THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: JR1342/12

Not reportable

Not of interest to other judges

In the matter between:

THOKOZANI RAYMOND J MKHIZE **Applicant**

and

MARK ANTROBUS SC (ARBITRATOR) **First Respondent**

BONITAS MARKETING (PTY) LTD **Second Respondent**

Heard : 5 November 2015

Delivered: 13 November 2015

Summary: Review of a private arbitration award in terms of section 33(1) of the Arbitration Act 42 of 1965. Review dismissed with costs.

JUDGMENT

AC BASSON J.

Introduction

[1] This is an application to review and set aside an arbitration award that was conducted in terms of the provisions of the Arbitration Act[1] (hereinafter referred to as "the Act)"[2]. This review is brought in terms of section 33 of the Act. I will return to the grounds for review specified in section 33(1) of the Act hereinbelow.

[2] This dispute has a protracted history and was referred to the Commission for Conciliation, Mediation and Arbitration and the Labour Court at various stages. The matter was ultimately finalised by way of private arbitration by Mr Mark Antrobus SC presiding as the arbitrator (the first respondent - hereinafter referred to as "the arbitrator").

[3] The matter to be decided by the arbitrator was whether the dismissal of the applicant was substantively and procedurally fair.

Facts

[4] The relevant facts pertaining to this matter are summarised in great detail by the arbitrator and it is not necessary for this Court to repeat the relevant facts except for highlighting a few pertinent facts.

[5] The Council for Medical Schemes (hereinafter referred to as "the Council") is a statutory body established under section 3 of the Medical Schemes Act[3]. Various medical schemes are registered in terms of that Act one being the Bonitas Medical Fund (hereinafter referred to as "the Fund"). From time to time the Council conducts inspections and investigations at registered medical aid schemes in terms of legislation.

[1] Act 42 of 1965.

[2] Section 33 reads as follows: "Setting aside of award.—

(1) Where—

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

[3] Act 131 of 1998.

[6] The second respondent is Bonitas Marketing (Pty) Ltd, a private company with limited liability which is a wholly owned subsidiary of the fund. (I will refer to the second respondent as "the respondent"). The respondent trades as a marketing arm of the Fund. The business of the respondent is to market, grow and enhance the membership of the Fund.

[7] The applicant was employed as the managing director of the respondent with effect from 1 July 2009. In terms of his contract of employment the applicant reported to the board of directors of the respondent. The applicant also served on the board of directors of the respondent as an executive board member. At the time of the applicant's dismissal, the respondent's board of directors consisted of three non-executive board members namely Mr Seobi, Mr van Heerden and Mr Van Emmenis. The applicant was the only executive director at the time.

[8] During July 2009 there was a change to the composition and functions of the respondent's board. On 17 September 2010 the Council obtained a court order in terms of which the Fund's board of trustees were divested of its powers. Van Emmenis became vested with the powers of the Fund's board of trustees and he effectively became the board of the Fund.

[9] The respondent was suspended and charged with misconduct and was dismissed on 3 December 2010. The charges against the applicant were extensive and relate to a gross dereliction of duty alternatively gross incompetence and alternatively gross negligence in respect of, *inter alia,* payments made to the South African Revenue Services (hereinafter referred to as "SARS") which payments had to be ratified by the board; unauthorised payments of significant sums to his erstwhile personal assistant which were neither due nor owing to her nor budgeted for and in excess of the applicant's delegation of authority. The applicant was also charged with allowing the marketing manager to go on "a frolic of her own" by allowing her to pursue the procurement of a loyalty awards program for the members of the scheme when such a program was not to be implemented or where procurement was never approved by the board which caused severe reputational, financial and/or governance risk to the respondent; the applicant's involvement in the unauthorised attempts made to procure a service provider for a loyalty awards program contrary to the direct instructions of the board to suspend the

procurement or implementation of any such loyalty program. The applicant was also charged for a failure and/or a refusal to timeously execute upon the decisions and instructions of the board by disregarding a resolution by the board that his erstwhile personal assistant was to be employed on a permanent basis thereby causing significant risk to the respondent relating to financial and/or labour implications. The applicant was further charged with not sufficiently and timeously keeping the board informed of the operational and financial well-being of the business and more in particular his failure to take instructions from and report to the board timeously and without unnecessary delay relating to the operations and well-being of the respondent, in particular in respect of the search and seizure of documentation and information relating to an ongoing inspection and for not reporting to the board on the inspection in good time notwithstanding being informed by the Council's compliance officer that the applicant should seek legal advice regarding the investigation which the applicant did not do.

[10] In the letter informing the applicant of his dismissal it is recorded that he was "guilty of misconduct as alleged in the Notice and, based on the fact that the relationship of trust has irretrievably broken down between the board and yourself as well as your employer, which trust relationship cannot be restored".

Arbitration Act

[11] It is trite that a private arbitration award is not reviewable in terms of the provisions of the Labour Relations Act (hereinafter referred to as "the LRA)[4] but only on the limited grounds set out in section 33(1) of the Act.[5] In this regard the

[4] Act 66 of 1995.

