Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J742/01

2001-03-13

In the matter between

N U M Applicant

and

I HAFFEGEE 1st Respondent

TUBATSE FENOCHROME MINES 2nd Respondent

J U D G M E N T

TRENGOVE AJ: The first respondent employer is in the process of contracting out certain of the work at one of its mines. It is doing so to cut costs. The process will involve the retrenchment of about 109 of its employees. Some 95 of them are members of the applicant union.

The union contends that the contracting out and the concomitant retrenchments are in breach of an agreement between the union and the employer. The agreement regulates the use by the employer of labour other than that of employees employed full time and for an indefinite term. It regulates amongst other things, the contracting out of work. I will refer to it as the

outsourcing agreement.

The union contends that the outsourcing agreement applies to the contracting out of all work, and accordingly also applies to the contracting out in this case. The employer on the other hand, denies that that is so. It contend that the agreement only applies to the contracting out of certain kinds of work, and that in this case the contracting out is not within the scope of the agreement.

The parties agreed to submit their dispute to private arbitration, that is, to an arbitrator appointed by agreement between them and not by the CCMA. The second respondent was the arbitrator. He made his award on 27 February 2001. He upheld the employer's contention that the outsourcing agreement did not apply to the contracting out being undertaken by the employer. The award thus cleared the way for the employer to proceed with the contracting out and retrenchment without regard to the outsourcing agreement.

The union now applies to have the award set aside. It does so in terms of section 33 of the Arbitration Act 42 of 1965. It also applies for an order interdicting the employer from proceeding with the retrenchments pending the final determination of the main application to have the award set aside .

By agreement between the parties, only the prayer for temporary relief pending the final determination of the application to have the award set aside, have come before me for determination on an urgent basis.

In order to succeed in its claim for temporary relief, the union at least has to establish a *prima facie* right. The right which has to be established on that basis, is a right to the final relief it claims, that is a right ultimately to stop the contracting out and the retrenchments. But the right only needs to be established *prima facie*. It means that the union must show that it is a right that arises as a matter of law from the facts of which there is *prima facie* proof, that is, from the

facts disclosed by the union's evidence, together with the facts disclosed by the employer's evidence that the union does not dispute.

All of this means that I must take the union's evidence together with the evidence of the employer that the union does not dispute, and ask myself whether on that evidence and if its truth is accepted, the union is entitled to two things. The first is to have the award set aside because if it is not set aside, the award remains final and binding on the parties whether right or wrong. The second is whether, if the award is set aside, the union will be entitled under the outsourcing agreement to stop the contracting out and the retrenchments in this case.

Mr Find for the employer submitted that the test is a more stringent one than the one I have described. He submitted that that is so because, although the claim for a temporary interdict is a claim for interim relief in form, it is indeed a claim for relief with final effect. The more stringent test for final relief, would require final proof of the same right on a balance of probabilities and not merely *prima facie*. It seems to me however that the difference between the two tests may not be material in this case, because the facts material to the issue between the parties are not in material dispute.

It is common cause between the parties that, in terms of section 157(3) of the Labour Relations Act 66 of 1995, the union's application to have the award set aside, is governed by section 33(1) of the Arbitration Act 42 of 1965. The latter section reads as follows:

"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."

The union contends that the arbitrator misconducted himself, committed gross irregularities in the conduct of the arbitration proceedings, and exceeded his powers. I accordingly have to determine whether those contentions have been *prima facie* proved.

The facts on which the union relies for its contentions go no further than that the arbitrator committed manifest errors of fact and law in his interpretation of the outsourcing agreement. The union does not say that the arbitrator asked himself the wrong question. It says merely that his answer to the question was manifestly wrong, both in fact and in law.

An arbitrator's manifest error of fact or law, is not in itself a ground for review. It may however be evidence from which misconduct may be inferred, and the latter would be a ground for review in terms of section 33(1)(a) of the Arbitration Act.

