REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR2384/2011

In the matter between:

ADONIA MUSHWANA **Applicant**

and

HAND-IN-HAND SOUTHERN AFRICA **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

COMMISSIONER NELSON LEDWABA, *N.O.* **Third Respondent**

Heard: **12 July 2013**

Delivered: **23 October 2013**

Summary: Application for review in terms of s. 145 of the LRA; applicant challenging the award only in relation to procedural fairness of the dismissal; award found to be one that a reasonable arbitrator could reach on all the available material and evidence; application for review dismissed with costs.

JUDGMENT

VOYI, AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the third respondent ("the commissioner") on 21 August 2011 under case number LP 250-11.

[2] The application is launched in terms of s. 145 of the Labour Relations Act, No. 66 of 1995 ("the LRA"). It is opposed only by the first respondent. The second and third respondents have opted to abide by the decision of this court.

The Review Application

[3] The review application was launched on 23 September 2011. It is premised on the provisions of s. 145 of the LRA.[1] The applicant's grounds for review are set out in his founding affidavit dated 15 September 2011.[2]

[4] At the hearing of this application, Advocate PMW Botha, appearing for the applicant, conveyed that the arbitration award is being challenged on review only in relation to the commissioner's decision that the applicant's dismissal was procedurally fair.

[5] The stance adopted by the applicant, through his counsel, effectively means that he has reconciled himself with the commissioner's decision that his dismissal was substantively fair.

[6] In view of the fact that the '*no difference*' principle has been expressly rejected by our courts,[3] it was necessary for this court to delve into the

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[1] In affording the right to review an arbitration award, s. 145(1) provides that '[any] party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the [CCMA] may apply to the Labour Court for an order setting aside the arbitration award-…'. The defect contemplated by s. 145(1) is particularly expressed under s. 145(2).

[2] The affidavit appears on pp. 4 – 9 of the indexed review papers.

[3] The relevance of the '*no difference*' principle in the context of this application is in view of the belated acquiescence to the commissioner's decision that the dismissal was substantively fair. A question may be started here - what difference would it have made if procedure was followed to the satisfaction of the applicant? Even if the answer is none, an employee is still entitled to be dismissed in accordance with a fair procedure. In particular, s. 188(1)(b) of the LRA requires that a dismissal be "*effected in accordance with a fair procedure*" or else it will not be procedurally fair. The cases in which the '*no difference*' approach was rejected are *inter alia*: *Mohamedy's v Commercial Catering and Allied Workers Union of SA* (1992) 13 *ILJ* 1174 (LAC) at 1181A–D; *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) at 650F–651D; *Kellogg SA (Pty) Ltd v Food & Allied Workers Union & Others* (1994) 15 *ILJ* 83 (LAC) at p. 87E-G; *National Union of Mineworkers & Another v Libanon Gold Mining Co Ltd* (1994) 15 *ILJ* 585 (LAC) at p. 590B-E; *Yichiho Plastics (Pty) Ltd v Muller* (1994) 15 *ILJ* 593 (LAC) at p. 603H-I; *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* (2000) 21 *ILJ* 501 (LAC) at para [59]; *Banking Insurance Finance*

merits of the application respecting the commissioner's decision that the applicant's dismissal was procedurally fair.

[7] In this regard, this court will only concern itself with whether or not the commissioner's decision that the applicant's dismissal was effected in accordance with the fair procedure is reviewable.

[8] For this purpose, the applicant's grounds for review of the award warrant closer consideration. These grounds are expressed as follows.

8.1. The commissioner '…was biased and unfair as she (sic) failed to see that the decision not to postpone the Disciplinary Hearing was unfair as [the Applicant] could not bring [his] witnesses to Tzaneen timeously on half day's notice, bearing in mind that the main witness [the Applicant] was to call was from Cape Town who incidentally was stakeholder.';[4]

8.2. The commissioner '…further failed to take into account that no reasonable explanation was provided for the sudden change of venue other than economic consideration which explanation was not substantiated nor proven by way of evidence by the 1st Respondent.';[5]

8.3. The commissioner '…in his analysis of evidence indicated that the time afforded for the relocation of the Disciplinary hearing was notice in advance.' The Applicant however, contends '…that the

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& Allied Workers Union & Another v Mutual & Federal Insurance Co Ltd (2006) 27 ILJ 600 (LAC) at para [33].

