REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Not of interest to other Judges

Case no: JR 815/12

In the matter between:

JOHN JOHANNES BUYS **Applicant**

and

TOKISO DISPUTE SETTLEMENT (PTY) LTD **First Respondent**

COMMISSIONER JOHN MYBURGH **Second Respondent**

PRASA: INTERSITE PROPERTY MANAGEMENT

SERVICES (PTY) LTD **Third Respondent**

Heard: 19 July 2013

Delivered: 30 July 2013

Summary: Review of private arbitration award in terms of Section 33 of the Arbitration Act, Act No. 42 of 1965. The Applicant was charged and dismissed by the Third Respondent. The dispute was referred to private arbitration under the auspices of the First Respondent. The Second Respondent upheld the Applicant's dismissal in respect of one of the

two charges of which the Applicant was charged and upheld the sanction of dismissal.

JUDGMENT

MADDERN AJ

Introduction

[1] This is an application to review the arbitration award of the Second Respondent of 10 January 2012 issued under the auspices of the First Respondent.

[2] In essence, the First Respondent upheld the dismissal of the Applicant on the second of two charges.

The facts

[3] The Applicant was appointed by the Third Respondent as the Executive Manager: Strategic Asset Manager on 1 February 2006. The Applicant was charged with misconduct during the course of October 2010 and after a disciplinary hearing was held on 6 December 2010, the Applicant was dismissed on 18 January 2011.

[4] The charges proffered in respect of the Applicant's conduct involved firstly, allegations of misconduct relating to contravention of various clauses of the employment contract and/or the Code of Ethics and/or Sections of the Public Finance Management Act of 1999 and the Tender and Procurement Policy in relation to the appointment of the Proconse Consortium to undertake phases 2 and 3 of the Jane Furse and Northam Projects, without following the Third Respondent's Procurement Policy. Although the Applicant was found guilty of this charge at the disciplinary enquiry, the Second Respondent found the Applicant not guilty in respect of this charge 1. Consequently, it is only

the Second Respondent's finding in relation to the second charge and the sanction that the application for review is directed.

[5] In relation to the second charge proffered by the Third Respondent in respect of the conduct of the Applicant, the Applicant was charged with the contravention of clauses of the employment contract and/or the Code of Ethics in that it was alleged that on or about 12 August 2010, the Applicant disseminated information regarding the Third Respondent's potential liability arising from the appointment of Proconse for Phases 2 and 3 of the Jan Furse and Northam Projects, which information was detrimental or potentially detrimental to the interests of the Third Respondent in potential litigation.

[6] In relation to this charge, it was common cause that the employment agreement (clause 2.2.1) provided for an obligation resting upon the Applicant to act honestly, faithfully and diligently to fulfill the duties and responsibilities of the office to which he was appointed and that in doing so he would use his best endeavours to promote the interests of the Third Respondent. Clause 10 of the employment agreement also provided for confidentiality.

[7] In early 2008, the Third Respondent invited expressions of interest from accredited professional providers (Strictly Consortiums) for "Intermodal Transportation Facilities" on various sites in Limpopo. Ten sites were identified, two of which were Northam and Jan Furse. The Third Respondent intended appointing multi disciplinary teams of consultants to implement the project on a four phase basis. Proconse was appointed on 26 August 2008 to provide Phase 1 of the Jane Furse and Northam Intermodal Transportation facility at a stipulated contract price.

[8] On 12 August 2010, the Applicant deposed to an affidavit in circumstances where the Commissioner of Oaths was a Mr Trew, a Director of Proconse, which affidavit was then provided to Proconse

("the Affidavit"). At the time, the Applicant furnished the Affidavit to Proconse the Applicant was an employee of the Third Respondent. Furthermore, Proconse had lodged two claims against the Third Respondent in respect of Phase 2 for Jane Furse and Northam in the amounts of R9 800 000.00 and R8 900 000.00 respectively, totaling R18 100 000.00. The Third Respondent had not paid Proconse these amounts.

[9] The Second Respondent issued an award in respect of the merits of the matter on 1 December 2011 in terms of which the Second Respondent found that the Applicant's breach of the employment contract constituted misconduct and consequently the Applicant was found guilty of charge 2. The Applicant and the Third Respondent were then afforded an opportunity to 6 January 2012 to make written representations in respect of sanction.

