IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D727/2021
Not Reportable

In the matter between:

NAMPAK DIVFOODS (PTY) LTD	Applicant
and	
AYANDA PRECIOUS DLAMINI	First Respondent
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)	Second Respondent
MANDLAKHE KHAWULA N. O	Third Respondent
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	Fourth Respondent

Heard: 06 December 2023
Delivered: 06 May 2024

JUDGMENT

GOVENDER AJ

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA), 66 of 1995 to review and set aside the Arbitration Award, issued by the third respondent (the Arbitrator) under case number: **MEKN11516** on 21 May 2021(the Award).

BACKGROUND

[2] The First Respondent/Ms Dlamini was employed by the Applicant on 26 January 2009, as a Graphic Designer. The Applicant alleged that on 2 October 2020, Ms Dlamini was requested to execute an alteration on a job previously done. The Applicant contended that the First Respondent was dishonest in that she withheld information on the quantity of plates utilised to execute the alteration and the duration spent on the task, resulting in a monetary loss to the company. This led to Applicant charging the First Respondent with misconduct.

CHARGES

[3] The charges that the First Respondent faced at the disciplinary hearing were:

Charge 1

i. Gross negligence in carrying out her duties in that on 2 October she submitted incorrect work to the printing lines. Which resulted in lost time in production amounting to 1.91 hours.

Charge 2

ii. Gross dishonesty in that she withheld information on the quantity of plates processed, issued and the duration spent in doing the required alterations. This resulted in excessive cost in the inventory amounting to R7 160.85.

[4] The Applicant led evidence against the Third Respondent in respect of Charge 2 only. The First Respondent was found guilty on Charge 2 and was dismissed. She was not satisfied with the outcome and referred an unfair dismissal dispute to the Fourth Respondent. At the conclusion of the arbitration, the Arbitrator found that the dismissal of the First Respondent was substantively unfairly and ordered her to be retrospectively re-instatement with effect from the 14 December 2020. The Applicant was not satisfied with the outcome of the arbitration and hence instituted this review.

Grounds of Review

[5] The Applicant seeks to set aside the Arbitration Award on the following grounds:

i. The Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by concluding that the CTP report constituted hearsay evidence and was therefore inadmissible evidence.

ii. The Arbitrator committed a gross irregularity in the conduct of the proceedings by failing to apply the "*helping hand principle"* in not advising the Applicant that it needed to call an expert witness to prove the veracity or accuracy of the CTP report under circumstances where he intended to construe the CTP report as hearsay and therefore inadmissible.

iii. The Arbitrator by drawing an adverse inference on the Applicant's failure to call Mr Ngadi as a witness during the arbitration proceedings, arrived at a conclusion which no reasonable decision maker could have reached. This conclusion materially affected the outcome of the arbitration proceedings and as such, constituted a gross irregularity in the conduct of the arbitration proceedings.

iv. The Arbitrator acted unreasonably, alternatively, erroneously, further alternatively, capriciously by reinstating the employee despite having found that the employee had misrepresented the time which it took to complete the task on the log sheet.

Opposition

[6] The First Respondent opposed the review and contended that the Arbitrator considered all the evidence that was placed before him and reached a reasonable decision that would have been reached by any Arbitrator on this matter. Further that the Applicant failed to advance reasons why he ought to be successful. The Third

Respondent contended that the Applicant submitted unused plates to the commission but failed to prove that the Applicant took eight hours to do the recovery. The Applicant also failed to call a witness (Protas) to lead evidence on the number of plates he made for the respondent. The First Respondent contends that the award is reasonable, lawful and procedurally fair as is required constitutionally[1].It must be pointed out that the Third Respondent has not challenged the second ground of review.

[7] I find that one grounds (i) and (ii) of the review are pertinent and I will determine them at this juncture , as I believe that it will be dispositive of the application. Grounds (i) and (ii) above are predicated on the contention that the Arbitrator committed a gross irregularity in the proceedings by firstly, failing to advise the Applicant , that he intended to construe the evidence of the CTP report as hearsay evidence , if an expert was not called to testify thereon on (i.e. applying the helping hand principle). Secondly, he failed to rule timeously during the arbitration hearing, on the admissibility of the CTP report resulting in a gross irregularity in the proceedings. Further that his ultimate finding at the end of the arbitration hearing that the CTP report was not admissible evidence as it was hearsay, had a direct and material effect on the final outcome of the arbitration proceedings.

Analysis/Evaluation

THE CTP REPORT AND THE ISSUE OF IT'S ADMISSIBALITY

[8] The Arbitrator rejected the log sheet /CTP report (from the output processing machine) as hearsay evidence on the grounds that the log sheet was a computer-generated form, which did not guarantee it's accuracy and further that the Applicant had failed to call an expert witness such as an IT specialist to testify with authority to the log sheet. Further no evidence was provided regarding the items deleted by ball point pen. I pause to mention, that the employer's witness, Ms Ngidi, who was the team leader of the graphic design team, testified that what the log sheet on A66

[1] Third respondent's HOA

seeks to achieve is a computer generated document which shows all the transactions in the CTP machine .[2]

[9] There is no doubt that the issue of the log sheet and times illustrated thereon to execute tasks, were pivotal to proving the charges against the First Respondent. Throughout the hearing, there was a dispute about the period of time that that First Respondent had taken to do the recovery and the alterations. The Applicant on the one hand contended that the First Respondent was dishonest as she indicated that she had taken 30 to 40 minutes to do the recovery on the computer, whereas she took more than 8 hours to complete the job and, in the process, she used twenty-two (22) plates. The First Respondent on the other hand disputed that she had taken that long to complete task and contended that she had used two plates and not 22.

