



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2333/2015

In the matter between:

BELO & KIES CONSTRUCTION (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

QUEENDY GUNGUBELE N.O

Second Respondent

THABANG ROBERT MADONSELA

Third Respondent

Heard: 1 August 2018

Delivered: 9 January 2019

Summary: Review application. Arbitrator's findings that dismissal was unfair is to be interfered with on review.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued on 20 October 2015 under case number GAJB 17155-15 wherein the Second

Respondent (the arbitrator) found the Third Respondent's (the employee) dismissal substantively and procedurally unfair and awarded him compensation equivalent to nine months' remuneration.

[2] The employee opposed the application.

Background facts

[3] The employee commenced employment with the Applicant in February 2013 as a quantity surveyor (QS). In August 2015, the employee was charged with acts of misconduct allegedly committed during the period October 2014 to July 2015. The charges were related to the employee's failure to carry out a fair and lawful instruction, gross negligence that led to a significant loss for the Applicant, poor quality of work and not working according to the applicant's standards, breach of the employee's duty of good faith to the employer and breach of trust. The employee is said to have failed to complete a monthly cost report from November 2014 to June 2015, notwithstanding instructions to produce such a report, which resulted in the project being re-measured and causing a loss of R 2 288138 for the Applicant. According to the Applicant, had a monthly cost report been produced as required, the losses could have been investigated and action taken to mitigate the losses.

[4] The employee was dismissed in August 2015, after being found guilty of misconduct.

[5] The employee subsequently referred an unfair dismissal dispute to the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter was arbitrated in October 2015.

The evidence adduced:

[6] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively and procedurally fair. As already pointed out, the arbitrator found the employee's dismissal procedurally and substantively unfair and ordered that he be paid compensation in the amount of R 117 000.

[7] In order to assess the arbitrator's findings in respect of substantive and procedural fairness and the award she issued, it is necessary to consider the

reason the employee was dismissed for and the evidence adduced at the arbitration proceedings.

- [8] It is evident from the transcribed record that in narrowing the issues in respect of procedural fairness, the employee firstly challenged the procedure with regard to his suspension and secondly that the charges were not clear, were contradictory, not elaborated on and already decided upon.

The Applicant's witnesses

- [9] The Applicant's first witness, Ms Freislich, was the chairperson of the disciplinary enquiry and in her testimony she dealt with the issue of the employee's suspension. In my view the issue regarding the employee's suspension and the testimony adduced on that, was irrelevant to the issues that the arbitrator had to decide. A challenge to the fairness of the employee's suspension should have been referred and dealt with as an unfair labour practice dispute.

- [10] Ms Freislich testified that the employee was given sufficient time to prepare for the disciplinary hearing, that the charges levelled against him were only allegations and that the employee was expected to present his case on the charges. She testified that the process to be followed was explained to the employee on the day of the hearing, the employee was asked whether he understood the charges and he did not at any stage indicate that he did not understand the charges. The nature of the misconduct had been detailed in the charge sheet. Ms Freislich questioned the fact that on the day of the disciplinary hearing the employee had no problem understanding the charges, but that this issue has been raised for the first time in the arbitration proceedings.

- [11] Ms Freislich testified that the employee had a full opportunity to cross-examine witnesses and to present his case.

- [12] It is evident from the transcribed record that the employee's questions during cross-examination related to issues of substantive fairness and he did not raise any challenge to procedural issues with the chairperson of the disciplinary hearing.

- [13] The Applicant's second witness was Mr Andre Kies (Mr Kies), the Applicant's contracts manager and a shareholder. Mr Kies testified that the employee was a qualified and professional QS, who was appointed as such for the Thaba Mall project. The employee was in charge of all the costs of the site and it was his responsibility to ensure that the project is profitable. He explained that the employee could work from the office or from home, but he was expected to spend most of his time on the site.
- [14] Mr Kies explained that the employee did not submit his monthly cost reports on the project, which is an important tool to making sure that on a month to month basis, the Applicant did not lose money on the project. The Applicant trusted that the employee, as a professional QS, was in control of the project, despite the fact that he did not submit his cost reports. Mr Kies explained that the cost report must correspond with the amount of money spent on the project and the money claimed from the client.
- [15] The first cost report was submitted in October 2014, based on the cost from April to September 2014, and the report did not make any sense because there was a R6 million difference in the cost, as received from the Applicant's head office. The cost report was inaccurate and could not be used. The employee was instructed in October 2014 to rectify the report and to submit a monthly report so that the Applicant could know what was happening on the site and to ensure that it had the cost control on the site.
- [16] The next cost report submitted by the employee was in February 2015, based on the period April 2014 to January 2015. This cost report did not relate to all the costs, it was inaccurate and could not be used. The Applicant was unable to determine what the financial situation on the site was and the employee was once again instructed to correct the report. At that stage the Applicant had lost trust in the employee to do a proper cost report as an inaccurate cost report had been received in February 2015 and the project was completed in March 2015. The Thaba Mall opened on 26 March 2015.
- [17] Mr Kies explained that to produce a cost report in the last month of a project does not help anyone because the financial losses made up to that time could not be recovered as it was too late to recover it when the project was finished.

