REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C1032/2012

In the matter between:

T LIPPERT	First Applicant
F LIPPERT	Second Applicant
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER JP HANEKOM NO	Second Respondent
EZT TRAVEL (PTY) LTD t/a GLOBAL TRAVEL ALLOWANCE SOUTH AFRICA	Third Respondent

Date heard: 14 May 2014

Delivered: 31 July 2013

Summary: Application to review and set aside an arbitration award

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JUDGMENT

Rabkin-Naicker J

[1] This is an opposed application to review and set aside an award dated 1 November 2012, under case number WECT324 – 12.

[2] The basis for the review of the arbitration award is that the second respondent (the Commissioner) committed a gross irregularity by refusing to allow the applicants legal representation at the hearing.

[3] It is also alleged by the applicants that the Commissioner in his conduct of the proceedings, interfered during the tendering of evidence and actively assisted witnesses of the third respondent to change their versions; refused the applicants the right to recall a crucial witness as was previously agreed to during the hearing; failed to consider material uncontested evidence prepared by the applicant; refused applicants the opportunity to lead crucial evidence at the hearing, dismissing it as being irrelevant and speculative; and reached a result that no reasonable Commissioner could reach.

Background

[4] The third respondent (the company) conducts business in the travel industry and provides discounts to club members in respect of accommodation and travel related services. It also rents out accommodation points/timeshare for members at a charge. The first applicant started his business relationship with entities related to the company during 2008. Second applicant was also previously employed within the group.

[5] The applicants hold a 30% shareholding in the company through a trust known as the F&T Trust. First applicant was nominated as director of the company during 2009 and was duly appointed and registered as such in December 2010. A resolution by the board of directors was adopted on 29 July 2010 in respect of his directorship. He was appointed as the director as a representative of the F & T Trust.

[6] The company was run as a quasi-partnership. First applicant with the assistance of his wife, second applicant, opened and managed the Somerset West offices of the company. According to the applicant's financial, personnel and operational functions for this office were managed and administered from the Somerset West office at all relevant times. It is their case that the relationship between them and the other directors started to deteriorate in mid-2011 when it was requested by one of the directors (Swanepoel) that second respondent be banned from future director and shareholders meetings

while she had always attended these meetings in the past. First applicant as a consequence addressed a letter to Swanepoel setting out his concerns and suggested a method to end the parties' business relationship as partners within the group of relevant entities.

[7] On 16 November 2011, two days after applicants returned from London where they were at been attending to business on behalf of the company and related entities, the other directors entered the Somerset West offices and took control of all functions at these offices. This action is described as a hostile takeover in submissions on behalf of the applicant.

[8] The applicants were then denied access to the premises of the company or access to any documents or information and were placed on immediate suspension. Nine charges were leveled against them by the other directors during December 2011. These charges included fraud, non-disclosure of information, gross insubordination, insolence and refusal to obey lawful instructions. The applicants were not present at the disciplinary hearings and were dismissed on 22 December 2011.

<u>The right to legal representation</u>

[9] Rule 25 (3)(c) of the CCMA Rules provides as follows:

> "(c) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule (1)(b) are not entitled to be represented by a legal practitioner in the proceedings unless-
>
> (1) the commissioner and all the other parties consent;
>
> (2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-
>
> (a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.'

[10] In **Commission for Conciliation, Mediation & Arbitration & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)**[1] the court considered this sub rule as follows:

> "The subrule indeed allows the commissioner considerable latitude in allowing legal representation. It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors. The listed factors are: the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute. The subrule does not disallow other forms of representation. Nor does it exclude the consideration of other relevant considerations. These factors may well, in a given case, include the seriousness of the individual consequences of a dismissal, assuming that this is not already encompassed by the subrule, which I doubt. "

[11] The Court made reference to the earlier case of **Hamata & another v Chairperson, Peninsula Technikon Disciplinary Committee & others**[2] in which the SCA dealt with the question of whether there is a right to legal representation in internal disciplinary hearings and found that no such right exists, holding as follows:

"This constitutional and statutory position comes as no surprise. There has always been a marked and understandable reluctance on the part of both legislators and the courts to embrace the proposition that the right to legal

[1] (2013) 34 ILJ 2779 (SCA)
[2] (2002) 23 ILJ 1531 (SCA)

representation of one's choice is always a sine qua non of procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words 'administrative proceeding' in the most general sense, i.e. to include, inter alia, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness." My emphasis)

