



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA13/16

Labour Court case no PR77/15

In the matter between:

NEHAWU OBO KERR HOHO

Appellant

and

CCMA

First Respondent

JEAN VAN ZYDAM, N.O.

Second Respondent

SECRETARY OF THE EASTERN CAPE LEGISLATURE

Third Respondent

Heard: 16 November 2017

Delivered: 10 May 2018

Summary: appeal against a dismissal of a Review application against an arbitration award –initially, an award was reviewed on the grounds that the commissioner applied the wrong test and the matter was remitted to the CCMA before same commissioner to complete the matter by applying the correct test – when CCMA dealt with the remitted matter it was not resigned to the initial commissioner who had resigned from the employ of the CCMA – the matter was then presided over by commissioner other than the person mentioned in the court order and fresh evidence was led on sanction – the appellant was then

dismissed - the parties had, ostensibly, consented to the substitution of another commissioner

HELD- the mere consent of the parties would have been insufficient to legitimise another presiding officer being assigned - – moreover, the initial order did not encompass the hearing of further evidence – the taking of such further evidence inconsistent with the initial order

HELD -the terms of the order would have had to be varied by an application wherein sound reasons why the initial order could not, appropriately, be complied with, ought to have been set out.

Accordingly, the Labour Court's judgment holding that the resumed hearing before a substitute commissioner was not susceptible to review set aside –

Appeal upheld.

Matter remitted to the CCMA for the parties to comply with the initial order or if not practicable, to seek a variation of the order

Coram: Coppin, Sutherland JJA and Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction

- [1] The Third Respondent, the Secretary to the Legislature of the Eastern Cape Province employed Mr Kerr Hoho (Hoho) as a researcher. In October 2011, Hoho was charged with misconduct related to his disruptive behaviour towards colleagues and members of the Legislature, abusing e-mail communications

media to do so and resulting in bringing the Legislature into disrepute. In a disciplinary enquiry, it was found he had committed this misconduct. Hoho then referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), which was heard by commissioner Mzama Mama. Commissioner Mama held that the misconduct was proven and convicted Hoho, and thereupon dismissed him, articulating the rationale thus:

'I find that ...the unrepentant nature of [Hoho], his previous disciplinary record, any reasonable decision maker could have arrived at the decision of the [employer].'

- [2] Commissioner Mama's decision was then taken on review before Van Niekerk J. The finding of guilt of the misconduct was not disturbed. However, it was held that the test used to determine the sanction, as cited above, demonstrated that the commissioner:

'misconceived the nature of the enquiry that he was obligated to undertake, in short[he] asked the wrong question and in doing so applied the wrong test'.¹

- [3] Van Niekerk J stated further that:

'Both parties agreed that in the event that the commissioner's award was set aside, it should be referred back to the same commissioner for him to conduct the enquiry into an appropriate sanction on the basis of the test established by *Sidumo*. This would appear to be a pragmatic and principled way forward – the papers in this matter [are] voluminous and this matter has taken some time to reach the point of a hearing in this court. The commissioner is best placed, having made findings in relation to conduct, to identify all of the factors relevant to sanction, properly assess them and come to a decision that is fair.'

- [4] Pursuant thereto, an order was made thus:

'(1) The arbitration award....on 5 November 2012 ... is reviewed and set aside.

¹ Paragraph [8] of the judgment per Van Niekerk J.

(2) The matter is remitted to the second respondent [ie commissioner Mama] to the extent that the second respondent is directed to determine a fair sanction for the misconduct that he found to have been committed by Kerr Hoho.'

[5] A point of importance to stress is that Van Niekerk J did not endeavour to sever the parts of the award that dealt with guilt and sanction. In my view, it is not obvious that it would be proper to do so in review proceedings. Accordingly, the entire award was set aside, not merely the sanction.

[6] Following upon these events, the matter again came before the CCMA on 2 March 2015. However, Commissioner Mama did not preside over the resumed hearing. Instead, the matter was assigned to commissioner Jean Van Zydham. The sole reason why this occurred is explained in the Award of commissioner Van Zydham:

'....commissioner Mama has since resigned as a part-time commissioner and is no longer contracted to the CCMA. After lengthy discussions and explanations, the parties accepted that commissioner Mama was no longer qualified to hear this dispute again. It was acceptable to the parties that I continue with the matter despite the labour Court's instructions.'

[7] The resumed proceedings then were embarked upon. Fresh evidence was presented by both parties directed at sanction. At the conclusion thereof, the sanction of dismissal was held to be fair.

[8] The decision of commissioner Van Zydham then was taken on review before Mahosi AJ, who dismissed the review. The main grounds of review were these:

8.1. The matter should have been referred to commissioner Mama only, and commissioner Van Zydham ought not to have heard it.

8.2. The decision on sanction in the award was not rationally connected to the "information" before the hearing and certain of the fresh evidence was ignored.

- [9] It is that judgment which is the subject of this appeal and the same complaints have been raised as the grounds of appeal.
- [10] The second ground of appeal cannot be addressed because the record composed for this Court omits the record. On a strict approach, the appeal ought to be struck off on that ground. We do not do so, because of the conclusions reached on the first ground.

Evaluation: Was it competent to have the matter heard by Commissioner Van Zydam?

- [11] It is abundantly plain from the order granted by Van Niekerk J, and the rationale in the judgment, cited above, that the order contemplated only commissioner Mama hearing the matter and no other person. No less important is that the rationale for doing so was to speedily expedite the conclusion of the case, premised on commissioner Mama being steeped in the facts of the case. Moreover, it is not plausible to read the order as contemplating further evidence being adduced; the matter was remitted to determine a sanction based on the existing record. It might be an open question whether further *argument* might be heard on the record, which undoubtedly would, generically, be of assistance in the resumed decision-making process, but a resumption of a hearing for more than that, is inconsistent with the order.
- [12] A reading of the award of commissioner Van Zydam does not supply any indication that the voluminous record was studied. A contention advanced on behalf of the Legislature that an inference could be drawn that commissioner Van Zydam had some record thereto cannot be sustained on a proper reading of the award. Rather, the proceedings before commissioner Van Zydam were quite distinct from the earlier proceedings before commissioner Mama. It can be inferred that it was assumed by the parties that a fresh enquiry could legitimately be embarked upon before commissioner Van Zydam into sanction, premised on the finding about guilt by commissioner Mama. This fresh *enquiry* was not in compliance with the order of Van Niekerk J, whose order contemplated an evaluation of the existing record. Even if a switch of the presiding officers could

have been justified, the failure to make a decision based on the record of the earlier proceedings is fatal to the legitimacy of these proceedings before commissioner Van Zydham.

[13] As to the switch of presiding officers, the only explanation available is that cited in the award of commissioner Van Zydham. Although there is no reason to doubt the veracity of that narration or the *bona fides* of all the persons who were party to that decision, the explanation is inadequate to justify a switch. Ostensibly, Mama is physically available but is merely not contracted to serve. It is not suggested that there might be a consideration present that renders it inappropriate to appoint Mama to complete the matter. Were such a factor present, for example, a reason to question the integrity of the commissioner, then it ought to have been stated. In addition, it is by no means obvious that Mama did not remain seized of the matter despite his resignation, but there is no need to consider that point in this judgment.

[14] Furthermore, were there to have been a proper reason not to appoint Mama *ad hoc*, the mere consent of the parties would have been insufficient to validate another presiding officer being assigned. The terms of the order made by Van Niekerk J would have had to be varied by an application, supported by all parties and setting out the reasons why the initial order could not, appropriately, be complied with. Such an application needed to be no more than a brief explanation of the circumstances, and would have benefited from the obvious aspect of how another presiding officer should approach the matter being expressly addressed so that Van Niekerk J could give due consideration to an appropriate variation.

[15] As a result, the proceedings are irreconcilable with the order of Van Niekerk J. The appeal must be upheld and the decision in the Labour Court and the award of commissioner Van Zydham must be set aside.

Appropriate further Relief

- [16] The primary objective of the relief must be to fulfil the purpose of the order granted by Van Niekerk J.
- [17] That objective will be achieved by reinstating the initial order, and directing the parties, if it is impossible to comply, to approach Van Niekerk J with an application to vary the order.
- [18] Given the elapse of time, the parties should be put on terms to do so within strict time limits.
- [19] As to costs, the blunders seem to have been perpetrated in concert and it is appropriate to make no orders.

The Order

- (1) The appeal is upheld.
- (2) The order of the court *a quo* is set aside and the award is set aside.
- (3) The order made by Van Niekerk J is reinstated.
- (4) The order of Van Niekerk J must be complied with no less than 90 days from the date of this judgment; in this regard, the first respondent shall make special arrangements to expedite a hearing.
- (5) The parties may, if they wish, address argument at the hearing on the issue of sanction, with reference to the record of the proceedings before commissioner Mama.
- (6) In the event compliance cannot be achieved, an application to Van Niekerk J to vary the order must be made within 60 days of the date of this judgment.
- (7) There is no order as to costs.

Sutherland JA

Sutherland JA (with whom Coppin JA and Savage AJA concur)

APPEARANCES:

FOR THE APPELLANT:

In person.

FOR THE THIRD RESPONDENT:

Adv Sam Swartbooi,

Instructed by the State attorney, East London.