

SOUTH AFRICA / JUDGMENT

Vector Logistics (Pty) Ltd v Phala and Others (J370/21) [2023] ZALCJHB 358 (31 March 2023) [2023] ZALCJHB 358

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

J370/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

case

no: J370/21

In

the matter between:

VECTOR LOGISTICS (PTY)
LTD
Applicant
and
ADVOCATE
MOTLATSI PHALA
First Respondent
ABEL
SITHOLE
AND
87 OTHERS
Second to further Respondents

Heard:

22 March 2023

Delivered:

31 March 2023

Summary:

A review in terms of section 33 of the Arbitration Act, 1965. Where an arbitrator does not afford the parties a fair trial of issues, a gross irregularity within the contemplation of section 33 (1) (b) of the Arbitration Act is committed. Once tainted by a gross irregularity, an arbitral award is debauched and falls to be set aside on review. In an instance where the arbitration award is capable of being anatomized, a Court may only set aside the cancerous part of the arbitral award and retain the healthy and fresh part. An inextricable arbitral award suffers in whole even where a portion is found to be abominable. Where a party request a submission to a new arbitration tribunal, the powers of the review Court are limited to directions as to the constitution of the new arbitration tribunal. Going beyond the agreement of the parties amounts to excess of power and equally depraves an arbitral award. The impugned arbitration award is reviewable in law. Held: (1) The entire arbitral award is set aside. (2) A new arbitral tribunal is to be constituted. (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a motion seeking to review and set aside what is mundanely referred to as a private arbitration award issued by Advocate Motlatsi Phala (Phala) in terms of which he found that the dismissal of some of the individual employees was unfair. He ordered the applicant, Vector Logistics (Pty) Ltd (Vector) to reinstate and compensate some of the individual employees. Displeased thereby, Vector launched the present motion. The motion is opposed by the individual employees. The individual employees were differently represented. The first batch was represented by a legal firm, Voyi Incorporated. The second batch was represented by a trade union, National Transport Movement (NTM).

- [2] By way of opening remarks, this motion came before me by way of a special allocation made by the Judge President of the Labour Court. It seems to me that what accounted for the special allocation is the size of the files as opposed to the size of the issues. The file of papers comprised of almost ten full lever-arch files. However, this motion does not turn on the merits of the dispute but on the conduct of Phala. To that end, in my view, this matter would have snugly commanded a place in the normal opposed roll.

Background

facts

- [3] Owing to the fact that this motion oscillates on a constrained legal issue – does the conduct of Phala amount to a gross irregularity that vitiates the impugned arbitral award – it is obsolete to narrate punctiliously the facts that pertain to the core dispute between the parties. The core dispute pertained to the fairness or otherwise of the dismissal of the individual employees. The essential facts for the purposes of this judgment are that in June of 2018, several employees of Vector engaged in unprotected strike action. Owing to the legality of the demand behind the strike action, Vector obtained an interim order in this Court restraining the continuation of the strike action. At some stage, the interim order was discharged.
- [4] Shortly thereafter, the individual employees transmigrated the demand and embarked on yet another unprotected strike action. After various ultimata demanding that the striking employees return to work, Vector dismissed about 88 employees for reasons of participation in and acting in furtherance of unprotected strike action. Aggrieved by their dismissal, the individual employees challenged the fairness of the dismissal. Originally various disputes were referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. Ultimately, the parties agreed to submit the dispute to Phala for what is generally known as private arbitration.

A written arbitration agreement was concluded to initiate the arbitration proceedings. Amid the arbitration proceedings, the parties concluded further agreements aimed at curtailing the issues and guiding the continuation of the proceedings; namely; the (Scenario and Schedule) agreements.

- [5] After what appeared to be a protracted arbitration process, on 8 February 2021, Phala issued the main arbitral award. On 23 and 28 March 2021, Phala issued further awards and dubbed them variation rulings. As indicated above Vector was chagrined by the arbitral awards and launched the present motion.

Grounds of review

- [6] Regard being had to the founding papers of Vector, the present motion is grounded on one pillar; namely; Phala committed an irregularity in the conduct of the proceedings or had exceeded his powers. Briefly, it is the contention of Vector that Phala committed latent

irregularities, which denied it of a full and fair trial of the issues, when he conducted a forensic assessment of the clocking information and denied it the rules of natural justice. Additionally, Phala exceeded his powers by going behind the Scenario and the Schedule agreements.

