REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR2049/09

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Applicant**
WILLIAM MABOTJA	**Second Applicant**
And	
TOKISO DISPUTE SETTLEMENT	**First Respondent**
DR A VAN DER MERWE, *N.O.*	**Second Respondent**
SILICON SMELTERS (PTY) LTD	**Third Respondent**

Heard: 09 May 2014

Delivered: 17 June 2014

Summary: (Review – s 33 of Arbitration Act 42 of 1965 – reasonableness not part of the review test of misconduct – stringent requirements to be met to overturn findings of fact – requirements not met *in casu* – application dismissed).

JUDGMENT

Background

[1] Mr W Mabotja, the second applicant in this matter, was dismissed on 29 October 2008 for inciting fellow workers. The third respondent had recently endured a 35 day strike which ended on 23 September 2008, about a week before the incident occurred. The evidence on which the charge was based was that of a Shift foreman, Mr J Mangena, who previously held a position of Segregation supervisor. He said that at 07h45 on 29 October 2008 he was passing the canteen door on his way to the clinic when he heard a voice which he recognised as that of the second applicant saying "We will make the company ungovernable until we get what we want." He had then stepped into the door of the canteen to confirm who it was and saw the second applicant addressing employees. He could not remember the precise number of employees present but said there were at least five. He also could not remember with whom he placed his order of food that day.

[2] Mangena had reported the incident because he felt he had an obligation to do so as he was responsible for general safety issues as part of his appointment. He interpreted the threat of 'ungovernability' as one that could impact on safety because the equipment and chemicals used at the plant were dangerous.

[3] The second applicant complained that the employer had failed to follow fair procedure in dismissing him. In particular, he was not informed of the outcome of the enquiry by the chairperson but by a security official. The chairperson of the enquiry, who was the executive manager of the processing department, testified on how the disciplinary proceedings were conducted and also on the dangerous working environment in that plant as well as the consequences of possible sabotage which might render the company ungovernable. He had intended to convene a hearing to hand down his finding but had been unable to do so and

passed on the decision to the security department to inform the second applicant of the result.

[4] The arbitrator found that the essential elements of a fair enquiry had been complied with and that it was improbable that chairperson had refused to allow the second applicant to cross-examine witnesses in an unhindered manner during the proceedings. The arbitrator also found that the chairperson had attempted to meet with the parties to advise them of his findings but no one had arrived on that occasion. The fact that the second applicant was informed of the outcome via the security department did not constitute an irregularity resulting in an unfair termination.

[5] On the question of the substantive fairness, the arbitrator could find no reason why Mangena would have fabricated the allegation and even though he was a single witness his evidence was most probable in the arbitrator's view. He believed that Mangena took his health and safety duties very seriously and could not be faulted for believing the words allegedly used and needed to be reported and acted upon. He also found that there was no evidence to support suspicion about the subsequent promotion of Mangena after the second applicant's dismissal. Moreover the disciplinary hearing took place independently of Mangena reporting the matter.

[6] The arbitrator did not accept the second applicant's testimony that he never made use of the canteen and did not address any employees on the day in question. In this regard the mere fact that Mangena could not remember who he had placed his food order with did not justify an inference that he was dishonest. Mangena was also not inconsistent in saying that there were quite a few employees present when the second applicant uttered the alleged words of incitement. The evidence of a co-employee that he had lunch with the second applicant did not show any light on the incident which occurred in the morning.

[7] The arbitrator was also satisfied that in the atmosphere which prevailed in the workplace following the strike, shopfloor relations had to be

handled with care and incitement in those circumstances could have ignited conflict with significant consequences especially given the dangerous work environment in which wilful property damage or reckless behaviour could lead to safety breaches with serious consequences. Further, taking into account the fact that the charge of incitement was one that carried a recommended penalty of dismissal in the employer's code, as well as the prevailing circumstances at the time and the nature employer's business, his dismissal was fair.

Grounds of review.