[4] Affidavit in support of the review application, p. 7, para [21].

[5] *Ibid*, para [22].

change of location for the disciplinary hearing held on the 9th December 2010 occurred on 8th December 2010 at 13h40.'[6]

8.4. The commissioner '…failed to take into account the fact that the Chairperson of the Disciplinary hearing, Mr. Chiliza Nkabinde, the initiator, Jephta Mahove and Chipo Mushwana, the 1st Respondent's third witness all travelled together in the same vehicle in the trip from Gauteng to Polokwane and that they also stayed in the same hotel as one another subsequent to attending the disciplinary hearing of 9 December 2010.';[7]

8.5. The commissioner '…in deciding whether the disciplinary hearing was fair and impartial, which in itself leads to substantive fairness, failed to take into account the fact that the Chair of the Hearing was a subordinate to Jephta Mahove and is remunerated by the 1st Respondent on a full time basis.';[8]

8.6. The applicant also contended that '…in the transcribed record of the proceedings of the disciplinary hearing held on 9th December the record does not disclose the objections [he] raised to the short notice provided for in the change of venue and the fact that [he] was unable to call witnesses as a result of the change of venue on such short notice.' According to the applicant, '…the exclusion of such evidence materially affected the decision which the Commissioner arrived at in deciding the matter before him.'[9]

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[6] *Ibid*, para [23].

[7] *Ibid*, para [24].

[8] *Ibid*, para [25].

[9] *Ibid*, para [26].

[9] Only the above grounds for review relate to the decision reached by the commissioner regarding the procedural fairness of the applicant's dismissal. The other grounds for review pertaining to the commissioner's findings on the substantive fairness of the dismissal warrant no consideration in view of the position taken by the applicant's counsel.

[10] In his affidavit in support of the review application, the applicant reserved the right to supplement or amend his affidavit upon receipt of the record of the arbitration proceedings.[10] However, and after the record was delivered, the applicant opted to stand by his notice of motion.[11]

[11] The first respondent delivered its answering affidavit to the applicant's founding papers.[12] No replying affidavit was delivered by the applicant following receipt of the first respondent's answering affidavit.

Evaluation

[12] It is by now trite that the standard test for review is as stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [13], which is the following:

> 'That standard is the one explained in Bato Star:Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

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10 *Ibid*, p 8 para [37].

11 The Applicant's Notice in terms of Rule 7A(8)(b) appears on p. 84 of the indexed review papers.

12 The aanswering affidavit appears on pp. 89 - 101 of the indexed review papers.

13 (2007) 28 *ILJ* 2405 (CC) at para 110

[13] In *Fidelity Cash Management Service v CCMA and Others*[14] , the Labour Appeal Court stated that the aforesaid test for review is '…a stringent test that will ensure that [arbitration awards] are not likely interfered with.'

[14] It is therefore uncontroversial that the bar has been lifted extremely high for a litigant to be able to succeed in reviewing and setting aside an arbitration award. Support for this stance can also be gleaned from the recent Supreme Court of Appeal decision in *Harold v Nedbank Ltd* [15], where the position regarding the review of CCMA awards was summarised as follows:

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[16]

[15] In my considered view, the provisions of s. 143(1) of the LRA are also instructive. They read thus:

> 'An arbitration award issued by a commissioner is final and binding…'

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14 (2008) 29 *ILJ* 964 (LAC) at para 100.

15 (701/2012) [2013] ZASCA 97 (5 September 2013)

16 **a**t para 25.

