



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/ Not Reportable
Case No: JR409/2021/J2156-19

In the matter between:

LESIRA MANUFACTURING (PTY) LTD

Applicant

and

K G SCHULZ

1ST Respondent

COMMISSIONER L M MOTSHO SC

2ND Respondent

ARBITRATION FOUNDATION OF SOUTH AFRICA

3RD Respondent

Heard: 24 October 2024

Delivered: 20 February 2025

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 20 February 2025.

JUDGMENT

DANDADZI, AJ

Introduction

[1] This matter has a protracted history following a private arbitration award under case number AFSA PTA-106/2019 that was issued by LM Montsho SC in a private arbitration between the applicant and the first respondent under the auspices of the Arbitration Foundation of South Africa (AFSA) on 23 October 2019.

[2] Following the arbitration, the first respondent instituted proceedings before this Court to have the arbitration award made an order of the court under case number J2156/19. Pursuant to that application, the first respondent brought a review application couched as a counter application to set aside the arbitration award. It is common cause that there was somewhat of a withdrawal of the said opposition under case number J1256/19, which the applicant now disputes was a withdrawal, I will address this matter elsewhere in this judgment. In 2021, the applicant instituted this application before me under case number JR409/21.

[3] There were several other applications before me, however at the commencement of the proceedings, it was agreed that I need not determine the application relating to security for costs as the application was now moot. I must therefore determine the following issues, the condonation and review application under case number JR409/21 and the application to make an arbitration award an order of court under case number J2156/19.

Background to the matter

[4] The first respondent was at the time the arbitration was held employed by the applicant. A dispute arose between the parties, which dispute the first respondent referred to AFSA for determination. There were various claims that the respondent brought against the applicant in receipt of monies he contended were due to him.

[5] Following various interlocutory applications and in particular a condonation application brought by the respondent for failing to comply with certain directives

made by the arbitrator, the matter proceeded in default of the applicant after condonation was refused.

[6] The applicant failed to comply with the order made by the arbitrator in the arbitration award which then led to the first respondent bringing proceedings before this court under case number J2156/2019 to have the arbitration award an order of court. The matter was initially opposed by the applicant; however, the applicant subsequently withdrew its opposition and its counter claim. The applicant subsequently instituted the review proceedings under case number JR409/21.

[7] There were attempts to have the matter under J2156/19 heard by this court. At the hearing held on 1 August 2024, Snyman AJ issued an *ex tempore* judgment consolidating the two matters and issuing directions on how the matter should proceed. The matter is now before me for consideration.

Withdrawal of the Review/Counter Application under Case No. J2156/19

[8] Firstly I will deal with the withdrawn Review/Counter Application under case number J2156/19 and the contention by the respondent that this application is a live dispute that must be considered. The applicant bizarrely seemed to want to base its case on its review application it had instituted in 2020 and made submissions that it had been made to believe that it had withdrawn its application while it had in fact not withdrawn the matter. It was submitted that because the Applicant had not itself filed the notice of withdrawal with the Registrar as contemplated by the rules, there was no withdrawal. Reliance for this argument was placed on what the court held in *Superway Construction (Pty) Ltd v Swafo, In re: Swafo v MEC for Roads and Transport, Limpopo and Others*¹. The Court found that there had been no withdrawal as the Notice of Withdrawal had not been delivered to the Registrar. The facts of this matter are however distinguishable in that the notice of withdrawal in this matter was in fact filed with the Registrar on 8 February 2021. In its founding affidavit under case number JR409/21, the deponent of the applicant's affidavit confirmed that the opposition and review application had in fact been withdrawn and deposed as

¹ [2017] ZAGPPHC 101 at para 22.

follows, “*due to ill advice, and a misunderstanding of applicable rules, principles and Laws pertaining to reviews, was withdrawn on 5 February 2020*”.² It is evident that at the time the applicant filed its new review application in March 2021 it was well aware and understood that it had withdrawn its opposition to the pending matter.

[9] In my view and in light of the position taken by the Applicant in its founding affidavit in the new review application, the issue of which party filed the notice of withdrawal with the Registrar is neither here nor there, the withdrawal had been perfected by filing with the Registrar in February 2021. In any event, even if I were to find that there had been no withdrawal, of the matter, the applicant’s review application would have been archived and declared as lapsed in terms of the provisions of clause 11.2.7 of the old Labour Court Practice Manual³ as at the time of the hearing of this matter, it had been more than 12 months since the launch of the said application in 2020.

Applicant’s Condonation Application

[10] Secondly, I will deal with the applicant’s condonation application. The condonation application was filed outside the six week time period within which review applications must be brought before this court. To determine the condonation application, I must consider the following factors: the degree of lateness, the explanation for the lateness, and the applicant’s prospects of success in the main dispute.

[11] The condonation application on the applicant’s version is 65 weeks late, however at the hearing of this matter, it was submitted that the condonation was not necessary because the applicant had not withdrawn the initial review application under case number J2156/19 and that to the extent that condonation was necessary, the delay could not be placed at the applicant’s doorstep but was in fact caused by the first respondent and his legal representatives.

