

SOUTH AFRICA / JUDGMENT

NUM obo Matlakaselo v Gildenguys NO and Others (JR 1731/11) [2013] ZALCJHB 253 (10 October 2013)

[2013] ZALCJHB 253

COURT

Labour Court Johannesburg

BEFORE

Fourie

CASE / FILE NUMBER

JR 1731/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Not reportable

Not of interest to other judges

Case no: JR1731/11

In the matter between:

NUM obo RAMATHABO DANIEL MATLAKASELOApplicant

and

DR. ANNELIE GILDENHUYS N.O.First Respondent

TOKISO DISPUTE SETTLEMENT (PTY) LTDSecond Respondent

ANGLO GOLD ASHANTI LTDThird Respondent

HEARD: 10 July 2013

DELIVERED: 10 October 2013:

SUMMARY: Review of private arbitration awards – established principles applied to the facts

FOURIE, AJ

This is an application to review a private arbitration award in which the First Respondent (the arbitrator) held that the dismissal of the Applicant's member (the employee) by the Third Respondent (the employer) was fair.

It is trite that private arbitration awards can be reviewed in the Labour Courts, but that review grounds are limited to those in Section 33 of the Arbitration Act. A private arbitration award is not reviewable on the grounds that the result is unreasonable. See *NUM obo 35 Employees v Grogan N.O. and Another* [2010] 8 BLLR 799 (LAC) at para 33, and *Stocks Civil Engineering (Pty) Ltd v Rip N.O. and Another* [2002] 3 BLLR 189 (LAC) at para 23 - 24.

In order to succeed with the review application, the applicant must therefore prove that the arbitrator misconducted herself in relation to her duties as arbitrator, or that she committed a gross irregularity in the conduct of the arbitration proceedings, or that she exceeded her powers, or that the award was improperly obtained.

The grounds of review alleged in the founding affidavit are that the arbitrator failed to apply her mind to the evidence in the finding that the employee's dismissal was substantively fair, that she improperly admitted and took account of certain evidence in reaching the decision, and thus committed a gross irregularity in the manner in which she determined the matter. It is also alleged that the award was not one that a reasonable arbitrator could have reached. However, as set out above, this ground of review does not apply to the review of private arbitration awards, and I will ignore it.

The allegations in the founding affidavit are simply stated as broad legal conclusions – no reference is made to particular findings in the arbitration award, or to the record, to justify the allegations. Similarly, in his supplementary affidavit the employee fails to refer to actual evidence in the record. He simply states baldly his view that the arbitrator's findings on inconsistencies in his various statements, and the conclusion of dishonesty that followed, were wrong.

The failure to properly plead facts, with reference to the award and review record, sufficient to justify the legal conclusion that the arbitration award should be set aside, is normally fatal to a review application. In *Naidoo v National Bargaining Council for the Chemical Industry and Others*¹, the Labour Court (per Gush J) commented on this type of conduct in review proceedings:

[13] It is trite that an application brought in terms of section 145 of the Labour Relations Act ("LRA") is not an appeal. It is incumbent upon the applicant in his founding or supplementary affidavit to establish with reference to the arbitrator's award and the record (and the material placed before the arbitrator), the grounds upon which the applicant relies in seeking to have the award reviewed and set aside.

[14] The applicant's first ground of review (paragraph 9(a) above) is not a ground of review but simply paraphrases the provisions of section 145.

[15] The second set of grounds of review (paragraph 9(b) above) is not supported by any reference to the award or the record or bundle of documents and in any event does not accord with the evidence contained in the record and as summarised by the second respondent.

[16] The onus to establish that the award of the second respondent is reviewable rests on the shoulders of the applicant. Rule 7A of the rules of this Court require an applicant:

“desiring to review a decision (of an arbitrator in terms of section 145 of the LRA) must deliver a notice of motion supported by an affidavit setting out the factual and legal grounds upon which the applicant

relies to have the decision or proceedings corrected or set aside”.

In so doing, it is incumbent upon the applicant to place such factual and legal grounds that will enable the court to determine the matter. In the matter of *Minnaar v Jugdeow* the court held:

“in proceedings such as these, (an application) the affidavits take place not only of the pleadings in the trial but also of the evidence ... on affidavit, before the Court as will enable it (to determine the dispute).”

[17] In the matter of *Morgan Fashions SA (Pty) Ltd v CCMA and others* to which the third respondent’s Counsel referred, Marcus AJ said the following:

“The ‘grounds’ of review advanced by the company are stated in stark and unsubstantiated terms. Although the company’s

standpoint was that it required the record of proceedings in order to motivate the review, the company was, at least in possession of the arbitration award. The award runs to some 11 pages typed in single spacing. It is extremely detailed and, on the face of it, appears to represent a careful and lucid analysis of all the issues in dispute. In the review proceedings, however, there is no attempt whatsoever to analyse the award or to point to any defect in reasoning, error of fact or error of law. The award reflects a consideration by the Commissioner of the documentary evidence that was placed before her.”

....

[19] In the heads of argument filed by the applicant’s Counsel, the applicant attempts to make out a case justifying the review and setting aside of the award and makes reference to the record and award. Heads of argument, however, do not constitute pleadings and the court is left with only the applicant’s founding and replying affidavits to determine the reviewability or otherwise of the second respondent[’s] award. In support thereof, Ms Naidoo, who appeared for the third respondent referred the Court to an unreported decision of the High Court of Zimbabwe *Cargill Zimbabwe v Culvenham Trading (Pvt) Limited* where the court held:

“In my view, a dispute between the parties can only arise ex facie the pleadings filed with the court ... It is my further view that the dispute cannot be brought to the attention of the court in the heads of argument for Counsel cannot plead on behalf of the parties. It is trite that heads of argument are counsel’s conclusions and opinion of the facts and law applicable to the facts of the matter. They are not part of the pleadings.”

[20] In the circumstances, the court is left with only the applicant’s founding and replying affidavits to determine the reviewability or otherwise of the second respondent’s award. It is abundantly clear from the applicant’s founding and replying affidavits

that the applicant has not established any basis upon which the court could find that the award of the second respondent was reviewable.

The applicant has not discharged the onus of establishing that the second respondent either committed “misconduct a gross

irregularity or exceeded (his) powers” or came to a decision to which a reasonable decision maker could not make the only evidence and material placed before him.

[21] ... In circumstances where an applicant wishes to rely on an averment that the arbitrator failed to take into account evidence properly placed before him in reaching his award it should be even more obvious that the applicant should at very least refer to that evidence and those parts of the award which demonstrate the proposition.

[22] It is not sufficient for an applicant applying to review and set aside an award of an arbitrator to simply pay lip service to the provisions of section 145 of the LRA. Rule 7A quite obviously requires an applicant to deal fully with such factual and legal grounds upon which the applicant relies with reference to the award and evidence.” (Own emphasis)

The arbitrator’s duty was to determine whether the employee’s dismissal was fair. The employee had been dismissed for misconduct having been found guilty of failing to disclose material facts relating to a fatal incident that occurred at the employer’s mine, and in giving false testimony during an inquiry conducted in terms of Section 65 of the Mine Health and Safety Act.

The arbitrator found on the evidence placed before her, including the record of the Section 65 inquiry and the disciplinary hearing, and the evidence presented the arbitration, that the employee had in fact provided contradictory statements. The arbitrator rejected the employee’s rather poor explanation for these contradictions, and concluded that the employee was in fact guilty of misconduct, and that his dismissal was fair.

The award is coherent and rational. It contains a painstaking and detailed summary of evidence and argument, a comprehensive analysis of the evidence, argument and probabilities, and thoroughly reasoned findings of fact and law. The applicant has failed to demonstrate (or even to properly plead) any defects in the award or the conduct of the arbitrator that could possibly satisfy the narrow grounds of review of a private arbitration award under the Arbitration Act.

The applicant does not even take issue with any portion of the arbitrator's summary of evidence. In effect, the applicant simply complains that the arbitrator rejected his explanation for the material inconsistencies in his various statements, and reached factual findings that are erroneous. Even if the errors alleged were proved, with reference to the record (and I am not persuaded that any errors were demonstrated), mistakes of fact in an arbitration award do not, without more, constitute a gross irregularity in the proceedings. This is because the arbitrator is empowered to determine what the facts are (on the basis of the evidence), and this includes the power to get the facts wrong. See *Herholdt v Nedbank Ltd*

[2013] ZASCA 97 (5 September 2013) at para 25, and *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) at para 29-33.

In the result, the application is dismissed with costs.

Fourie, AJ.

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate N. Mahlangu

For the respondents: Advocate M. Lennox

1 [2012] 9 BLLR 915 (LC)

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