[16] The above provisions are self-explanatory and are often overlooked by litigants before this court. The provisions of s. 143(1) effectively limit the parties' right to have the merits of their dispute re-litigated or reconsidered.[17]

[17] In the Applicant's founding affidavit, the defects envisaged by s. 145(2) of the LRA are not articulated. Instead, the Applicant makes bald and unsubstantiated allegations regarding, *inter alia*, the justifiability of the commissioner's award. The closest the Applicant goes in making reference to s. 145(2) of the LRA is to contend that the commissioner '…failed to properly apply his mind and failed to have proper consideration of the facts and the law in respect of the relief afforded to the 1st Respondent in this instance and the 3rd Respondent exceeded his powers in this regard.'[18]

[18] Based on what is contained in the applicant's affidavit in support of the application for review, it is my view that no proper case is made out for the setting aside of the commissioner's award.[19]

[19] Despite having filed quite a substantial record of the arbitration proceedings, the applicant opted not to deliver a supplementary affidavit.[20] Neither did he deliver an affidavit in reply to the first respondent's comprehensive answering affidavit.

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17 This view is drawn from the case of *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) at para [14].

18 Affidavit in support of the review application, p. 8, para [34].

19 This view is strengthened by the decision of this court in *Naidoo v National Bargaining Council for the Chemical Industry and Others* [2012] 9 BLLR 915 (LC), where it was stated, at para [22], that 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.'

20 A right the applicant had strictly reserved in his founding affidavit.

[20] The commissioner's award is well-reasoned and substantiated. In finding that the dismissal was procedurally fair, the commissioner reasoned as follows:

> '7.12 The applicant alleged that he was not given a proper chance to state his case neither was he given the right to cross-examine the witnesses. This evidence was successfully refuted by the disciplinary hearing chairperson who appeared to have been someone who understood the pitfalls of a disciplinary hearing; he further submitted as evidence the records of the disciplinary hearing confirming that the applicant did exercise his rights to present his case and to question the [third respondent's] witnesses. This version remains unchallenged and is accepted.
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> 7.13 The applicant alleges bias on the part of the chairperson because he drove in the same vehicle with the initiator. It is common cause that, the initiator and the chairperson travelled in the same vehicle to the hearing venue following the change of venue from Gauteng to Limpopo. It is furthermore common cause that the applicant requested the [third respondent's] to transport his eight (08) witnesses from Limpopo to Gauteng. The applicant further requested their accommodation. And reference was made to page 70 of Exhibit A. All eight witnesses were based in Tzaneen according to the applicant. It is further common cause that both the initiator, Mr. Mahove and the chairperson, Mr. Nkabinde, work within the same office setup and interact with each other on a daily basis.
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> 7.14 It is trite that, the test for bias is a reasonable apprehension that the chairman will not or did not act in an impartial manner. It is always difficult to prove actual bias, so the test is a perception of bias. The applicant's opinion will not suffice to prove the perception of bias; there should be a factual basis for the applicant to allege bias in this regard. The applicant did not lead

any tangible proof which could make one suspicious that the perception of bias existed.*(SA Commercial Catering and Allied Workers Union and Others v President, Industrial Tribunal and Another* (2001) 22 ILJ 1311 (SCA); *Jockey Club of SA v Forbe*s 1993 (1) SA 649 (A); *President of the Republic of SA and Others v SA Rugby Football Union and Others* 1999 (4) SA 147 (CC)).

7.15 Both Mr. Mahove and Mr. Nkabinde work within the same office set up in Gauteng and if indeed they wanted to discuss the outcome of the disciplinary hearing, nothing could have prevented them to do so.

7.16 In this regard it is common cause that the applicant's witnesses were based in Tzaneen and it was expected of the respondent to transport and accommodate them if the hearing was to continue in Gauteng. The [third respondent's] version that, the decision to travel in one vehicle was based on costs considerations does hold water and is acceptable. The applicant alleged that, the change of venue further inconvenienced him yet he failed to raise same during the hearing, neither did he call one of those witnesses if indeed his request was genuine during this arbitration proceedings.

