



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 173/2014

In the matter between:

PIKITUP JOHANNESBURG SOC LIMITED

Applicant

And

TOKISO DISPUTE SETTLEMENT (PTY) LTD

First Respondent

ADV KENNETH M MOSIME N.O

Second Respondent

NEIGHBOUR EDWARD MUTERO

Third Respondent

Heard: 14 January 2015

Delivered: 17 May 2016

JUDGMENT

PIENAAR AJ;

Introduction

- [1] This is an application for review in terms of section 33(1) of the Arbitration Act, No 42 of 1965 ("Arbitration Act").
- [2] The Applicant seeks the review and setting aside of an arbitration award issued by the Second Respondent, dated 11 November 2013.
- [3] The Second Respondent found the dismissal of the Third Respondent to be both procedurally and substantively unfair and ordered the Applicant to retrospectively reinstate the Third Respondent.

Background.

- [4] The Third Respondent commenced his employment with the Applicant on 18 December 2006 in terms of a fixed term contract for a period of five years, which was renewable subject to performance.
- [5] The relevant clause of the Third Respondent's employment contract provided as follows:

‘This contract of employment is for a period of five (5) years (renewable at the end of the period, subject to performance), and shall come into operation on the 18 December 2006 and shall continue until the employment of the employee shall cease and terminate.’
- [6] On 17 October 2011, the Applicant addressed a letter to the Third Respondent informing him that the Applicant would be commencing a process of developing a new operational structure, which would affect numerous positions, including that of the Third Respondent.
- [7] The Third Respondent's employment contract was extended for six months to 30 June 2012 and thereafter again for 6 months until 31 December 2012.
- [8] On 9 November 2012, the Applicant addressed a letter to the Third Respondent, informing him of its decision not to renew Third Respondent's employment contract ending on 31 December 2012.

- [9] It is common cause that there was no consultation between the parties prior to 31 December 2012.
- [10] It is not in dispute that the Third Respondent was a good worker.
- [11] The Third Respondent proceeded to refer a dispute to the CCMA.
- [12] The Applicant raised a point *in limine* challenging the jurisdiction of the CCMA on the grounds that clause 10 of the Third Respondent's employment contract provided for the referral of disputes to private arbitration.
- [13] The dispute was, accordingly, referred to private arbitration where the Second Respondent ordered the reinstatement of the Third Respondent.
- [14] The Second Respondent held that the Third Respondent indeed had a legitimate expectation of renewal of the contract and ordered the retrospective reinstatement of the Third Respondent.
- [15] At the proceedings before this Court, it was the submission of the Applicant that the Third Respondent's contract had come to an end by the effluxion of time.
- [16] The Third Respondent, on the other hand, argued that the non-renewal of his contract constituted a unilateral change in terms and conditions of his employment. According to the Third Respondent, his contract obliged the Applicant to renew the contract if his performance was satisfactory. It is noted that the representative of the Applicant conceded the second point during argument before me.

Analysis and findings.

- [17] The Applicant initially filed a notice of motion and founding affidavit, applying for review in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("LRA").
- [18] The Third Respondent, in his answering affidavit, submitted that the Applicant's review application was fatally defective because it placed

reliance on section 145 of the LRA as opposed to section 33(1) of the Arbitration Act.

[19] Private arbitration awards, such as the one presently at issue, are only reviewable in terms of section 33(1) of the Arbitration Act.¹ Section 33(1) provides as follows:

‘Where -

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

[20] The Applicant proceeded to amend its notice of motion to reflect that its application is one in terms of section 33(1) of the Arbitration Act.

[21] The Applicant did not amend its founding affidavit in this regard.

[22] As such, the Applicant's submission in its founding affidavit was that the Second Respondent came to a decision which no reasonable decision maker could have reached.

[23] Thus, the Applicant places reliance in its founding affidavit on the test for review established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.²

[24] The other grounds for review submitted by the Applicant in the founding affidavit are as follows:

¹ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 51; *National Union of Mineworkers obo Employees v Grogan NO and Another* (2010) 31 ILJ 1618 (LAC) at para 33.

² 2008 2 SA 24 (CC) at para 110.

