REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA; JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 818/2011

In the matter between:

ELLERINES FURNISHERS (PTY) LTD **Applicant**

and

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

S NTOMBELA NO **Second Respondent**

R M WHITEHEAD **Third Respondent**

Heard: **19 December 2013**

Delivered: **23 May 2014**

Summary: Review - arbitration award – peremption – whether payment by employer of compensation ordered in award prior to variation thereof by arbitrator perempts employer's right to review entire award on the merits subsequent to variation. Once right of review exists in respect of arbitration award such right

cannot be circumscribed by peremption of a portion of such right.

Waiver - payment by employer of full amount of arbitration award does not in and of itself constitute waiver or abandonment of right to review variation ruling that is clearly not within employer's contemplation and adversely affecting it.

Variation ruling - once issued, reopens entire arbitration award to review by affected party on any recognised grounds of review despite possible earlier peremption of such right to review by such party.

JUDGMENT

Bank; AJ

[1] For the purposes of clarity I will refer to the parties in this matter as follows:

1.1 the applicant - "Ellerines";

1.2 first respondent - "CCMA";

1.3 second respondent - "the Commissioner";

1.4 third respondent - "Whitehead".

Factual background

[2] Ellerines decided to restructure its logistics and supply chain department in 2008 as a result of various acquisitions and restructuring. Whitehead was involved in the initial investigation into the proposed new structure which was eventually approved by Ellerines' board. On 15 October 2008, Whitehead raised a number of concerns in an email to his line manager, Graham Adie ("Adie"), being aware of the advertised position of Group Logistics Executive ("GLE") and that he was entitled to apply for this position. Numerous consultation meetings were held with Whitehead and various issues and

queries arising from these meetings were raised in certain emails exchanged between the parties. In short, Ellerines made it clear to Whitehead that it did not want to lose him as an employee and that it valued his services. It furthermore made it clear that there would be no material change to his terms and conditions of employment other than his job title of GLE.

[3] In an email dated 6 November 2008[1] Whitehead recorded that it would have been futile for him to apply for the GLE position because if he was suitable for it in the first place the process itself would not have been initiated. It appears that he later had a change of heart and ultimately applied for the position but was unsuccessful. After the company restructuring, the job requirements of the GLE position were however redefined, with the effect that Whitehead's responsibility would have become limited to those stores in the Ellerines Group occupying what is known as “Market Position 1” such as Ellerines itself, Town Talk and Furniture City. The redefined GLE position post-restructuring gave the incumbent responsibility for all trading brands, including the abovementioned ones as well as Beares, Lubners, Savills, among others.[2] This effectively caused Whitehead’s earlier position to become redundant. It is common cause however, that he was offered two alternative positions with Ellerines. On 17 November 2008, Whitehead turned down the two alternative positions offered to him during the third consultation meeting held with him. A fourth consultation meeting took place on 27 November. On 29 November, Whitehead was informed of the proposed restructuring of the logistics department for reasons of cost-effectiveness and efficiency. He was given a section 189(3) letter setting out the reasons for the termination of his employment for operational requirements. After his dismissal he referred an unfair dismissal dispute to the CCMA.

The arbitration

[4] After a lengthy eight-day arbitration the Commissioner found that Whitehead’s dismissal for operational requirements, whilst substantively fair,

[1] Document bundle pp 205 - 206

was procedurally unfair because the consultation period ought to have been extended to give Whitehead sufficient time to reflect on a document entitled "SCIP Streams and Requirements", or "the SCIP document", to formulate a response and to ask questions arising from that document. He furthermore found that Ellerines had failed to consult with Whitehead on the issue of severance pay and that Whitehead's written question regarding this issue had never been answered. The Commissioner awarded Whitehead five months' salary as compensation in the amount of R25,000.00 (being the net salary per month after all deductions) x 5, i.e. R125,000.00.

The variation ruling

[5] A variation ruling was issued on 4 April 2011, when the Commissioner realised that the compensation awarded Whitehead had been based on net pay when it should have been calculated on his gross pay of R42,805.73 per month and consequently varied the award to the increased amount of R214,028.65. In the meantime however, and before Ellerines became aware of the looming variation ruling, it had taken a practical view of the matter and decided to pay Whitehead the full amount of the initial arbitration award of R125,000. After making payment of this amount to Whitehead Ellerines was made aware of the variation ruling increasing the amount payable to Whitehead. Ellerines then decided to take the entire arbitration award on review which encompassed not only a review of the Commissioner's decision to vary the award by increasing the amount of Whitehead's salary from a net to a gross basis but which also, for the first time, included a review of the Commissioner's original finding of procedural unfairness.

