REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Reportable

Case Number: JR 1477/13

In the matter between:

SOLLY SIFISO SIBIJA **Applicant**

and

MEIBC **First Respondent**

JOHANN D. STAPELBERG *N.O* **Second Respondent**

CONTACT ENGINEERING **Third Respondent**

Heard: **08 July 2014**

Delivered: **11 November 2014**

Summary: Application for review and setting aside of Arbitration Award in terms of section 145; Failure to present information at the Arbitration Hearing; not a ground for review when such information is not considered; Arbitrator found not to have violated s145 therefore no defect in the arbitration proceedings; review application unsuccessful.

JUDGMENT

RALEFATANE AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the Second Respondent dated the 3 July 2013 under case number MEGA 36232.

Background details

[2] The Applicant was employed by the Third Respondent since October 2010 on different fixed term contracts and appointed on permanent position of CNC operator in around February 2011.

[3] The Applicant was dismissed on 28 February 2012 subsequent to the internal disciplinary hearing as a result of alleged insubordination and failure to carry out lawful instructions. The Applicant referred the unfair dismissal dispute to the First Respondent for resolution and the dispute culminated at arbitration.

[4] At the arbitration hearing the jurisdictional point was raised based on the fact that the Applicant alleged victimization and racism. The arbitrator issued a ruling that the matter be referred to Court as the First Respondent was found to lack jurisdiction on the ground of victimization and racism. The Court found no jurisdictional barrier on the First Respondent to can dispose of the matter therefore referring it back to the First Respondent to be dealt with hence the arbitration award dated 03 July 2013.

[5] The Second Respondent found the Applicant's dismissal by the First Respondent to be fair. This is the award that the Applicant seeks to review and set aside.

Grounds for review

[6] Section 145 of the LRA[1] provides as thus:

[1] Labour Relations Act, 1995 (Act 66 of 1995)

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) …

(b) …

(1A) …

(2) A defect referred to in subsection (1), means-

(a) That the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b)…'

[7] The arbitration awards issued under the auspices of the CCMA or the Bargaining Council may be reviewed on the grounds listed in s145 of the LRA, in addition on the ground of unreasonableness.

[8] In order to succeed in the review application, the Applicant must show that the commissioner has violated the provisions of s145 and in addition, show the existence of unreasonableness.

[9] The Applicant seeks to review the arbitration award issued under the auspices of the First Respondent on the following grounds:

9.1 That the Second Respondent erred in disregarding the issue of the relationship between the parties as relevant to the arbitration.

9.2 The Second Respondent failed to apply his mind to such, that relevant factors were ignored.

9.3 Those factors allegedly ignored by the Second Respondent are summarised as follows:

9.4 Not properly attending to the alleged abuse and victimisation of the Applicant;

9.5 Not taking into account to the alleged continued unbearable work environment;

9.6 During the testimony of the Applicant's witness the Second Respondent conducted himself as the complainant rather than the arbitrator, and was responsible for obtaining evidence from the Respondent's witness;

9.7 The Second Respondent accepted the statement made by the First Respondent's witness (Mr Duke) to the effect that the relationship between the Applicant and Third Respondent has irretrievably broke down; whereas there was no supporting evidence;

9.8 The Second Respondent ignored the fact that Johan mentioned that he hated the Applicant hence the Applicant had a problem of working close with Johan at a dangerous machine;

9.9 The Second Respondent ignored the fact that to tell a person that he can take his bags and go is different from advising a person that a formal disciplinary procedure could lead to the dismissal of an employee.

[10] The Applicant states that the Second Respondent ignored the allegations that the Applicant was abused and victimized**.** The Third Respondent submitted that the Applicant did not present this information at the arbitration hearing.

[11] The review yardstick is whether there is rational connection between the decision and the information before the arbitrator and the reasons for it. This simply means that the outcome must be informed by the information that was before the decision maker at the time. The fact that the information was presented before the chairperson of the disciplinary hearing, does not mean that such information is automatically part of the arbitration proceedings, unless presented to him or her especially so because the arbitration hearing is

a hearing *de novo* and not an appeal or continuation of what transpired at the internal hearing.

[12] In *Carephone (Pty) Ltd v Marcus NO and Others*[2] held that:

> 'It seems to me that one will never be able to formulate a more specific test other than, in one way or another asking the question: is there a rational objective basic justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time, only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA'.