7.17 I therefore find that the applicant's procedural rights were upheld and dismiss the allegation suggesting otherwise.'[21]

[21] From the above, it is clear that the commissioner dealt with the applicant's claim that he was neither given a proper chance to state his case nor was he given the right to cross-examine witnesses. The

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[21] Arbitration Award, at p 53 of the indexed review papers.

commissioner's finding in this regard cannot be faulted. It is also clear from the record that the applicant did indeed state his case and that he was allowed to cross-examine witnesses.[22]

[22] The commissioner also dealt with the allegation of bias on the part of the chairperson of the disciplinary enquiry. The commissioner concluded that the applicant '…did not lead any tangible proof which could make one suspicious that the perception of bias existed.' This finding can equally not be faulted. In my view, the fact that the chairperson travelled in the same motor vehicle with the initiator and the witness cannot in and of itself give rise to partiality.[23]

[23] What is worth noting is that the alleged bias on the part of the chairperson of the disciplinary enquiry was never raised at the disciplinary enquiry itself. If the fact that the chairperson travelled together with the initiator and the witness was a cause for concern to the applicant, he ought to have raised the issue at the disciplinary enquiry itself. He however, failed to do so. It may very well be that the allegation of bias against the chairperson was simply an afterthought.

[24] It is apparent that the need for the chairperson to travel together with the initiator and the witness came about as the first respondent was accommodating the applicant. Initially the hearing was to be held in

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[22] Minutes of the disciplinary enquiry, at p. 296 – 313 indexed review papers, reflect various questions posed by the applicant. Also, the chairperson of the disciplinary hearing, in his written outcome, recorded what the applicant had to say in his defence (Disciplinary Hearing Outcome, at pp. 246 – 264 of the indexed review papers). The applicant's case at the disciplinary hearing is also recorded in the written outcome issued by the chairperson (at pp. 258 & 259 of the indexed review papers)

[23] The standard of procedural fairness established by the LRA was enunciated by this court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others* [2006] 9 BLLR 833 (LC). In that decision, the criminal justice model of procedural fairness, particularly on the rule against bias, was expressly rejected.

Johannesburg. When the applicant indicated that he had a number of witnesses that had to be transported to the hearing venue, it was decided that the hearing be rather moved closer to the applicant and the said witnesses.

[25] The 'economic considerations' associated with such change are obvious in the present matter. The applicant had requested that his eight witnesses be transported and also accommodated. It would have been more costly to transport and accommodate eight individuals as opposed to the three that were actually transported and accommodated by the first respondent.

[26] I cannot see how changing the venue of the hearing to be closer to the applicant and his witnesses could have disadvantaged him. The applicant was given sufficient notice of the disciplinary enquiry. He could not have been prejudiced by the change in venue.

[27] What is also noteworthy is the fact that the applicant did not call the alleged witnesses during the arbitration proceedings. In my view, his failure to call such witnesses and also his election not to challenge the commissioner's decision insofar as the merits of the dispute lead to the conclusion that the applicant never had the intention to seriously dispute the misconduct allegations levelled against him.

[28] All things considered, I am of the considered view that the decision reached by the commissioner regarding the procedural fairness of the applicant's dismissal falls within the realm of decisions that any reasonable decision-maker could reach. The application must, accordingly, fail.

Costs

[29] In the exercise of the discretion conferred by s. 162 of the LRA, it is my view that costs should follow the results. The applicant brought a substantial application for review before this court only to abandon the challenge to the commissioner's findings regarding the substantive fairness of his dismissal.

[30] The applicant's belated acceptance of the commissioner's decision that his dismissal was substantively fair unavoidably leads to the conclusion that the application for review was simply frivolous. An order for costs is warranted under such circumstances.

Order

[31] I, accordingly, make the following order:

(i) The application for review is dismissed.

(ii) The applicant is ordered to pay the first respondent's costs.

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Voyi, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate PMW Botha
Instructed by:	Mohlaba and Moshoana Attorneys
For the First Respondent:	Advocate J F Nalane
Instructed by:	DMS Attorneys