IN THE HIGH COURT OF ESWATINI

CASE NO. 1011/2021

HELD AT MBABANE
In the matter between:

KUKHANYA (PTY) LTD t/a KUKHANYA CIVIL ENGENEERING CONTRACTORS	**APPLICANT**
And	
MCINISELI MATSEBULA	**1ST RESPONDENT**
VELAPHI Z. DLAMINI N.O	**2ND RESPONDENT**
ARBITRATION COMMISSION	**3RD RESPONDENT**

NEUTRAL CITATION: *KHUKHANYA (PTY) LTD t/a KUKHANYA CIVIL ENGENEERING CONTRACTORS VS MCINISELI MATSEBULA & 2 OTHERS (1011/2021) [2023] SZHC - 212 (11/082023)*

CORAM: **BW MAGAGULA J**

HEARD: **16/06/2023**

DELIVERED: **11/08/2023**

SUMMARY: *Civil Law – Application for a review in terms of Section 19 (5) of the Industrial Relations Act of 2000 – Requirements for a review application restated.*

Held: *The Arbitration applied his mind to all the issues that were before him. The Applicant's application fails to pass the legal muster that would enable the court to find that the Arbitrator reached his decision capriciously or mala fide. Application dismissed with costs.*

JUDGMENT

BW MAGAGULA J

BACK GROUND FACTS

[1] The First Respondent is a former employee of the Applicant, having been employed through a fixed term contract on the 1st of February 2017. The contract was set to lapse on the 31st of December 2018. This contract was for a period of 23 months.

[2] During the life time of this contract, the Applicant is alleged to have experienced a number of financial difficulties which impacted on the operations of its business. To this end, a number of meetings were held with the staff of the Applicant including the First Respondent. The subject matter was ways to get around the financial ruin. A number of alternatives are said to have been discussed and explored by both management and staff, some of these included pay cuts and layoffs. These alternatives were meant to save the jobs of the employees and improve the financial situation of the Applicant.

[3] However, these alternatives proved futile. The Applicant is alleged to have then been faced with the difficult task of having to terminate some of the employees, due to the unavailability of work. The Applicant position was identified as one of the position which could be terminated.

[4] This was more so because, although there had been an intention to renew his contract, the contract had not been signed by the parties. The contract between Applicant and First Respondent had lapsed on the 31st of December 2018. Preceding the lapse of this contract, the parties between October and November 2018 had written to each other on the intention to renew the contract. The last correspondence by the Applicant indicated that a contract would be singed on January 2019.[1]

[5] In the absence of a written contract, the relationship between the parties was regulated by the previous contract terms and conditions, save for the duration. As it will appear later on in the judgment, the Arbitrator had a pre-arbitration meeting with the parties, where the issues for determination were streamlined. Including the duration of the employment.

[6] On the 29th of April 2019, the Applicant formally gave its notice that it was terminating the services of the First Respondent due to its financial position. The First Respondent was aggrieved by the decision to terminate its services

[1] See page 19 of the documentary evidence tendered before the arbitrator.

and then reported a dispute with CMAC which was then arbitrated by the Second Respondent.

[7] At arbitration the First Respondent claimed amongst other things the salary in respect of the remainder of the contract which he contended was for eight months. The Second Respondent found in favour of the First Respondent. He also found that there was a contract existing at the time between the Applicant and the Fist Respondent, therefore the former was entitled to the remainder of the contract. Secondly, the Second Respondent found that the deductions effected on the 1st Respondent's terminal benefits had been unlawful.

ISSUES FOR DETERMINATION

[8] The Applicant seeks to review the Second Respondent's arbitration award made on the 28th April 2021. The basis being that it is grossly unreasonable to such an extent that the only conclusion that can be drawn is that the commissioner failed to apply his mind to the issues before him. The court is therefore in essence is called upon to determine if there was any failure or error which the Second Respondent relied on, which led to an unreasonable outcome. Further, if there is such a failure or error is it reviewable.

