REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1073/15

In the matter between:

Samuel Hendrik WALTERS Applicant

and

CCMA First respondent

Mervin JOHNSON N.O. Second respondent

Heard: 27 October 2016

Delivered: 2 December 2016

Summary: Review – LRA s 145. Procedural defects amounting to reviewable irregularities. Award reviewed and set aside. Dispute remitted to CCMA.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, a farm manager, was dismissed by the third respondent, Bosplaas Gouda, after he had allegedly sold cows belonging to the farm for his own pocket.

[2] He referred an unfair dismissal dispute to the CCMA. The arbitrator, Mervin Johnson (the second respondent) found that the dismissal was fair. The employee applies to have the award reviewed and set aside, and referred back to the CCMA.

Condonation

[3] The application is about eight weeks late. The applicant applied for condonation on 29 September 2016, a year after the award had been handed down. I shall consider the application for condonation with reference to the well-known principles in *Melane v Santam Insurance Co Ltd.*[1]

Degree of lateness

[4] The delay is significant. The arbitration award was handed down on 28 August 2015. The applicant says he received it on 1 September 2015. The six week time period within which to apply for review expired on 13 October 2015. He only did so on 18 December 2015, some eight weeks after the six week period had expired. And he waited for a year, until 29 September 2016 – a month before this application was heard – before applying for condonation. This excessive delay must be weighed up against the explanation therefor and his prospects of success.

Reason for delay

[5] The employee was not represented at arbitration. He was dissatisfied with the award. He approached Basson Louw attorneys in Malmesbury. They told him to apply for rescission. It was the wrong advice.

[1] 1962 (4) SA 531 (A) 532 C-F.

[6] On 16 September 2015, well within the prescribed time period, Basson Louw attorneys wrongly delivered a document called a “notice of intention to apply for variation of arbitration award” to the CCMA on behalf of the applicant. They compounded their bad advice by subsequently delivering, on 7 October 2015, an application for rescission in terms of s 144 of the LRA.[2]

[7] The rescission application was heard on 3 November 2015. The arbitrator in that application was the second respondent, Mr Johnson. The applicant was represented by an attorney, Erik Louw. The farm was represented by an official of an employer’s organisation. The arbitrator correctly ruled that the application amounted to a review in terms of s 145 and not rescission in terms of s 144. He dismissed the application for rescission on 11 November 2015. (The applicant has abandoned an application to review the rescission award after having obtained better legal advice).

[8] The applicant instructed his current attorney, Teresa Erasmus, on 30 November 2015 on the advice of a labour consultant, having terminated the mandate of Basson Louw attorneys. She is based in Stellenbosch; he lives in Gouda. He could only consult with her a week later, on 7 December 2015. She drafted a review application. The applicant signed the founding affidavit in terms of rule 7A(3) on 17 December and delivered the application on 18 December 2015.

[9] Unfortunately, it took more time for the applicant to obtain proper legal advice. It was only after his current attorney had briefed counsel, and when he consulted with Mr *Bosch* on 2 September 2016 in preparation for this hearing, that Mr Bosch told him that he had to apply for condonation. Counsel drafted the application for condonation and the applicant’s attorney delivered it on 29 September 2016.

[10] Apart from being badly served by his attorneys, the applicant also had other legal fires to fight. He lived on the farm with his wife. The farm applied for and was granted an eviction order on 2 November 2015. He appealed on 15 December 2015. The appeal is pending before the High Court.

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[2] Labour Relations Act 66 of 1995.

[11] The explanation is a reasonable one. Although there is a limit beyond which a litigant cannot escape the negligence of his attorneys, in this case the applicant took steps throughout in order to challenge the arbitration award. He is a layman who did not realise until late in the day that he had been receiving bad advice. And when he received good advice, he acted on that advice immediately.

.Prospects of success

[12] The extent of the delay and the reasons therefor must also be considered together with the prospects of success in the review application. And, as will become apparent, I consider those prospects to be good.

Conclusion on condonation

[13] Considering these factors cumulatively, condonation should be granted for the late filing of the review application.

Background facts

[14] The owner of Bosplaas, Duncan Stephenson, bought cows from Nick Dippenaar. It came to his attention that the applicant, Walters, sold cows to Moorreesburg Abattoir. He testified that Walters did so for his own pocket and without permission. He dismissed Walters for theft.

[15] The applicant denied any misconduct. He testified that the Adri Walters Trust bought the cows that were onsold to the abattoir from Dippenaar. He did not know that Bosplaas had also bought cows from Dippenaar; but Dippenaar was not the owner. The applicant instructed the farm manager, André Coetzee, to load a cow known simply as “cow 827” (as opposed to, say, Daisy) on a truck to be transported to Moorreesburg abattoir. He did so at the request of his wife on behalf of Adri Walters Trust, the owner (the entity that had bought cow 827 from Dippenaar). The proceeds of the sale was paid to the Trust and not to him.

