

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C260/18

In the matter between:

ENGEDI ELECTRICAL CC

Applicant

and

**THE NATIONAL BARGAINING COUNCIL
FOR THE ELECTRICAL INDUSTRY**

First Respondent

M PATEL N.O

Second Respondent

Heard: 5 June 2019

Delivered: 24 July 2019

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ for an order to review and set aside the arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent, the National Bargaining Council for the Electrical Industry (the NBCEI), dated 12 March 2018 under case number ECI078/17RTB.

¹ Act 66 of 1995 as amended.

- [2] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.
- [3] Prior to outlining the applicant's claims in detail and to considering the issues to which they give rise, it is necessary to summarise the facts that form the relevant background to the dispute between the parties.

Material background facts

- [4] The applicant and the first respondent's relationship emanates from the Main Collective Agreement² (the Main Agreement), which requires any employer operating in the electrical industry to register with the first respondent within a specific period and to pay certain levies and contributions to the first respondent in relation to its employees.
- [5] In terms of Clause 29(f) of the Main Agreement, an employer attracts personal liability in the event of an employee being disqualified from claiming benefits due to the employer failing to pay the contributions prescribed by the Main Agreement. The clause reads:
- 'In the event that an employee fails to qualify for death, disability and/or funeral benefits in terms of pension and/or provident fund agreements because the employer failed to pay contributions owing to the employee's membership, the employer shall be liable to pay such employee or his/her beneficiaries an amount of money equal to the death, disability and funeral benefits that would have been payable to the employee under the rules of the applicable fund had the contributions been paid by the employer.'
- [6] The genesis of this dispute arose from the applicant's alleged failure to make the necessary contributions as prescribed by the Main Agreement. On 9 March 2017, a claim was submitted for death benefits and funeral expenses following the death of the late Mr Patric Sethole. The first respondent's underwriters, Nestlife Assurance Corporation Limited, repudiated the claim after establishing that the applicant's contributions were in arrears.
- [7] On 09 May 2017, the first respondent wrote a letter of demand to the applicant demanding the benefit which the family of the deceased employee would have

² Government Gazette of 24 March 2017

been entitled to had the applicant made the contributions under the Main Agreement, amounting to R134 937.68. The applicant only paid the family an amount of R10 000,00 (ten thousand rand). This resulted in the third respondent issuing the applicant with a compliance order, however the applicant failed to make the payment. The matter was conciliated unsuccessfully and it was then set down for arbitration that was heard on 26 February 2016. Subsequently, the arbitrator issued the award on the 12 March 2018. It is this award that is the subject of this application.

The Arbitration

- [8] The issue before the arbitrator was whether the applicant contravened clause 29(f) Part 1 of the Main Agreement. The applicant was represented by Mr. Lan Lewis, a representative of the South African United Commercial And Allied Employers Organisation (SAUEO) and the first respondent was represented by Mr. Abraham Mabello, a designated agent.
- [9] The record evidences that prior to the arbitration hearing, the matter was conciliated with an attempt to resolve it. However, it could not be resolved. Consequently, the parties agreed to narrow the issues down and to confine the issue that the arbitrator had to determine to the question whether the contribution amount of R6 000,00 was paid by the applicant to the first respondent on the 31 August 2016.
- [10] On the one hand, Mr. Mabello submitted that after Mr Sithole's death, his family submitted a claim that was forwarded to the first respondent's Head office. However, the claim was not approved for payment as the applicant was in arrears. Consequently, Mr Mabello had a meeting with the applicant in which he indicated that the family was entitled to R20 000.00 for the funeral costs. The applicant indicated that he was not in a good financial position and that he would pay R10 000,00 which he paid. It was after the funeral that Mr. Lewis, on behalf of the applicant, disputed non-payment of the contribution and provided proof that it was paid into the first respondent's Nedbank account. Mr Mabello submitted that such payment was not received, as the first respondent did not hold any account with Nedbank and argued that it was surprising that the first respondent had always used the first respondent's correct account details.

