

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P70/2000

DATE: 12 AUGUST 2000

In the matter between:

WAVERLEY BLANKETS

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First respondent

NGCOLA HEMPE N.O.

Second respondent

NATIONAL CLOTHING AND TEXTILE

WORKERS' UNION OF SOUTH AFRICA

Third respondent

SHEPHARD SOKUJIKA

Fourth respondent

J U D G M E N T DELIVERED ON 12 AUGUST 2000

REVELAS, J:

[1] This is an unopposed application in terms of Sec 145 of the Labour Relations Act 66 of 1995 ("the Act") to review and set aside the award of the second respondent ("the Arbitrator"), reinstating the fourth respondent

in the applicant's employ, having found that his dismissal by the applicant was substantively

unfair.

[2] On the undisputed evidence presented by the applicant during the arbitration proceedings, the following events resulted in the fourth respondent's dismissal.

[3] On the day in question, the fourth respondent left the working area and walked up a steep flight of stairs towards the male cloakrooms with his elbows at his sides at a time when he should have been expected to use his hands. At some stage during cross-examination the fourth respondent conceded that he would normally use his hands when he walked up the stairs in question.

[4] The fourth respondent had also left his workstation without the required authorisation and in circumstances where he knew he was not entitled to be. He then entered the male cloakroom at the top of the flight of stairs where the manager of the relevant department, Mr Fonseca, found him.

[5] Mr Fonseca had followed the fourth respondent up the stairs and peeped through the partially closed cloakroom door. He noticed the fourth respondent standing on a table with his hands "in" the ceiling.

[6] The following facts are in dispute. Mr Fonseca witnessed how the fourth respondent placed material into a gap in the cloakroom ceiling. Here I may just pause to mention that the applicant's business is the manufacturing of duvets and other similar fabric products. According to Mr Fonseca he approached the fourth respondent and enquired from him as to why he sought to jeopardise his employment in this fashion and in response the fourth respondent told Mr Fonseca that he was sorry.

{7] Mr Fonseca found various other fabrics, also the property of the applicant, inside the ceiling of the male cloakroom in question. The fabrics were discovered through a hole in the ceiling.

[8] The fourth respondent's explanation was that he was looking for a brush in the ceiling and had never placed any material there. The Arbitrator rejected Mr Fonseca's evidence and found that the dismissal was substantively unfair.

[9] The essential grounds on which the applicant seeks to have the arbitration award reviewed and set aside, are the following:

1. The Arbitrator, in breach of Sec 138(7) of the Labour Relations Act delayed unreasonably in rendering his award; and

2. The Arbitrator's award is neither "rational" nor "justifiable" within the meaning of *Carephone (Pty) Ltd v Marcus, N O and Others [1998] 19 ILJ 1425 (LAC)*;

3. In reaching his conclusions the Arbitrator had regard to irrelevant evidence and further disregarded relevant evidence, thereby committing a gross irregularity in the conduct of the arbitration proceedings within the meaning of Sec 145(2)(a)(ii) of the LRA;

4. The Arbitrator failed to properly apply his mind to the inherent probabilities or issues of credibility emerging from common cause or undisputed facts. In doing so he committed a gross irregularity in

the conduct of the arbitration proceedings within the meaning of Sec 145(2)(a)(ii) of the Act.

[10] Firstly I will deal with the delay in rendering the award. In terms of sections

138(7) and (8) of the Act, an arbitrator, acting under the auspices of the

Commission for Conciliation, Mediation and Arbitration, should render his or her award within 14 days of the conclusion of the arbitration proceedings. Such an arbitration award has to set out

brief reasons and therefore it must be signed by the Commissioner. In the matter before me, the arbitration proceedings in question came to an end on 24 July 1999. By agreement between the respective parties and with the concurrence of the Arbitrator, written heads of argument were thereafter submitted to the Arbitrator. The applicant's heads of argument were served and filed during July 1999 but the award was only issued on 22 December 1999, virtually six months after the conclusion of the arbitration proceedings.

[11] In matters where arbitration awards were rendered late it appears that the attitude adopted by the Labour Court was that the provisions contained in section 138 of the LRA were intended to be guidelines and not imperative. In other words, that the non-compliance with the time limits contained in section 138 of the Act need not result in the proceedings being rendered a nullity. The Court has, however, held that there are exceptions in circumstances where an award is issued so late that different consequences may follow. (See: *A A Ball (Pty) Ltd v Kolisi and Another* [1998] 6 BLLR 560 and *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU and Another* [1999] 3 BLLR 223 (LC) at 226D-G)).

[12] It was argued on behalf of the applicant that whether directly or peremptory, the legislature could never have been intended there to be no consequences attendant upon an arbitrator's failure to render an award within a reasonable time, where the delay was gross. It was argued that in the present matter the delay in itself amounts to either misconduct within the meaning of Sec 145(2)(a)(i) of the Act or a denial of a fair hearing within the meaning of Sec 145(2)(a)(ii) thereof and that in such circumstances and despite the fact that the matter may have to be heard *de novo*, the award stands to be reviewed and set aside on this basis alone.

[13] The long delay in itself is not an irregularity which would result in the proceedings becoming null and void (see paragraph 11 supra) but it compounded other shortcomings in the award which of necessity, was the result of such a long delay. The long delay resulted in a failure on the part of the arbitrator to apply his mind to the evidence. There are several examples of this.

