

SOUTH AFRICA / JUDGMENT

Matiko v Friedman N.O and Another (JR570/2023) [2024] ZALCJHB 473 (28 November 2024)

[2024] ZALCJHB 473

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR570/2023

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 570 /2023

In the matter between:

SIMON

MATIKO

Applicant

and

LANCE

FRIEDMAN N.O

First

Respondent

OPRAH

WINFREY LEADERSHIP

ACADEMEY

FOR GIRLS

Second

Respondent

Heard: 13

November 2024

Delivered: 28

November 2024

This

judgment was handed down electronically by consent of the parties' representatives by circulation to them via email.

The date for

hand-down is deemed to be 28 November 2024.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside a private arbitration award issued in consequence of private arbitration proceedings agreed to between the Applicant and the Second Respondent (the employer or Respondent). The parties concluded an arbitration agreement in which they agreed to the terms of reference for the conduct of the arbitration proceedings, which was conducted by the First Respondent (arbitrator). The Applicant seeks an order to the effect that the arbitration award be reviewed and set aside and be substituted with one which finds that his dismissal was procedurally and substantively unfair and that he be reinstated with retrospective effect.

Background facts

- [2] The Applicant was employed by the Respondent on 1 July 2021 as head of operations. The Applicant and the Respondent entered into a written employment agreement and clause 15.2 thereof provided for a 12-month probation period. On 21 October 2021 the parties entered into a separate probation agreement in terms of which the Applicant's probation period would end on 30 June 2022.
- [3] After a final probation meeting was held on 27 June 2022, the chairperson of the Respondent's Board notified the Applicant on 30 June 2022 that his appointment would not be confirmed and that his contract would terminate on 30 June 2022 at the end of his probation period. The reasons in summary were that there was a breakdown in the Respondent's trust in the Applicant, the Applicant did not possess the leadership values required for the position he occupied and he failed to display the necessary executive leadership expected at the level of the head of operations.
- [4] The Applicant initially referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, which he subsequently withdrew on 11 July 2022. On 12 July 2022 the Applicant invoked the Respondent's 'Employee Private Dispute Resolution Procedure' and the parties agreed to have the dispute arbitrated by way of private arbitration. An arbitration agreement was signed in August 2022 and in February 2023 the parties signed a pre-arbitration minute. They agreed that the arbitrator had to decide whether the Applicant's dismissal was procedurally and substantively fair and that the arbitration award shall be final and binding.
- [5] The dispute was arbitrated in February 2022 and on 13 March 2022 an arbitration award was issued wherein the arbitrator dismissed the Applicant's case and ordered him to pay the costs on an attorney and client scale. The arbitration award is the subject of this review application.

The test on review

- [6] The review of arbitration awards is governed by section 145 of the Labour Relations Act[1] (LRA) and the test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[2] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [7] However, the arbitration award sought to be reviewed in *casu* was issued in consequence of a private arbitration agreement between the parties and the review of private arbitration awards is governed by section 33 of the Arbitration Act[3]. Thus, the award may only be reviewed in terms of the provisions of section 33 of the Arbitration Act.
- [8] The difference between a review application pursued in terms of the LRA and the Arbitration Act has been recognised and emphasized by the courts, as is evident from several authorities.
- [9] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[4] the majority in the Constitutional Court held that:

‘The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.’

- [10] The Constitutional Court in *Mphaphuli* further confirmed that the *Sidumo* test does not assist in the review of private arbitration awards and held that:

‘To return then to the question of the proper interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of section 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting

section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has

been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.’

