Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 866/10

In the matter between:

NANDHAGOPAL NAIDOO **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY **First Respondent**

Mr. A C ZWANE **Second Respondent**

SHELL AND BP REFINERS **Third Respondent**

Heard: **29 May 2011**

Delivered: **30 May 2011**

Summary: Review of arbitration award: Applicant failing to aver factual and legal grounds upon which application based. No reference to or analysis of award in founding affidavit and no rule 7A(8) affidavit filed. Application refused

JUDGMENT

GUSH J

1] The applicant in this matter, who was dismissed by the third respondent on 30 November 2008 for reasons of incapacity, referred a dispute regarding his dismissal to the first respondent who in turn appointed the second respondent to arbitrate the dispute. In this application, the applicant applies to have the second respondent's arbitration award, issued on 8 December 2010 under case number KZNCHEM179 – 08/09, reviewed and set aside.

2] At the conclusion of the arbitration which commenced on 16 July 2009 and was finalised on 4 August 2010, the second respondent in his award concluded that:

a. the applicant was incapacitated;

b. the respondent took adequate steps to ameliorate the position of the applicant;

c. the applicant was properly consulted regarding the alternative to dismissal;

And accordingly that

d. the applicant's dismissal was both substantively and procedurally fair;

And dismissed the applicant's application.

3] The brief background to the matter is as follows:

a. the applicant was employed by the third respondent in December 1981 in its electrical maintenance department until November 1996 and thereafter in the third respondent's stores as a receiving clerk (until November 2000), storeman (until February 2002) and as warehouse

administrator until his temporary medical boarding in January 2007 and dismissal on 30 November 2008 .

b. During the mid-1980s, the applicant developed chest problems variously described during the evidence as sinusitis/allergic bronchitis, a persistent cough, tightness of the chest and throat irritation a post nasal drip, which deteriorated and was eventually diagnosed as asthma.

c During his employment, the applicant had received medical treatment and had been assessed and treated by a number of medical practitioners appointed by the third respondent including doctors Hariparsad, (specialist physician), Van Selm (occupational health consultant) Lalloo (head of the respiratory unit of the University of Kwazulu-Natal medical school), Abdool-Gaffar (specialist physician/pulmonologist) Henderson (cardio-thoracic surgeon). The applicant's deteriorating condition eventually led to the applicant being medically boarded. The application by the applicant was for permanent medical boarding and included a declaration in support of his application in which he stated that he was last able to perform his duties in June 2005 and that he was unable to work on the site, declared that there were no other occupations on-site that he considered himself capable of performing by reason of his lack of training education and competence.

d The medical boarding commenced in January 2007 and was reviewed by the insurers in November 2007 at which time they advised the applicant that they no longer considered him totally disabled and that he was to return to work.

e Whilst it appears as if the applicant's condition had improved during his boarding, the medical examinations of the applicant requested by the third respondent once notice was given by the insurers that they considered the applicant fit to return to work, was to the effect that third respondent site and its location presented a risk to the applicant should

he return to work even if he was placed in the third respondent's office block.

f FAs a result, the third respondent convened an internal incapacity enquiry. The outcome of the disability enquiry was recorded in a letter addressed to the applicant dated 24 November 2008. The letter reads:

> '"from the documentation presented, you are clearly not in a position to perform work on any of [third respondent's sites] due to the risk posed to your health by exposure to the irritants present here. The doctors involved in your case indicate that while you are capable of carrying out work the same time previously performed ...,,even an office job at the refinery will pose a risk your health. ...your services are to be terminated on the basis of incapacity"

g The applicant appealed unsuccessfully against his dismissal and referred a dispute to the first respondent.

4] The arbitration commenced on 16th July 2009 and proceeded on 17th July 2009, 18th and 19th August 2000, 9th and 10th May 2010, and 2nd and 4th August 2010. At the commencement of the arbitration, the parties handed in a pre-arbitration minute which recorded the issues in dispute as follows:

a. Whether the applicant was incapacitated?;

b. Whether adequate steps were taken by the respondent to ameliorate the position and or improve the working environment?;

c. Whether the applicant had been properly consulted by the respondent about alternatives that would or could be taken to ameliorate the position will improve the working environment?

5] In addition to the oral evidence, the second respondent was handed a number of documents including correspondence between the medical practitioners, medical reports and the applicant's application for a disability benefit all of which the second respondent clearly took into account in his award.

6] The second respondent in a comprehensive and very detailed award surveys the evidence and the arguments before thoroughly analysing the evidence and arguments and concluding that the dismissal of the applicant was fair.

7] I do not intend to summarise the extensive evidence placed before the second respondent. The second respondent has clearly and lucidly done this.

