THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR1314/13

In the matter between:

EBS SECURITY ADMIN (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER LUFUNO RAMABULANA *NO* **Second Respondent**

ANDRE VAN DER HEEVER **Third Respondent**

Delivered: 06 October 2015

Summary: Generally, the record of proceedings is of critical importance when a court is required, in review proceedings, to determine whether a Commissioner's award is one that a reasonable decision-maker could have reached - the Applicant's review application required a complete record - in the absence of a complete record, a determination on whether a gross irregularity was committed and a finding on whether the arbitrator produced an unreasonable

outcome cannot be made - the Applicant has not discharged the onus to show that the award is reviewable.

The award, read in totality, does not reflect a material patent irregularity - no reasonable prospects that another court would arrive at a finding - the application for leave to appeal is dismissed.

JUDGMENT – LEAVE TO APPEAL

VAN DER MERWE, AJ

[1] The review application in this matter was heard on 17 December 2014 and my judgment was delivered as an *ex-tempore* judgment on the same day.

[2] This is an application for leave to appeal against the entire judgment that I handed down on 17 December 2014. The Applicant, on 13 May 2015, delivered written submissions in support of its application for leave. The parties were informed that this application for leave would be decided in Chambers on the basis of the submissions filed in terms of Rule 30(3A) and I proceed to do so in this judgment.

[3] I have therefore considered the application for leave to appeal and submissions made pursuant thereto on the papers. This application for leave to appeal is unopposed.

<u>The test applicable to applications for leave to appeal</u>

[4] It is trite that the court will grant leave to appeal if it is shown:

4.1. that there are reasonable prospects of success on appeal or, stated differently, that there is a reasonable possibility that another court may come to a different conclusion; and

4.2. either:

4.2.1. that the amount in dispute is not trifling, or

4.2.2. that the matter is of substantial importance to either or both of the parties.[1]

[5] In the Labour Court, only the first of these is required.[2]

[6] The Applicant has to demonstrate that there is a reasonable possibility that another court, in this case the Labour Appeal Court, may come to a different conclusion to what I have arrived at in the judgment.

The Judgment

[7] The central findings of the judgment can be stated as follows:

7.1. The record in the review application was incomplete and the review could not be determined without the record by merely considering the award. Primarily, a decision as to whether an award is reasonable can only be taken after a careful consideration of all the evidence that was before the Commissioner.

7.2. The Applicant did not transcribe the handwritten notes or attempt to reconstruct the record and the court was in no position to adjudicate properly on the application. There was no justification as to why the Applicant did not produce a proper record.

7.3. The Applicant's representative conceded that the record was incomplete and illegible but maintained that the application could be determined without a record by merely considering the award itself. I disagreed on the basis that no gross irregularity was patent from the award itself and also because there appeared to be a dispute of facts which presented the Applicant with a dichotomy of manifestly incompatible approaches. Furthermore, the court was in no position to adjudicate properly on a review application aimed at the merits of the

[1] See *Afrikaanse Pers Bpk v Olivier* 1949 (2) SA 890 (O).
[2] See *Woolworths Ltd v Matthews* [1999] 3 BLLR 288 (LC) and *Van der Merwe v Du Plessis* (1999) 20 *ILJ* 1305 (LC) at para 4.

dismissal and a view could not be expressed on the reasonableness of the award in these circumstances.

Grounds of Appeal

[8] The Applicant advances this appeal on three grounds:

8.1. that I erred and misdirected myself in assessing the logic of the Second Respondent who made the arbitration award;

8.2. that I erred and contradicted myself in paragraph 6 of the Judgment; and

8.3. that I erred and misdirected myself by opining that the Review Application could not be decided on the arbitration award itself.

[9] The record of the arbitration had not been made available and the Applicant did not provide any justification for this.

[10] There is no dispute or uncertainty with regards to what comprised the record of the arbitration proceedings before the Commissioner. The Applicant's supplementary affidavit clearly rests on the record, as filed, and makes it clear in paragraph 4 that the deponent has "read the record" and that the Applicant relies on this record to "… further… illustrate, the grossly irregular nature of the arbitration award…"

[11] The supplementary affidavit goes on to record that the Commissioner's handwritten notes are illegible but the Applicant did not address this shortcoming by following the settled practice of transcribing the handwritten notes. The illegible handwritten notes are the only recordal of the proceedings before the Commissioner.

[12] The Applicant's failure to transcribe the handwritten notes or to obtain legible copies of the notes, which could be transcribed, left the court with an incomplete record.

[13] In a belated attempt to deal with the above defect, the Applicant in its submissions in support of application for leave to appeal refers to an email

from the CCMA dated 22 April 2015 and suggests in paragraphs 11 and 12 of the submissions that the Applicant was unable to supplement the record because the CCMA informed the Applicant that the Commissioner's services were terminated.

[14] As referred to above, the Applicant should have obtained a legible copy of the notes (which should be in the CCMA file) and should have had a transcribed version thereof at the hearing of the review application. In addition, the review application was argued on 17 December 2014 and the judgment was delivered on the same day as an *ex-tempore* judgment being on 17 December 2014 and the Applicant cannot rely on an attempt to supplement the record (in its submissions in support of application for leave to appeal) after the judgment and thereby escape the consequences of a defective review application.