[14] Mr Fonseca for instance testified that he and the fourth respondent had a sound working relationship. This evidence went entirely unchallenged during the course of the cross-examination and should have been accepted by the arbitrator. The arbitrator ignored this unchallenged evidence tendered on behalf of the applicant and then simply accepted, without motivating why, evidence which had never been put to the applicant's respective witnesses, namely that the relationship between Fonseca and the fourth respondent was poor, despite Mr Fonseca's detailed unchallenged evidence to the contrary. The arbitrator also made an adverse credibility finding against Mr Fonseca without affording him the opportunity of responding to various contrary allegations which were never put to him during the course of cross-examination. Mr Fonseca's evidence that the fourth respondent specifically indicated that he was "sorry" was not disputed during cross-examination. The arbitrator found it fit to reject Mr Fonseca's evidence on the basis that his evidence was not corroborated by witnesses in whose presence the statement was allegedly made. Rational thinking is totally absent from the reasoning of the arbitrator at this point. At no stage did Mr Fonseca testify that there were any other persons present, apart from himself and the fourth respondent at the time this inculpatory statement was made. In respect of this incident, the Arbitrator referred to a Ms Moletsane who was never even called as a witness.

[15] The arbitrator also found that Mr Fonseca testified to the effect that the respondent alighted the stairs furtively. This is also incorrect, since Mr Fonseca at no stage testified that his suspicions

were aroused as to the manner or gait of the fourth respondent when he alighted the stairs. What made him suspicious was that the fourth respondent had left the working station without permission and he assumed that the fourth respondent was going to the male cloakroom to smoke there.

[16] The arbitrator also did not deal at all with the probability of an employee looking for his brush inside the ceiling of a male cloakroom As a fact that seems highly improbable. This escaped the arbitrator completely.

[17] The arbitrator also observed that Mr Fonseca's view of the fourth respondent would have been obscured. There was no basis for

such an observation and, having made it, he ought to have afforded

Mr Fonseca the opportunity of commenting on this observation.

[18] The Arbitrator also did not comment on the quality of the fourth respondent's evidence with a view to deciding whether or not the evidence was credible. Very obvious factors he ignored, such as the fact that Mr Fonseca's evidence was largely unchallenged, that the fourth respondent had failed to obtain authorisation to be in the cloakroom during working hours; that the fourth respondent belatedly saw fit to deny the existence of the hole in the cloakroom roof; that the fourth respondent sought to suggest on very spurious grounds that Mr Fonseca had actively set about framing him.

[19] There has been much debate about the test for review in the Labour Appeal Court. I'd rather not dwell on the current debate surrounding the question of whether the justifiability test as set out in the *CAREPHONE* case (paragraph 9.2 supra) for review, within the meaning of Sec 145 of the

Act, is correct or not. For present purposes it has to be accepted that the test of justifiability or reasonableness (or the “CAREPHONE test”) still forms part of the *ratio decidendi* of the Labour Appeal Court's judgment in that matter. The “CAREPHONE test” was applied in at least two subsequent decisions of the Labour Appeal Court. (See: *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [1999] 2 ILJ 1701 (LAC) at 1706-7 and 1716 and *Mkhonto v Ford N O and Others* [2000] 7 BLLR 768 (LAC) at 770 para 5.) I therefore regard the CAREPHONE decision as binding.

[20] This brings me to the nature of the arbitrators conduct, and the question whether on the material available to him, he gave a justifiable award. The arbitrator rejected the applicant's evidence on the strength of evidence which was never put to the applicant's witnesses. He ignored the applicant's unchallenged evidence. He determined the matter solely with reference to the evidence tendered by the fourth respondent, which was fraught with glaring improbabilities as demonstrated. He drew adverse conclusions on the strength of observations made during the course of an inspection *in loco* without recording those observations or permitting the applicant's witnesses to comment thereon.

[21] In *Ellis v Morgan* 1909 (T) 576 Manson, J held that a gross irregularity is one of the grounds upon which a court may review the decisions of inferior tribunals, but that **“irregularity in the proceedings does not mean an incorrect judgment. It refers, not to the result, but to the methods of the trial such as, for example some high-handed or mistaken action which has prevented the aggrieved party from having its case fully and fairly determined”** (at 581).

[22] In *Goldfields Investment Ltd and another v The City Council of Johannesburg and another* 1938 (TPD) 551 Schreiner, J held that: **“The law as stated in *ELLIS v MORGAN* (supra) has been**

accepted in subsequent cases and the passage which has been quoted from the case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to gross irregularity."

The aforesaid dictum is particularly apposite to the matter at hand as the arbitrator's conduct prevented a fair trial of the issues, and constitutes a gross irregularity.

[23] The Arbitrator waited six months to render his award. After that time, he apparently no longer had the understanding of the evidence as he should have had, had he given his award timeously. The manner in which he dealt

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et aside.

[24] I make the following ORDER:

1. The award of the second respondent (the Arbitrator) is SET ASIDE.
2. The matter is referred back to the Commissioner for Conciliation, Mediation and Arbitration to be heard before another arbitrator.

E REVELAS