The circumstances in which such an inference is justified, are however rare. They are described in the chapter on arbitration in Joubert, *The Law of South Africa* vol 1, first re-issue, page 291, paragraph 445 as follows:

"The word (misconduct) must be construed in its ordinary sense of wrongful or improper conduct on the part of the person whose behaviour is in question. A *bona fide* mistake of law or fact cannot be construed as misconduct; but if the mistake is so gross or obvious that it could not have been made without some degree of misconduct, the award may be set aside, not on the ground of mistake, but on the ground of misconduct, the mistake merely amounting to evidence of the misconduct. If there is an explanation for the error other than misconduct or

corruption, a court would not be entitled to set aside the award in question. There is no assumption that an arbitrator knows and applies the principles of our law. Accordingly if an arbitrator misdirects himself on the law, that in itself is no reason for setting aside the award. The parties are bound by his finding even if he errs on the facts or the law."

The learned author continues as follows later in the same paragraph:

"The court will set aside an award if there is no evidence to support it. Whether lack or absence of evidence is so glaring as to amount to a total want of judicial capacity, the award will be set aside. A party attacking an award, must prove not only that there is no evidence to support it and that no reasonable man could possibly have made it, but also that the lack of evidence is such that misconduct on the part of the arbitrator ought properly to be inferred therefrom."

These principles were confirmed by the Appellate Division in *Amalgamated Clothing and Textile Workers Union the Veldspun* 1994 1 SA 162 (A). His Lordship Mr Justice Goldstone, who gave the judgment of the court, said the following in this regard at 169:

"It is only in those cases which fall within the provisions of section 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 submission, that would be a case falling under Section 33(1)(b). As to misconduct, it is clear that the word does not extend to *bona fide* mistakes the arbitrator 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: *Dickinson & Brown vs The Fishers Executors,* 1915 (AD) 166 at 177-181. It was held in *Donner The Ehrlich* 1928 (WLD) 159 at 161 that even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant

interference."

Later on the same page the learned judge continued as follows:

"When parties agree to refer a matter or arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under section 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party or an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

I accordingly have to determine whether the arbitrator's interpretation of the outsourcing agreement was right or wrong. If he was right, then that is the end of the matter. But if he was wrong, I need to embark on a second inquiry to determine whether his error was so gross as to give rise to an inference of misconduct. I turn firstly to his interpretation of the outsourcing agreement.

I have already mentioned that the outsourcing agreement deals broadly with a company's use of labour other than that of its own full time employees to do some of its work. The alternative forms of labour contemplated by the agreement are firstly contracting out, that is, the employment of independent contractors; secondly, labour brokers, that is, the employment of labour brokers who make the services of their employees available to the company; thirdly, casuals, that is, people employed for short spells of not more than three days in any week; and lastly temporary employees, that is, people employed by the company for a

limited specified period to perform specific functions. This matter of course is particularly concerned with those provisions of the outsourcing agreement that govern contracting out, and I will henceforth confine myself to them.

The only operational provisions of the outsourcing agreement governing contracting out, are those in clauses 5 and 9. In terms of clause 5 the parties agreed to establish a Joint Contracting and Temporary Labour Committee. The committee comprises three members representing management and three members representing labour. Clause 5.4. provides that:

"The terms of reference of the committee shall be -

1. To establish a list of work that has historically been contracted out;
2. To preview work expected to be contracted out and explore possible alternatives in line with the guidelines stipulated above.
3. To resolve the matters under 1 and 2 above by mutually agreeing that the work in question either shall or shall not be contracted out or if the matter is not resolved, to submit the disagreement to expedited arbitration."

The implication of this clause is in other words that the contracting out to which the agreement applies, may only be undertaken by agreement between the parties in the joint committee or, if they are unable to reach agreement, by arbitration. This mechanism is supplemented by clause 9 which provides in broad terms that the employer is obliged when contracting out is contemplated, to notify the union of that fact and to furnish it with such particularity of the planned contracting out as is necessary to enable the union to formulate its response to the employer's proposal.