[11] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another*[5] (*Stocks*), the appellant approached the Labour Appeal Court (LAC) contending that the arbitrator had failed to apply his mind to the question of whether the employee should be awarded compensation following the finding that the employee’s dismissal was substantively and procedurally unfair. The LAC considered the test on review and held that:

‘The Labour Court has no inherent common law powers of review. Its powers are to be found within the confines of its enabling act. In the case of reviews of awards of commissioners of the CCMA it is section 145 of the LRA, in the review of functions, acts and omissions under the LRA section 158(1)(g) of that Act, and in the

case of private arbitrations section 33(1) of the Arbitration Act. It is clear that common-law review powers are not granted by section 33(1). Neither are the "wide powers" of review in the popular sense of a total rehearing of the merits. But it does not follow that for this reason the first, so-called "narrow" review is the option. The scope of this review is to be determined from section 33(1) itself, bearing in mind that terms used in the statute may historically have acquired a special jurisprudential meaning.’

[12] In *Telcordia Technologies Inc v Telkom SA Ltd*[6] (*Telcordia*) the Supreme Court of Appeal (SCA) stressed the need, when courts are considering the confirmation or setting aside of private arbitration awards, for adherence to the principle of party autonomy, which requires a high degree of

deference to arbitral decisions and minimises the scope for intervention by the courts. It was held that:

‘... by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in section 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, “common law” or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court.

[13] In *SACCAWU and others v Pick ’n Pay Retailers (Pty) Ltd and others*[7] (*SACCAWU*) the Court summarised the position in respect of the review of private arbitration as:

‘In short: in the case of a review of a private arbitration award, there exists little scope for a review going to the merits, as a private arbitrator has the right to be wrong.’

[14] The Courts have made it clear in numerous judgments that the norms that apply in reviews of private arbitrations are those found in the provisions of section 33 of the Arbitration Act and the wider test of review of section 145 of the LRA is not applicable to private arbitrations under section 33 of the Arbitration Act.

[15] In *Clear Channel Independent (Pty) Ltd v Savage NO and another*[8] the applicant argued that the test to apply in assessing whether a private arbitration award is reviewable or not was that of a

reasonable decision-maker as set out in *Sidumo* as the right to fair labour practices applied to all employees. The applicant further argued that *Telcordia* did not apply as the case before the SCA concerned a commercial dispute and not a labour dispute. The court held, with reference to the LAC judgments in *Stocks* that the wider review test under section 145 of the LRA did not apply to private arbitrations under section 33 of the Arbitration Act. It further held that as section 33 of the Arbitration Act did not distinguish between commercial and labour related disputes and therefore it could not be said that *Telcordia* did not apply. Accordingly, the Court found that the test set out in *Telcordia*[9] applied to the review of private labour arbitration disputes. The Court concluded that, by referring the dispute to private arbitration, the parties had limited interferences by the court to the grounds of procedural irregularities as set out in section 33 of the Arbitration Act. The test to apply is set out as follows:

'By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they I have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court.'

[16] In short: by agreeing to refer their dispute to private arbitration the parties limit interference by court to the grounds of procedural irregularities as set out in section 33(1) of the Arbitration Act. The consequence of agreeing to refer the matter to private arbitration is that the parties waive the right to rely on any further ground of review be it 'common law' or otherwise. The grounds for review as set out in section 33(1) of the Arbitration Act can only be extended by agreement between the parties. Section 33(1) of the Arbitration Act provides for the setting aside of an award as follows:

‘(1) Where

- (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.

[17] It is within this context that the Applicant's grounds for review must be assessed.

Grounds for review

- [18] It is 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[10].

- [19] In short: it is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review. An applicant is bound by the grounds for review raised in the papers before Court. In casu the Applicant raised three main grounds for review, which I will deal with in turn.

- [20] The Applicant's grounds for review are to be considered within the strict confines of a review of a private arbitration award, as alluded to supra. When one analyses the grounds for review set out in section 33 (1) of the Arbitration Act, it is clear that the first three relate to the manner in which the arbitrator functioned, not to the outcome of the arbitration. The

fourth ground, i.e where the award has been improperly obtained, is also a ground which relates to function.