[10] On 10 January 2012, the Second Respondent issued an award on sanction in terms of which the dismissal of the Applicant on charge 2 was upheld.

Grounds of Review

[11] The Applicant contends a review of the award of the Second Respondent on four grounds, these are:

11.1. The submission that the Second Respondent committed gross misconduct in the execution of his duties as an arbitrator in that he misconstrued the issues in finding that it was probable that Proconse will use the Affidavit as background to its claim and that is why the Third Respondent was willing to settle the Proconse claim. It is alleged that no evidence was led to draw such a conclusion.

11.2. The Second Respondent committed an irregularity in that he found a breakdown of the trust relationship where no evidence was placed before him of such a breakdown.

11.3. The Second Respondent failed to take into account the Third Respondent's disciplinary policy as a whole in relying only on clause 2.11 which states that dismissal will be considered as a last resort; and

11.4. That the Second Respondent relied to a large extent on the Applicant's seniority to justify his reasons for finding that the dismissal to be fair instead of the evidence presented by the Third Respondent.

[12] The Applicant seeks relief in the form of a review and setting aside of the Second Respondent's order of 10 January 2012 and for an order in terms of which both the award on the merits and the award on sanction is substituted with an order that the dismissal was substantively unfair. The Applicant further seeks reinstatement from the date of dismissal without a loss of benefits. In the alternative, the Applicant requests an order in terms of which the matter is referred back to the First Respondent to be decided before another Commissioner other than the Second Respondent.

[13] The notice of motion and founding affidavit make no reference to the legal basis for the relief sought and the Applicant elected to stand by its notice of motion and its founding affidavit. The Third Respondent opposes the relief sought. In doing so, the Third Respondent relies on Section 33 of the Arbitration Act, Act No. 42 of 1965 ("the Arbitration Act"). In argument, the Applicant makes reference to Section 33 of the Arbitration Act in apparent concession of the Third Respondent's contentions that any review by this Court in respect of a private arbitration award is to be determined subject to the provisions of

Section 33 of the Arbitration Act. This was confirmed by Counsel for the Applicant at the hearing of the matter.

The Arbitration Act

[14] The Arbitration Act provides four grounds on which an arbitration award may be set aside:[1]

> '(a) Where any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings; or
>
> (c) Where any arbitration tribunal has exceeded its powers; and
>
> (d) Where an award has been improperly obtained.'

[15] The provisions of Section 33 of the Arbitration Act must be construed in the context of the provisions of Section 28 which provide that an arbitrator's award is final and is not subject to appeal to the Court.[2] An analysis of what conduct on the part of an Arbitrator would amount to misconduct was dealt with extensively by the Supreme Court of Appeal in the matter of *Total Support Management (Pty) Limited and Another v Diversified Health Systems South Africa (Pty) Limited and Another,*[3] where the Court considered the various cases starting with *Dickenson and Brown v Fisher's Executors*[4] which preceded the promulgation of the Arbitration Act as well as the various cases which then, after the promulgation of the Arbitration Act confirmed the legal

[1] Section 33(1) of the Arbitration Act, Act No. 42 of 1965.
[2] Section 28 of the Arbitration Act provides: Unless the arbitration agreement provides otherwise an award shall, subject to the provisions of this Act, 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.
[3] [2002] 4 SA 661 (SCA) per Smalberger ADP with Marais JA, Cameron JA, Brand JA and Lewis AJA concurring.
[4] 1915 AD 166.

position as laid out in *Dickenson and Brown v Fisher's Executors*. In so doing the Court concludes:

> 'As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not *per se* misconduct. At best it provides evidence of misconduct (*Dickensen and Brown v Fisher's Executors, supra, at 176)* which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference), of what has variously been described as "wrongful and improper conduct" *(Dickenson and Brown v Fisher's Executors, supra, at 176), "*dishonesty" and *"mala fides* or partiality*" (Donner v Ehrlich, supra, at 160-1)* and "moral turpitude*" (Kolber and Another v Sourcecom Solutions (Pty) Limited and Others, supra, at 1108A).*[5]

[16] In relation to the grounds of review as tabled by the Applicant, the Applicant contends gross misconduct in relation to the first ground of review which relates to the finding by the Second Respondent that it was probable that Proconse would use the affidavit as background to its claim against the Third Respondent. The Applicant contended that the basis of the Proconse claim in respect of the Third Respondent was not on the Affidavit but rather the breach of a settlement agreement concluded on 4 February 2011. The Applicant further contends that the facts that he set out in the affidavit provided to Proconse were facts which were public knowledge.