[13] Section 138 (1) and (2) of the LRA[3] empowers the commissioner to determine the manner and form of the proceedings. In terms of section 138(2), subject to the commissioner's prerogative, any party to the proceedings may decide to give evidence, call witnesses, cross-examine the witnesses of the other party and address closing arguments to the commissioner. It is the party's duty to make sure that all the relevant information is presented before the decision-maker because failure thereto, cannot be blamed unto the decision-maker where such information is not discussed. It should not be each and every issue that is discussed in the outcome for the mere reason that the decision-maker discusses only the relevant information and leaves out the irrelevant ones. Similarly, if the statement is mentioned in passing, the decision-maker may take that such statement is not important.

See *Carephone*[4]'s case where the court asked this question:

> 'Is there a rational objective basic justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?'

The wording, *"…*the material properly available to him…" requires that the material should be properly available to the decision-maker. If the material

[2] (1999) 3 SA 304 (LAC); (1998) 11 BLLR 1093 (LAC); (1998) 19 ILJ 1425 (LAC)
[3] Labour Relations Act, 1995 (Act 66 o 1995)
[4] *Supra* par 8 footnote 1

was not properly availed to him, it cannot be heard that the decision-maker has ignored information. It is of cardinally importance for a party to canvass an issue in such a way that it is clear to the decision-maker that a specific discussion and evaluation of the issue is necessary.

[14] The allegation of victimization was the issue that caused the Applicant's application to be referred back and forward between the First Respondent and the Court as it questioned the jurisdiction of First Respondent and even caused unnecessary delays. It is baffling that at the arbitration hearing the Applicant failed to properly avail the information that he regarded as serious when there was an opportunity to do so; similarly, the issue of abuse was not canvassed at the arbitration hearing. It cannot be said that the Arbitrator ignored the relevant material or that the arbitrator failed to apply his or her mind to the facts that were not presented before him or her at the time. The decision-maker cannot be held responsible for not taking into account the material that was not submitted. It is not the decision-maker's duty to hunt or search for supporting evidence on behalf of any party. The Applicant failed to canvass the issues at the right forum which is the arbitration hearing in order for the arbitrator to take into consideration such information. It was the duty of the Applicant to present all the relevant information before the Second Respondent.

[15] It is this Court's consideration that where, in a case, a party represents himself or herself (especially when is a layman in the fraternity) while the other party is represented or all the parties not represented, the commissioner or the arbitrator must exercise the mandate with extra caution in that the unrepresented party(s) would need proper guidance and education as to how the hearing process will be going and also going to an extend of flagging warnings in regards to failure to raise full material facts in a hearing which gives the other party the opportunity to respond. In that case it also makes matters easy for the commissioner or the arbitrator to arrive at a comprehensively considered decision which stands high chance of passing reasonableness test. This will also serve the requirement of complying with fairness and serving justice. In any event it is upon the commissioner or arbitrator to guide the arbitration proceedings. However, in doing so he or she must save guard

against appearing to represent the one party or being bias. One of the Applicant's grounds for review is that, at the arbitration hearing, the Second Respondent conducted himself as if he was the complainant and adducing evidence on behalf of the applicant. It clearly appears from the transcribed record that indeed the Second Respondent did much of the talking in the name of trying to get the objective evidence of the parties especially that of the Applicant[5], so say the First Respondent.

[16] In casu, the Applicant was so much kin that the issues of discrimination and victimization must be decided upon but at arbitration proceedings he failed to put such before the Second Respondent. The Applicant's failure to raise material facts that he considered so important had nothing to do with him not being represented because he knew what important facts were for his case but failed to present such. For this Court, point of departure is what was before the arbitrator during the proceedings which turns to be apparent that the issues that the Applicant alleges that the Second Respondent ignored (discrimination and victimization) were in fact never canvassed at the arbitration proceedings.

[17] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[6] the court said:

> '…What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*… In short, A review 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 which was reasonable to justify the decisions he or she arrived at'.

[18] In *Country Fair Food (Pty) Ltd v CCMA and Others*[7], the following reflects:

> 'However, the decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing *de novo'*.