- [18] The employee was instructed to leave the cost report and instead to compile the final account. The employee was working on the final account during April and May 2015 and in the week (in July 2015), that the Applicant was supposed to submit the final account to the client, the employee was involved in a car accident and he could not report for duty. The Applicant had to get other quantity surveyors to come and assist with the finalisation of the final account as it had to be submitted. The said quantity surveyors measured the whole project and it became clear that the employee did not do his job. The employee had not measured all the work that was done on site and there were losses on the project that the Applicant was unable to recover. The employee paid more per square meter than what was claimed from the client and it is not possible to recover the losses.
- [19] Mr Kies explained that if the cost reports had been compiled and received monthly, the losses could have been avoided as the problems could have been identified and rectified and a loss at the end of the project could have been avoided. The Applicant suffered a loss of R 3 million on the Thaba Mall project.
- [20] Mr Kies testified that the QS is supposed to submit a monthly report, but as a QS is a professional, some leeway is given and the QS is trusted to ensure that the project is profitable. The Thaba Mall was the employee's only project and he was expected to submit a monthly cost report.
- [21] Mr Dwayne Hawkins (Mr Hawkins), the site manager at the Thaba Mall, testified that the employee was supposed to submit monthly reports and for the duration of the Thaba Mall project, he should have submitted about five to seven reports, but the Applicant only received three reports from the employee. The reports so received were incomplete and could not be used.
- [22] Mr Hawkins explained that the monthly cost reports are used to see where there was overspending or underspending and to rectify that in the following month. The employee's responsibility was to quantify the costs and to do the measurements for the payment of the subcontractors. If subcontractors are overpaid, this becomes a direct loss to the Applicant and cannot be recovered. In this case the employee overspent on the subcontractors and this resulted in a loss for the Applicant.

- [23] Mr Hawkins testified that during October, November and December 2014, which was a critical period of the project because in those three months they had the most costs and expenses on the project, the employee's attendance at the site was not sufficient
- [24] Mr Andries Ndlovu (Mr Ndlovu) testified that he is a QS, employed by the Applicant as such since 2007. Initially he was supposed to work on the Thaba Mall project with the employee, but he got involved in other projects and the employee was placed at the Thaba Mall project. Mr Ndlovu spent the first two months of the project at the Thaba Mall with the employee.
- [25] Mr Ndlovu explained that the main functions of a QS are to ensure that the monthly claims to the client are correct and to ensure that the costs are correctly calculated and reported on a monthly basis, according to the Applicant's schedule. Cost reports had to be submitted every month to see if there was anything negative on the costing side so that it could be addressed and remedied and if necessary, be raised with the client. If this is not done, it will impact negatively on the project.
- [26] Mr Ndlovu explained that there are instances where the cost report cannot be submitted monthly and if this is the case, the Applicant's director is to be informed. He testified that where a cost report is not submitted for a period of three months, it would have a huge impact on the project for instance, if the Applicant was running at a loss, such loss could not be picked up and remedied timeously.

The employee

- [27] The employee testified about the procedural fairness of his disciplinary hearing and it is evident from the transcribed record that he raised issues outside of the procedural challenges. The recorded shows that the versions of the employee's testimony, were never put to the Applicant's witnesses.
- [28] The employee testified that he had done the best he could on the Thaba Mall project and according to him, the figures showed theft of the material at the site. The employee was 250 km away from the site and he was not responsible for the material on site.

- [29] The employee explained that mistakes are rectified in the final account and the final account was his chance to provide all the answers regarding the project, but he was not afforded the opportunity to provide the final account.
- [30] In cross-examination the employee conceded that he did not submit the cost reports and when he indeed submitted them, his manager informed him that they were wrong.
- [31] Mr Leslie testified on behalf of the Applicant. He is a former employee of the Applicant and was employed as a safety site officer. He testified about cases of theft on site and his evidence did not take the employee's case any further.