Proceedings in this court

[6] Ellerines has applied for the partial review and either the substitution or setting aside of the Commissioner's arbitration award under case number GAJB 38441-08, and has also has applied for the review and either the

[2] Record, pp 15-18

substitution or setting aside of the Commissioner's variation ruling dated 4 April 2011. It also seeks condonation for the late filing of its review application.

[7] Whitehead has subsequently launched what he terms a “counter-review” application which is opposed by Ellerines, which is also out of time and for which he seeks condonation. In his counter-review, Whitehead has raised a point *in limine* to the effect that, by making payment of the amount of compensation set out in the initial arbitration award prior to variation, Ellerines’ right of review has effectively been perempted and it cannot now, after the fact, attack the Commissioner’s finding of procedural unfairness.

[8] What I therefore have before me are two review applications, each coupled with a condonation application, one from either party. Each party seeks a review of a different aspect of the arbitration award and for that reason I deem it expedient to deal briefly with the arbitration award and the grounds set forth by each party to have it reviewed, prior to considering the questions of whether there has been a peremption of Ellerines' right of review and whether condonation ought to be granted to each party for the late filing of their respective review applications.

[9] Neither party has challenged the Commissioner's finding on substantive fairness and both rely on fairly narrow grounds of review in their papers.

[10] The basis of Ellerines' review is an attack on the Commissioner’s finding of procedural unfairness. It is argued that that if there is no prejudice to the employee as a result of alleged procedural unfairness, one should not exercise the discretion to make an award of compensation. I was not provided with any authority for this proposition but I need not rule on it as I agree with the Commissioner’s finding that the retrenchment procedure was tainted by Ellerines' failure to provide Whitehead with a document he had requested as well as by its failure to properly consult with him on the question of severance pay. I agree further that these failures may reasonably be seen to have prejudiced Whitehead to the extent that, had they not

occurred, he might well have received a greater award of severance pay (or been able to negotiate such greater award with his employer) prior to the conclusion of the consultation process.

[11] Apart from the point *in limine* on peremption to which I will return momentarily, the basis of Whitehead's counter-review is limited to a review of the Commissioner's finding that Whitehead was not entitled to severance pay because he had unreasonably refused to accept Ellerines' offer of alternative employment. Whitehead seeks a review of that finding together with an order that he was indeed entitled to severance pay in accordance with the severance pay policy of Ellerines prevailing at the time of his dismissal, alternatively, in accordance with section 41(2) of the Basic Conditions of Employment Act. In the further alternative he seeks that the matter be remitted back to the CCMA for a *de novo* hearing.

Peremption

[12] It is argued on behalf of Whitehead that Ellerines is perempted from applying for review of the varied award because it waived its right to do so by effecting payment of the amount of compensation of R125,000.00 ordered in the original unvaried award.

[13] Although most of the established authorities deal with the peremption of a right of appeal I note that more recently, in the matter of *NEHAWU obo Tumana v CCMA*,[3] Lallie AJ briefly analysed the common law doctrine of peremption. Simply stated this doctrine is based on the application of the principle that no person can be allowed to take up two positions inconsistent with one another or, as it is commonly expressed, to blow hot and cold or to approbate and reprobate.[4] This principle has also been approved by the Labour Appeal Court in *NUMSA v Fast Freeze*.[5] With regard to the application of this principle to the review of CCMA arbitration awards this

[3] (2012) 33 *ILJ* 666 (LC) at paras 7 -9
[4] *Hlatshwayo v Mare and Deas* 1912 AD 242 as quoted in the *NEHAWU* case *supra* at para 7
[5] (1992) 13 *ILJ* 963 (LAC)

Court has confirmed the relevance and applicability of the doctrine of peremption by finding that a party who offers to comply with an award unconditionally and unreservedly is precluded from seeking to review the award (my emphasis).[6] Also relevant is a decision of this Court in *Balasana v Motor Bargaining Council*[7] where Molahlehi J confirmed the common law requirement that the onus of satisfying all the requirements of peremption rests on the party alleging it.

