THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: **C95/2022**

In the matter between:

H & W DISTRIBUTORS	Applicant
and	
CCMA	First Respondent
CHITANE SOZA, N.O.	Second Respondent
HENDRICH THEODORE POFADDER	Third Respondent
KENNETH VAN SCHALKWYK	Fourth Respondent
LESEGO KLIP	Fifth Respondent

Heard: **29 June 2023**

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 13 July 2023

JUDGMENT

K NAIDOO, AJ

Introduction

1. The third, fourth and fifth respondents are all former employees of H&W Distributors - the applicant in this application, a wholesale distribution business located in Upington in the Northern Cape. They were all dismissed by the applicant for dishonesty, having allegedly "stolen" one additional hour from the time that they were allocated to do a delivery for the applicant. For the sake of convenience, I refer to them collectively as the respondent employees.

2. On 23 February 2022, the Commission for Conciliation, Mediation and Arbitration (CCMA) issued an arbitration award in the respondent employees' unfair dismissal dispute with the applicant, in the absence of the applicant, in terms of which their dismissals were found to be substantively unfair. The applicant was ordered to reinstate each of them with full retrospective effect.

3. The applicant now seeks to review the arbitration award. The application is unopposed.[1]

Material facts

4. The respondent employees were all permanently employed by the applicant until they were dismissed on 1 December 2021. The reason for their dismissals is that they allegedly "stole" one additional hour from the time that the applicant allocated to them for a return trip to do a delivery to Rietfontein, a town in the Northern Cape on the Namibian border, approximately 263 kms outside of Upington. The respondent employees admitted to returning late. They indicated that on the return trip, they stopped the vehicle in Askham, another town approximately 180 kms outside Upington, to check the vehicle, eat and use the

[1] At the hearing of this application on 27 June 2023, the fourth and fifth respondents appeared in person and requested an opportunity to make oral submissions, having travelled from Upington on the day. They were self-represented. Although I afforded them such an opportunity, I have nevertheless adjudicated the application on an unopposed basis.

ablution facilities. As a result, they arrived back at the applicant approximately one hour outside of the allocated time for the total trip.

5. On 6 December 2021, the third respondent completed and signed the CCMA's form 7.11, served it on the applicant and filed it with the CCMA. In the section of the form requiring the name of the referring party, the third respondent inserted his own name and contact details. In addition to this, in the section of the form requiring alternative contact details for the employee, the fourth respondent's name was inserted. The fifth respondent was not referred to at all. In various other places on the form, reference is made to "we", in the plural – under the heading Discrimination Matter, it is stated that "*we ask him to take his 1 hour and a half*"; in the summary of the facts of the dispute it is stated that "*he claim that we stole 1 hour of his time*"; in the description of the procedural unfairness it is stated that "*from the start we were found guilty*"; and in the description of the substantive issues it is stated that "*we were found guilty before the hearing*".

6. The CCMA then issued a notice of set down for con-arb on 12 January 2022, to which the applicant objected in terms of section 191(5)(A) of the Labour Relations Act, 1995 (LRA). Therefore, only the conciliation proceeded on 12 January 2022. The attendance register of the conciliation that took place on that day reflects that the respondent employees were all present at the conciliation, together with a representative of the applicant, Mr Kal Louw. The parties were however unable to resolve the matter, and, on the same day, the CCMA issued a certificate of non-resolution from conciliation. On the actual certificate, only the third respondent is cited.

7. Later that day, the respondent employees referred the dispute to arbitration. The referral to arbitration is again signed by the third respondent, but this time the fourth and fifth respondents signed alongside the third respondent in the column of the form alongside the section requiring the details of the referring party.

8. The CCMA then set the matter down for arbitration on 23 February 2022. In the notice of set down, again only the third respondent is cited. However, when the matter then sat for arbitration on 23 February 2022, the respondent employees were again all present. Having satisfied himself that the applicant was duly notified of the arbitration, the second respondent then heard evidence, it appears only from the fourth respondent, and proceeded to issue a default arbitration award in which he found that the dismissals of the respondent employees were substantively unfair and ordered the applicant to reinstate them with full retrospective effect.