The arbitrator's findings

- [32] In her analysis of the evidence and consideration of procedural fairness, the arbitrator found the employee's dismissal procedurally unfair. She accepted the employee's version that his explanation and documents with which he sought to justify the figures, were cast aside by the chairperson and this is so because of Ms Freislich's utterances that the employee's documents were 'rubbish'.
- [33] The arbitrator found that Mr Kies and the chairperson, Ms Freislich, were furious when they detected the perceived losses and committed irregularities in their quest to prove the employee wrong. Mr Kies and Ms Freislich refused to look at the employee's documents or listen to his explanation, which could have explained the gaps. The chairperson entered the arena and aligned herself with the initiator by declaring the documents as rubbish, which showed that the chairperson did not apply her mind.
- [34] These findings show that the arbitrator lost sight of the issues that she recorded as challenges in respect of procedural fairness. The arbitrator made findings on procedural aspects not challenged by the employee and certainly not put to Ms Freislich during her testimony.
- [35] In respect of substantive fairness, the arbitrator accepted that the employee was an experienced QS who was trusted with a big project and he was trusted even when he did not submit his cost reports on time and the Applicant was lenient towards him and other QS in the Applicant's employ.

- [36] The arbitrator found that the Applicant's figures on the losses it suffered were thumb sucked and could not be scientifically authenticated. She held that the Thaba Mall was handed over to the client within the targeted time and is fully operational, without any structural malfunctions and this should prove to anyone who had doubts about the employee's performance that he was a competent employee. The arbitrator recorded that the discrepancies could have occurred but did not go to the heart of the project and that the employee had acquitted himself.
- [37] This finding is indicative of the fact that the arbitrator had no understanding of the issues she had to decide. The fact that the Thaba Mall was handed over in time and is operational without structural malfunctions, is irrelevant to the charges faced by the employee and the reasons for his ultimate dismissal.
- [38] The arbitrator had no regard to the issues she had to decide namely; whether the employee was guilty of the misconduct he was dismissed for in that he failed to obey a direct instruction to submit monthly cost reports, which resulted in financial loss that the Applicant was unable to recover.
- [39] The arbitrator recorded that it was common cause that the employee had not submitted the cost reports as expected, but that his omission could be justified and understood in a similar manner as those of Mr Ndlovu. The employee's misdemeanour could have been aggravated by the fact that he was in hospital for three weeks and thus incapacitated.
- [40] This finding too is indicative of the fact that the arbitrator misunderstood the nature of the misconduct the employee was dismissed for and she misunderstood the evidence. The employee was charged and dismissed for his failure to complete and submit monthly cost reports from November 2014 until June 2015, despite a direct instruction to do so. There was no evidence to show that the employee's failure to submit a cost report was for reasons similar to the reasons presented by Mr Ndlovu and such a finding is not supported by the evidence. Furthermore, the employee was involved in a car accident on 4 July 2015 and he was hospitalised thereafter. The employee was not charged for his failure to present the final account, which was due on 14 July 2015, but for his failure to submit monthly cost reports for a period that far preceded his hospitalisation and his period of incapacity.

[41] The arbitrator found that the Applicant had not applied the rule consistently and that the sanction of dismissal was not appropriate as the Applicant did not follow progressive discipline. Furthermore, the Applicant did not discharge the onus to show that it had a fair reason to dismiss the employee.

The grounds for review

[42] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[43] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*² affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[44] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with such is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence presented³.

[45] The Applicant raised a number of grounds for review in its founding and supplementary affidavits. The heads of argument submitted by the Applicant's counsel were of no use or assistance to this Court as 29 pages of the heads of argument contained nothing but a *verbatim* repetition of the founding and

¹ 2007 28 ILJ 2405 (CC) at para 110.

² (2014) 35 ILJ 943 (LAC).

³ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

supplementary affidavits. There was no attempt whatsoever to narrow the issues and to present them in the form of heads of argument. A repetition of affidavits and lengthy quotations from case law do not assist this Court and heads of arguments as submitted by the Applicant burdened rather than assist this Court.

[46] The employee's heads of arguments were equally of no assistance as they addressed only the first ground for review raised by the Applicant and no further arguments were submitted in respect of the other grounds for review.

[47] The first ground for review is that the arbitrator acted with bias in respect of the exchange of bundles of documents submitted by the parties. In my view there is no merit in this ground for review and I do not intend to deal with it in any detail.

[48] The remaining grounds for review all relate to the manner in which the arbitrator dealt with the evidence before her. In my view there is merit in the remaining grounds for review.