THE APPLICANTS CASE AND GROUNDS FOR REVIEW

[9] The crux of the Applicant's basis for the review is that the findings by the Second Respondent that the First Respondent was dismissed and that such

dismissal was substantially and procedurally unfair, are reviewable at common law. The basis as alleged in the founding affidavit, is that the reasons are so grossly unreasonable so as to warrant the inference that the arbitrator did not apply his mind to the evidence and facts presented to him[2]. The Applicant also contends that the findings of the arbitrator are not reconcilable with the evidence and common facts presented before him.

[10] The Applicant proceeds to substantiate its case as follows;

10.1 *"The Applicant faced financial difficulties due to non-payment it's clients upon completion of works and scarcity of new projects. As a result the Applicant placed its administrative staff on unpaid leave of absence and layoffs. Consequently, I find that the Respondent has proved on a balance of probabilities that it had a bona fide and commercial reason for contemplating retrenchment of its administrative employees. Nevertheless the less the Respondent sill had the onus of proving that it was fair and reasonable to only select the Applicant for retrenchment out of twelve (12) administrative staff."*

[11] The Second Respondent having found that the Applicant had proved on a balance of probabilities that it was facing financial hardship and that this was a reason to implement retrenchment, then went on to award the First Respondent on the basis that the decision was substantively unfair. This

[2] See paragraph 25

renders the award grossly unreasonable such that it can be inferred that the arbitrator failed to apply its mind to the facts and evidence before it.

[12] The Applicant having established that there was a fair reason for the termination of the services of the First Respondent, and that it being common cause that all executive employees of the Applicant had been engaged by management to discuss the issue of financial hardship faced by the Applicant and potential retrenchments, the finding that the termination of the First Respondent's contract was procedurally unfair is therefore grossly unreasonable. The Applicant argues further that there is no evidence upon which the finding of procedural unfairness is based.

[13] The other leg of the Applicant's argument is that the Second Respondent's finding that the deductions relating to unpaid leave were unlawful is grossly unreasonable. To such an extent that it may be inferred that the Second Respondent failed to apply his mind to the issues before him. Applicant contends that it was undisputed that the Applicant was going through a financial turmoil, that the Applicant had engaged its employees including the First Respondent on possible avenues to sustain itself during this difficult financial period. That the employees including the First Respondent consented to unpaid leave.

[14] It is also contended by the Applicant that the situation was temporary and it would reimburse the employees in due course, once it has received payments from clients. The finding by the Second Respondent that the First Respondent

was entitled to payment of the amount without any evidence that the Applicant had been paid by clients or that its financial position had improved, is said to be grossly unreasonable and without basis. The finding is alleged not to be unsupported by any evidence. The reimbursement was conditional, based on the improvement of the financial status of the Applicant.

1ST RESPONDENT'S ARGUMENTS

[15] The 1st Respondent argues contra, that it is common cause that he was employed by the Applicant initially on a written fixed term contract commencing 1st February 2017, lapsing on the 31st December 2018. This initial contract was renewed before it lapsed. Reference has been made to Annexure **"PF2"** at pages 9, 81 – 94 of the Book of Pleadings (The Book) and Page 41, paragraph 25 of the transcribed record ("The Record").

[16] The parties are said to have not been in agreement on whether or not the termination of the fixed term contract was substantively and procedurally fair during the arbitration.

[17] The following pertinent and significant concessions are alleged to have been made by Applicant's witnesses under cross-examination during the arbitration:

17.1 That First Respondent's contract was renewed;[3]

[3] See: Page 289 of the record, paragraph 15

17.2 That salary deductions were made pursuant to the Chairman's Memorandum dated February 2018;[4]

17.3 That she had not seen First Respondent meeting with Chairman prior to the Memorandum of February 2018 and that she had no document to prove the alleged meeting she had referred to;[5]

17.4 That there had been no prior consultation with other employees regarding the deductions;

17.5 That in terms of the minutes dated 7th March 2018 nothing shows that First Respondent was consulted prior to the deductions;[6]