- [11] On the other hand, Mr Lewis submitted the first respondent's bank account was not known to the applicant. He further submitted the applicant's payment history drawn from its internet bank and a letter from the bank confirming that the amount of R6 000,00 was paid on 31 August 2016 and that it was paid to the first respondent's bank account. Mr Lewis argued that in the absence of the first respondent's bank statement, it could not be verified whether the amount paid was received or not. He confirmed that the applicant received a letter from the first respondent in terms of which it was advised that the Nedbank account did not belong to the first respondent. However, he argued that the said letter was of no consequence as it was only sent to the applicant after 31 august 2016.
- [12] In his award, the arbitrator made a finding that the applicant was aware that the first respondent had no bank account with Nedbank and further that, by failing to ascertain that the payment was made into the first respondent's correct bank account, the respondent breached the Main Agreement. It is this award that is the subject of this application.

The Grounds for Review

- [13] The applicant's contention is that the arbitrator acted unreasonably by not allowing the parties to testify under oath and to test evidence through cross-examination. It was further contended that the arbitrator failed to consider the documentation presented as proof of compliance with the Main Agreement and as well as the applicant's arguments that the applicant was loaded by the first respondent's designated agent as a beneficiary on the system upon registration.
- [14] In opposing the application, the first respondent's contention is that there is no evidence that the applicant was denied an opportunity to cross-examine the third respondent's agent. However, in the alternative, the third respondent seems to suggest that cross-examination would not in any way advance the applicant's case. It is further contended that the record does not support the applicant's contention that the arbitrator refused to accept the documentary proof.

Applicable legal principles and analysis

- [15] Section 145 of the LRA provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) of the LRA defines a defect as the commissioner's misconduct in relation to the duties of the arbitrator as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.
- [16] The principle, as laid out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³, is whether the decision reached by the arbitrator is one that a reasonable decision maker could have reached. Therefore, the test on review is not whether the arbitrator came to a correct decision that the court sitting in the same position as the arbitrator would have reached, but whether the arbitrator arrived at a reasonable decision based on the material before him or her.
- [17] The applicant challenged the process adopted by the arbitrator in conducting the arbitration. In opposing, the first respondent relied on the provisions of section 138(1) of the LRA to submit that the arbitrator has a broad discretion to choose the manner in which she/he may conduct the proceedings. Section 138 of the LRA provides for the manner in which arbitrations may be conducted and it reads:
- ‘(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
- (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.
- ...
- (6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter

³ [2007] 12 BLLR 1097 (CC).

being considered in the arbitration proceedings.

- (7) Within 14 days of the conclusion of the arbitration proceedings -
 - (a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner.'

[18] In *Satani v Department of Education, Western Cape and Others*⁴, the Labour Appeal Court (LAC) stated that:

'[13] Section 138 of the Act empowers the commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA), including the Bargaining Council to conduct arbitrations under the LRA in a manner they consider appropriate in order to determine the dispute fairly and quickly. They are however, enjoined to deal with the substantial merits of the dispute with the minimum of legal formalities. The commissioners are given the discretion to decide the appropriate form of the proceedings and the rights conferred upon a party in terms of s138(2) are subject to the overriding discretion conferred on the commissioners.'

[19] The rights conferred upon a party to an arbitration includes giving evidence, calling witnesses, questioning witnesses and addressing concluding arguments.⁵ The CCMA Guidelines on Misconduct Arbitrations deal with how the arbitrator should, *inter alia*, conduct arbitration proceedings and evaluate evidence for the purpose of making an award.⁶ Clause 15 reads:

'The parties are entitled to exercise these rights irrespective of the form of proceedings. However, the manner in which they exercise those rights will depend on how the arbitrator decides in terms of section 138(1) to conduct the arbitration.'

[20] In the instant case, the parties agreed on the issue the arbitrator had to determine and the manner in which the arbitration would be conducted. The record shows that at the commencement of the arbitration, the arbitrator laid down the form in which he was going to conduct the proceedings as follows:

⁴ [2016] ZALAC 38; (2016) 37 ILJ 2298 (LAC).

⁵ Section 138(2) of the LRA, as amended.

