IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: J 4694/99

In the matter between:

ANGLO VAAL OPERATIONS LIMITED Applicant
(NEW VAAL COLLIERY)

and

THE INDEPENDENT MEDIATION SERVICES
OF SOUTH AFRICA AND OTHERS Respondents

J U D G M E N T

BASSON, J:

[1] This is an application for the review of an arbitration award issued under the auspices of the first respondent, the Independent Mediation Services of South Africa ("IMSSA"). The arbitration took place between the applicant, Anglo Vaal Operations Limited (New Vaal Colliery) and the third respondent, Mr L Ferreira. The arbitration award under review is therefore the product of a so-called private voluntary arbitration in terms of the Arbitration Act, 42 of 1965 ("the Act").

[2] It was common cause between the parties that the arbitration award stands to be reviewed (in terms of section 33 of the Act) only on the so-called narrow basis, set out in cases such as Eskom v Hiemstra NO and Others 1999 20 ILJ 2362 LC at 2368F and Seardal Group Trading (Pty) Ltd t/a Bonwit Group v A Andrews and Others (unreported case no: C483/99 dated 10/3/2000).

[3] In the event, the narrow grounds on which the Court would interfere would be, inter alia:

(a) the arbitrator's lack of jurisdiction;

(b) the arbitrator exceeding his or her terms of reference;

(c) the arbitrator's lack of independence; and

(d) the arbitrator committing a gross irregularity or misconduct.

[4] The applicant appears to rely especially on paragraph (b) above, in that the arbitrator allegedly exceeded his terms of reference (the arbitrator being the second respondent in casu).

[5] The terms of reference of the arbitrator, and this was also common cause between the parties, can be found in the collective agreement which regulates arbitrations of this nature between the relevant parties. I quote in this regard from the heading "Compulsory Adjudication" (at page 55 of the papers):

"In the event of a DRC being unable to settle the dispute, it shall endeavour to agree the issues in dispute. The dispute, or the agreed issues, as the case may be, shall be referred to the arbitrator for adjudication in terms of this agreement. The agreed issues and the terms of this agreement shall constitute the arbitrator's terms of reference".

[6] And, to put it beyond doubt, clause 13 of the collective agreement reads as follows:

"The arbitrator shall confine the proceedings to issues identified by the DRC as the issues in dispute".

[7] As far as the remedy at arbitration is concerned, the said collective agreement also identifies the remedy (at clause 12 under "Adjudication Procedure". Clause 12 reads as follows:

"The terms of reference of the arbitrator shall be to determine whether dismissal of the employee was procedurally and substantively fair, with full powers to determine the above dispute in the manner he deems to be fair and equitable and to award an appropriate remedy as defined hereunder:

12.1 To confirm the decision to dismiss; or

12.2 to reinstate the employee with or without retrospective effect, save that any such retrospective reinstatement shall not exceed a period of six months or a date of dismissal whichever is the lesser; or

12.3 to uphold the dismissal decision, but to award the employee an appropriate compensatory award which shall not exceed the employee's basic monthly pay for a period of six months or a period since the date of his dismissal, whichever is the lesser".

[8] It has been held, as a general principle, also in regard to the former industrial court, that an adjudicating body

should not be hasty to interfere with the employer's sanction. In other words, in terms of the Labour Appeal Court decisions in cases such as De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2000) 1 ILJ 1051 (LAC) and Toyota SA Motors (Pty) Ltd v Radebe and Others [2000] 3 BLLR 243 (LAC) it was held that some deference must be shown to the sanction imposed by the employer, in that the employer's prerogative in this regard, although not unimpeachable, must be respected.

[9] Mr Hutton argued on behalf of the applicant that the principle to be applied, is that, in general, an arbitrator should not readily interfere with such sanction, but interfere only in cases where the sanction is unfair. This means that, where the sanction is not unfair, the arbitrator (or the adjudicating body) itself cannot substitute such sanction with what the arbitrator regards to be a fair sanction. In my view, this appears to be the correct summation of the law in this regard.

[10] I do not believe that the collective agreement in casu as such in any way abrogates from this general principle. It is clear that its provisions give the arbitrator concerned an option as to which would be the appropriate remedy (see paragraph [7] above).

[11] Paragraph 12.1 of the collective agreement grants the arbitrator the option to confirm the decision to dismiss, and therefore to uphold the sanction applied by the employer. Paragraph 12.2 allows the arbitrator concerned to reinstate the employee with or without retrospective effect and paragraph 12.3 allows the arbitrator to uphold the dismissal decision, but to award the employee an appropriate compensatory award within a prescribed maximum. This appears to give the arbitrator concerned a wide discretion as to the amount of compensation he or she should award.

[12] Clearly, these remedies differ from those provided in terms of section 194 of the Labour Relations Act, 66 of 1995 ("the LRA"). I reiterate that the general principle should apply, namely that the decision to dismiss as a sanction should not readily be interfered with, unless it is unfair. It is also clear from the provisions contained in clause 12 of the collective agreement that the arbitrator shall determine whether the dismissal was "substantively fair" (see paragraph [7] above).

[13] In the present matter the arbitrator concerned, despite having in the arbitration award itself quoted the contents of paragraphs 12.1 to 12.3 of the collective agreement (above at paragraph[7]) as being the terms of reference within which to award the appropriate relief, awarded relief in the following manner.

[14] I quote from the award (at page 66 of the papers) where the second respondent overturned the sanction of dismissal and substituted the following:

" 1. The grievant to be reinstated with full retrospective effect from the date of his dismissal.

2. The grievant will be given a final written warning valid for six months for being under the influence of alcohol at the workplace.

3.The grievant with immediate effect to be placed under any agreed accredited alcoholic assistance program.

4.The company shall monitor the progress of the grievant in this program on a regular basis. Should the grievant fail to participate in this program, the company shall have the right to institute disciplinary action against the grievant".

[15] After being challenged in the founding affidavit with exceeding the terms of reference in regard to awarding such relief, the second respondent, that is, the arbitrator in casu (at page 93 of his explanatory affidavit at paragraph (e)) stated the following:

"Despite dismissal being the appropriate sanction in the circumstances, it was in the interest of justice within the specific context that the third respondent receive a final written warning"(emphasis supplied).

[16] In my view, the arbitrator in adding to the relief in paragraph 1, that is, by adding paragraphs 2, 3 and 4 (quoted above at paragraph [14]) substituted the sanction of dismissal with what to his mind, would have been an "appropriate sanction" in the circumstances and did so in "the interest of justice". The arbitrator therefore ordered the third respondent to receive a final written warning, regardless of the fact that "dismissal (is) the appropriate sanction" (see paragraph [15] above).

[17] It was also clear from the affidavit of the second respondent (at the said paragraph (e) quoted above at paragraph [15]) that the arbitrator was of the view that the dismissal of the employee party should have been upheld, unless he could substitute the dismissal sanction with another

"appropriate sanction" in that it would have to include a final written warning. This leaves one with the distinct impression that, had this not been possible for the arbitrator to do, the arbitrator would not have awarded the primary or most dramatic remedy of reinstatement (see paragraph 12.2 of the collective agreement quoted above at paragraph [7]).

[18] Mr Maritz on behalf of the respondents, argued that the competence to issue another type of sanction in the form of a final written warning, can be read into clause 12.2 of the collective agreement, because the introductory paragraph states that the arbitrator may determine the above dispute in a manner he deems to be fair and equitable.

[19] I do not agree with this reasoning for the following reasons. It is clear that the introductory paragraph is limited with the words "to award an appropriate remedy as defined hereunder". Further, the sanction of a final written warning is clearly a sanction that is not mentioned at all in the relief prescribed and is not a sanction that can without more be read into the remedy of reinstatement. It is, in effect, not a remedy, but it is, in effect, a punishment and in this regard, the only punishment that the arbitrator can hand out is to confirm the decision to dismiss in terms of paragraphs 12.1 and 12.3 of the collective agreement (quoted above at paragraph [7]). If the arbitrator does not want to confirm the decision to dismiss, it is clear that he will then set aside the decision to dismiss by reinstating the employee in terms of paragraph 12.2 of the said collective agreement.

[20] There is no indication at all that an arbitrator can mete out any appropriate punishment other than that provided for in paragraph 12.1 of the collective agreement. However, the arbitrator in casu clearly substituted such punishment with another form of punishment which in his view was a fair or "appropriate" sanction, and that was to impose a final written warning.

[21] In the event, as the arbitrator's terms of reference or powers in regard to the possible remedy was clearly prescribed by clause 12 of the

collective agreement that regulates arbitrations, the arbitrator (the second respondent) exceeded the terms of reference by adding paragraphs 2, 3 and 4 to the remedy when he overturned the sanction of dismissal and substituted it with an order for reinstatement coupled with a final warning.

[22] Having gone outside the terms of reference and having thereby exceeded his powers, the arbitration award in casu falls to be set aside on review in terms of section 33(1) of the Arbitration Act, which specifically provides for this ground of review.

[23] It was argued on behalf of the respondents that merely the remedy should be set aside. However, as the remedy is intricately connected to the merits of this dispute, namely the blameworthy conduct or misconduct of the applicant (as it also appears from paragraph (e) of the affidavit of the arbitrator quoted at paragraph [15] above), it would be the more appropriate remedy to refer the matter back for arbitration anew before a different arbitrator.

[24] It was argued that costs should follow the result and, in fairness, I see no reason why costs should not follow the result.

[25] I make the following order:

1. The award handed down by the second respondent on 7 October 1999 is reviewed and set aside.
2. The dispute is referred back to be dealt with in terms of the collective agreement with the proviso that the arbitration should be conducted anew before a different arbitrator.
3. The third respondent is to pay the applicant's costs herein.

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Basson, J

: 3 August 2000

: 3 August 2000 (*ex tempore*)

On behalf of applicant : Adv Hutton

On behalf of respondent : Adv Maritz