Evaluation

- [7] The general principle applicable to gross irregularity is that it concerns the conduct of the proceedings rather than the merits of the decision made by the arbitrator. This principle is different from where an arbitrator errs on the facts and on the law. Such errors do not constitute an irregularity which will deprave an arbitration award[1]. In an instance where gross irregularity is alleged, it is required of a Court of review to concern itself with the conduct of the arbitrator more than his or her decision[2]. In *Goldfields Investments Ltd and another v City Council of Johannesburg and another*[3], the learned Schreiner J assiduously and clinically unpacked the law as follows:

“It seems to me that gross irregularity fall broadly into two classes, those that take place openly, as part of the conduct of the trial – they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which may be called latent...The crucial question is it prevented whether a fair trial of the issues...”

- [8] Regard being had to the grounds advanced by Vector, this matter involves an allegation of latent gross irregularity. Allegedly, Vector only picked up the error that had the effect of it having not enjoyed a fair trial of issues, when it studied the long arbitral award. Lately, gross irregularity in relation to proceedings is dubbed a methodological error which prevents a fair hearing. It is comprised of two aspects. First, there must be an (i) irregularity and secondly it must be (ii) gross. Of course, the prime and relevant question is what amounts to an irregularity? To my mind, in order to give a proper meaning to the word, it is cardinal to consider the meaning of the adjective ‘irregular’. It means, not even or balanced in shape or arrangement. Once a decision maker becomes uneven or imbalanced in his or her conduct, it may be said that such a decision maker is acting irregularly. Therefore, an irregularity is a high-handed or mistaken action[4].
- [9] Not every irregularity depraves the ultimate decision. The irregularity must be gross. As an adjective, the word gross, especially in relation to wrongdoing, means something very obvious and unacceptable. It is something flagrant, blatant and glaring. In the

context of a review application, an action is gross when it is calculated to cause the consequences that it prevents the case of the aggrieved party from being fully and fairly determined. It is by now rested law that in an arbitration process, an arbitrator has a duty to act fairly[5]. In this particular matter, the parties agreed that Phala must, in deciding the fairness of the dismissal, do so in accordance with the relevant provisions of the Labour Relations Act (LRA)[6]. One of the relevant provisions of the LRA is section 138 (1), which impels a commissioner to amongst others determine the dispute fairly. As an added lever, both parties, in this particular instance, Vector, must have expected Phala to conduct the determination of the dispute fairly. Contrary to a

submission by Mr Hulley SC, who appeared on behalf of the first batch of the respondents, this expectation is different from one of expecting a fair decision or outcome. There is, in my view, a pronounced difference between a fair conduct and a fair outcome. Vector does not lament a fair outcome but a fair conduct. Stated differently, Vector laments that the actions of Phala were uneven and imbalanced, to a point that, as latently discovered, it did not enjoy a full and fair hearing of issues.

[10] In support of Vector's case, its counsel Mr. Watt-Pringle SC placed heavy reliance on the judgment of ABSA Bank Ltd v Judge Thomas Cloete and another[7], where the erudite Madam Justice Kathree-Setiloane assiduously stated the law as follows:

"[21] ...what matters, is that it is a factor which the arbitrator took into account in dismissing Absa's extension application. In other words, the arbitrator relied on statements made from the Bar by MyRoof's

counsel that "the in duplum limit has already been reached in many if not most cases and that will prejudice [MyRoof]" in the absence of any supporting

affidavit evidence from MyRoof. This mistaken action prevented Absa from having its extension application fully and fairly determined. Simply put, the arbitrator made a methodological or procedural error that prevented a fair hearing of the application, by denying Absa (and MyRoof included) the opportunity to present evidence on affidavit on the question of whether MyRoof would suffer in duplum prejudice. This is a grave methodological or procedural mistake (and not a mere technicality) as it imperiled the arbitrator's duty to act fairly in the arbitration proceedings before him."

(Own emphasis)

[11] This Court fully accords with the sentiments expressed by the erudite Madam Justice. The sentiments are apt. The foray launched by Mr. Hulley SC against the above sentiments is, in my respectful view, unjustified. In *Sheibani v Elan and C LLP*[8], the Honourable Mr. Justice Langstaff relying on *Stanley Cole (Wainfleet) Ltd v Sheridan*[9] concluded that a procedural irregularity is one in which the principles of natural justice have been broken[10]. In English law, the duty to act fairly encapsulates the right to a hearing. As held in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another*[11] submission to arbitration is subject to an implied condition that the arbitrator should proceed fairly.