[5] See: *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* [2002] 3 BLLR 189 (LAC) where the Labour Appeal Court summarized the principles regarding reviews in terms of the Labour Relations Act as Follows: "Review principles

[23] The question which arises is whether, if these aberrations are reviewable, the Arbitration Act or the principles applicable in reviews under the LRA should govern the proceedings. One line of thought is that as section 33(1) of the Arbitration Act and section 145 of the LRA are virtually the same, this Court and the Labour Court should apply the same norm under both, *viz* that of rational justifiability laid down in *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1625 (LAC) (now since this matter was heard redefined by this Court as rationality in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* 2001 (4) SA 1038 (LAC) paragraph 25). This approach is to be found in *Transnet v HOSPERSA* (1999) 20 *ILJ* 1293 (LC) paragraph 15; *NUM v Brand NO and Another* [1999] 8 BLLR 849 (LC) paragraph 14 and *Orange Toyota (Kimberley) v Van der Walt and Others* [2001] 1 BLLR 85 (LC). The other line of thought is that whatever the test may be for matters falling under the LRA regime, private arbitrations are to be reviewed (also in the Labour Court) in terms of the norms laid

Court in *SACCAWU v Pick 'n Pay Retailers Pty Ltd and others*[6] with reference to the grounds upon which a review can be brought, explains that there exists little scope for reviewing the merits of a private arbitration award:

> "[7] The specific grounds upon which a private arbitration award can be reviewed on account of the conduct of the arbitrator are those grounds (strictly interpreted) set out in s 33(1)*(a)* and *(b)* of the Arbitration Act, ie misconduct; gross irregularity; or excess of powers. Neither s 33 (just administrative action) nor s 34 (access to courts) of the Constitution apply directly to private arbitrations, and thus cannot serve as a basis for extending the grounds upon which a private arbitration award can be reviewed. In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC), O'Regan J, writing for the majority, set out the policy basis for the limited scope of intervention in private arbitrations:
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> 'Courts should be respectful of the intention of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.'
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> This cautionary sentiment is reflected in the conclusion reached by Van Dijkhorst AJA in *Stocks Civil Engineering*:
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> 'A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly

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down in section 33(1) of the Arbitration Act. The latter view was expressed in *Eskom v Hiemstra NO and Others* (1999) 20 *ILJ* 2362 (LC) and *Seardel Group Trading (Pty) Ltd t/a Bouwit Group v Andrews NO and Others* [2000] 10 BLLR 1219 (LC).

[24] In my view the latter is the correct approach. Private arbitrations are subject to the Arbitration Act 42 of 1965. Section 40 provides for an exception where an Act of parliament expressly or by implication excludes its operation. An example is section 145 of the LRA. There is no such exception in the case of private arbitrations. Considerations of expediency based upon the fact that the arbitration provisions of the LRA coincide with those in the Arbitration Act and that it would be preferable for Labour Courts to apply one test throughout, cannot override the clear provisions of the Arbitration Act. I do not share the view of Molahledi AJ in the *Orange Toyota* case (*supra*) paragraph 13 that the Arbitration Act is to be read subject to the Constitution and that therefore the test for review of the CCMA arbitration awards set out in the *Carephone* judgment would equally apply to reviews in terms of section 33 of the Arbitration Act. The important difference between the two types of arbitration is that CCMA arbitrations were held to be by an organ of state to which the constitutional precepts for just administrative action applied, whereas private arbitrations are not. This arbitration therefore has to be evaluated against the norms laid down in section 33(1) of the Arbitration Act as if this were a High Court doing likewise."

[6] 2012 (33) ILJ 279 (LC).

undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable.... An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.'

In short: in the case of a review of a private arbitration award, there exists little scope for a review going to the merits, as a private arbitrator has the right to be wrong."

The court in this case continued to explain that in order for there to be a gross irregularity warranting interference on review, two conditions must be met:

"[8] The applicants rely solely on the ground of review of a (latent) gross irregularity. In order for there to be a gross irregularity warranting interference on review, two conditions must be met: firstly, the omission on the part of the arbitrator must involve his or her having misconceived the nature of the enquiry or his or her duties in connection with the enquiry, and thus result in his preventing a fair trial of the matter. Secondly, there must not exist material that would serve to justify the arbitrator's decision, because 'if there was material before the [arbitrator], justifying the action taken, the court would not be entitled to interfere even if an irregularity had been committed'. Put differently, if an arbitrator was caused by inappropriate means to reach one conclusion whereas if he had adopted appropriate means he might have reached another conclusion favourable to the applicant, then the award is reviewable."

[12] The Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Ltd*[7] likewise confirmed that an arbitrator has "the right to be wrong":

"[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the

[7] 2007 (3) SA 266 (SCA).

> inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."