² FA Review application page 20 at para 9.5, 9.7 and 9.10.

³ Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.

[12] The review application is over a year late, the applicant however fails to provide a reasonable explanation for the delay in bringing the application, however in argument essentially shifted the blame to AFSA and the first respondent. In its founding affidavit, in which the applicant should have put this Court in its confidence by explaining each period of delay, the applicant failed to do so.

[13] The applicant in explaining the reason for delay in bringing the proceedings between 5 February 2020 and 4 March 2021 relied on a settlement proposal predating the period in question, and is dated 29 November 2019, annexure LDB2 to the review application. This position cannot be true state of affairs as the said settlement offer had remained open until 3 December 2019. When the first respondent failed to accept the offer by the said date it was evident that if the applicant wanted to challenge the arbitration award it had to approach this, Court. It failed to do so. Further reliance for the delay was placed on an ongoing disciplinary process between the parties which resulted in a final written warning on 25 January 2020 and the parties going on to arbitration. There is however no indication of when the parties went to arbitration or when the arbitration was finalised. There is again a gap in respect of an explanation for delay from that period until 25 February 2021 when the applicant is said to have consulted with its present attorneys.

[14] At the hearing of this application, a version that had not been pleaded, that the delays in bringing the proceedings were because AFSA and the first respondent and its legal representatives refused and/or failed to co-operate with the applicant in getting the record before this Court was argued before me. It was said that these delays took place in July 2021. The date of July 2021 is however four months after the institution of the review application. The delays in placing the record before this Court have no bearing on the reason for the delay in bringing the application in March 2021, a period of delay of more than a year.

[15] For a party that was represented at the arbitration and in the earlier part of the proceedings before this court by a legally trained in house representative, and throughout the arbitration the applicant provided a very poor explanation for a delay of over a year. The applicant did not approach this matter with any urgency at all. It is trite that condonation is not there for the asking.

[16] In *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others*⁴ the Labour Appeal Court (LAC) held that it is

‘It is also generally accepted that if an applicant does not provide an acceptable explanation for its delay, the court need not consider the other factors and refuse condonation. This, again, is not an inflexible rule. It applies where the other factors do not in themselves raise issues that could necessitate the court’s interference to grant the indulgence sought.’

[17] Having regard that the Court must not be inflexible in its approach, I will consider the applicant’s prospects of success which are interlinked with the grounds for review in the discussion below.

[18] Having found that the grounds for review are without merit, it is evident that the applicant has no prospects of success as the applicant’s complaints do not fall within the ambit of section 33 of the Arbitration Act⁵, the condonation application is dismissed.

Jurisdiction and the Review Test

[19] Section 157(3) of the Labour Relations Act 66 of 1995 (The LRA) states that: ‘Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.’

[20] Section 157(3) gives the Labour Court power to adjudicate on matters brought to it in terms of the Arbitration Act, however in doing in accordance with its powers set out in section 33 of the Act. Section 158(1)(g) accords this Court’s power to review. On that basis, it is competent for this Court to entertain a review application relating to a matter brought to it in terms of the Arbitration Act.

⁴ [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) at para 22.

⁵ Act 42 of 1965.

[21] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been stated extensively following the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*⁶, whether the decision made by the commissioner is one that a reasonable decision maker could not make. It was stated by the Constitutional Court that the arbitrator's decision must fall within a range of decisions that a reasonable decision maker could make.

[22] The difference however comes when it is a private arbitration award that is sought to be reviewed, the award may only be reviewed in terms of the provisions of section 33 of the Arbitration Act as stated above. The Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*⁷ (*Lufuno*), the majority in the Constitutional Court held that:

'The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration ("CCMA") in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.'

[23] In confirming that the *Sidumo* test finds no application in private arbitrations, the Constitutional Court in *Lufuno* stated that⁸:

'To return then to the question of the proper interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of section 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration

⁶ [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 at para 110.

⁷ 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 198.

⁸ *Supra* at para 235.

awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.'

[24] The scope of reviewing a private arbitration award is therefore strictly limited to considerations set out in section 33 of the Arbitration Act⁹ which provides as follows:

'(1) Where –

- (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.'

Grounds for Review

[25] There are three grounds for review to be considered:

- 25.1. The arbitrator misconducted herself alternatively wrongfully misconducted herself in accepting improper and irregular calculations in respect of payments due to the applicant and without applying her mind to the bonus scheme agreement and/or a proper regular calculation simply accepted that the demonstration by the first respondent on a power point presentation was sufficient to find in favour of the respondent.

⁹ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA).

25.2. The arbitrator committed gross irregularities and/or exceeded her powers in the conduct of the arbitration proceedings in taking a decision to exclude the applicant from the arbitration exceeded her powers and prevented a fair trial on the issues (the condonation application before the arbitrator).