[14] What makes the present situation somewhat unique is that none of the authorities to which the parties referred me contemplate an issue such as the present: whether the handing down of a ruling varying an initial arbitration award which has already been complied with by an employer party by unconditional payment of this amount to the employee in question, automatically perempts the right of that employer to launch a review application against the entirety of such award on any of the recognised grounds of review, once such award has been varied.

[15] It is common cause that the burden of proving such peremption is on the one raising it and I must agree with the argument submitted on behalf of Ellerines that this is indeed a difficult onus for Whitehead to discharge. It was argued further that Whitehead could only discharge his onus if he was able to demonstrate that Ellerines, by making payment of the compensation set forth in the original arbitration award prior to variation, had unequivocally abandoned or waived its right to institute review proceedings. This is however not the correct formulation of the test: Whitehead would have had to demonstrate that, by making payment of the amount stipulated in the original arbitration award, Ellerines had effectively offered to comply with this award unconditionally and unreservedly and was thus precluded from taking it on review. There can be no doubt that this is so insofar as the original unvaried award is concerned. But what of the variation ruling? Can it be said that payment by Ellerines of the full amount of the arbitration award constitutes a waiver or abandonment of the right to review a ruling that was clearly not

[6] *Jusayo v Mudau NO and Others* (2008) 29 *ILJ* 2953 (LC)

within its contemplation at the time it made payment and in respect of which it was not given any opportunity of opposing?

[16] It was cogently argued on behalf of Whitehead that the subsequent issue of a variation ruling by the Commissioner in no way affected the substance of his original award and that the partial compliance by Ellerines with the varied arbitration award, through payment of the initial amount of compensation, constituted sufficient evidence of an unequivocal abandoning or waiver of its right to institute review proceedings. Although this is a persuasive argument I very much doubt that when making payment of the original award prior to variation, Ellerines unconditionally waived the right to seek a review of a variation of such award, particularly where the effect of such variation adversely affected it.

[17] In reply it was further submitted on behalf of Ellerines that there is no authority for the view that the basis of the review of a variation ruling ought to be limited to the extent of that variation and the reasons for such variation, as this could conceivably lead to the invidious position of having two simultaneous review applications running simultaneously, against both the initial arbitration award and the variation ruling respectively. Whilst I agree with this submission it does not in my view go far enough. This is because I very much doubt that the correct legal position is that peremption of the right of review may occur for only certain aspects of the award but may not occur with respect to the extent of the variation, which in this case was the method of calculation of the compensation awarded and the resulting increase in quantum.

[18] In my view, once it can be said that a right of review exists such right cannot be circumscribed by the peremption of a portion of that right or that only certain grounds of review may be raised but not others. Not only would this give rise to the possibility raised by Mr Makapane on behalf of Ellerines but I find this to be an outcome that pushes the bounds of what may be termed the

[7] (2011) 32 *ILJ* 297 (LC)

overriding objective of the LRA: the fair, just and expeditious resolution of labour disputes. It would also constitute a fettering of the discretion of the Court to review and set aside any award or ruling that falls within the grounds of review set out in the LRA as amplified, refined and evolved over almost twenty years of jurisprudence in this and other Courts under the LRA.

[19] What this effectively means, is that once the variation ruling was issued it became open to Ellerines to challenge the entire arbitration award, for example, by reopening the issue of the Commissioner's ruling on procedural fairness as it did. Simply put, once a variation ruling is handed down by a Commissioner the entire arbitration award then becomes open to review by any party affected by such variation on any of the recognised grounds of review, despite an earlier possible peremption of such right of review on the part of an affected party.

[20] Ellerines' right to review the entire arbitration award cannot therefore be said to have been perempted by its payment of the full amount of the arbitration award prior to the issue of the variation ruling. Whitehead has not discharged the onus of proving such peremption and the point *in limine* must therefore fail.

Ellerines' application for condonation

[21] Before dealing with the merits of both reviews I have to apply my mind to the question of condonation being sought by both sides. I note that the original arbitration award was received in January 2011 and that the variation ruling received on 4 April 2011. Ellerines' review application was filed on 13 May 2011, within the statutory six-week period after receipt of the final award but longer than six weeks after receipt of the original award.