9. The applicant's review application was then delivered on 7 April 2023. As indicated above, it is unopposed.

Grounds of review

10. The applicant's founding affidavit sets out very little in the form of substantive review grounds. What it contains is a re-statement of the standard review grounds – cast in the following terms:

> "The Commissioner misconducted himself, committed a gross irregularity in the conduct of the proceedings, or exceeded his powers in that he hopelessly failed to apply his mind to the facts of the dispute and clearly both ignored and disregarded material and relevant evidence in the process of making his award. We content it is an award that a reasonable decision maker could not have made based on all the material that was before him." (sic)

11. The affidavit then proceeds to state the following:

> "15. The Commissioner misconducted himself, committed a latent gross irregularity, and/or exceeded his powers in that:
>
> 15.1 The Commissioner made an award in my absence;

15.2 By finding that the Third-Fourth & Fifth Respondents were dismissed unfairly due to substantive reasons."

12. Thereafter, the applicant goes on to set out its reasons for not attending the arbitration proceedings and deals with its prospects of success. During the hearing and in a post-hearing note, the applicant confined its challenge to the award in this respect, in addition to jurisdiction, to the alleged defect constituting a gross irregularity. In essence, it submits that the second respondent's decision to proceed with the arbitration in its absence amounts to a gross irregularity in the conduct of the proceedings.

13. Regarding jurisdiction, in dealing with its prospects of success, the applicant states that because the referral to the CCMA was signed only by the third respondent, who was not mandated by the fourth and fifth respondents to sign on their behalf, there had been no compliance with Rule 4 of the CCMA Rules and therefore the CCMA had no jurisdiction to adjudicate the unfair dismissal dispute and make an award in favour of the fourth and fifth respondents. The Labour Appeal Court's (LAC) decision in *Oosthuizen v Imperial Logistics CC & others* [2014] ZALAC 106 (Oosthuizen) is cited as authority in support of this ground. I deal with this issue first.

Analysis

Jurisdiction

14. As stated above, aside from the complaint that the second respondent committed a gross irregularity by proceeding with the arbitration in its absence, the founding affidavit does also reveal a jurisdictional issue that was pursued in oral argument during the hearing. The point is simply that not all the respondent employees signed the initiating referral to the CCMA, and the third respondent, who did sign it, was not mandated by the fourth and fifth respondents to do so on their behalf. This, the applicant contends, amounts to non-compliance with Rule 4 of the CCMA Rules and, as a result, it is argued, the CCMA did not have

jurisdiction to adjudicate the dispute relating to the fourth and fifth respondents. In support of this argument, the applicant referred me to the decision of *Oosthuizen.* This issue raises a point of law that stands to be determined (*CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC)). I therefore proceed to do so.

15. Prior to its most recent amendment in 2023, CCMA Rule 4 read as follows:

> **4. Who must sign documents**
>
> (1) A document that a party must sign in terms of the Act or these Rules may be signed by the party or by a person entitled in terms of the Act or these Rules to represent that party in the proceedings.
>
> (2) If proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to sign documents. A list in writing of the employees who have mandated the employee to sign on their behalf must be attached to the referral document.

16. Under that version of Rule 4, a series of judgments out of this court and the LAC were decided on the basis that attorneys and other representatives not automatically entitled to represent a party in the proceedings were precluded from signing the initiating referral to conciliation. This culminated in the LAC's decision, in May 2020, in *Adams v National Bargaining Council for the Road Freight & Logistics Industry & Others*.[2] That case also concerned the significance of the person who signs the prescribed form to refer a dispute to conciliation and then to refer the dispute to arbitration. In *Adams*, the aggrieved dismissed employee did not personally sign the referral to conciliation or to arbitration; his attorney did so. The employee and the employer attended conciliation and arbitration, but the employer only raised a point *in limine* objecting to the employee's defective referral at the arbitration stage. The commissioner then issued a ruling upholding the employer's point *in limine*.

[2] (2020) 41 ILJ 2051 (LAC).

16. Before the review court and during the appeal hearing, the employee relied on *ABC Telesales v Pasmans (2001) 22 ILJ 624 (LAC)* as authority for the proposition that, where a party does not personally sign the prescribed form but thereafter appears at the convened proceedings, such conduct amounts to a quasi-ratification which satisfies the need for proof of jurisdiction. The LAC agreed, noting that –

> [8] From ABC Telesales these important considerations are notable:
>
> 8.1 First, the core rationale is the divination of the purpose of the primary injunction that the form must be signed by the 'dismissed employee' — in the phraseology used in the council's rules — the 'party'. In accordance with the interpretation of a rule being purposively interpreted, this court in ABC Telesales recognised that the function of the injunction was to eliminate the risk of unauthorised referrals.
>
> 8.2 Second, a failure to adhere strictly to this rule does not unsuit an aggrieved party for want of jurisdiction. The conduct of the aggrieved party subsequent to the irregular signature could render 'the requirement of her signature redundant at that stage'. The reference to that stage was to the proceedings at which the aggrieved party appeared and sought to participate as envisaged by the referral.
>
> …
>
> [10] However, in my view, that distinction does not serve to distinguish the decision on the material issue: post-signature conduct by the aggrieved employee that achieves the purpose of the rule which is to eliminate the risk of an unauthorised referral. Moreover, no sound policy consideration can exist that, under such circumstances, should impel a court to uphold the absurd result that a party who demonstrates unequivocally that he wants his own dispute addressed is improperly before the tribunal because a formality to eliminate the risk of an unauthorised referral was not complied with in the literal terms of such rule. The appearance of the aggrieved employee in the

> arbitration proceedings is the foundation of the clear proof that the referral was not unauthorised. The legitimate concern of the council to avoid assuming a jurisdiction it might not have, is addressed.

