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IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR141/17

In the matter between:

JD GROUP (PTY) LTD (A DIVISION OF PEPKOR)

T/A JOSHUA DOORE

Applicant

and

PLAATJIES, S N.O

First Respondent

SACCAWU obo INGRID COETZEE

Second Respondent

Heard: 20 March 2019

Delivered: 3 April 2019

JUDGMENT

MAHOSI.J

Introduction

- [1] This is an application in terms of section 158(1)(g) of the Labour Relations Act (LRA)¹ read with section 33 of the Arbitrations Act² to review and set aside the arbitration award issued by the first respondent (the arbitrator) under the auspices of the Tokiso Dispute Settlement (Tokiso), dated 16 May 2017 under case number TCR010674.
- [2] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties

Material background facts

- [3] The second respondent's member (the employee) was employed by the applicant with effect from 1 January 2005. She was a Branch Manager of the Russells (Joshua Doore) Fleet Street branch and she was dismissed on 10 March 2016 after being subjected to a disciplinary hearing for misconduct. The charges that were leveled against her were as follows:

Count 1 – Dishonest Behaviour

In that during the period of September and October you received money from customers Nogwaja with ID number 71..., Nompucuko with ID number 51... and Yekeni as per Lay-buy number 11610841 and you failed to receipt the funds as per policy and/or you have misappropriated funds received from customers meant for lay-buy payments.

¹ Act 66 of 1995, as amended.

² Act 42 of 1965, as amended.

Count 2 – Misconduct

In that your actions/behavior during the period of September and October 2015 where you took money from customers and failed to receipt, has caused or may have placed the company name and reputation into disrepute.'

- [4] Aggrieved by the employee's dismissal, the second respondent on behalf of the employee, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). However, the matter ultimately proceeded to private arbitration under the auspices of Tokiso because of the provisions of the collective agreement between the applicant and the second respondent.
- [5] Subsequently, the arbitrator issued an award in terms of which he found the employee's dismissal substantively unfair and ordered the applicant to pay her compensation equal to her 12 months' salary. It is this award that is the subject matter of this application.

Arbitration and the award

- [6] The employee's charges relate to incidents reported by customers in which lay-by transactions were initiated by making a deposit as part payment of the total cost, which deposits could not be traced. This resulted in customers not receiving the items they supposedly bought. The applicant dismissed several employees, other than the employee in this matter.
- [7] The applicant's case is that the employee received money from customers, namely, Ms Nogwaja, Ms Nompuculo and Ms Yekeni without receipting it. It is

further alleged that the employee concealed her wrongful conduct by creating a transaction and thereafter deleting it from the system.

[8] At the arbitration, the applicant led evidence through oral testimony of three witnesses, namely Mr Jarrod Smith, Mr Quinton Warries and Ms Yekeni. The third respondent led evidence through the oral testimony of the employee. In addition, the parties submitted documentation, which was accepted to be what it purports to be.

[9] On the question of whether the employee received money from the three customers as charged, the arbitrator considered the common cause fact that there had been other potential suspects, two of whom had been dismissed by the applicant and one of whom had resigned. He found that the employee was, at best for the applicant, one of the suspects and not the only suspect. It was for this reason that the arbitrator concluded as follows:

‘...It is my view that the probability that all customers only dealt with the applicant when it concerns the handing over of money is negated by the fact that three sales staff was implicated in the initial investigation resulting in their dismissal and resignation from the employ of the respondent. None of the three sales personnel was called to testify in any proceedings including this tribunal.’³

[10] Ms Yekeni was the only witness who testified about the transaction for which the employee was charged. The arbitrator had the benefit of observing her demeanor and made the following observations:

‘The witness Yekeni did not give evidence during the disciplinary proceedings of the applicant although her statement annexed as page 82 in the Bundle “B” was submitted to this tribunal. There are contradictions between the written and

³ Index to Pleadings, page 25

signed statement in her oral testimony during this tribunal. The witness had an interpreter appointed for translation purposes. She gave evidence with her hand covering her mouth and had to be requested to remove her hand. Her demeanour during the tribunal, in my considered opinion, did not enhance or support her credibility as witness. She had a selective memory of the incidents and only referred/pointed to the applicant as the only person she interacted with when she came to the premises of the respondent, whereas in her statement which she admitted signing, there is reference made to a Zanele and Lungi. Both these sales staff were reported to and charged by the South African Police Services.⁴

[11] The arbitrator found that it is more likely that the employee's involvement with the customers in question was solicited for the purpose of creating sales orders on the system and confirming information with them. The basis on which he made this finding was on what he referred to as the employee's "limited proficiency in Xhosa." The arbitrator also noted that the employee did not deny that she offered assistance to the customers as part of her responsibility in her managerial capacity.

[12] The arbitrator regarded the applicant's evidence relating to the versions of Ms Nogwaja and Ms Nompucuko to be hearsay evidence, the basis of which appear in his award as follows:

...The fact that the Respondent referred to witnesses in their absence and submitted oral evidence from the witnesses Smith and Warries during this tribunal on behalf of the two customers in my opinion can be regarded as hearsay.

The witness Warries referred to interaction with the customer Nogwaja as well as the SAPS officers which was never corroborated by testimony/affidavit from neither of the parties mentioned in this testimony. It is true that documents do not speak for themselves and need to be corroborated by oral testimony of the

⁴ Index to Pleadings, page 25

author(s) or originator(s). It is also trite that neither of the respondent's witnesses viz. Smith and Warries were present when the alleged infractions were allegedly committed by the applicant.'