- [21] The grounds for review provided for in section 33 (1) of the Arbitration Act relate to the process followed by the arbitrator and not the outcome of the process. This was confirmed by the LAC in Stocks where it was held that:

'[51] When one analyses the grounds set out in section 33 (1) it is clear that the first three relate to the manner in which the arbitrator functioned, not to the outcome of the arbitration. The fourth ground, ie where the award has been improperly obtained, is also a ground which relates to function. Where for example, false evidence is adduced or a bribe is taken, it detrimentally affects the arbitrator's judicial functioning. It is also clear that the grounds overlap. The taking of a bribe is misconduct and renders the award improperly obtained. Where the arbitrator seriously shirks his duties it can be classified as misconduct or a gross irregularity in the proceedings. These are some examples. It is not an "either/or"

situation.

- [52] In my view the following principles emerge: A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this,

but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect

reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it

evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.'

Arbitrator committed any gross irregularity in the conduct of the arbitration proceedings

[22] The Applicant's first and second grounds for review relate to a complaint that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.

[23] In *Telcordia* the SCA considered the meaning of 'gross irregularity' in the context of section 33(1)(b) of the Arbitration Act and it was held that statutory ground of 'gross irregularity' was generally accepted to mean that a decision-maker misconceived the whole nature of the inquiry or his duties in connection therewith.

[24] Where the decision-making body misconceives its mandate, whether statutory or consensual, a hearing cannot in principle be fair because the body fails to perform its mandate. The SCA made it clear that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity.

[25] Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. If the mistake leads to the decision-making body not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.

[26] The SCA confirmed that the complaint must be directed at the method or conduct and not the result of the proceedings. Where the legal issue is left for the decision of the functionary any complaint about how he reached his decision must be directed at the method and not the result. It is wrong to confuse the reasoning with the conduct of the proceedings.

[27] In *Ellis v Morgan*[11] the basic principle was laid down as:

But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.

[28] In *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd*[12] the SCA held that:

‘[8] ... It suffices to say that where an arbitrator for some reason misconceives the nature of the inquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award.’

[29] It is within this context that the Applicant’s grounds for review must be decided.

[30] A review of a private arbitration award is limited to a review of any procedural irregularities which are articulated in section 33(1) of the Arbitration Act and the correctness of a finding by a private arbitrator is effectively irrelevant to a complaint that is limited to procedural irregularities.

[31] In his founding affidavit the Applicant stated that the arbitrator arrived at conclusions and made findings that no reasonable commissioner could have arrived at and that his conclusions constituted gross irregularities in the proceedings. This statement is repeated in the Applicant’s heads of argument. It is ill-conceived – the test of reasonableness finds no application and a gross irregularity as provided for in the Arbitration Act is different from the Applicant’s understanding as to what would constitute such irregularity. The Applicant evidently seeks to attack the result of the arbitration when such is not permissible in private arbitration proceedings.

[32] The question is whether the gross irregularity alleged by the Applicant prevented a fair trial of the issues either because the arbitrator misconceived the whole nature of the enquiry or because the arbitrator misconceived the nature of his duties.

[33] Before considering the attack on the arbitrator on the ground that he had committed gross irregularities in the conduct of the arbitration proceedings, it is necessary to determine the nature of the inquiry, the arbitrator’s duties and his powers.

[34] It is evident from the pre-arbitration agreement that the arbitrator was mandated to decide whether the Applicant’s dismissal was substantively and procedurally fair, whether the Respondent was liable to pay 50% of the referral fee paid by the Applicant to AFSA for the appointment of a private arbitrator and whether a cost order should be made regarding any party’s legal costs, excluding the administrative costs of the arbitration, which was dealt with in paragraph 22 of the agreement. In respect of substantive fairness, it was agreed that the arbitrator should decide inter alia the Applicant’s contentions that he had performed in respect of his probation agreement, that he met the performance objectives for his probation period, that he was not given reasonable time to improve and that he was

dismissed for poor work performance and / or misconduct.

