REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1475/10

In the matter between:

SIYABULELA MXALISA AND OTHERS **Applicant**

and

DOMINION URANIUM JOINT **First Respondent**

ROLAND SURTHERLAND *N.O* **Second Respondent**

Heard: **27 September 2012**

Delivered: **23 January 2013**

Summary: Review of private arbitration award- grounds for review governed by section 33 (1) of the Arbitration Act of 1969 - **employees embarking on unprotected strike action- employees formed a crisis committee to engage with employer- employer statutorily enjoins to engage with recognised trade union- crisis committee- arbitrator conclusion influenced largely by the finding of the credibility of the witnesses. Courts would interfere with the finding of credibility of witnesses only if arbitrator did not apply properly the rules of evidence regarding the assessment of the credibility of witnesses. Review application dismissed**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicants seek to review and set aside the arbitration award made by the second respondent (the arbitrator) dated 29 April 2010 in terms of which the dismissal of the applicants was found to be fair.

[2] After the conciliation at the CCMA had failed, the applicants filed a statement of case with this Court. The case before the court was withdrawn after the parties agreed to refer their dispute to private arbitration.

Background facts

[3] The dismissal in this matter involves a total of 821 employees who were dismissed during October 2008, for allegedly participating in an unlawful and unprotected strike action. Some of the applicants were at the time of the dismissal members of the National Union of Mine Workers (the NUM) and the others were non-unionised.

[4] The dismissal has its history in the dispute that arose in 2006, regarding the issue of health and safety standards which was initially raised by the NUM on behalf of the employees. The negotiations regarding the matter took a very long time as a result of which some of the employees lost confidence in NUM. It was a result of this that the employees formed a crisis committee to engage with the first respondent on behalf of the employees. The crisis committee consisted of both members of NUM and non-members.

[5] After its formation, the crisis committee demanded that it be involved in the negotiation regarding a range of issues including health and safety, salaries and benefits for the employees. The first respondent refused to engage the crisis committee and continued to engage NUM in the negotiations.

[6] In response to the first respondent's refusal to engage the crisis committee in the negotiations, the committee organised a protest march during July 2008. The members of the crisis committee were charged and dismissed for inciting the employees to participate in a protest march. Thereafter, the applicants sought unsuccessfully to negotiate the reinstatement of members of the crisis committee.

[7] Because of the refusal by the first respondent to negotiation the reinstatement of the dismissed members of the crisis committee, the applicants embarked on a work stoppage on 8 October 2008.

[8] The following day on 9 October 2008, the employer approached the court for an urgent interdict, interdicting the strike action. The court papers were served on NUM which did not oppose the application. Accordingly an order declaring the strike action unlawful and ordering the employees to cease their unlawful action was made by the court. The Court order which was in the form of a rule *nisi* which was later confirmed unopposed.

[9] On 10 October 2008, the employer issued another ultimatum to the employees calling on them to show cause why they should not be dismissed. The employees did not respond and accordingly the first respondent dismissed them.

[10] The applicants being unhappy with their dismissal referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). The conciliation process having failed to resolve the dispute the applicants referred the matter to the Labour Court for adjudication. However, by agreement between the parties the matter was withdrawn from the Labour Court and referred to private arbitration, the outcome of which is the subject of the present proceedings.

[11] Turning to the agreement to refer the dispute to private arbitration, the terms of reference are contained in the pre-arbitration minutes date 28 August 2009. Paragraph 1 of the pre-arbitration minutes reads as follows:

‘1.1 the parties agree for their dispute in the Labour Court under case number JS355/09 as read with the Arbitration Act.

1.2 the parties agree that Advocate Roland Sutherland SC will act as the arbitrator in this matter.

1.3 the Arbitrator will have the same powers as a Labour Court judge presiding over this matter and his terms of reference will determine this dispute.

1.4 the arbitration will be final and binding upon the parties and neither party shall have the right to appeal the award.

1.5 the respondent will pay the costs of the arbitration, including the arbitrator's fees, the venue costs, costs of the recording of the proceedings and interpreter's costs. Each party will pay its own legal fees incurred in this matter, but the arbitrator may make costs order which he deems fit at the conclusion of the arbitration.

1.6 the arbitrator will deliver his award within 30 days from the conclusion of the arbitration by forwarding a copy of his award to the parties’ respective attorneys. The arbitrator shall not be required to reconvene the arbitration only for the purpose of delivery of his award.

1.7 the applicant will withdraw their dispute before the Labour Court.

