

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case no. 2372/98

In the matter between:

Applicant

And

1st Respondent

2nd Respondent

Commission for Conciliation

3rd Respondent

JUDGMENT

—

MLAMBO J.

4. This is an application for review of an award of the Commission for Conciliation Mediation and Arbitration (“The Commission”). The second respondent (“Makhanya”) was dismissed by the applicant on 12 September 1997 for misconduct. He was dismissed pursuant to attending a disciplinary enquiry in which he was found guilty of assaulting a fellow employee (“Tshikedi”) and for unauthorised absence from work.
5. Makhanya referred the dispute for arbitration after conciliation failed to resolve it.

The first respondent (“Mothuloe”) was appointed in terms of section 136 to resolve the dispute through arbitration. Mothuloe found that Makhanya’s dismissal was unfair and awarded him twelve months compensation. In awarding Makhanya compensation, Mothuloe ordered that the compensation be calculated not at Makhanya’s rate of R 988- 00 per month, but at the rate of R 2000.00 per month which was apparently earned by Makhanya’s co-worker who, allegedly earned so much more than Makhanya, because he is white. Mothuloe also found the applicant’s representative to have behaved in a contemptuous manner during the arbitration proceedings, and for that reason ordered the applicant to pay the Commission an administration fee of R 4000, 00 i.e. for the four days on which the arbitration proceedings were held.

6. The applicant seeks to review and set aside the entire award on a number of bases.

These are set out in the heads of argument filed on behalf of the applicant. For completeness sake I set out the grounds of review hereunder. It is alleged that:

- “The first respondent -**
- 3.1 failed to consider the contradicting evidence, which the second respondent gave at the disciplinary inquiry in relation to the evidence, which he produced at the arbitration hearing;**
 - 3.2 failed to consider the effect of the evidence which the second respondent sought to produce through the evidence of Clive who was called to the disciplinary inquiry in support of the second respondent’s allegation, that he never had a knife on him and that it was in actual fact William who produced a knife to attack him;**
 - 3.3 completely ignored and failed to make a finding concerning the second charge which the applicant had brought against the second respondent for**

- purposes of considering whether the second respondent's dismissal by the applicant had been substantively fair or not, and in so doing acted unreasonably and committed a gross irregularity;**
- 3.4 completely ignored and failed to consider the effect which the second respondent's absconding from work from 15 July 1997 until 11 September 1997 should have had on a finding that the second respondent be compensated for his loss of earnings over a period of twelve months and in so doing acted unreasonably and committed a gross irregularity;**
- 3.5 incorrectly found that the second respondent's white counterpart had earned a salary of R 2000.00 per month purely for the reason that he was white or that the applicant had paid him such a salary because of the applicant's motivation and intention to discriminate against the second respondent on racial grounds. It is submitted that the first respondent acted outside the scope of his powers in finding that he had the power to compensate the second respondent based on a remuneration package, which the second respondent did not earn at the time of his dismissal. The compensation awarded to the second respondent exceeded the limit of compensation as laid down by the provisions of section 194 of the Act. For this reason alone, it is submitted that his decision is defective and should be reviewed and set aside.**
- 3.6 acted improperly and committed a gross-irregularity by excluding and failing to consider the evidence presented by Ms Flett (who chaired the disciplinary inquiry held on 12 September 1997) at the arbitration hearing. It is submitted that the first respondent was blinded by the irrelevant provisions of section 187 of the Criminal Procedure Act, 57 of 1977, in arriving at this particular decision.**
- 3.7 failed to take into account relevant considerations and to apply his mind and in so doing arrived at a decision, which was grossly unreasonable, that Ms Flett had acted improperly or unfairly in chairing and conducting the disciplinary inquiry;**
- 3.8 unjustifiably concluded that the evidence of the witnesses who testified on behalf of the applicant left "much to be desired."**
- 3.9 committed a gross irregularity and exceeded his jurisdiction to order that the applicant pay to the third respondent an administration fee of R 1000.00 per day for a period of four days."**