[8] A number of grounds of review were raised:

8.1 It was alleged that by allowing the employee to lead evidence first when there was no dispute about the fact of his dismissal amounted to a reversal of the onus which lay on the employer to prove the fairness of the dismissal. This constituted a gross irregularity and rendered his decision unreasonable.

8.2 A further ground of review relating to the reasoning of the arbitrator concerns his alleged failure to apply himself to a number of facts before him. It is claimed this rendered his decision unreasonable. Further, it is claimed that the evidentiary basis on which the decision was made which it is claimed could not have satisfied the onus of proof.

8.3 Although identified as a matter of fact, the applicants complained that the arbitrator failed to embark on a two-stage enquiry into whether the second applicant had uttered the words alleged to be and then made a determination on the motive of Mangena for making such an allegation. The applicants' adopt the view that the arbitrator failed to make finding whether or not the offensive statement was uttered at all which indicated a failure on his part to apply his mind. According to the applicants it was not enough for the arbitrator simply to say that he was convinced that the second applicant committed the misconduct he was charged with.

8.4 In particular, the applicants submit that the award is one no reasonable arbitrator would have made given that there was no witness to

corroborate Mangena's version, and that his version was materially lacking in certain respects, namely that:

8.4.1 he could not identify any of the persons which were addressed in the canteen by the second applicant;

8.4.2 that he ought to have been able to do so if he could identify the second applicant by his voice;

8.4.3 that he could not identify who had served him in the canteen even though he stated that the disciplinary hearing it was his intention to go to the canteen and collect his order, and

8.4.4 his failure to provide proof that he attended the clinic.

Essentially, these criticisms are aimed at the arbitrator's apparent failure to consider the credibility of Mangena's testimony and the absence of corroboratory evidence.

8.5 The applicants further allege that the arbitrator failed to take account of the failure of the employer to adduce certain evidence such as:

8.5.1 proof that Mangena attended the clinic on the day in question;

8.5.2 documentary evidence that the second applicant re-registered his thumbprint after the strike in order to access the canteen to refute his evidence that he did not do so;

8.5.3 corroborative evidence of personnel at the clinic to confirm Mangena's visit, and

8.5.4 evidence of the canteen staff who might have served Mangena.

Apart from the second point, these criticisms relate again to the absence of corroboratory evidence which the employer conceivably could have obtained, but did not.

8.6 Moreover, the applicants accuse the arbitrator not taking account of the second applicant's evidence that:

8.6.1 he never reregistered for access to the canteen after the strike;

8.6.2 there was a resolution by union members not to patronise the canteen after the strike;

8.6.3 he brought lunch from home and could not use the canteen because he had not re-registered to gain access to it after the strike;

8.6.4 he used his car to go to work and consequently did not know when union members resumed using the canteen, and

8.6.5 further, Mangena testified that he saw the second applicant talking to other people in the engineering section which demonstrates that the second applicant was never in the canteen as alleged.

8.7 In addition, the applicants argued that if a two-stage enquiry had been followed, as they say ought to have been the case, the arbitrator would have found evidence to explain why Mangena had a motive to fabricate the incident. This related to the fact that he was previously a shop steward and knew the thinking of the employer following a strike. Further he had worked as a replacement worker during the protected strike and continued to do so afterwards whereas circumstances dictated that replacement labour would not be retained. Moreover he was subsequently promoted which the applicants seem to interpret as a result of his testimony against Mr Mabotja at the disciplinary enquiry. The arbitrator also ignored the fact that the workplace relationship between the two of them was not good owing to Mangena chairing an enquiry involving the second applicant even though the second applicant had objected to him chairing the matter, which had resulted in the second applicant lodging a grievance about this.

8.8 According to the applicants, these factors should necessarily have led to the arbitrator finding that the workplace relationship between them was not good and hence Mangena had a motive to concoct the allegation against the second applicant. This too is ultimately an attack on the arbitrator's assessment of the evidence before him.

