



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2899/2012

In the matter between:

SUPER SQUAD LABOUR BROKERS

Applicant

and

SEHUNANE M, N.O.

First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

KHAHLAMBA TINYIKO PERCY

Third Respondent

Heard: 18 December 2015

Delivered: 10 October 2016

Summary: Review of arbitration award in terms of Section 145 of the LRA. Gross irregularity perpetrated by Arbitrator. Unreasonably refusal to postpone arbitration to allow employer to adduce evidence of crucial witnesses and then finding that dismissal was unfair because employer failed to call those witnesses renders award reviewable. Excessive compensation awarded and no reasoning coupled to amount awarded. Dispute remitted to CCMA.

JUDGMENT

BEKKER AJ

Introduction

- [1] This is an application seeking to review and set aside an arbitration award issued by the First Respondent Commissioner under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] The Applicant further seeks an order remitting the matter back to the Second Respondent for determination of the dispute afresh before a Commissioner other than the First Respondent.
- [3] The arbitration award that forms the subject matter of the current application held that the Employee's dismissal (the Third Respondent) was procedurally and substantively unfair and the Applicant was directed to pay the Employee an amount of R110 000.00 representing 10 months' remuneration.
- [4] Although the review application was initially opposed by the Employee, there was no appearance on behalf of the Employee when the matter was argued.

Background

- [5] The Applicant is in the business of labour broking. The employee was placed by the Applicant as a Warehouse and Receiving Supervisor at one of the Applicant's clients, Baker's Transport, rendering service in turn to Whirlpool South Africa.
- [6] A disciplinary hearing was conducted on 1 and 8 June 2012 where it was alleged that the employee perpetrated certain acts of misconduct, including bringing the company into disrepute by, *inter alia*, allegedly promoting negativity towards the company, showing a lack of respect with regards to company policy, moving warehouse employees not to follow instructions from team leaders and generally a breach of trust.
- [7] The disciplinary hearing culminated in the employee's dismissal and he referred an unfair dismissal dispute to the CCMA that resulted in the award

that is the subject-matter of the current application.

Grounds for review

- [8] The grounds for review advanced by the Applicant are related to the allegation that the Commissioner acted grossly irregular during the arbitration process and, as a result thereof, deprived the Applicant of a fair hearing.
- [9] The Applicant submits that proof of the Commissioner's bias towards the Applicant can be found in his statement in the arbitration award to the effect that he did not receive the Applicant's Heads of Argument on the agreed date "*... and even at the time of finalising the award*".
- [10] It appears from a facsimile transmission dated 4 October 2012 that the Heads of Argument were indeed transmitted by facsimile to the CCMA and the Commissioner. The argument by the Applicant is that, by the Commissioner failing to have regard to its Heads of Argument, this prevented a fair hearing resulting in a situation where the Commissioner prepared and made his award without any consideration of the Applicant's closing argument. Because of the other (more cogent) grounds for review advanced by the Applicant as set out hereunder, I deem it unnecessary to make a finding on this aspect.
- [11] The second ground for review pertains to the Commissioner's refusal to postpone the arbitration proceedings on 27 September 2012. The Applicant alleges that it must have been abundantly clear to the Commissioner that the Applicant's representative was a lay person and not an expert in conducting arbitration processes.
- [12] That being the case, there was a duty and obligation on the Commissioner to have guided and assisted the Applicant's representative (also pertaining to the process to be followed in arbitration hearings) and, *inter alia*, the Commissioner allegedly should have advised the Applicant that it was not proper to merely rely on the record of the disciplinary proceedings, but that evidence should be adduced by the Applicant since it was a *de novo* process.
- [13] The Applicant argues that, during the course of the arbitration process, it

became clear to the Applicant's representative that more witnesses would have to be called in order to prove its case and he then requested for a postponement to call these witnesses. This request was refused by the Commissioner, whereas it must surely have been clear to him from the documents presented that the Applicant has, at least, a *prima facie* case against the employee.

