Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 264/14

In the matter between:

JOHANNESBURG SOCIAL HOUSING COMPANY	**Applicant**
and	
MOLETSANE, R S (*N.O.*)	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
LESOLE, EDWARD	**Third Respondent**

Heard: 18 August 2016
Delivered: 23 August 2016
Summary: (Review-alleged misconduct by the arbitrator in the course of conducting the arbitration-not supported by the evidence – review confined to grounds raised by applicant)

JUDGMENT

LAGRANGE J

Introduction

[1] In this matter the third respondent Mr E Lesole ('Lesole'), was dismissed on 24 July 2013 after being charged and found guilty of two acts of misconduct involving rude, abusive, provocative, intimidatory or aggressive behaviour towards a fellow employee and bringing the administration of the employer into disrepute by shouting and screaming in the open plan offices thereby disrupting the smooth operations of the company. The employee's alleged conduct was directed towards a temporary employee from an employment agency who had allegedly asked him to assist her with some files and he had taken exception to being given instructions by someone he regarded as his social inferior in cultural terms.

[2] The complainant did not give evidence at the disciplinary enquiry or the arbitration hearing. The arbitrator accepted that an email apparently written by her to her supervisor at her employment agency was authentic. In that email she detailed a number of incidents leading up to the final one, on which occasion she claimed the employee had threatened to beat her up. Her report to her supervisor led to a complaint being lodged by the employment agency with the employer ('Joshco') which in turn led to the charges being laid and enquiry been held. According to the Joshco's witnesses the complainant was unwilling to testify because she was afraid the employee might retaliate outside the workplace.

[3] One of the witnesses for the employee also produced an SMS message purportedly from the complainant in which she had indicated that she did not want anything to do with the hearing and that she had reported the matter at the time out of anger. The alleged SMS from the complainant said that when she was told that if she testified against him the employee might be dismissed she told them she wanted to withdraw the complaint because if that happened she would not be safe outside the employer's premises. She also allegedly said that she was told by a Joshco manager that she was being a coward (for not being willing to testify) and should never set foot in their premises again, which she interpreted as an expression of disappointment that Joshco would not succeed in their

mission of dismissing the employee. The arbitrator accepted that the SMS message was also authentic.

[4] However, in the absence of the complainant testifying the arbitrator found that the truth of the contents of those communications could not be verified and that her version could not be tested in the absence of doing so, which would result in prejudice to the employee if the hearsay evidence was considered.

[5] Regarding two of the employer's witnesses, the arbitrator discounted the value of their evidence as they were not eyewitnesses and they relied on the contents of the complainants email. As regards the evidence of Mr B Zwane, he found his evidence was not very helpful because he did not see the incident. He also assumed that he heard the employee's voice when he heard shouting and was unaware until after the incident that there had apparently been an argument. In the absence of the complainant, he found that the evidence of the employee and his witness remained uncontested and that the employer had failed to discharge the onus of proving the misconduct. However he dismissed the employee's claims of procedural unfairness. In the absence of any of the employer's witnesses testified on the breakdown of the relationship and the fact that issues in aggravation were only raised in closing argument, the arbitrator found there was no reason not to reinstate the employee.

[6] What is essentially not in dispute in the evidence is that:

6.1 The complainant lodged a complaint with the agency about the way she was allegedly treated by the employee and was so disturbed by the incident that she did not want to return to the workplace.

6.2 Although there was a statement in the SMS that the complainant was angry when she refused to testify, even the SMS, which was introduced into evidence by the employee, showed that the complainant was afraid what might happen to her at the hands of the employee if she testified against him and he was dismissed.

6.3 There was sufficient disturbance in the office for it to have attracted Zwane's attention.

6.4 Zwane's evidence that he heard someone whom he believed to be the employee threatening to beat someone up was not effectively challenged under cross-examination.

6.5 It is clear from the employee's own evidence that he objected to being instructed by the complainant and that he made his feelings about this clear on two occasions the same day that she had acted disrespectfully towards him in his view. His own witness also described him as' exploding' when the complainant asked him to fetch the files.