[5] **See para 21 below where this issue of biasness is exhausted in detail.**
[6] [2014] 1 BLLR 20 (LAC); (2014) 35 *ILJ* 943 (LAC) at paras 15 and 16.
[7] [1999] 11 BLLR 1117 (LAC); (1999) 20 *ILJ* 1701(LAC) at para 11.

[19] The Applicant could not even show this Court that he presented such information before the arbitrator and he does not contest the fact that he in fact did not. In the Applicant's evidence in chief digitally recorded and reflected in the transcript, there is no information referring to either victimization or abuse. In this regard the arbitrator acted like any other reasonable decision-maker would have.

[20] The Applicant states that the Arbitrator ignored the issue of his unbearable working environment that existed. The Third Respondent indicated that this issue was not presented before the arbitrator. The Applicant could not show that he presented such information before the arbitrator. As there is no evidence before this Court to show that this allegation was presented before the arbitrator, it cannot be said that the arbitrator committed irregularity. The duty of any party to make sure that all the relevant material is presented to the decision-maker was discussed in details above.

[21] During Mr Duke's testimony the arbitrator was allegedly conducting himself like a complainant and obtaining evidence from the witness. Whether this allegation is true it can be determined from the transcript of the arbitration proceedings. The role of the arbitrator is to facilitate, set rules, manage the arbitration process, listen to the submissions, reading the documents submitted during the proceedings assist the parties to be within the parameter, ask clarity questions, and in fact manage the arbitration proceeding in a less legalistic manner. It is not for the arbitrator to solicit evidence or cross-examine witnesses. In this case whether or not the Second Respondent assumed the position of the complainant will be revealed in the transcript as the arbitration proceedings were digitally recorded and it will show the true reflection of what transpired during the hearing. From the transcript, it appears that the arbitrator was asking many questions but from the line of questioning it appears that the arbitrator was struggling to get relevant information especially from the Applicant himself. The line of questioning was within the powers of the arbitrator who in his capacity as decision-maker should clarify issues in order to arrive at an informed decision. From the transcript there is no reasonable inference that can be drawn that

the Second Respondent assumed the capacity of a complainant and obtaining evidence from Mr Duke. The conclusion is that the arbitrator was well within his powers.

[22] The Applicant alleges that the arbitrator ignored the circumstances under which the insubordination took place. In the Applicant's head of argument first paragraph he states as follows:

> 'The Second Respondent disregarded the explanation by the Applicant of the circumstances within which the insubordination took place when considered the sanction that was imposed by the Third Respondent'.

[23] Reading from the statement above the question whether or not insubordination was committed is not contested. The issue rather is the circumstances under which such insubordination was committed. Even from the argument the Applicant does not deny the fact that he refused to follow instructions but he is arguing that the reasons behind the refusal to carry out such instructions were ignored.

[24] It is also not the argument that the instructions were unlawful. It is common cause that someone with authority issued instructions which were lawful. It is incontrovertible that the Applicant persistently refused to take instructions from more than one senior or authorised person. However, the Applicant states that his reasons to refuse to take instructions were not considered.

[25] The Applicant mentioned those reasons as follows:

The Applicant indicated that Johan hated him. The fact that there is hatred between colleagues, cannot be justification to refuse instructions or behave in an unbecoming manner especially when by doing so may go into the root of employment relationship that can be construed as breach of employment contract. The Applicant submitted that as there existed bad blood between him and Johan he could not train him or even work close to him at a dangerous machine. Whether the Applicant would have been in danger had he worked close to Johan at a dangerous machine could not on a balance of probabilities be proven and cannot be relied upon as it appears only to be

subjective. There is no objective evidence or information to can conclude that Johan might harm the Applicant. Therefore this cannot be a valid reason for the Applicant to refuse instruction or refuse to work with Johan. If conclusion can be reached based on a mere feeling of a person or subjective information, there will be absurdity in law because information informed by a mere feeling or subjective element can result in unfair outcome. This court is satisfied that the issue of bad blood between the Applicant and Johan was dealt with. The transcript also confirms that the factors raised in regard to this insubordination were considered.

[26] The Applicant further stated that he cannot train someone who has many years of experience and a senior to him. The arbitrator exhausted this issue in detail in his award and at the end it was apparent that the Applicant's reasoning was not good enough for him to refuse instructions. The arbitrator has evaluated the material before him and applied his mind to the issue and reached a reasonable decision.