The remainder of the agreement in so far as it applies to contracting out, gives flesh to the bones of this mechanism created under clauses 5 and 9. They are the following provisions. There is firstly clause 1 which is a preamble that

describes the purpose of the agreement in broad terms. Clause 2 contains a number of definitions, including definitions of contracting out and contractors. The definitions are central to the dispute between the parties and I will return to them later. Clause 3 lays down certain guiding principles which guide the decisions involving the use of contractors. The clause provides for some four guiding principles of that kind. Clause 4 provides that in order to determine the reasonableness of using alternative labour and/or contracted services, certain factors have to be considered. It lists 11 factors which have to be considered in their context. Clause 6.1. lastly provides for certain guidelines on the use of contractors. It lays down four guidelines for that purpose.

It is accordingly clear that the provisions of clauses 3, 4 and 6.1. lay down the principles or guidelines upon which decisions have to be taken in the joint committee and if no consensus is achieved, the basis upon which their dispute is to be arbitrated.

The employer's contention which was upheld by the arbitrator, is that the outsourcing agreement only governs contracting out by a contractor as defined in clauses 2.1. and 2.2. of the outsourcing agreement. Those two definitions read as follows:

"Contracting out shall mean a contractor given a contract on basis of specialised skills that it offers and that (the employer) does not have, for a specified period of time which will not exceed 12 months."

"Contractors shall mean registered service providers who are contracted by the company to do complete projects for the company which are too large for the company to handle itself or acquires specialised equipment or expertise which is not available inside the company, or can be performed more efficiently by a contractor than by the company. This agreement will be between the company

and the contractor for a project."

The effect of the employer's contention upheld by the arbitrator, is in other words that the outsourcing agreement only applies to contracting out which conforms to those two definitions of "contracting out to a 'contractor'". It which means that it would only apply to contracting out which complies with the following four requirements. The first is that the contract must be one given to a contractor on the basis of the specialised skills that it offers that the employer does not have. The second is that the contract must be for a specified period of not more than 12 months. The third is that the contract must be one for a discreet and complete project. The fourth is that the project must be one which is too large for the employer to handle itself, or which requires specialised equipment or expertise which is not available to the employer, or which can be performed more efficiently by the contractor than by the employer.

The contracting out within the meaning of these definitions would in other words be of a kind that can generally be more readily justified on the basis that it is firstly for work that the contractor can perform better or more efficiently than the employer, and secondly that the contractor is employed for a limited period to address a temporary need or to serve as a transitional arrangement and accordingly does not become part of the employer's long term structural arrangements.

It would in my view be highly anomalous that the employer should submit to the decisions of the joint committee only when it intends to embark on contracting out of this kind that can more readily be justified, but that it should remain free and unfettered whenever it wishes to embark on contracting out of a kind which cannot be justified on the basis contemplated by these two definitions.

Let me give a few examples of these anomalies that would arise from the

interpretation adopted by the arbitrator. Firstly, it would mean that when the employer contracts out for a period of less than 12 months, he would be bound by the fetters of the outsourcing agreement. On the other hand if he chooses to embark on a more drastic form of outsourcing for a period in excess of 12 months, he is entitled to do so unfettered by the limitations of the outsourcing agreement.

Secondly, if the employer embarks on contracting out for a project too large for the employer itself to handle, then he would be bound by the agreement and the fetters that it imposes on him. On the other hand if the employer indeed has the capacity to handle the project itself, but nonetheless for some peculiar or perverse reason decides to contract it out, the outsourcing agreement does not apply and the employees are not protected.

Thirdly, if the employer does not have the specialised skills and accordingly has to contract out to acquire them, the fetters of the outsourcing agreement applies. If on the other hand the employer does have the skills and it is not necessary to contract out to have the work done, the employer is free to do so without the strictures of the outsourcing agreement.