8.9 Lastly, the applicants claim that the arbitrator was wrong to allow the chairperson of the enquiry to give evidence on the state of affairs

prevailing at the respondent's premises after the strike whereas he should have confined his evidence to what transpired in the enquiry before him. Further, the arbitrator ought not to have relied on evidence of someone who had not handled the disciplinary enquiry fairly and objectively. In the same vein as its criticism of the respondent's failure to call corroboratory evidence in respect of Mangena's version, the applicants point out that no evidence of the incidents which are alleged to have occurred on the same day the second applicant made his alleged utterance was led.

Evaluation

[9] In regard to the above grounds of review, a common theme running through many of them is that the employer failed to lead all the evidence it could to corroborate Mangena's story. The need for corroboration or the adduction of confirmatory evidence arises principally in relation to inherently suspect or unreliable evidence. For example, "...before the coming into operation of the Criminal Procedure Act 1977 some form of formal corroboration was required for perjury, treason, accomplice evidence, a confession, and for a plea of guilty in an inferior court. With the exception of the confession, these requirements were left out of the 1977 Act".[1]

[10] There is no duty on a party to corroborate evidence simply because it is able to. Obviously, there is a risk that if other evidence is adduced which raises genuine concerns about the reliability of the uncorroborated evidence, then the failure to lead confirmatory evidence might count against the party who failed to adduce it, simply because in the absence of corroboration the probative value of the limited evidence led might be diminished. Thus even if this award were being reviewed under s 145 of the LRA, I would not consider this an irregularity or form of misconduct on the arbitrator's part. In any event the test for interference in a private arbitration award sets a much higher standard as mentioned below.

[1]CWH Schmidt et al, *Law of Evidence*, Butterworths (July 2013 – Service Issue 11) at 4-4

[11] On the question of the sequence of the enquiry in which the applicant adduced evidence first it is important to note that the sequence of adducing evidence does not alter the onus of proof in an unfair dismissal dispute which is set out in s 188 of the Labour Relations Act, 66 of 1995, namely that :

> *"188 Other unfair dismissals*
>
> *(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
>
> *(a) that the reason for dismissal is a fair reason-*
>
> *(i) related to the employee's conduct or capacity; or*
>
> *(ii) based on the employer's operational requirements; and*
>
> *(b) that the dismissal was effected in accordance with a fair procedure."*

[12] The employer bears the overall onus at the end of the arbitration of proving that the dismissal was procedurally and substantively unfair on the evidence presented. However, there is no reason in principle why an employee, who after all is claiming the dismissal is unfair, should not present evidence in support of that contention, which the employer must successfully rebut in order to succeed. While it is customary that the party which is seeking to prove its case usually commences, it is not absolutely necessary, subject to the ordinary principle that the party which leads evidence second, has a duty to put its version to the witnesses of the first party, if the subsequent evidence would contradict theirs. But the sequence of evidence does not, in and of itself, imply a change in the overall onus of proof. The only difference is that the employer need only prove that it did act fairly in respect of those matters which the employee claims it did not, and not canvass issues which might not even be in dispute. In any proper pre-arbitration proceedings, the areas in dispute are clarified upfront, making it unnecessary for an employer who starts leading evidence first to lead evidence on every facet of the procedure followed or the substantive issues.

[13] However, in this case there is another overriding consideration: the arbitration is a private one and even if it is not correct that an employee might begin leading evidence in statutory unfair dismissal arbitration proceedings, the practices in statutory arbitration proceedings are not necessarily applicable in private arbitration proceedings under the Arbitration Act 42 of 1965 ('the Arbitration Act'). S 33 of the Arbitration Act permits a review only on one or more of the following grounds:

13.1 the arbitrator has committed misconduct in relation to the duties of an arbitrator;

13.2 the arbitrator has committed a gross irregularity or exceeded the arbitrator's powers, or

13.3 the award was improperly obtained.

[14] The complaint about the sequence of the proceedings is not one that would fall within the ambit of a gross irregularity in my view, or the reasons mentioned.