[17] The Second Respondent deals extensively with the evidence before him and, in doing so, makes the obvious point that if the facts were of public knowledge then, clearly it would have been unnecessary for Proconse to enlist the assistance of the Applicant to provide those facts.

[5] *Total Support Management* case n3 above at para 21.

[18] Further, as it was common cause that a representative of Proconse was at the meeting which formed the subject matter of the Affidavit, then, Proconse themselves could have given evidence of the facts in relation to the instructions to proceed with Phases 2 and 3, and they would not have needed the Applicant to prove the instruction. Further, as Proconse had not been paid in respect of its claim for Phase 2 on the two projects, notwithstanding the lodgment by Proconse of its claim, the finding by the Second Respondent that the Applicant must have appreciated that Proconse intended to use the affidavit provided by the Applicant to advance its case against the Third Respondent, should the Third Respondent fail to make payment, is clearly an inference which the Second Respondent was entitled to draw from the facts. Even if the Second Respondent was not entitled to draw the inference he did and I do not believe that he was, this would not represent any basis to set aside the award on grounds of misconduct, if regard is had to the following:

18.1. Solomon JA in *Dickenson and Brown v Fisher's Executors* found:

> 'Now if the word misconduct is to be construed in its ordinary sense, it seems to me impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterized as misconduct any more than a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law… But in ordinary circumstances, where an arbitrator has given fair consideration to the matter which has been submitted to him for a decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he made a *bona fide* mistake either of law or of fact.'[6]

[6] Above n4 at 176.

18.2. Further, in *Clark v African Guarantee and Indemnity Limited*, Gardener J,[7] held:

> 'If the arbitrator has taken evidence and has fairly considered it, the Court will not set aside the conclusion that he has come to upon that evidence, because he has drawn inferences which, though possible, are not acceptable to the Court.'

18.3. And further, Price J, dealt with the matter as follows in *Hyper Chemicals International (Pty) Limited and Another v Maybaker Agrichem and Another*:[8]

> 'Mistake, no matter how gross, is not misconduct. At most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such a case a Court might be justified in drawing the inference of misconduct. The award would then be set aside, not for mistake, but for misconduct.'[9]

[19] There is, consequently, no merit in the Applicant's first ground of review.

[20] In the second ground of review, the Applicant relies on "an irregularity in that he found a breakdown of the trust relationship when no evidence was placed before him of such a breakdown".

20.1. The Applicant relies simply on an irregularity and no allegation is made that the irregularity constitutes a gross irregularity as envisaged by Section 33(1)(b) of the Arbitration Act.

20.2. Consequently, no purpose would be served in further consideration of this ground of review as the Applicant, himself, does not contend that even if there was indeed any irregularity

[7] 1915 CPD 68 at 78.
[8] *Hyper Chemicals International v Maybaker Agrichem* 1992 (1) SA 89 (W).
[9] Ibid at 100 B-C

in relation to this finding on the part of the Second Respondent, such irregularity was gross.

[21] In relation to the third ground of review, it is quite apparent that the Second Respondent did rely on the disciplinary policy as he specifically makes reference to the policy. A contention to the contrary that there was no reference by the Second Respondent to the disciplinary policy as a whole does not come close to constituting a ground of review as contemplated by Sections 33(1)(a) or (b) of the Arbitration Act. There is, consequently, no merit in the third ground of review.

[22] In relation to the fourth ground of review, this Court's finding in relation to the third ground of review applies equally and there is, consequently, no merit in this ground of review either.

[23] In the premises, I make the following order:

23.1. The Application is dismissed.

23.2. There appears no basis on which costs should not follow the result and the Applicant is directed to pay the Third Respondent's party and party costs, as taxed or agreed.

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Maddern, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant:	Advocate M. Khanyeza
Instructed by:	Moshoana Attorneys
For the Respondent:	Advocate V. Notshe
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys