



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number C967/2014

In the matter between:

VINCENT NKULULEKO MAYISELA

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

THEODORUS POTGIETER

First Respondent

LEGAL AID SOUTH AFRICA

Second Respondent

Third Respondent

Date heard: 19 March 2015

Delivered: 5 August 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number NC1084-14, which was handed down on the 8 October 2014. In terms of the award the dismissal of the applicant was found to be both procedurally and substantively fair.
- [2] The applicant was employed by the third respondent (the Legal Aid Board) as its Justice Centre Executive at the time of his dismissal. The second respondent (the Commissioner) summarises the main charges against him in paragraph 12 of the Award of as follows:
- “a) gross insubordination, b) gross insolence; c) attack on the honour dignity or good name of the ROE; d) threats and intimidation made via e-mail to the ROE; e) disruption of employer’s operations and activities; f) conduct resulting in or potentially damaging to the reputation of Legal Aid SA and/or bringing the name of Legal Aid SA into disrepute; g) irregular absence from office without proper leave, permission/notification; and h) transgression of the rules, regulations, policies and procedures of Legal Aid SA.”
- [3] The Commissioner records the following at paragraph 16 of his Award:
- “It is not necessary for me to summarize the evidence tendered by the parties as the evidence tendered is also captured in the documentary evidence contained in the bundles in the form of e-mails, notices and minutes of meetings regarding reinstating Mr Hole at the Regional Court, which were read into the record and the respective witnesses examined on.”
- [4] This abrogation of his duties as a Commissioner is made even more extraordinary if regard is had to the fact that there is a transcript of the oral evidence at arbitration which is well in excess of a thousand pages. The Commissioner has disregarded the relevant guidelines issued by the CCMA for misconduct arbitrations which duly include the need to summarise and analyse the oral and documentary evidence¹. The result of this failure by the Commissioner is that the court cannot begin to properly perform its duties as a reviewing court.

¹ 23 GN 602 of GG 34573 of 2 September 2011.

- [5] In a review application under section 145 of the LRA, the court must ask the following questions: (1) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process employed by the commissioner give the parties a full opportunity to have their say? (2) Did the commissioner identify the dispute he or she was required to arbitrate? (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate? (4) Did the commissioner deal with the substantial merits of the dispute? (5) Is the commissioner's decision one that another decision maker could reasonably have arrived at based on the evidence? ²
- [6] However, with no summary of the evidence and no analysis of the evidence based on same contained in the award, a reviewing court simply cannot answer the questions listed by the Labour Appeal Court above. Much of the grounds of review in this matter deal with the Commissioner's alleged failure to apply his mind to the evidence before him. In these circumstances however, the court cannot assess if there have been errors of fact made by him and if so whether these led to an unreasonable result.³
- [7] Unfortunately for the parties, I have no alternative but to remit this matter to be heard anew. To do otherwise would be to blur the critical distinction between an appeal and a review and in effect decide the matter on the merits *de novo* on the basis of the record before me. The parties have put much time, effort and resources into presenting their cases before the court and I regret that the matter could not be dealt with in the normal way.
- [8] I therefore make the following order:
1. The award under case number NC1084-14 is hereby reviewed and set aside.

² Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at paragraph 20.

³ see Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at paragraph 25

2. The dispute is remitted to first respondent to be heard by a commissioner other than second respondent.
3. The Registrar is directed to forward this judgment for the attention of the Senior Convening Commissioner of the CCMA, Northern Cape.
4. There is no order as to costs.

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

For the Applicant: In person

For the Third Respondent: Advocate Suzanna Harvey instructed by Legal Aid South Africa