[12] In casu, it was within the contemplation of the parties that pre-arbitration agreements and pleadings shall amongst others guide Phala in conducting the arbitration proceedings. To my mind, agreements struck in the midst of the arbitration proceedings augments as it were the powers of the arbitrator as provided for in the antecedent arbitration agreement. To that extent, in the same way an arbitration agreement, binds an arbitrator, agreements struck intra arbitration proceedings binds an arbitrator. Differently stated, they become the source of arbitral powers. In casu, on 13 November 2020, the parties, augmented, as it were, the powers of Phala with regard to the determination of the dispute that served before him.

Prior to reaching the agreement, the parties prepared what became known as Scenarios. This, as it became common cause during the proceedings before me, was nothing but defences mounted by the individual employees against the allegation of participation in an unprotected strike action or acting in furtherance thereof. The existence of the unprotected strike action was not necessarily placed in dispute. What was smack-dab placed in dispute was the participation in or acting in furtherance of the strike action, hence the defences. In relation to that, it was agreed as follows:

“3.3 As a result, it will not be necessary for the individual Applicants to lead evidence and place their respective versions as to which scenario they fall.”

- [13] In any proceedings versions are mounted against a specific testimony. Differently stated, it is illogical to expect a version being put in the circumstances where no evidence is available[12]. As indicated above, the scenarios were defences. A defence must be mounted to some implicatory or accusatorial evidence. For an example, Mr. Joe Soap, may be told that an employer is in possession of video and photographic evidence that on 14-16 November 2018 he participated in or acted in furtherance of a strike action. The natural defence of Joe Soap would be an exculpatory one – I was on leave, I was only obliged to work night shift and so on. It must be so that the fact that the individual employees withdrew their labour was common cause between the parties. Otherwise, it becomes nonsensical for the parties to agree that there is no need to lead evidence in support of the defences. Regard being had to the scenarios, it is logical to conclude that they are mountable and capable of sticking to an accusation or implication of participating or acting in furtherance of a strike action. The admitted video and photographic evidence was aimed at showing participation or acting in furtherance. It is for that reason that they became the source that germinated the schedule used by Vector’s witness to testify.
- [14] Mr. Hulley SC submitted that under such prevailing circumstances it was still expected of Vector to lead evidence in support of the allegation that the individuals participated in a strike action or acted in furtherance on the identified days. Additionally, he submitted that Vector failed to lead such evidence. With considerable regret, I do not agree with those submissions. It became common cause that parties struck yet another agreement, which was dubbed a Schedule agreement. Brief background to the Schedule agreement is that one witness of Vector had analysed the video and photographic evidence and drew a schedule out of that analysis. When testimony was delivered that was predicated on such a schedule, the objection raised thereto was that the source documents (video and photographs) were not authenticated. Ultimately, an agreement was reached that the contents of the video and photographs were not placed in dispute. It remained the case of Vector throughout that any employee who appear in the videos and photographs in question was participating in or acting in furtherance of a strike action.

[15] It is trite that where an issue becomes common cause (not placed in dispute), there is no need for evidence to prove that issue. Evidence is something that furnishes proof. Where proof is not required, tendering evidence is an exercise in futility. Of cardinal importance, a question must be raised as to what the purpose of the Scenario and Schedule agreements was, in an instance where it would still be required that the evidence against which the scenarios are mounted still require rehashing. To my mind, the purpose of the Scenario and Schedule agreements was palpably obvious. It was intended to curtail the issues with the sole purpose of curtailing the proceedings. It cannot be correct, as submitted by Mr. Hulley SC, that the Scenario agreement was lopsided in favour of the individual employees and to, what appears to be, the detriment of Vector. Logic informs me that had Vector known that it remained

saddled with the duty to adduce evidence to prove the contents of the videos and the photographs, it would not have concluded the agreements.

