Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 1018/14

In the matter between:

HARMON GOLD MINING COMPANY **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

KATLHOLO WABILE *N.O.* **Second Respondent**

NATIONAL UNION OF MINEWORKERS **Third Respondent**

PAT MOHALE **Fourth Respondent**

Heard: 25 November 2015

Delivered: 11 October 2016

Summary: (review – ruling on admissions of evidence – evidence relevant and potentially highly material to outcome – failure to admit evidence subject for purposes of cross examination a gross irregularity in terms of s 145(a)(ii) of LRA)

JUDGMENT

LAGRANGE J

Introduction

[1] This review application concerns an interlocutory ruling made during lengthy arbitration proceedings in an unfair dismissal dispute. The applicant only filed those portions of the record it deemed directly relevant to the ground of review. For the sake of contextualisation, it is necessary to set out some of the other evidence as recorded by the arbitrator, which is not a matter of controversy.

[2] The employee, the fourth respondent had been dismissed for an alleged abuse of trust and authority on the basis that:

> "... As a senior employee of Harmony... and/or in your delegated capacity as the principal officer of...Minemed, between October 2011 and January 2012, you purchased furniture for the sum of approximately R 26 482.20... For use in an office of Harmony, occupied by yourself, utilising funds from Minemed without any authorisation from the relevant authority and in breach of the governance procedures of Minemed, which you are required to uphold as a principal officer of Minemed at all times."

[3] In 2007/8, the employee had been seconded by Harmony to work as the principal officer of Minemed, a medical scheme to which Harmony employees belonged as members. The administration of the scheme was handled by a service provider, Providence Risk Management ('Providence'). In November 2010 an approvals framework ('AF') had been adopted. Owing to the poor financial state of the scheme at the time it was operating under supervision of the Council of Medical Schemes to which it had to report on a bimonthly basis on its situation.

[4] In January 2012, new furniture was delivered to the employee's office. According to the chairperson of Minemed who testified for the employer, the purchase should have been approved by the scheme' s Board of Trustees ('BOT') and such approval would not have been given in light of the financial position of the scheme. He further testified that on 28 April 2012, the Minemed Board of Trustees found that the purchase of the furniture had been inappropriate and that the employee was not fit and proper to hold the position of principal officer. In addition, the BOT had

reprimanded Providence for failing to highlight the purchase of the furniture which they should not have done without the approval of the BOT and the principal officer.

[5] From the evidence of the CEO of Providence, it would appear that the purchase was initiated by the employee and was completed by the finance department of Providence without the CEO's knowledge. Had he known about it, he claimed he would have queried it with the employee and it would not have been approved because there were merger discussions with another medical scheme in progress at the time.

[6] According to the evidence of the employee as recorded by the arbitrator, he acknowledged requesting the purchase of the furniture which he felt was necessary so that he could hold meetings in his office and he approved the quotations provided to him in November 2011, after which he expected that Providence staff would follow the necessary procedures including the involvement of the Committee of Management ('COM'). He is recorded as testifying that the COM had to sit to approve the purchase and he had to be consulted in that regard. If the COM did not approve the purchase then the matter had to be referred to the BOT for a decision. That was the process which he had expected to be followed once he approved the quotations.

[7] Because he knew that there had been no COM meeting, he was shocked to learn that the furniture had been delivered when he returned from leave in mid-January 2012. Consequently, he asked for the matter to be put on the first BOT meeting scheduled for 9 February 2012 as there was no COM meeting scheduled before that. From the award, it appears that the essence of his defence was that it was Providence which had purchased the furniture and he could not have known that the correct procedures were not followed until after the fact. He expected that the BOT would rebuke Providence, but nevertheless ratify the purchase. Before the BOT meeting took place he was suspended and he was never consulted during the investigation into the purchase of the furniture. It would appear from the award that the BOT had invited him to make representations on the

purchase of the furniture at its meeting of 27 March 2012, but he declined to do so because of the pending disciplinary enquiry.

[8] The arbitrator noted that the BOT only terminated the employee's position as principal officer of Minemed on the grounds that he was not "fit and proper" to perform the role after rejecting an initial proposal that his appointment to be terminated and a subsequent one that he be issued with a warning for contravening the AF, both of which related specifically to his alleged unauthorised purchase of the furniture.

[9] Both the employer and the employee were legally represented in the 12 day arbitration hearing. After leading the evidence of seven witnesses, the employer closed its case, but at the outset of the adjourned proceedings on Tuesday 11 March 2014, by which stage the employee was under cross-examination, it applied to introduce seven pages of email correspondence which it claimed had come to light since the previous occasion when the hearing sat on 10 January 2014. The emails in question had been provided to the employee's attorneys the evening prior to the recommencement of proceedings.