[15] Generally, the record of proceedings is of critical importance when a court is required, in review proceedings, to determine whether a Commissioner's award is one that a reasonable decision-maker could have reached in the light of the evidence that was presented to the Commissioner. Rule 7A(5) of the Labour Court Rules also incorporates this requirement when it demands that an applicant must make copies of such portions of the record as may be necessary for the review. The Applicant's review application included the handwritten notes made by the Commissioner and the Applicant presented these notes as necessary for the review. This was also the Applicant's position in the founding affidavit that sought to capture the material evidence that was presented at the CCMA in paragraphs 10 to 25 of that affidavit.

[16] Contrary to the above, the Applicant in court attempted to abandon the record and argue that the review application could be determined without the record and by merely considering the award. It is this line of argument that forms the pivot of this appeal.

[17] I do not agree with the Applicant's submission that this review (dealing with the merits of the dismissal) can be determined as an exception to the general rule referred to in 15 above i.e. as a narrow issue that can be determined

without the need for a record.

[18] If this was to be permitted, it would bring about a piecemeal and fragmented analysis of this award. A broad–based evaluation of the totality of the evidence is required in this review application in order to determine whether a gross irregularity was committed i.e. whether the alleged irregularity was material to the outcome.

[19] In sum, the Applicant's review application required a complete record. In the absence of a complete record, a determination on whether a gross irregularity (that was material to the outcome) was committed and a finding on whether the arbitrator produced an unreasonable outcome cannot be made.[3]

[3] The SCA in *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA) explained the standard of review, laid down by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC), as follows:

> '[12] ….That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. (footnote omitted) On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.
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> ….
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> [25] In summary, the position regarding the review of CCMA awards is this: 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 inquiry 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.' [My emphasis]

See also, the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC), at 21:

> '[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and another v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that

[20] The Applicant has not discharged the onus to show that the award is reviewable. The Appeal Court and this court has on numerous occasions cautioned applicants that a party in review proceedings who do not furnish an adequate record to the Court runs the risk of not discharging the onus that the matter is reviewable.[4]

[21] The Applicant's review application should on this ground alone be dismissed.

[22] I do not think that there is a reasonable possibility that another court will come to a different conclusion.

[23] I also do not see any merit in the Applicant's second submission that paragraph 6 of the judgment contains a contradiction. Paragraph 6 of the judgment must be read in its proper context and both paragraphs 5 and 6 are thus quoted. The paragraphs are plain and reads as follows:

> "[5] The Applicant's representative conceded that the record was incomplete and illegible, but maintained that the application can be determined without a record by merely considering the award itself.
>
> [6] I do not agree. It is correct that sometimes in the absence of a complete record, the courts have been robust in determining the matter on the available information. But these instances are limited to where the irregularity may be so patent from the award itself, that a record might not be necessary or because there was no 'material dispute of fact going to the very heart of the review application.'"

[24] I was not willing to determine the review application in the absence of a complete record. This review did not justify a deviation from the general rule and a complete record was required. The existence of a material dispute of fact going to the heart of the review existed on the papers and this was a further reason why a full record was required.

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the award must be rational and reasonable – there is no room for conjecture and guesswork.'

[4] See *SACCAWU and Others v President Industrial Tribunal and Another* 2001 (2) SA 277 (SCA) at para 7 and *JBE Trading (Pty) Ltd t/a Russells v Whitcher NO and Others* (2001) 22 *ILJ* 648 (LAC).

[25] The Applicant argues that a patent irregularity is clear from paragraph 24 of the Second Respondent's award. The portion of the paragraph on which the Applicant relies reads:

> "It is [in] my opinion the said granting of the competency certificate [which] was so close to the termination of employment that a reconsideration of the dismissal should have genuinely been made."

[26] This is, however, not reflective of the full reasoning in the award. The aforementioned sentence is quoted out of context. The award makes it clear that the dismissal was found to be substantively unfair also due to the fact that the Applicant "could have been granted further time" and because other alternatives could have been explored. Paragraphs 23 – 26 of the award is quoted in full as follows:

> "23. I did not find anything and (sic) how this retrenchment would have assisted the respondent in its operation in fact it would seem the company would have been assisted by retaining his services.
>
> 24. The respondents seem to have granted the applicant some indulgence and time to get his competency certificate. It is my view that the delay was not extremely excessive to an extent that it would amount to being unreasonable, more so it was granted just a week after termination of employment. It is my opinion the said granting of the competency certificate was so close to the termination of employment that a reconsideration of the dismissal should have genuinely been made.
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> 25. It was argued that applicant refused to take an alternative job at a lesser pay and hence his retrenchment was then made final, it seems as suggested by the applicant that he was seconded to do other work and paid his salary, in this instance it is my view that before any dismissal could be made and as it was not (sic) applicant's fault that he did not have the said certificate he could have been granted further time albeit at different condition (sic) like suspension of the employment until such time that he gets competency certificate.

> 26. Applicant's retrenchment does not make operational requirements sense (sic) and I find it unfair on the basis that other alternatives could have been made, the employer had given him indulgence to get his certificate, the delay from December 2012 to 11th February 2013 was not in my view the (sic) excessive to an extent that the employer's operations could have been affected negatively. The employer in my view could have made other alternatives to avoid costs if that really was their concern."

[27] In conclusion, the award, read in totality, does not reflect a material patent irregularity.

[28] In the absence of a complete record, it is difficult to see how another court will be in a better position to review and set aside the award. I, accordingly, find no reasonable prospects that another court would arrive at a finding different from mine.

[29] In the circumstances, the application for leave to appeal ought to be dismissed.

Order

[1] The following order is, therefore, made:

1.1. The application for leave to appeal is dismissed.

1.2. No order is made with respect to costs as there was no opposition to the application.

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Van der Merwe, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Q Donaldson (On the Papers)

For the Respondent: Unopposed