

THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case: JR 730/08

In the matter between:

TSOTETSI, S A

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

RAFFEE, M (N.O.)

First Respondent

MULTIMED

First Respondent

JUDGMENT ON LEAVE TO APPEAL

LAGRANGE, J:

[1] This is an application for leave to appeal against a judgement handed down by the Honourable Justice Zilwa AJ, on 25 January 2011 dismissing an application to review an award issued by the second respondent, A CCMA commissioner on 26 March 2008. The learned judge set out the applicant's grounds of review, which may be summarised as follows:

- a. the commissioner failed to consider the matter afresh after it had been referred back to the CCMA, following a previous review application, and merely issued the same ruling as the original commissioner.

b. The commissioner was biased and referred to the Tint being represented by an advocate on the internal hearing, whereas no evidence of this nature was provided by either of the parties.

c. The commissioner failed to conduct the arbitration fairly and independently of the previous commissioner's ruling. The commissioner abused his powers for his own gain and did not comply with the principles of mediation and arbitration

d. the commissioner reached his findings with out evaluating the evidence deposed to in the bundle of documents.

[2] The learned judge found that the essence of the applicant's complaint was that the commissioner failed to consider the matter afresh and simply adopted the decision of the previous commissioner. The court found that there was not a shred of merit in the argument because the matter was clearly heard afresh with evidence being led by both parties and that the applicant was represented by a legal representative during the proceedings, Mr Molamola. Further argument was presented by both parties after which the arbitrator took some time to consider his decision. The court was satisfied that the award was based on the evidence before the arbitrator and the arbitrator summarised evidence that was before him and came to the conclusion that the third respondents' evidence was more plausible when compared with the applicant's version which was so flawed and full of improbabilities that it should be rejected.

[3] Furthermore, the court did not accept that merely because the commissioner mentioned the name of another advocate as the applicant's representative and that was indicative of bias on his part and noted that the applicant himself had made a mistake about who was representing him during argument of the review application.

[4] In so far as it was claimed that the arbitrator failed to evaluate the evidence before him to reach a proper decision, the court was satisfied that on the standard of a reasonable commissioner it could not be said that the commissioner had acted unreasonably in this regard.

Grounds of appeal

[5] The applicant submits that the court erred by overlooking the commissioner's referral to the previous commissioner's award in circumstances where he was ordered to consider the matter afresh.

[6] In a similar vein, the applicant submits that the court erred in finding that because the previous court order did not specify that the commissioner could not have regard to the previous award as a record of the preceding that there was no reason why it should not be considered relevant. He argues further that the statement made by the commissioner about the previous

commissioner's award showed that he failed to consider the matter afresh and the court failed to have proper regard to this.

[7] The court also allegedly erred in not realising that the commissioner failed to properly evaluate whether or not the applicant had intended to resign voluntarily or not. Lastly, the applicant contends that the court wrongly preferred the employer's evidence to that of the applicant on the disputed issues, though he provides no particulars in support of this claim.

[8] Without putting too fine a point on it, the applicant's grounds of appeal are almost identical to his original grounds of review, namely that: the commissioner was unduly influenced by the first commissioner's award; he did not apply his mind to the matter, and he was biased.

[9] Regarding the commissioner's mistaken reference to an advocate Van der Walt, it appears that this was a result of the company's representative mistakenly referring to the applicant's representative, advocate Bester, as advocate Van der Waal. It would appear that this was an understandable error and I agree that it has no obvious bearing on the question whether or not the commissioner was biased.

[10] In the course of the arbitration proceedings, it is apparent that from time to time the previous award was referred to by all parties including the. For example, the arbitrator referred to the applicant's claim, which had been recorded in the first award, that the employer had made his employment intolerable by withholding the outcome of the disciplinary enquiry he had been

subjected to. The arbitrator asked if there were any other reasons why he had resigned, to which the applicant responded that he had also not received his salary on 15 May 2003 as he should have. Likewise, the employer's representative when cross-examining the applicant contrasted evidence as recorded in the previous award with the applicant's testimony in the second arbitration hearing. At the end of the arbitration proceedings, when the commissioner was debating various aspects of the applicant's case with his representative, the arbitrator indicated that the previous commissioner had 'messed up' and asked the applicant's representative why he should not make the same finding. This appears to be nothing more than a rhetorical device to obtain a response from the applicant's representative, who then replied by arguing that in the previous arbitration the arbitrator had failed to have regard to the circumstances surrounding the applicant's resignation.

[11] It is noteworthy, that at no stage when parties referred to the previous award during the arbitration proceedings was any objection made by the applicant or his representative.

[12] In the arbitrator's award, he made no mention of the arbitration award at all and refers only to the evidence that was laid before him. In his evaluation of the evidence, the arbitrator follows the sequence of events leading to the termination of the applicant's services and examines the applicant's own reasons why he claimed he had been constructively dismissed. In the end the

arbitrator concluded that even if a disciplinary enquiry had taken place and he had not yet been informed of the outcome and even if the employer advised him that the trust relationship had been broken, the arbitrator decided that those were not sufficient grounds for concluding that he had no alternative but to resign. The arbitrator was clearly concerned that they appeared to have been no pressure on the applicant to resign, and accordingly held that the applicant had failed to discharge the onus of proving that he was constructively dismissed.

Events leading to the termination of the applicant's employment

[13] The applicant was notified of a disciplinary hearing over an alleged fraudulent medical claim. The hearing was due to take place on 10 and 11 April 2003. The arbitrator held that the applicant was advised by his union official and advocate who is representing him that he should resign because the evidence against him was overwhelming. The applicant claims that the enquiry did take place and he was advised that he would be informed telephonically of the outcome. On the evidence it would appear that there was a meeting and discussions between representatives of the employer and the applicant's representatives. During that meeting it seems that the management representative shared the employer's intended evidence with the applicant and his representatives and it was on that basis that his representatives formed the view that he should not undergo the disciplinary

enquiry. The applicant for his part appears to have interpreted the meeting as part of the hearing.

[14] On 15 May 2003 the applicant submitted his written resignation making it effective from 30 April 2003. In his evidence the applicant claimed that on 15 May 2003 he had been issued with a certificate of service showing that his service ended on the 30 April 2003 and was told that the trust relationship had broken down when he went to the office to complain that he had not received his salary by then. His evidence was that he had been instructed to write the letter of resignation after the respondent refused to issue him with a notice of dismissal. It must be said, that his explanation for why he would have simply complied with such an instruction is difficult to understand. Moreover, the applicant's erstwhile union representative, Louw, who testified he was present when the applicant submitted his resignation, was not tested under cross-examination on this version of the applicant. The arbitrator's conclusion was that the most likely explanation was that the applicant decided to resign because of the advice that he had received from his representatives. It does not appear to me that the commissioner acted unreasonably in preferring the respondent's version of evidence to that of the applicant on this critical issue. For that reason I think it is unlikely that another court would differ with Judge Zilwa's conclusions in this respect.

Conclusion

[15] Having examined the arbitration award against the evidence led in the arbitration hearing and on consideration of the arbitrator's reasoning, I do not believe there is any prospect of the applicant succeeding with any of his grounds of appeal on the basis of the analysis above.

[16] Accordingly, the application for leave to appeal is dismissed. No order is made as to costs



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of judgment: 28 September 2011

(In chambers)