17.6 That the time sheet of AM Consultancy relates to payroll processing which was First Respondent's responsibility;[7]

17.7 That there is no express provision for layoff in the employment contract;[8]

17.8 That there was no written agreement authorizing the deducting of E1, 092.50;[9]

17.9 That there was no consultation during the layoff period, and[10]

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[4] See: Page 290 – 291 of the record
[5] See: Page 293 of the record
[6] See: Pages 297 – 298 of the record
[7] See: Page 306 of the record

[8] See: Page 311 of the record.
[9] See: Page 313 of the record.
[10] See: Page 322 of the record

17.10 That there is no document supporting mutual consent to terminate the contract.[11]

17.11 AM Consultancy was called to train Siphilile (Applicant's Corporate Affairs Officer) on the job on how to run the payroll responsibilities; and[12]

17.12 AM Consultancy did the work referred to in the invoice whilst at Respondent's premises (the running of payroll included).[13]

[18] The Applicant has further referred the court to an authority being, **John Grogan**[14], he postulate the following regarding fixed term contracts.

> ***"The life of a contract may be determined either by stipulating a date for termination, or by stipulating a particular event the occurrence of which will bring the contract to an end. Where the parties have indicated that the contract will terminate on the occurrence of a particular event or the completion of a particular task, the onus rests on the employer to prove that the event has occurred or the task was in fact completed. Unless otherwise agreed, a fixed term contract cannot be terminated during its currency without good cause".***

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[11] See: Page 325 of the record
[12] See: Pages 345 and 352 of the record
[13] See: Pages 355 – 356 of the record.
[14] See: **WORKPLACE LAW 9TH EDITION. JUTA AND CO AT PAGES 43 – 45 "FIXED TERM CONTRACTS"**

[19] The court has further been referred to the contract of Employment at Clause 23.2 concerning termination. It provides that:

> ***"23.2 This contract may also be terminated in the following manners:***
>
> ***(A) Mutual consent***
>
> ***This contract of employment may be terminated by either party upon one (1) month written notice...."***

[20] The 1st Respondent continue to argue that there was no mutual consent to terminate First Respondent's fixed term employment contract. Also, the termination was not in accordance with the Employment Act. Applicant conceded that there was no document or minutes to support consensual termination. Accordingly, the unilateral termination is unlawful.

[21] The 1st Respondent insists that the Arbitration was correct to find that termination of services was substantively unfair. The court has been referred to a Labour Appeal Court decision in South Africa[15] it was held as follows:

> ***"...There is no doubt that at common law a party to a fixed term contract has no right to terminate such contract in the absence of repudiation or a material breach of contract by the other party. In other words, there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale is clear. When parties agree that***

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[15] See: **Buthelezi v Municipal Demarcation Board (JA37/2002) [2004] ZALAC 20 (22nd September, 2004) at pages 5 – 6 paragraph [9].**

their contract will endure for a certain period as opposed to a contract for indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract. And they plan, as they are entitled to, in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of the contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of a material breach of such contract by the other party."

[22] This judgment was quoted with approval in **Dlamini v Swaziland United Bakeries (Pty) Ltd (200/2002) [2007] SZIC 79 (15th May, 2007) at paragraph 55.**

[23] The 1st Respondent also contend that the Applicant's evidence during the arbitration was that it renewed First Respondent's contract in good faith with the hope that its financial situation would improve. 1st Respondent therefore

argues that Applicant has only itself to blame in renewing the contract as it is the one that concluded the renewal on its own volition and with the attendant risks to such a decision. Accordingly, it is submitted that Applicant cannot seek now to avoid the consequences of its decision to renew. The basis for the termination is neither here nor there in the circumstances. First Respondent should not be made to suffer because of Applicant's poor judgment. It is contended that Applicant has dismally failed to prove that the termination was in terms of the written contract of Employment or in terms of the law. First Respondent argues that he testified that his termination came after he had lodged a claim at the Industrial Court regarding his terminal benefits arising from the termination of his indefinite contract of employment. This evidence is said to have not been challenged at all by Applicant during the arbitration. The termination was therefore malicious and unfair labour practice, argues the 1st Respondent.