[10] During the entire arbitration proceedings there were numerous references to the CTP report/log sheets. I am not going to detail them as they are self-evident from the transcripts and are in any event too numerous to mention. Ms Ngidi testified that the CTP report is the report generated by the Equious machine, which is the printer machine. Further that the times recorded on the CTP machine of the plate makers, reflect the time the machine takes to process the file or document[3] .

[11] Ms Ngidi, under cross-examination testified that "*What the finished report is telling me is that the Applicant started processing at 10:08 and finished and the last record of this job in particular was 14:11 and that is just for the processing of the plates."* During cross-examination, Ms Dlamini's representative, Mr Mlangeni, put to the witness that, "*Okay. The company said that CTP machine recorded that the Applicant used 22 plates."*[4]

[12] The cross-examination then digressed to the issue of the machine being on autopilot and further related to the issue of output which did not appear to be relevant to the matter. The Arbitrator stated: "*I do not even know the version of the*

[2] Para 18 of the award at page 21 of the pleadings bundle

[3] Transcript Vol 1 Page 86 lines 9 -15

[4] Transcript p96, lines 5-6.

Applicant with regards to time allocation. Now, you have moved to the cost of the computation of cost of damages. Now, why do you not finish with the time and then move to the plates and then move to the issue of costs?"[5]

[13] The Arbitrator correctly identified that the dispute before him revolves around time spent and the plates uses. He states that: ". *if we can deal with those issues and show me, why do you say it was not 30 minutes, why do you say it was not 22 plates, that is, it. Then we are gone."*[6]

[14] Clearly the CTP report /log sheet was the only clear evidence to prove or disprove the time spent on the task and the plates used. At page 102/numbered 66 of the Index of the Bundle, the times and number of plates utilised for each tasked is illustrated. There was also a version that page 102 from Bundle B is the snapshot of the CTP machines report and differs from the CTP report produced by the employer which illustrated that the Applicant started work at 10:00 in the morning. Whilst the Applicant contended that she started work at 10:20.[7] The response from Ms Ngidi was that the documents from Ms Dlamini were not computer-generated reports but were documents or files stored in the program which files or documents can be amended and/or edited or deleted.[8] This was disputed by Ms Dlamini.

[15] With respect to the critical question of whether or not the Arbitrator ought to have informed the parties, in particular the Applicant, that the CTP report constitutes hearsay evidence, unless they called expert testimony to prove the veracity of the reports , the court makes reference to what was held in the case of **Nkomati Joint Venture V CCMA and Others [9].**

[16] In the **Nkomati case** above, it was held that an Arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so. The purpose of a helping hand

[5] Transcript p115, lines 2-5.

[6] Transcripts Vol1 Page 96 lines 7 to 18

[7] Transcript p140, lines 15-18.

[8] Transcript p144, line 6 to p146, line 16.

[9] (2019) ILJ 819 (LAC) at para 5 and 18

is to prevent procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues.

[17] Notably, the merits of Nkomati referred a scenario where the Arbitrator failed to advise the appellant that since the employee (Smit) had recanted his plea of guilty, therefore the appellant was required to lead evidence on the merits of three charges and by such failure it was held that the conduct of the Arbitrator amounted to a gross irregularity. Similarly, the Arbitrator in *casu* failed to advice the parties that without an expert witness the evidence of the log sheet report /CTP report on page A66 will be rejected and no weight attached thereto. The Arbitrator states that the First Respondent challenged the authenticity and veracity of the CTP report and produced bundle B1, which she claimed was more accurate as compared to A66. This also resulted in a conundrum, as the veracity of her document was also challenged.

[18] In the case of **Exxaro Coal (Pty) Ltd & Another v Chipana & Others**[10] it was held that the:

> *"... (24) Those safeguards and precautions, duly adapted, also applied to the application of section 3 of the LEAA in civil proceedings. Because of the similarities between the civil proceedings and arbitration proceedings, the, overwhelmingly, adversarial nature of arbitration proceedings under the LRA, and the overarching requirement that such proceedings be fair, those safeguards and precautions, duly adapted, apply equally to arbitration proceedings to ensure fairness and serve as an invaluable guide for Commissioners and Arbitrators when confronted with hearsay evidence, and in particular when applying section 3 of the LEAA…. **It was significantly held that the Trial Court must be asked clearly and timeously to consider and rule on hearsay evidence and its inadmissibility thereof. This cannot be done for the first time at the end of the trial, nor in argument, still left in the court's judgment, nor on appeal.** This is done so that the parties in these proceedings can fully appreciate the full evidentiary ambit of hearsay*