[10] The employee objected to the late introduction of this material, which the employer intended to use in cross examining him. The arbitrator ruled against the admission of the emails on the following basis as per paragraph 5.2 of his award:

> Towards the tail end of these proceedings, the respondent sought to introduce documents which would prove that the applicant's testimony under cross-examination that he was shocked to see the furniture in his office could not be true. I ruled that <u>in the light of the totality of the evidence led on the purchase of the furniture, I would be able to determine the issue without the need to submit further documents in the proceedings</u>."

(emphasis added)

The arbitrator disregarded the employee's statement that he was shocked when he saw the furniture in his office in the following terms, at paragraph 9.15 of his award:

> "The applicant attacked the reference to the word "purchased" as it appears on the charge sheet with much venom during the course of proceedings. The attack is, with respect, misplaced and the venom quite harmless, considering my view that it appears from the paper trail that, at all material times leading up to the purchase of the furniture, the applicant was patently aware that he was playing a role in the purchase. In my view, considering the protocols that had to be observed (A F), it stands to reason that along the trajectory of said procurement, there would be different roles different people but the bottom line was that all were working towards the purchase. This fact, in my view, cannot have been lost on the applicant. I find that the applicant did, in fact, which is the furniture albeit as part of a collective (various role players in the purchase). In the circumstances, the applicant's contention that he was shocked when he saw the furniture in his office is, in my view melodrama. Pleasantly surprised may be closer to the point."

[11] The arbitrator found that with regard to the AF, Minemed's rules and Governance prescript" the employee in his capacity as principal officer of Minemed did not have ultimate authority to process the payment for the furniture. In terms of Minemed's rules read with AF, the COM, which was chaired by the principal officer and also had to consult with him, had the power to authorise an unbudgeted expense of less than R 50,000. The arbitrator appears to have mistakenly referred to the BOT in this regard, though it is apparent from extracts from the testimony of the employee and Van Vuuren, that in the ordinary course of business, decisions on purchase of this amount would be taken by the COM. The arbitrator also concluded that there had been a breakdown in the application of the AF when it came to the furniture transaction. However, he disagreed that the employee could be blamed for this, even though he had "brusquely" stated in his email of 8 November 2011 to the Minemed employee who had obtained the quotes, "Approved, please go ahead and place the order". The arbitrator reasoned:

> "I find that there is no interpretation that can be placed on the statement other than that the applicant approve the purchase of the furniture. I also have no hesitation coming to the conclusion that he was consulted on the purchase as envisaged in the AF. In my view, not only had the applicant completed his role in the purchase of furniture at this point, but he had done

> so in the context of an unbudgeted item in excess of R 20,000 which was to be bought outside the accepted protocols. In my view, there was nothing untoward in this regard, let alone culpability on his part for any alleged breach of the AF. It seems to me therefore, that the only issue that remained in the process (for process it was) of purchase after the applicant's role therein was completed was consultation with Mr Van Vuuren as equally envisaged in the AF and there's the rub. In my view, inasmuch as the employees of Providence were in consultation with the applicant with regards to the purchase of the furniture, they were similarly obliged, in terms of the AF, to be in consultation with Mr Van Vuuren of the same issue. Based on the evidence I heard, I would like to think that such consultation did not take place because to think otherwise, beg the question of why the applicant was dismissed in the first place."

[12] The arbitrator dismissed any suggestion that employees of Minemed who were involved in purchasing could not have been aware of the AF and there was no urgency in making the purchase before there had been consultation with Mr Van Vuuren. On this basis, the arbitrator concluded that there had been a "monumental failure" by the Providence staff, and not the employee, to comply with the AF and, in view of the role he played in the purchasing of the furniture, it could not be said that he had abused his position of trust and authority.

[13] Having regard to the emails which the employer wished to introduce in cross-examination of the employee, it appears that they cover a period from 5 December to 12 December and deal with the confirmation of delivery dates for the furniture. Some of the emails appear to be between the person who obtained the furniture quotes and the furniture supplier, and in some instances appear to be direct communications between the employee and the supplier on the same issue. The last email directed to the employee by the supplier confirms delivery would take place on Monday, 12 December 2011.

The review

[14] The applicant contends that the arbitrator failed to appreciate the true relevance of the emails in that it was not because they were relevant to whether he was shocked at seeing the furniture or not, but were relevant

to his defence that he was not complicit in failing to comply with the procurement protocols.

[15] It is evident from the arbitrator's reasoning that he accepted that the employee had simply set the procurement approval chain in motion and that he did not expect the purchase to be approved without going through the rest of the procedures including approval by the BOT or COM. He also accepted that the employee could not have known that the procedures had not been followed when claimed to have learnt of the delivery of the furniture. Clearly, the contents of the purported emails, if accepted as genuine communications, tend to suggest that in December 2011, the employee was directly involved in the arrangements to deliver the furniture and was expecting it to be delivered by mid-December. This would tend to contradict contention in his evidence in chief that he only discovered the furniture had been purchased when he arrived at the office on 19 January 2012. It naturally also raises further doubts about whether he could genuinely have been unaware until that date that the proper procedures for approving the purchase had not been completed when he would appear to have been involved in facilitating the delivery of the furniture in early December. In his evidence in chief, he had testified that he knew that there had been no COM meeting which could have approved the purchase between the time he went on leave and when he returned in January 2012. There is little doubt that, whatever disputes might have arisen about the authenticity of the correspondence, on the face of it, it was relevant to a central feature of the employee's defence.

