Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 740/15

In the matter between:

TIGER CONSUMER BRANDS LTD	**Applicant**
and	
FAWU obo MISHACK MLAMBO	**First Respondent**
COMMISSIONER FAITH GUMEDE (*NO*)	**Second Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: 25 April 2018

Delivered: 2 May 2018

Summary: (review-inadequate pleading of review grounds- interpretation of phrase in contract of employment not wholly implausible even if not necessarily correct)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant (' Albany') has applied to review and set aside an arbitration award of the second respondent, Ms F Gumede ('the arbitrator') in which she held that dismissal of the Mr M Mlambo ('Mlambo') was substantively unfair and awarded him reinstatement subject to a final written warning effective for 12 months from the date of his reinstatement.

Background

[2] Mlambo was employed as an artisan's assistant in the engineering department of Albany's bakery in Secunda.'

[3] At the end of June 2014, an agreement was reached between shop stewards and Albany, which normalised working hours and in terms of which the first shift on a Saturday would start at 06H00 and end at 11H00. The introductory paragraph of the agreement read:

> "Please be advised as of the 01 July 2014 business will change current practice in respect of Excessive Working Hours on Saturdays and therefore as discussed and communicated staff will proceed in executing the 45 working hours."

[4] Evidence was led by Albany that in the engineering department, there was no discussion and communication as mentioned in the paragraph and that the agreement was concluded only in respect of production staff and did not apply to engineering, sales or dispatch departments. Mlambo was a shop steward and was a signatory to the agreement. He contended that the agreement applied to the whole workforce and not just to the production department.

[5] It was also common cause that when Mlambo was first employed by Albany, that his contract required him to work overtime "from time to time". Evidence was led by Albany that this was a general term of employment and not confined to particular occupations, which was not disputed.

[6] It was common cause that even after the agreement was concluded that, staff in the engineering department continued to work overtime on Saturdays after 11H00 as they had done before.

[7] However, a problem developed in November 2014 when artisans' assistants, including Mlambo, in the engineering department refused to continue working after the end of normal hours on Saturday at 11H00. According to Mlambo's evidence, they refused to work overtime because they only continued to do so after the excessive working hours agreement was reached because they were waiting for feedback from management on whether they would receive additional remuneration. When they were told in mid-October that there would be no change, that is when they decided they would no longer work overtime. Unfortunately, that version was never put to Albany's witness, so these discussions were never properly canvassed in evidence during the arbitration hearing.

[8] Be that as it may, it appears that after the assistants notified the company of their stance, Albany disputed they were entitled to refuse overtime work and reaffirmed its stance by placing a notice issued by the Maintenance Manager on the noticeboard on 7 November 2014 addressed to all maintenance staff, and which read:

> "Please be advised that it is a requirement of Albany Bakery Secunda that Artisans and Artisan Aids will work on a Saturday doing weekly maintenance from 06:00 until finish and released by the Maintenance Manager, who will require from you to work overtime. This arrangement is an operational requirement to ensure that we provide a well-maintained on action and to minimise breakdowns during the week.
>
> Please be aware that failing to comply with the above arrangement a lead to disciplinary action against such an employee. The view of the companies that this is an operational requirement and a reasonable request.
>
> Please note that the arrangement made to work till 11:00 on a Saturday was only made for the Production Staff."

[9] Despite this, Mlambo and other artisans did not work after 11:00 on Saturday 8 November 2014. Further, on Saturday 22 November 2014, left work at 11:00, allegedly without explanation and without completing work he was supposed to finish on a shaft. Consequently, he was charged with the following charges, of which he was found guilty and dismissed:

9.1 Charge 1: Gross insubordination: refusing to pay a reasonable, legal and lawful instruction by leaving a workplace at 11:00 on Saturday

the 08th of November 2014, after a clear instruction was given directly and by way of a notice that was placed on the notice board on Friday the 07th November 2014.

9.2 Charge 2: Desertion of workplace: it was reported to him that the moulder bearing needed replacement, him stripped the moulder and failed to put together again, leaving his work unfinished at 11h00 on 22 November 2014.

Arbitrator's findings

[10] The arbitrator dismissed the employer's contention that the agreement on working hours was confined to the production department. She did so on the basis that the agreement did not expressly differentiate between different departments.

[11] She also found that even though Mlambo's contract required him to work overtime "from time to time", the requirement that the maintenance Department had to work overtime every Saturday was in conflict with this provision and therefore in breach of section 10 (1) (a) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') which states that an employer "may not require or permit or require an employee to work overtime except in accordance with an agreement". This suggestion that the imposition of a regular overtime was in breach of the BCEA was never canvassed with Albany's witness, though it was submitted in written argument by the union. She appeared to concur with the union's submission, also only made in argument, that Mlambo had been dismissed for refusing to work overtime which was in breach of section 79 of the BCEA because it amounted to prejudicing him for refusing to do something he was not legally required to do.

[12] In relation to the charge of desertion, she held that his departure from the workplace at 11H00 did not amount to desertion because it did not involve him failing to report for duty for an unreasonably long period. She did not appear to make a finding whether or not there had been an understanding that incomplete work would be completed by a contractor or whether he had simply left the workplace without completing the repairs to the shaft. It

is implicit in her reasoning on this charge that she found that, strictly speaking, he could not be held guilty of the charge because his conduct did not amount to desertion. She further found that the evidence that because he left the plant without the repair being complete, this had caused a financial loss of R80,000-00 was unsupported and uncorroborated.

