IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 903/17

In the matter between:

DORCUS L MASITO **First Applicant**

and

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

FAIZEL MOOI *N.O*. **Second Respondent**

NETCARE KRUGERSDORP HOSPITAL **Third Respondent**

Enrolled: 07 May 2020, in view of the measures implemented as a result of the Covid-19 outbreak this matter was decided on papers.

Delivered: This judgment was handed down electronically by circulation to the parties representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 22 May 2020.

JUDGMENT

MABASO, AJ

Introduction

[1] The question to be answered in this judgment is: Do the facts before the Second Respondent justify his outcome? The guiding principle is the six pillar requirements as set out by the Labour Appeal Court (LAC) in *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others* thus:[1]

> "(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 employed give the parties a full opportunity to have their say in respect of the dispute?
>
> (ii) Did the Arbitrator identify the dispute he 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? and
>
> (v) Is the Arbitrator's decision one that another decision-maker reasonably have arrived at based on the evidence."[2]

[2] The Applicant is challenging the arbitration award that was issued by the second respondent under the auspices of the first respondent under case number GAJB 24537-16, wherein the latter concluded that the dismissal of the applicant by the third respondent was substantively fair but procedurally unfair.

[3] The applicant is Dorcus L Masito (the employee). The first respondent is the Commission for Conciliation, Mediation and Arbitration (the CCMA), the second respondent is the Commissioner of the CCMA, Faizel Mooi, (the Arbitrator), and the third respondent is Netcare Krugersdorp Hospital (the employer). Only the employer is opposing this application.

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[1] [2014] 1 BLLR 20 (LAC) at para 20. (*Goldfields*)
[2] .Court Emphasis.

Preliminary Points

[4] The employer argues that the application is deemed to have been withdrawn therefore, should be struck from the roll. In support of its point, it argued that according to the CCMA notice[3] the records were dispatched on 23 May 2017, therefore, the employee should have delivered the records on or before 17 August 2017 but were delivered on 03 November 2017. The employer stated that it has no knowledge as to when did the Registrar notify the applicant that the records were ready for collection.

[5] The employer relies on the provisions of the Practice Manual which provides that

> "11.2 Applications to review and to set aside arbitration awards and rulings
>
> 11.2.1 Once the Registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.
>
> 11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been received.
>
> 11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent"s consent for an extension of time and consent has been given[4]…"

[6] Rule 7A (2)(b) requires that the CCMA must notify an applicant once it has delivered the records to the Registrar, and rule 7A(5) requires the Registrar to make available to the applicant the records received from the CCMA. The introduction of paragraph 11 of the Practice Manual is that once the Registrar has received the records and sorts them accordingly. Then it will notify the applicant that it is now ready for collection. Therefore, a party cannot rely on

[3] Rule 7A(3) Notice
[4] Court Emphasis

the notice in terms of Rule 7A(3) that the other party is aware of the records, I say this because the practice manual was introduced with the aim of *inter alia* facilitating the administration of this Court. Therefore, a respondent who claims a deemed withdrawal must confirm that the Registrar did notify the other party. In this matter, the applicant states as to when they received the records, and there is no indication that the Registrar notified her to collect the records, therefore, conclude that it will be regular for this Court to make a ruling that the review is deemed withdrawn.

[7] The employer, in its answering affidavit, incorporated what is termed condonation for the late filing of opposing papers. They were delivered on 27 November. 2017, the replying affidavit challenging the late delivery of the answering affidavit was delivered on or about 22 January 2018. This is beyond the stipulated period stated by clause 11.4.2 of Practice manual.[5] Therefore, as the objection was out of time, the answering affidavit is properly before this Court.

The arbitration

[8] The employee was dismissed by the employer following an internal disciplinary hearing that found her guilty. Reading the charge sheet and the award she was found guilty of theft. Before the Arbitrator, the employee was challenging both procedural and substantive fairness of the dismissal.

