IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D615/2020

In the matter between:

ITHALA DEVELOPMENT FINANCE CORPORATION LTD **Applicant**

and

CLIFFORD SIYABONGA ZULU **First Respondent**

COMMISSIONER BESS PILLEMER N. O **Second Respondent**

THE CCMA **Third Respondent**

Heard: **31 May 2023**
Delivered: **2 June 2023**
Edited: **24 July 2023**

Summary: **Application to reinstate a deemed withdrawn review – opposition withdrawn – review reinstated. The applicant effectively complains about a latent gross irregularity in that the arbitrating commissioner latently rejected a testimony of its witness on the basis of it being inadmissible hearsay evidence without applying the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988 (Evidence Act). When faced with hearsay evidence, a decision maker must apply the provisions of the Evidence Act before admitting or not admitting such**

evidence. Failure to do so amounts to an irregularity in the arbitration proceedings and such failure depraves the arbitration award. A reasonable decision maker would not reject hearsay evidence without having regard to the provisions of the Evidence Act. Held: [1] The arbitration award is reviewed and set aside and it is replaced with an order that the dismissal of the employee was substantively fair. Held: [2] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before this Court served two applications as a sequel of an order by my sister Whitcher J to the effect that the reinstatement application should be enrolled together with a review application. Amidst submissions on the reinstatement application Mr. P Shangase (Shangase), counsel for the third respondent, Mr. Clifford Siyabonga Zulu (Zulu), withdrew the opposition to the reinstatement application which encapsulated a condonation for the late filing of the record relief. Owing to the withdrawal of the opposition, this Court, being satisfied that a case for reinstatement and condonation has been made, issued an order reinstating the review application and condoning the late filing of the record. Therefore, this judgment only concerns itself with the reincarnated review application. There was also a section 158 (1) (c) of the Labour Relations Act, 1995 (LRA) application. However, same was not enrolled before me. Nevertheless, since it sought to make the impugned arbitration award an order of this Court, given the view this Court takes at the end, the section 158 (1) (c) application would become moot.

[2] The review application was strenuously opposed by Zulu. The Court must point out upfront that the record of the arbitration proceedings alone constituted 17 volumes contained in no less than five lever-arch files. However, it turned out that the review application oscillates on one legal point; namely, was the second respondent, the erudite Madam Commissioner Bess Pillemer, entitled to reject the evidence of one Mr. Mkhize (Mkhize), the investigator, on the basis that it constituted inadmissible hearsay evidence, without having regard to the provisions of the Law of Evidence Amendment Act (Evidence Act)[1].

[3] It became common cause that the learned Madam Commissioner rejected the evidence of Mkhize solely because it constituted inadmissible hearsay evidence. This Court hasten to point out that during oral submissions Shangase vacillated between two positions and submitted that the learned Madam Commissioner considered the hearsay evidence and found that the scales of proof were evenly balanced. This submission lacks merit simply because by having regard to the body of the arbitration award, such alleged consideration is not apparent. More on this later.

Background Facts

[4] Given the view this Court takes at the end, the facts appertaining this dispute shall not be dealt with punctiliously. The salient facts are that on 1 April 2013, Ithala Development Finance Corporation Ltd (Ithala) employed Zulu as a Divisional Manager. Zulu was dismissed on 15 June 2018 following a disciplinary hearing into allegations of misconduct.

[5] Internally, Zulu faced four allegations of misconduct. He was found guilty of three of the allegations and was dismissed. Briefly, the three allegations involved alleged dishonesty and or violation of the Supply Chain Management (SCM) policy in respect of adjudication of a tender to construct a supermarket for a particular project; an allegation that Zulu advised an entity that did not meet the requirements to submit a tender

[1] Act 45 of 1988 as amended.

prior to other service providers being requested to submit bids to manage the project owned by the Dhlomo family; he instructed an official within the SCM of Ithala to submit a bid even if the invited bidder was not part of the approved database kept by Ithala; he failed to act in the best interests of Ithala and its client; he allowed a service provider to appoint a contractor who was part of that service provider and ultimately defrauded the Dhlomo family to the tune of R96 000.00 allegedly in respect of refunds for materials from suppliers; he failed to assist the Dhlomo family by escalating their complaint; he was complicit in the scam by a service provider to use a front in order to obtain a loan from Ithala; and that he withheld information which was prejudicial to Ithala.

