THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2863/19

In the matter between:

THOKA MAROKWANE PATRICK KGOALE **Applicant**

and

THABA CHWEU LOCAL MUNICIPALITY **First Respondent**

THE CCMA **Second Respondent**

GLEN CORMARCK N. O **Third Respondent**

Heard: **05 August 2021**

Delivered: **11 August 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 11th August 2021 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid-19 lockdown, this application was determined by hearing of oral submissions virtually and the parties agreed to the arrangement. Application to review an arbitration award. Where a commissioner did not receive evidence a proper arbitration did not occur. An arbitration award issued without hearing evidence is a nullity. Held: (1) The arbitration award is reviewed and set aside. (2) The dispute is remitted back for hearing *de novo*. (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed review application in terms of which Thoka Marokwane Patrick Kgoale (Kgoale) seeks to review and set aside an arbitration award which found that his dismissal was substantively fair but procedurally unfair. Commissioner Cormack (Cormack) ordered Thaba Chweu Local Municipality (TCLM) to pay to Kgoale an amount equivalent to one month's salary as compensation for the procedural unfairness suffered by him. Kgoale was aggrieved by the arbitration award and launched the present application. Prior to hearing submissions virtually, I enquired from the parties whether there was arbitration proceedings in this matter. Mr Mofokeng appearing for Kgoale submitted that there was. This position was not fully supported by Mr Mkhawane appearing for the TCLM. Since the Court was not in a position to rule on the issue raised *mero motu*, particularly because Mr Mofokeng made certain submissions, the Court allowed submissions on the merits of the review, subject to the rider that if the Court is not persuaded by Mr Mofokeng in particular the arguments will unfortunately go to waste. Parties were afforded a further opportunity to make submissions on the issue by 6 August 2021. Such submissions were received from Mr Mofokeng only and shall be dealt with in this judgment should a need arise.

Background facts

[2] Given the view I take at the end, a full rendition of the facts of this case is obsolete. Essentially, on 30 April 2019, Kgoale was dismissed by TCLM on account of misconduct. Aggrieved by his dismissal Kgoale referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal. Conciliation failed to resolve the dispute.

Kgoale requested the CCMA to resolve the dispute through arbitration. Arbitration commenced on 15 October 2019. Cormack directed the parties to hold a pre-arbitration meeting within the contemplation of the rules of the CCMA. The parties duly obliged. Thereafter, the parties together with Cormack agreed that the issues in the dispute are legal in nature and it was not necessary to receive evidence for and against the alleged unfair dismissal. As a substitute, parties and Cormack agreed that documents will be submitted and written submissions will be made.

[3] On 3 November 2019, Cormack published an arbitration award and reached the findings set out above. On 18 December 2019, the present review application was launched by Kgoale.

Grounds for review

[4] Kgoale raised a barrage of grounds to review the arbitration award. All of those could be considered by this Court had a proper arbitration taken place. In the Court's view it shall be unnecessary to consider each of the punted for grounds in an instance where no arbitration proceedings took place.

Evaluation

[5] The powers of this Court to review arbitration awards emanates from section 145 of the Labour Relations Act[1] (LRA). In terms of subsection (1) thereof, if a party alleges a defect in *any arbitration proceedings*, that party may apply to this Court for an order setting aside the arbitration award. The section suggests that there must have been arbitration proceedings before an arbitration award may be set aside as being defective. Prior to the passing of the LRA, there existed a statute in *pari materia* known as the Arbitration Act (AA)[2]. The AA defined what an arbitration proceedings are. It states that it means proceedings conducted by an arbitration tribunal

[1] No. 66 of 1995, as amended.
[2] Act 42 of 1965.

for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement. By definition, the grammatical meaning of arbitration is the process by which the parties to a dispute submit their differences to the judgment of an impartial person.

[6] The LRA does not define the word arbitration nor the phrase arbitration proceedings. In law, proceedings means where evidence is taken for the purposes of determining issues of fact and reaching a decision based on that evidence. In terms of section 191 (5) (a) of the LRA an unresolved dispute about unfair dismissal must be resolved by arbitration. In specific terms the section provides that the Commission must arbitrate the dispute at the request of the employee. Section 136 (1) (a) of the LRA specifically provides that if the LRA requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate the dispute.

