



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2789/18

In the matter between:

NATIONAL REGULATOR FOR COMPULSORY SPECIFICATIONS **Applicant**

and

ELMARIE CORNELIUS **First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION** **Second Respondent**

PAUL BOTHA N.O. **Third Respondent**

Heard: 19 March 2025

Delivered: 10 April 2025

JUDGMENT

KIRSTEIN, AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award dated 17 November 2018 under Case No GATW9323/18 issued by the third respondent under the auspices of the second respondent. The third respondent determined that the dismissal of the first respondent was substantively unfair and ordered the applicant to pay compensation in the amount of R572,064.00. The first respondent opposed the application.

Background

[2] The first respondent was employed by the applicant as a Financial Manager. During a disciplinary hearing held on 6 April 2018 relating to adverse audit findings by the Auditor-General, South Africa, the first respondent wrote a note to her legal representative during the disciplinary proceedings that reads as follows:

‘Ask how many times the bitch has addressed or does she send me an email?’
(the note)

[3] The first respondent referred to her Line Manager, Ms Abdool, the Chief Financial Officer of the applicant in the note. Ms Abdool, during the disciplinary process and in the absence of the first respondent and her representative, gained access to the note. The third respondent was thereafter found guilty of insolence and dismissed on 31 July 2018.

Arbitration

[4] At the commencement of the arbitration, the third respondent was informed by the parties’ representative that the parties do not intend to lead evidence at the arbitration and that the third respondent should consider a common bundle of documents and closing arguments, whether the dismissal was substantively and procedurally unfair.

[5] The third respondent correctly raised his concerns regarding the procedural approach of the parties and referred to the requirement of a stated case to be submitted in such circumstances. The parties, on request of the third respondent, conducted a pre-arbitration meeting and placed on record that the common bundle serves as the record of proceedings before the arbitration.

[6] With regard to the facts in dispute, the parties placed on record whether the first respondent's dismissal was procedurally and substantively fair and what the appropriate sanction and relief the first respondent will be entitled to. The procedural challenge to the dismissal of the first respondent was abandoned.

[7] With regard to the status of the bundle of documents, the parties agreed that the combined bundle of documents are to serve as the record of proceedings and the content of the bundle be admitted as correct. The parties further stated that there need not be any evidence led to bar what is set out in the combined bundle. Both parties submitted written heads of arguments, whereafter the third respondent issued the award under review.

Arbitration award:

[8] In the award issued by the third respondent, the arbitrator stated *inter alia* the following in paragraph 7:

'7. I cautioned the parties on record in respect of the limiting aspect of deciding a case on the basis of a stated case with no evidence being available to be led. Parties were however insistent that the matter be handled thus. I therefore placed it on record that no specific or particular guidance or clarity was given in respect of certain issues that required my consideration, save for what was argued in closing by both parties, and conclusions that I have drawn are a matter of, or a lack of, record in the bundle. It is of course impossible for a commissioner to be able to rule that evidence would need to be led on specific aspects, when he or she has no knowledge of precisely what the contents of the bundle might or might not reveal upon subsequent scrutiny.'

[9] It is clear from the arbitration award that the third respondent did not have sufficient evidence to come to material findings in order to render a reasonable award, where the following was stated:

‘12. There is no evidence before me that Abdool’s having become aware of the use of the word “bitch” in a note from the applicant to her attorney during the cross-examination of Abdool, was as a result of the applicant having chosen to make this note known or available to Abdool. The only evidence available is that somehow Abdool read the note, which had not been offered to her, and chose to openly take offence in respect of its existence.

13. There is evidence, that does not appear to be thoroughly refuted by the respondent (and which could not be further tested due to the stated case approach insisted upon by the parties), that the applicant was, at some point prior to the document coming under the eyes of the respondent’s attorney at that hearing, threatened by the respondent’s attorney in some way or another, with a criminal charge of *crimen injuria* in respect of the written note. This can only attract an inference that there was some sort of threat upon the applicant by her erstwhile employer’s attorney, which could quite conceivably have affected her immediate approach to the note and perhaps the conduct of her attorney.

14. There is evidence of the applicant’s attorney handing the note in question to the respondent’s attorney for viewing, with no accompanying evidence or argument that the legal professional privilege that would attach to communications between a client and her attorney at common law, which this note obviously was, was expressly or by implication, waived by the applicant. Even implied waiver requires an element of publication of the document to serve as a ground for the inference that the applicant no longer wished to keep the contents of the document a secret. (See in this respect *Ex Parte Minister of Justice: In re S v Wagner* 1965 4 SA 507 (A).) There is no evidence before me that the applicant’s attorney took instruction from her in respect of the waiver of the privilege or act (which one would expect him to as a matter of course) so I am unable to conclude that the applicant had waived the privilege. Her attorney was not lawfully in a position to waive it on her behalf without consultation. There is no evidence of such consultation.