See also *Academic and Professional Staff Association v Pretorius SC N.O and others* [2008] 1 BLLR 1 (LC) where the following is said:

> "[59] The courts have, in dealing with reviews of private arbitrations, adopted a narrow approach. This approach confines itself to mainly issues related to procedural aspects of the arbitration. This approach is mainly informed by the fact that private arbitrations flow from the consent of the parties, who, through an agreement, determine the powers of the arbitrator."

[13] It is lastly important to point out that a review in terms of section 33(1) of the Act does not amount to an appeal: It is not the function of this Court to reassess the evidence that was placed before the arbitrator and consider the evidence in a way an appeal court would have done. See in this regard *Telcordia Technologies:*[8]

> "[99] The High Court's approach was to interpret the agreement afresh; to come to a different conclusion about its meaning; and then to conclude that as a result of the difference 'the arbitrator did not apply his mind thereto in a proper manner, [and] that he misconceived the whole nature of the inquiry and his duties therewith' and that he simultaneously exceeded the bounds of his powers. But it was not for the High Court to reinterpret the contract; its function was to determine whether the gross irregularities alleged had been committed. By its reinterpretation the Court dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to

[8] *Supra*

follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a 'gross irregularity', as the quotations from *Doyle v Shenker* illustrate. It is circuitous to reason, as the court did, that this alleged failure amounted to a misconception of the whole nature of the inquiry and that consequently the failure amounted to a gross irregularity. The Court sought to distinguish *Doyle v Shenker* on the basis that in that case the magistrate committed an error of law while acting within his jurisdiction, implying that by interpreting the Integrated Agreement the arbitrator had acted outside his jurisdiction, which is simply wrong. If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned award, it was as presumptuous as it was fallacious for the Court to have held that the arbitrator did not apply his mind properly to the issues at hand."

[14] A party who agrees to arbitration also agrees to limit an interference of this Court to the grounds of review as set out in section 33(1) of the Act. The Court in *Telcordia Technologies*[9] explains as follows:

> "[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained - by virtue of judicial interpretation - in the Act, and it is strictly unnecessary to deal with the common law in this regard."

[15] With the above in mind I will now proceed to evaluate the grounds of review as set out by the applicant in the Founding Affidavit.

<u>The grounds of review in terms of section 33 of the Act</u>

[16] Section 33 of the Act provides for the setting aside of an arbitration award:

> "(1) Where -
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> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

[9] *Ibid*.

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his 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".

As already pointed out, the test on review which is set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[10] is not applicable.

[17] In respect of the concept of an arbitrator exceeding his or her powers the Court in *Telcordia* held as follows:

> "[52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all:
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> > 'But the issue was whether the tribunal ''exceeded its powers'' within the meaning of s 68(2)*(b)* [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. *If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)*(b) *is involved*. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail.'"

In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [11] the Court held as follows in respect of the three grounds of review and confirmed that the grounds on which an arbitration award may be reviewed are narrow:

> "Before considering these grounds, it is as well to emphasise that the basis upon which a Court will set aside an arbitrator's award is a very narrow one. The submission itself declared that the arbitrator's determination 'shall be final

[10] [2007] 12 BLLR 1097 (CC).
[11] 1994 (1) SA 162 (A)

> and binding on the parties'. And s 28 of the Arbitration Act provides that an arbitrator's award shall 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'.
>
> It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a Court is empowered to intervene. If an arbitrator *exceeds his powers* by making a determination outside the terms of the submission, that would be a case falling under s 33(1)*(b)*. As to *misconduct*, it is clear that the word does not extend to *bona fide* mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: *Dickenson and Brown v Fisher's Executors* 1915 AD 166 at 174-81. It was held in *Donner v Ehrlich* 1928 WLD 159 at 161 that even a gross mistake, unless it establishes *mala fides* or partiality would be insufficient to warrant interference."[12]

The review application

[18] It is somewhat difficult to distil from the review application exactly on what basis the applicant is bringing this review application and it would appear that the applicant (apart from possibly one ground relating to his right to be represented) is bringing a review under the guise of an appeal. In essence the applicant is taking issue with the numerous factual findings made by the arbitrator and in respect of each of these factual findings the applicant sets out in detail what facts the arbitrator should have taken into account. In respect of the majority of the factual findings made by the arbitrator, the applicant averred that the arbitrator "committed misconduct in relation to his duties as an arbitrator, gross irregularity in the conduct of the arbitration proceedings and he exceeded his powers".

[19] Insofar as it was possible to do so, I have endeavoured to extract from the papers (which are voluminous) on what basis the applicant is bringing this application to review the arbitration award. I will accordingly deal with the issues as they are raised in the applicant's papers as well as the Heads of Argument. At the outset, it must again be pointed out that the applicant did not bring a proper review in terms of the Act but brought an application more akin to an

[12] Emphasis added.

appeal. If regard is had to the case law referred to hereinabove it is clear that a review in terms of the Act can only be brought on a limited basis. Moreover, as already pointed out it is not the function of this Court to reassess the evidence that was placed before the arbitrator and consider the evidence in a way an appeal court would have done. Essentially this Court can consider whether the arbitrator has duly considered the evidence before him and "if he does this, but reaches the wrong conclusion, so be it".[13]

Legal representation

[20] The first ground for review appears to be the procedural fairness of the dismissal. In this regard the applicant submitted that he had expressed concerns to the arbitration regarding the fact that he was not able to have legal representation at arbitration and that he was then obliged to be represented by his brother who did not have any legal background and who was at the time a Human Resources Manager at Transnet. This appears to be the only ground of review that can be brought within the boundaries of section 33(1) of the Act.