[22] The question then arises whether the six week period for instituting review proceedings commences from the date of the original arbitration award or whether it commences afresh once variation award has been issued by the Commissioner. It was submitted on behalf of Ellerines that, for purposes of

calculation of the relevant time period for purposes of review applications, the date of the award is deemed to be that of the varied award and that there is, consequently, no need to apply for condonation where a review application has been filed within six weeks of receipt of the varied award, in other words, within six weeks of receipt of the variation ruling.[8] I am in agreement with the submission and find that Ellerines' review application was launched timeously. Even if I am wrong in this regard, I find that there has been a sufficient explanation for any delay that was occasioned and that the delay is, in any event, insubstantial. Condonation is therefore granted to the extent that this is necessary.

Whitehead's application for condonation

[23] Whitehead, on the other hand, filed his answering affidavit in the review application only on 17 April 2012, some five and a half months late, but Ellerines does not oppose his application for condonation in that respect. Whitehead's counter-review application was however filed over 11 months late and this was readily conceded by Mr Grundlingh who appeared on behalf of Whitehead.

[24] I pause here to point out that there is no specific provision in either the LRA or the Rules of this Court for a "*counter-review application*" and I agree with the applicant's submissions based on the authority of *SABC Ltd v Grogan NO and Another*[9] to the effect that a counter-review application is simply a substantive application for review by a different name. For this reason, the proper time to do so is within six weeks after the publication of the arbitration award (or, in this matter, within six weeks after publication of the variation ruling). This period cannot be said to commence as late as the time when the applicant files the requisite notice in terms of Rule 7A (8).

[8] *Solidarity obo Bouwer v Arivia (Pty) Ltd t/a Arivia.Kom* [2010] 9 BLLR 981 (LC) at para 5; *JDG Trading (Pty) Ltd t/a Bradlows Furnishers v Laka NO and Others* [2001] 3 BLLR 294 (LAC)

[9] (2006) 27 *ILJ* 1519 (LC) at para 13-24

[25] In support of his application for the extremely late filing of his counter-review application, Whitehead's affidavit explains his lateness by stating that the grounds of this counter-review were only confirmed upon perusal of the transcribed record and also that his attorneys were attempting to reach an amicable settlement with Ellerines' attorneys. It is clear to me however that at no stage was there any agreement between the parties that the counter-review application be put on hold pending the finalisation of any possible settlement between the parties. It is submitted on behalf of Ellerines that its attorneys were only formally notified of Whitehead's intention to institute the counter-review in his attorney's email of 5 March 2012 almost one year after publication of the variation ruling. From this time Ellerines contended that condonation had to be sought by and granted to Whitehead.

[26] In considering these reasons I find no reason why Whitehead could not have at least instituted his counter-review application timeously as it is plain that the basis of his application is the Commissioner's failure to award him severance pay in addition to the compensation awarded. This much is patently clear from the initial arbitration award which was handed down in January 2011. It appears to me that the institution of the counter-review was an afterthought on the part of Whitehead and his attorneys, albeit an extremely late one. It bears mentioning that Whitehead has been legally represented from the outset of the arbitration proceedings.

[27] I find furthermore that Whitehead has failed to make out a sufficient case for condonation for the late filing of his counter-review application by reason of the fact that he has failed to fully explain the reasons for the inordinate delay of some 11 months. The extreme lateness of the delay is also a factor to be taken into account. For these reasons I am inclined to refuse Whitehead's application for condonation and this must inevitably have fatal consequences for his counter-review application as well. I have, in any event, considered the merits of the counter-review application but find that they are noticeably lacking for similar reasons to those I have expressed above in relation to Ellerines' review: the Commissioner's evaluation of the evidence and his

assessment of the law as contained in paragraphs 137 to 149 of the arbitration award, when considered together with his analysis of the provisions of section 41(4) of the Basic Conditions of Employment Act are all rational, reasonable and, in my view, entirely correct, based on the evidence before the Commissioner. There is, thus, no basis to interfere with his finding that Whitehead was not entitled to severance pay.

[28] I therefore dismiss Whitehead's application for condonation for the late filing of his counter-review.

