IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C118/17

Reportable

In the matter between:

UNICORN PHARMACEUTICALS (PTY) LTD Applicant

and

ARBITRATOR K EDWARDS N.O. First respondent

PAUL VAN DER HORST and 12 others Second and further respondents

Heard: 31 January 2018

Delivered: 20 February 2018

SUMMARY: Review – Arbitration Act 42 of 1965.

JUDGMENT

STEENKAMP J:

Introduction

[1] The applicant seeks to have an arbitration award reviewed and set aside. But this is not, as is usually the case in this Court, an application in terms

of s 145 of the LRA[1]; instead, it is an application in terms of s 33 of the Arbitration Act[2] to review and set aside a private arbitration award.

Background

[2] The applicant was involved in the business of pharmaceutical distribution, primarily for the Clicks group, before it was renamed and repurposed. In 1990 it set up an "owner-driver" scheme whereby drivers would deliver pharmaceuticals on its behalf. The second to twelfth respondents, Messrs van der Horst and others, were owner drivers under this scheme. The applicant says they were engaged as independent contractors.

[3] The relationship was initially governed by "cartage agreements" that were replaced by individual "transportation agreements" in March 2006. All of the individual respondents signed transportation agreements on 20 March 2006, subject to the condition that they had to undergo polygraph tests within a specified period. The agreements also included an arbitration clause that required any dispute to be referred to private arbitration. It includes the following sub clause:[3]

> "The arbitrator shall be any suitably qualified independent person agreed upon between the parties to the dispute, and failing agreement within 7 days, appointed on the application of either party by the chairman for the time being of the Association of Arbitrators."

[4] The individual respondents continued driving in terms of the agreement but refused to undergo polygraph tests. The applicant terminated the transportation agreements with them on 23 October 2006.

[5] The individual respondents referred an unfair dismissal dispute to the CCMA.[4] The CCMA dismissed the referral because it lacked jurisdiction. Commissioner W F Maritz ruled:

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[1] The Labour Relations Act 66 of 1995.

[2] Act 42 of 1965.

[3] Clause 50.4.

[4] The Commission for Conciliation, Mediation and Arbitration.

> "The CCMA does not have jurisdiction to consider either the validity of the agreement or whether the applicants, despite the apparent terms of the agreement, are nonetheless employees and not independent contractors.
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> The *in limine* objection is upheld and the application is dismissed."

[6] On 20 April 2008 the individual respondents launched an application in the Western Cape High Court to compel the applicant to participate in private arbitration. Blignault J dismissed the application with costs on 1 July 2009. He held that the court does not have the power to compel a reluctant party to participate in arbitration.

[7] Over seven years later, on 13 December 2016, a private arbitrator, Ms Kim Edwards[5] handed down an arbitration award, following an arbitration that was held in the absence of the applicant. She found that the individual respondents were employees; that they were unfairly dismissed; and she ordered the applicant to pay each of them compensation equivalent to 12 months' remuneration.

[8] The applicant says that the award was improperly obtained; that the arbitrator's appointment was irregular; that it did not receive proper notice of the arbitration; and that the arbitrator did not apply her mind to the issues before her. It is for those reasons that it seeks to have the award reviewed and set aside. I shall consider each of those grounds of review separately.

Evaluation

[9] As I mentioned at the outset, this is an application in terms of s 33(1) of the Arbitration Act. That section reads:

> "Where –
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> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
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> (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,

[5] The first respondent.

> 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."

Irregular appointment?

[10] The parties did not agree to the appointment of an arbitrator. The respondents made much of the applicant's recalcitrance to do so, and blamed it for the fact that, ten years after the dispute arose, it has not been finalised. But as a matter of fact, there is no evidence before me that the respondents tried to get the applicant's agreement. Mr *Chamisa*, who represented the respondents in these proceedings, has done so from at least 2016. On 16 November 2016 he sent a fax to the applicant at its general fax number in Montague Gardens. It was addressed to no-one in particular, despite the fact that the respondents' previous representative, one Bertram Albrecht (styled as a labour and HR practitioner with Nwekwezi Labour & HR Consultancy cc) had been in email correspondence with the applicant's Head: Group Legal Counsel, Mr David Janks, about this very dispute. Janks had a different and dedicated fax number and email address. And as long ago as 14 February 2012 Janks wrote to Albrecht and said:

> "You indicated in your letter to UPD dated 21 July 2011 that there is still a private arbitration pending with regards to the allegation of unfair dismissal. Please let me know what issues are being determined in such arbitration, who the parties are, and the arbitrator's details and contact information."