[6] After being found guilty of the allegations and dismissed as outlined above and aggrieved by his dismissal, Zulu referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal. He effectively challenged the substantive fairness of his dismissal (that he is not guilty as charged and dismissal as a sanction was inappropriate if he is guilty of any of the allegations that led to his dismissal).

Grounds of Review

[7] The grounds of review were poorly articulated in the founding affidavit. However, others of the so poorly articulated grounds were not persisted with before me. Chiefly, Ithala laments the failure to consider evidence which failure distorted the outcome reached by the learned Madam Commissioner. In rejecting the evidence of Mkhize on the basis of it being inadmissible hearsay evidence, the learned Madam Commissioner failed to properly evaluate the evidence together with other documentary evidence. Ultimately, it was contended that her decision is not one that a reasonable decision maker may reach.

Evaluation

[8] Early on in the body of her impugned arbitration award, the learned Madam Commissioner made her intentions clear that all she was looking for is direct evidence and not any other form of evidence like hearsay

evidence. Where direct evidence was tendered she considered that to be in "*few focused areas*". Ultimately she reached this conclusion, which suggested that the alleged misconduct against Zulu was not proven:

> "[5.4] There was no other admissible evidence of the alleged misconduct. All there was after days of hearing was the hearsay and speculation of the investigator Mr. Mkhize. There was no documentation that tied the Applicant to the alleged misconduct that he was not able to explain, and the Respondent elected to not call the Dhlomos to testify, because of on-going litigation between them and the Respondent

[9] The above perspicuously demonstrates that the learned Madam Commissioner was critical of the reasons why Ithala failed to call certain witnesses. This approach is unfortunate. In an arbitration process, a commissioner is tasked to assess the evidence presented before him or her and not to be critical of a party's failure to call witnesses that a commissioner believes would have advanced the case of a party. The above finding suggests that the evidence elaborately tendered by Mkhize was considered to be inadmissible. What is also perspicuous in the rejection, is that the provisions of section 3 of the Evidence Act were not taken into consideration. The section provides the exceptions under which hearsay evidence should be admitted. It has long been held that hearsay evidence is admissible in arbitration proceedings[2]. Having rejected the evidence of Mkhize without due regard to the provisions of section 3 of the Evidence Act, the learned Madam Commissioner committed an irregularity which ineluctably means that Ithala did not enjoy a fair hearing of issues. At no stage did Zulu object to the admission of the evidence of Mkhize. Impliedly, the evidence was adduced with his agreement.

[10] The learned Madam Commissioner alerted the parties, who were represented legally represented, that the evidence of Mkhize was probably of the nature of hearsay. At that point, Zulu and his legal representative should have objected to the leading of evidence of that

[2] See *Sangweni v Matshaka N.O* unreported judgment [2019] ZALCJHB 173. See also *Exxaro Coal (Pty) Ltd v Chipana and others (JA161/17) [2019] ZALAC 27 June 2019.*

nature. Shangase argued that the evidence was admitted provisionally on condition that other witnesses would support it. Nowhere in the transcript is such an important ruling by the Madam Commissioner apparent. As a matter of procedure, when a witness tenders inadmissible evidence, the party against whom the evidence is tendered must immediately object to the tendering of such testimony. Failure to object would imply that there is an agreement as to the admission of such evidence. A decision maker faced with such a situation of objection to the admission of such evidence must do one of two things. Firstly, reject that evidence as being inadmissible. Secondly, provisionally admit such evidence based on certain conditions.