[21] There is no merit in this ground of review and in fact it would appear in light of the papers that the applicant is blatantly attempting to mislead the Court. On 9 February 2012, the arbitrator arranged for a meeting in his chambers with all parties present. The meeting was mechanically recorded. A transcript of the recording is included in the papers. The applicant (Mr Mkhize) as well as his brother Mr Sipho Mkhize (his representative) were present at this meeting. The issue was pertinently raised whether the applicant could be represented by his brother. In fact, Mr Bekker – the representative for the respondent - specifically requested an assurance from the applicant that his brother was fully qualified and experienced to represent him at the private arbitration process. It is clear from the transcribed record that Mr. Sipho Mkhize in no uncertain terms assured the arbitrator not only that he was able to represent the applicant, but that he and the applicant were fully prepared and able to proceed with the matter. In this regard he stated on record as follows:

> "Ja that is fine, Mr Arbitrator, I can assure you we are prepared for this case. If this case was to start tomorrow we are prepared for it and we are going to see it through to the end. In short, I believe I am qualified to fully

[13] See par [11] supra.

represent the applicant in this matter, and I will not withdraw myself in the process. Thank you."

Disciplinary hearing

[22] The applicant was dismissed pursuant to a decision taken by the board on recommendation from a subcommittee appointed by the board. The applicant contended that he was entitled to a disciplinary hearing in terms of the respondent's disciplinary code and procedure. The arbitrator noted in his award that the respondent's disciplinary code does not require the appointment of an independent chairman to conduct a disciplinary enquiry. In any event, as will be pointed out hereinbelow, the applicant refused to attend the hearing and is therefore the author of his own misfortune.

[23] It appears from the evidence that the applicant was called to a board meeting which was held on 2 December 2010 to answer the allegations contained in the notice attached to the letter (which contained the charges) and "advance to us reasons why the sub-committee of the board cannot terminate your services." The applicant was therefore invited to attend the meeting of 2 December 2010 to state his case in relation to the charges contained in the charge sheet. The applicant was not prepared to engage with the board as he was of the view that he was a whistle-blower.

[24] In this regard the applicant contended that this board meeting did not constitute a disciplinary enquiry and that there was no independent and impartial chairman appointed to conduct the disciplinary enquiry. The applicant further contended that the board was biased and not impartial.

[25] The arbitrator deals extensively with the procedural fairness of the dismissal and finds firstly that the decision to terminate the applicant's employment was taken by the board pursuant to a recommendation from a subcommittee of the board that his employment be terminated. The arbitrator further held that the respondent's disciplinary code does not require the appointment of an independent chairperson to conduct disciplinary enquiry. Because the person (the applicant) charged with misconduct was the managing director there was in any event no more senior executive managers within the ranks of the respondent available who could have conducted the enquiry and that it was for that reason that the board itself, to which the applicant reported directly, conducted the disciplinary proceedings. This, the arbitrator found, was not

unfair. Secondly, the applicant had been granted an opportunity to address the subcommittee that was established to fulfil the same function as a disciplinary hearing but the applicant refused to take part in the process.

[26] I have considered the conduct of the arbitrator and his findings in light of the narrow grounds set out in section 33(1) of the Act and can find no reason to interfere with the findings made by the arbitrator.

Alleged bias

[27] The applicant claimed rather vaguely that the arbitrator was biased and based this on the fact that Mr Van Heerden who testified for the respondent was once employed by a subsidiary of Kumba Iron Ore which was at one time a client of the arbitrator.

[28] There is simply no merit in this complaint especially in light of the fact that the arbitrator had disclosed this fact to the parties and not one of the parties objected to the arbitrator continuing with the arbitration hearing.

The respondent's failure to call certain witnesses

[29] The applicant further claimed that the award is reviewable since the respondent did not call a witness that the applicant regarded to be pertinent to the issues raised by him. In this regard the applicant contended that the legal representatives for the respondent had at some point undertaken that certain witnesses would be called only not to do so.

[30] There is no merit in this allegation as there is no obligation on a party to call a specific witness and, moreover, the applicant in any event had the right to call any of the witnesses not called by the respondent to testify on his behalf.

Reporting lines

[31] In respect of the substantive fairness of the dismissal the applicant raised various concerns to the effect that the arbitrator according to him did not consider various portions of the evidence. More in particular it was submitted that the arbitrator's award "is based on a wrong assumption that there was no change in reporting lines from Bonitas Marketing Company (BMC)." In this regard it was submitted that the arbitrator disregarded the evidence which showed that new reporting lines were implemented. The applicant submitted

that the arbitrator misconducted himself, that he did not apply his mind and that he had exceeded his powers.