[11] Chamisa's letter of 16 November 2016 reads:[6]

> "In re: Private arbitration re Paul van der Horst and 13 Others v New United Pharmaceutical Distributors Pty Ltd
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> 1. Above has reference.
> 2. Please note that Paul van der Horst and 13 others will be proceeding with private arbitration after the lack of co-operation from Respondent in giving finality to the dispute that required private arbitration.
> 3. It is the position of the applicants that if the respondent had genuine concerns was to raise such in limine to be considered at private

[6] Verbatim.

arbitration, however the lack of co-operation at all material times has left the applicants vis-à-vis the unreasonable period taken with no option but to proceed with private arbitration set for the 5th and 6th of December 2016.

4. It is imperative for the company to be informed that the process will be carried out without any further delay by the respondent.

Regards

Adv Dennis Jnr Chamisa."

[12] The applicant says it was not aware of this fax. It had been sent to a general fax machine at a distribution centre at another company in the same group of companies. But be that as it may, it is apparent that it does not comply with the provisions of clause 50.4 of the arbitration agreement. Chamisa, on behalf of the respondents, did not ask the applicant to agree to the appointment of an arbitrator. He merely purported to inform it of an arbitration that had already been set down. And, failing any agreement to the appointment of an arbitrator, neither did the chairperson of the Association of Arbitrators appoint one.

[13] When asked about this in argument, Mr *Chamisa* conceded that the arbitrator was not appointed in terms of clause 50.4. The best he could do was to refer to email correspondence between him and the Association. But the arbitrator that the respondents unilaterally appointed, Ms Edwards, was appointed neither by agreement nor by the Association of Arbitrators.

[14] It follows that the appointment of the arbitrator was irregular and the award was improperly obtained. Her award must be reviewed and set aside for this reason alone.

Defective notice

[15] Also, and in any event, the arbitration notice did not comply with s 15(1) of the Arbitration Act:

> "An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to be present personally or by representative and to be heard at such proceedings."

[16] In this case, the arbitrator gave no such notice.

[17] Although it may appear to elevate substance over form, Mr *Conradie* referred in this regard to the binding authority of the SCA in *Favish Vidavsky v Body Corporate of Sunhill Villas*[7]:

> "It will be convenient first to consider the nature of the irregularity in the present case. The arbitrator was vested with general jurisdiction to try the dispute between the parties by reason of his appointment. But his powers to conduct the proceedings in the absence of a party were expressly limited by s 15(2), which lays down as a jurisdictional fact that the arbitrator may only proceed if that party has received reasonable notice of the time and place of the hearing. The requirement is peremptory. There was no notice and the arbitrator's jurisdiction to proceed was lacking. An alternative, but, I think equally valid, approach to the section is to recognise that proceeding with a hearing without proper notice to a party of the date and place of that hearing fundamentally taints both the proceedings and any decision which depends upon them."

[18] For this reason also, the arbitration was an irregularity and must be reviewed and set aside.

Failure to apply her mind

[19] The arbitrator recorded in the opening paragraph of her award:

> "The defendant [*sic*] did not attend the arbitration. The defendant has thus far not co-operated with the need to pursue the private arbitration as directed by an order of the High Court. I am satisfied that all communication in respect of this arbitration was delivered to the defendant within the prescribed time periods."

[20] Firstly, the High Court gave no such order. On the contrary, Blignault J dismissed the individual respondents' claim with costs. He held that the Court did not have the power to compel a reluctant party to participate in arbitration proceedings. And he pointed out that the applicants in that case (i.e. the individual respondents in this one) could have proceeded in terms of clause 50.4. Yet they did not do so. The arbitrator nevertheless proceeded with the arbitration, despite the fact that clause 50.4 had not

[7] 2005 (5) SA 200 (SCA) par 12.

been followed, and she did so based on an incorrect premise. The very foundation of the arbitration was irregular.

[21] Secondly, the arbitrator accepted that the company had received "all communication" – presumably including the notice of the arbitration. But she took no further steps to ensure that that was the case, nor did she ask the individuals to provide such proof, other than the fax transmission sheet of the fax that Mr Chamisa had sent to the general fax number at the distribution centre. Yet she proceeded in the absence of the company. That deprived it of a fair trial in circumstances where it was not clear that it had waived its right to a hearing.