The arbitration proceedings

[12] The arbitration proceedings *in casu* commenced on 2 March 2012. The company was represented by the head of the Employer's Federation of South Africa (EFOSA) and later during the proceedings by another official of EFOSA. The applicant's attorney was present and applied to the Commissioner to represent his clients at the hearing due to the complexity of the matter and the legal and commercial implications and consequences of their respective dismissals, as well as the comparative ability of the parties – the company was represented by the head of a national employers' organization while the applicants had never taken part in such proceedings. The Commissioner reasoned as follows in relation to Rule 25(3) of the CCMA rules:

> "Okay, be that as it may, as far as comparative ability is concerned, do you know, that CCMA, you're always going to have that problem when you have comparative ability, because the rules are quite clear, once you belong to an employer's organization, you are entitled to bring your most experienced, whoever you want to bring as an official, you

> entitled to do so, even if the applicant, on the other side has no experience whatsoever.
>
> To my mind, this comparative ability,…To continue, I was busy with the comparative ability. So that will always be the case that the CCMA and to my mind, clauses must not be read in isolation and my interpretation of this issue of comparative ability must be read in line with the complexity of the matter.
>
> In other words, what I'm saying is if the matter is complex, then comparative ability becomes an important issue.
>
> So, that to me itself is not a reason to grant legal representation today. The important issue here from me today is the complexity of this matter.…"

[13] The above reasoning is fundamentally flawed. First, it is premised on the belief that because the CCMA rules allow for employer representatives from employers' organizations, there is 'always' going to be a comparative ability problem. The Commissioner then moves from the premise that 'this will always be the case at the CCMA" (presumably because he believes employer representatives always have more ability than those of employees') to state that it is only where a matter is complex that comparative ability becomes an important issue. The fact that a matter may be complex to an unrepresented person yet straightforward to a person well versed in arbitration proceedings does not occur to the Commissioner.

[14] The Commissioner then proceeded to consider whether the matter was 'complex' in his view. Some of his thoughts on this are set out below:

> "Now, Mr. Jacobs addressed me on the issues and it was clear from his argument, that the applicants are not actually familiar with the charges and then they haven't seen the charges and the documentation that was required and that itself makes the matter complex.
>
> Mr. Uittenbogaard was adamant that this matter is not complex. It is straightforward. The charges against the applicant number one and two, their case is basically focusing on charges 12 and 5, the fraud the breach of trust and the other charges interrelate. Some of the charges were withdrawn.

So as far as applicant one and two is concerned[3], that its clear to me that it relates to fraud in the case of pay-slips and whether or not there was misconduct in that regard and whether there was a bank account open, a private bank account opened to defraud the company or the respondent.

So for me, that, there's nothing in my experience, there's nothing complex about that.

Mr Uittenbogaard said that 90% of this case is based on documentation. So it's – for me it's straightforward, whether or not the applicant 1 and 2 is guilty of falsifying documentation of opening a false employee records in order to create extra… There is nothing complex about that…..

To my mind this is not a matter where directors have defrauded the company of millions where perhaps fictitious financial statements and so forth. Something for example that make would make this a very complex matter.

It's simple. This case revolves around pay-slips, false pay-slips, false employees, fraud. As simple as that and whether or not they were guilty of misconduct. So, I'm not convinced that this is a complex matter and the whole purpose of rule 25 was for the CCMA to deal with these kind of disputes at arbitration level as easily as fairly as possible without complex legal formalities and that is the reason why and whereas I'm not allowed. It is not because I am difficult…

So my decision today is, I'm not going to allow legal representation. This is a straightforward matter and lastly you know the fact that you have 12 or 15 or 20 witnesses does not make the matter complex. In my experience sometimes you have six files and afterwards, you realize it wasn't such a complicated matter."

Evaluation

[15] In considering whether legal representation should be allowed, the Commissioner did not discernibly apply his mind to the issue of procedural fairness when parties have different abilities to conduct the leading of evidence; he misconceived the issue of comparative ability of the parties on

[3] The applicants in casu

the premise that an employer's representative will always be more skilled and omitted to understand that the complexity of a matter is relative to the comparative ability of a party; and laboured under the misconception that because much of the evidence was contained in documentation this would somehow make the hearing more simple. He further did not give sufficient weight to the fact that the applicants were without any experience in cross-examination of witnesses, whereas the employer's representative was extremely experienced in running such proceedings. A reading of the award itself reveals that the matter was indeed of a complex nature with a large amount of evidence presented.