- [14] An award that the Applicant pays the costs of the employee could have been made by the Commissioner to ameliorate any prejudice suffered by the employee as a result of the postponement. This the Commissioner failed to do.
- [15] The third and last ground for review pertains to the compensation awarded by the Commissioner. The Applicant argues that the Commissioner awarded the employee 10 months' remuneration as compensation without laying any basis for the compensation awarded.
- [16] The date of the arbitration was a mere three months after the employee's dismissal and the Commissioner failed to have regard to the principles pertaining to the awarding of compensation, resulting in a situation where the Commissioner exceeded his powers and acted unreasonably and irregular.

Analysis and the award

- [17] Should an Arbitrator exercise his or her powers in good faith and in a rational and reasonable manner, there is limited scope for a review court to interfere with the award. The Supreme Court of Appeal in *MEC for Environmental Affairs and Development Planning v Clairison's CC*¹ confirms this position.
- [18] Section 145(2)(a)(i) of the LRA specifies that an award is reviewable when a Commissioner committed misconduct in relation to the duties of the Commissioner as an Arbitrator.
- [19] In *Naraindath v CCMA and Others*,² the Labour Court held that the failure by a Commissioner to conduct arbitration proceedings in a fair manner (where

¹ 2013 (6) SA 235 (SCA) at 240H – 241A.

² (2000) 21 ILJ 1151 (LC) at para 27.

that has the effect that one of the parties fails to receive a fair hearing of its 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.

[20] The Applicant *in casu* alleges that the Commissioner has committed misconduct in relation to his duties and perpetrated a gross irregularity in the conduct of the arbitration proceedings. There is substance in this submission if tested against the contents of the award and the transcribed arbitration record.

[21] In coming to his award that the dismissal of the employee was substantively unfair, the Commissioner relied on the fact that the Applicant failed to produce sufficient evidence of the alleged misconduct, and particularly that the Applicant failed to call any witnesses to testify on the charges brought against the employee. The Commissioner held that the evidence of the Applicant's sole witness at the arbitration process was "*purely hearsay*".

[22] The Applicant's sole witness, Mr S Ebohim, indeed did not proffer sufficient evidence to justify the employee's dismissal on the five charges of misconduct.

[23] The Commissioner further stated that the Applicant failed to call witnesses to testify against the employee and that it also failed to disclose the names of the witnesses. As justification for the award, the Commissioner stated as follows in his award:

'... In the absence of any credible witness called by the Respondent (Applicant) to testify about the charges levelled against the Applicant (employee), I find on balance of probabilities that the Applicant (employee) succeeded in proving that his dismissal was substantively unfair.'

[24] It was naturally also not for the employee to prove that his dismissal was fair, but in reality for the Applicant to prove same.

[25] No mention is made in the arbitration award that the Applicant indeed

requested a postponement of the arbitration process after its first witness testified and there is further no mention of the reason/s for refusing such a postponement.

- [26] The witness (Mr Ebrahim) informed the Commissioner during his testimony that a certain Mr Calitz from the client was the person in charge of the Whirlpool contract and that he (Mr Calitz) testified at the internal disciplinary hearing pertaining to the employee's misconduct. Mr Calitz was not in a position to attend the arbitration process on the day since there was at that point in time a national strike. Mr Calitz, as Supply Chain Executive for Whirlpool South Africa, was occupied at the time. According to Mr Ebrahim, Mr Calitz was at the time "... trying to keep his clients at bay" and "... that is unfortunately bad timing the way I see it".
- [27] The Commissioner then advised Mr Ebrahim during his testimony that he cannot *mero motu* rely on an e-mail message without the author having testified.
- [28] Towards the end of Mr Ebrahim's testimony, the Respondent's representative (Mr Ngubane, an Industrial Relations Specialist for the Applicant) indicated to the Commissioner that the Applicant's key witness (Mr Calitz) is compelled to remain at the Whirlpool South Africa's premises on the day of the arbitration due to the strike action that was ongoing at that time.
- [29] Mr Ebrahim also indicated that there were trucks being burned on the R21 highway.
- [30] During the cross-examination of Mr Ebrahim, it was confirmed to the Commissioner that the reason why Mr Calitz was not present at the arbitration process was because of the strike action.
- [31] After Mr Ebrahim's evidence was concluded, the Applicant's representative requested a postponement of the process since the Applicant was not in a position to adduce the evidence of the remainder of its witnesses on the day due to the national strike. Reference was also made of the employee's questions during cross-examination, i.e. that he (the employee) wanted to

