



REPUBLIC OF SOUTH AFRICA

Not reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO JR 2390/12

In the matter between:

LIQUIFIRE ORGANIC FUEL CC

APPLICANT

and

EVA NGOBENI NO

1ST RESPONDENT

CCMA

2ND RESPONDENT

ABEL LEBUDI

3RD RESPONDENT

Application heard: 26 November 2013

Judgment delivered: 17 January 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the first respondent, to whom I shall refer as 'the commissioner'. In her award, the commissioner held that the third respondent had been unfairly dismissed and ordered the applicant to reinstate him.
- [2] At the hearing of the application, the third respondent was represented *pro bono* by Adv G Fourie, under the auspices of the legal aid programme initiated and managed by the South African Society for Labour Law. The court is indebted to Adv Fourie for his assistance.
- [3] The facts that are material to the application can be briefly stated. The third respondent was employed by the applicant in March 2004. The third respondent was suspended on 17 May 2012, after having been found guilty of various offences under the applicant's disciplinary code. The hearing was conducted by a consultant, who recommended, as an alternative to dismissal, that the third respondent be suspended for a period of a week. For reasons that are not immediately apparent from the record, the applicant decided that suspension for a period of two days was appropriate. The applicant's case was that it specifically advised the third respondent, through the medium of an interpreter, that he had been suspended for two days, and he was advised of the dates on which he should not report for work. The third respondent's version was that he had been suspended for five days, that he remained absent from work for five days and that on his return to work on 29 May, he was told by a Mr Haywood that he was dismissed, in essence on account of the previous referral of a dispute to the CCMA. This version was denied by the applicant's witnesses, who stated that

the third respondent had deserted, despite a number of attempts by letter and by sms messages to request him to return to work.

- [4] The commissioner correctly identified that the issues in dispute were the existence of a dismissal, and assuming that the third respondent discharged the onus of establishing that he had been dismissed, whether the dismissal was procedurally and substantively fair.
- [5] In regard to the first issue, the commissioner found that the third respondent had been dismissed. She found, on balance, that the third respondent had been dismissed on 29 May as he claimed. On the merits of the claim, the commissioner found that the third respondent's dismissal was substantively and procedurally unfair, largely on the basis of inconsistencies in the applicant's version.
- [6] In review proceedings in this court, the applicant bears the obligation to place a complete record before the court. In the present instance, the state of the record is unsatisfactory and is insufficiently complete for the court to exercise any judgment as to the reasonableness of the commissioner's award. First, the face of the record indicates that a not insignificant portion of the proceedings was never transcribed. The transcriber has prefaced the record with a note to the effect that 'a lot of what was discussed between the Applicant and the interpreter was not interpreted for the record. Therefore it could not be placed in the record.' Certain of the passages that are specifically indicted by the transcriber as not having been interpreted extend beyond the obviously irrelevant – there are passages, for example, where what would appear to be substantive statements made by the third respondent are missing. Secondly, the commissioner and the parties make extensive reference to the applicant's bundle of documents. These were not placed in the court file, if they were filed at all. The documents specifically referred to and on which crucial findings were made include copies of letters which the applicant avers were sent to the third respondent to address the issue of his 'desertion' and to invite him to return to work. Also relevant is the documentation surrounding the notice of further disciplinary proceedings relating

to what the applicant contended to be absence from work. Particularly relevant is the documentation handed in by the applicant's witness Brown, and included in the bundle as pages 30 to 32. This is crucial to any assessment of the commissioner's factual findings and in particular to her finding that the applicant had fabricated documents for the purpose of the arbitration hearing. There is no explanation for the absence of these documents from the record before the court. It is incumbent on an applicant in a review application to ensure that a complete record of the proceedings under review is before the court. In ordinary circumstances, I would have had no hesitation in dismissing the application for this reason alone. However, the absence of the documentation concerned only serves to exacerbate a situation already made difficult by the poor state of the transcription of the evidence. In short, I find myself unable to do justice to the parties on the basis of the existing record. There is clearly no prospect of any reconstruction of the record within a reasonable time, and it seems to me therefore that the order that is just and equitable in the circumstances is that the matter be remitted for rehearing by a different commissioner. To the extent that the review of an award is taken into account in assessing the performance of commissioners, the circumstances of the present matter are such that the order I intend to make is no reflection on the conduct of the commissioner.

I make the following order:

1. The arbitration award issued by the first respondent on 13 August 2012 under case number GATW 6762/12 is reviewed and set aside.
2. The matter is remitted to the second respondent for rehearing before a commissioner other than the first respondent.
3. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv Roeloffs, instructed by De Villiers and Du Plessis

For the third respondent: Adv G Fourie, *pro bono*

Labour Court