[16] The failure to allow the applicants representation led to a situation in which there was not a fair trial of the issues. This was compounded by the Commissioner's conduct of the proceedings. There are various examples of the Commissioner's interference in the cross examination of the company's witnesses. For example the following transcribed part of the record:

> "Mr. Lippert: Ja all right. Okay, if you look at the invoice, can you confirm that around about 21 October 2009 you rented a week at Charka's Rock for Mr. Wilson?
>
> Ms. Simons: yes.
>
> Mr. Lippert: okay. Is the price on the invoice correct R2500.00?
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> Ms. Simons: Correct
>
> Mr. Lippert: Are any other details on this invoice incorrect?
>
> Ms. Simons: how do you mean other details – this is an invoice.
>
> Mr. Lippert: is (indistinct) correct… Intervention.
>
> Commissioner: where is the original of this invoice, Mr. Lippert, where is the original of this invoice?
>
> Mr. Lippert: it must be at the office. They keep things like that at the office.
>
> Commissioner: where did you get yours from?
>
> Ms. Simons: I don't understand.

Commissioner: The reason why I am asking is you are asking this witness is the rest of the writing on the invoice correct. Yes.

Commissioner: so you know yourself computer technology, you can copy and paste and change an invoice as you like. So now in all fairness to this witness, if she has to answer that, then I want to see the original one unless she agrees to the rest of the invoice; what do you say? Do you say the rest of this info on this invoice is a correct? I am allowing the witness time to look at the invoice.

Ms. Simon's: well if you look at the invoice, my details, my address details on the top never appeared on it, but that is my personal home address, and when I did the invoice I wouldn't put my home address on them, because I was working in the main road Somerset West officers so how come my address is on the top you, my home address? And it says, resort services. So this was never on top."

[15] The applicants have contrasted this assistance given to the witness for the company to the way that the Commissioner dealt with the applicants themselves. For example, the Commissioner having interrupted the cross-examination of Ms. Simons by Mr. Lippert, interrogated Mr. Lippert himself about the company that was paying Ms. Simon's her salary as follows:

"Commissioner: now whose company's that?

Mr. Lippert: that company was set up at that point to cater for the Travelcorr because – Desi[4] can explain it better than me, because (indistinct).

Commissioner: Now Sir, don't confuse me.

Ms Simons: no, I don't… (intervention)

Commissioner: Don't confuse me with the facts. You can't be a trier of law once you're not a trier of facts, but I will assure you, at the end of the day I will know all the facts of this case. Don't confuse me at this stage. All I'm asking you is in all fairness to the witness, you're putting questions the witness as to who employed her and who was her

[4] i.e. Ms Simons

employer. Now I am asking you for the sake of clarity, who is this company FGL TravelCorr?

Lippert: FTO TravelCorr at the time… (Intervention)

Commissioner: We are busy with cross examination so I think it is important to know who this company is. Are you saying that travel – FDL TravelCorr paid her salary? Who paid her salary if Global Travel did not pay her salary? Who employed her?

Mr Lippert: FTL

Commissioner: Travel Corp paid her salary

Mr Lippert: Ja."

[14] I note that that the company's answering affidavit did not deal with any of the allegations/facts set out in the applicants' supplementary affidavit. The issue of an allegation by the company that the review application was one day out of time was not pursued and I heard this application on the merits.

[15] Given the reasons for my order, I prefer not to comment on the merits of the dispute as I trust these will be properly dealt with in due course at a new arbitration hearing. Over and above the grounds for review I have highlighted i.e. the failure to provide a fair trial of the issues, the Commissioner's misconstruction of the enquiry required in terms of rule 25 of the CCMA rules, and his misconduct in arbitrating the process, I note that the Award itself, more especially in its recording of the evidence given, lacks both clarity and insight. I see no reason why costs should not follow the result in this matter. In all the circumstances, I make the following order:

Order

1. The arbitration Award under case number WECT324 – 12 is reviewed and set aside.
2. The dispute is referred back to First Respondent for hearing anew before a Commissioner other than Second Respondent.

3. The parties may have legal representation at the de novo arbitration proceedings.
4. Third respondent to pay the costs

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H.Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicants: Adv. A de Wet instructed by Joose Heswick Attorneys

First Respondent: Adv. Paul Tredoux instructed by Quinton J Williams & Associates