[32] I have considered these complaints which essentially amount to an attack on the arbitrator's findings in respect of what the facts were on the basis of the evidence. These grounds for review amount to nothing more than an attempt to appeal the findings and the award of the arbitrator. I can find no reason to conclude that the arbitrator had misconducted himself or that he had exceeded his powers in arriving at the conclusions recorded in the award. The applicant is also losing sight of the fact that an arbitrator "has the right to be wrong on the merits of the case". Although I am alive to the fact that this is not an appeal I nonetheless venture to point out that the facts set out by the arbitrator in his award clearly support his findings: The applicant failed to follow the instructions of his employer (the respondent) and more specifically that of the board of directors of the respondent. The applicant was also not able to explain during cross examination why he elected to disregard instructions of the board of directors and instead attempted to rely on a new reporting structure which was not borne out by the evidence that was placed before the arbitrator.

SARS payments

[33] In respect of the charge that the applicant had not obtained the board's approval for payments made to SARS in respect of outstanding VAT and that exceeded his delegation of authority and that he paid the amount without first enquiring into the nature of the payment. The arbitrator again deals in detail with the evidence in respect of this charge and concluded in light of the evidence that it was common cause in the arbitration that incorrect VAT payments were made and that this expenditure was unauthorised. In this regard the arbitrator concluded on the probabilities that the board did not approve these VAT payments and that the applicant was guilty of misconduct in having failed to obtain approval from the board and that he made these payments in excess of his delegated authority.

[34] In respect of this charge the applicant in his papers and the Heads of Argument endeavours to revisit the extensive evidence led by the respondent on this charge and submitted that, because the arbitrator did not consider all the

evidence, he misconducted himself in relation to his duties as arbitrator and exceeded his powers.

[35] There is simply no merit in the allegation that the arbitrator had failed to take into account the evidence and therefore misconducted himself in relation to his duties as an arbitrator. It is clear from the award that the arbitrator was fully apprised of the evidence and that he has duly considered the evidence that was properly placed before the arbitration. The fact remains: the respondent had direct evidence on the charge pertaining to the payment of VAT. Mr. Van Heerden gave extensive evidence on this charge. The arbitrator has applied his mind to the evidence and came to a conclusion. Any allegation that he has misconducted himself is misconceived.

Payments to his Personal Assistant

[36] The applicant was charged with the unauthorised payment of significant sums to Khelele Consulting CC for his erstwhile personal assistant which were neither due nor owing nor budgeted for and for disregarding a resolution by the board that his personal assistant was to be appointed on a permanent basis. In this regard the evidence was that there was a clear instruction from the board at a meeting (at which the applicant was present) that his personal assistant was a temporary employee and should be appointed on a permanent basis. This instruction is contained in the minutes of the board meeting of 8 November 2009. The applicant submitted in his defence that this was merely a comment by the chairman of the board and not a board resolution and that it was his choice whether he wished to appoint his personal assistant permanently or not. The arbitrator evaluated the evidence and concluded that there was indeed a board resolution to the effect that the applicant should appoint his personal assistant on a permanent basis. Moreover, the arbitrator took into account that the applicant himself in an e-mail confirmed that there exists such a board resolution.

[37] The arbitrator also carefully evaluated the evidence which pointed to the fact that the personal assistant had received excessive amounts in overtime and that the applicant had approved payment thereof. In fact the evidence showed that the personal assistant claimed overtime in the region of 160 hours in one

month only. In some months the employment agency was paid more than R50, 000.00 including the overtime claimed by the personal assistant with the applicant authorising payment thereof. The arbitrator concluded that the evidence established that the amounts paid to the agency were not due either to the agency or to the personal assistant herself and that the payments constituted unauthorised payments made by the respondent in consequence of a fraud perpetrated by the personal assistant. The arbitrator also found that it was clear from the evidence that the applicant was responsible for signing off and acknowledging that the overtime claimed by the personal assistant had indeed been worked and that the applicant did so despite the fact that no such overtime was worked. The arbitrator consequently found the applicant guilty as charged.

[38] The applicant submitted that the arbitrator had committed misconduct, alternative gross irregularity in the conduct of the proceedings in that he did not properly apply his mind alternatively disregarded relevant evidence. I have perused the evidence and I do not agree with the submission that the arbitrator had misconducted himself in relation to his duties as an arbitrator. It is clear that the arbitrator was aware of the issues that were before him. Moreover, this is not an appeal and even if the arbitrator was wrong in arriving at this findings, that does not constitute a ground for review.