1.8 the parties agree for the pleadings in the Labour Court matter to stand as pleadings in this arbitration.’

[12] The issues which the arbitrator was to determine are set out at paragraph 5 of the pre-arbitration minutes as follows:

‘5.1 Whether the ultimatum referred to in paragraph 18.6 below were given to the individual applicants.

5.2. Whether the individual applicants were afforded a reasonable opportunity to respond to these ultimatum before being dismissed by the respondent.

5.3. Whether the individual applicants were afforded a reasonable opportunity to make submissions concerning the decision to dismiss them.

5.4. Whether the individual applicants were afforded a reasonable opportunity to appeal against the decision to dismiss them.

5.5. Whether the dismissals of the individual applicants were procedurally fair.

5.6. Whether the dismissal was the appropriate sanction in the circumstances.

5.7. Whether the dismissal of the individual applicants were substantively unfair.

5.8. If their dismissals were substantively unfair, appropriate relief to be awarded to individual applicants.

5.9. If their dismissals were procedurally unfair, the appropriate compensation to be awarded to the applicants.'

[13] The relief sought by the applicants is compensation in terms of section 193 read with section 194 of the LRA.

Grounds for review

[14] The applicants have raised a number of grounds upon which they rely on in their contention that the arbitration award is reviewable. The grounds of review as raised by the applicants can be summarised as follows; gross irregularity, the arbitrator exceeding his powers, the arbitrator arrived at a conclusion that is not justifiable, misdirection on the part of the arbitrator and shifting *onus* on to the applicants and ignoring that the ultimatum was not fair.

[15] It was argued on behalf of the applicants during the hearing that the arbitrator committed gross irregularity in that he made swiping statement in saying that the issue of health and safety had no bearing on the strike. The applicants also disputed that they were served with the ultimatum and that the *onus* was on the first respondent to show that they were indeed served. It was further argued on behalf of the applicants that the arbitrator failed to take into account the unreasonableness of the ultimatum in particular in relation to the fact that there was no time indicated in it and also that it was not translated into any of the language spoken by the applicants.

[16] In relation to the Court order, which found the applicants to have been on an unlawful industrial action, the applicants argued that the notice of motion that led to the order was served on NUM and not the applicants.

[17] The applicants further contend that the dismissal was procedurally unfair because the first respondent, on the advice of the South African Police did not conduct a disciplinary hearing. The first respondent did not dispute this, and stated that the advice was based on the level of violence that followed the strike.

The arbitration award

[18] At the beginning of the arbitration award, the arbitrator recorded that the amendment introduced by the applicants, which the first respondent did not oppose, introduced another group of dismissed employees. These are employees who claimed that they, for different circumstances did not participate in the industrial action. The arbitrator indicated in his arbitration award that he would not deal with this group and it was for the parties to deal with their case in another forum. Their cases have not been raised in this review application.

[19] The issue which the arbitrator confined himself with in his arbitration award concerned those dismissed employees who notwithstanding their participation in the strike action contended that their dismissal was unfair. Before dealing with the facts relating to the dismissals, the arbitrator set out the principles that would guide his decision in relation to the fairness of the dismissals of the

applicants. The arbitrator specifically relied on the decisions in the cases of *Modise and Others v Steve's Spar, Blackheath*[1] and *Mzeku and Others v Volkswagen SA (Pty) Ltd*.[2] The arbitrator summarised the principlesin these two cases as follows:

> 'According to *Steve's Spar*, fair dismissal requires adherence to the principles *Audi alterem partem.* Preferably before a decision is taken, but in exceptional circumstances, of which a given strike situation is one category, a hearing after de facto provisional decision is taken. Further, according to *Mzeku* at (54)-(60), an employer is obliged to deal with a worker's union as long as he remains a member.'

[20] After setting out the above principles, the arbitrator then discussed in some details the testimony of the main witness of the first respondent, Mr Lousteau, the HR Vice President.

[21] In brief, the testimony of Mr Lousteau was that a Relationship Building by Objective was embarked upon after employees raised uneasiness about the risk of mining uranium. The issue was apparently resolved during that process and the outcome thereof was accepted by NUM.

[22] The arbitrator found that there was unhappiness amongst some of the employees about the performance of NUM and accordingly repudiated its role as representative of the employees' interest. It was as a result of the unhappiness with the representation of NUM that the crisis committee was established. As indicated earlier, the crisis committee sought to engage with management on a number of issues including the health and safety. The arbitrator found that the crisis committee was established initially because the employees were not satisfied with the health assessment of certain employees.

