

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

not reportable

Case no: C663/06

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION,
WESTERN CAPE EDUCATION DEPARTMENT

Applicant

and

J J ENGELBRECHT

First Respondent

L.O. MARTIN N.O.

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

Date of hearing : 19/4/2011

Date of judgment :

JUDGMENT

Introduction

This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside the decision of the second respondent (the commissioner). The application was unopposed. The applicant seeks, inter alia, an order reviewing and correcting and/or setting aside the arbitration award of the second respondent. The further order sought is that this Court makes an order that it deems appropriate for the further conduct of the proceedings.

Mr J J Engelbrecht (Engelbrecht) is employed by the Western Cape Education Department (the Department) as an Educator. Disciplinary action was taken against Engelbrecht. It was alleged that on 13 September 2005 and whilst on duty at school Engelbrecht used racist and abusive language when referring to some or all of the learners in his class. In particular Engelbrecht is alleged to have uttered the following words: “Julle is nie net hotnots nie maar erger as kaffirs”. Allegations of misconduct were put to Engelbrecht and a disciplinary hearing was convened and held. At the disciplinary hearing Engelbrecht pleaded guilty to the allegations of misconduct (charge 1) and conceded that the words used by him were wrong, unprofessional and inappropriate. The chairperson of the disciplinary hearing then had to determine an appropriate sanction. Under the Employment of Educators Act 1, 76 of 1998 (the Act) a number of possible sanctions are listed. The chairperson of the disciplinary enquiry imposed a sanction of a final written warning and a suspension for three months without pay. Engelbrecht did not appeal the sanction as imposed by the chairperson. Further Engelbrecht did not file a grievance in relation to the sanction imposed by the chairperson. That sanction was determined on 17 January 2006. In the absence of an appeal in relation to that sanction, the disciplinary hearing and its associated proceedings were concluded.

During February 2006 Engelbrecht, assisted by the National Union of Educators applied to the Department for permission to work during the period of his suspension. Engelbrecht proposed to work for the Governing Body of President High School, the very school at which Engelbrecht worked when disciplinary action was

taken against him, in respect of which he was found guilty and for which he was suspended without pay for three months and given a final written warning valid for six months.

Unsurprisingly perhaps, the Department did not give Engelbrecht the permission he sought. Engelbrecht was informed in writing that:

“Die goedkeuring van so ‘n diens sal beteken dat die sanksie ondermyn word. Die persepsie sal bestaan dat geen sanksie toegepas is nie and dit sal meebring dat hy dan steeds ononderbroke diens by die skool verrig.”

Engelbrecht first took steps to avoid the ordinary consequences of sanction imposed upon him after he was informed that the Department would not give permission for him to work for the Governing Body of the President High School and to be paid by it. Only after Engelbrecht was informed of the decision of the Department did Engelbrecht refer an alleged unfair labour practice dispute to the Education Labour Relations Council, the third respondent. The dispute referral form is dated 16 March 2006. The dispute referral form itself in summarising the facts on which Engelbrecht’s relies is very telling. The form records the following:

“Mr J Engelbrecht received a sanction of final written warning and a suspension of three months without pay after a disciplinary hearing. Mr Engelbrecht accepted the sanction at the time, but as the WCED is refusing to grant permission for Mr Engelbrecht to work for the SGB (another employer) during the period of suspension, Mr Engelbrecht

has no option other than to dispute the sanction and the decision of the WCED”

The arbitration award comprises some three pages. The award is dated 26 August 2006. It appears that the arbitration took place on 27 July 2006. The record indicates that no oral evidence was led before the commissioner. In fact the arbitration award records the following:

“The Respondent, the Department of Education Western Cape, was represented by Mr H Mazaca, an assistant director. The parties agreed that at the outset of the arbitration proceedings that they would argue the matter in writing. The parties agreed to submit heads of argument with the final rebutting arguments of the Applicant being due on 15 August 2006. The award for this matter is accordingly due on 29 August 2006.”

The arbitrator and the parties appear to have approached this matter as being one that could be resolved on a “stated case approach”. In the alleged unfair labour dispute Engelbrecht contended that the refusal by the Department to grant permission for him to work for the School Governing Body of the President High School constitutes a further sanction imposed upon Engelbrecht. It is clear that Engelbrecht sought to revisit the fairness of the sanction in light of the decision of the Department to not grant permission as sought by him to work for the school governing body and to be paid by it.

In assessing the sanction the commissioner has the following to say:

“In respect therefore of the argument of [Engelbrecht] that the sanction of suspension without pay is unfair as far as Engelbrecht had not consented to any deduction from his salary in terms of Schedule 2(a) of the Employment of Educators Act I am of the view that for the Respondent to have commuted a sanction of dismissal to one of suspension without pay without Engelbrecht’s consent is unfair... Having considered all the evidence and argument presented at this arbitration I find that an unfair labour practice had been committed by the Respondent in terms of section 186(2) of the Act.”

There is simply no evidentiary basis whatsoever for the finding of the commissioner as to an unfair labour practice having been committed in the determination of an appropriate sanction. Engelbrecht accepted the sanction at the time (17 January 2006). He consented to the sanction. He only sought to challenge the sanction after the Department refused permission for him to work for the SGB of President High School. The sanction imposed by the chairperson of the disciplinary hearing, Ms Henriette Bouwer, was within range of competence sanctions as contemplated in the Employment Act. There was no proper factual basis in the material before the commissioner for him to conclude that Engelbrecht did not accept the sanction and that imposing a sanction which would include suspension without pay is unfair. Further, the fairness or otherwise of a suspension without pay does not turn upon whether Engelbrecht may enter the premises of President High School for other purposes. The commissioner’s award is one which is informed by a misappreciation of the material facts and the legal position.

In the matter of *Sil Farming CC t/a Wigwam v CCMA* (unreported LC Judgment) Van Niekerk AJ held that:

“A Commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justify the decision arrived at or where the decision-maker ignores contradicted evidence.”

Further, in the matter of *Bestel v Astral Operations Ltd*,¹ the Court held that:

“Although the judgment in *Sidumo, supra*, superceded the test for the review as contained in the decision of this Court in *Carephone (Pty) Ltd v Marcus* 1999 (3) SA384 (LAC) [also reported at [1998] 11 BLLR 1093 (LAC) – Ed] at paragraph 37, the following dictum in the latter judgment is helpful in order to illustrate the nature of the test:

‘Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at.’”

Further it appears from the record that the commissioner was of the view that the alleged unfair labour practice dispute referred to the Education Labour Relations Council was one capable of resolution by having regard to the documents placed before the Education Labour Relations Council and then submissions on facts and argument by the disputant. This too is incorrect. At the very least there were a

¹ [2011] 2 BLLR 129 (LAC) at para 17.

number of questions of fact on which the parties held differing views or approaches. These included Engelbrecht's purported understanding of the terms of his suspension (i.e. that he would not withstanding the suspension without pay be allowed to apply for and be granted permission to work for the School Governing Body and be paid for such work). In the ordinary course these disputes would require the hearing and assessment of evidence and then argument in relation to such evidence. Irrespective of the wishes of the parties, it is not open to an arbitrator in these circumstances to have adopted the approach which the commissioner did.

In the circumstances I make the following order:

The arbitration award of the commissioner is set aside and the matter is remitted to the third respondent for arbitration before a commissioner other than the second respondent.

There is no order as to costs.

VAN VOORE AJ

Appearances:

For the applicant : Adv. C Carolissen

Instructed by : The State Attorney

For the Respondent - Unopposed

LABOUR COURT