pose questions to specifically Mr Calitz pertaining to his alleged misconduct, further justifying a postponement. The ruling of the Commissioner was that there is absolutely no reason why the Commissioner should not agree with the employee that there is no need to postpone the arbitration hearing. The Commissioner relied on the fact that the witnesses that the Applicant now wanted to call at the arbitration hearing did not testify in the internal disciplinary hearing.

[32] The Commissioner also held that the set-down notice for arbitration stipulated that if a party wanted to postpone the arbitration process it should have been done at least seven days prior to the set-down date.

[33] Lastly, the Commissioner held that the Applicant did not at the onset of the arbitration process request a postponement, but requested a postponement at the end of its first witness' evidence.

[34] The Applicant's representative then made the proposal that evidence be adduced by way of a conference call due to the witnesses not being able to attend on the day. This request was also refused by the Commissioner since he deemed same as not fair. As justification for that decision, the Commissioner stated that the fact that the Applicant, at the onset of the arbitration process, indicated that it would only be calling one witness but later on indicated that it wanted to call more than one. The Commissioner was of the view that he did not *run a court of law like that*". The Commissioner accused the Applicant of requesting a postponement only to *"cash bonus on their case by calling the witnesses who, who are not even here, or trying to make a conference call, there is no need for emergency the reason provided why the main witness is not here are inexcusable and unacceptable and I therefore reject the request for conference call so the hearing should proceed."*

[35] A perusal of the transcribed arbitration record evidences that Mr Ngubane, acting for the Applicant in the arbitration process, was totally out of his depth. This was apparent to the Commissioner when he advised Mr Ngubane as to the processes followed at the CCMA and further reprimanding Mr Ngubane

for not complying with rules relating to evidence.

- [36] When Mr Ngubane came to the realisation that it was indeed necessary to call more witnesses to prove the Applicant's case (and that it was not sufficient to merely rely on documentation and the evidence of only Mr Ebrahim), he applied for a postponement immediately.
- [37] All the Commissioner in reality had to do was to postpone the arbitration process to a later date. The day was not wasted since Mr Ebrahim testified extensively and was also cross-examined by the employee. It appears to be common cause that there was a strike action at Whirlpool South Africa, and specifically at Bakers Transport rendering services to Whirlpool. Since Mr Calitz was in charge of the logistical side of Whirlpool South Africa, it is apparent that it would have been extremely difficult for him at the time to attend the CCMA process to testify.
- [38] This conduct by the Commissioner should be measured in light of the Commissioner's repeated questions regarding the Applicant not calling witnesses to specifically testify about the various allegations of misconduct. On the one hand, the Commissioner insists that the Applicant should have called witnesses to testify about the alleged misconduct of the Applicant, but on the other hand holds in his arbitration award that the Applicant failed to prove its case against the employee based on its failure to produce evidence by way of calling witnesses.
- [39] It would certainly have been reasonable of the Commissioner to postpone the arbitration process to allow the Applicant to call the witnesses it needed to prove its case. The Commissioner went so far as to accuse the Applicant from wanting to "cash in" on the fact that its witnesses were not available at the time.
- [40] This reasoning and conclusion is far removed from the actual events that ensued at the arbitration hearing, coupled with the circumstances of the Applicant at the time in not being able to adduce the evidence of its witnesses (other than that of Mr Ebrahim).