The review

[7] However, except in respect of issue of the relief ordered by the arbitrator, the review application did not challenge the reasonableness of the arbitrator's award with respect to his findings on the evidence before him, and accordingly the court cannot deal with the reasonableness of his finding on the charges as such. Rather, the thrust of the applicant's complaint on review is that the arbitrator refused to postpone the enquiry after the first day even though the applicant was unable to call critical witnesses who could give eyewitness testimony to the event giving rise to the charges against the employee. The applicant claims that one or more of those witnesses was on leave and that was the basis for requesting the postponement. The applicant's representative at the arbitration, a senior manager, claims that she specifically indicated that postponing the arbitration to 14 January could still constitute a difficulty for the applicant in obtaining external witnesses who might still be on leave. She further claims that her fear materialised when preparing for the arbitration on 14 January it became apparent that three of her witnesses would not be obtainable apart from the complainant. She claims that at the outset of the proceedings she made a verbal application to postpone the matter because of the unavailability of her witnesses but the application was refused out of hand by the arbitrator. In his answering affidavit, the employee agrees only that a postponement occurred on the first day of the arbitration owing to two of the applicant's witnesses having left during the course of the proceedings. He further claims that the subsequent dates

commencing on 14 January had in fact been agreed between the parties and the arbitrator. Further, the employee denies that any request for a further postponement was made when the hearing recommenced on 14 January.

[8] A second complaint of the applicant of alleged bias on the part of the arbitrator was an allegation that there had been a number of discussions between the arbitrator and the employee representatives which took place in the vernacular in the presence of the applicant's representative which created a perception of bias in the mind of the applicant's representative. In addition during breaks in the proceedings the respondent had stood with the employee talking in Sotho, which made her "extremely uncomfortable". The employee's representative denies that he or the employee had any conversations with the arbitrator in the absence of the applicant's representative and denies the allegations. He also queried the timing of the complaint which was never raised during the course of the proceedings.

[9] There was no transcript made of the first day of the proceedings that might corroborate the applicant's claim that it was pertinently pointed out to the arbitrator that 14 January would hamper its ability to call relevant witnesses. Accordingly the only version of what transpired on the first day must be gleaned from the founding and answering affidavits of the parties and any factual dispute determined on the basis of the principles in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd)***.[1] At the hearing of the application, *Ms Moyo*, appearing for the applicant suggested that the dispute over what transpired in relation to the postponement question should be referred to oral evidence. However, this review application was initiated in February 2014 and the applicant had taken no steps to make such an application prior to the hearing, when it would have been obvious from the founding and answering affidavits and the failure to file a replying affidavit that on an ordinary application of the rule in Plascon-Evans, the applicant had failed to establish a factual basis for the above-mentioned grounds of review.

[1] **1984 (3) SA 623 (A)** at 634E-635C.

[10] It is also noteworthy, in my view, that there is not even the slightest reference to the arbitrator's supposed refusal to consider the arbitration resuming on a date other than 14 January despite the fact that the applicant had supposedly made it clear that 14 January would be inappropriate because some of its witnesses would still be unavailable. Ordinarily, where such an adverse ruling had been made, one might reasonably expect some reference to that in the course of the subsequent proceedings. In this case there is no residual trace of that ruling in the entire transcript of the subsequent days' proceedings. In the transcript of the proceedings on 14 January there is also no suggestion of any application for postponement being made on that date and being rejected out of hand. In relation to the complaint concerning the alleged discussions which took place in Sotho between the arbitrator and the employee party at the arbitration, there is no indication in the transcript that during the course of the proceedings discussions took place in the vernacular at any stage. There is also nothing to demonstrate that the applicant's representative raised any of her alleged concern about such conduct during the course of the proceedings, which one would expect of a senior manager who felt 'extremely uncomfortable' with such conduct. It was suggested in argument in court that she may not have realised the impropriety committed by the arbitrator until she consulted with the applicant's attorneys, but she did not say that in her affidavit. In fact, as mentioned, if anything she was well aware at the time that such kind of behaviour was unacceptable, which makes it all the more likely that if it occurred she would have raised the issue at some stage during the proceedings with the arbitrator.

[11] The applicant places most of the emphasis in its grounds of review on the arbitrator's alleged misconduct in failing to postpone the hearing on 14 January so the complainant could be subpoenaed to testify at the arbitration. The first point, already made above, is that there is no evidence of any request made by the applicant for a postponement for this purpose. The only other question is whether the arbitrator ought of his own accord to have postponed the proceedings so a *subpoena* could be issued to obtain the testimony of this important witness. I accept that generally

speaking in dealing with a lay representatives, an arbitrator should alert the parties to issues such as rules of evidence which might be decisive and which those representatives might not be familiar with. The LAC has stated the general principle governing intervention by arbitrators in the following terms:

> "[17] In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise we would be opening the floodgates allowing every lay representative who has bungled his/her case to seek its reopening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of s 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole rather than 'nitpicking through every shrapnel of evidence that was considered or not considered', as was stated in *Coin Security Group* (*Pty*) *Ltd v Machago* (2000) 5 LLD 283 (LC)."[2]

(emphasis added)

[12] In this instance, the particular circumstances were that the applicant was unable to get hold of the complainant using the only contact details it had for her. Further, on its own admission, her employment agency had the same contact details. From the transcript, it appears common cause that the arbitrator had asked both sides to try and secure the attendance of the complainant when the arbitration resumed. The arbitrator, alluding to the SMS and the email, observed that the witness was a very important one for both parties. Then, the following exchange took place:

> "Commissioner: So it is not that you cannot get hold of her or what?