Loyalty Programme

[39] The applicant was charged with two charges relating to the so-called PanAvest report. The evidence in this regard briefly was that it was decided that the issue of loyalty programs be put on ice until an investigation by the Council was completed. The minutes of the meeting held on 22 July 2009 reflect that the respondent should not sign any contract until the investigation was completed. Van Heerden explained in his evidence that PanAvest was a company that offered a loyalty programme. Evidence was produced in terms of a letter from the president and CEO of PanAvest to the applicant recording that PanAvest had been appointed as the preferred service provider to roll out a loyalty programme for the respondent. In this regard it was the evidence of Van Heerden that this loyalty program was not approved by the respondent and

that the applicant was aware of this as he was present at the Board meeting where this decision was taken.

[40] The arbitrator concluded that the applicant was aware that his marketing manager was pursuing the procurement of a loyalty awards programme and that he in fact suggested to her that she prepare for the agenda items which he indicated she should raise at the forthcoming marketing meeting.

[41] The arbitrator accordingly concluded that the respondent has established that the conduct of the applicant constituted misconduct in the form of gross negligence and gross incompetence.

[42] Once again the applicant submitted that the arbitrator committed misconduct alternatively committed a gross irregularity in the conduct of the proceedings. There is absolutely no basis for concluding that the arbitrator had committed misconduct alternatively committed a gross irregularity. The evidence overwhelmingly show (although I am mindful that this is not an appeal) that the applicant was aware of the conduct of his marketing manager and that he blatantly disregarded the decisions and instructions of the board.

Failure to execute decisions and instructions of the board

[43] The applicant claims that the arbitrator failed to take into account that he had led evidence to the effect that he never failed to execute the decisions and instructions of the board. In order to place this charge in its proper context it is necessary to briefly refer to some of the events that preceded the laying of the disciplinary charges against the applicant.

[44] In March 2010 the board became concerned about the running of the respondent. The applicant was then required to report on a weekly basis in writing to board.

[45] The respondent's attorneys in the meantime conducted an investigation. The investigation was completed on 2 August 2010 and the findings we recorded in the so-called PanAvest report. In that report it was concluded that the applicant was guilty of gross dereliction of his duties, gross negligence and incompetence which he had exhibited in the execution of his duties as managing director of the respondent. The applicant was not immediately charged and was only charged on 25 November 2010.

[46] Matters took a turn when Mr Maluleke (for the respondent) received a call from a Senior Investigator at the Council in which he (Maluleke) was advised that the Registrar of the Council had in terms of the Medical Schemes Act and the Inspection of Financial Institutions Act appointed certain inspectors from Syncerus Business Solutions (hereinafter referred to as "Syncerus") to inspect the respondent and the Fund and any associated financial institution. On this point it is important to point out that it was common cause that the applicant had reported certain alleged financial irregularities to the Council. The alleged complaints by the applicant were subsequently found to be without merit. In this regard the respondent had appointed senior counsel to investigate the allegations levelled against Van Emmenis. The conclusion reached by Council was that the allegations against Van Emmenis were baseless.

[47] Maluleke emailed the applicant on the same day and requested him as managing director of the respondent to notify the staff of this development. At that stage Van Heerden and the other board members were not aware of the fact that the inspection which the Registrar had called for was as a direct consequence of information contained in a report which the applicant had furnished to the Council. In fact, Maluleke testified that he was not aware of what had prompted this inspection and it was only later that he established that the applicant had compiled a dossier which he had forwarded to the Council. When Maluleke obtained the dossier from the Council he realised that the applicant had levelled various serious allegations against Van Emmenis. Maluleke also testified that the applicant had at no point informed him that the appointment of inspectors was as a consequence of the dossier which he had furnished to Council.

[48] Van Heerden also testified that he was concerned by the fact that the applicant had failed to inform the respondent that the notification of the inspection had been received the day before.

[49] Van Heerden issued an email on 18 November 2010 to the applicant in which he instructed him not to make available any information to the investigators until the respondent had received legal opinion in respect of the pending investigation. The arbitrator found that this instruction from the board had been issued at the stage when the applicant himself was aware of the content of the

PanAvest report which concluded that the applicant was guilty of gross dereliction of his duties, gross negligence and incompetence.

[50] The arbitrator deals with the evidence in detail as well as with the other events that followed upon the email sent to the applicant on 18 November 2010. The arbitrator also considered all the defences raised by the applicant against the charges levelled against him. The arbitrator concluded that the respondent has on a balance of probabilities made out a case that the applicant had failed to timeously inform the respondent of the fact that Council had ordered an inspection and that the applicant had failed timeously to seek advice from the board and from the respondent's lawyers in circumstances where the applicant wanted to ensure that the investigation proceed in the hope that Van Emmenis and the board would not be able to discipline him pursuant to the PanAvest report. The arbitrator further concluded that on a balance of probabilities, the applicant's conduct was not motivated by what was in the best interests of the respondent but that his conduct was driven by what the applicant perceived as being in his own interest. This, the arbitrator concluded, constitutes insubordinate conduct and constitutes very serious misconduct on the part of a managing director.

