



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO. JR 1814/2013

In the matter between

GREAT NORTH TRANSPORT

(SOC) LTD

Applicant

And

CCMA

First Respondent

HN MATSIRE N.O.

Second Respondent

ND MOKOENA

Third Respondent

Heard: 22 June 2016

Delivered: 02 November 2016

Summary: When an arbitrator fails to deal with the substantial merits of a dispute and reach an unreasonable decision, his or her award becomes susceptible to review.

JUDGMENT

Lallie J

Introduction

- [1] The applicant brought this application to review and set aside an arbitration award of the second respondent who will be referred to as the commissioner in this judgement. The application is opposed by the third respondent who filed an application for the dismissal of the review application owing to the delay in its prosecution. The third respondent expressed his intention to oppose the review application. The application to have the application for review dismissed is opposed by the applicant. When this matter was argued, there was no appearance by or on behalf of the third respondent.

Material facts

- [2] The third respondent was employed by the applicant as a Human Resources Manager. In 2012, the applicant had vacancies in its Bapedi and Motetema depots. In letters dated 14 September 2012, the third respondent invited a number of the applicant's employees including the managers of the depots to participate in interviews to fill the vacancies. The interviews were scheduled to be held at the Bapedi Depot on 17 September 2012. Mr Mabona ("Mabona"), the Bapedi Depot Manager, pointed out that the scheduled interviews would be flawed as the third respondent had failed to comply with recruitment procedures. He sought the extension of the closing date for applications to allow more candidates to apply and for the process to be consistent with recruitment procedures. In response, the third respondent invited the depot managers and members of the Bapedi Depot Skills Committee to a short listing session scheduled for 17 September 2012 at 09h00. The applicant alleged that the third respondent lied and said that the applicant's head office had either conducted the short listing of candidates or took a decision not to embark on the short listing exercise. The interviews were then cancelled and

a number of charges were preferred against the third respondent. A disciplinary enquiry into the charges found him guilty of two charges and dismissed him for dishonesty in that he lied that GNT head office had conducted or resolved not to conduct short listing for the vacancies of H R Manager and System Operator for the Bapedi depot. The third respondent referred an unfair dismissal dispute to the first respondent ("the CCMA"), where the commissioner found his dismissal substantively unfair and ordered his reinstatement. In this application, the applicant seeks to have the award reviewed and set aside.

- [3] The arbitration award was issued on 11 August 2013 and the application for review was filed on 17 September 2013. In February 2015, the third respondent filed an application for the dismissal of the review application owing to the applicant's delay in its prosecution.

Application for the dismissal of the application for review

- [4] The application to have the review application dismissed was triggered by what the third respondent perceived as the applicant's inordinate delay in its prosecution. The chronology of the relevant facts starts with the dismissal of the third respondent on 9 January 2013. He challenged the fairness of his dismissal at the CCMA which issued an arbitration award on 11 August 2013. The applicant launched its application to have the arbitration award reviewed and set aside on 17 September 2013. The applicant submitted that despite letters by his attorneys persuading the applicant to finalise the review application, the applicant persisted with its delay. It exacerbated matters by filing an unnecessary second review application on 5 February 2015. The third respondent filed the dismissal application on 21 May 2015.

- [5] Opposing the application, the applicant submitted that the third respondent had no basis for launching the dismissal application. It accused the third respondent of giving an incorrect account of the reasons for the delay by deliberately excluding material facts in the applicant's favour. The applicant attributed the initial delay to the inefficiency of its legal section, the head of which it eventually replaced. It acknowledged that the firm of attorneys which

initially assisted it in this matter failed to reply to the letters of the third respondent's attorneys dated 5 February and 3 April 2014, in which the third respondent sought progress on the review application.

- [6] In a letter dated 6 August 2014, the third respondent's attorneys referred to the applicant's letter of the previous day and informed the applicant of the instructions they received to reject the applicant's offer. They, *inter alia*, informed the applicant of the third respondent's wish to enforce the arbitration award and launch the application to have the review application dismissed. In a letter dated 25 August 2014, the third respondent's attorneys threatened to file the dismissal application. In a later dated 7 November 2014, the third respondent's attorneys asked the applicant to attend to finalise the review application within 30 days failing which they would apply for its dismissal. The applicant withdrew its mandate from the firm of attorneys which initially represented it because of its lack of diligence. It enlisted the services of a different firm of attorneys, namely, Kgathla Incorporated which, on 6 November 2014, requested copies of documents relating to the review application from the third respondent's attorney. Notwithstanding the offer to pay for the copies, the request was not acceded to. One of the reasons for the refusal was that Kgathla Incorporated was not properly on record. The applicant attributed part of the delay to the third respondent's refusal to provide the copies.

- [7] The third respondent submitted that he continues to suffer prejudice as a result of the delay as he is unable to enjoy the fruits of his success at arbitration. He further submitted that the applicant lacks prospects of success on review as it failed to lead evidence to prove that he committed the act of misconduct which led to his dismissal. The applicant submitted that the prejudice resulted from the third respondent's own failure to accede to its request for documents.

- [8] In *Sishuba v National Commissioner of the SAPS*¹, after analysing authorities on the consequences of delays by applicants in executing their claims, the court expressed the following view:

‘The focal point in considering whether to grant the order barring the employer, in this case, from proceeding further with the review application is the issue of justice and fairness to both parties. The question that then arises is whether the interest of the administration of justice, in this instance, dictates that the employer be barred from proceeding further with the review application’.