[13] She then proceeded to determine whether dismissal was an appropriate sanction and after considering that he had a clean record of 12 years of service with the respondent she was of the view that the trust relationship could be rebuilt. Nevertheless, because she found that he was not "entirely guilt free of wrongdoings" that affected the relief. She took the view that he would not have refused overtime work if the "mutual interest" issue of this nature could not be resolved by simply refusing to work overtime. She also considered the repercussions it might have in the workplace considering his position as a shop steward, though it is not entirely clear what she meant by this.

Grounds of review

[14] Albany attacks the arbitrator's reasoning. In Albany's founding papers, it phrases the attack principally in terms of various errors committed by the arbitrator which it then submits resulted in the arbitrator's powers and/or permitting a gross irregularity and/or coming to a decision that a reasonable Commissioner would not have come to. No supplementary affidavit was filed. It was only in the applicant's heads of argument that it was articulated for the first time why the errors in question were ones that amounted to a reviewable irregularities rather than simply grounds of appeal.

[15] In relation to the perfunctory and improper pleading of the grounds of review, it is apposite to repeat the comments of the court in ***Mooki v CCMA and Others*** [1], which are equally applicable here:

> "[9] In the present instance, the applicant's grounds for review are not cast in terms that reflect the enquiry that the court must undertake. In particular,

[1] (JR772/15) [2017] ZALCJHB 173 (3 February 2017)

> the grounds articulated both in the founding and supplementary affidavits do not make out a case to the effect that the outcome of the proceedings under review was one that fell outside of the band of decisions to which a reasonable decision-maker could come on the available material. It is not sufficient, as the applicant has done, to record a litany of complaints that amount to no more than assertions that the commissioner came to conclusions that were wrong. Commissioners are allowed to be wrong; the review test affords them this latitude, provided that the outcome is not compromised in the sense that is an unreasonable one. The two-stage test referred to above preserves the all-important distinction between appeals and reviews. Further, in an application such as the present, the basis on which the outcome of arbitration proceedings subject to review is alleged to be unreasonable must be specifically pleaded - a failure to do so reflects a failure to establish a cause of action. The applicant's failure to frame his grounds for review on the proper basis and to rely in piecemeal fashion on a series of alleged misdirections, in my view, is in itself a reason to dismiss the present application."

To this, I would add that it is not the job of the court to make the connections between identifying an error, which might amount to an irregularity, and why it purportedly has a fatal effect on the award, nor should a respondent have to guess what that connection might be, or wait until heads of argument are submitted before the supposed connection is revealed.

[16] In any event, notwithstanding this fundamental defect, I am not satisfied that the review should succeed anyway even if it was possible to construe the pleadings most generously. In this regard, it is only necessary to address the ground which the applicant persisted with in argument at the hearing.

[17] Albany complains that the arbitrator committed a reviewable irregularity in interpreting the agreement on excessive working hours to apply to the maintenance department, because she failed to take account the fact that the Department had continued to work overtime after the agreement was concluded and failed to have regard to the context of the agreement, which explained its genesis and purpose namely that it was intended to prevent working overtime except in areas that required overtime work for

operational reasons. It is true that the arbitrator appears to have neglected the uncontroverted evidence of O'Donovan that the excessive hours agreement was never "discussed and communicated" in the maintenance department and could only have applied to a department where that had happened. Likewise, she failed to deal with his evidence which was not contradicted that it did not apply to the sales department either. However, the applicability of the excessive working hours agreement to the maintenance department was only one pillar in her reasoning. The second concerned her interpretation of the effect of Mlambo's contract on his overtime obligations.

[18] Albany complains that in this respect also she adopted an overly technical approach in deciding that the phrase "time to time" could not be construed as an agreement to work overtime on an invariable basis and moreover any attempt by Albany to impose a requirement to do so was in breach of section 10 (1)(a) of the BCEA. To bolster its claim that there was an obligation to work overtime on a constant basis, Albany argues that the arbitrator ought also to have recognised that there was a tacit agreement by the maintenance workers to continue working overtime on a constant basis based on their practice in the past, because the BCEA did not require an agreement to work overtime to be in writing. Thus on the one hand, Albany complains that the arbitrator misconstrued and misdirected herself in interpreting the phrase from "time to time" in Mlambo's contract of employment. On the other hand, Albany in effect contends that in any event she ought to have inferred the existence of a tacit agreement, which implicitly superseded the terms of his contract. Whether her interpretation of the contentious phrase is correct or not, it was not a wholly implausible or irrational interpretation. Secondly, it was never argued before the arbitrator that it was in any event superseded by a tacit agreement. The evidence of the practice of maintenance staff working overtime despite the conclusion of the excessive hours agreement was led in order to persuade the arbitrator that the excessive hours agreement did not apply to them, not to prove the existence of a tacit agreement.

[19] There are certainly unsatisfactory features of the award such as the failure of the arbitrator to identify clearly what she considered to have been a

form of misconduct on Mlambo's part, which warranted a final written warning valid for twelve months as well as denying him full retrospective statement. However, given the factors she says she considered such as Mlambo's clean service record of twelve years, it is not inconceivable that if she felt there was some degree of insubordination he was guilty of, nonetheless did not warrant dismissal at that stage. It is perhaps worth noting in this regard that Mlambo was charged with both charges simultaneously rather than issuing him with a written warning or final written warning after the first infraction on 8 November. The overall outcome is not one that is unsustainable on the evidence before her.

Order

[1] The review application is dismissed with costs.

_____

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	J Norval of Edward Nathan Sonnenbergs Inc
RESPONDENT:	J v d Bergh instructed by Steyn, Strydom & Viljoen