⁶ Clause 2 of CCMA Guidelines on Misconduct Arbitrations

‘ARBITRATOR: ...The applicant as well as the respondent will make submissions or oral submissions to myself as to whether in actual fact this amount of R6 000,00 was paid to the Electrical Industry and whether it had been received by the electrical industry. The indication is then had this amount been received by the Electrical Industry within 60-day period the employer would not be liable for the funeral and death benefits of the employee and had it not been received within the 60-day grace period they would then have been liable for the death and the funeral benefits. Now I'm going to then give Mr Mabello the opportunity to make submissions to me in that regard and Mr Lewis will obviously oppose the submissions and Mr Mabello will have the right of reply and within 14 days thereafter an award would be issue. Just to also indicates the employee or the applicant in this matter had indicated that they have no documentation, the documentation is whatever is presented in the case file, is this correct Mr Mabello?

MR MABELLO: Yes

ARBITRATOR: And from the employer's side Mr Lewis has indicated that he's got four pages is that correct Mr Lewis?

MR LEWIS: That's correct Commissioner, I just want to add something maybe before Mr Mabello go on record... (intervention)

ARBITRATOR: So if we can just confirm gentlemen that the issue then narrowed in our discussions off the record is that in actual fact whether R6000,00 was paid to Council and was received by council which would in actual fact take out or either indicate the liability of the employer, is that correct Mr Mabello?

MR MABELLO: Yes

ARBITRATOR: Mr. Lewis?

MR LEWIS: Yes, that's correct.

ARBITRATOR: Okay good. Yes you wanted to say something Mr Lewis?

MR LEWIS: No that's the confirmation.

ARBITRATOR: Okay good, that is then confirmed. Good Mr Mabello from your side you will then indicate to me why do you state that the employer is liable

for the funeral and death benefit of the employee and let's just state for the record purposes the employee's name is Mr P Sithole, you can proceed.'⁷

[21] It is apparent that the parties agreed to address the arbitrator on one issue, namely whether the contribution amounting to R6000.00 was paid to and received by the first respondent. At no point did Mr Lewis object to the procedure adopted by the arbitrator in running the arbitration, attempt to inform the arbitrator that he intended to call witnesses or that he wanted to cross-examine Mr. Leballo or any other witness. To attack the arbitrator on the ground that he failed to allow the parties to testify under oath and to test evidence through cross-examination in the circumstances is meritless. More fundamentally, in this case the arbitrator identified the dispute, i.e. whether the R6000,00 contribution was paid into the first respondent's account as required in terms of the Main Agreement, and both parties addressed him to this effect.

[22] In this regard, I find the quote from *Head of the Department of Education v Mofokeng and Others*⁸ apposite:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an

⁷ Index to record, Page 15, line 11 to 25

⁸ [2015] 1 BLLR 50 (LAC) at para 33.

irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so 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 from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’ [Footnotes omitted]

- [23] In *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*⁹ the Labour Court said the following regarding what is required of the arbitrator in conducting arbitration proceedings:

‘[27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in *the* conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA ; McKenzie, *The Law of building and Engineering Contracts and Arbitration*, 5th Ed. pp 188-189).’

- [24] It is apparent from the reading of the award and the record that the arbitrator assessed the submissions made and the documentary evidence placed before him and preferred the first respondent's version. The applicant could not sway the arbitrator to favour its version on the probabilities. It is not for this Court to interfere with the arbitrator's reasoning for choosing one version over another when there were conflicting versions unless the decision is so implausible as to render it unreasonable.

⁹ (2000) 6 BLLR 716 (LC).

[25] It is my view that the arbitrator was reasonable in his assessment of the evidence before him and reached a conclusion that any reasonable decision maker could have reached on the probabilities of the versions placed before him. It follows that the applicant has not established any basis upon which the Court could find that the arbitrator's award was reviewable. As such, the applicant failed to discharge the onus of establishing that the arbitrator committed misconduct in relation to his duties, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers. It cannot be said that he reached a decision that a reasonable decision-maker could not reach. There is, therefore, no reason for this Court to interfere with the arbitrator's award.

Costs

[26] In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹⁰, that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[27] In the circumstances, I make the following order.

Order

1. The application to review and set aside the arbitration award issued by the second respondent under the auspices of the first respondent dated 12 March 2018 under case number ECI078/17RTB is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

¹⁰ (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC).

For the applicant: Advocate Venter

Instructed by: Andrie Hetcher Attorneys

For the third respondent: Advocate M. Mgxashe

Instructed by: Elton De Bruin Attorneys

LABOUR COURT