25.3. The arbitration award was improperly obtained in respect of the key man bonus award and overtime.

[26] In *Telcordia*, the SCA stated as follows:

[83] In short, the arbitrator had to (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of its terms, and (iv) all the admissible evidence.

[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

[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 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.'

[27] The three grounds for review fall short of the review standard set out in Section 33 of the Arbitration Act as they go intrinsically to the evidence that the arbitrator considered at the arbitration.

[28] It is said that the arbitrator erred in accepting the improper calculations of the payments due to the first respondent in the face of contract evidence in the bonus scheme agreement. This ground for review speaks directly to the merits of the issue that the arbitrator had to consider, whether the applicant was entitled to the amounts he claimed were due to him in terms of the agreement. If regard is had to the record placed before this Court and in particular the record of the arbitration meeting, and paragraphs 27 to 34 the arbitration award, it is evident that the arbitrator considered the evidence that was placed before her by the first respondent in the default arbitration proceedings. Nothing points to the Arbitrator's conduct constituting misconduct or a gross irregularity, nor did she exceed his powers. This ground is therefore in my view without merit.

[29] The applicant may disagree with the arbitrator's findings and conclusions, however, as was stated by this Court in the matter of *SACCAWU & others v Pick 'n Pay Retailers (Pty) Ltd & others*¹⁰, the Court stated that:

¹⁰ [2012] 1 BLLR 71 (LC); (2012) 33 ILJ 279 (LC) at para 7.

‘In short: in the case of a review of a private arbitration award, there exists little scope for a review going to the merits, as a private arbitrator has the right to be wrong.’

[30] The second ground for review relates to the arbitrator refusing to grant the applicant condonation and proceeding with the arbitration in the absence of the applicant. The applicant contends that in that regard, the arbitrator committed gross irregularities. In my view, the arbitrator is entitled to exercise her discretion to grant or refuse a condonation application and issued a ruling refusing to grant condonation. There is nothing irregular or that would amount to exceeding of powers in refusing a condonation application, it is a discretion that the arbitrator exercised having regard to the facts of the matter.

[31] Lastly it is contended by the applicant that the award was improperly obtained, in that the arbitrator admitted evidence without allowing the applicant a fair hearing or a fair hearing or a proper ventilation of the disputes. It is again evident from the record and the award itself that arbitrator considered the evidence that was placed before her. The applicant did not participate in the proceedings after condonation had been refused, however from the record and award, it is evident that the arbitrator considered the evidence that was placed before her.

[32] Having regard to the grounds for review in totality, the grounds for review are without merit. As I stated earlier in this judgment, the grounds for review and the prospects of success are inter-linked, having found that the grounds for review are without merit, there are no prospects of success in this review application, therefore condonation is refused.

Arbitration Award made an Order of Court

[33] In finding that the Labour Court had the powers to make a private arbitration award an order of court, in *Manaka and Others v Air Chefs (Pty) Ltd*¹¹ the following was said:

¹¹ [1998] ZALC 150; (1999) 20 ILJ 388 (LC) at para 4.

'The crisp question, therefore, is whether it is necessary for the dispute to remain cognizable under the Act throughout its currency or whether it is enough for the purposes of section 157(3) that it be a dispute that at least at the outset is cognisable under the statute. In my view, the latter interpretation is the appropriate one. The section simply states that the dispute must be one that may be referred to arbitration in terms of this Act. It must, therefore, be a dispute that permissibly or legally can be referred to arbitration in that manner. It is such a dispute at its outset and that, in my opinion, is sufficient to bring it within the ambit of section 157(3).'

[34] At the hearing of this matter, it was conceded by the applicant's representative that should its condonation and review application fail, the application to have the arbitration award an order of court must succeed. As no argument precluding me to make the arbitration award an order of court was made, the application must succeed.

[35] I therefore make the arbitration award under case number AFSA PTA 0106/2019 an order of Court.

Costs

[36] As I intimated earlier in this judgment, this matter has a protracted history from October 2019 and was only considered by this Court in November 2024 due to numerous delays, following the withdrawal of the first review, the subsequent instituting of the current review proceedings and various interlocutory proceedings.

[37] The applicant failed to participate in the arbitration despite having been given numerous opportunities to, it however now sought to review the arbitration award without merit.

[38] The first respondent is an individual litigant who has had to be out of pocket in respect of costs of this protracted litigation. I am in that regard inclined to exercise my discretion and order that the applicant must pay the first respondent's costs.

Order

1. The applicant's Review/Counter Application under case number J2156/29 was archived and declared as lapsed in terms of the provisions of clause 11.2.7 of the old Labour Court Practice Manual.
2. The applicant's application for condonation for late filing of the review application under case number JR409/21 is dismissed.
3. The arbitration award under case number AFSA PTA-106/2019 issued by LM Montsho SC on 23 October 2019 is made an order of Court.
4. The applicant is ordered to pay the first respondent's costs.

N. L. Dandadzi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr C.J. Geldenhuys for Geldenhuys Attorneys

For the Second Respondent:

Advocate B. Bester

Instructed by:

Erasmus Scheepers Inc