- [9] The decision to bar a party from proceeding further with a review application is not taken lightly. The explanation proffered by the applicant is that it was let down by people it trusted with its review application, namely, the head of its legal section and its initial firm of attorneys. When the applicant realised that they were not acting with the necessary diligence, it withdrew its mandate, enlisted the services of a new firm of attorneys and employed an acting head for its legal section.
- [10] Failure by the applicant’s representatives of choice to execute their mandate properly and cause inordinate delay is not an acceptable defence. I have, however, taken into account that the third respondent had a number of avenues open to him to enforce at the arbitration award shortly after it had been issued. The third respondent acquiesced to the delay. As late as the 7 November 2014, the third respondent’s attorneys afforded the applicant 30 days to amend and finalise the review application. When the applicant’s attorneys requested copies of vital documents which would have assisted them meet the deadline, the third respondent’s attorneys refused to cooperate. The applicant had to devise other means which caused further delay. Had the third respondent’s attorneys provided the documents, particularly after receiving the applicant’s attorney’s notice of appointment as attorneys of record, the applicant would have met the deadline by taking steps towards the finalisation of the review application within 30 days from 7 November 2014. In addition, any prejudice which the third respondent may

¹ [2007] 10 BLLR 988 (LC) at para 16

have suffered as a result of the delay can be cured by an appropriate costs order. Justice and fairness to the applicant and the third respondent will be achieved if the applicant is afforded the opportunity to proceed further with the application for review. The dismissal application can, in the circumstances, not succeed.

The award

- [11] The commissioner noted that he was required to determine the substantive fairness of the third respondent's dismissal for dishonesty for lying by stating that the head office of the applicant had either resolved not to conduct short listing for the positions of HR officer and System Operator for the Bapedi and Mafeteng depots respectively. The third respondent denied having committed the misconduct. After taking into account the evidence tendered at the arbitration, the commissioner found that only one witness, Mabona, the Bapedi Depot Manager, linked the third respondent to the misconduct which led to his dismissal. He testified that the third respondent told him that short listing had been done at head office. Mabona conceded under the cross examination that there were errors in his testimony. The commissioner noted that the charge which forms the basis of the third respondent's dismissal does not indicate the person he lied to and the date and venue the lie was told. He found that the evidence of the parties before him balanced evenly and concluded that the applicant could not be deemed to have discharged the onus of proof. He found the third respondent's version reasonably probably true. He concluded that the applicant had failed to discharge the onus of proving the substantive fairness of the third respondent's dismissal. He found the third respondent's dismissal substantively unfair and ordered his reinstatement.

Grounds for review

- [12] The applicant submitted that the commissioner committed gross irregularities in finding that all the witnesses of the applicant did not testify that the third respondent had told them that short listing had been conducted at head office as he later found Mabona's evidence on the issue different. A further gross irregularity the applicant sought to rely on was that having accepted Mabona's evidence that the third respondent had told him that short listing had been conducted at head office, he

reinstated the third respondent without giving reasons. Another attack on the award is mounted on the commissioner's failure to deal with the substantial merits of the dispute by not applying the correct principles to resolve the dispute of fact arising from the mutually exclusive versions presented by the parties before him. The applicant also submitted that the commissioner failed to reach a reasonable decision based on the facts before him.

Analysis

[13] The test for review based on irregularities committed by commissioners in the conduct of arbitrations is expressed as follows in *Head of the Department of Education v Mofokeng and others*².

'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 an reasonable decision-maker could reach on all the material that was before him or her.'

[14] Section 138(4) of the Labour Relations Act 66 of 1995 as amended ("the LRA") enjoins commissioners to deal with the substantial merits of disputes when conducting arbitration proceedings. The reviewing court is required to consider the totality of the evidence before the arbitrator before deciding whether the decision reached by the arbitrator is one that a reasonable decision-maker could make³.

[15] The applicant highlighted a number of irregularities committed by the commissioner in the conduct of the arbitration and argued that those

² [2015] 1 BLLR 50 (LAC) para 32

³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) para17.

irregularities had an effect of rendering the arbitration award unreasonable. It is common cause that the commissioner was presented with two mutually exclusive versions. The applicant submitted that the third respondent had made himself guilty of serious misconduct which justified his dismissal and the third respondent denied having committed the misconduct. The commissioner was required to determine the fairness of the third respondent's dismissal. He had to decide whether the applicant had discharged the onus of proving the substantive fairness of the dismissal. The commissioner had a duty to deal with the substantial merits of the dispute by, *inter alia*, resolving the dispute of fact. In deciding whether the applicant had discharged the onus of proof, the commissioner, had to apply the principle in *Stellenbosch Farmers Winery Group Ltd & Martell et Cie & others*⁴. He did not. He accepted both versions. The commissioner was required to apply the relevant legal principles and choose one. The commissioner undertook the enquiry into the fairness of the third respondent's dismissal in the wrong manner and reached an unreasonable decision.

[16] A proper decision on the fairness of the third respondent's dismissal can be made after the dispute of fact has been correctly resolved. The test for resolving a dispute of fact can, in terms of the *Stellenbosch Farmers Winery* decision (*supra*) be applied by a decision maker who has observed the witnesses testify and had the opportunity of making a finding on their demeanour and conduct. I am not convinced that the transcript of the arbitration proceedings has sufficient information on which a decision on the fairness of the third respondent's dismissal can be based.

[17] In the premises the following order is made:

17.1 The application for the dismissal for the review application is dismissed.

17.2 The arbitration award issued by the second respondent dated 11 August 2013 is reviewed and set aside.

⁴ 2003 (1) SA 11 (SCA)

- 17.3 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate Basson

Instructed by Kgatla Inc

LABOUR COURT