[51] In this regard the applicant tried to persuade the Court that the arbitrator had misconducted himself in ignoring the evidence that was placed before the arbitration. I have carefully considered the evidence and can find no indication of misconduct on the part of the arbitrator or that he committed a gross irregularity in the conduct of the arbitration proceedings. Again, the applicant argued an appeal not a review.

<u>Ruling in respect of further evidence</u>

[52] The applicant alleged that the arbitrator made a ruling that he could not lead evidence of financial irregularities amounting to approximately 20 million Rand and that the arbitrator therefore did not consider the "undisputed evidence" that officials of the respondent had committed untoward conduct.

[53] Apart from the fact that there is no merit in this allegation, the applicant is again blatantly trying to mislead the Court: It is clear from the transcribed record that the applicant's representative specifically indicated to the arbitrator that they are not going to object to the arbitrator's ruling in this regard. Furthermore, the

record also reflects that the applicant's representative expressly stated that the evidence that the applicant had wished to put forward on this issue "is not relevant".

Alleged lack of authority to depose to the answering affidavit

[54] In the replying affidavit the applicant raised the fact that Ms Gray from the respondent's attorneys is not authorised to depose to the answering affidavit or to oppose the review application.

[55] In this regard the applicant alleged that he was not furnished with the minutes of the meeting of the board of directors which authorised Ms Gray to depose to the answering affidavit and to oppose the review application.

[56] There is no merit in this allegation as it appears from the papers that the attorneys were authorised as far back as 1 July 2011 by the board of directors of the respondent to "act as the legal representatives of the company in these and any related or ancillary proceedings which exist or may exist in the future and all that is necessary and sign any document that is required for the protection or prosecution of the company's rights and interests". A second resolution was also obtained in respect of the two applications to strike out. A further resolution dated 18 March 2014 confirmed the previous resolutions of the board dated 1 July 2011. In the event this point is dismissed.

Conclusion

[57] In respect of the review application, the application is dismissed. Because the application is ill-conceived and in light of the warnings expressed by Lagrange, J that the review had very little prospects of success and in light of the fact that the applicant was pursuing an appeal in the guise of a review, I have decided to dismiss the review with costs on a punitive scale.

Interlocutory applications and the application to strike out

[58] The respondent has filed two applications to strike out scandalous, vexatious and/or irrelevant matter that appear in the applicant's supplementary affidavit for the review dated 10 February 2014 as well as the applicant's replying affidavit dated 3 March 2014.

[59] The first application to strike out was brought by the respondent on 25 February 2014 and was opposed by the applicant. The second application to strike out was brought by the respondent on 20 June 2014 and was not opposed by the applicant.

[60] In essence the respondent has sought to strike out references by the applicant alleging that the attorney of the respondent (Ms Gray) and officials of the respondent perpetrated "serious fraud with underpinned motive". There is also an allegation that Bonitas is involved in "irregularly transferring millions of rands of public funds". Ms Gray (the attorney on behalf of the respondent) is accused of being "the main culprit, the mastermind and architect who drafted a dismissal roadmap against me fraudulently". This evidence once again suggested that Ms Gray completely sacrificed her professional ethics as an officer of court, and also sacrificed professional ethics as a director of Gildenhuys Malatji Incorporated. Therefore, appropriate punitive measures should be taken against Ms Gray."

[61] The first application to strike out was preceded by a letter to Mr Shongwe (the attorney on behalf of the applicant) setting out in detail what the issue of the respondent was with reference to the various scandalous averments contained in the applicant's papers. In fact, Ms Gray on behalf of the respondent stated clearly that the "scandalous, malicious, defamatory and malevolent expressions of animosity" is "devoid of any truth".

[62] Despite the fact that Mr Shongwe was pertinently and in no uncertain terms made aware of the scandalous averments contained in the papers, he tried to distance himself from these allegations in the Heads of Arguments filed in opposition to the first application to strike out. In a poor attempt to distance himself from the scandalous allegations, Mr Shongwe now effectively tried to convince this Court that he was not aware of the contents of the affidavits:

> "4. As the heads were prepared and having gone through the Bonitas Marketing heads, it dawned on us that the complaint that led to the application to strike out is the words like "fraudulent "and "fabrication". Contact was then made with Bonitas Marketing attorneys to try and resolve the matter but no solution came at the time to file the heads was fast approaching. The heads were then filed in which the explanation as aforegoing is made."

[63] This is, in my view, a patent attempt to mislead the Court and I am of the view that this constitutes conduct unbecoming of an officer of this Court.

[64] What makes matters worse is the fact that Mr Shongwe deposed to a confirmatory affidavit (although unsigned) in which he stated as follows:

> "I have further read through the application to strike out filed by Bonitas Marketing's attorneys of record and have noted the order of costs sought against me and our client. I am unable to comprehend the basis of seeking such a cost order. It is in my view that this may be a way of intimidating me not to advise Mr Mkhize further. On reading the striking out application I have observed no scandalous, vexatious and/or irrelevant issues raised."

Mr. Shongwe therefore clearly made common cause with the scandalous averments contained in the applicant's papers.