[16] The above notwithstanding, the veritable issue is that the agreements struck midstream were aimed at giving the decision maker a beacon towards the determination of the dispute handed to him for resolution. It is, in my view, a methodological and procedural error for Phala to behave in a manner that seeks to ignore or wish away such agreements. Such cannot be fair on Vector, particularly with regard to the full and fair trial of issues. In *Kelly v Lennon*[13], Clarke J had the following to say, which this Court resonates with:

“... The starting point must be to give full recognition to the fact that the parties have agreed between themselves in the contract to refer any question under the contract to arbitration. A court should not seek to go behind that decision of the parties. In those circumstances it does not seem to me that there could be any legitimate basis for the court taking on the role, which the parties had agreed to refer to an arbitrator of determining any issues which arise under the relevant provision in the contract.”

[17] Having established what gross irregularity means, it is appropriate to zoom into the provisions of section 33 of the Arbitration Act (AA)[14]. Although the parties clothed Phala with some of the powers emanating from the LRA, he functioned as the so-called private arbitrator

within the contemplation of the AA. Section 33 (1) (b) of the AA authorizes a Court to set aside an award, where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers. Mr. Hulley SC in being critical of the ABSA judgment, submitted that not every gross irregularity depraves an award. In my respectful view, the argument is oblivious of the text of the section. In terms thereof, any gross irregularity suffices. The question is not one of form but of substance. Is the conduct complained of meeting the definitional requirements of gross irregularity? If it does, the award is susceptible to being set aside irrespective of the name it goes by.

[18] As indicated earlier, we are here involved with a latent irregularity. Phala rendered a very long arbitration award. In dealing with scenario (defence) 8, Phala acknowledged that the case of Vector was that the 33 employees who raised the defence that they reported for work on 16 November 2018 but were not allocated work, did not report for duty or tender their services. In dealing with that case, latently, it was revealed that he did the following:

“587 I did an analysis of the clocking information of the applicants in scenario 8 and confirmed that all clocked in except the following individuals [names omitted]...”

[19] In the arbitration award, Phala does not explain how he conducted the latently revealed analysis. It turns out that the clocking information is clocking transaction(s) emanating from some computer system of Vector recording entrances at various turnstiles. Therefore, this must mean that Phala, on his own, whilst crafting the assailed arbitration award, performed a forensic assessment of the clocking documents and accorded them an interpretation without being assisted by any witness. The clocking transaction(s) would, I must assume, record every entrance into the premises of Vector. Ex facie the clock transactions document there are no less than four turnstiles accounted for in it; viz; (security, right, left and back

turnstiles). The case of Vector was that employees congregated at the smoking room and did not perform any duties and picketed. That being the case, a cold assessment of the clocking information is likely to lead a decision maker astray, as Vector now argues that Phala went off tangent and misinterpreted the clocking information. That mistake was costly to Vector because it led to a finding that the dismissal, of those who, on the ‘independent’ assessment of Phala clocked in, was unfair.

[20] On the submission of Mr. Hulley SC, because the clocking information was the material placed before him, Phala was entitled to perform the forensic assessment and interpretation. I disagree. The duty of any decision maker is to evaluate evidence and not to manufacture evidence as it were. Having had sight of the clocking transaction, there is merit in a contention that Phala required evidence to assist him to interpret some of the technical or scientific information contained therein. Surely, if Vector was forewarned – a hallmark of a fair and full trial of issues – that such an analysis was in the offing, most certainly, Vector would

have wished to place some relevant evidence that would assist Phala in his interpretation of the technical and scientific information.

Axiomatically, Phala committed a methodological and procedural error. Certainly, this error has as the natural effect, the denial of a fair and fullness of the trial of issues. Based on the analysis of the authorities conducted above, it is lucid and perspicuous that the mistake by Phala amounts to a gross irregularity in the proceedings.

[21] The statutory consequences of that is the setting aside of the arbitration award. There can be no doubt that the arbitration award is a product of taint. Mr. Hulley SC submitted that the entire award should not be set aside but the setting aside should be to the extent of the alleged irregularity. For reasons expatiated below, I disagree. This Court is not possessed of such power. Section 33 (1) of the AA is perspicuous. It provides:

“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.”