15. It is unclear from the bundle C or arguments from the parties how the particular photograph which captures the note in question, came to be in the respondent's possession as documentary evidence of misconduct, this aspect was specifically contested by the applicant during the hearing that led to her dismissal, and there is no evidence that it was provided by the applicant or her attorney to be reproduced or photographed at the time it was raised as an issue and handed to the respondent's attorney. The chairperson of the hearing did not decisively deal with the origin of the document in evidence and how he/she came to accept it as admissible evidence, despite it being a matter of dispute at the hearing. I cannot conclude that the photo of the document was properly discovered or obtained.'

[10] The third respondent determined that the note has privileged status. In paragraph 17 of the arbitration award, the third respondent determined that the first respondent did not waive her right with regard to the privileged status of the note when the note was handed by her representative to the applicant's representative.

[11] In paragraph 18 of the arbitration award, the third respondent determined that the evidence (the note) in respect of the charge was not admissible and, therefore concluded that the dismissal was substantively unfair.

[12] In determining the remedy, the third respondent took into account:

- 12.1 the first respondent's right to legal professional privilege;
- 12.2 the improper admission of the evidence;
- 12.3 the substantial length of service.

Evaluation

13 In the case of *SA Social Security Agency v National Education Health & Allied Workers Union on behalf of Punzi & Others*¹ (SA Social Security Agency) the Labour Court *inter alia* stated in paragraph 8 the following:

‘Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review. In the result, the principle of speedy resolution of disputes is ultimately sacrificed.’

14 In paragraph 5 of the *SA Social Security Agency* – matter, the Court stated the following:

‘I fail to comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence. A decision made in such a way means that the Labour Court must answer all the following questions in the negative:

“(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?”

15 In the matter of *Hillside Aluminium (Pty) Ltd v Mathuse & others (Hillside Aluminium)*,² Prinsloo J referred to the status of a disciplinary record as evidence

¹ [2015] 36 ILJ 2345 (LC); [2023] ZALCJHB 286.

² (2016) 37 ILJ 2082 (LC); [2016] 10 BLLR 1041 (LC).

before the arbitrator. The pre-arbitration agreement between the parties *in casu*, as placed on record at the arbitration, confirms that the common bundle presented by the parties served as the record of proceedings and the content of the bundle is admitted as correct. There is no indication by the parties in the pre-arbitration agreement that the record of the disciplinary hearing would be accepted as evidence in the arbitration. In the *Hillside Aluminium* - matter, Prinsloo *inter alia* stated the following:

[63] In casu it is common cause that the parties agreed that the record of the disciplinary hearing was what it purported to be and that it was a fair reflection of what transpired. As such the parties could use the record in cross-examination and as part of the evidence they wanted to introduce.

[64] There was no agreement between the parties that the record of the disciplinary hearing would be accepted as evidence in the arbitration. The agreement was limited to an acceptance that it was what it purported to be.'

16 The indication from the arbitration award is that the third respondent considered evidence not properly placed before him when he determined the applicability of the privileged status of the note and more specifically, whether the privileged status was waived by the first respondent.

17 The review test that must be applied in deciding whether an arbitration award is reviewable has been rehearsed in enumerable cases as to whether the decision reached by the arbitration is one that a reasonable decision-maker could not reach. In the matter of *Head of the Department of Education v Mofokeng & Others*³ the Labour Appeal Court provided *inter alia* the following exposition of the review test:

'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 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

³ (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at para 33.

from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

18 The failure of the third respondent to request the parties to lead evidence on issues of concern that he clearly identified in the arbitration award or at least request the parties to submit a stated case, is sufficient to set aside on that ground alone the arbitration award.

Costs

19 Having taken into consideration the relevant facts and circumstances and having regard to the requirement of law and fairness, it would not be appropriate to make a cost order.

20 In the circumstances I make the following order:

Order

20.1 The award under Case No GATW9323/18 is reviewed and set aside;

20.2 The dispute is remitted to the second respondent for arbitration anew before a Commissioner other than the third respondent;

20.3 There is no order as to costs.

P.H. Kirstein

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

M Ledwaba of Cliffe Dekker Hofmeyr Inc.

For the first respondent:

G J Geldenhuys of Geldenhuys Inc.