

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JA 70/99

In the matter between:

ENZO PANELBEATERS CC Appellant

and

SHEREEN CECILIA NAIR Respondent

JUDGMENT

NUGENT AJA:

[1] This appeal relates to an arbitration award that was made in terms of s.191 of the Labour Relations Act 1995. The award declared that the respondent had been unfairly dismissed, and ordered the appellant to pay compensation to her in the sum of R30 000, which was the equivalent of twelve months' remuneration. The award was made an order of the Labour Court on 17 December 1998. The appellant applied to the Labour Court to rescind that order, and in a separate application, it applied to set aside the arbitrator's award. Both those applications were dismissed. The appellant now appeals against both decisions, with leave granted on

petition to the Judge President.

[2] In order to appreciate the nature of the issues that arise in this appeal, it is necessary to outline the circumstances in which the applications to the court a quo arose.

[3] The respondent was employed by the appellant until 15 January 1997, when her employment terminated in circumstances which are in dispute. Alleging that she was unfairly dismissed, the respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration, as provided for in s.191 of the Act, and in due course an arbitrator was appointed to resolve the dispute.

[4] The arbitrator who was first appointed allocated 16 July 1998 for the conduct of the arbitration. On that day the appellant failed to appear, and the arbitration was postponed. A second arbitrator was appointed, who allocated 7 August 1998 for the conduct of the arbitration. Again the appellant failed to appear, and the arbitration proceeded in its absence. The respondent gave evidence before the arbitrator. She said that on 15 January 1997 she had been ill, and her husband had telephoned a certain Mr Bester, who performed managerial functions for the appellant, and advised him that she would not be at work that day. A little later, Mr Bester telephoned the respondent at her home, and asked her why she was not at work. She asked him whether her husband had telephoned to inform him that she was ill, and Mr Bester replied in the affirmative, but asked why she had not telephoned herself. He then said that she should not return to work, and she would be paid until the end of the month. When she asked whether she was being dismissed, he replied in the affirmative. She subsequently received a cheque for the moneys that were due to her until the end of the month.

[5] On the basis of that evidence the arbitrator found that the respondent had been unfairly dismissed, and he awarded her compensation in the sum of R35 080,65, which was the equivalent of her remuneration from 1 June 1997 to the date of the arbitration. He calculated the compensation from 1 June 1997 because he considered that her delay in pursuing her remedies until then had been unreasonable.

[6] On 8 September 1998 the appellant wrote to the arbitrator, explaining why it had not been represented at the arbitration, and requesting him to "rescind" his award. Shortly thereafter, on 22 September 1998, the appellant's attorneys filed an application to the Labour Court to set aside the award. That application was not pursued, because shortly after it had been filed, the arbitrator wrote to the appellant's attorneys,

informing him that he intended to “rescind” his award, because he had misinterpreted his powers in relation to the amount of compensation that he was entitled to award, and that he had scheduled a rehearing of the matter for 5 October 1998.

[7] I should interpose at this stage to observe that, generally, once an arbitrator has made an award, he or she is functus officio, and may not thereafter “rescind” the award other than in the circumstances provided for in s.144 of the Act, unless with the parties’ consent. It is not necessary in the present case to consider whether the provisions of that section entitled the arbitrator to withdraw his award, for neither party has sought to rely upon the original award. On the contrary, the appellant, who was the party adversely affected, expressly asked the arbitrator to withdraw the award, and the respondent raised no objection. The arbitrator duly withdrew his award on 5 October 1998, without objection from any of the parties, and proceeded to hear the matter afresh.

[8] On that occasion the appellant’s representatives and the respondent were present. At that hearing the respondent repeated her earlier evidence, and the owner of the appellant and Mr Bester, also gave evidence. They said that Mr Bester had indeed telephoned the respondent on the day in question, and had asked her why she was not at work. Mr Bester said that he told her that if she needed the rest of the month off, the appellant would pay her until then. He said that when she asked to be paid the moneys that were due to her, he assumed that she was thereby resigning, and he denied that she was dismissed. The arbitrator disbelieved that evidence, and found that the respondent had indeed been dismissed, in the manner which she had described in her evidence. He concluded that her dismissal had been unfair, both substantively and procedurally, and he awarded compensation to her in the sum of R30 000, which was the equivalent of twelve months’ remuneration.

[9] On 21 October 1998 the respondent filed an application to the Labour Court for the award to be made an order of that court. On 6 November 1998 the applicant filed an application to the Labour Court for an order reviewing and setting aside the award.