7. In effect the applicant's grounds are that Mothuloe committed a gross irregularity in relation to the conduct of the proceedings before him. His award is also challenged on the basis that he exceeded his powers in ordering the applicant to pay Makhanya compensation calculated at a rate higher than his own rate, and in ordering the applicant to pay the CCMA an administration fee.
8. It is now trite that an award of a commissioner, being administrative action must be justified in relation to the reasons given for it. See **Carephone (Pty)Ltd v Marcus (1998) 19 ILJ --- (LAC)**. In other words the award must be capable of substantive justification.
9. The applicant's attack on Mothuloe regarding the conduct of the arbitration proceedings is in essence that he failed to consider and/or ignored the true nature of the evidence before him. It was submitted that Mothuloe failed to consider the contradicting evidence which Makhanya gave at the internal disciplinary enquiry and the evidence he produced at the arbitration hearing. It is not clear from the founding affidavit in what respects it is alleged that Makhanya produced contradicting versions at the disciplinary enquiry and during the arbitration hearing. In the absence of any indication in what respect it is alleged Makhanya contradicted himself this court cannot entertain this ground. It is simply not the duty of this court to analyse the evidence led at the disciplinary enquiry and at the arbitration hearing. Parties must pinpoint what according to them, is reviewable and make submissions. It is simply

not acceptable to make bald allegations which are in themselves not helpful.

10. The award is further attacked on the basis that Mothuloe failed to consider the effect of the evidence which Makhanya sought to produce through the evidence of Clive, who testified during the disciplinary enquiry (and not at the arbitration hearing), to support Makhanya's version that he never had a knife on him but it was Tshikedi who produced a knife. In regard to this ground the applicant has also failed to indicate in what respects was Mothuloe remiss. What is clear is that Clive's evidence during the disciplinary enquiry in a way supported Makhanya. In the absence of any indication how Mothuloe misdirected himself this line of attack can also not be upheld.

11. Issue is also taken with Mothuloe for his alleged failure to consider the second charge on which Makhanya was also found guilty. This is the charge relating to the abscondment from work from 15 July 1997 to 11 September 1997. It is not correct that Mothuloe did not consider this aspect. Mothuloe mentioned that both parties did not place enormous importance on this charge. It appears that Makhanya mentioned in passing that there was no merit to this charge. Mothuloe also records in the award that Makhanya was "suspended" from work during the period of the alleged abscondment. He also records that a number of things occurred during this period such as conciliation by the Commission. There is no doubt in my mind that Mothuloe regarded the assault charge as the more important of the two as far as Makhanya's dismissal was concerned.

12. It is important therefore to consider the effect of Mothuloe's failure to make a finding regarding the second charge. It appears that during the first enquiry on 15 July 1997 Makhanya walked out due to disagreement with the chairman of that enquiry, Mr Fred Smith. Makhanya then referred a dispute to the Commission alleging that he was unfairly dismissed. The Commission enrolled the dispute for conciliation on 10 September 1997. The parties "resolved" that dispute by means of an agreement to the effect that Makhanya would be "reinstated" but would be placed on suspension pending another disciplinary enquiry on such charges as the applicant deemed fit. That enquiry took place on 12 September 1997 when Makhanya was dismissed.

13. Whilst no evidence relating to the abscondment charge was led before Mothuloe same was led at the disciplinary enquiry. Mothuloe was handed the transcripts of the disciplinary enquiry. In view of the fact that the dispute which Mothuloe was arbitrating included the abscondment charge Mothuloe was therefore duty bound to make a finding about it. Does his failure to consider the abscondment charge and make a finding about it amount to a defect within the meaning of section 145?

14. Section 145 as interpreted by the Labour Appeal Court in **Carephone** imports a measure of a certain degree rationality or soundness in the outcome. It is not possible to determine the rationality of the award relating to this aspect in the absence of a direct finding about the abscondment conviction. In my view the failure to consider

and make a finding on the second charge prevented the applicants's case from being fairly determined. That means in my view that Mothuloe committed an irregularity warranting interference by this Court.

15. Criticism is also levelled at Mothuloe for his findings on the dual role played by Ms Flett as a "prosecutor" and "chairman" in Makhanya's disciplinary hearing. It is apparent that Mothuloe went to great lengths to analyse the transcripts of the disciplinary enquiry. The role of the court in this matter is to determine if the finding is justifiable on the reasons given for it. In other words is the finding capable of substantive justification. A careful study of the award reveals that it is so much the fact that Flett played a dual role that disqualified her evidence but it is the fact that Mothuloe found it unacceptable that she sat and heard all the evidence during the arbitration and then testified against Makhanya. In my view the finding against Ms Flett's "dual" role was carefully considered by Mothuloe. I can find no reason to interfere with it. It is also my view that indeed Ms Flett behaved as "prosecutor" and "magistrate" in a sense which deprived Makhanya of a fair hearing.

