAMARUMO: Did not cross-examine.

COMMISSIONER: So what is irregular about that?

MR RAMARUMO: No, I am saying the employer had made up a case against the employee and said that there were offences that have been committed.

COMMISSIONER: Yes, that is substantive.

MR RAMARUMO: Yes.

COMMISSIONER: That is not a procedural problem. Making up a case is a substantive issue and not a procedural issue. …

COMMISSIONER: Does the applicant say that he was allowed to present his case at the disciplinary hearing?

MR RAMARUMO: The applicant was allowed to present his case at the disciplinary hearing.

[15] The applicant's representative raised no further procedural complaints. In these circumstances, the arbitrator was justified in concluding, as he did in paragraph 4 of his award, that the applicant had not challenged procedural fairness. An opening address serves to characterise the nature of the dispute, identify the issues in dispute, and the basis of the defence to the claim (see *Consol Ltd v Kanjee & others* (2008) 29 *ILJ* 1474 (LC) at paragraph 17). The only procedural issue raised by the applicant's representative in his opening address and in response to an invitation by the arbitrator to articulate the basis on which procedural fairness was challenged, was correctly categorised by the arbitrator as one of substance. There is accordingly no merit in this ground for review.

[16] Turning next to the ground of review relating to the arbitrator's assessment of the evidence, the test to be applied is one that recognises and reinforces the

distinction between a review and an appeal. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. The *locus classicus* remains *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), where the LAC said the following:

> [30] 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…
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> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
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> [33] 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, if 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 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.

[17] The arbitrator appreciated the nature of the enquiry. He properly appreciated and applied the test to determine the material dispute of fact before him, amongst other things, by making credibility findings and determining the respective probabilities of the versions that served before him. The applicant's grounds for review suggest that the arbitrator came to a decision that was incorrect. Arbitrators are allowed to be wrong. They are not allowed to come to decisions that are so unreasonable that no reasonable decision-maker could reach the same decision on the available material.

[18] In regard to the charge relating to the hiring of the vehicle, as I have indicated above, the arbitrator correctly identified the dispute of fact, in particular the existence or otherwise of a discussion between the applicant and Mtungwa. He found that it was more probable that Mtungwa had telephoned the applicant concerning the endorsement "No Europcar' on the F36 form and that there was no motive for Mtungwa to fabricate a version. Mtungwa freely admitted that he was an experience in its position, and that he had taken the applicant's explanation during the telephone call at face value and approved the travel application without further verification. He admitted that this was a mistake on his

part. The commissioner's evaluation and assessment of the evidence cannot be faulted and the conclusion to which he came was reasonable.

[19] In regard to the charge that concerned the use of a vehicle and the unauthorised trip to Venda pick up the applicant's wife and child, the arbitrator considered the inherent probabilities in this defence and found the applicant's version to be improbable, particularly since it was a violation of the University's travel policy. Insofar as the applicant did not dispute that he had travelled 1225 kilometres as opposed to the 700 kilometres that constituted a reasonable distance for the trip, and insofar as the applicant relied on the defence that Sithole had authorised him to make the deviation, the arbitrator took into account that the applicant's explanation was not corroborated and drew a negative inference from the applicant's failure to call Sithole as a witness. It should be recorded that the arbitrator had specifically warned the applicant of his failure to call Sithole. The arbitrator found that it was improbable that Sithole would have advised the applicant not to disclose his trip to Venda and further took into account the fact that the applicant did not pay for the extra distance travelled in the vehicle. In support of the present application, the applicant's counsel submitted that it was for the University to have called Sithole, and that no negative inference could be drawn from the applicant's failure to do so. There is no merit in this submission. The applicant did not dispute having used the vehicle for private use. To the extent that his defence was that he had obtained authorisation to what amounted to a breach of the University's policies and a clear act of dishonesty, it was incumbent on the applicant to satisfy the arbitrator as to the merits of that defence. He failed to do so and in these circumstances, the university cannot be held to account for this failure.

[20] Insofar as the relocation policy is concerned, the arbitrator clearly recognised the distinction between the general relocation benefit and the benefit really relevant to the charge against the applicant, the once off payment of R 40,000 to assist with mortgage registration costs. The arbitrator reasonably considered that registration of a mortgage bond created an entitlement to this benefit. On an

evaluation of the evidence, the arbitrator concluded that the applicant had not shown that a mortgage bond was registered by him of any property in Pretoria. On an evaluation of the totality of the evidence in relation to this charge, the arbitrator considered that the misrepresentation lay in the fact that the applicant knew or ought to have known by the end of November 2008 that he would not be completing his transaction to purchase the property in Mont Bernini and that he was not entitled to the benefit.

[21] In short, the arbitrator, in respect of each charge, evaluated the totality of the evidence led in the proceedings before him and assessed that evidence in accordance with the required approach. I fail to appreciate how it can be said that he committed any material irregularity in this regard or how it can be said that the outcome of the proceedings under review falls outside of a band of decisions to which reasonable decision-makers could come on the available material. For the above reasons, the application to review and set aside the arbitrator's award stands to be dismissed.

[22] Section 162 provides that this court may make orders for costs according to the requirements of the law and fairness. The court thus has a discretion to make costs orders, one that must be exercised judicially having regard to all of the relevant factors. In the present instance, the applicant has brought an application that is frankly devoid of merit. The backlog in the opposed motion court is largely a consequence of applications such as the present, where a review is regarded as the next step in the dispute resolution process, one where an applicant has little to lose on account of the remote prospect of an adverse order for costs, in what more often than not amounts to an appeal disguised as a review. For this reason, I was inclined to dismiss the application with costs. On the other hand, the court is cautious not to close its doors to genuinely aggrieved litigants who pursue their interests in good faith. In the present instance, with a great deal of hesitation, I find that the present application falls into the latter category and that while the application borders on an abuse of the process of this court, the applicant's conduct is not so egregious so as to warrant an order for costs. I also

accept that the applicant remains unemployed and that the costs of an application such as the present, with its unnecessarily long record, is likely to inflict a financial blow from which he is unlikely to recover. On balance, the interests of the law and fairness are best satisfied by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. B Roode, instructed by Friedland Hart Solomon and Nicholson

For the third respondent: Mr. I Mohammed, Hogan Lovells (South Africa) Inc.