- [41] The Commissioner's insistence on proceeding with the arbitration process and then finding against the Applicant for not producing the witnesses it needed to prove its case is a gross and reviewable irregularity, rendering the award reviewable. The Commissioner's absolute and mechanical reliance (as recorded in his postponement ruling captured in the transcribed record) on the CCMA Rule that stipulates that any application for the postponement of an arbitration process needs to be made no later than seven days before the date of arbitration is also misplaced. Nothing precludes any party from making an application for postponement on the day of the arbitration if cogent reasons exist. To hold otherwise will lead to miscarriages of justice.
- [42] In *Bafokeng Rasimone Platinum Mine v CCMA and Others*³ it was confirmed by this Court that there is a duty on an Arbitrator to intervene and advise a lay employee that the only way that he/she could properly put his/her version of the disputed facts before the Arbitrator was through evidence under oath. This would also equally apply to the employer party.
- [43] In *Landbank v Nowosens & N. S. and Others*⁴ it was held that, where it is evident that during an arbitration process either representative does not understand the nature of the proceedings and that this is prejudicing the presentation of either of their cases, a Commissioner is to alert a party to this. This naturally includes a situation where a party fails to lead the necessary evidence.
- [44] It is clear that the Commissioner did not consider the law pertaining to applications for postponements properly.⁵
- [45] Had he done so, nothing precluded the Commissioner from directing the Applicant to pay the employee's wasted costs occasioned by a postponement. This would also apply in a situation where the Applicant has not made an application for a postponement timeously or is otherwise to blame with respect to procedure not being followed (but where justice nonetheless

³ (2006) 27 ILJ 1499 (LC) at para 12.

⁴ (2013) 34 ILJ 2608 (LC) at para 8.

⁵ *Insurance and Banking Staff Association and Others v SA Mutual Life Insurance Society* (2000) 21 ILJ 386 (LC) at para 44.

justified such a postponement in the particular circumstances of the case, as *in casu*).

- [46] The refusal of the postponement undoubtedly prejudiced the Applicant. This prejudice was so significant that it effectively deprived the Applicant of presenting its case for consideration prior to the award being made. This in itself renders the refusal of the postponement application by the Commissioner grossly irregular.⁶
- [47] The Commissioner awarded the employee 10 months' remuneration as compensation for a substantively unfair dismissal, yet he gave no reason for arriving at the amount of compensation.
- [48] The lack of reasoning as to how the Commissioner came to the award of 10 months' compensation constitutes a reviewable irregularity. Section 194(1) of the LRA reads that compensation awarded to an employee whose dismissal is found to be unfair must be just and equitable in the circumstances.
- [49] In *Ferodo (Pty) Ltd v De Ruiter (Ferodo)*,⁷ the factors that need to be taken into account in assessing the quantum of compensation to an employee was summarised.
- [50] None of the factors listed in *Ferodo* was addressed or taken into account by the Commissioner. In *Boyer Super Stores (Pty) Ltd v Zuma and Others*,⁸ the Labour Appeal Court confirmed that a Commissioner's award is manifestly irrational when a Commissioner gives no (or insufficient) reasons for awarding compensation after having found that the employer had failed to discharge the onus in relation to a substantively fair dismissal. The compensation awarded in the amount of representing 10 month's remuneration is also excessive in the circumstances.
- [51] The review application was initially opposed by the employee, but he appeared to have abandoned his challenge. This is not a matter where costs

⁶ *Fundi Projects and Distributors (Pty) Ltd v CCMA and Others* (2006) 27 ILJ 1136 (LC) at paras 12 – 13.

⁷ (1993) 14 ILJ 974 (LAC).

⁸ (2008) 29 ILJ 2680 (LAC).

should follow the result.

Order

[52] In the circumstances, I make the following order:

1. The arbitration award issued by Commissioner Sehunane of the CCMA under case number GAJB17466/12 is reviewed and set aside.
2. The unfair dismissal dispute is remitted to the CCMA Johannesburg for an arbitration hearing *de novo* before a Commissioner other than Commissioner Sehunane.
3. There is no order as to costs.

Wilhelm Bekker

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Mr RJC Orton of Snyman Attorneys

FOR THE THIRD RESPONDENT:

No appearance

LABOUR COURT