



Not Reportable

**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Case no: D 183/2010

In the matter between:

**SIFISO CYRIL MSIBI**

**Applicant**

and

**CELL C (PTY) LTD**

**First Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**COMMISSIONER N HARILALL**

**Third Respondent**

**Heard: 30 October 2012**

**Delivered: 15 August 2013**

**Summary: Review: Application dismissed**

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**JUDGMENT**

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GUSH J

[1] The applicant in this matter applies to review and set aside an arbitration award issued by the third respondent who found in his award dated 22 February 2010, that the dismissal of the applicant by the first respondent was substantively and procedurally fair. The applicant applies for the award to be substituted with an order that the dismissal of the applicant was substantively and procedurally unfair and that the first respondent be ordered to retrospectively reinstate the applicant.

[2] Prior to his dismissal on 14 December 2007, the applicant, who had commenced his employment on 1 May 2007, was employed by the first

respondent as an “Area Channel Executive”. The applicant’s responsibilities involved the processing of applications for “container products”.

- [3] Apparently, according to the record and pleadings, the first respondent awards contracts to successful applicants to operate community telephone services from containers. These services are operated as a business and are subject to certain conditions being met. The applicant’s duties involved the processing of these applications.
- [4] A certain Mr Mtolo applied to the first respondent for permission to operate such a container business and the applicant processed his application. Following an inspection of the site on which the container was to be situated, Mtolo’s application was refused as there were other similar containers businesses in the vicinity of Mtolo’s proposed site. Mtolo then resubmitted his application during September 2007.
- [5] Pursuant to an allegation by Mtolo that the applicant had solicited from him an amount of R3000 in order for his application to be approved, the first respondent charged the applicant with the following misconduct:
 

‘Dishonesty, in that you used your position as a Main Market Channel ACE of Cell Cs CST Department to enrich yourself, in that you requested an amount of R3000 from a CST customer in order to get his application for a CST container approved. You collected the R3000 from the CST customer Mr Mtolo and then motivated for his application to be approved’.
- [6] Following a disciplinary enquiry, the applicant was found guilty of misconduct and dismissed. Dissatisfied with his dismissal, the applicant referred a dispute to the second respondent who in turn appointed the third respondent to arbitrate the dispute. At the conclusion of the arbitration, the third respondent issued an award in which she dismissed the applicant’s application having found that the dismissal of the applicant was substantively and procedurally fair.
- [7] The applicant sets out the following grounds of review in his founding affidavit. The affidavit commences by paraphrasing provisions of section 145(2)(a) (i) (ii) and (iii)<sup>1</sup> and averring that the award is reviewable ‘on one or more of

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<sup>1</sup> Act 66 of 1995.

these grounds" and by averring that the award is "unjustifiable in relation to the evidence properly produced at the hearing and in relation to the reasons given for it and that it is an award that no reasonable Commissioner would make'.

- [8] This is followed by a series of general statements suggesting the third respondent failed to consider and properly evaluate the relevance and credibility of admissible evidence and argument.
- [9] In his founding affidavit, under the heading "The Crux of the Matter" the applicant suggests that '[i]t was a gross-irregularity for the CCMA Commissioner to rely on the evidence of Mr Mtolo which was riddled with self contradictions, inconsistencies etc. The CCMA commissioner simply ignored my evidence and all the evidence contradicting Mr Mtolo's version'.<sup>2</sup>
- [10] The applicant having received the record from the second respondent filed a supplementary affidavit. The applicant in an attempt to supplement his grounds of review makes only the following three statements:
- (a) Firstly, that the third respondent 'did not take into account the fact that Mr Mtolo conceded that if the phone calls he alleges were made by me into his phone were not showing in his call report then his evidence should not be relied upon.. Mr Khoza whose task was to witness the exchange of cash fails to wait for the cash to change hands and did not even see the person who is alleged to be the payee.'<sup>3</sup>
  - (b) Secondly, that 'my evidence was corroborated by Skosana in all respects that I was at the call centre for training. There is no reason to doubt the evidence of Skosana who is still employed by the employer party...'<sup>4</sup>
  - (c) Thirdly, that 'my telephone records explain exactly where I was at all material times. On the other hand Mtolo shifts and changes the time he alleges I met with him or phoned him. At the end of the day some of the

<sup>2</sup> Founding affidavit paragraph 10

<sup>3</sup> Supplementary affidavit paragraph 7

<sup>4</sup> Supplementary affidavit paragraph 8

crucial telephone calls he alleges I made into his cellphone not appear in his call report’<sup>5</sup>