Ellerines' review

[29] Although it is not clear from the papers before me whether Whitehead launched a formal variation application or whether the perceived error in the award was brought to the attention of the Commissioner in some other way this is not determinative of the issue as I cannot agree with the submission on behalf of Ellerines that the *audi alteram partem* test was in any way materially compromised by the want of compliance with the requirements of Rule 31 of the CCMA Rules requiring applications to be brought on notice to all parties.

[30] Although it is somewhat perturbing that Ellerines did not receive any notice of the application to vary the initial arbitration award, from one based on net pay to one based on the total cost to company, it cannot be denied that this decision was made on evidence available to the Commissioner which had been placed before him during the initial arbitration. The Commissioner's initial award in this regard states that Ellerines was to compensate Whitehead, by reason of the procedurally unfair dismissal, compensation "*…which is equivalent to five months' salary calculated at the applicant's rate of salary at the time of dismissal i.e. R25,000.00 x 5 = R125,000.00*." This was clearly incorrect on the evidence before the Commissioner and the fact that he later saw fit to correct the monthly "*rate of salary*" from R25,000.00 to R42,805.00 does not in my mind constitute a valid reason to interfere with his

award, notwithstanding Ellerines vociferous complaints that it was not afforded any opportunity to oppose this variation of the arbitration award.

[31] In the present matter, it is argued on behalf of Ellerines that the variation ruling increases the compensation per month from R25,000.00 (which is, in fact, R24,956.04, as evidenced by a payslip which formed part of the record)[10] to some R42,805.00 (which is in fact R42,805.73 according to the same payslip). The amount of R42,805.73 is clearly the total cost to company whereas Whitehead's gross monthly pay was, in fact, R39,962.29, an amount equivalent to his net pay adding back the total deductions of R15,006.25 per month.

[32] It is well within the powers of a commissioner appointed by the CCMA to *mero motu* vary an arbitration award to the extent that there is some form of patent error or ambiguity therein and I find that the limited extent of the variation of the award was most certainly covered by the evidence before him, particularly by a payslip of Whitehead's to which reference was made.

[33] I am not persuaded that Ellerines has made out a proper case to review the decision of the Commissioner to vary the award and effectively increase the compensation payable to Whitehead. The varied arbitration award is a decision that most certainly falls within the band of reasonable outcomes at which a reasonable decision-maker could have arrived.

[34] As to the further grounds of review, I find no merit in Ellerines' submissions that the Commissioner acted unreasonably or committed a gross irregularity in his finding of procedural unfairness by reason of Ellerines' failure to properly consult with Whitehead on the question of severance pay. The Commissioner was well aware of the aversion of these Courts to following a 'mechanical checklist approach' but felt fairly strongly, on the evidence before him, that the aspect of severance pay was one on which Francois Nel of Ellerines ought to have consulted Whitehead, but failed to do so. The

[10] Record p 478

Commissioner also noted the fact that Nel had failed to respond to Whitehead's written query regarding severance pay.

[35] The challenge by Ellerines to the Commissioner's finding of procedural fairness is therefore without merit as such finding cannot be assailed on the grounds of unreasonableness.

[36] In my view then, the arbitration award, read together with the variation ruling, constitutes a reasonable decision that is based on evidence placed before the Commissioner that is entirely rational and connected to the evidence before him. The arbitration award as varied is thus one which contains a reasonable result and the outcome thereof can in no way be said to be unreasonable. The Commissioner reached a fair and equitable decision and he determined the dispute in accordance with a fair procedure.[11]

Order

[37] By reason of the fact that both parties have been equally successful (or, rather, unsuccessful) in their respective applications, I deem it appropriate that no order as to costs be made in this matter.

[38] In the result and for all the above reasons I make the following order:

38.1 The point *in limine* raised by Whitehead regarding peremption of the right to review is dismissed;

38.2 Ellerines' application for condonation for the late filing of its review application, to the extent that this is necessary, is granted;

38.3 Ellerines' application for review of the arbitration award as modified by the variation ruling dated 4 April 2011 is dismissed;

[11] *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA), *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* 2014 (1) SA 585 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC)

38.4 Whitehead's application for condonation for the late filing of his counter-review is dismissed;

38.5 Whitehead's counter-review application is dismissed;

38.6 There is no order as to costs.

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Bank; AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr K Makapane, Bowman Gilfillan Inc

For the Third Respondent: Advocate R Grundlingh

Instructed by: Bester & Rhoodie, Pretoria