[2] ***Bafokeng Rasimone Platinum Mine v Commission for Conciliation, Mediation & Arbitration and others*** **((2006) 27 ILJ 499) (LC)** at 1505.

Respondent's Representative: Commissioner we have tried since she was employed by us we had her contact details so I tried to reach and the phone goes directly into voicemail, I am not sure when the number is still being used, in addition to that I contacted the employment agency that replaced it with us and they have exactly the same contact details were, so they tried as well, and we cannot get hold of her.

Commissioner: Uhm

Respondent's Representative: So (interrupted by the Commissioner)

Commissioner: Because if you can't get hold of her you can't subpoena her.

Respondent's Representative: This is the thing, we can't reach, we can't find her, because at the time when she left our employment, as I said the last hearing she had said that she is not going to be the hearing because she fears for her life.

Commissioner: Uhm

Respondent's Representative: so I don't know if that is the reason but all I am saying you know from the very object to point of view actual icon creature on any of the details that she gave us.

Commissioner: Uhm in other words it is something beyond both parties control.

Respondent's Representative: It is beyond our control.

Commissioner: She is not here.

Respondent's Representative: yes.

Commissioner: Umm, know what will be left will be what weight must be attached to the SMS to the email, in the absence of the author, the author, in other words that that the lady who purportedly wrote the messages, Mr Ramashala?"

[13] What is plainly evident from the above exchange is that the issue of whether the complainant could be subpoenaed was canvassed openly and there was no reason for the arbitrator to have believed that a subpoena could have been issued in circumstances where none of the available contact details of the complainant had yielded any response. In such

circumstances, I cannot see how the arbitrator can be blamed for being remiss in any way in not pursuing the question of issuing a subpoena. Moreover, it is also apparent from what precedes the above exchange in the transcript that the importance of obtaining the complainant as a witness had been raised by the arbitrator on the previous occasion and the parties were aware of this.

[14] The last ground of review which also concerned perceived bias on the part of the Commissioner related to the submission of argument at the end of the proceedings. At the close of proceedings, the applicant had expressed a preference for written argument and the employee party wish to make oral submissions. The following day when submissions were supposed to be made the employee's representative was not present and the arbitrator decided to allow both parties to make written submissions. The applicant contends that this about turn by the arbitrator when the employee representative failed to appear make oral submissions was an indication of bias. It is true that the arbitrator might well have said that he would simply hear the submissions of the applicant when the employee's representative failed to appear, but the arbitrator's decision to then allow written submissions cannot meaningfully be said to have prejudiced the applicant as the applicant wanted to make written submissions in the first place. Secondly, allowing the employee party an opportunity to make written submissions notwithstanding the failure of the representative to appear and make oral submissions does not seem to be unduly favourable towards the employee: in the end, both parties had an equal opportunity to make submissions and the fact that the employee was not disbarred from doing so is not sufficient reason in my mind to conclude that the applicant had a reasonable basis for suspecting he was biased.

[15] In the founding affidavit, the applicant had also contested the reasonableness of the arbitrator in deciding to grant the employee relief in the form of reinstatement. It is apparent from the award that the arbitrator did give consideration to whether there was evidence militating against reinstating the employee, and he regarded submissions made in argument by the applicant as insufficient ground for refusing reinstatement because those allegations had not been raised in evidence. He also observed that

none of the employer's witnesses had specifically testified that the employment relationship had broken down. If the applicant had indeed intended to persist with this ground of review, it cannot be said on the basis of his reasoning above that there was no rational basis for him coming to the conclusion that reinstatement was appropriate relief. In any event I am satisfied that this ground of review was not one that the applicant intended to pursue as it was not an issue which *Ms Moyo* sought to address me on nor was it an issue canvassed in the applicant's heads of argument, quite apart from the submission by Mr Maimane that he had been assured by Ms Moyo's principal at the case management hearing before Judge Van Niekerk that the applicant did not intend to pursue this point.

[16] In light of the analysis above of the grounds of review relied upon, I am satisfied that the application must fail. Because I am confined to consider only those points of review specifically raised by the applicant, I must mention in passing that this judgement should not be understood to be an endorsement of the substantive merits of the arbitrator's decision.

[17] Neither party pressed the issue of costs, so I see no need to make an order in this regard.

Order

[18] The review application is dismissed with no order as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Moyo of Snyman Attorneys
THIRD RESPONDENT:	D Maimane of K D Maimane Inc