17. While the LAC in *Adams* did not overturn the judgment of *Oosthuizen*,[3] it held that –

> [13] In Oosthuizen v Imperial Logistics CC & others (2013) 34 ILJ 683 (LC), the Labour Court considered ABC Telesales. In Oosthuizen, as in Manentza, the central controversy was whether a late referral should be condoned. The referral in question was a second referral. The first referral had been rejected by the bargaining council because it was not personally signed by the aggrieved employee. The case was decided on the basis that no proper case for a delay of about a year in respect of the second referral had been made out. Some attempt was made in the argument to invoke ABC Telesales, but the court rejected the applicability of that authority to the facts of the case because there was no attempt by the aggrieved employee to ratify the first referral. No allusion was made to ABC Telesales having been wrongly decided.

18. The LAC accordingly upheld that appeal, finding that –

> [15] In the result, I am of the view that ABC Telesales is sound authority for the appellant's proposition that the purpose of the signature rule was achieved by the ratification of the aggrieved person's agent signing the referral. The fact that it was an attorney who signed it is a non-material fact".

19. Following the LAC's decision in *Adams*, CCMA Rule 4 was amended in 2023 to clarify the position that a party's presence at CCMA proceedings ratifies a defective referral. Rule 4 was accordingly amended to include sub-rules 1A and 3. The full version of the Rule therefore now reads as follows:

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[3] It is not clear from the judgment whether the LAC's decision in Oosthuizen was considered.

(1) A document that a party must sign in terms of the Act, or these Rules may be signed by the party or by a person entitled in terms of the Act or these Rules to represent that party in the proceedings.

(1A) Where a document has not been signed or was signed by a person who is not entitled to represent that party in terms of the Act or these Rules, the intention of that party to submit that document may be confirmed by the subsequent appearance of the party at the convened proceedings before the commissioner or by any other method of confirmation that may be placed on record at the Commission.

(2) If proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to sign documents. A list in writing of the employees who have mandated the employee to sign on their behalf, must be attached to the referral document.

(3) For purposes of these Rules, a signature includes an electronic signature inclusive of an electronic referral made through the Commission's electronic referral online portals as included in Schedule One.

20. The amendments to Rule 4 are directed towards precisely the circumstances in this case. Here, although not all the respondent employees signed the initial referral, they all attended and participated in the conciliation; they all signed the referral to arbitration; and they all attended and participated in the arbitration. It is common cause that the applicant attended and participated in the conciliation with all three respondent employees, and received the referral to arbitration, which was signed by all three respondent employees. There was also, at no stage, any objection by the applicant to the participation of the respondent employees. From the outset, it was clear that they all intended to challenge the fairness of their dismissals by the applicant under the referral to conciliation that had been made on 6 December 2021. I therefore find that the failure of them all

to sign the initial form 7.11 was ratified by their subsequent conduct and attendances at the conciliation and arbitration, as described above.

21. To my mind, it is of no concern that Rule 4 was only amended in 2023, after the arbitration in this matter on 23 February 2022. The LAC's decision in *Adams* was made in May 2020, long before. The law as it was restated in *Adams* therefore applied to this matter too, irrespective of whether the CCMA Rule had by that time been amended to give effect to *Adams*.

22. The CCMA accordingly had jurisdiction to adjudicate the unfair dismissal dispute of the respondent employees. What remains to be determined is whether the second respondent's decision to proceed with the arbitration in the absence of the applicant, amounts to a gross irregularity within the meaning of section 145 of the LRA.

Gross irregularity?

23. The applicant's complaint is that its absence from the arbitration was due to it not being notified of the date of the arbitration. It states that the notice of set down for arbitration was sent to an incorrect email address, and it therefore did not receive the CCMA's email containing the notice. It alleges that this amounts to a gross irregularity in the conduct of the proceedings and renders the arbitration award reviewable under section 145 of the LRA.

