Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 1258/14

In the matter between:

MTHOKOZISI W. RADEBE

Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRIES **1ST**

Respondent

QUEENDY GUNGUBELE **2ND**

Respondent

BULK MINING EXPLOSIVE (BME) **3RD**

Respondent

Heard: 8 December 2016

Delivered: 8 December 2016

Summary: (Review – jurisdictional ruling – arbitrator simply ignoring highly material provisions of pre-arbitration agreement and referral documents – no evidence consequences of *in limine* ruling explained before making it)

REASONS FOR JUDGMENT

LAGRANGE J

Introduction

[1] In this application, I made the order which is reproduced below and my reasons for making the order are set out hereunder. In my order, I not only set aside the jurisdictional ruling but the rescission ruling issued by the arbitrator thereafter. The portion of the order rescinding the rescission ruling is clearly incorrect, but nothing turns on this because nothing of any practical significance flowed from that ruling and the only substantive order concerns the jurisdictional ruling of the arbitrator made on 24 February 2014, which did have legal consequences as long as it was not set aside. Thus for all practical purposes, the erroneous portion of the order setting aside the rescission ruling of 24 May 2014 may be treated as *pro non scripto.*

Background

[2] The applicant, Mr M W Radebe, brought this application to set aside two rulings issued by the second respondent a panellist with the first respondent a bargaining Council.

[3] In her first ruling dated twenty-four February 2014, the arbitrator decided that the bargaining Council had no jurisdiction to arbitrate the matter based on the contents of a pre-arbitration minute concluded by the parties. In particular, it was stated in the pre-arbitration minute as a common cause fact that the applicant had raised a grievance against his manager complaining that she was intimidating him for exercising his rights in terms of the Labour Relations Act, 66 of 1995 ('the LRA'). It was also stated as a 'fact' in dispute that it was his case that he was victimised and dismissed for exercising his rights under the LRA and that his manager had told him she would get rid of him.

[4] The arbitrator found that it was common cause that the nature of the dispute concerned a breach of the applicant's fundamental right to fair labour practices in terms of Chapter 2 of the Constitution, and incorrectly held that only the Labour Court had jurisdiction to hear the matter. It appears that the arbitrator was blind to the fact that an ordinary unfair dismissal dispute also concerns a potential infringement of the right to fair labour practices in s 23(1) of the Constitution and not just automatically unfair dismissal claims.

[5] The second ruling dated 22 May 2014 arose from a misguided application by the applicant to rescind the first ruling. The third respondent opposed this application on the basis that because the first ruling was not made in the absence of the applicant, it was not competent for the bargaining Council to entertain an application to rescind the ruling in terms of section 144 and the appropriate course of action for the applicant was to review the ruling. The rescission application was accordingly dismissed.

Grounds of review

[6] The applicant contends that the ruling of 24 February 2014 should be set aside because:

6.1 It was common cause he was dismissed for alleged misconduct and he referred an unfair dismissal for misconduct claim to the bargaining Council in terms of section 191(5)(a). Moreover the notices of set down and his letter of dismissal make it clear that the reason for his dismissal was misconduct, as did the certificate of non-resolution.

6.2 He further claims that the arbitrator did not apply her mind to the matter on the issue before her.

[7] The applicant was dismissed following a disciplinary enquiry on 13 August 2013 relating to his alleged non-compliance with the employer's policies and procedures concerning limits on expenditure relating to his vehicle allowance. On 5 June 2013, he was issued with a notice to attend a disciplinary enquiry. Subsequently on twelve July 2013 lodged a grievance against his superior claiming that she was victimising him for exercising his rights in terms of the LRA.

[8] In essence, the applicant claims that the arbitrator got the jurisdictional issue wrong and should have allowed this matter to proceed as an unfair dismissal claim for misconduct.

[9] A preliminary point raised by the respondent is that the applicant failed to finalise his application until it is threatened to apply to have the application dismissed. Even when the applicant finally did comply with the rules, he never made an application for condonation for not filing the record or his supplementary affidavit timeously and accordingly his application is deemed to be withdrawn in terms of paragraph 11.2.3 of the practice manual. I accept that there was a delay, but on the face of the papers the applicant through his union had attempted to serve the record, *albeit* incorrectly on the third respondent, in circumstances where the third respondent's attorney of record had already noted the third respondent's opposition to the application and provided its own address for service.