[9] The dismissal of the employee emanated from a damnedest event, that in August 2016 an abusive ex-boyfriend (the boyfriend) of the employee visited the latter's workplace, the employer, and delivered to the management certain items including the employer's personalised teaspoons,[6] then left the

[5] Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serve a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse

[6] P 79

premises. The Human Resource Manager then invited the employee to the boardroom and apprised her of the incident.[7]

[10] When the employee was asked to identify the items, she immediately set down and put her hands on the side of her head and looked down. Furthermore, she avowed of removing the items from the employer, but she said she never thought that the boyfriend wants to get to her in this way.[8] Consequently, she was asked to put her admissions in writing, which she did. The excerpt thereof read thus.

> " …I am telling the truth that I took the Theatre and the Response of Netcare I did a stupid mistake after so long and I am apologising for that if you can give me a second chance to prove my honesty to you... is a long time 2010 when I was at the theatre taking caps and spoon. I wish you can I hope you forgive me because the person who brought this is my x-fiance he verbalised that he wanted to destroy me and he did it. And if you are unable to forgive me I am asking again to pls not make him happy for what he did to me"[9]

[11] Because of the admissions, the employee was charged with misconduct in that she took the property of the employer without authorisation, to deprive it with no intention to return it.[10] During the hearing, she pleaded, not guilty. However, she was found guilty and dismissed from work.

[12] In her testimony, the employee admitted that the personalised items were presented and that she made the written statement above. However, she denied committing the offence. Her four fold defence are condensed, as put during cross-examination of the employer's witnesses, thus:

12.1 When she was invited to the boardroom was told that she stole the items and police had already been contacted and that she was to be arrested therefore she wrote it *"under duress"* as she was *"going to be arrested and immediately she was traumatised"*.

[7] ibid
[8] Ibid 42 and 121
[9] P 29 and 30, 58 and 124
[10] In criminal law parlance, this is theft.

12.2 She claimed fabrication as she alleged that the employer was getting to her as she had been dismissed previously and then reinstated in 2005;

12.3 she was being victimised because of her involvement within her trade union;

12.4 At the time of writing the statement, she had a mental condition and was suffering from depression, and

12.5 Denies ever agreeing that she removed the items from the employer.

[13] The employee's testimony was as follows. She confirmed making the statement and days later, she submitted the second statement, wherein it is stated that when she wrote the first statement, she was in the state of trauma. It is not the correct statement, and the reason for her to make the statement was *"because I have received threats from my boyfriend that is going to destroy me and kill me, I was under trauma because of the abuse from him".*[11] At the time of writing the first statement, she was not even sure what she was writing.

[14] The Arbitrator identifies the dispute between the parties and the issues that she had to decide with the defences that were raised by the employee.[12] The Arbitrator after analysing the substance of the dispute concluded that the version of the employer could not stand and indicated the reasons thereof, that the applicant did commit the offence of dishonesty as charged.[13] Consequently, what needs to be investigated is whether the grounds of review suggest that the Arbitrator, based on the totality of the evidence presented before him, failed to deal with the substantial merits of the dispute, which this may include a reviewable irregularity, which resulted in his decision being one that a reasonable decision-maker could not have made.

Grounds of review and the law

[11] See also p 108.
[12] Para 53.
[13] The award at para 66.

[15] A Commissioner ceased with the determination of the fairness of a dismissal is not limited to what transpired at the internal dismissal hearing as arbitration is a hearing *de novo*.[14] It is also trite law that irregularity alone is not a ground for review, as more is required. It must be shown that the irregularity prevented the other party from having a fair trial of issues which resulted in an unreasonable outcome.

[16] The applicant contends that the entire award is flawed as it does not represent the evidence that was presented before the Arbitrator. Specifically relating to how the Arbitrator dealt with the evidence of the chairperson of the hearing or lack thereof.[15] As indicated in the preceding paragraph, an arbitration is a hearing *de novo*. Looking at the arbitration award, the Arbitrator concluded that the dismissal was procedurally unfair. The The Arbitrator supports his conclusion in paragraph 50 and 51. The Arbitrator did not need to deal with each and every testimony in the award. On perusal of the documents, this Court concludes that no irregularity was committed.