[22] This conclusion of course impacts on the second batch of respondents represented by NTM and possibly the other scenarios. NTM represented

employees whose defence was that they were not on strike. The case of Vector is that those individuals associated themselves with the strikers and accordingly participated in a strike action[15]. It is not the intention of this judgment to evaluate the merits or the demerits of the decision of Phala. Fact remains that, there is only one arbitration award. The compartmentalization into scenarios was for the convenience of the parties and did not give birth to different cases as it were. One arbitration award was awaited, which squarely dealt with one cause of action – the fairness of the dismissal of the individual employees. The reason advanced by Vector to justify the mass dismissal was one – participation in or action in furtherance of unprotected strike action. That arbitration award is tainted by a gross irregularity. Unfortunately, the baby is going to be thrown out with the bath water. Even if this Court may take a view that the mistake in relation to scenario 8 does not affect scenario 9, this Court cannot perform a surgical operation and excise scenario 9 from the assailed arbitration award. In doing so, this Court would be indirectly issuing an arbitration award for the parties in the circumstances where the Court has not been chosen by the parties to be an umpire in their dispute. An elementary rule of law is that no one, Courts included, would exercise a power that one does not have. This Court is devoid of any power to arbitrate the dispute. This being the point made in Kelly.

[23] In case there is any doubt as to the powers of this Court, section 33 (4) of the AA makes it absolutely clear that if the award is set aside, what should happen is, at the request of either party, a submission to a new arbitration tribunal constituted in the manner directed by the Court. Therefore, unlike in a section 145 (4) (a) of the LRA situation, this Court is not empowered to determine the dispute alleging the unfair dismissal.

[24] After the matter was fully argued and whilst this Court was considering its judgment, parties agreed to supplement their respective arguments on the question whether this Court is empowered to excise the good from the bad and set the arbitral award aside only to an extent. This Court only received submissions from Vector and the first batch of respondents. There was however evidence that the representative of NTM was invited to make submissions, if any. In support of an answer in the affirmative – this Court is empowered to -, Mr. Hulley SC placed heavy reliance on Palabora Copper. To my mind, the facts of Palabora Copper are entirely distinguishable. The palpable distinguishing feature is that in

that case there was a main claim and a counterclaim. The irregularity related only to the counterclaim. Although the main claim and the counterclaim were for sake of convenience dealt with in one set of proceedings, they were clearly discrete and detachable causes of action. In casu, there was only one cause of action – the fairness of the dismissal of 88 employees of Vector. It is clear that the interpretation afforded to section 33 (1) (b) of the AA in Palabora Copper was largely influenced by what the English author Russel on Arbitration[16] had to say about the English Arbitration Act as it stood before its amendment. Chief amongst, the author perspicuously stated that:

“The bad portion, however, must be clearly separable in its nature in order that the award may be good for residue. When it is so divisible, the faulty direction will alone be set aside or treated as null... if the objectionable provisions in the award are inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided.

[25] Assuming for now, that the methodological error is only in respect of scenario 8, the view this Court takes is that that bad portion is not clearly separable from the rest of the award, in order to qualify for excision. As pointed out earlier, the scenarios were not separate and distinct causes of actions. They are separate a distinct defences to one cause of action – unfair dismissal. Inasmuch as Palabora Copper is binding authority on this Court, in recent times, the Constitutional Court has approved a method of interpretation and held

that text, context and purpose must be considered concomitantly[17]. It does seem that the English lawgiver was not comfortable with the views of the author because the English Arbitration Act was in due course amended to be specific, by inserting – in whole or in part. Perhaps that is the answer for the South African Arbitration Act.>

[26] Nevertheless, the view this Court takes is that the facts of this case are distinguishable. In my respectful view, the principle established in Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others[18] is specific, the irregularity was related to failing to finally decide an issue. Such is clearly discrete from issues that were

properly and finally decided. In casu no failure to finally decide an issue arose. All the subsequent judgments that followed Palabora Copper did so because they were faced with detachable issues.[19]

[27] More recently, the Supreme Court of Appeal, in the matter of OCA Testing and Certification South Africa (Pty) Ltd and Another[20] reconfirmed the principle in Palabora Copper and concluded thus:

“[38] Here the issue is clear-cut. The portion of the arbitrator’s award that has been impeached by OCA Testing relates to a part of the main claim and does not affect the counter-claim. The fact that OCA Testing has accepted its fate in relation to a minor portion of its claim (i.e. R142 002.46) does not, by parity of reasoning, detract from this principle. Accordingly, paragraph 1 of the award falls to be set aside albeit only to the extent that it relates to the amounts arising from the second and third agreements.”