[23] The arbitrator summarised the case of the applicants in the following terms:

[1] (2000) 21 ILJ 519 (LAC).
[2] (2001) 8 BLLR 857 (LAC).

'Given the thesis of the applicants' case that they were indeed on an unprotected strike provoked by the respondent's unfair conduct, it was incumbent upon the applicants to adduce credible evidence of blameworthy conduct on the part of the Management.'

[24] In light of the above, the arbitrator considered the testimony of each of the applicants' witnesses and found them to have been unreliable. The testimony of the applicants' witnesses on a number of issues were rejected and that of Mr Lousteau, accepted. The arbitrator then made a number of findings relating to the fairness of the dismissals of the applicants.

[25] In relation to how the first respondent treated the crisis committee, the arbitrator firstly found that the first respondent's management acted appropriately and was willing to engage with those who purported to speak on behalf of those of the employees who were on strike. He further found that the first respondent was obliged to honour its binding obligations towards NUM. He in this regard rejected as fanciful the argument of the applicants that the agreement with NUM was not valid.

[26] In relation to the steps the first respondent took before dismissing the applicants the arbitrator found that before taking the steps that would have jeopardised the employees' employment the first respondent sought the intervention of the recognised trade union and that the applicants to their peril rejected such intervention by the trade union.

[27] In his final analysis the arbitrator found that:

'61 In general terms, the inappropriate action of the workers in admittedly going on an unprotected strike in support of admittedly inappropriate demands places them under an evidentiary burden to adduce facts and circumstances to warrant a conclusion that the conduct was mitigated to such an extent that dismissal was inappropriate. The strike was characterised by vandalism, and hi-jacking of vehicles. The strike was repudiated by the union. Evidence from those selected to testify reveals a taste for anarchic methods of dispute resolution. No

cogent case to substantiate culpability by the Respondent is made out.'

Evaluation

[28] It is now common cause that the arbitration proceedings in this matter were conducted in terms of the provisions of the Arbitration Act of 1969 (the Act). Therefore the grounds for review as set out in the applicants' papers have to be read as those envisaged in section 33(1) of the Act which reads as follows:

'(1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or as an 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.'

[29] This Court has previously on the basis of established authorities held that an irregularity in private arbitration proceedings does not refer to the result or the correctness of the decision but rather to the reasoning process or the method of the arbitration proceedings. It is also trite that in private arbitration proceedings a mistake of law or fact does not necessarily lead to the conclusion that the arbitrator has committed gross irregularity. In general gross irregularity occurs when the arbitrator misconceives the whole nature of the enquiry or the duties he or she is supposed to perform.[3]

[3] See *Goldfields Investment Ltd and Another v City of Johannesburg and Another* 1938 TPD 551 at 560).

[30] It is now well established that in private arbitration review proceedings the test to apply is based on a narrow approach.[4] The basis for this approach is the consensual basis upon which the parties seek to resolve their dispute by way of arbitration with limited statutory imposition on the process.[5]

[31] The Courts are as a matter of principle enjoined in considering reviews of private arbitrations to '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.'[6] This is the approach which was adopted by the Supreme Court of Appeal *in Telcordia* and subsequently endorsed by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*.[7]

[32] In upholding and summarising what was said in the *Telcordia* matter, the Constitutional Court in *Lufuno Mphaphuli*, had the following to say:

> '[65] In *Telcordia* the Supreme Court of Appeal held, inter alia, that—
>
> (a) private arbitrations would, as a starting point, fall within the ambit of s 34 of the Constitution;
>
> (b) the rights contained in the section "may be waived unless the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores*;"
>
> (c) by agreeing to arbitration, parties waive their rights *pro tanto*; they usually waive the right to a public hearing;

[4] In *Standard Bank of SA Ltd v Mosime NO and Anothers,* [2008] 10 BLLR 1010 (LC), in adopting the narrow test of review the court followed the decision in *Telcordia Technologies v Telkom SA Ltd* [2006] SCA 139 (RSA) [also reported at [2007] 2 All SA 243 (SCA).

[5] See *Total Support Management* (*Pty*) *Ltd v Diversified Health Systems SA* (*Pty*) *Ltd and Another* 2002 (4) SA 661 (SCA) [also reported at [2002] JOL 9517 (A) – Ed], *South African Airways* (*Pty*) *Ltd v SATAWU obo Mashele and Others* case JR 2618/04 and *National Union of Mine Workers and Others v Grogan NO and Another* (2007) 28 *ILJ* 1808 (LC) [also reported at [2007] JOL 19449 (LC).