8] In his award, the second respondent, respondent, bearing in mind his carefully considered analysis of the evidence and the arguments, variously comments and concludes that:

a. "The applicant's case is not a normal case of an employee who was incapacitated and could carry on working. His incapacity occurred over a long progressive period of time. He was medically boarded and was out of sight for a period of about two years. The Sanlam medical doctors were of the opinion that the applicant was not unfit for administrative work in other more favourable circumstances Dr Abdul-Gaffar indicated that the applicant would be able to work as long as there is no exposure to respiratory irritants or sensitizers. The evidence of Ms Francis is to the effect that in the [third respondent's site] there are respiratory irritants or sensitizers';

b. 'It is incorrect argue that the applicant was certified fit to return to work. The applicant was not unfit for administrative work in other more favourable circumstances. This meant that he could work in an environment where there was no exposure to respiratory irritants or sensitizers. The respondent environment is not favourable to the applicant'.

c. 'The submission that the respondent failed to conduct a full and proper investigation into the applicant's suitability for the office based position and that the respondent simply relied on certain environmental reports and the conclusion of Dr Jagot cannot be sustained on the basis of the evidence on this matter. The conclusions of Dr Jagot are supported by Dr Abdul-Gaffar."'

before making his award.

9] In his founding affidavit the applicant sets out his grounds for review as

follows:

a. ‘The second respondent arbitration award is subject to being reviewed and set aside in that he committed misconduct and/or a gross irregularity and/or exceeded his powers in terms of section 145 of the Labour relations act. The second respondent further failed to apply his mind properly to the evidence before him, which renders his award unreasonable and reviewable’

b. ‘the second respondent failed that proper regard to the evidence before him in that:

i. the internal medical practitioner of the third respondent had not conducted in the clinical test to compile the clinical report in relation to my illness;

ii. a proper test on my lungs was never concluded;

iii. the second respondent unjustifiably found that my health condition was distinguishable from other colleagues with as matter without any medical evidence put before him: and

c. There was no evidence that the third respondent took steps to ameliorate his position in that no other alternatives were offered to him nor any position adapted to accommodate him.’

10] The applicant makes no reference to the contents of the award and does not attempt in any way whatsoever to analyse the award.

11] Despite reserving his right to supplement, amend or vary his founding affidavit, on receipt of the record of the proceedings and the filing thereof the applicant elected to file a rule 7A(8)(a)[1] notice in which he indicates that he stands by his notice of motion and founding affidavit.

12] The applicant’s approach to his application as evidenced by his founding affidavit and Rule 7A(8)(a) notice unfortunately prevails in his replying

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affidavit. In the replying affidavit the applicant takes the matter no further. Neither the transcript of the evidence nor the extensive bundle of documents are considered or referred to. Again as in the founding affidavit, conspicuous by its absence is any reference whatsoever to the contents of the second respondent's detailed and well reasoned award in support of his averment that the second respondent's award is reviewable.

13] It is trite that an application brought in terms of section 145 of the Labour Relations Act[2] (LRA) is not an appeal. It is incumbent upon the applicant in his founding or supplementary affidavit to establish with reference to the arbitrator's award and the record (and the material placed before the arbitrator), the grounds upon which the applicant relies in seeking to have the award reviewed and set aside.

14] The applicant's first ground of review (para 9a above) is not a ground of review but simply paraphrases the provisions of section 145.

15] The second set of grounds of review (para 9b above) is not supported by any reference to the award or the record or bundle of documents and in any event does not accord with the evidence contained in the record and as summarised by the second respondent.

16] The *onus* to establish that the award of the second respondent is reviewable rests on the shoulders of the applicant. Rule 7A of the rules of this Court require an applicant 'desiring to review a decision [of an arbitrator in terms of s145 of the LRA] must deliver a notice of motion supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside'.[3] In so doing, it is incumbent upon the applicant to place such factual and legal grounds that will enable the court to determine the matter. In the matter of *Minnaar v Jugdeow*[4] the court held:

2 Act 66 of 1995.
3 Rule 7A(1) and (2)(c)
4 1964 (1) SA 770 [D and CLD]

> 'in proceedings such as these, [an application] the affidavits take place not only of the pleadings in the trial but also of the evidence... on affidavit, before the Court as will enable it [to determine the dispute]'.[5]

17] In the matter of *Morgan Fashions SA (Pty) Ltd v CCMA and Others*,[6] to which the third respondent's counsel referred Marcus AJ said the following:

> 'The "grounds" of review advanced by the company are stated in stark and unsubstantiated terms. Although the company's standpoint was that it required the record of proceedings in order to motivate the review, the company was, at least in possession of the arbitration award. The award runs to some 11 pages typed in single spacing. It is extremely detailed and, on the face of it, appears to represent a careful and lucid analysis of all the issues in dispute. In the review proceedings, however, there is no attempt whatsoever to analyse the award or to point to any defect in reasoning, error of fact or error of law. The award reflects a consideration by the Commissioner of the documentary evidence that was placed before her'[7]

