

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D161/08

Not Reportable

In the matter between:

INDEPENDENT NEWSPAPERS (PTY) LTD trading as

INDEPENDENT NEWSPAPERS KWAZULU-NATAL

Applicant

And

STATUTORY COUNCIL FOR THE PRINTING,

NEWSPAPER & PACKAGING INDUSTRIES

First Respondent

B MNGOMA N.O.

Second Respondent

SKHUMBUZO MIYA

Third Respondent

JUDGMENT

Conradie AJ

Introduction

1. This is a review application in terms of section 145 of the Labour Relations Act 66 of 1995 in which the Applicant seeks to review and set aside the award of the Second Respondent dated 23 January 2008.

Background

2. The following facts can be regarded as common cause in this matter:

- 2.1 The Third Respondent was appointed as a news editor for one of the Applicant's publications with effect of June 2006.
- 2.2 According to the Applicant the functions of a news editor are, *inter alia*, to ensure that articles put forward for publication are accurate, factually correct and authentic. In other words the news editor is responsible for the content of the news articles.
- 2.3 The Third Respondent is an experienced journalist. His qualifications and working background date back to 1987. Since this time Third Respondent has held the position of journalist for several newspapers. He has also served as an editor, consulting editor and editorial director of various publications.
- 2.4 The daily routine of a daily newspaper publication and in particular at the Applicant's publication where the Third Respondent worked is that there is an editorial planning team which meets three times a day. The first meeting takes place at the start of the working day, the second at lunchtime and the final one at approximately 17h00. On each occasion the editorial content mix for the next day's publication is discussed and assessed. At the last meeting final decisions are

made as to the headline story and articles that are to be published. The primary concern of the committee is to assess the newsworthiness and mix of stories.

2.5 The editor, although he is obviously in overall charge and consequently accepts responsibility for the publication, places a heavy reliance on his news editor in respect of accuracy and factual content of articles. The editor must be able to rely on the professionalism, expertise and experience of his staff and in particular senior staff.

2.6 The Third Respondent was the journalist responsible for the story relating to a woman giving birth to twelve children, a story which proved to be untrue.

2.7 As a result of the untrue story the Applicant charged the Third Respondent with misconduct as follows:

- “1. **GROSS MISCONDUCT** in that you breached your contract of employment by publishing a fictitious story titled “Woman dies after giving birth to 12 babies” on Thursday, August 16, 2007 in Isolezwe; and
2. **GROSS MISCONDUCT** by publishing a fictitious story, you misled the public thereby bringing Isolezwe into disrepute.”

3. The Third Respondent was dismissed for misconduct following which he referred a dispute to the First Respondent. The referral documents reflect that the dismissal was for misconduct.
4. It is apparent from his award that the Second Respondent accepts that the Applicant was dismissed for misconduct.
5. The Applicant's evidence at the arbitration was to the effect that the dismissal was for misconduct. The main witness for the Applicant testified that the Third Respondent was negligent and acted in breach of his contract of employment.
6. In the circumstances the Second Respondent was required to adjudicate an alleged unfair dismissal for misconduct. The parties in presenting their cases addressed the matter on that basis and as referred to above there was agreement that procedural fairness on the basis of misconduct was not in issue.
7. The Applicant alleges that in dealing with the matter the Second Respondent misdirected himself on two major issues and they are:-

7.1 He makes the statement in paragraph 47 at paragraph 24 of the papers that *"I agree that arbitration proceeding is a de novo hearing and as such I am not necessarily bound by how the original charge sheet looked like."*

The Applicant submitted that although an arbitration hearing is manifestly a “*de novo*” hearing the Second Respondent was very much bound by what the charge sheet looked like as the cause of action reflected in the charge sheet was the whole basis upon which the disciplinary enquiry was dealt with and upon which the Second Respondent must now deal with the matter.

7.2 The Second Respondent further stated that he was satisfied that the dismissal was not for misconduct but incapacity and then proceeds to deal with the matter on that basis. In presenting their case neither the representatives of the Applicant or the Third Respondent contemplated that the dismissal was an incapacity one or presented their evidence on that basis.

8. By approaching the matter on the basis of an incapacity dismissal as opposed to one for misconduct and using this reasoning to conclude that the dismissal was unfair, the Second Respondent came to a decision which a reasonable decision maker could not have reached.
9. The irregularity of the Second Respondent’s reasoning in this matter is further highlighted by his rejection of the Applicant’s evidence of similar cases where employees were dismissed for putting forward a fictitious story in the one instance and bringing the newspaper into disrepute in the other. In this regard the Second Respondent’s reasoning that the Third Respondent’s case was

distinguishable from a former employee on the basis that the former employee had direct access to a source which gave information about his employer as opposed to the Third Respondent who worked through a third party, lacks all logic. If anything, where the information is being sourced from a third party more care should be taken to ensure its authenticity than is the case where the information is coming straight from the *“horse’s mouth so to speak.”*

10. In the circumstances I conclude that the Second Respondent came to a conclusion which a reasonable decision maker could not reach.

11. As a result I make the following order:

1. The decision of the Second Respondent is reviewed and set aside.
2. The dispute is referred back to the First Respondent for determination by a commissioner other than the Second Respondent.
3. No order as to costs.

Conradie AJ

Date: 4 December 2009

Appearances:

For the Applicant: RCW Pemberton – Garlicke and Bousefield

For the Respondent: Meshack Zweni – Union Official