[15] This brings me to the remainder of the grounds of review. In essence, the applicants argue that the arbitrator's assessment of the evidence showed that he omitted to consider certain evidence, or failed to give evidence the weight it deserved. The major hurdle the applicants face is that this is not a review under s 145 of the LRA.

[16] Consequently, considerations of reasonableness as a ground of review under the LRA in the variations it has undergone are not applicable to reviews under s 33 of the Arbitration Act. As the LAC stated in ***National Union of Mineworkers obo 35 Employees v Grogan NO & another*** **[2010] JOL 25689 (LAC)**:

> *"The grounds of review set out in section 145 of the LRA are the same as the grounds of review set out in section 33 of the Arbitration Act. The only difference is that there are court decisions which have interpreted some of the grounds of review set out in section 145 of the LRA to include certain grounds of review taken from the Constitution whereas, as far as I know, there is no decision of any court which has interpreted section 33 of the Arbitration Act to include any grounds of review that are not explicitly expressed in section 33*

of the Arbitration Act. Of course, I am, in this regard, referring to the grounds of review of unjustifiability of CCMA awards articulated by this Court in Carephone (Pty) Ltd v Marcus NO, supra, of the irrationality of CCMA awards as articulated by the court in Shoprite Checkers (Pty) Limited v Ramdaw NO & others (2001) 22 ILJ 1603 (LAC) [also reported at [2001] JOL 8489 (LAC) – Ed] as well as that of the unreasonableness of CCMA awards imputed to section 145 of the LRA by the Constitutional Court in Sidumo & another v Rustenburg Platinum Mines Ltd & others, supra."[2]

(emphasis added)

[17] Further in ***Volkswagen SA (Pty) Ltd v Koorts NO & others*** **(2011) 32 *ILJ* 1892 (LAC)** , the LAC confirmed the correctness of the appellant's argument that:

"...[C]ourts are not legally able to give effect to the parties' requirement that a private arbitrator render an award which is "rational and justifiable", or any other review standard for that matter. Unless the error thus vitiates the award a review court is bound to measure the product of private arbitration proceedings against the narrow grounds of review encapsulated in the Arbitration Act of 1965."[3]

[18] Moreover, the scope for attacking factual findings of an arbitrator on grounds of misconduct under s 33(1)(a) are very limited. As the Appellate Division, as it then was, held in ***Amalgamated Clothing And Textile Workers Union Of South Africa v Veldspun (Pty) Ltd*** **1994 (1) SA 162 (A)**:

"As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174-81. It was held in Donner v

[2] At para [32]

[3] At 1897, paras [8] – [9].

Ehrlich 1928 WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference.[4]

[19] Similarly, with reference to a claim that an incorrect finding on the merits of a matter, in fact or law, could found a review based on a misdirection by an arbitrator under s 33 the SCA said in ***Telcordia Technologies Inc v Telkom SA Ltd*** **2007 (3) SA 266 (SCA)**:

"An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry" [5]

[20] When considering the remaining grounds of review against these stringent limitations on the power of the court to interfere when exercising its powers under s 33 of the Arbitration Act, it is clear that arbitrator's alleged shortcomings in his assessment of the available evidence, even if well founded, would not clear the hurdles placed in the way of a successful review based on mistakes made in assessing the evidence.

[21] Consequently, even if the applicants might have had grounds for successfully challenging the award relying on the s 145 of the LRA and the requirement of reasonableness (which is doubtful, though not necessary to analyse in detail), those criticisms cannot lay a basis for arguing that the arbitrator committed gross misconduct in the proceedings.

[22] In the result I am satisfied the applicants have failed to establish a basis for reviewing and setting aside the award under s 33 of the Arbitration Act, which they needed to demonstrate in order to succeed, and the application must be dismissed.

[4] At 169C-E

[5] At 301-2, para [85]

Order

[23] In light of the analysis above, the review application is dismissed with costs.

R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicants: P Motaung of Nomali Tshabala Attorneys

For the Third Respondent: G Fourie instructed by Edward Nathan Sonnenberg Inc.