[35] The facts before the arbitrator were inter alia that the parties concluded a probation agreement and that the Applicant was a probationary employee. In terms of the agreement, the Respondent would confirm the Applicant's employment if it was satisfied with the Applicant in the position he had occupied,

alternatively, the probation could be extended or his employment terminated. The issue the arbitrator had to decide was whether the termination of the Applicant's employment was fair within the confines of the probation agreement.

[36] The arbitrator recorded the law on probationary employees and specifically Schedule 8 of the Code of Good Practice: Dismissal, item 8 which deals with the dismissal of probationary employees, he dealt with the evidence, the parties' submissions in closing and made a finding that the Applicant's dismissal was procedurally and substantively fair.

[37] The first ground for review is that the arbitrator committed a gross irregularity by making an error of law by recognising that probationary employees do not have permanent status of employment and thereafter applied the provisions of the Code of Good Practice: Dismissal with a skewed approach.

[38] There is no merit in this ground for review.

[39] To succeed with a ground for review based on a gross irregularity in the proceedings, the Applicant must make out a case to the effect that the arbitrator misconceived the whole nature of the inquiry or his duties in connection therewith and that he did not have a fair trial. No such averment is made – instead the Applicant complains about an error of law which is no error of law. The LRA allows a distinction between a permanent and probationary employee.

[40] In any event, even if it was an error of law, it was not reviewable as was held in *Telcordia*:

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator "has the right to be wrong" on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

[87] In support of this I revert to *Doyle v Shenker*, a case that dealt with a review on the ground of a gross irregularity in the proceedings. Innes CJ said in a passage that speaks for itself:

'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation

nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.'

[88] Innes CJ added:

'It was suggested that, in the present instance, the fact that the magistrate did not deal with the merits, would constitute a gross irregularity. But if he considered the document to be conclusive, there was no need to discuss the merits. He may have been wrong in that view, but that would be an error of law only, and not an irregularity.'

[41] The second ground for review is that the arbitrator committed a gross irregularity by making determinations on facts that should be considered in misconduct proceedings and then using such irrelevant material for purposes of bringing it within the ambit of the probationary enquiry and/or drawing adverse conclusions from it against the Applicant, based on speculation.

- [42] Mr Higgs for the Applicant submitted that this ground for review is premised on the fact that the arbitrator considered considerations that one ought to consider in misconduct proceedings and made adverse conclusions in respect thereof in an attempt to find that the Applicant's dismissal was fair.
- [43] Once again, this ground for review is premised on the outcome of the arbitration proceedings and the findings or conclusions made by the arbitrator. This is not permissible in the review of a private arbitration award.
- [44] The only basis to review the outcome of a private arbitration is by showing that there was a complete misconception of the enquiry and in casu the Applicant must show that the arbitrator misconceived the enquiry because he did not understand that the enquiry was whether the Applicant's termination of employment was fair within the confines of the probation agreement. The Applicant failed to make out such a case.
- [45] As the SCA has held in Palabora Copper where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award.
- [46] The third ground for review relates to the arbitrator's incorrect application of the legal principles pertaining to cost orders in employment related disputes when he arrived at a punitive cost order against the Applicant, which resulted in a failure to exercise his discretion judicially.
- [47] During argument Mr Orr for the Respondent conceded that the arbitrator was indeed wrong in some respects on the issue of costs. Mr Orr conceded that in terms of the arbitration agreement concluded by the parties it was agreed that all costs incidental to the arbitration (administrative costs), excluding legal costs, would be borne by the parties in equal shares.
- [48] The arbitrator ordered the Applicant to pay the administrative costs, notwithstanding the fact that the parties agreed that such costs would be borne by them in equal shares. Mr Orr conceded that the arbitrator did not have the power to grant a cost order in respect of administrative costs.
- [49] The source of an arbitrator's power is the arbitration agreement. The point of departure in considering this ground for review is to consider what powers were given to the arbitrator and what the issues were the parties mandated him to decide. An arbitrator may not determine issues not provided for in the arbitration agreement.
- [50] It is evident from the arbitration agreement that the arbitrator was given powers to determine the issue of cost. It was recorded in the pre-arbitration agreement that the arbitrator had to decide whether the Respondent was liable to pay 50% of the referral fee paid by the Applicant to AFSA for the appointment of a private arbitrator and whether a cost order should be made regarding any party's legal costs, excluding the administrative costs of the arbitration, which was dealt with in paragraph 22 of the agreement.