- 24.1. The Second Respondent held that the Third Respondent had a legitimate expectation of the renewal of his contract. This constituted a gross irregularity on the part of the Second Respondent because the Third Respondent knew that the Applicant was experiencing changes in its business structure and that the Third Respondent could, therefore, not have his contract renewed.
- 24.2. The Second Respondent failed to consider the evidence that the Applicant was undergoing changes in its operational structure. This constituted a gross irregularity.
- 24.3. The Second Respondent failed to appreciate that even though his employment contract stated that renewal was subject to performance, the changes in operational structure made renewal impractical, even though the Third Respondent performed satisfactorily.
- 24.4. The Second Respondent embarked upon a lengthy analysis of the Third Respondent's employment contract, the terms of which were not at issue. The issue was whether the Applicant's structural changes justified non-renewal. The Second Respondent thus misconstrued the issue before him.
- 24.5. The Second Respondent relied on cases which were distinguishable from the present facts. In the cases relied on by the Second Respondent, non-renewal of the contract was not due to changes in operational structure.
- 24.6. In light of all of the above, the Second Respondent made a decision which no reasonable decision maker could have reached.

[25] The Applicant once again stated in the conclusion of its heads of argument as follows:

'In the premise, we humbly submit that there is no rational connection between the Arbitrator decision, the factual matrix and legalistic framework.

Put differently, the decision reached by the Arbitrator was one that a reasonable decision-maker could not reach placed with the same facts.'

- [26] While the wording of section 33(1) of the Arbitration Act and section 145(2) of the LRA is virtually identical, the standard for review in the Arbitration Act is not the same as that of the LRA. Section 33(1) of the Arbitration Act is not infused with a reasonableness standard. The Labour Court in *Clear Channel Independent (Pty) Ltd v Savage NO and Another*³ confirmed as follows:

'It is clear, in my view, that the norms that apply in reviews of private arbitrations review are those found in the provisions of s33 of the Arbitration Act and the wider test for review of s145 of the LRA is not applicable to private arbitrations under s33 of the Arbitration Act.'

- [27] Brand, in his article entitled *Judicial Review of Arbitration Awards*, states as follows:

'The [reasonable decision maker] test requires the review court to examine the merits of the case and to determine whether the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and material properly before the arbitrator.'⁴

- [28] With reference to section 33 of the Arbitration Act, Brand goes on to state that:

'... "gross irregularity" still has the meaning attributed to the term in *Ellis v Morgan and Goldfields Investment*. That means it is purely procedure based. It has nothing to do with outcome. It can only be invoked where, as a result of something that went wrong procedurally, the aggrieved party can be said to not to have had a fair trial. Under the LRA, on the other hand, gross irregularity is now also focused on outcome, albeit that it is still clearly distinguishable from an appeal.'⁵

- [29] It was incumbent upon the Applicant to properly submit grounds for review in terms of section 33(1) of the Arbitration Act in its founding affidavit. In

³ (2009) 5 BLLR 439 (LC) at para 36.

⁴ Brand, FDJ "Judicial Review of Arbitration Awards" (2014) *Stell LR* 2 247-264.

⁵ *Ibid.*

light of the differing standards of review in section 33(1) of the Arbitration Act and s 145 of the LRA, a failure to do so would indeed constitute a fatal defect. It does not suffice to simply make general submissions or allegations of gross irregularities on the part of the Second Respondent.

[30] It must also be noted that the Applicant's affidavits and heads of argument were contradictory in various respects and were generally inadequately drafted.

[31] The Applicant failed to set out proper grounds or to make out a case for review with reference to section 33(1) of the Arbitration Act in its papers. Instead, the Applicant relied on the reasonable decision maker standard of section 145 of the LRA.

[32] I am satisfied that the Applicant has not made a proper case for review in terms of the Arbitration Act.

Order.

1. The review application is, accordingly, dismissed with costs.
2. I am granting costs to show this Court's displeasure with the quality of the pleadings before it.

Pienaar, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr N.T. Mzinyathi

Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys

For the First Respondent: Mr S.B. Mgaga

Instructed by: Garlicke & Bousfield Inc