Arbitration award

[16] The arbitrator recorded that the applicant had been dismissed for theft arising from the sale of the cows (including 827), allegedly for his own benefit.

[17] The arbitrator considered whether the applicant had committed the misconduct. He considered the evidence of Stephenson, Coetzee and the applicant.

[18] The arbitrator found Stephenson's evidence to be "clear and coherent". Bosplaas bought cow 827 from Dippenaar on 28 September 2014. Coetzee also did a stock count indicating that 827 was part of the Bosplaas stock and that she was slaughtered on 3 November 2014.

[19] The applicant, on the other hand, contended that Adri Walters trust had bought cow 827 from Dippenaar. But the arbitrator found that the stock report favoured the Bosplaas version that "three Fries cows" belonged to Bosplaas, and that the applicant had no proof that 827 belonged to the Trust.

[20] The arbitrator found that Walters had committed the misconduct and that dismissal was fair.

Grounds of review

[21] Mr *Bosch*, for the applicant, raised four grounds of review:

21.1 The applicant did not receive a fair trial, as there were a number of procedural defects in the conduct of the proceeding.

21.2 The finding that the dismissal was procedurally fair was not one that a reasonable commissioner could reach.[3]

21.3 The finding that the applicant was "guilty of theft" was not one that a reasonable commissioner could reach on the evidence before him.

21.4 It follows that the dismissal was not fair.

[3] i.e. the test set out in *Sidumo v Rustenberg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

Evaluation

[22] I shall first consider the attack on the alleged procedural irregularities in the arbitration proceedings. Should the applicant be successful on this leg, the dispute would have to be remitted to the CCMA and it would not be appropriate for this Court to express a view on the question whether the applicant had committed the misconduct.

Procedural defects

[23] I agree with Mr *Bosch* that, as the law now stands, errors in the conduct of the arbitration proceedings render an arbitration procedurally unfair and are actionable on review as a form of misconduct or gross irregularity.[4] Such irregularities prevent a party from having its case fairly heard or prevent a fair trial of the issues. They are not subject to the *Sidumo* test.[5]

Legal representation

[24] Mr *Bosch* argued that the arbitrator committed a reviewable irregularity by denying the applicant legal representation. It has been held that, where the arbitrator should have afforded legal representation but did not, it is a reviewable irregularity in itself.[6]

[25] The applicant represented himself at the arbitration. Bosplaas was represented by a Mr Jan Geldenhuys, an official of the South African Allied Transporters Employers Association (SAATEA). It does not appear that the arbitrator ascertained whether Bosplaas was a member of an employers' association that would appear to operate in the transport industry; nor, indeed, if it is a registered employers' organisation.

[26] In his founding affidavit, Walters alleged that Myburgh is an experienced labour consultant. Bosplaas did not deny this. At the commencement of

[4] Myburgh & Bosch *Reviews in the Labour Courts* at 81 and 2013 and the authorities summarised there.

[5] Cf *Toyota SA Motors (Pty) Ltd v CCMA* [2016] 3 BLLR 217 (CC) paras 105 and 192; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* [2014] 3 BLLR 207 (LAC) par 20; *BAUR Research cc v CCMA* [2014] 4 BLLR 374 (LC) par 18.

[6] *BAUR (supra)* par 18; *Colyer v Essack NO* (1997) 18 *ILJ* 1381 (LC) 1384; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman N.O*. (2013) 34 *ILJ* 2347 (LC) paras 38-39.

the arbitration, the applicant's then attorney – Mr Erik Louw of Louw Basson attorneys – applied to represent Walters. He said:

> 'So dis derhalwe my submissie dat die applikant bygestaan moet word deur 'n regsverteenwoordiger, aangesien hy 'n ekspert [*sic* – m.a.w. deskundige] gaan moet kruisverhoor, bedoelende Mnr Geldenhuys wat 'n ekspert in die gebied is en hy nie op sy eie opgewasse is om met sodanige ekspert die nodige kruisondervraging te behartig nie.'

[27] Geldenhuys did not dispute that he is an expert. Instead, he relied on a submission that this was a simple dispute about theft.

[28] The arbitrator denied legal representation on the basis that the dispute is not complex and straightforward.

[29] Mr *Bosch* argued that, in doing so, he failed to have proper regard to the comparative abilities of the parties, viz an experienced labour consultant as opposed to a farm manager. He thus failed to exercise his discretion judicially.

[30] Ms *Harvey*, on the other hand, argued that the commissioner assisted the applicant throughout the arbitration hearing by describing the procedure; prompting him when necessary; and giving explanations as to what was expected of him.

[31] That may be so; but this is a case where there was a clear disparity between the abilities of the parties. The arbitrator exercised a discretion, but he did not do so judicially. He should have ensured that the playing fields were level, or at least not unreasonably bumpy. He did not. He should either have allowed the employee representation, or he should have disallowed the consultant.