[24] Further, First Respondent's argues that it was his evidence that during his layoff, his responsibilities were performed by AM Consultancy. The latter is Manager (AM Consultancy) conceded this fact under cross-examination and further testified that it trained Siphilile to assume the role of First Respondent after his termination. Siphilile conceded that she performed First Respondent's role after his dismissal. It is therefore submitted that the reason for the termination was a façade. First Respondent's termination was triggered by the legal suit instituted by him at the Industrial Court. Had the reason for the termination been genuinely a fair one, Applicant would have paid First Respondent's balance of the outstanding months in the contract and it would

have given notice of the intention to retrench First Respondent but it failed to do so.

THE LAW

[25] Lest sight be lost regarding the nature of the application before court, it is important to highlight that it is one for review. The parties have gone to considerable lengths to regurgitate the issues and arguments that were made before the 2nd Respondent. In my view the depth in which that has been done was excessive, and not necessarily relevant for the nature of the relief sought.

[26] This court is not sitting as an Appeal Court, but as a review court. There is a difference between the two. The focus in a review application is not on whether the decision of the arbitrator is right or wrong. But, rather on the process and on the way in which the decision maker (in this case the Second Respondent) came to the challenged conclusion.[16] As Justice Cameron articulated it, in a review the question is whether the decision is capable of being justified.[17]

[27] In order to establish review grounds, it must be shown that the decision maker failed to apply his mind to the relevant issues in accordance with the behests of the statute or the tenets of natural justice. Such failure may be shown by proof, *inter alia* that the decision was arrived at arbitrarily or capriciously or

[16] See: Rustenburg Platinum Mines vs Commission for conciliation, Midiation Arbitration 2007 (1) SA 576 SCA.
[17] Rustenburg Platinum Mines judgment (ibid)

mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose. See **Takhona Dlamini vs President of the Industrial Court and Another**. Supreme Court Case No. 23/1997 citing with approval the case of **Johannesburg Stock Exchange vs Witwatersrand Nigel Limited 1988 (3) SA 132.**

[28] A court should not interfere with a due and honest exercise of discretion, even if it considers the exercise inequitable or wrong. The only instance where an exercise of a discretion should be attacked on review, is where the person entrusted with the duty, failed to do so at all. Or that he acted *mala fide*, or was motivated by improper considerations. See: **Mpanyane vs Thlone & others 1991 (4) SA 450 (b) at 458 (A – B).**

ADJUDICATION AND CONCLUSION

[29] The Applicant's basis for the review and the grounds thereof are gleaned from the founding affidavit deposed on behalf of the Applicant. The basis in particular, starts from paragraph 25, where the Applicant contends that the findings of the Second Respondent, that the First Respondent was dismissed and that such dismissal was substantively and procedurally unfair are reviewable at common law. The deponent sets out the basis, as being that the findings of the arbitrator are so grossly unreasonable, so as to warrant the inference that the arbitrator did not apply his mind to the evidence and facts presented to him. The Applicant further puts differently the basis as being that, the findings of the arbitrator are not reconcilable with the evidence and common facts presented before him.

[30] It is apposite for the court to look at the reasoning of the arbitrator, which is contained in the arbitration award forming part of the papers before court, found on page 15 of the book of pleadings.

Substantive fairness of the dismissal

[32] The Applicant contends that the finding of the arbitrator that the dismissal of the Second Respondent was substantively unfair is not supported by any evidence or facts. The argument is premised on the reasoning that in his award at paragraph 6.4 the Second Respondent had made a finding and certain conclusion of facts which is as follows;

> *"There is no doubt that the Respondent faced financial difficulties due to non-payments by clients upon completion of works and scarcity of new projects. As a result the Respondent placed its administrative staff on unpaid leave of absence and layoff. Consequently, I find that the Respondent has proved on a balance of probabilities that it had a bona fide and commercial reason for contemplating retrenchment on its administrative employees. Nevertheless, the Respondent still had the onus of proving that it was fair and reasonable to only select the Applicant for retrenchment out of 12 (twelve) administrative staff."*

