

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO.: DA8/2001

In the matter between

AMALGAMATED BEVERAGE INDUSTRIES

LIMITED

and

M.N. SIBIYA

B.V. GAZU

A.Z. NENE

A.M. ZONDO

M.I. NDWANDWE

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

—

JUDGMENT

—

Nicholson JA

The five respondents worked for the appellant as casual labourers for an extended period from the late eighties to the end of 1997. They contend that they were unfairly dismissed by the appellant. Their dispute was referred for arbitration before a Commissioner of the Commission for Conciliation Mediation and Arbitration (“CCMA”) in terms of the Labour Relations Act, 66 of 1995 (“the Act”). At the commencement of the arbitration on the 28 July 1997 it was agreed that three of the respondents would proceed with their

disputes and that the remaining two respondents would stand over for determination later.

The case of the three respondents was that they worked continuously for the company for five days a week on a nine hour day and had done so for a number of years prior to 1997. They contended that although they were designated by the company as casual workers they “worked like permanent employees”. When the dispute was referred to the CCMA for conciliation they sought the following relief namely “re-employment as permanent employees”.

The relief sought before the Commissioner was “the reinstatement of all respondents on a permanent basis alternatively compensation.” The Commissioner held that the applicants had not been dismissed within the meaning of section 186 of the Act. Various schedules were handed in indicating the hours worked by the respondents and the Commissioner found that, except in isolated instances, they were employed for not more than three days in any week.

The Commissioner held as follows: “what has happened is that the employer has failed to continue to offer employment to the applicants as it is entitled to do, given the nature of the relationship which is *sui generis*.”

The respondents brought a review application in the Labour court in which they asked that in terms of section 145 alternatively section 158(1)(g) of the Act they be granted the following relief - the parties being referred to as in the court below:

- 1)
 1. “Holding that all of the Third Respondent’s ruling to dismiss the Applicant’s application on 21st July 1998 under Case No. KN 3754 is open to review.
 2. Reviewing, correcting and setting aside the Third Respondent’s ruling issued on the 21st July 1998 under Case No. KN 3754 in terms whereof the Third Respondent erroneously and inadvertently held that :-
 - 2.1 “The Applicant worked for not more than three (3) days in a week”.
 - 2.2 “That the Applicants were not dismissed”.
 3. Joining and holding severally liable for costs the First, Second and Third Respondents (“The Respondents”), the one paying the others to be absolved.
 4. Granting applicants such further and/or alternative relief.”

The deponent to the founding affidavit, the first respondent herein, after citing the parties and recording the circumstances of the arbitration hearing and the award made, contended, in paragraph 8, that the Commissioner erred in finding that the respondents had not established that they worked continuously for five days per week for the company.

At paragraph 20 first respondent alleged that the commissioner's finding on page 39 of his award to the effect that the respondents were not dismissed was wrong for two reasons which were then enumerated. Two confirmatory affidavits were filed by second and fifth respondents respectively.

In the Labour Court the application for review was successful and the award of the Commissioner was set aside and substituted with an order that the present respondents were dismissed by the present appellant. The matter was referred back to the CCMA for a determination as to whether the dismissal was fair and the present appellant was ordered to pay the respondents' costs. The application for review was out of time but the court condoned the late filing and for the purposes of this appeal it is not necessary to go into that matter at all.

The grounds for review in terms of Section 145 are well known and have been dealt with in a large number of cases. They include corruption, misconduct and gross irregularity in the conduct of the arbitration proceedings and where a Commissioner exceeds his powers. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view *Shoprite Checkers (Pty) Ltd v Ramdau N.O. and Others* 2001 (4) SA 1037 (LAC) paragraph [26], *Pharmaceutical Manufacturers Association of SA and Others: In re: Ex parte application of the President of the RSA and Others* 2000(3)BCLR 241 (CC) or if it is not justifiable as to the reasons given. See *Carephone (Pty) Ltd v Marcus N.O. and Others* (1998) 11 BLLR 1093 (LAC) at 1103C. A gross irregularity can occur patently where for example the right to cross-examination is denied or latently where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues. See *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC).

It follows that an applicant for review must make out a case by alleging and proving one of the grounds which I have enumerated. It is trite law that an applicant seeking to review a commissioner of the CCMA must bring himself within the provisions of section 145. Such an applicant must not only allege but he must also prove why he maintains that the commissioner's award falls to be set aside on the grounds set out in section 145.

In *Naude and Another vs Fraser* 1998 (4) SA 539 (SCA) Schutz JA held at page 563 E - G:

“It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be

apprized of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the sub-rule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on...”

The respondent’s attorney made no mention of what section, sub-section or ground he was relying on in bringing the said review and at no place in the founding affidavits is there mention of any of the grounds set out in Section 145.

Mr Jafta, who appeared for the respondents, maintained that the use of the words “erroneously and inadvertently” in the Notice of Motion were sufficient indication of the grounds of review relied upon. A perusal of the above-mentioned grounds - set out in section 145 and the cases referred to - reveal that this falls lamentably short of alleging any ground whatsoever.

In the appellant’s reply to the application for review the appellant informed the respondent that firstly; the application for review was out of time and there was no application for condonation and secondly, that the attention of respondents and their attorney was drawn to the fact that they had “failed to set out in their affidavits any grounds for review, which grounds are contained in section 145 of the Labour Relations Act, and, as such, there is no basis on which this Court is in a position to adjudicate this matter.”

In reply to this the respondents allege that the “grounds for review are set in the Notice of Motion as indicated in Annexure A.” The Notice of Motion that I have quoted is then annexed. Alerted as they now were to the late filing of the review the respondents launched an application for condonation and in dealing with the prospects of success of the review application, the only ground relied on was that the Commissioner made “an obvious error”.

In answering the application for condonation the appellant said the following:

“11.1 I am informed by First Respondent’s attorney that the grounds set out in these paragraphs are not grounds on which this Court can review the decision of the Third Respondent.

11.2 The Applicants have applied for a review in terms of Section 145(2) of the Labour Relations Act which sets out the grounds on which a review can be claimed. The incorrect conclusions alleged to have been reached by the Third Respondent do not fall

within the meaning of a defect as referred to in section 145 of the Act. In fact, I am advised, the allegations are tantamount to an appeal and not a review.”

Despite the fact that the respondents and their attorney were specifically alerted to the deficiency in their papers they did nothing to amend or supplement the affidavits filed in this matter. In *Naude’s* case *op cit* Schutz JA went on to say that another manifestation of the requirement that a party be apprised of the case he faces is that he must set out in his founding affidavit the case that he seeks to advance. At page 563 H- 564A he said:

“The case that the respondents sought to make on appeal was not squarely raised in his founding affidavit. That lacking, he tried to piece that case together out of statements in the appellant’s answering affidavit.”

The respondents failed dismally to allege or make out any grounds whatsoever for reviewing the arbitration award of the Commissioner. The application for review in the Labour Court ought to have been dismissed on that ground alone. The appeal in this matter must therefore be upheld.

I make the following order:

1)The appeal is upheld with costs

2)The judgment of the Labour Court is set aside and replaced with the following order

“The application is dismissed with costs.”

NICHOLSON JA

I agree.

ZONDO JP

I agree.

MOGOENG JA

Appearance for Appellant: Adv J J Gauntlett SC instructed by Barkers Incorporated.

Appearance for Respondent: Mr Jafta of Jafta and Company.

Date of hearing: 14 May 2002.

Date of judgment: 7 December 2002