



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: PR195/13

In the matter between:

D.B. BEZUIDENHOUT t/a D.B. BEZUIDENHOUT

Applicant

and

D.D PRETORIUS

First Respondent

E. DIRKS

Second Respondent

S. MINNIE

Third Respondent

NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT AND LOGISTICS INDUSTRY

Fourth Respondent

V.H. LE ROUX N.O

Fifth Respondent

Heard: 2 May 2014

Delivered: 27 May 2014

Summary: When evidence led at the arbitration is not placed before the reviewing court either in the form of a record or in the body of the award, the award may be reviewed and

set aside. An adverse costs order may be granted against an arbitrator who deliberately breaches his duty to act impartially and seeks to conceal it by not recording the arbitration proceedings.

Review: Breach of a bargaining council's main agreement

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award issued by the fifth respondent (“the arbitrator”) in favour of the first, second and third respondents (“the respondents”). The factual background of this dispute is that on 23 February 2010 all the respondents referred a dispute to the first respondent alleging that the applicant had contravened clauses 19(1) (a) 21(1) (a), 32 (1) (a) of the fourth applicant’s collective agreement (“the main agreement”) and clauses 4.1 and 4.2 of the agency shop collective agreement. The arbitration hearing of the dispute was scheduled for 26 October 2010 and held in the absence of the applicant. An award was served on the applicant on 29 November 2010. The applicant successfully applied for its rescission. The matter was rescheduled for arbitration on 1 October 2013, on which date the applicant’s attorney moved an application for the fifth respondent to recuse himself because he had issued the award which had been rescinded in which made comments on the applicant’s credibility. The application was dismissed but the matter was postponed to 19 November 2013, on the recommendation of the fifth respondent’s son who appeared for all the respondents.
- [2] On 2 October 2013, the applicant’s attorney addressed a letter to the first applicant expressing that the applicant was expecting the postponement ruling with reasons thereof. When the matter resumed on 19 November 2013, the fifth respondent refused to hear the applicant’s attorney in the applicant’s absence of both the applicant and his attorney and issued the award which is the subject of the present application.

- [3] The applicant sought to rely on a number of grounds which were mainly based on the manner in which the arbitrator conducted the arbitration which led him to reach a decision a reasonable decision-maker could not reach on the evidence before him. The grounds include the arbitrator's refusal to give the applicant's attorney an audience, refusal to recuse himself when he had made the award which was rescinded in which he made negative comments on the credibility of the applicant and his failure to disclose that the respondents' representative on 1 October 2013 was his son.
- [4] The award appears to be a standard form in which the arbitrator inserted information peculiar to the dispute before him. He stated that after a grace period of 30 minutes there was no appearance by the applicant. He also recorded that the respondents gave evidence under oath. He ordered the applicant to comply with the collective agreement(s) of the fourth respondent and to ensure that its business and all its employees are registered with the fourth respondent and to pay the respondents amounts of money specified in paragraph 5.2 of the award, in the global amount of R27 189. 09.
- [5] A reviewing court is required to ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a reasonable conclusion. See *Gold fields Mining SA (Pty) Ltd v CCMA*¹. When the award is considered in its totality it reflects that the arbitrator did not consider the facts presented at the arbitration. The applicant's unopposed version is that the arbitrator refused to record the arbitration proceedings mechanically. When filing the record of the arbitration proceedings the fourth respondent stated that the arbitration proceedings were not recorded. The deliberate omission to generate the record rendered this particular award reviewable as I am without a record of the evidence led at the arbitration on which the award is based. The arbitrator stated that the respondents led evidence under oath but I am denied the benefit of such evidence. In the absence of the record, I do not have the benefit of the nature of the evidence. The arbitrator did not state even in summary what the evidence entailed. Also missing from the award is the presence of the applicant's attorney at the arbitration, the submissions he made and the reasons he was given marching orders by the arbitrator.

¹ [2014] 1 BLLR 20 (LAC).

- [6] The arbitrator was required in terms of section 138(1) of the Labour relations Act 66 of 1995 (“the LRA”) to have conducted the arbitration fairly and to deal with the substantial merits of the dispute. He failed to do so. He acted unfairly by not giving the applicant’s legal representative an audience and not giving reasons for his ruling. What makes the arbitrator’s conduct gross is that he did not even mention the legal representative’s presence and the submissions he made and deliberately concealed his gross misconduct by not recording the proceedings. The arbitrator’s obligation to conduct the arbitration fairly required him to have disclosed the relationship between himself and the respondents’ representative who was his son. It further required him to have refrained from arbitrating the dispute as he had arbitrated the dispute before and made adverse findings on the applicants’ credibility. The arbitrator’s failure to consider the principal dispute before him, evaluate the facts presented at the arbitration led him to reach an unreasonable conclusion.
- [7] The applicant sought a costs order against the fourth and fifth respondents. Section 162 provides that an order for the payment of costs may be made according to the requirements of the law and fairness. The applicant fulfilled the first requirement because generally costs follow the result. The unopposed version of the applicant reveals that it is fair to order the fourth and fifth respondents to pay the applicant’s costs. The fifth respondent acted under the auspices of the fourth respondent who allocated the arbitration to the fifth respondent at its own peril. The fifth respondent knew that he had an obligation to act fairly when conducting the arbitration. He does not have an unfettered discretion and his powers are spelt out in the LRA. He knew that he was committing gross misconduct by not recusing himself and insisting on arbitrating the dispute for the second time after the rescission of his first award in which he made adverse credibility findings against the applicant. He attempted to conceal his gross misconduct by refusing to record the proceedings even against the request of the applicant’s legal representative. He was bent on issuing an award which required the applicant to pay an amount of R27 183. 01 at all costs. The applicant was compelled to approach this Court to have the arbitration unreasonable award reviewed at a substantial cost. It would be unfair for the applicant to be out of pocket as a result of an arbitrator who deliberately acted unreasonable. As an expression of this Court’s disapproval of the conduct of arbitrators

who abuse the positions of trust they are appointed to in terms of the LRA the fourth and fifth respondents are ordered to pay the applicant's costs on the attorney and client scale.

[18] In the premises, the following order is made:

- 18.1 The arbitration award issued by the fifth respondent under case number PE 34/10399/09 and dated 3 December 2013 is reviewed and set aside.
- 18.2 The matter is remitted to the fourth respondent to be arbitrated *de novo* by an arbitrator other than the fifth respondent.
- 18.3 The fourth and fifth respondents are ordered to pay the applicant's cost on the attorney and client scale, jointly and severally one paying the other to be absolved.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Potgieter of Potgieter Attorneys

For the Respondents: No appearance

LABOUR COURT