[33] The arbitrator in my view, appears to have made a finding that there was evidence that was placed before him that the Respondent faced financial difficulties and that the Applicant (who was the Respondent in the arbitration proceedings) had on a balance of probabilities demonstrated before him that they had a *bona fide* and a commercial reason to contemplate a retrenchment of the administrative employees. Applicant appears to miss the context on which this conclusion was made. The arbitrator goes further to say, despite that the employer had demonstrated before him that there was a *bona fide* and commercial reason, the employer still reserved the onus of proving that it was fair and reasonable to particularly select the Applicant (now 1st Respondent) for the retrenchment, out of the 12 administrative staff that was available. It is the latter consideration that in my view, the Applicant before this court has ignored when developing it's argument on the criticism of the arbitration. The arbitrator did not end by finding that the employer was facing financial challenges or that the employer had demonstrated that there was a substantive reason for effecting the retrenchments. The arbitrator went further to say the employer had the onus of proving that in particular, it was reasonable to only select the Second Respondent for retrenchment out of the other members of the administrative staff. It is basically the short fall of evidence produced by the Applicant in this aspect which the arbitrator found that the Applicant had fallen short of.

[34] The arbitrator deals extensively on his reasoning, on how the Applicant had failed to prove that it was fair to only retrench the Applicant, despite that it had proved that it was going on financial difficulties. In particular, in paragraph 6.5, of the award, the arbitrator remarks that in the letter of

termination, the reason that was communicated to the First Respondent for the termination was that it was due to the cessation of site operations and unavailability of work.

[35] The arbitrator in the following paragraph 6.6 states clearly that the letter of termination does not reveal the sites that had ceased operations and the dates of such cessation. The evidence through RW1, stated that when the 1st Applicant was engaged on a fixed term contract in 2017, the Nhlangano/ Sicunusa road project had 395 employees. However, at the time his services terminated in 2019 it had 28 workers. The arbitrator also continue to state that the operations of the Nhlangano/Sicunusa road projects were stopped through a letter dated the 17th January 2018, despite that this was one of the Applicant's major projects which employed about 75% of its work force. The Applicant had retained the First Respondent for a whole year after that and even renewed his contract in November 2018. Clearly, after the Nhlangano/ Sicunusa project had been stopped, the reasoning of the arbitrator is that, it could not have been that when the First Respondent was employed he was employed for a specific project nor was it suggested to him that when the contract was renewed First Respondent was to be attached to a specific project. I fail to find any gross unreasonableness in the reasoning of the Second Respondent. He lays a basis for his conclusion that it was fair to only retrench the 1st Respondent.

[36] The court observes that the arbitrator made a determination that the employee, who is the First Respondent in the matter at hand, was not consulted prior to

effecting the retrenchment. This finding raises significant concerns regarding the fairness and legality of the termination process. I therefore, against this backdrop, do not see how would have the arbitrator's finding have been said to be grossly unreasonable.

[37] Consultation with an employee before a retrenchment is effected, is a fundamental aspect of a due process in the employment arena. It is typically required by the Employment laws of this country.[18] It ensures that employees have an opportunity to provide their perspective, raise any concerns, and potentially rectify any issues before the employer implements the retrenchment. By failing to consult the First Respondent, the arbitrator found correctly that the Applicant had disregarded the First Respondent's rights and had violated labour laws. The lack of consultation undermines the principles of fairness and justice that should be upheld in the work space. Under the circumstances, I fail to see how did the arbitrator committed an irregularity.