[10] The appellant did not oppose the application by the respondent to have the award made an order of court. According to the appellant, it was advised by an unnamed labour consultant that it was not necessary for it to do so, in view of the fact that the appellant had filed an application to review the award. The appellant also alleged that when it received a notice from the Registrar informing it that the application had been set down on the unopposed roll, its labour consultant telephoned the Registrar and advised

him that the award was the subject of an application for review, whereupon the Registrar told the labour consultant that the matter would be removed from the roll.

[11] In fact, the matter came before the Labour Court on 17 December 1998. Needless to say, the appellant was not present to oppose it, and the award was made an order of court.

[12] That prompted the appellant to bring an application to rescind the order. That application, and the application that had been brought earlier to set aside the award, were heard simultaneously by De Villiers AJ, and her decisions are the subject of this appeal. The learned judge was of the view that there were no proper grounds to rescind the order that had been made on 17 December 1998, more particularly because the appellant had not shown good cause for its failure to oppose the granting of that order, and she dismissed that application. Having dismissed that application, she apparently considered the application to set aside the award to be academic, and she dismissed that application too, without considering its merits.

[13] Because of the view which I have taken of the matter, it is not necessary to consider whether the learned judge correctly found that the appellant had not shown good cause for failing to oppose the granting of the order that was made on 17 December 1998. The appellant's counsel accepted, in my view correctly, that unless there was merit in the application to set aside the underlying award, then the application to rescind the order was in any event bound to fail, irrespective of whether the appellant had shown good cause for its default, and the matter was argued on that basis.

[14] In argument before us, three grounds were advanced for setting aside the award. Firstly, it was submitted that the arbitrator, having withdrawn his earlier award, should not have heard the matter again, for to do so created not only a reasonable apprehension that he might be biased against the appellant, bearing in mind the terms of his earlier award, and it also created an actual risk that he would not have an open mind on the matter. In my view there is no merit in that submission. At no stage before, or during, the arbitration did the appellant even suggest to the arbitrator that he should recuse himself, or that the appellant feared that he might not bring an open mind to bear on the matter. In my view it is not open to the appellant to contend only in retrospect that it entertained the alleged apprehension that is now sought to be relied on.

[15] The second ground which was relied upon for setting aside the

award was that the appellant's witnesses had not been placed under oath at the time they gave their evidence. If that was an irregularity, it can hardly be said to have caused prejudice to the appellant, and there is no merit in that objection.

[16] Finally, it was submitted that the arbitrator acted irregularly, in that he inhibited the appellant from cross examining the respondent. It must be borne in mind that an arbitration that is conducted in terms of the Labour Relations Act is not required to be conducted as if it was an adversarial trial. An arbitrator has a discretion to conduct the proceedings in a manner that he considers appropriate in the particular circumstances, in order to deal with the substantial merits of the dispute with the minimum of legal formalities (s.138(1) of the Act). While he or she is required to allow adequate opportunity to the parties to properly present their respective cases by presenting evidence, questioning witnesses, and advancing argument (s.138(2)), the extent to which this is allowed in any particular case remains in the discretion of the arbitrator. The very nature of such an arbitration might often require the arbitrator to adopt an inquisitorial role, particular if the parties are unrepresented. Although the record of the arbitration is somewhat incomplete, I can find nothing to suggest that the arbitrator did not properly exercise his discretion, and the allegations made by the appellant are so generalised as not to establish, in my view, that the arbitrator erred in any material respect. I might only add that the probabilities were so overwhelmingly in favour of the respondent, that it is difficult to see what could have been elicited by any greater latitude for cross-examination. In my view the appellant has not shown that the arbitrator acted irregularly.

[16] In my view there are no proper grounds for setting aside the award. In those circumstances there was also no basis for rescinding the order that was made by the court on 17 December 1998, irrespective of whether the appellant had acceptable reasons for not opposing that application. Accordingly the court a quo correctly dismissed both applications, and the appeals against both the decisions must fail. The respondent was not represented in this appeal, and it is appropriate in those circumstances that no order should be made in relation to costs.

The appeals against both the decisions that were made by the court a quo are accordingly dismissed.

R.W. NUGENT
ACTING JUDGE OF APPEAL

R.M.M. ZONDO
JUDGE PRESIDENT

C.R. NICHOLSON

JUDGE OF APPEAL

For the appellant: Adv. R Venter
 Instructed by
Gavin Joynt & Krynauw Attorneys, Pretoria.

For the Respondent: In Person

Date of Hearing: 22 June 2000

Date of Judgment: 29 June 2000