



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 1291/16

In the matter between:

DEAN LEONARD JACOBIE

Applicant

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

First Respondent

SECTORAL BARGAINING COUNCIL

DIALWA MATHALA N.O

Second Respondent

DEPARTMENT OF HEALTH – GAUTENG

Third Respondent

Heard: 26 February 2019

Delivered: 10 June 2019

Summary: Application to review and set aside an arbitration award-
Arbitrator found to have carried out his duties in assisting an
unrepresented employee, no misconduct on the part of the
Arbitrator. Award not reviewable.

JUDGMENT

RAPHULU, AJ

Introduction

- [1] The Applicant was employed by the Third Respondent as a Switchboard Supervisor. In May 2012, the Applicant was charged with various acts of misconduct, which he was found guilty of, and was dismissed in October 2012. The Applicant appealed against his dismissal, and the outcome of his appeal, maintaining that his dismissal, was issued in September 2014. The Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] The first CCMA arbitration sitting was scheduled to take place on 10 July 2015. On that day, the Applicant was represented by an attorney. However, the Third Respondent's representative was ill and unable to attend and, as a result of this, the arbitration proceedings were postponed to 3 and 4 September 2015, respectively.
- [3] On 3 September 2015, the Applicant's attorney did not appear at the arbitration proceedings. The Applicant's contention is that he was not aware that his attorney would not be present.
- [4] Despite the absence of the Applicant's attorney, the matter proceeded, with the Applicant representing himself.
- [5] On 6 October 2015, the Second Respondent issued an arbitration award, finding that the dismissal of the Applicant was both substantively and procedurally fair.

Grounds of review

- [6] The Applicant has raised three grounds of review / issues to be determined by this Court as follows:
- 6.1 Whether the refusal to postpone the arbitration proceedings in the absence of the Applicant's legal representative was reasonable or not;
 - 6.2 Whether the Applicant had sufficient time to prepare and secure the services of an employee representative; and
 - 6.3 Whether the Applicant's dismissal was accordingly procedurally and substantively fair.

- [7] The basis for seeking to review and set aside the arbitration award is that the Applicant was not legally represented at the arbitration proceedings, whereas the Third Respondent was legally represented.
- [8] The question is whether, by not postponing the matter and proceeding with the arbitration on a day when the Applicant's legal representative was not present, the Second Respondent committed an irregularity warranting the resultant arbitration award to be reviewed and set aside.
- [9] The Applicant contends that the proceedings were postponed on a previous occasion when the Third Respondent's representative was ill and unable to attend, but that the same was not done for the Applicant when his legal representative was not present.
- [10] The Applicant, at paragraph 6.3 of his Founding Affidavit, states that the Second Respondent noted his attorney's absenteeism, but requested that the hearing should continue. The Applicant contends that he was not mentally prepared and not up to the challenge to face his previous employer's representatives, whom were both "seasoned labour employers".
- [11] At paragraph 6.7 of his Founding Affidavit, the Applicant contends that considerations regarding his attorney not being present should have been applied by the arbitrator, whereby a postponement would have been justified.
- [12] The Third Respondent, in its Opposing Affidavit, denies the Applicant's contentions, and states that at the arbitration proceedings, the Applicant did not raise the issue of postponing the proceedings because his attorney did not arrive with the Second Respondent, and he seemed to have been content with proceeding without any legal representation.
- [13] The Applicant states, in his Heads of Argument, that the Second Respondent refused to grant him a postponement. The Third Respondent contends in its Heads of Argument that the record of the arbitration proceedings does not show that the Applicant made

submissions asking for a postponement, that this issue is not dealt with in the Applicant's Founding Affidavit and yet it appears in the Applicant's Heads of Argument. The Third Respondent contends that the Applicant is precluded from advancing submissions on points that were not included in the Founding Affidavit and are further nowhere to be found on the record of the arbitration proceedings, as doing so is prejudicial to the Third Respondent. The Third Respondent further contends that the Applicant should have either: (i) supplemented his review application to include averments relating to the issue of the postponement of the proceedings; or (ii) raised this issue upfront so that the record of the arbitration proceedings could have been reconstructed, or (iii) clarified with the arbitrator by requiring the arbitrator to submit a statement confirming whether or not there was an application for a postponement.