- [13] The arbitrator drew an adverse inference in the applicant's failure to adduce direct evidence and found that the evidence adduced by the employee presented a more probable version of the events. For that reason, the arbitrator found that the applicant failed to discharge the onus of proving, on balance of probabilities, the employee's misconduct and the fairness of her subsequent dismissal. The arbitrator further found that there was no evidence to prove that the relationship between the parties had broken down and ordered that the employee be reinstated. It was on the basis of the above that the arbitrator found that the employee's dismissal was substantively unfair and he ordered that she be reinstated retrospectively. Dissatisfied with the arbitrator's findings, the applicant launched this application on the grounds that will be dealt with hereunder.

The Grounds for Review

- [14] The applicant's submission was that the award is not one that a reasonable decision-maker could arrive at for the following reasons:

7.10.1 The first respondent failed to comply with the provisions of the Act, pertaining to the conducting of fair and proper arbitration proceedings in terms of the Act;

7.10.2 Factual findings made by the first respondent himself, in fact did not correspond with the evidence and documents properly placed before the first respondent in this particular matter;

7.10.3 The first respondent exceeded his powers in terms of the Act;

- 7.10.4 The first respondent did not properly and rationally and justifiably apply his mind to the effects of the law in this instance;
- 7.10.5 The first respondent failed to afford the applicant a fair and proper hearing in the circumstances and failed to properly conduct the arbitration proceedings in the circumstances;
- 7.10.6 The award made by the first respondent is not justifiable in relation to the reasons given for such award, such award is nor rational or justifiable in its merit or outcome; and is not an award a reasonable decision-maker could arrive at;
- 7.10.7 The first respondent fails to properly apply his mind and failed to have proper consideration of the facts and the law, in respect of the relief afforded to the individual second respondent in this instance, entity first respondent exceeded his powers in this regard;
- 7.10.8 The first respondent fails to properly, justifiably and reasonably determine and assess the evidence properly before him in this matter, and the relevant provision of the law.⁵

The Test for Review

[15] The arbitration award that is sought to be reviewed is one issued by a private arbitrator pursuant to a collective agreement between the applicant and the second respondent. It follows that, in this matter, the principles of review as enunciated in *Sidumo*⁶ do not find application. Private arbitration awards can be challenged on review on the grounds set out in section 33(1)(b) of the Arbitration Act⁷ as follows:

‘(1) Where-

⁵ Index to Pleadings, pages 16 to 17.

⁶ *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*

⁷ Act 42 of 1965, as amended.

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[16] The applicant seeks to review the award on the basis that the arbitrator committed a latent gross irregularity in that he negated most of the evidence and made no proper probability and credibility findings. According to the applicant, there is simply no evidentiary basis on which the award can be sustained. The applicant submitted that the arbitrator misconstrued the issue of onus and unduly and irregularly limited the inquiry he was required to make.

[17] In opposing this application, the second respondent's contention was that the applicant's reliance on the latent gross irregularity as a ground of review flies in the face of *Telcordia Technology v Telkom SA Limited*⁸ where the Court stated as follows:

'[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: It cannot be said that the wrong interpretation of the Integrated Agreement

⁸ 2007 (3) SA 266 (SCA).

prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.'

[18] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*⁹ the Court stated that:

'[71] The principle of party autonomy, stressed in *Telcordia*, which requires a high degree of deference to arbitral decisions, and which implicitly informed the approach of the Supreme Court of Appeal in the present matter, is not a weighty consideration against a conclusion that the fairness requirement of section 34 is of application to arbitrations. *Telcordia* itself, and the authorities it referred to in emphasising the principle, were matters which concerned errors of fact or law to which the well-known and well-established principles governing arbitrations do apply. Procedural irregularities giving rise to unfairness are, however, a horse of a different colour.

⁹ 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC)

[72] In my view, there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act. On the contrary, there is every reason why co-existence should be accepted: the fairness requirement in section 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.

[73] This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights, including the right to a fair and impartial hearing guaranteed by section 34.' [Footnotes omitted]

[19] In this matter, there is no merit to the applicant's submission that the arbitrator failed to afford it a fair and proper hearing or that he exceeded his powers in terms of the Act. There is nothing in the pleadings, the record or the heads of arguments to suggest that the arbitrator ignored the principles of natural justice.

[20] On the ground of latent gross irregularity, the employee submitted that, albeit rendered in the context of a review of a statutory arbitration pursued in terms of section 145 of the LRA, *Herhold*¹⁰ remains relevant, insofar as it reaffirmed the proper ambit of gross irregularity as follows:

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

¹⁰ *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA).

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

[21] There is nothing, in this matter, to show that the arbitrator misconceived the nature of the dispute before him. A proper reading of the arbitration award evidences that the arbitrator considered both the documentary and oral evidence presented before reaching a conclusion that the employee's dismissal was substantively unfair. I agree with the employee that the arbitrator followed an entirely logical process of reasoning.

[22] It is my view that the applicant has not established any basis upon which the Court could find that the award is reviewable. As such, the applicant failed to discharge the *onus* of establishing that the arbitrator has misconducted himself in relation to his duties as arbitrator or umpire, committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers. There is, therefore, no reason for this Court to interfere with his award.

Costs

[23] In terms of section 162 of the LRA, this Court has wide discretion in awarding costs. The Constitutional Court has reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*,¹¹ that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[24] In the circumstances, I make the following order.

¹¹ [2018] 4 BLLR 323 (CC) at para 24.

Order

1. The application to review and set aside the arbitration award issued by the first respondent under the auspices of the Tokiso Dispute Settlement, dated 16 May 2017 under case number TCR010674 is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For applicant: Mr Sean Snyman of Snyman Attorneys

For third respondent: Advocate F.E. Le Roux

Instructed by: Wesley Pretorius and Associates Inc. Attorneys