[22] The Constitutional Court held in *Lufano Mlhaphuli & Associates (Pty) Ltd v Andrews*[8]:

> "[74] In my view, there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act. On the contrary, there is every reason why co-existence should be accepted: the fairness requirement in section 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.
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> [75] This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights, including the right to a fair and impartial hearing guaranteed by section 34.
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> [76] …
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> [77] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, a case dealing with statutory arbitrations under the Labour Relations Act (the LRA), Ngcobo J made comments to the following effect. In order to give effect to the intention that, as far as possible, arbitration awards would be final and only interfered with in very limited circumstances, the drafters of the LRA, in section 145(2)(a) thereof, chose to provide for narrow grounds of review similar to those provided for in section 33(1) of the Arbitration Act, and did so aware of the jurisprudence under the latter Act. But they were equally aware that in construing the

[8] 2009 (6) BCLR 527 (CC); 2009 (4) SA 429 (CC) (footnotes omitted).

provisions of section 145(2)(a), in particular the ambit of the grounds of review in the section, the Labour Courts would have regard inter alia to the right to fair labour practices guaranteed to everyone in terms of section 23 of the Constitution and the interpretative injunction contained in section 39(2) of the Constitution. The crucial inquiry (in assessing irregularities) is whether the conduct of the decision-maker complained of prevented a fair trial of issues. The requirements of fairness in the conduct of arbitration proceedings are consistent with the LRA and the Constitution: section 138(1) of the LRA enjoins the commissioner to determine the dispute fairly; section 34 of the Constitution enshrines the right of everyone to, inter alia, a fair hearing. The right to a fair hearing before a tribunal lies at the heart of the rule of law, and a fair hearing before a tribunal is a pre-requisite for an order against an individual, and this is fundamental to a just and credible legal order.

[78] Similarly, O'Regan J stated that it was beyond doubt that the functions performed by a commissioner in an arbitration under the LRA clearly fall within the terms of section 34 of the Constitution. In my judgement, private arbitrations are, as a starting point, not to be subjected to a lower standard of procedural fairness – once an arbitration award is made an order of court the legal effect thereof is identical to that of an arbitration award under the LRA.

[79] I conclude therefore that the mere fact of a submission to arbitration does not import a waiver of the fairness requirement. This conclusion finds support in *Suovaniemi*.

[80] In the above discussion I have assumed that the constitutional right to a fair hearing may validly be waived.

[81] The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to

> waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.
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> [82] What should be emphasised is that, as will appear from the authorities referred to below, the fairness rights invoked by Mphaphuli lie at the core of a legitimate arbitration and it would require extremely strong evidence for a conclusion to be sustained that Mphaphuli waived such rights. Yet, neither the arbitrator nor Bopanang alleged, let alone proved, that there had been a waiver of rights sufficient to allow the arbitrator to engage with Bopanang in the absence of Mphaphuli."

[23] Similarly, in this case, neither the individuals nor the arbitrator showed that there was a waiver of rights sufficient to allow her to engage with the individuals in the absence of the company.

[24] With regard to the fax transmission, this Court held in *Halcyon Hotels*[9] that a telefax transmission slip is only *prima facie* proof that a document has come to the knowledge of the party on whom it was served. The court held that the arbitrator should have satisfied himself that the parties had been properly notified and that the arbitrator misdirected himself in finding that a notice sent to a general fax number constituted sufficient notification. The same holds true for the case before me. In this regard also, the arbitrator misdirected herself.

Conclusion

[25] For all these reasons, the arbitration award must be reviewed and set aside.

[26] With regard to costs, I take into account that this dispute should and could have been resolved ten years ago, had the parties been more co-operative. Both parties are to blame for the subsequent delays. It may be that the dispute is still not resolved. In law and fairness, I do not consider a costs award to be appropriate.

[9] *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA* [2001] 8 BLLR 911 (LC) par 14.

Order

The arbitration award of the first respondent dated 13 December 2016 is reviewed and set aside.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Bradley Conradie of BCHC attorneys.
SECOND AND FURTHER RESPONDENTS:	Dennis Chamisa of Dech Legal.