- [11] The supplementary affidavit then concludes with the suggestion that ‘there are a lot of contradictions between the evidence of Mtolo and that of Khoza material respects’.
- [12] Conspicuous by its absence in both the applicant’s founding and supplementary affidavits is any reference whatsoever to the award itself. This disturbing absence of any particularity with reference to the award itself is exacerbated by the applicant’s failure to refer to the record or any portion thereof. Rule 7A of the rules of this court prescribed that an applicant wishing to review a decision of an arbitrator must file “an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision ... set aside.”<sup>6</sup> The rule expressly permits an applicant to deliver a supplementary affidavit after a transcript of the record has been filed “amend[ing] add[ing] to or vary[ing] the terms of the notice of motion and supplementing the supporting affidavit.”<sup>7</sup>
- [13] It goes without saying that to comply with Rule 7A it is incumbent upon an applicant to at least relate such grounds of review as may set out in the founding and supplementary affidavits to those aspects of the award itself that the applicant believes renders it defective and subject to review. The applicant in this matter does no such thing.
- [14] A consideration of the award reveals that the third respondent sets out the background to the matter before recording in detail a survey of the evidence. This survey summarises the evidence of the seven witnesses and gave evidence for the first respondent and that of the applicant and his two witnesses. The applicant does not take issue with the third respondent’s summary of the evidence save for the general and unsubstantiated averment that the third respondent did not take into account certain of the evidence.
- [15] The third respondent, in the award, then proceeded to analyse the evidence and the arguments. In this analysis, the third respondent carefully and in detail

<sup>5</sup> Supplementary affidavit paragraphs 9.

<sup>6</sup> Rule 7A(2)(c)

<sup>7</sup> Rule 7A(8)(a)

dealt with the evidence, the probabilities and credibility of the witnesses before coming to the conclusion that the probabilities favoured the first respondent. Again it must be emphasised that the applicant at no stage takes issue with any of the specific aspects of the third respondent's analysis.

- [16] There is no apparent reason why the applicant has seemingly ignored the specifics of the award or taking issue with the conclusions and analysis by the third respondent of the evidence by reference to the award itself or the transcript of the evidence other than the only likely conclusion that the applicant did not read the record or consider the merits of the award other than the outcome. A glaring example of this is the applicant's averment regarding the evidence of Skosana. The applicant avers that Skosana's evidence corroborated his evidence. In her award,<sup>8</sup> the third respondent specifically dealt with Skosana's evidence and found his evidence improbable. This the applicant conveniently ignores.
- [17] An applicant should at very least deal in the founding or supplementary affidavit with his or her grounds of review by reference to the award and those aspects thereof on which he relies in support of his application to have the award reviewed and set aside, and as is the case in this matter where the grounds of review in the founding affidavit are mere generalities at least explain with reference to the transcript what aspects of the award with which the applicant takes issue.
- [18] The applicant's founding and supplementary affidavits are to be more in keeping in an appeal against the award. The test in determining whether an award is reviewable is:
- '... is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.'<sup>9</sup>
- [19] It is not whether the arbitrator was correct or not but whether the award satisfies the above test. The applicants' general complaints regarding the award, couched as grounds of review, do not take account of or deal with the

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<sup>8</sup> At paragraph 133

<sup>9</sup> *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA) at page 2650.

third respondent's detailed "survey of the evidence" or "analysis of the evidence and arguments".

- [20] There is no basis upon which it can be held that the third respondent did not take into account the material placed before her. The third respondent's award considered and analysed the evidence having summarised it before concluding that the version presented by the first respondent and its witnesses is more probable before concluding that the dismissal of the applicant was both substantively and procedurally fair. The applicant in the face of this simply accuses the third respondent generally, without reference to any of the third respondent's analysis or conclusions, of failing to take into account the evidence reaching and reasonable conclusions and relying on evidence that the applicant suggests should not be relied upon.
- [21] It is not sufficient for the applicant, particularly bearing in mind the test to be applied when determining whether the award is reviewable by:
- (a) firstly simply suggesting that there is a 'defect in [the] arbitration proceedings' by paraphrasing the meaning of "defect" as set out in the Act; and/or
  - (b) accusing the third respondent of reaching a decision which a reasonable arbitrator could not come to based on the material placed before her without identifying the "material" with reference to the award or transcript or both in order to show which conclusions or what analysis the applicant regards as unreasonably having led to the conclusions reached by the third respondent.
- [22] I am not satisfied that the applicant has demonstrated in any way whatsoever that the third respondent's award is reviewable. On the contrary, a careful consideration of the award and the record shows not only that the third respondent's award satisfies the test set out above and particularly took into account the evidence adduced by the applicant and first respondent, but analysed this evidence before reaching a conclusion on a balance of probabilities that the dismissal of the applicant was both substantively and procedurally fair
- [23] As regards costs, I am not satisfied that a cost award in this matter is justified.

[24] In the circumstances, and for the reasons set out above, I make the following order:

- (a) the applicant's application is dismissed;
- (b) there is no order as to costs.

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D H Gush  
Judge

#### APPEARANCES

APPLICANT:

C A Nel

Instructed by Japhta Inc

FIRST RESPONDENT:

F A Boda

Instructed by Cliffe Decker Hofmeyr