[38] During the arbitration proceedings, the transcribed record which was filed in this court reflects that the arbitrator had a pre-arbitration session with both counsel that appeared before him at that time. He clearly articulated that at that point, he just wanted to streamline issues so that the issues that are not disputed which are issues that are common cause, and issues that undisputed are streamlined. Starting from page 13 of the record this is what is captured:- ***arbitrator***; *the prayers or claims at this stage we are not dealing with whether*

[18] See Section 57(1) (2) of The Employment Act of 1980; Bernard Hough vs U.S.A Distillers (Pty) Ltd (29/2011) SZIC 29 (15th July 2014) at page 29 paragraph 56.

he is entitled or not but just to record this are the prayers in issue here. It is on paragraph 2 of the certificate. It says there it is recorded that there 8 months remainder of the contract which is an amount of E184 193, and then is also unlawful deductions February to a sum of E53 551.47 and then is notice pay a sum of E5 025, and then is April salary April 2019 this are E23 024 and unlawful loan which is E1 092. So, further alternative relief is that the parties will be contesting before the arbitrator AC it is arbitrator. So I will be correct to just capture the issues for determination by the commissioner or by the arbitrator as well or not determination was procedurally and substantively fair. That is one and then obviously two will be whether or not the Applicant is entitled to the claim, paragraph two AC and RC; yes (innunison).

[39] These were the issues before the arbitrator which were agreed were for determination.

[40] Having said so, it means that then parties approached the issue of the nature of the employment on a common ground that the issue for determination was the 8 months balance of the contract, which amounted to E184 193. I then assume that it had been determined at that point that there was a valid contract between the parties, pursuant to the intention to renew and I also assume that the period was assumed that it was the same the previous fixed term contract. Otherwise, the parties would not have agreed that the issue in dispute is the 8 months remainder of the contract.

[40] The Applicant has argued in the heads of argument[19] that the arbitrator failed to take into account cogent considerations of fact, thus misguiding himself on the relevant considerations and sought to have a ruling leaving towards a more laissez-fair attitude. I have taken time to peruse the founding affidavit in an attempt to find how this argument is pleaded and support. It appears that this argument was not pleaded at all in the Applicant's founding affidavit, it comes for the first time in the heads of argument. It is trite that the factual basis that supports a relief sought in the notice of motion must be set out in the founding affidavit supporting the notice of motion. Not in the heads of argument. No wonder there is no detail on the cogent considerations of fact that the Second Respondent is alleged to have failed to take into account in reaching his conclusion. Let alone what the relevant considerations are and how he misguided himself.

[41] On the issue of deductions relating to unpaid leave, the Second Respondent clearly applied his mind as appears in paragraphs 6.29 to 6.32 of his ruling. The Arbitrator deals with the issue extensively as he states that the First Respondent had contended before him that the unpaid leave was imposed. In as much as that allegation was disputed by the Applicant, the Arbitrator found that there is no provision in the contract between the parties for unpaid leave. He opined that the onus rested on the Applicant to prove that the Applicant consented in writing to all the unpaid leave taken. The learned Arbitrator went further to interrogate the exhibit **"R3"** which is the leave application forms. He highlighted the specific dates which the First Respondent had signed for unpaid leave and he concluded that the remainder of the leave days were not

[19] See paragraph 5.3 of the heads of arguments.

signed for. [20] In light of the aforegoing, I fail to appreciate how the Arbitrator can be said to have failed to apply his mind, let alone that his finding is grossly unreasonable.

[42] In conclusion, the ruling of the Arbitrator in it's entirety reflect that the Second Respondent applied his mind to the issues that were before him. There is nothing that points to the direction that his decision was reached capriciously, arbitrarily or *mala fides*. The ruling is replete of relevant considerations that he took and he demonstrated an extensive application of his mind to all the issues before him. He exercised due and honest discretion. This court is unable to find reasons based on which his discretion can be interfered with. This court being a review court, is not necessarily concerned whether the decision of the Arbitrator is right or wrong, but rather the process in which the Arbitrator came to the decision.

[43] It follows from the aforegoing considerations that the Second Respondent did not commit any reviewable error. The Applicant's application stands to be dismissed. Costs to follow the event.

ORDER

a) The Applicant's application is dismissed.

b) The Applicant is to bear the costs of suit at an ordinary scale.

[20] See specifically paragraph 6.31 of the ruling.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: E. Shabangu (Robinson Bertram)

For the Respondents: M. Motsa (Musa Motsa Attorneys)