Procedural defects

[14] Errors by an arbitrator, in the conduct of the arbitration proceedings, render an arbitration award procedurally unfair and such errors are actionable on review as a form of misconduct or gross irregularity. Such misconduct or irregularities prevent a party from having its case fairly heard or prevent a fair trial of the issues. These are not subject to the *Sidumo v Rustenberg Platinum Mines Ltd*¹ test.²

Legal representation

[15] Our case law has held that where the arbitrator should have afforded legal representation but did not, that is a reviewable irregularity.³

[16] It is accepted that a proper regard to the comparative abilities of the parties should be had and the discretion whether or not to allow legal

¹ (2007) 28 ILJ 2405 (CC).

² See: *Toyota SA Motors (Pty) Ltd v CCMA* [2016] 3 BLLR 217 (CC) paras 105 and 192; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* [2014] 3 BLLR 207 (LAC) at par 20; *BAUR Research cc v CCMA* [2014] 4 BLLR 374 (LC) at par 18; *Walters v CCMA and Another* [2016] ZALCCT 48 (LC) at par 23.

³ *BAUR (supra)* at par 18; *Colyer v Essack NO* (1997) 18 ILJ 1381 (LC) 1384; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman N. O.* (2013) 34 ILJ 2347 (LC) paras 38-39; *Walters (supra)* par 24.

representation should be exercised judicially, and that the arbitrator must ensure that the playing fields are level, or at least not unreasonably bumpy.⁴

- [17] On the facts of this case, the Applicant was allowed legal representation, but his representative did not arrive, and the matter proceeded with him not being legally represented.
- [18] There is nothing in the record of the proceedings to show that the Applicant asked for the matter to be postponed on the day that his legal representative did not arrive. Further, there is no evidence that the Second Respondent refused to grant the Applicant a postponement.
- [19] For instance, page 25 of the paginated pages of the record shows, at line 4 to 5, the Applicant stating that he is very disappointed in his lawyer. However, this does not show him asking for a postponement, or even asking for the matter to stand down while he prepares himself.
- [20] Without any evidence of an application or request for a postponement, there are no grounds on which I can rationally conclude that the Second Respondent failed to exercise his discretion judicially. The Second Respondent cannot be shown to have been asked to exercise his discretion, and it follows, that he cannot be shown to have failed to exercise his discretion.

Other procedural defects at the CCMA

- [21] The Applicant also raises the issue of whether or not he had sufficient time to prepare and secure the services of an employee representative. Again, this goes to the question of whether the Applicant asked for the matter to be postponed so that he could secure the services of an employee representative. The record of the CCMA proceedings does not show this.

⁴ *Walters (supra)* at par 31.

- [22] The record of the CCMA proceedings, at page 24 of the paginated papers, line 1 to 3, and line 25, as well as page 25 line 1 to 3, show the Second Respondent assisting the Applicant where the Applicant needed assistance, as one would expect in relation to a person representing themselves.

Procedural fairness of the dismissal

- [23] It is apparent that the procedural fairness of the Applicant's dismissal was not an issue before the Second Respondent at the arbitration proceedings. The Applicant contends that had he known that the CCMA proceedings were a hearing *de novo*, he would have raised procedural fairness, and put this issue before the Second Respondent. By going ahead and representing himself, the Applicant ran the matter as he chose, and this is something that the Applicant cannot now want to blame on the Second Respondent.

Substantive fairness

- [24] Having considered the charges against the Applicant, the Second Respondent's consideration of the evidence presented to him, as well as the Second Respondent's findings on the charges, I am of the view that the Second Respondent reached a decision that a reasonable decision maker would reach in the circumstances.
- [25] In particular: the fact of the Applicant's conduct in running a money lending scheme at the workplace during working hours; the Applicant's own admission of this at the proceedings, as well as admitting that he was doing so without permission from his employer; the fact that the Applicant himself instilled discipline in relation to his subordinates; that there were employee threats at the workplace as a result of the monies owed, resulting in the police being called; and the fact that the Applicant's allegations that he was being targeted and charged with misconduct only after the Third Respondent found out that he reported fraud were found to be baseless; and there is nothing before this Court to

point me to a conclusion that the Second Respondent reached a decision that a reasonable decision maker would not reach in the circumstances.

[26] I therefore do not find misconduct or gross irregularity by the Second Respondent in relation to the procedural aspects, and in relation to substance, my view is that he made a decision that falls within the reasonableness test.

[27] Accordingly, I make the following order:

Order

1. The Applicant's review application is dismissed.
2. There is no order as to costs.

L Raphulu

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Jayshree Juglal Inc

For the Third Respondent: Mncedisi Ndlovu and Sedumedi Inc