[7] So it is beyond any doubt that the statutory functions of Cormack was to arbitrate the dispute. Failure to arbitrate the dispute amounts to failure to perform the statutory function. In terms of section 138 (1) of the LRA, a commissioner is obliged to deal with the substantial merits of the dispute with the minimum of legal formalities. In law, merits means the factual content of a matter. In my view absent facts, a commissioner cannot deal with the substantial merits of a dispute. The Labour Appeal Court in *Ramabele v Head of Department – Free State Provincial Department of Education and others*[3], had the following to state:-

> "[34] In the consideration of the fairness of the dismissal, the arbitrator was required to have regard to the totality of the circumstances[4]. This required the arbitrator to have regard to the allegations raised, the evidence put up, to resolve factual disputes in the manner detailed in *SFW Group Ltd v Martell et Cie and*

[3] (CA16/2019) 2021 ZALCCT 51 (3 August 2021).

[4] *Sidumo and Another v PPM Ltd and others* 2008 (2) SA 24 (CC).

> *others*[5] and determine whether the allegations against the appellant had been proven on a balance of probabilities."

[8] Contrary to what is required above, what happened in the arbitration proceedings involved herein, parties submitted only bundles of documents. Of critical importance, the parties agreed in the pre-arbitration minutes that the documents are only what they purport to be. No oral evidence was led. Generally documents constitute hearsay evidence[6]. Such evidence is inadmissible unless the requirements of section 3 of the Law of Evidence Amendment Act[7] (Evidence Act) are met. An award based on inadmissible evidence is reviewable in law[8].

[9] Mofokeng argued that what Mr Cormack received was hearsay evidence and such evidence is admissible because the parties agreed to submit documents. I cannot agree with this submission. Section 3 (1) (a) of the Evidence Act is perspicuous. It refers to an agreement to the admission of hearsay evidence as evidence in such proceedings. The parties in this matter did not agree that hearsay evidence will be admitted as evidence[9]. What they and Cormack did was to agree to a process of how the arbitration will be undertaken. Ordinarily, the agreement contemplated in section 3 (1) (a) has to be between the litigants to the exclusion of the decision maker. The decision maker becomes the receiver of such evidence to enable him or her to make a decision on the dispute.

[10] Further, reliance cannot be placed on section 34 (1) of the Civil Proceedings Act (CPA)[10] as Mr Mofokeng submitted. The section deals specifically with a statement which upon production of an original thereof may be admitted as evidence subject to certain requirements being met. Section 34 (2) of CPA makes it clear that the presiding officer, if satisfied,

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[5] 2003 (1) SA 11 (SCA) at para 5.

[6] See section 34 of the Civil Proceedings Evidence Act 25 of 1965 and *MEC for Police, Roads and Transport v Hieronymus* Case (A51/2016) [2017] ZAFSHC 131 (17 July 2017)

[7] Act 45 of 1988.

[8] See: *Exxaro Coal (Pty) Ltd v Chipana and others* [2019] 10 BLLR 991 (LAC).

[9] See: *Taku v Sekhanisa and Others* [2019] 6 BLLR 588 (LC) at para 55.

[10] Act 25 of 1965.

would admit such a statement as evidence. There is no indication in this matter as to whether any statement was admitted as evidence, let alone that the internal disciplinary hearing transcript was admitted as evidence. The transcript only formed part of the documents that are what they purported to be. All what Cormack was to note is that which is purported to be is a transcript, no more and no less. If one says something is purported to be a particular thing it means that one claims the thing to be that although that claim may not be believed.

[11] Section 17 of the CPA provides that a trial of any person may be proved by production of a document certified by the clerk or registrar. Ordinarily records of internal disciplinary hearings are certified by the transcribers for veracity and often times with a number of inaudibles. For that reason the questions raised by Whitcher J in paragraph 45 of the judgment must be addressed by the parties before the transcript may qualify as hearsay evidence. In *casu*, parties simply lumped Cormack with documents purporting to be a transcript.

