REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case No: P 189/12

In the matter between:

BORDER RUGBY FOOTBALL UNION **APPLICANT**

and

PINDILE LEON MJIJI **RESPONDENT**

HEARD: **30 JANUARY 2014**

DELIVERED: **7 FEBRUARY 2014**

Summary: **An arbitrator who refused to determine an issue which forms part of his or her terms of reference commits gross misconduct which renders his or her award reviewable.**

Review in terms of section 33 of the Arbitration Act.

JUDGMENT

LALLIE, J

Introduction

[1] The applicant employed the first respondent in 2002 as a club coordinator. In 2006 it entrusted him with the responsibility of being a fixture manager. The first respondent was suspended from work on 10 September 2011 and a disciplinary enquiry was held into allegation of misconduct he was suspected to have committed. A number of charges were proffered against him. Some were withdrawn and he was acquitted of others. He was found guilty of gross negligence in handling the fixture and log lists and dismissed. The first respondent's internal appeal was dismissed. In terms of the first respondent's contract of employment the next avenue open to him was referring his dismissal dispute to private arbitration.

[2] In compliance with provisions of the Arbitration Act 42 of 1965 the applicant and the first respondent had to reach an agreement on the arbitrator and his or her terms of reference. They appointed the second respondent. They further agreed that the issues the second respondent was required to determine would be in the pleadings. Part of the agreement was that the arbitration award would be final and binding. The second respondent issued the arbitration award which forms the subject matter of this application.

Point in *limine*

[3] The first respondent challenged the jurisdiction of this court over the current proceedings on the basis of the agreement between himself and the applicant that the decision of the second respondent would be final and binding. Opposing the point in *limine* the applicant correctly relied on section 33 of the Arbitration Act and a number of cases which I will refer to later in this judgment. Section 33 of the Arbitration Act provides as follows:

> "Setting aside of award**.**-(1) Where-
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> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside' In addition, Section 157 of the Labour Relations Act (the LRA) provides that the court referred to in the Arbitration Act is the Labour Court, when an arbitration is conducted under the latter Act in respect of any dispute that may be referred to arbitration in terms of the LRA.

[4] The agreement by the applicant and the first respondent that the award would be final and binding did not oust the provisions of section 33 of the Arbitration Act. The finality meant that the award would not be subject to an appeal. In *Telecordia Technologies Inc v Telkon SA Limited*[1] which was referred to with approval in Herholdt v Nedbank[2] it was held that by agreeing to arbitration, parties to a dispute waive their right to appeal. It is a right they may not reclaim even by agreement. The first respondent's point in *limine* has no legal basis and is therefore dismissed.

The arbitration award

[5] The second respondent recorded that the pleadings reflected that he was required to determine whether the first respondent's dismissal was substantively fair. He was further required to determine whether the respondent was entitled to introduce new evidence in order to revive a charge the applicant was found not guilty of at the disciplinary enquiry. The arbitrator took into account that the chairperson of the disciplinary enquiry acquitted the first respondent of the charge to which entailed conducting business during working hours (charge 2) and dishonesty in

[1] (2006) SA 266 at 292 A-C

[2] [2013] 11 BLLR 1074 (SCA) at 1079 A-B

the work place. He made a finding that the applicant was not entitled to subject the first respondent to a second disciplinary enquiry. As the first respondent was found not guilty of charge 2, the charge fell outside his terms of reference. The arbitrator found no dishonesty in the manner the first respondent dealt with the log and concluded that the first respondent's dismissal was substantively unfair and reinstated him with retrospective effect.

Grounds for review

[6] The applicant submitted that the second respondent committed misconduct, numerous gross irregularities and exceeded his power. He disregarded relevant and material evidence. A further criticism of the award is based on the manner in which the second respondent dealt with facts, evidence and legal principles. The applicant also sought to rely on the second respondent's failure to determine the issues articulated in the pleadings.

[7] I will firstly consider whether the second respondent committed the gross irregularity of failure to determine the issues articulated in the pleadings. The parties agreed that the issues the second respondent had to determine would be in the pleadings. The pleadings consisted of the first respondent's statement of case and the applicant's statement of defence and counter claim. In stating the issues he was required to determine, the second respondent recorded that from the pleadings filed it was clear that the issue he was required to determine was whether the applicant's dismissal on 11 April 2011 was substaively fair. The recordal is incorrect as it implies that the dismissal is for the acts of misconduct the first respondent was found guilty of at the disciplinary enquiry. It reduces the extent of the power vested in him by the agreement. A proper reading of the pleadings reflects that the issue before the second respondent went beyond the substantive fairness of the first applicant's dismissal on 11 April 2011 and included charge 2 which the first respondent was found not guilty of at the disciplinary enquiry. Even when it is considered that the second respondent stated the issue before him in a nut shell without

repeating every item he had to make a ruling on his summary fails to reflect the real issue before him.

[8] Another ground the applicant sought to rely on is the second respondent's finding that the applicant was not entitled to subject the first respondent to a second disciplinary enquiry and that since the first respondent was found not guilty of charge 2 it did not fall within his terms of references to adjudicate the charge. The following dictum in Stocks Civil Engineering (Pty) Ltd v RIP NO and Another[3] is apposite:

> "It is equally explicit in the agreement under which an arbitrator is appointed that he is fully cogniscent with the extent of a limit to any discretion or powers he may have. If he is not and sum ignorance impact upon his award, he has not functioned properly and his award will be reviewable".

[9] The agreement between the applicant and the first respondent which granted the second respondent authority to arbitrate and drew the parameters of his powers granted the second respondent power to arbitrate issues in the pleadings. In the applicant's statement of defence it stated unequivocally that it intended to resurrect and proceed with charge 2 as new evidence had come to the fore after the first respondent's dismissal that he had been dishonest in that he was in Mthatha on or about 16 August 2011. As the first respondent's power was prescribed in the agreement he had no discretion to identify the issues which fell within his terms of reference. They had already identified in the pleadings. As charge 2 was resuscitated by the applicant it fell within his terms of reference and the second respondent was obliged to adjudicate it. By refusing to adjudicate it he purported the exercise a discretion he did not have. The power to identify issues which fell within his terms of reference fell outside the purview of his authority. He exceeded his power.

[10] The manner in which the second respondent defined the issue he was required to determine and his finding on charge 2 indicated that he was

[3] (2002) ILJ 358 LAC

not fully cognescent with the extent of his power as defined in the agreement. That had a direct effect on his award, constituted a gross irregularity and rendered the award reviewable.

[11] The first respondent opposed this application armed with an award in his favour. He also did not act unreasonably by opposing it. Granting a costs order will, in the circumstances be inappropriate.

[12] In the premises the following order is made:

12.1 The point in *limine* is dismissed.

12.2 The arbitration award issued by the second respondent dated 5 April 2012 is reviewed and set aside.

12.3 The matter is remitted to the second respondent for the continuation of the arbitration in accordance with his terms of reference.

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Lallie, J

Judge of the Labour Court of South Africa

APPEARANCE:

For the Applicant: Advocate Gauss

Instructed by: Van Rooyen Efstratiou Attorneys

For the first Respondent: Mr Mqanto of Mzwai Mqanto Attorneys