[17] The Arbitrator is being challenged for the manner in which he dealt with the evidence relating to the relationship between the employee and her boyfriend[16]. He is accused of taking into account irrelevant evidence. Further, as to whether the person who is alleged to have brought the items was the former employee's boyfriend or not.[17] My conclusion is that this is not relevant considering that the employee already told the Arbitrator that the boyfriend told her of his intention.

[18] He is accused of not accepting that the first statement was made under duress. This court has considered this ground keeping in mind the Arbitrator's finding in respect of this alleged duress and concludes that the statement was not made under duress. As this Court entirely agrees with him, taking into account the evidence that was presented during the arbitration hearing. The

[14] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).
[15] Para 15.1.1 of the founding affidavit.
[16] Para 15.2.2 of the founding affidavit.
[17] 15.2.4 of the founding affidavit.

applicant wants the Court to apply the test that is applicable in an appeal, whereas this is a review application.

[19] The Arbitrator is accused of considering hearsay evidence regarding the identity of the employee's boyfriend. Looking at the records, it transpired that the employee accepted the identity of the boyfriend. It is essential to state that, most importantly is whether the personalised items were removed by the employee or not. According to the letter mentioned above, she accepted. As to whether it was duress or not, it is dealt with below.

[20] The Arbitrator is further accused of leading the employer's representative as a witness, during the arbitration and further, it is contended that there was no objection which the Commissioner did not make a ruling on. This point is not persuaded further by the employee, taking into account that in the answering affidavit, the employer details what happened in the arbitration hearing, and in reply, the employee accepted such an explanation. On perusal of the records I could not find where such an irregularity was made and the objection. The explanation provided in the answering affidavit, specifically paragraph 48 to 48.3 is accepted. It is concluded that there is no irregularity.

[21] I agree with the employee that the Arbitrator in concluding that the evidence in respect of theft is irrelevant and then later concluding that the employee committed theft amounts to confusion which resulted in an irregularity on the part of the Arbitrator. However the question is: does the irregularity result in a gross irregularity which renders the arbitration award reviewable? The answer is no. The reasons are thus.

[22] The Arbitrator rejected the evidence of the employee that she made the statement under duress. The employee's evidence was full of contradictions, taking into account that the versions which were put to the witnesses of the employer, when she tried to justify as to why she made the first statement, confirmed that she knew about the items that were brought by her boyfriend. The arbitrator rejected the version of the employee. Moreover, it must indicate that the employee decided to put forward versions which are different, as

stated above. Therefore, it was reasonable for the Arbitrator to conclude that the employee's action when making the first statement was done freely and voluntarily.

[23] The only reasonable inference that can be drawn is that the second statement was made as an afterthought. This is so because, during the arbitration, the applicant put five versions to the witnesses of the employer. Therefore, the Arbitrator's conclusion in respect of the offence for which the employee was dismissed for, ticks all the boxes of the six pillar requirements.

[24] I agree with the employee that the Arbitrator committed irregularity, an error of fact when he concluded that the employee had asked for compensation. However, such an irregularity does not amount to a reviewable irregularity because once the Arbitrator, in terms of section 191 of the LRA finds a dismissal to be procedurally unfair, he has the discretion to order compensation and nowhere in that section is it stated, that reinstatement has to be issued. The Arbitrator used his discretion in awarding relief, and this Court cannot easily interfere with such unless proper grounds are set out.

[25] I have perused the arbitration award, together with the supporting documents which include the arbitration records and conclude that the aforementioned grounds of review have no relevance to the substantial merits of the dispute.

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

Order

1. The review application is dismissed.
2. There is no order as to costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mphakathi (Sipho) Attorneys

For the Respondent: Bowman Gilfillan Inc.