[28] Here, issues are not clear-cut. As submitted by Mr. Hulley SC and not challenged, different individual employees fell under two or more categories. That will make it impossible for this Court to perform a surgery on the arbitral award. In conclusion, it is apposite to refer to the sentiments expressed by the Honourable Mr Justice William Stone SBS KC sitting in the Court of first instance Commercial and Civil Division (Abu Dhabi) in a matter of A6 v B6 (B6) [21]. The learned Justice reverberated thus:

“Clearly, A6 appears to wish to ‘cherry pick’ and retain what has fallen in its favour in the Award, but to set aside the remainder and to have another go with a fresh tribunal to consider A6’s evidence on those parts of the dispute which did not find favour with the Tribunal. This submission is at variance with both first principles and accumulated arbitral jurisprudence. There is no mechanism under the Federal Arbitration Law ... to ‘re-open’ any arbitration after the Final Award is rendered: in principle either the Award is set aside or it is not, and there can be no question of any ‘halfway house’ such as now is canvassed by A6.

Should the award be set aside that is the end of that: the issues between the parties the subject of the initial reference can of course be subject to consideration in a new second arbitration before a newly-constituted tribunal, but there can be no appointment of a new tribunal solely to consider/ analyse those parts of evidence submitted by a particular party which did not attain success in the existing reference, as A6 now wishes to achieve. Accordingly the remedy sought is not available in law and is rejected.”

[28] In B6, the claim filed requested setting aside to an extent. It is the remedy that the learned judge concluded was not available in law.

Just a comment in passing, it seems to me that the concept of severing the bad and retaining the good applies snugly in the contract[22] as opposed to a legislative situation. In *Eastwood v Shepstone*[23], Innes CJ stated that:

“Where a contract is divisible, that is to say, where parties have so expressed themselves, either in the original agreement or in any subsequent valid variation of it, that the subject matter of the contract and the consideration can be divided into two or more parts, then if one part be void and bad, and one part be good, the Court will, at the request of one of the parties, reject the bad portion and enforce the good.”[24]

In my view, divisibility must be pleaded and proven, otherwise a different award shall emerge. Section 28 of the AA provides that unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of the AA, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms. As I read the

provisions of section 33 (1) of the AA, the only observable order that a Court may make is that of setting aside the award. If the views of Russel on Arbitration are to be accepted, as they were already accepted, it must mean that a tribunal may issue two awards, which are detachable and shall qualify as ‘the award’. The Constitutional Court reaffirmed Cool Ideas 1186 CC v Hubbard and Another[25] in Chisuse and Others v DG of Home Affairs and another[26]. Most importantly, the Court in Chisuse[27] sternly warned judges as follows:

“Judges must hesitate “to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation”

[29] In addition to the gross irregularity allegation, Vector contends that by going behind the Scenario and Schedule agreement, Phala exceeded his arbitral powers. As a general principle, an arbitrator source powers from the arbitration agreement[28]. Straddling outside the four corners of the arbitral agreement amounts to excess of power. This Court takes a view that the Scenario and Schedule agreements are an extension of the arbitration agreement or on their respective own arbitration agreements. In Hosmed the following, which underscores the point being made herein, was said:

“[30] In my view it is clear that the only source of an arbitrator’s power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator ...had no jurisdiction to decide a matter not pleaded...”

[30] Mr. Hulley SC argued that since clause 2.7 of the arbitration agreement contains a non-variation clause (Shifren clause), subsequent agreements are invalid if not reduced to writing and signed by all parties. Given the view this Court takes on the gross irregularity ground it is academic to consider separately the ground of excess of power. It ought to be remembered that the word or may be used to either link alternatives or introduce a synonym or explanation of a preceding word or phrase. It is not out of kilter to conclude that an arbitrator who commits a gross irregularity effectively exceeds power.

[31] However, I do state in passing that the two agreements did not seek to vary any clause of the arbitration agreement. What those two agreements did was to give effect to clause 2.3.4 of the arbitration agreement which contemplated pre-arbitration meetings and pre-trial minutes – a consensual agreement. To my mind, there is nothing that shall prevent parties to enter into multiple arbitration agreements all aimed at referring an existing or future dispute to arbitration.

Conclusions

[32] This Court concludes that by conducting an analysis of the clocking records without affording Vector an opportunity to make any input, Phala failed to observe the rules of natural justice. Such conduct is inconsistent with the duty to act fairly. Given the agreed position of the parties in the schedule agreement, it was no longer necessary for Phala to

conduct a forensic assessment of the clocking records. Had it been that he was not satisfied with the manner in which the parties agreed on the clocking information, it was incumbent on Phala to intra the proceedings indicate that much to the parties. Vector was not forewarned of this action. This mistake was obviously serious enough to deprave the arbitral award. It clearly offends the duty to act fairly. Its effect is that Vector did not receive a fair and full hearing of the issues.