[27] The other issue that the Applicant raised is that the arbitrator accepted the only evidence from Mr Duke who said that the employment relationship is irretrievably broken down. It appears that the Applicant denies that the employment relationship is irretrievably broken down. Sometimes the relationship can be broken down but be retrievable to a harmonious state whereas it can happen that the relationship is irretrievably broken down to such a degree that it is no longer possible to retrieve it. In this case it would mean that the parties can no longer tolerate each other. Should that be the case, to force the relationship to continue under those circumstances it would be a recipe for disaster. It is of significance to establish the cause of the broken down relationship so as to apply the appropriate remedy. The question will be who caused the relationship to break down between the employer and the employee. In this case the Third Respondent alleges that the Applicant's actions are the cause.

[28] In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[8] case the test was as follows:

> 'Whether or not the employee's actions had the effect of rendering the continuation of the relationship of employer and employee intolerable'.

[29] From the record, the Third Respondent called Mr Duke as the only witness who testified to that effect. There are factors submitted by the Applicant that can be said to have connection with the alleged irretrievably broken down relationship. The Applicant said that the continued working environment was unbearable for him. This statement in clear terms signifies the unhealthy relationship that existed which in essence supports the fact that the relationship has broken down.

[30] The Applicant admits that he has mentioned the fact that he might resign from the employ of the Third Respondent. This is an indicative of the fact that there is a problem with the employment relationship. If an employee contemplates resignation, it is in essence termination of an employment relationship. The employment relationship can be terminated for various reasons among others, an employee want to exhaust greener pastures, or for growth, or he/she does not wish to work anymore or he/she resigns because the employment relationship is no longer healthy and so forth. The Applicant's situation relates to the latter. On the submissions and reasons for him to contemplate resignation, was on the basis that the employment relationship was unbearable. This again supports the fact that the employment relationship has broken down.

[31] The Applicant's refusal to accept instructions revolved around several issues that he allegedly was unhappy with. He brought in the medical aid issue which apparently is one of the factors that made him not to be contended with his employment. Having considered the circumstances, the question is whether it was justified for the Applicant to resort to refusal to obey instructions as recourse for his unhappiness? There should be other ways to address problems rather than to resort to actions that are bound to complicate issues

[8] (1992) 13 *ILJ* 573 LAC

even having the consequences of digging into the root of the employment contract. I mean if the employee still cares about his or her work.

[32] A breach of trust (conduct of the employee that destroys the faith and goodwill of the employer towards the employee) will normally be considered a material breach of an essential term that may justify dismissal.

[33] The Applicant's behaviour demonstrated the actions of an employee who no longer cared about his employment with the Third Respondent hence contemplating even to resign.

[34] In *Anglo American Farms*[9] the court held further that:

> 'If the confidence is destroyed …, due to the employee's actions, the continuation of their relationship can be expected to become intolerable…'

[35] It is held in the case of *Hulett Aluminium (Pty) Ltd v Bargaining Council for Metal Industry and Others*[10] it was said that:

> 'It would in my view be unfair for this court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgement of wrongdoing on the part of the employee would have gone a long way in indicating the potential or possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future'.

[36] The Applicant's attitude matches gravely inimical to the already damaged relationship.

[37] In *Jones v East Rand Extension Gold Mining Co Ltd*[11] at 334 the court held that:

> 'If an employee does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him'.

[9] *Supra* in par 18 footnote 7
[10] (2008) 29 *ILJ* 1180 (LC) at para 45.
[11] *1903 TH 325*

[38] In this Court's view, the reasoning of the arbitrator, based on the material that was before him at the time, it cannot be said that the conclusion he has arrived at was one that a reasonable decision- maker could not reach. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[12] where the Court said that the requirement is for the Court to ask a question:

> 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[39] Therefore the conclusion is that the arbitrator applied his mind, carefully and thoroughly considered the relevant material before him.

Order

In the premise, the following order is made:

I. That the application seeking to review and setting aside of the award issued by the Second Respondent dated 30 July 2014 is dismissed.

II. That the Applicant bears the costs of this application.

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RALEFATANE AJ

Acting Judge of the Labour Court of South Africa

[12] *(2008) 2 SA 24 (CC) at para 110;(2008) 28 ILJ 2405 (CC)*

APPEARANCES:

For Applicant: The Applicant represented himself

For the Third Respondent: Advocate S Makamu