[12] Cormack in this matter did not receive any admissible evidence. In the absence of an agreed stated case, a commissioner has no option but to receive evidence in order to fairly resolve a dispute[11]. In *Mbhele v MEC for Health for Gauteng Province*[12], the Supreme Court of Appeal (SCA) stated the following:

> "[21] …A trial Court must have before it, a stated case in which both facts and issues are crisply set out in order for the proceedings to be truly curtailed…"

[13] In a stated case proper, a decision maker is restricted to the consideration of the law alone and is required to accept the statement of facts submitted by the parties. No statement of facts was submitted by the parties in this matter. Cormack did not only consider questions of law but he made

[11] *Arends and others v SALGBC and others* [2015] 1 BLLR 23 (LAC)
[12] (355/2015) [2018] ZASCA 166 (18 November 2018)

certain factual conclusions in favour of the one party and obviously to the disadvantage of the other party. In terms of section 138 (2) of the LRA parties have a right to give evidence, call witnesses, question the witnesses of any other party. True, all of these right are subject to the discretion of Cormack as to the appropriate form of the proceedings, but they may not be denied to the parties. A commissioner may decide to adopt an inquisitorial or accusatorial form. In both those forms, evidence must be given. In law, evidence is a means by which an allegation may be proven. As an example, substantive fairness involve the factual question whether dismissal as a sanction is an appropriate and fair one. There, a commissioner applies his or her own sense of fairness and does not have to defer to the decision of an employer. Therefore oral evidence or an agreed stated case is crucial, owing to the fact that the entitlement to question the evidence will be seriously curtailed. What the parties and Cormack agreed to is clear. There is no need to have regard to what was said in *Jordaan v Trollip*[13] in order to establish any meeting of minds. What is clearer is that the agreement was about the process as opposed to admission of hearsay evidence within the contemplation of section 3 (1) (a) of the Evidence Act.

[14] In the process agreed to by Cormack and the parties all of those rights, acquired in terms of section 138 (2) of the LRA, remain a pipe dream. In the final analysis since Cormack failed to conduct arbitration proceedings an award issued without conducting arbitration proceedings is a nullity in law[14]. Section 138 (7) of the LRA, clearly suggest that an award is capable of being issued 14 days of the conclusion of arbitration proceedings. Where no arbitration proceedings occurred, as it is in this case, an arbitration award is incapable of being issued. In fact it is impossible for a commissioner to arbitrate a dispute where unfairness is alleged without receiving evidence and/or some agreed facts. In his award, Cormack stated that the purpose of the arbitration was to determine whether Kgoale was fairly dismissed. He recorded that Kgoale disputed both procedural

[13] 1960 1 PH A25 (T)
[14] *Department of Agriculture & Rural Development: Limpopo v Phooko and others* (JR2007/17) [2019] ZALCJHB 190 (2 August 2019)

and substantive fairness of his dismissal. By considering the documents and written submissions, Cormack failed to arbitrate the dispute of unfairness as alleged by Kgoale. Not having received admissible evidence or evidence at all, Cormack reached the following perplexing findings:

> "[21] When taking all the evidence into consideration in a holistic fashion…The misconduct has been established by evidence as recorded above and I have no hesitation in finding that the overall sanction of dismissal was warranted."

[15] It is perplexing as to which evidence is Cormack referring to when no oral evidence was led, apparently on his advice to the parties.[15] I must hasten to mention that a commissioner does not sit as a review body of the internal proceedings. In appropriate circumstances, the transcript of the internal hearing may serve as evidence to determine the fairness of the arbitration processes on the simple basis that it being hearsay evidence section 3 (1) (a) of the Evidence Act may legitimize it. Those circumstances were considered by my sister Whitcher J in *Minister of Police v M and others.*[16] At paragraph 43 of the judgment Whitcher J pertinently cautioned as follows:

> "[43] I do not mean to suggest that transcripts take the place of live witnesses or that arbitrations should not function as hearings *de novo*. The issue is that in *appropriate factual circumstances*, a single piece of hearsay, such as a transcript of a properly run internal hearing may carry sufficient weight to trigger the duty in the accused employee to rebut the allegations contained in the hearsay."