[6] See *Telcordia v Technologies*-supra.

[7] [2009] JOL 23310 (CC); 2009 (4) SA 529 (CC) at para 64.

(d) by agreeing to arbitration the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else; and

(e) by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in s 33(1) of the Act, and, by necessary implication, they waive the right to rely on any further ground of review, "common law" or otherwise.' (footnotes left out).

[33] The essence of the enquiry of allegations of gross irregularity in private arbitration entails essentially a determination of whether the conduct of the arbitrator presented a fair trial of the issues which were presented before him or her by the parties.[8]

[34] The issue of "exceeding powers" entails the arbitrator exercising powers that he or she does not have or exercising those powers erroneously.[9] Misconduct on the other hand entails serious mistake of fact or law but does not extend to *bona fide* mistakes made by the arbitrator.[10] The restriction from interfering with private arbitration is essentially because the powers given to the arbitrator are consensual between the parties.

[35] In the present case, the first three grounds of review as set out in the applicants' founding affidavit are indeed those envisaged in section 33(1) of the Act including allegation that the arbitrator misdirected himself in finding that the grievance over the safety and health issues had no bearing on the strike. The remainder of the grounds of review are those envisaged in section 145 of the Labour Relations Act. It is trite that the test to apply when considering reviews under the provisions of section 145 of the LRA is that of a reasonable decision-maker which does not apply in reviews involving private arbitrations as is the case in the present instance. In other words, the

[8] See *Standard Bank supra.*
[9] See *Lesotho Highlands Development Authority v Impregelio SPA* (2005) UKHL 43, a case quoted with approval as to what constituted exceeding powers, a case quoted with approval as concerning the issue of exceeding powers by *Telcordia.*
[10] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (*Pty*) *Ltd* 1994 (1) SA 162 (AD) at 169.

remainder of the grounds of review as set out in the applicants' papers are those that seek to challenge the outcome of the arbitrator's arbitration award on the basis of its reasonableness.

[36] In light of the above discussion, this Court will confine itself to considering those grounds of review provided for in terms of the provisions of section 33(1) of the Act.

[37] The question of whether the arbitration award is reviewable has to be answered on the basis of the facts and the guiding principles set out in the authorities.

[38] It is clear in as far as the facts and the circumstances of this case are concerned that the arbitrator arrived at the conclusion as he did, influenced largely by the finding of the credibility of the witnesses. In this respect, the arbitrator found the credibility of the applicants' witnesses to be questionable. The version of the first respondent which was mainly based on the testimony of one witness was found to have been credible and accepted for that reason.

[39] It is trite in law that the Courts are very slow in interfering with the finding of credibility by trial of facts. Of course the Court would readily intervene where a case has been made that the arbitrator failed to apply properly the rules of evidence regarding the assessment of the credibility of witnesses.

[40] In the present instance, the arbitrator accepted the testimony of Mr Lousteau as more convincing than that of the applicants' witnesses. He did so after considering in details the evidence presented by the witnesses, analysing that evidence and weighing the circumstances surrounding the dismissals. The arbitrator accepted as common cause that the first respondent had issued an ultimatum before issuing dismissal notices. This finding is based firstly on the testimony of Mr Lousteau who testified that a final ultimatum was issued wherein the employees were advised that the first respondent was of the "prima facie view that they should be dismissed for their persistent misconduct". That ultimatum was issued after several others were ignored by the employees, including ignoring the Labour Court order. Although the applicants claim not have been served with the papers instituting the

proceedings that Court order remains unchallenged and therefore has all the necessary force and effect in law. The order was initially made as a rule *nisi*, which was later made a final order. The applicants did not oppose the application to have the order confirmed.

[41] The fact that the final ultimatum was issued is confirmed by the applicants in their statement of claim which was filed with the Court before the matter was withdrawn. It has to be noted that the parties had agreed that the pleadings which had been filed with the Court before the case was withdrawn would constitute pleadings in the arbitration proceedings. The case of the applicants is in this respect stated at paragraph 5.8 of the statement of case as follows:

> 'At 13h30 the Respondent issued a final ultimatum to the employees to return to work on 8 October 2008 06h00, without speaking to the delegation or attending to their grievances. The employees were advised that failure to comply with the instruction to return to work might result in their dismissal.'

And at paragraph 5.13 the applicants aver that:

> 'The Respondent did not react to their demand and instead issued a pre-dismissal ultimatum on 10 October 2008 in terms of which the employees should say why they should not be dismissed.'