[65] In a surprise turn of events the applicant and his attorney then states the following in the Heads of Argument:

> "5. It is suspected submitted that had Bonitas Marketing explained himself clearly that they were worried about words and phrases, surely the matter would not have come this far. It would have been resolved. We are however opposed to a complete removal of certain paragraphs as cited by the Bonitas Marketing legal team. It is our considered view that removing this seeming scandalous words and/or phrases should be enough and the matter can proceed without any further delay. And if it is made to correct the supplementary affidavit and the replying affidavit as far as offensive words are concerned. Both the Honourable Court and the legal team of Bonitas Marketing should be received a copy in less than seven days hereof.
>
> 6. We propose that the application to strike out be withdrawn and the cost be reserved."

[66] Shongwe Attorneys thereafter served and filed two fresh and amended affidavits (a supplementary affidavit and a replying affidavit) from which it appears that the bulk of the offensive phrases were removed.

[67] What is however of concern to this Court is the fact that an officer of this Court makes common cause in an affidavit with scandalous and unsubstantiated allegations not only against a party to this dispute, but more importantly, a member of the same profession. This is conduct unbecoming of an officer of this Court. I should mention at this juncture that Mr Shongwe confirmed in Court

that he had deposed to this affidavit which makes common cause with the scandalous allegations against Ms Gray.

[68] Furthermore, it is not accepted that it only "dawned" on the applicant and Mr. Shongwe when they prepared their Heads of Argument that the respondent has raised the issue of the striking out. I am in agreement with the submission that the applicant simply had to remove the offensive contents from the respective affidavit and tender the respondent's costs for bringing the two applications to strike out. I am further in agreement with the submission that the applicant's conduct and that of Mr. Shongwe in respect of the two applications deserves the imposition of a punitive costs order.

[69] As if matters cannot become worse, the Court's attention was drawn to the fact that this particular affidavit deposed to by Mr. Shongwe had mysteriously disappeared from the papers filed at this Court. Mr Bekker handed up a copy of this affidavit and indicated to the Court that this affidavit was in fact part of the papers originally filed at court and that this affidavit is clearly identified in the index as "Unsigned Confirmatory Affidavit: Isiaah Moses Shongwe". The page reference is pages 59 and 60. Pages 59 and 60 are missing from the record and it would seem that they were removed from the file prior to the hearing of this matter.

[70] The two striking out applications are therefore granted and it is ordered that the applicant and Mr Shongwe pay the costs of the respondent relating to these two applications on the scale as between attorney and own client (pertaining to the applicant) and costs *de bonis propriis* against Mr Shongwe, the one paying the other to be absolved.

[71] I have in light of my view of what seems to be unprofessional conduct unbecoming of an officer of this Court directed the Registrar of this Court to furnish the Law Society of the Northern Provinces with a copy of my judgment for investigation into the conduct of Mr Shongwe of Shongwe Attorneys.

Security for costs

[72] When the applicant instituted the review proceedings, Lagrange, J of this Court held that the applicant should set security for costs after an application was brought by the respondent seeking to compel the applicant to set security for costs.

[73] In his judgment, Lagrange, J clearly warned the applicant that he (the applicant) was "attempting to pursue an appeal in the guise of a review. Further, the limited procedural challenges which are raised appear to have very limited prospects of success." The Court also warned the applicant that he cannot rely on the test in *Sidumo* to augment his grounds raised in respect of the merits of his review. More in particular, the Court pointed out that it appears that the applicant is pursuing the current review application with a "reckless disregard for the likely outcome" based on the basis of the scant prospects of success as set out in the judgment and the fact that most of the review is based on grounds of appeal. The costs of the application for security for costs were ordered to be costs in the cause of the review application.

[74] I have considered the issue of costs and in light of the outcome in these proceedings I can find no reason why the applicant should not be ordered to pay the costs in the application to set security for costs.

Order

[75] In the event the following order is made:

76.1 The applicant is ordered to pay the costs in the application to set security for costs which was reserved by Lagrange, J.

76.2 The applicant and Mr Shongwe are ordered to pay the costs of the first application to strike out on an opposed basis on the scale as between attorney and own client (pertaining to the applicant) and costs *de bonis propriis* against Mr Shongwe the one paying the other to be absolved.

76.3 The applicant and Mr Shongwe are ordered to pay the costs of the second application to strike out on an unopposed basis on the scale as between attorney and own client (pertaining to the applicant) and costs *de bonis propriis* against Mr Shongwe, the one paying the other to be absolved.

76.4 The application for review is dismissed with costs on an attorney and client scale.

76.5 The Registrar is directed to furnish the Law Society of the Northern Provinces with a copy of this judgment for investigation into the conduct of Mr Shongwe of Shongwe Attorneys.

AC BASSON

Judge of the Labour Court

Appearances:

For the applicant : Mr Shongwe of Shongwe Attorneys.

For the respondent : Advocate WP Bekker

Instructed by : Gildenhuys Malatji Incorporated