[33] Additionally, this Court concludes that in seeking to go behind the agreement of the parties, Phala committed an excess of power on procedural matters. Yet again, if Phala did not accept the manner in which the parties agreed on procedural matters, he was,

on application of the duty to act fairly, required to intra the proceedings raise his concerns for the purposes of sourcing the input of the parties before him. All these failures points to a denial of justice. Accordingly for all or some of the reasons outlined above, the arbitral award made by Phala is debauched and falls to be reviewed and set aside. Vector sought a fresh submission to a new arbitration process. There is nothing to countervail this request. In this regard, the powers of this Court are confined to a direction on how the fresh hearing is to be conducted. The issue involved in this matter is singular in nature and is incapable of being detached. Accordingly, Phala has disqualified himself as an umpire and should not be chosen to conduct a fresh arbitration. A new umpire must be agreed upon.

[34] In the result the following order is made:

Order

1. The arbitral award as subsequently varied on various dates issued by Advocate Motlatsi Phala is hereby reviewed and set aside.
2. The parties involved in the dispute are to submit to a new arbitration tribunal, which does not encapsulate Advocate Motlatsi Phala.
3. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. C Watt-Pringle SC with him Ms S Quinn

Instructed by: Macgregor Erasmus Attorneys Inc, Sandton.

For the Respondents: Mr. G I Hulley SC with him Ms N Mbelle (first batch of individual respondents).

Instructed by: Voui Inc, Midrand.

For the Respondents: Mr E Mphahlele (NTM official) (second batch of individual respondents).

- [1] Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd 2018
- (5) SA 462 (SCA) (Palabora Copper).
- [2] See *Ellis v Morgan*; *Ellis v Desai* 1909 TS 576.
- [3] 1938 TPD 551 at p. 560.
- [4] See *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and another* 2016 (1) SA 78 (GJ).
- [5] See *Telcordia Technologies Inc v Telkom SA Ltd*
- [2006] ZASCA 112; 2007 (3) SA 266 (SCA) (Telcordia).
- [6] Act 66 of 1995 as amended.
- [7] (35640/2019) [2021] ZAGPJHC 733 (9 March 2021) at para 21.
- [8]
- [2012] ICR D38
- [9]
- [2003] EWCA Civ 1046.
- [10] In *Sheridan* (id fn 8) Ward LJ stated that “not to be afforded a fair hearing would be an obviously serious procedural irregularity sufficient to allow the appeal. The real question is, however, what happened was seriously irregular and unfair.”
- [11] 2009 (4) SA 529 (CC).
- [12] As aptly put in *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at para 61 held that “if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct.”
- [13]
- [2009] IEHC 320.
- [14] Act 42 of 1965 as amended.
- [15] See *Moqhaka Local Municipality v IMATU obo Thebe and others* (JA65/18) [2020] ZALAC 29 (22 May 2020).
- [16] Anthony Walton QC & Mary Victoria Russel on Arbitration 20 Ed (1982) at 430-1.
- [17] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) 1 SA (CC).

- [18] 2020 (2) SA 295 (SCA)
- [19] See *Kruinkloof Bushveld Estate NPC v Chairperson, Panel of Arbitrators and Others* 2022 (6) SA 236 (GJ) (The Appeal Panel awarded costs incorrectly) and *Crook v Lipschitz and Others* (2019/18319) [2020] ZAGPJHC 80 (12 March 2020 (Many issues were not contentious)
- [20] (1226/2021) [2023] ZASCA 13 (17 February 2023)
- [21]
- [2023] ADMGMCFI 0005
- [22] See *Bal v Van Staden* 1903 TS 70 at 82.
- [23] 1902 TS 294 at 303.
- [24] See also *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 1 SA 438 (A).
- [25] 2014 (4) SA 474 (CC).
- [26] 2020 (6) SA 14 (CC).
- [27] *Ibid* at para 48.
- [28] See *Hos+Med Medical Aid Scheme v Thebe Ya Pelo Healthcare Marketing and Consulting (Pty) Ltd and others (Hosmed)*
- [2007] ZASCA 163; 2008 (2) SA 608 (SCA).
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