[10] [2013] 3 (BLLR) 237 (LAC).

evidence and ultimately, will understand that the case he or she has to meet. So, this is done so that the party must, as early as possible in the proceedings, be made aware of its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he or she or it is facing. To ensure compliance, a Commissioner should, at the outset, require parties to indicate such an intention, the Commissioner must explain to the parties the significance of the provisions of section 3(1)(c) of the LEAA or the alternative, a fair, standard and procedure adopted by the Commissioner to consider the admission of the evidence, the Commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration or in the closing argument, or in the Award. ***The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount."***

[19] The Arbitrator ought to have conducted himself according to the principles set out in the *Exxaro* judgment. But he failed to do so. He failed to pronounce on the issue of the admissibility of the CTP report/log sheet at the juncture when such evidence was raised in the proceedings. Instead, he waited until the very end to rule on this issue, as it was only in the Award that the Arbitrator for the first time pronounced and ruled that the CTP report/log sheet was excluded and that he finds such evidence constituted hearsay evidence. Therefore when one has regard to the Exxaro case, it is clear that the Arbitrator acted in a manner that denied the parties a fair hearing.

[20] Had he done so during the proceedings, when the report was first introduced into evidence, then the Applicant would have understood the evidentiary burden it had to meet. The Applicant could have re-considered their position and may have presented different or alternative evidence. Instead, rather unfairly, the Arbitrator allowed the evidence to proceed on the CTP report as is evident from the testimony of Ms Ngidi and even Ms Dlamini. Most perplexing, is that the Arbitrator created the impression that such evidence was acceptable and he even seeks clarification of the

CTP report and it's recordings . This is evident from pages 40 of the transcripts up until page 138 and even onwards of the Record. It is only then that the Arbitrator suddenly asks the employee representative whether they dispute the report, to which Mr Mhlanengi states that they do.

[21] The Arbitrator also fails to lay any basis for permitting further questioning on the CTP report yet allows further cross examination thereon.[11] He does advise or state to the parties at that juncture when the report was disputed , that the report is temporarily allowed into evidence on the basis that an expert will be called and if such witness is not called then such evidence will be excluded. This was most unfair to the parties as both were not legally represented. Therefore, it cannot be said that there a proper ventilation of the of the dispute and a fair trial of the issues.

[22] There were discrepancies between the CTP reports produced by Ms Dlamini from her folder and the copies of the CTP reports that were produced by the employer. There were material discrepancies in the times between the two sets of reports and hence the evidence was quite crucial to the Arbitrator's findings on the overall fairness of Ms Dlamini's dismissal.

[23] The Arbitrator further drew an adverse inference from the Applicant's failure to call Mr Mngadi as a witness during the arbitration proceedings. This conclusion, too, was entwined with the issue of the veracity of the evidence of the CTP reports/log sheets which were led during the arbitration proceedings. Had the Arbitrator made a ruling at the time that the CTP reports were raised, then the employer would have been alive to the fact that the Arbitrator did not intend to accept the evidence of the CTP reports/log sheets without the evidence of Mr Mngadi and as stated above the employer at that juncture could have made an informed decision of whether or not to call Mr Mngadi if the employer wished to rely the evidence of the CTP report or any other witness for that matter .

[24] The rejection of the hearsay evidence was significantly material to the outcome reached by the Arbitrator.

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[11] Transcripts page 143 onwards

Conclusion

[25] An Arbitrator commits a reviewable irregularity not only when the outcome is unreasonable but also where he fails to apply helping hand to the parties compromising the fairness of the proceedings[12]. It is re-iterated that the Arbitrator should have told the Applicants that they need to call an expert and that such advice of the reports /log sheets will be excluded unless confirmed by an expert. Further he should have addressed the issue of the admissibility of the evidence when it was raised and made a ruling at that point on whether or not he was accepting such evidence. He ought not to have waited until the end of the case, when both parties had closed their cases, to make his finding that the evidence constituted hearsay evidence and was rejected. As stated above, the finding was material to the outcome of the award. Afterall, he finds in the award that in absence evidence to the contrary he must accept the version of the Third Respondent and her understanding of the time taken.

[26] In light of the above conduct, it is my view that the Arbitrator committed a gross irregularity in the proceedings, failed to fairly try the issues and this resulted in an award that which was unreasonable. The relief sought by the Applicant is that the matter be referred back to the Fourth Respondent for an arbitration hearing *de novo* before a commissioner other than the Third Respondent. Since I find there was no fair trial of the issues, and the court is unable to determine the dispute on the papers, I therefore order that the arbitration be remitted back to the Fourth Respondent for a hearing *de novo*.

[27] I do not find that there is any need for a cost order, and I accordingly make no so order.

For the reasons above, I make the following Order:

i) The arbitration award is set aside.

[12] Nkomo supra

ii) The matter is referred to the Fourth Respondent for an arbitration hearing *de novo*, before a Commissioner other than the Third Respondent.

iii) I make no order as to costs.

N Govender

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: **Adv Van As**

instructed by Attorney Cliff **Dekker Hoffmeyer Incorporated**.

RESPONDENT: NUMSA