[10] It is true that the pre-arbitration minute contains the allegations of victimisation, but it is equally true that the applicant claimed that his dismissal was simply procedurally and substantively unfair. Thus, paragraphs 4.2 to 5 of the pre-arbitration minute read:

> "4.2 Procedural Fairness
>
> The applicant alleges that his dismissal was procedurally unfair for the following reasons:
>
> *4.2.1 Appl. Ask for and same was not provided only shown.*
>
> 4.2.2 *After the chairperson made a report, he was not given a signed copy*.
>
> 4.2.3 This is disputed by the Respondent.
>
> 4.3 Substantive Fairness
>
> The applicant alleges that his dismissal was substantively unfair for the following reasons:
>
> 4.3.1 *Appl position is that he is not guilty of the charges*.
>
> 4.3.2 *Other employees who use auto cards in the same way were not subjected to discipl*ine.
>
> 5 ISSUES TO BE DECIDED

> Whether the applicant's dismissal was substantively or procedurally unfair within the ambit of what is set out herein."
>
> (italicised text was entered in handwritten script in the pre-arbitration minute)

[11] At best for the respondent, on the face of the pre-arbitration minute, what the arbitrator had before her were two possible unfair dismissal claims: one concerned an automatically unfair dismissal under s 187(1) read with s 5 (2)(c) of the LRA, which ought to have been heard by this court; the other, an ordinary unfair dismissal claim for misconduct under s 188(1) of the LRA, which ought be decided by arbitration. I agree with the applicant that the arbitrator failed to apply her mind to the issue before her because she simply ignored the paragraphs in the minute dealing with substantive and procedural unfairness for misconduct. If one has regard to paragraph 5 of the arbitration minute, it is difficult to understand how that could have required the arbitrator to determine anything other than the substantive and procedural unfairness of the misconduct dismissal, since a claim for automatically unfair dismissal is simply automatically unfair if proven and the issue of substantive and procedural fairness does not arise. It is true that the issue of victimisation is still highlighted in the minute but the arbitrator was not called upon to make any finding that his dismissal was automatically unfair.

[12] It is also noteworthy that the *in limine* objection which had not been raised when the pre-arbitration minute had been concluded, which is when one would expect a represented party to raise such an issue. It was only raised when the arbitration hearing was convened in circumstances where the applicant's legal representative at the time had to leave the applicant on his own, with a view to requesting a postponement, because he had to attend a conflicting appearance in the High Court. The applicant accordingly had to deal with the *in limine* point which was only raised at the hearing without the assistance of his legal adviser. Prior to that point, there had been nothing in the pre-arbitration minute raised by the third respondent's representatives to indicate that it would be raising such a fundamental objection. Likewise, there is no explanation in the pleadings

why the matter was only raised at a stage when the arbitration was due to proceed but the applicant's legal representative was not present.

[13] However, notwithstanding the fact that nothing appeared in the pre-arbitration minute to forewarn the applicant of the objection and notwithstanding the fact that the applicant was now unrepresented and was being confronted with a legal point raised for the first time by the third respondent's attorney, Prof H Pienaar, the arbitrator did not question why the point had not been raised previously and proceeded to entertain the objection.

[14] The third respondent contends that in her rescission ruling, the arbitrator confirmed that the applicant had admitted that his claim was based on the fact that he was victimised for exercising his Labour Relations Act rights. In the analysis portion of her rescission ruling the arbitrator stated:

> "6. The applicant conceded to the fact that his dispute was based on the fact that he was victimised for exercising his labour relations act rights and the ruling was informed by his stance. Although the applicant's legal representative elected to attend to another matter in a different tribunal on the same date, the applicant was in no way prejudiced because the point in limine was solely based on what he and his learn of legal representative had consented to during the pre-arbitration meeting with the respondent."

(emphasis added)

[15] The arbitrator correctly identified the pre-arbitration minute as the most important thing to consider in determining her jurisdiction. However in applying herself to the document, she completely failed to deal with the contents of paragraphs 4.2 to 5 of the minute. That part of the pre-arbitration minute deals with ordinary substantive and procedural unfairness but might as well not have been recorded in the minute as far as the arbitrator was concerned, and there is no basis for assuming that she asked him about that.

[16] In any event, to the extent that the arbitrator had any doubts about what the applicant's unfair dismissal claim for misconduct might entail and knowing that the implication of making the ruling would non-suit the applicant in the arbitration proceedings and that he would not have been

prepared to argue the *in limine* point which the third upon respondent had sprung upon him when he was no longer represented, the arbitrator ought to have explained to him the consequence of upholding the *in limine* objection and sought clarity from him whether he was willing to accept that his unfair dismissal claim could only continue on the basis of what was contained in paragraph 4.2 and that she could not consider his victimisation allegation in deciding the issue she was required to decide in paragraph 5.