[32] It is so that an employer may be represented by an employers' organisation of which it is a member.[7] But the arbitrator did not ascertain whether Bosplaas was indeed a member of SAATEA[8]; whether SAATEA is a registered employers' organisation, as envisaged by CCMA rule 25;

[7] CCMA rule 25(1)(b)(3).

[8] CCMA rule 25(2).

and he did not have proper regard to the comparative abilities of the parties.

[33] In these circumstances, I agree that the commissioner committed a reviewable irregularity. The dispute should be remitted to the CCMA for another arbitrator to decide whether representation should be allowed for either or both parties. That arbitrator should also ascertain whether Mr Geldenhuys is entitled to represent Bosplaas, should he wish to do so again.

Other procedural defects

[34] Mr *Bosch* also argued that the arbitrator did not allow the applicant the opportunity to obtain and submit evidence of the transaction between the Adri Walters Trust and Dippenaar.

[35] This is a crucial element of the applicant's defence. He testified that cow 827 was owned by the Trust and that there was a contract of sale reflecting that; but he did not have a copy and the arbitrator found that he "did not provide the necessary proof" that 827 belonged to the Trust.

[36] The applicant did say that he wanted to get a copy of the contract and that he wanted to call Dippenaar as a witness:

> 'So ek voel net om die ding reg neer te sit, ek wil daai koopkontrak op hierdie tafel hê. Mnr Dippenaar moet by wees, dat ons die datums en die goed 100% reg het en hoekom is daar nooit met die trust gepraat nie…"
>
> '[E]k het nie gedink dit sou nodig wees om Mnr Dippenaar te laat kom vir dit nie. Maar waarnatoe dit nou hiernatoe gaan, verwys dit alles dat Mnr Dippenaar is 'n key getuie in hierdie hele saak, en wie se koeie dit was en met wie hy die transaksie gehad het en wanneer het hy wat met Mnr Stevenson bespreek, want die trust was nie daarin geken nie. Dis hoekom hy 'n key getuie is.'

[37] Dippenaar was indeed a key witness. Bosplaas alleged that it bought the cows from him; the applicant alleged that the Trust did. Dippenaar's evidence and the existence of a contract of sale would be the best evidence of the truth of either allegation. But the arbitrator did not have the benefit of either piece of evidence.

[38] Having denied the applicant legal representation, should the arbitrator *mero motu* have given Walters the opportunity to bring this evidence – for example, by granting a postponement to enable him to do so? Ms *Harvey* says that would be expecting too much: Walters came to the hearing with the hope that he would have legal representation. He arrived with his attorney, Mr Louw. They should have been prepared. They should have brought the necessary witnesses and documentary evidence. They knew what their case was.

[39] The Court is indeed loath to impose too inquisitorial a duty on a commissioner; but the applicant made it clear that he only realised in the course of the proceedings that Dippenaar would be a key witness. On balance, I agree that the arbitrator should at least have allowed him to bring the necessary evidence, thus making it easier for the commissioner to ascertain the truth on a balance of probabilities, having regard to the best evidence available. As the court stated in *Dimbaza Foundries*[9]:

> 'In the circumstances where the applicant was represented by a layman, it is careless to assume that a postponement is going to be requested at an "appropriate" time. In my view it is the arbitrator's function to be sensitive and alert to the fact that he is there to guide the process particularly as section 138 of the Act provides…'

[40] For this reason also, I agree that the dispute should be remitted for a fresh arbitration before a different commissioner who would have the opportunity of considering the best available evidence afresh.

The findings on substantive fairness, procedural fairness and sanction

[41] Given my findings above, I need not express a view on the other review grounds raised by the applicant. Another arbitrator will have the opportunity to decide afresh on the questions of procedural fairness; whether Walters had committed the misconduct; and if so, the appropriate sanction. She or he should be able to do so with or without the benefit of representation for neither or both parties; and the best possible evidence.

[9] *Dimabaza Foundries v CCMA* [1999] 8 BLLR 779 (LC) para 105.

Conclusion

[42] The award should be reviewed and set aside, and remitted to the CCMA for a fresh arbitration.

Costs

[43] Although the application is successful, that is not the end of the dispute. The matter is to be decided afresh by a different arbitrator who may still decide that the dismissal was fair. And the applicant, represented by his attorneys, has been responsible for unnecessary delays and further costs. The farm should not be ordered to pay his costs, in law or fairness.

Order

[44] I therefore make the following order:

44.1 The arbitration award under case number WECT 8304/15 dated 28 August 2015 is reviewed and set aside.

44.2 The dispute is referred back to the CCMA for a fresh hearing before a commissioner other than the second respondent.

44.3 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Craig Bosch
Instructed by	Teresa Erasmus.
THIRD RESPONDENT:	Suzanna Harvey
Instructed by	Kemp Nabal Inc.