16. Mothuloe awarded Makhanya twelve months compensation based on a monthly salary of R 2000.00. This decision was based on evidence by Makhanya that a white co-worker who performed the same work as him earned R 2000.00 per month whilst Makhanya earned R 988.00. Mothuloe found that this amounted to racial segregation. Whilst that may be so it is equally correct that Mothuloe was not appointed to

consider a racial segregation dispute but an unfair dismissal one which had nothing to do with racial segregation. Clearly Mothuloe exceeded his powers within the meaning of section 145.

17. Another source of criticism of the award is Mothuloe's order that the applicant pay an administration fee of R 4000.00. This order was made in terms of section 140(2) which authorises such decisions by commissioners particularly in instances where a dismissal is found to be procedurally unfair. Mothuloe's decision appears to have been influenced by the conduct of the applicant's representative, Mr Smith, which apparently lengthened the number of days on which the arbitration was held. I am not persuaded that this decision is irregular justifying interference by this court. The applicant has also failed to demonstrate in what way is the decision reviewable.

18. In the final analysis it is so that Mothuloe committed reviewable irregularities in regard to:

15.1 His failure to consider and make a finding on the abscondment charge.

15.2 His decision that the applicant pay Makhanya compensation at the rate of R2000.00 per month. Other than these defects the award is appropriate and I have detected no other irregularity justifying interference by this court. It is proper therefore to correct those aspects set out above and let the award stand.

19. Having considered all the facts surrounding the abscondment conviction it is my view

that it was unfair to charge Makhanya with that offence in the first place. It is clear that Makhanya walked out of the disciplinary enquiry and went straight to the Commission to refer a dispute about an alleged unfair dismissal. The applicant was aware of the referral and indeed the agreement reached at the conciliation of that dispute is crucial. In terms of the agreement Makhanya was regarded as having been on suspension from the day he walked out of the enquiry which is 15 July 1997 to the date of the enquiry which is 11 September 1997. In my view this agreement rendered unfair any charge of abscondment during the same period as for all intents and purposes Makhanya was on suspension. There was therefore no merit in the charge of abscondment and any conviction based thereon cannot stand. The fact that the agreement provided that the applicant could proffer any charge it deemed fit cannot be interpreted to mean that it was open to charge Makhanya with that charge. That charge simply went against the agreement itself.

20. It is also clear that Mothuloe could not order compensation on a rate of pay different to that earned by Makhanya based on considerations of racial discrimination. Compensation should be based on Makhanya's rate of pay at the time of the dismissal i.e R 988, 00 per month.

21. It now remains for me to consider the referral for contempt of the Commission by applicant's representative. A reading of the award on this aspect gives the impression that Mothuloe has already found Smith to have been in contempt. To the extent that

this may be so his findings are set aside as he is not empowered to do so. See **Colyer v Essack N O & others , Malan v CCMA & another (1997) 9 BLLR 11173 (LC)**.

I will consider the matter as a referral within the meaning of section 142(9).

22. In my view the referral by Mothuloe in terms of section 142 (9) is proper. The applicant and/or Smith were entitled to make representations regarding Mothuloe's allegations in that regard. No such representations were made. The applicant has contented itself with an application to review the award on certain specified grounds. There is no challenge relating to the contempt allegation and referral. It appears therefore that the applicant and Smith take no issue with that aspect of the award.

23.

24. The referral for contempt is based on a number of incidents that occurred during the arbitration and the manner in which Smith conducted himself. For completeness' sake I recount hereunder such conduct and occurrences as recorded in the award:

“The representative of the respondent, Mr Smith, of the employers' organisation by the name of ASAMBO mentioned above, conducted himself in a manner to say the least, which was grossly ungentlemanly. This is borne out by the following incidents that occurred during the arbitration:

- . **Admittedly Mr Smith has an enormously limited understanding of English, particularly when he gets emotional, which happened quite frequently. The consequence of this is that on many occasions Mr Smith attributed certain words and meanings to the applicant under cross-examination, which the applicant had not mentioned at all.**
- . **The applicant first did not complain, but later complained and complained bitterly about this particular cross-examination on the transcript of the disciplinary hearing. When I spoke to Mr Smith about this matter, his view was that I had taken sides with the applicant and the respondent feels**

“abused” by this conduct on my part. I sincerely hope that this was not the word that Mr Smith intended for if it is it can only make his case worse.