18] Not only is the second applicant's award "lucid", it contains a detailed exposition of the extensive evidence and documentation presented to him during the arbitration followed by an equally detailed analysis of the evidence and argument. It is startling that the applicant, in his founding affidavit, fails to refer to the award or make any 'attempt whatsoever to analyse the award or to point to any defect in reasoning, error of fact or error of law'. The rules of this court because an applicant when filing a review is unlikely to be in possession of the transcribed record, specifically afforded the applicant an opportunity to file a further affidavit once it is in possession of the record. The rule provides an applicant the opportunity to file "an accompanying affidavit amend[ing] add[ing] to or vary[ing] the terms of the notice of motion and supplement[ing] the supporting affidavit."[8] The applicant having transcribed the record comprising some 600 pages plus approximately 400 pages of documentary evidence elected to file a notice in which he states simply that he "stands by

5 *Minnaar v Jugdeow* at 774 A
6 [1999] 10 BLLR 1063 (LC).
7 At page 1066 para 13.
8 Rule 7A(8)

his notice of motion and founding affidavit".

19] In the heads of argument filed by the applicant counsel, the applicant attempts to make out a case justifying the review and setting aside of the award and makes reference to the record and award. Heads of argument however do not constitute pleadings and the court is left with only the applicants founding and replying affidavits to determine the review ability or otherwise of the second respondent award. In support thereof, Ms Naidoo, who appeared for the third respondent referred the court to an unreported decision of High Court of *Zimbabwe Cargill Zimbabwe Versus Culvenham Trading (Pvt) Limited*[9] where the court held:

> 'In my view, a dispute between the parties can only arise ex facie the pleadings filed with the court ... It is my further view that the dispute cannot be brought to the attention of the court in the heads of argument for counsel cannot plead on behalf of the parties. It is trite that heads of argument are counsel's conclusions and opinion of the facts and law applicable to the facts of the matter. They are not part of the pleadings.'[10]

20] In the circumstances, the court is left with only the applicant's founding and replying affidavits to determine the reviewability or otherwise of the second respondent's award. It is abundantly clear from the applicants founding and replying affidavits that the applicant has not established any basis upon which the court could find that the award of the second respondent was reviewable. The applicant has not discharged the onus of establishing that the second respondent either committed "misconduct a gross irregularity or exceeded [his] powers"[11] or came to a decision to which a reasonable decision maker could not make the only evidence and material placed before him.[12]

21] Mr Anderton who appeared for the applicant specifically argued that the award was reviewable for "process related reasons"[13] in that the second

9 HH 42-2006 HC 5964/05.
10 Page 3.
11 Section 145(2) LRA
12 The test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC)
13 See S A Airways v Blackburn and Others 3 BLLR (2010)

respondent had failed to take into account the evidence and material placed before him in reaching his decision. In circumstances where an applicant wishes to rely on an averment that the arbitrator failed to take into account evidence properly placed before him in reaching his award it should be even more obvious that the applicant should at very least refer to that evidence and those parts of the award which demonstrate the proposition.

22] It is not sufficient for an applicant applying to review and set aside an award of an arbitrator to simply pay lip service to the provisions of section 145 of the LRA. Rule 7A quite obviously requires an applicant to deal fully with such factual and legal grounds upon which the applicant relies **with reference to** the award and evidence.

23] It is abundantly clear from the second respondent award that he specifically took into account the long history of the matter and numerous medical reports and medical evidence relating to the applicants illness and the medical practitioners tests and conclusions regarding his condition as well as such evidence as was led regarding the steps taken to 'ameliorate the position of the applicant', and the evidence regarding the relative condition of his colleagues in reaching his decision.

24] Likewise there is no doubt from the second respondent's award that he, in concluding that the applicant was fairly dismissed, was of the opinion, based on the evidence, satisfied that the third respondent had properly consulted with the applicant prior to dismissing him.

25] As far as costs are concerned, the applicant merely argued that this application should succeed and that costs should follow that result. The third respondent argued that the application should be dismissed with costs given the circumstances and facts surrounding the application. I have no doubt that the bulk of the costs incurred involved perusing the record in preparation. It would not be fair to the third respondent, given the fact that the applicant having filed over 1000 pages of evidence and documentation elected not to refer to such documentation or record in his application to order that each

party pay its own costs. I am satisfied in the circumstances of this matter that is equitable that the applicant be ordered to pay the third respondent's costs.

26] In the circumstances, I make the following order:

The applicant's application is dismissed with costs

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D H Gush

Judge

APPEARANCES

FOR THE APPLICANT: Adv S Anderton

Instructed by Henwood Britter and Caney.

FOR THE THIRD RESPONDENT: Adv L Naidoo

Instructed by Edward Nathan Sonnenbergs.