

SOUTH AFRICA / JUDGMENT

Legend Logistics (PTY) Ltd v SATAWU and Others (JR 1099/19) [2022] ZALCJHB 241 (26 August 2022) [2022] ZALCJHB 241

COURT

Labour Court Johannesburg

BEFORE

H Schensema

CASE / FILE NUMBER

JR 1099/19

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Source record

THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
no: JR 1099/19
In

the matter between:

LEGEND LOGISTICS (PTY)
LTD
Applicant
And
SATAWU
First Respondent
AMOS DOCTOR
MASEKO
Second Respondent
COMMISSIONER
NOKO
Third Respondent
NATIONAL BARGAINING
COUNCIL FOR
THE ROAD FREIGHT &
LOGISTICS INDUSTRY
Fourth Respondent

Heard: 5 July 2022

Delivered: 26 August 2022 (This judgment was handed down electronically by emailing a copy to the parties.)

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 28 March 2019 under case number MPRFBC52486 wherein the Third Respondent ("the Commissioner") found that the Second Respondent's dismissal was procedurally fair but substantively unfair.
- [2] The First Respondent opposed the application.

Background

- [3] I do not intend to repeat the evidence in great detail, it is sufficient for present purposes to record that the Second Respondent was employed by the Applicant on 18 March 2017 as a Truck Driver. While off from work, the Second Respondent received an SMS requesting him to report for duty on 30 March 2018, however, since it was his "off-day", the Second Respondent only reported to work on 31 March 2022.
- [4] As a result of the Second Respondent's non-attendance at work, the truck which the Second Respondent should have driven was allocated to another driver, and for the period 31 March 2018 to 3 April 2018 he waited at the Applicant's yard for further instructions.
- [5] On 4 April 2018 the Second Respondent was dismissed due to his absenteeism on 30 March 2018. On 5 June 2018, the Second Respondent contacted the Applicant regarding a provident fund payout, which he then went to sign for at the Applicant's offices on 6 June 2018. On 6 June 2018 he was informed of a pending disciplinary enquiry.
- [6] On 30 July 2018 a settlement was reached, in respect of which the Second Respondent was required to report for duty on 6 August 2018. On 6 August 2018, he was issued with a notice to attend a disciplinary enquiry scheduled for 8 August 2018. The Second Respondent refused to partake in the disciplinary enquiry.
- [7] On 8 August 2018, at approximately 16h00, the Second Respondent was informed that a mutual separation agreement was concluded, despite the Second Respondent's refusal to partake in the disciplinary enquiry. The mutual separation agreement was based on three months' salary.

The arbitration proceedings and the award

- [8] The Second Respondent subsequently referred an unfair dismissal dispute to the Fourth Respondent. The dispute was arbitrated on 28 March 2019. At the commencement of the arbitration proceedings, the Applicant contended that there was no dispute between the parties on the basis that a mutual separation agreement had been concluded.
- [9] The issue therefore to be decided by the Commissioner was whether or not the Second Respondent had been dismissed and if so whether the dismissal was substantively and procedurally fair.
- [10] After considering the evidence, the Commissioner found that the Second Respondent's dismissal was procedurally fair but substantively unfair and ordered the Second Respondent be reinstated together with the payment of back-pay in the amount of R86 619.68.

The Review Application

- [11] Dissatisfied with the arbitration award, the Applicant filed a review application in which the Applicant *inter alia* raised the following in respect of the arbitration award:

11.1 the Fourth Respondent lacked jurisdiction to arbitrate the dispute as the dispute had become settled between the parties;

11.2 The Commissioner committed a number of irregularities in the conduct of the arbitration in that:

11.2.1 He did not deal with the Applicant's assertion that the dismissal was in dispute and proceeded on the basis that there was a dismissal;

11.2.2 not all of the evidence has been captured in the arbitration award;

11.2.3 he refused to accept the transcript of the recording as it was not on a letterhead;

11.2.4 he did not wish to accept the recording as it was not on a memory stick or CD;

11.2.5 he did not make a ruling whether there was a dismissal; and

11.2.6 he prejudged the dispute and made a determination that the Second Respondent had been dismissed.

- [12] The Applicant has further submitted in respect of its review application that the Commissioner had failed to apply his mind to the evidence and that the decision by the Commissioner was one that no reasonable decision maker could reach.

The Review Test

- [13] In light of the fact that the Applicant submits that the Fourth Respondent did not have jurisdiction to hear the dispute on the basis that the matter had become settled between the parties and therefore there was no dismissal, the Applicant has utilised the incorrect review test.

[14] In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[1] the Labour Appeal Court said the following:

"[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court."

[15] The proper review in this matter is one based on correctness and that is the case that must be pleaded in the founding affidavit, and supplemented if required, after the receipt of the transcribed record. This the Applicant has failed to do, as it is clear from the Applicant's pleadings that the Applicant has utilised the wrong review test by attacking the arbitration award on the basis of unreasonableness.

[16] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary)

affidavit. This was confirmed by the Constitutional Court in *CUSA v Tao Ying Metal Industries and others (Tao Ying)*[2] where it was held that:

‘...the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise

issues

which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.’

[17] In *NUMSA obo Zahela and 3 others v Volkswagen SA (Pty) Ltd and others*[3], the application for review was dismissed on the basis that the applicant had applied the wrong review test and it was held that:

‘[6] In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a

determination

of whether the commissioner's decision was correct.

[7] It follows that in a matter such as the present, where the proper right of review is one based on correctness, that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.

[8] There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry she was to conduct and that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of

action.'

[18] It is further trite that a party who seeks to review an arbitration award is bound by the grounds for review contained in the review

application, subject to one qualification namely that the Court is obliged to deal with a point of law apparent from the papers[4].

[19] Given that the dismissal was in dispute, this clearly deals with jurisdiction and in such a case the Court is required to determine whether the arbitrator was right or wrong. The Applicant for the aforementioned reasons has applied the wrong test in this review application.

[20] Notwithstanding the aforementioned, it is evident from the transcription of the arbitration proceedings, that the Applicant dismally failed to present a proper case during the arbitration. It is clear from the transcript of the proceedings that:

20.1 the Applicant did not comply with the Commissioner's directive to transcribe the recordings;

20.2 there was no agreement as the Second Respondent had clearly stated "Yes I am not going to sign anything before I take it to my attorney;" and

20.3 the Applicant failed to call a witness who had been part of the discussion with the Second Respondent.

Conclusion

[21] The applicant's review application for the aforementioned reasons must fail, in that the Applicant has clearly utilised the incorrect review test by applying the test of unreasonableness instead of the test of correctness.

[22] In the results, the following order is made:

1. The Applicant's review application is dismissed;
2. There is no order as to costs.

H.Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate Casey

Instructed by:

Yusuf Nagdee Attorney

For the First Respondent:

Mr A Mathenjwa

[1] (2008) 29 ILJ 2218 (LAC)

[2] (2008) 29 ILJ 2461 (CC) at para 67.

[3] Unreported judgment case no: PR137/13(handled down on 16 November 2016) at paras 6-8.

[4] Tao Ying at para 68.

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