[49] The Applicant's case is that the arbitrator failed to consider the evidence and she failed to apply her mind to the evidence. Furthermore, the arbitrator attached undue weight to the fact that the employee was hospitalised during July 2015 and she failed to consider that the project had been handed over by March 2015, long before the employee was hospitalised and by the time the employee was hospitalised, he had already committed the acts of misconduct he was charged with.

[50] The arbitrator failed to consider that the employee in cross-examination conceded that he had failed to submit the cost reports and that he had admitted that when he indeed submitted the reports, they were inaccurate.

[51] The Applicant also took issue with the arbitrator's findings that the employee's dismissal was substantively unfair due to the inconsistent application of the rule. The evidence was that it happened from time to time that a monthly report would be submitted late and that such delays were acceptable for specific reasons, for example when the documents needed to complete and submit an accurate report were delivered too late for the report to be submitted on the due date and such late submissions could be justified and were

accepted or instances where the QS was working on several projects simultaneously and showing a profit on all the projects. However, the employee has not provided any reason or justification for his failure to submit the monthly reports, more so where he was given a direct instruction to submit his cost report monthly and where the Thaba Mall was the only project he was working on.

- [52] The arbitrator's finding that there was an inconsistent application of the rule was not supported by the evidence and in finding that there was such inconsistent application, she failed to apply her mind to the evidence that was adduced. The evidence showed that there was justification for the late submission of the cost reports submitted by Mr Ndlovu, however, there was no such evidence presented in respect of the employee.
- [53] The Applicant also took issue with the arbitrator's findings on procedural fairness and submitted that the arbitrator confused the fact that the employee submitted a poor quality cost report in October 2014 which the Applicant referred to as 'rubbish', with the chairperson's alleged refusal to admit the employee's evidence by making it off as 'rubbish'. The employee was asked in cross-examination about the poor quality of the report he submitted and the same word 'rubbish' was used in the question. The arbitrator's conclusion that the chairperson refused to accept the employee's evidence at the hearing because she called his evidence 'rubbish', was unfounded and indicative of the fact that the arbitrator misconceived the evidence.
- [54] There was no evidence to support the arbitrator's finding that the chairperson entered the arena and failed to apply her mind at the disciplinary hearing. This was never put to the chairperson and was not the version presented by the employee.
- [55] The arbitrator made no findings on the issues the employee challenged in respect of procedural fairness, but instead made findings on issues he did not challenge.
- [56] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her. I have considered this question after perusal of the transcribed record, the arbitration

award and the grounds for review raised by the Applicant. In my view the arbitrator's findings do not fall within the bounds of reasonableness, based on the evidence that was placed before her.

[57] The issue the arbitrator had to consider was whether the employee was guilty of the misconduct he was dismissed for and from a perusal of the arbitration award, it is evident that the arbitrator lost sight of the issue she had to decide and she ignored material evidence placed before her. The evidence, on a balance of probabilities, shows that the employee indeed failed to submit the cost reports on a monthly basis and persisted with this failure, even after he was given a direct instruction to do so, which resulted in a financial loss for the Applicant. The Applicant's case that the loss could have been avoided had the employee submitted the cost reports on a monthly basis, was not disputed.

[58] The arbitrator misdirected herself by finding that because the Thaba Mall was handed over on time and was well functioning, shows that the employee was a competent employee. The charges had nothing to do with the timing of the handing over of the Thaba Mall or the structural condition of the building works, but the charges related to the employee's failure to submit cost reports and the fact that the Applicant suffered considerable financial losses due to his failure to submit the cost reports timeously, and that when he did, the reports were inaccurate and could not be used.

[59] Based on the above, I am persuaded that the award cannot stand and should be interfered with on review.

Relief

[60] This leaves the issue of relief.

[61] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that the employee's dismissal was fair.

[62] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter. The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[63] I am indeed in a position to decide and finally determine the matter based on the record as it is before me and where the parties' cases were fully ventilated.

[64] It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as the employee's dismissal took place as far back as 2015 and in my view, keeping in line with the tenet of LRA, to have labour matters dealt with expeditiously, this matter should be and could be brought to finality.

Costs

[65] This Court has a wide discretion in respect of costs, guided by the principles of justice and fairness. In my view, this is a matter where the interest of justice will be best served by making no order as to cost.

[66] In the premises, I make the following order:

Order

1. The arbitration award issued by the Second Respondent on 20 October 2015 under case number GAJB 17155-15 is reviewed and set aside;
2. The arbitration award is substituted with an order that the Third Respondent's dismissal was substantively and procedurally fair;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate H Bucksteg

Instructed by: Carel J Schoeman Inc Attorneys

Third Respondent: Mr T J Khomola of Khomola Boshomane Attorneys

LABOUR COURT