Fourthly and lastly, if the contractor can perform the work more efficiently than the employer and the contracting out is accordingly commercially justifiable on that basis, the outsourcing agreement applies. On the other hand, where the employer itself can do the work as efficiently or more efficiently than the contractor and if there is accordingly no similar commercial justification for the outsourcing, the employer is nonetheless free to proceed without the strictures of the outsourcing agreement.

These anomalies just seem to me to be intolerable. It is inconceivable that the parties contemplated that the restriction upon the employer and the protection of the employees would operate only in those cases where the

contracting out could generally be readily justified on the basis contemplated by these definitions but that, where it could not be so justified, the employer would remain free to proceed with the contracting without any restriction. Such an interpretation would defeat what seems to me to have been the clear intention of the outsourcing agreement, namely to protect the employer's freedom on the one hand, to resort to contracting out where there is a commercial justification for it, but on the other hand, to protect the employees in their job security by limiting the employer's freedom to resort to contracting out in those cases where it could be commercially justified.

I accordingly conclude that the arbitrator's interpretation of the outsourcing agreement was with respect incorrect. The proper interpretation of the outsourcing agreement is that it applies to all contracting out. The contracting out contemplated by the definitions of "contracting out" and "contractor", is merely that kind of contracting out which the agreement contemplates as the contracting out that would be permissible under the agreement. Its purpose is to confine the employer to contracting out within the meaning of those definitions. The purpose of the agreement is not to permit the employer to embark on any other form of contracting out without limitation. The outsourcing agreement was intended to apply and govern all contracting out by the employer.

But as I have said at the outset, my conclusion that the arbitrator erred in his interpretation of the outsourcing agreement, is not the end of the matter. The fact is that the parties agreed to have their dispute resolved by the arbitrator of their choice. They are bound by his determination whether right or wrong, unless it can be said that he was so grossly wrong that it justifies an inference of misconduct. I accordingly have to embark on the next inquiry whether the error of the arbitrator was so manifest and gross as to give rise to an inference that he

was guilty of misconduct. One merely needs to pose that question immediately to appreciate that he was not. There is no basis upon which to infer that the arbitrator was guilty of misconduct or indeed that he acted in anything other than in good faith.

The agreement is poorly drafted and is consequently confusing. The interpretation adopted by the arbitrator is compatible with the language of the agreement. Indeed, although I have held his interpretation to have been wrong because it would be contrary to the very purpose of the agreement, his interpretation fits more comfortably with the language of the agreement. I am of the view that the interpretation adopted by the arbitrator, although it is one that I have held to be incorrect, is one that an arbitrator applying his mind in good faith to the issue before him, can quite readily adopt by the exercise of reasonable care and skill. There is accordingly no basis to infer from the arbitrator's error that he was guilty of any misconduct.

It follows from this conclusion that the union is not entitled to the relief it seeks because it has not established a right to stop the contracting out or the retrenchments whether on a *prima facie* or on a final basis.

That leaves only the question of costs. I appreciate that I make this determination at an interim stage. It may well appear when the matter is finally determined on all the evidence that the parties wish to place before the court, that the court which makes the final determination in this matter, may come to a different conclusion than the one that I have arrived at today. If that were so, it would be unfair to mulct the union in costs if at the end of the day its contentions are upheld once all the facts are known.

The appropriate order for costs will accordingly in my view be to order that the costs in the application for interim relief be costs in the cause of the

application for final relief. I therefore make the following order:

1. The application for the relief claimed in part A of the applicant's notice of motion is dismissed.
2. The costs of the application for the relief claimed in part A of the notice of motion, are to be costs in the cause of the application for the relief claimed in part B of the notice of motion.

ON BEHALF OF THE APPLICANT	:	ADV MOSEBO
ON BEHALF OF THE FIRST RESPONDENT	:	IN PERSON
ON BEHALF OF THE SECOND RESPONDENT	:	ADV J OLIVIER