- [51] It is evident that the arbitrator exceeded his powers when he ordered the Applicant to pay the administrative costs. The issue of administrative costs was agreed upon between the parties and it was specifically excluded from the issues the arbitrator had to decide. The arbitrator's order that the Applicant should pay the administrative costs is to be reviewed and set aside.
- [52] The arbitrator was mandated to decide whether the Respondent was liable to pay 50% of the referral fee paid by the Applicant to AFSA and whether a cost order should be made regarding any party's legal costs.
- [53] The Applicant's case is that the arbitrator ought to have departed from the premise that the Applicant would not be ordered to pay costs unless there was a reason to deviate from the general rule that a losing party in labour matters should not be mulcted in costs. The established rule in litigation that costs follow the result does not apply in labour matters.
- [54] In respect of legal costs, Mr Orr referred to paragraph 7.4 of the arbitration agreement where the parties agreed that the arbitrator may, in his discretion, order any party to the arbitration to pay the legal costs of the other party on any scale he deems appropriate. Mr Orr submitted that the parties agreed that the arbitrator be given a very wide discretion to order any party to the arbitration to pay the legal costs of the other party on any scale he deems appropriate. The arbitrator's discretion was not limited.
- [55] The Applicant effectively seeks to review the exercising of a very wide discretionary power.
- [56] Section 162 of the LRA gives a broad discretion to make orders for costs according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.
- [57] In *Zungu v Premier of the Province of Kwa Zulu-Natal and Others*[13] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters.
- [58] In casu the Applicant's complaint is that the arbitrator applied the principles of law incorrectly when he made a punitive cost order and as such, he did not exercise his discretion judicially. He ought not to have ordered costs, unless there was a reason to deviate from the rule that cost does not follow the result in a labour matter.
- [59] In the arbitration agreement the parties agreed that the arbitrator may, in his discretion, order any party to pay the legal costs of the other party on any scale he deems appropriate. It is thus clear that the arbitrator was mandated to make a cost order on any scale he deemed appropriate.
- [60] In *MEC for Environmental Affairs and Development Planning v Clairison's CC*[14] the Supreme Court of Appeal described the test that applies to the review of a discretion as follows:

‘When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.

..... The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.’

[61] It is trite that the courts should not too readily interfere with the exercising of a discretion. However, in cases where the discretion was not exercised judicially or where it was exercised capriciously or biased or based on the wrong principle or approach or not for a substantial reason, the court may interfere.

[62] When the exercising of a discretion is challenged, the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether or not the decision maker adopted an incorrect approach.

[63] In the application before this Court the Applicant did not make a single averment to the effect that the arbitrator acted capriciously or with bias. The only possible complaint is that the arbitrator adopted an incorrect approach when he deviated from the rule that cost does not follow the result in a labour matter.

[64] Mr Higgs referred to *Public Servants Association of South Africa v Department of Employment and Labour and Another*[15] where the Constitutional Court held that:

‘[35] In the labour context, the judicial exercise of a court’s discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in section 162, and the constitutional and statutory imperatives that underpin it. Where a court fails to do so, it commits an error of law and thus misdirects itself. This Court explained this in Long:

“When making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties. This, the Labour Court failed to do. There is no reasoning on the question of costs beyond an indication that costs are to follow the result. This is a misdirection of law and it follows that the Labour Court’s discretion in respect of costs was not judicially exercised and must be set aside.”