[17] Instead, the arbitrator arrived at her ruling by means of a highly selective and partial reading of the pre-arbitration minute. It may be that the applicant had a lingering attachment to a victimisation claim and believed that in some way he could raise it in the arbitration proceedings ('as spice' as his representative explained it in court). Nonetheless, the pre-arbitration minute also set out very clearly the basis for an ordinary unfair dismissal claim in which the alleged victimisation does not appear as part of the procedural or substantive reasons for the unfairness. Likewise, the issue to be determined according to paragraph 5 of the pre-arbitration minute, did not require the arbitrator to determine the fairness of the dismissal on the basis of victimisation. *Mr Preston*, who appeared for the third respondent argued that the claim of inconsistent treatment was indicative that victimisation was still a part of the unfair dismissal claim set out in paragraphs 4 and 5 of the minute, but a claim of inconsistent treatment is one of the basic tenets of substantive fairness in misconduct dismissals and only in the colloquial sense could be equated with a claim of victimisation.

[18] I was referred *inter alia* to the case of ***Mawisa v Commission for Conciliation, Mediation & Arbitration & others***[1] in which an arbitrator was faced with an unfair dismissal claim but stopped the proceedings and referred the matter to the Labour Court when it became apparent that the dispute was a claim of automatically unfair dismissal based on victimisation. Much turns on the facts of each case and the circumstances in which the point comes to be raised and the facts in this matter are

[1] (1998) 19 ILJ 1194 (LC)

somewhat different from that matter. I note in passing that in *Mawisa* Basson J observed that the CCMA referral documents clearly indicated that the dispute concerned an automatically unfair dismissal which is not the case here. Neither did that case entail a pre-arbitration minute which demanded clarification, once the belated *in limine* objection was raised.

[19] On the evidence, the arbitrator made an election that the applicant could only pursue a claim in the Labour Court. The evidence before the commissioner of his referral documents and the pre-arbitration minute, if anything, tended to show that he sought to have an unfair dismissal claim for misconduct arbitrated and had articulated clear grounds of procedural and substantive fairness in that regard, but that he also felt he had been victimised. However, the latter issue was not placed at the centre of issues the arbitrator was called upon to determine. The evidence before the commissioner of his referral documents and the pre-arbitration minute, if anything tended to show that he sought to have an unfair dismissal claim for misconduct arbitrated. He also did believe he had been victimised but this was not an issue placed at the centre of issues to be determined.

[20] The election made by the arbitrator was one for the applicant to make on being properly advised of the consequences of doing so. It was not for the arbitrator to do so, and there is no evidence that she advised him before making her ruling what would follow if he insisted that victimisation was the real claim he wanted determined. This was particularly important given the fact that the *in limine* point was raised *after* the conclusion of the minute and in the absence of the applicant's legal representative.

[21] Instead of non-suiting the applicant, the arbitrator should simply have advised him that if he wanted to proceed with the arbitration, she could only entertain his claim insofar as it related to a simple claim of substantive and procedural unfairness for misconduct and made it clear to him that she had no jurisdiction to pursue a claim based of automatically unfair dismissal relating to s 5 of the LRA. Only then could she be satisfied that his decision to refer the dispute to arbitration was made in full appreciation of the jurisdictional consequences thereof.[2]

[2] See *Ngobe v J P Morgan Chase Bank & others* (2015) 36 *ILJ* 3137 (LC) at 3141-2, para [12].

Order

[22] The respective jurisdictional and purported rescission rulings of the second respondent dated 24 February 2014 and 22 May 2014 under case number GPCHEM 22-13/14 are reviewed and set aside.

[23] The matter is returned back to the first respondent to be enrolled for arbitration before an arbitrator other than the second respondent solely to determine if the applicant's dismissal for misconduct was substantively and procedurally fair on the grounds set out in paragraphs 4.2 and 4.3 of the pre-arbitration minute concluded by the parties on 17 February 2014.

[24] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

(12 December 2016)

APPEARANCES

APPLICANT:	J Ngubane of United Chemical Industries, Mining , Electrical, State, Health and Aligned Workers Union.
THIRD RESPONDENT:	N Preston of Cliffe Dekker Hofmeyr Inc.