[16] In order to avoid confusion, Whitcher J tabulated at paragraph 45 of the judgment the circumstances under which the single piece hearsay

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[15] At paragraph [6] it is recorded by Cormack that "*After further engagements with the parties and giving consideration to the voluminous documentation…including two volumes of the transcribed disciplinary enquiry…it was agreed the parties would merely submit Heads of Arguments as nothing would be submitted through oral evidence of witnesses not already covered in the documentary evidence submitted.*

[16] [2017] 38 ILJ 402 (LC).

evidence would operate. Cormack did not accept the transcript of the internal hearing under the single piece of hearsay principle as coined by Whitcher J. In any matter involving dismissal based on misconduct, arbitration being a hearing *de novo*[17], it is the duty of a commissioner to establish through admissible evidence that (a) the employee is guilty or not guilty of the misconduct that led to his or her dismissal; (b) if guilty, whether dismissal as a sanction is fair, by applying one's own sense of fairness; and (c) where necessary consider an appropriate remedy in light of the evidence led. Without hearing evidence or having a stated case proper, it is impossible for a commissioner to determine the fairness of a dismissal[18].

[17] In this Court on review, this Court must be satisfied that an arbitration award is reasonable or not, by having regard to the evidence presented at arbitration proceedings. In the absence of proper evidence, this Court would equally not be in a position to perform its judicial review powers. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[19], the Labour Appeal Court (LAC) stated the following:

> "[16] In short: A review Court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to the conclusion which was reasonable to justify the decisions he or she arrived at."

[18] In the absence of facts, in the form of evidence, being presented, what is there to evaluate? Nothing. Ultimately, this dispute must be referred back to the CCMA to be properly arbitrated by another commissioner other than Cormack. As a concluding remark, the judgment of *Arends and others v SALGBC and others*[20] was published in the law reports in 2015. The principle in *Arends* is conspicuously perspicuous and the facts therein does not distinguish its application in any matter where arbitration was

[17] *Motor Industry Staff Association and another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and others* [2013] 34 ILJ 1440 (LAC) at para 45.
[18] *SA Social Security Agency v Nehawu obo Punzi* [2015] 36 ILJ 2345 (LC).
[19] [2014] 35 ILJ 943 (LAC).
[20] [2015] 1 BLLR 23 (LAC).

conducted without receiving oral evidence and in the absence of a stated case. All other cases that followed *Arends* were following the principle as such there is no room for distinction. It is expected by now that commissioners cannot absent a stated case conduct an arbitration in a fair manner. The management of the CCMA must do something about these type of processes, which are increasingly becoming fashionable, that are not conducted by arbitrators in terms of the requirements of the LRA. *Arends* made it absolutely clear that commissioners must not allow such to happen. Section 1 of the LRA requires that labour disputes must be resolved quickly and effectively. Clearly this dispute must have been resolved effectively by 2019. Three years later, this Court finds itself in an invidious task where it is required to discharge its statutory duties without a proper arbitration proceedings. This Court has no other option but to remit the matter[21]. The Constitution of the Republic of South Africa, 1996 and the LRA enjoins this Court and other forums to resolve labour disputes without undue delay[22].

[19] In the results the following order is made:

Order

1. The award issued by Commissioner Glen Cormack dated 3 November 2019 under case number MP4226-19 is hereby reviewed and set aside.
2. The dispute is remitted back to the CCMA to be arbitrated by another commissioner other than Cormack.
3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

[21] See para 43 of *Ramabele*. Since the issue of the fairness of the dismissal of Kgoale was not canvassed at all.

[22] These sentiments were expressed in the judgment of *SAMWU v DEMAWUSA obo Members and others* (JR 2494-19) dated 15 February 2021.

Appearances:

For the applicant:	Mr X Mofokeng
Instructed by:	T Majang of Majang Attorneys, Johannesburg.
For the First Respondent:	Mr E Mkhawane.
Instructed by:	Mculu Incorporated Attorneys, Hazyview.