[65] It is evident that there is no general bar against the awarding of costs in labour matters, the position is rather that the established rule that costs follow the result does not automatically apply in labour matters. When a cost order is granted in a labour matter, the presiding officer must consider the principle of fairness and must give reasons for granting a cost

order. In considering fairness, the conduct of the parties should be considered, and mala fides, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

- [66] The question is whether the arbitrator considered the principles of fairness when he ordered the Applicant to pay the Respondent's costs and whether he gave reasons for awarding costs.
- [67] It is evident from the arbitration award that the arbitrator considered fairness in that he considered the conduct of the parties and found that the Applicant's conduct justified the imposition of a cost order. The arbitrator provided reasons in recording that he found that a cost order was justified because the Applicant placed almost all of the Respondent's version in dispute, just to concede it later or "not to have been proven by the applicant."
- [68] This ground for review, except in respect of the order that the Applicant must pay the administrative costs, must fail as I am not convinced that the arbitrator did not exercise his discretion judicially.

Costs

- [69] The last issue to be decided is the issue of costs. This Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of law and fairness.
- [70] The Respondent submitted that the Applicant should pay the costs for pursuing a meritless application as it would be unfair to burden the Respondent with the costs associated with opposing such an application. There is a clear difference between the review of a statutory arbitration and a private arbitration, which was completely ignored. This application was mala fide and frivolous and therefore the interests of justice will be best served by making an order of punitive costs against the applicant.
- [71] Mr Orr submitted that the Applicant filed a LRA review application under the guise of a private arbitration review and that there are no grounds upon which the private arbitration award could be reviewed.
- [72] Mr Higgs submitted that there should be no order as to costs and that each party should pay its own costs. He argued that there is merit in the Applicant's case.
- [73] This is a matter where this Court has to strike a balance. The Respondent's arguments are not without merit – the Applicant lost sight of the fact that this review application was not the same as the review of an arbitration award issued in a statutory arbitration process and the grounds for review raised by the Applicant were more appropriate for a section 145 review application. However, I am of the view that the interest of justice will be best served by making no order as to costs. The Applicant also challenged the arbitrator's findings on costs and the Respondent conceded that a material part thereof was wrong.

[74] In the premises I make the following order:

Order:

1.The arbitration award is reviewed and set aside only in respect of the arbitrator's order that the Applicant is to pay the

administrative costs;

2.The arbitrator's order is substituted with the following:

“The administrative costs in respect of the arbitration are to be paid by the parties in accordance with paragraph 22 of the pre-arbitration

minute signed by the parties on 6 February 2023.”

3.The remainder of the arbitration award is not reviewed;

4.There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Higgs from Higgs Attorneys Inc For the Second Respondent: Instructed by: Advocate C Orr SC Cheadle Thompson & Haysom Inc Attorneys

[1] No. 66 of 1995, as amended.

[2] (2007) 28 ILJ 2405 (CC) at para 110.

[3] Act 42 of 1965.

[4] (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC).

[5] [2002] 3 BLLR 189 (LAC) at para 30.

[6] 2007

(3) SA 266 (SCA).

[7] [2012] 1 BLLR 71 (LC).

[8] (2009) 30 ILJ 1593 (LC).

[9] Telcordia Technologies at paras 50 – 51.

[10] CUSA v Tao Ying Metal Industries and Others

(2008) 29 ILJ 2461 (CC) at par 67.

[11] Ellis v Morgan; Ellis v Desai 1909 TS 576 at 581.

[12] 2018

(5) SA 462 (SCA).

[13] (2018) 39 ILJ 523 (CC) at para 24.

[14] 2013

(6) SA 235 (SCA) paras 18 and 20.

[15] (2024) 45 ILJ 1646 (LC) at para 35.

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