[11] In *casu*, the learned Madam Commissioner did neither of the two. The only thing she stated, even before receiving the evidence, was that the evidence will "*probably be hearsay*". That statement was brimmed with conjecture at the time it was made and it was with respect feckless. Shangase forcefully argued that during the cross-examination of Mkhize he objected to the hearsay evidence of Mkhize. It is one thing to put to the witness that his or her testimony constitutes hearsay, yet it is another thing to object to the admission of hearsay testimony. As stated before, nowhere in the transcript was it recorded that the evidence which was tendered by Mkhize was not agreed to. Cross-examination is a valuable tool available in any proceedings and it is aimed at discrediting the testimony or impugning the credibility of a witness. Its ultimate goal is to have the evidence of the cross-examined witness rejected as being untruthful. It is not a tool to be used to object to the admissibility of evidence.

[12] Given the nature of the arbitration proceedings, the interest of justice would require that hearsay evidence should be admitted. It must follow axiomatically that had the learned Madam Commissioner admitted the evidence of Mkhize as directed by section 3 of the Evidence Act a different outcome would have been reached. Thus the error committed by the learned Madam Commissioner had the distorting effect or contorted the outcome.

[13] However, another important consideration is that the evidence of Mkhize ties up with the direct evidence of one Khati. She testified amongst others that the entity she ran did not have the basic requirements demanded by Ithala to be considered for the contract such as the tax clearance and related documents. She was introduced to Zulu by Maharaj. Khati's entity was nevertheless recommended to Ithala by Zulu. This, Zulu did with the full knowledge that the recommended entity did not meet the basic requirements of Ithala. The retort that the SCM official to whom the entity of Khati was recommended should have herself followed the SCM processes misses the point by a proverbial mile. A senior employee, who has the interest of his employer at heart would not recommend a non-compliant entity. Clearly, in recommending such an entity, Zulu was not acting in the best interests of Ithala and its clients.

[14] It is apparent to this Court that the learned Madam Commissioner treated the allegations as if they were criminal allegations which required proof beyond reasonable doubt. She paid a huge premium on the bare denials by Zulu and ignored, as it were, to assess the probabilities regard being had to the admitted evidence from other valuable witnesses. This on its own is a reviewable irregularity. There was no legal basis to reject the entire evidence of Khati on the basis that there were contradictions. A reasonable decision maker would not have rejected the evidence of Khati in its entirety. As a matter of principle contradictions *per se* do not automatically lead to rejection of the testimony.

[15] Where an employee faces various acts of misconduct, should the evidence tendered at arbitration establish and prove one act of misconduct, which is serious enough to justify a dismissal, such is enough to substantively support the fairness of a dismissal. Zulu did not dispute the exchanged emails between himself and Maharaj. There was clear evidence that Zulu had a questionable relationship with Maharaj, which relationship did not advance the interests of Ithala at all. A senior employee who acts in conflict with the interests of his or her employer commits a serious misconduct. Shangase pitch-perfectly submitted that this Court need not dislike the findings of the commissioner. The test is

whether the decision is so unreasonable that no other reasonable decision maker may reach the said impugned decision. No reasonable decision maker would ignore a legal provision and still emerge with a reasonable outcome.

[16] For all the above reasons, the arbitration award by the learned Madam Commissioner is not one that a reasonable decision maker may reach. Regard being had to the totality of the evidence adduced before her, there is an unjustifiable disconnect between her findings and the evidence adduced. Her arbitration award falls outside the bands of reasonableness by a proverbial mile. Accordingly, the review application must succeed.

[17] This Court is in as good a position as the learned Madam Commissioner was. When the evidence of Mkhize together with the evidence of others is taken into account, as it should have been, there existed a fair reason to dismiss Zulu – he was guilty as charged. Regard being had to the seriousness of the allegations that Zulu made himself guilty of, the sanction of dismissal as imposed by Ithala was fair and appropriate and should not have been interfered with.

Order

[18] In the results, I make the following order:

1. The arbitration award issued by Commissioner Bess Pillemer under case number KNDB9219-18 dated 15 November 2020 under the auspices of the CCMA is hereby reviewed and set aside.

2. It is replaced with an order that the dismissal of Zulu is substantively fair.

3. There is no costs order.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms Z Rasool together with Mr. M T Magigaba

Instructed by: K Gcolotela and Peter Inc, Durban North

For Respondent: Mr Philani Shangase of AP Shangase and Associates, Durban.