[42] In as far as the issue of the *audi altarem partem* rule is concerned, it is common cause that no formal hearing was conducted by the first respondent. In considering and applying his mind to this issue it is apparent that the arbitrator took into account the totality of the facts and the circumstance of the matter and arrived at the conclusion that:

> '54. Prior to taking any steps to jeopardise the employment of the strikers, the Management called upon their recognised union to intervene. The applicants recklessly and at their peril rejected the entreaties to cease the strike.

55. The decision to not convene a hearing but rather to dismiss subject to an appeal was appropriate in the circumstances.'

[43] In the circumstances where the employees refused to engage with management through the formal dispute resolution mechanism and also where they were uncooperative in relation to seeking to deal with the matter through their delegation starting from 7 October 2008, there can be no basis for attacking the decision of the arbitrator. The approach adopted by the arbitrator has to also be understood in the context where the first respondent was dealing with the dismissal of 1428 employees who were not only involved in an unlawful industrial act, which had been so declared by the Labour Court, but also who were involved in intense acts of violence and intimidation.

[44] In my view, in the circumstances of this case the applicants had two opportunities where they could have presented their case/s and be heard by the first respondent. The first instance is as it is stated in their statement of case, when they were in the ultimatum invited to "say why they should not be dismissed," and secondly with the use of the appeal procedure.

[45] The other basis upon which the arbitrator's arbitration award is criticised seems to be on the basis that he misconstrued the inquiry he had to conduct in that he shifted the *onus* onto the applicants. Although this allegation is not fully substantiated, it is apparent that it relates to the finding that the applicants had the evidentiary burden to explain their conduct.

[46] It is common cause that the applicants participated in an unprotected industrial action which constitutes misconduct in terms of the law. Once the first respondent had established the misconduct, it was for the applicants to provide an explanation or some justification for their unlawful conduct. That as I understand it, is what the arbitrator is referring to when he speaks about the evidentiary burden that rested on the applicants.

[47] The explanation proffered by the applicants for their conduct which was rejected by the arbitrator is that the first respondent provoked the strike by refusing to recognise their crisis committee and engaging them in the

collective bargaining process in particular with regard to the issues of health and safety.

[48] The applicants seek to locate the issue of provocation within the allegation that the first respondent failed to address the issues of health and safety and refused to engage with the crisis committee in negotiating that issue and other demands they had. Those issues as stated earlier were addressed with the representative trade union in terms of the collective agreement which the first respondent had with the union. In terms of the law, the first respondent was obliged to respect the recognition agreement it had with the union and abide with any collective agreement it had with it. This cannot constitute provocation as all what the first respondent was doing was compliance with its obligations as provided for in the law. It follows that the agreement which the first respondent had reached with the union regarding the issue of health and safety was binding on the first respondent and compliance with it could never have constituted provocation. The agreement was also binding on the employees in terms of the provisions of section 200(1) of the LRA which reads:[11]

> 'A registered trade union or registered employees' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party –
>
> (a) in its own interest;
> (b) on behalf of any of its members;
> (c) in the interest of any of its members.'

[49] In fact, what triggered the strike in my view was the dismissal of the crisis committee members by the first respondent. The strike commenced even on the version of the applicants after the unfair dismissal dispute of the dismissed crisis committee members which was referred to the CCMA was unsuccessful. This analysis is supported by what is stated in the applicants' statement of case at paragraph 5.10 where they state the following:

[11] See the interpretation of section 200(1) of the LRA in *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* [2001] 8 BLLR 857 (LAC).

'On 9 October the employees handed their demands to the Respondent, demanding inter alia

5.10.1 The release of the arrested employees

5.10.2 The re-instatement of a workers forum known as the crisis committee

5.10.3 To cancel members contribution stop orders of the NUM from their salaries. '

[50] It follows that the claim that the first respondent provoked the applicants into striking bears no merit. Thus the only reasonable and correct conclusion to have reached, as the arbitrator did, was that the applicants were guilty of unacceptable conduct which amounted to a serious breach of their employment contract with the first respondent.

[51] I do not on the basis of the above reasons find a basis upon which there can be any justification for interfering with the decision of the arbitrator. And accordingly the applicants' application stands to fail. It seems to me to be inappropriate to order costs to follow the results.

Order

[52] In the premises, the applicants' application to have the arbitration award of the second respondent reviewed is dismissed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	Adv L.D Harlam
	Instructed by Pangwa Attorneys.
FOR THE RESPONDENT:	Adv M Van As
	Instructed by Edward Nathan Sonnenbergs