- . On many occasions I imposed on the applicant to answer Mr Smith’s questions, delivering to the applicant the meaning of Mr Smith’s questions, as I have perceived it. Ten out of ten times he agreed with me that I have delivered his meaning correctly, but late he turned against me and said I have mentioned that I am biased and he feels abused.**
- . Mr Smith submitted to me a record of the disciplinary hearing, which he knew not to be correct at the time that he submitted it and without first disclosing that the transcript has defects. I made it clear to him that this conduct is unacceptable. He did not even apologise for it.**
- . On at least two occasions Mr Smith put a false version to the applicant under cross-examination, which version he never pursued in his evidence in chief or anywhere else during the arbitration. For example, when cross-examining the applicant on the reason why the Department of Labour had rejected his identity document, the applicant said it was because it was a Bophuthatswana identity document and Mr Smith in turn replied and said “no, your identity document was rejected because it was forged.” Never again did Mr Smith follow up this version as I have mentioned. When he put it to the applicant that Mr Nick Smith did not give the applicant an option to resign or be fired, but instead said to the applicant “Did you give it a thought to resign?” It is undesirable in the extreme that a cross-examiner of a witness should knowingly put to the witness a version which he knows not to be true, which version either conflicts with the evidence in chief which the third (sic) cross-examiner is going to lead or has led during the hearing, or is not going to be led in evidence in chief at all by the third cross-examiner. This rule is no formulation of mine, but a tried rule of practice in cross-examination.**
- . Mr Smith introduced the transcript of the disciplinary hearing at a rather discomfoting time while after the applicant had been under cross-examination for a while. The applicant himself complained about this in that it prejudiced him. Such a (sic) conduct lends itself to the impression that Mr Smith intended to catch the witness out.**

The following conduct on the part of Smith in my view breached the provisions of the Labour Relations Act (Act 66 of 1995):-

- . On the last day of the hearing, both parties agreed with the commissioner**

that we would adjourn for an hour and a half or so and resume at 18:45 to take closing arguments. Indeed 19:00 we reconvened for closing arguments. The applicant commenced. At 19:45 or 19:48, Mr Smith suddenly exploded refusing to be present at the CCMA and said the following:

“I am not staying in this building later than 20:00. You can make your judgment with or without my argument.”

This comment he made in a very loud and aggressive voice. By this conduct Mr Smith breached the provisions of section 138(10)(b) read with section 142(8)(g) and (c) in that by these utterances he belittled a commissioner.

Mr Smith contravened the provisions of section 142(8)(g) in that he improperly anticipated the commissioner’s award by saying about the applicant “...who is blatantly lying in these proceedings... wasting our time for three days now because he is so guilty you can see it in his face:.”

On the basis of the aforementioned sub paragraphs, I hold Mr Smith in contempt of the Commission and will refer this matter to the Labour Court in terms of the Act in such circumstances.”

25. Whilst an impression may be gained that overall Smith’s conduct bordered on contempt a careful scrutiny of the overall conduct does not amount to contempt. However, I find Smith’s conduct on the last day of the arbitration to be contemptuous. Indeed by his utterances he belittled Mothuloe. Such conduct is unacceptable. It appears justified therefore that an appropriate order be issued to discourage any further conduct of a similar kind.

26. Under the circumstances I make the following order:

27. The application for review is dismissed.

28. The award is corrected to the effect that the applicant must pay second respondent (Makhanya) compensation for 12 months calculated at R 988,00 per month. This amount must be paid within 10 days of this order.

3. Mr Erhard Smith is found to have been in contempt of the first respondent (Mothuloe).

29. Mr Erhard Smith is ordered to direct an unconditional written apology to the first respondent within 10 days of this order.

30. There is no order as to costs.

MLAMBO J

Date of judgment 19 March 1999.

For the applicant: Mr Sher of Eric Louw Attorneys.