[16] It is common cause that the string of emails was sent to the employee's attorneys just before 6 pm, the day before proceedings recommenced on 11 March 2014. The employer accepted that the employee and his legal representatives would need to consult over the document although he was already under cross-examination and that they might wish to oppose its introduction. The reason advanced for the late introduction of the emails was that, after the previous sitting of the arbitration where the employee had indicated he was surprised to find the furniture in his office in January 2012, the employer had gone through approximately 1700 emails which were still on the server and found the string of emails in question. It was

also argued by the employer's representative that other documents had been introduced by the employee during the course of the cross-examination of their witnesses, which had not been previously included in the bundle of documents. Lastly, she motivated for the admission of the documents on the basis that they were important to deal with the substantive merits of the dispute. The employee's counsel objected that they had only been apprised of the documents the day before in circumstances where it was not clear how soon after the last sitting the applicant had discovered the emails. Secondly, it was suggested that the authenticity of the documents was in doubt and would be challenged and expert evidence might have to be called to demonstrate that they were fraudulent documents. Lastly, he appealed to the arbitrator to consider that the imperatives of expeditious dispute resolution as envisaged in section 1 (d) (iv) of the Labour Relations Act 66 of 1995 ('the LRA'). Lastly, he argued that it ought not to be admitted because the applicant had closed its case. The applicant conceded that it might be necessary to apply to reopen its case to verify the authenticity of the emails if they were not accepted by the employee.

[17] In ***Head of Department of Education v Mofokeng & others*** the LAC expressed the test of review in the following terms:

> 'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of

the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'[1]

(emphasis added)

[18] In **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**

[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

[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 & another NO v New Clicks SA (Pty) Ltd & 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

[1] (2015) 36 *ILJ* 2802 (LAC) at para 33

> 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 the award must be rational and reasonable — there is no room for conjecture and guesswork."[2]

(emphasis added)

[19] In essence, what happened in this matter is that the arbitrator misconceived the full relevance of the evidence which the employer wished to lead. It is true that the evidence had a bearing on the employee's true state of mind on 19 January 2012, but that was merely a secondary consideration. The material import of the email evidence affected the core of his defence that his role in the purchase of the furniture was merely setting the initial procurement process in motion and that he could not have known until 19 January that the necessary subsequent approval mechanisms had not been followed. It is also obvious that not only was the evidence potentially relevant but highly material to the possible outcome of the case. In the circumstances, there is no justification for the arbitrator refusing to allow the employer to put the evidence to the employee, irrespective of any disputes about its authenticity and the possible reopening of the employer's case.

[20] This is an instance where the arbitrator's failure to fully appreciate the import of evidence led him to deny a party the right to deal with an important component of the substantive merits of the dispute, which had the obvious potential to materially affect the outcome of the arbitration. Accordingly, his failure to allow the employer to introduce the emails and during cross-examination of the employee constituted a gross irregularity in the conduct of the arbitration proceedings rendering the award reviewable in terms of section 145 (a)(ii) of the LRA.

[21] As mentioned above, the proceedings in the arbitration were lengthy and were clearly unlikely to run on much longer even if the employer might still

[2] (2014) 35 ILJ 943 (LAC) at 950.

have to apply to reopen its case to authenticate the emails. The court cannot speculate about the course of evidence in the proceedings following the introduction of the new evidence. The nature of the defect is one that can only be properly remedied by allowing the proceedings to continue subject to setting aside the defective ruling. However, there is already an extensive record available to the parties and there seems to be no good reason why that cannot serve as a record of the proceedings to date, provided that the matter continues before another arbitrator.

Order

[22] The arbitration award of the second respondent dated 9 April 2014 under case number GAJB 8081-13 is reviewed and set aside.

[23] The matter is remitted back to the first respondent to be set down for an arbitration hearing *de novo* before an arbitrator other than the second respondent, subject to the following limitations:

23.1 the record of the arbitration proceedings before the second respondent shall serve as part of the record of proceedings before the new arbitrator, and

23.2 the applicant shall be entitled to reopen its cross examination of the fourth respondent for the purpose of questioning him about the purported email correspondence attached as Annexure “FA2” to the applicant’s founding affidavit in the review application.

[24] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	AT Myburgh SC instructed by Edward Nathan Sonnebergs Africa
THIRD AND FOURTH RESprincipal officerNDENTS:	N Cassim SC instructed by Cheadle, Thompson & Hayson Inc.