24. This is quintessentially the kind of circumstances that would, if correct, result in the arbitration award being erroneously granted in the absence of a party affected by the award (*Mohube v Commission for Conciliation Mediation and Arbitration and Others* (JA18/2022) [2023] ZALAC 9 (18 May 2023). It is therefore perplexing why the applicant chose not to avail itself of the opportunity to apply to rescind the award in terms of section 144 of the LRA. No reasons whatsoever have been tendered for this approach.

25. The email address of the applicant to which the CCMA transmitted the notice of set down does appear to be incorrect, and the applicant would indeed have therefore not have received notice of the set down via email. However, it is common cause that, in addition to the email, the CCMA also sent notice of the date of the arbitration to the applicant via short message service (SMS). This was in accordance with Rule 5A of the CCMA Rules, which provides that:

> 5A The Commission may provide notice of a conciliation or arbitration hearing, or any other proceedings before it, by means of any of the methods prescribed in Rule 5 and/or by means of short message service.

26. In dealing with this issue, the applicant states in paragraphs 17 and 18 of the founding affidavit in this application, that:

> "17. I was not aware that I ever received a sms from the CCMA.
>
> 18 I then went through my electronic messages and found Annexure "A1". I have dealt with CCMA matters in the past and in my humble opinion a notice of set down should have the logo of the CCMA on the front page. I attach an example of a bona fide notice of set down hereto as Annexure "A2". I am aware that there are a number of mala fide CCMA set down notices in circulation. I attach an example of same hereto as Annexure "A3". I believe that there are several similarities between annexures "A1" and "A3"."

27. It is not clear on this version if the recipient of that SMS read the message at the time it was sent and disregarded it as a scam, or whether he just did not open it at all. Even if I were to assume that this court has the power to review an award under section 145 under the rubric of a gross irregularity solely because it was granted in the absence of the applicant (as opposed to the applicant availing itself of the primary remedy under section 144 to set aside the award in these circumstances), for the purposes of determining whether the

second respondent committed a gross irregularity in the conduct of the proceedings, this is irrelevant.

28. The second respondent states in paragraph 4 of the award that, approximately thirty minutes after 12:30 on the day of the arbitration, he called the applicant and spoke to Mr Gustav Du Preez, who indicated that he had not received the notice of set down but who confirmed the cell phone number and the email address of the applicant. The second respondent then states in paragraph 6 of the award that he informed Mr Du Preez that he intended on proceeding with the arbitration in the applicant's absence, to which Mr Du Preez stated that he was going to consult his representative.

29. Though the applicant denies that it was the second respondent who called on that day, it confirms that someone from the CCMA called on the day of the arbitration. Paragraph 16 of the founding affidavit states the following:

> "16. I received a phone call from the offices of the First Respondent on the day of the arbitration. The offices of the First Respondent advised that the CCMA informed me via sms and email of the proceedings. I deny that the Second Respondent spoke to me on the day of the arbitration as alleged in paragraph 4 of the award marked "DL1"."

30. The applicant does not deal with the substantive issue raised in these paragraphs 4 and 6 of the award - that the CCMA informed it that notice of the arbitration proceedings had been sent by at least SMS, and that the second respondent intended to proceed with the arbitration on the day. It simply denies that it was the second respondent who made the call. It is clear therefore that the second respondent satisfied himself that the applicant was timeously notified of the date of the arbitration. Despite this, he waited for a further hour for the applicant to arrive before eventually commencing with the proceedings at 14:00 that day. This is beyond reproach.

31. The reasonableness of the explanation tendered by the applicant for why it failed to have proper regard to the SMS relates to whether good cause exists for why the applicant was absent from the arbitration. This goes to the explanation for its default. Because the applicant has not pursued the remedy available to it under section 144 of the LRA and tried to rescind the award, in which event the reasonableness of its explanation may have been relevant in the consideration of whether good cause had been shown, this is not a factor that I need consider now. Ultimately, on the material before him, the second respondent was correct that the applicant had indeed been notified of the arbitration timeously and it failed to attend. The applicant has accordingly not demonstrated that the second respondent committed a gross irregularity in the conduct of the proceedings which rendered the award unreasonable and thus susceptible to review. The applicant's failure in this regard is fatal to this application.

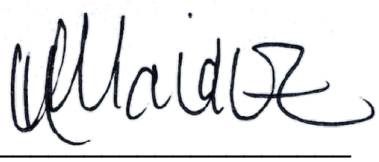
32. As there is no challenge to the award on any other basis, the review application must therefore fail.

33. In the circumstances, the following order is made:

Order

1. The applicant's application to review and set aside the arbitration award issued under case number NC2995-21, is dismissed.

2. There is no order as to costs.



K Naidoo AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate B Hansen

Instructed by: Carlo Swanepoel Attorneys, Cape Town.