IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C1260/2018

In the matter between:

ARCELORMITTAL SOUTH AFRICA LIMITED Applicant

and

CARLO THOMAS First Respondent

C BRUMMER N.O. Second Respondent

MEIBC Third Respondent

Date heard: 17 March 2021 on the papers
Delivered: 21 June 2021 by means of email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration Award under case number WECT 8238-18. The dispute before the second respondent (the Commissioner) involved the dismissal of the first respondent who had been found guilty of sexual harassment by the applicant (the Company).

[2] The alleged victims of the said sexual harassment (which it appears was in the form of 'whats app' messages and verbal comments) refused to attend the arbitration proceedings after having been subpoenaed. There were two

postponements of the proceedings. The Company's legal representative requested the Arbitrator to make a finding in terms of section 142 (8) and (9) of the LRA and refer the matter to the Labour Court. The relevant provisions of the LRA read as follows:

"(8) A person commits contempt of the Commission-

(a) if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;

(b) …….

(c) …….

(d) …….

(e) …….

(f) …….

(h)

(i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9) (a) A commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) The commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11)."

[3] The Commissioner made what she called an *ex tempore* ruling which is contained in the transcript of the proceedings but not in the Award. The transcript of this ruling is as follows:

"Having assessed both parties' submissions, and having assessed the past history is that it is, this is the third sitting that we have, that the witnesses are not here It is my view that the applicant will be adversely affected to proceed, or to deal with the contempt proceedings to court as it is not clear if we are suspending the matter sine die or adjourning the sine die when the matter will actually be heard. Subsequent to that is whether or not we would still get the

respondents witnesses here. It is also said in the light of the nature of the dispute where the witnesses, their testimony is obviously the core of the matter, as pertains to, as the applicant has been dismissed for sexual harassment So on the basis of the balance between the two parties and the past, the past history regarding the case, I am not going to proceed with the contempt proceedings in this case as the applicant is adversely affected by that to a degree that I don't believe is fair and reasonable I will obviously provide further reasons in my ruling , but that is my ex tempore ruling."

[4] In fact the Arbitrator made no mention whatsoever of the request by the Company for her to find the witnesses in contempt and refer the matter to the Labour Court in her Award.

[5] The outcome of the Award was to reinstate the first respondent, a Supervisor at the Company, with back-pay. This was ordered on the basis of the following paragraphs in the Award:

"The matter was postponed to secure the presence of the witnesses for the Respondent, who had been subpoenaed as their evidence was critical to this matter as it pertains to alleged sexual harassment.

The witnesses, despite have been served with subpoena again, and with additional efforts made to secure their presence at the arbitration, refused to attend the hearing. It was therefore not possible for the Respondent to lead evidence in support of the decision to terminate the services of the Applicant."

[6] It appears from the record that the Company confirmed instructions to its attorney during the proceedings, that it wished the contempt matter to proceed to the Labour Court. This was relayed to the Arbitrator. The *ex tempore* ruling contained in the transcript of the proceedings reflects a decision by the Arbitrator not to follow the section 142 route. It was not a model of clarity. However, it was a decision that was in the discretion of the Arbitrator to take, and a referral to the Labour Court was not mandatory.[1]

[1] National Bargaining Council for the Road Freight Industry v Meyer t/a Oakley Carriers (2000) 21 ILJ 1391 (LC); Bargaining Council for the Clothing Manufacturing Industry & another v Prinsloo (2007) 28 ILJ 1754 (LC)

[7] It seems to the Court that the main problem with the Award, is that it was made without any evidence being given by the first respondent whatsoever. The attorney for the first respondent began to lead his evidence. Ironically it appears from the record that it was the Company's attorney who interjected as follows:

"MR MAHLANGU: Sorry Madam Commissioner I just need to ask, if I am out of order you can advise me. The way I understand the law is that the employer bears the onus to prove?

COMMISSIONER: Correct

MR MAHLANGU: The employer must satisfy you that the applicant is guilty of the offence and it justifies dismissal.

COMMISSIONER: Correct.

MR MAHLANGU: It is not for the employee to prove to you that he is not guilty, so the consequence of an employer failing to lead in evidence in support of his case automatically compels you to find the dismissal unfair. Without the applicant to take the stand in his defence because without the employers case he has no defence to make."

[8] The attorney for the first respondent pointed out the problem of the above approach:

"MR COERCIUS: I am not arguing with the rule of logic by Mr Mahlangu. But I think for purposes of clarity and transparency at least some evidence must be lead on the incident for yourself to make a finding, because you as Commissioner can't make a finding on nothing, without anything being placed before you.

COMMISSIONER: Well actually I can. So what Mr Mahlangu is saying is that they had failed to discharged the onus of proof, and if the fail to discharge the onus of proof, then the matter found to be, …(indistinct) be found to be unfair

MR COERCIUS: It is ultimately what Mr Mahlangu is referring to something akin to the default judgment?"

[9] The Commissioner then proceeded to ask Mr Coerecius why he would want to lead evidence. He answered as follows:

"MR COERECIUS: Well it is, as I have mentioned for transparency purposes, so if this case goes on review and Mr Mahlangu has indicated that it will[2], at least there is something before the judge. That is my rational, but if we are in agreement and you obviously the most important person here today that will make a finding, if you are happy without us leading evidence, and you are happy to make a finding then, I am happy to stop Mr Thomas's testimony right there and now.

COMMISSIONER: Mr Mahlangu is correct in law, I mean he is indicating that they failed to discharge the onus of proof in the absence of having witnesses here. In terms of that the only thing that then is of relevance is what is the relief that the applicant is seeking, and the relief currently is, he is seeking retrospective reinstatement…"

[10] The above stance of the Commissioner amounted to a gross irregularity of both the latent and patent type[3]. She made a mistake of law and then proceeded to conduct the proceedings in the wrong way.The Commissioner tried to articulate what Mr Mahlangu was arguing and stated in the exchange that he was referring to something: "between a default judgment and an absolution of instance, like somewhere in between."

[11] It is trite that for either of the above orders to be made, there has to be evidence before an adjudicator – either pleadings or oral evidence. This is why when default arbitration awards are issued, an applicant must give evidence to establish she or he has a prima facie case. The irregularity committed is one that renders the Award reviewable given that the Commissioner diverted from the correct path in conducting the arbitration. As the LAC stated in **Head of Department of Education v Mofokeng & Others**[4]:

[2] This was in respect of the section 192 application
[3] Goldfields Investments Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551
[4] (2015) 36 ILJ 2802 (LAC)

"[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[12] In all the above circumstances, I am bound to review and set aside the Award. In relation to the issue of a costs order, I think it is fair that costs of this application be paid by the Company given its stance at the arbitration that the first respondent need not lead evidence.

[13] I make the following Order:

Order

1. The Award under case number WECT 8238-18 is reviewed and set aside.

2. The dispute is remitted to the third respondent for rehearing before a Commissioner other than second respondent.

3. Applicant to pay the costs.

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H.Rabkin-Naicker

Judge of the Labour Court

Representation on the papers

Applicant: Cliffe Dekker Hofmeyer Inc

First Respondent: Coerecius Attorneys