

CASE NO : D1136/2000 Revised/Reportable
DATE : 28 February 2001
ELS TRANSPORT versus CCMA & ANOTHER

JUDGMENT

PILLAY J

- [1] This is a review. The first issue challenged in terms of section 158(1)(g) was that the Bargaining Council conciliated and issued a certificate of non-resolution of the dispute despite the referral for conciliation being made outside the 30 days prescribed in section 191(1)(a) of the Labour Relations Act No 66 of 1995 (the "LRA"). Ms Posemann wisely withdrew this ground of review at the outset of her address.
- [2] The second challenge brought in terms of section 145(1) of the LRA was leveled at the decision of commissioner R of the Commission for Conciliation, Mediation and Arbitration (the CCMA) who had found that the dismissal of the employees was unfair.
- [3] The grounds of review were, *inter alia*, that, firstly, commissioner R awarded compensation in excess of the 12-month limit prescribed in section 194(2) of the LRA thereby exceeding his powers. Secondly, commissioner R accepted the evidence of the employees that they had been dismissed on 30 October 1998 when it was common cause that they had been dismissed in April 1999. Consequently, it was submitted, the award was improperly obtained.
- [4] The third challenge which was in terms of section 158(1)(g) was against a ruling of commissioner N who refused the application for rescission of the award of Commissioner R referred to above.
- [5] The first point taken *in limine* by Mr Blomkamp for the employees was that the application for review was not properly made as a number of separate and distinct applications and causes of action were combined in one application. There is no substance in this objection. A party may plead as many separate causes of action as it wants provided the facts in support of each cause and the remedy or remedies sought are clearly and concisely set out. (Erasmus, *Superior Court Practice* at B1-129. Harms, *Civil Procedure in the Supreme Court* at J1.)

- [6] As a second point *in limine* Mr Blomkamp submitted that the application for the review of the award and the ruling was out of time. In the absence of an application for condonation these applications should therefore fail.
- [7] The review of commissioner R's award should have been made within six weeks from 14 February 2000. The application was delayed until 6 September 1999. Ms Posemann submitted that the reason for the delay was because a review application would have become unnecessary if the rescission application succeeded. As the application for review was brought within six weeks of the employer being notified of the ruling of commissioner N, no application for condonation was necessary, so the argument went.
- [8] The application for the review of the award of commissioner R was not brought within the time limits prescribed in section 145(1)(a). An application for condonation was therefore warranted. As the evidence in support of such an application was already on the papers before Court, it could have been made from the bar. [*Northam v UU Net Internet Africa (Pty) Ltd & Others* 1998 19 ILJ 862 (LC)]. However, as Ms Posemann pointed out, if the review of the ruling of commissioner N succeeds, the award will effectively be rescinded.
- [9] As regards the review of the ruling, it had to be brought within a reasonable time. [*Librapack CC v Fedcraw & Others* 1999 20 ILJ 151 (O); *Dartprops (Pty) Ltd v CCMA & Others* 1999 (4) LLD 95 (LC)]. Six weeks has been held to be a reasonable time. [*Moolman Brothers v Gaylard NO & Others* 1990 8 ILJ 150 (LC); *Librapack CC v Moletsane NO & Others* 1998 19 ILJ 1159 (LC)].
- [10] The employer's evidence on affidavit was that the ruling was received on 1 August 2000. This was disputed by the employees. Support for the employer's version can be found on the fax transmission print at the top of each page of the ruling which gives the date of faxing as 1 August 2000. The application to review the refusal of the rescission application was therefore made within six weeks. In any event the employees were not able to refute the evidence of the employer that it had received the ruling on rescission on 1 August 2000. The period of six

weeks is reasonable in the circumstances of this case as the employer regularly attended to the matter in order to bring it before the Court.

[11] Section 144 of the LRA provides:

"Any commissioner who has issued an arbitration award acting of the commissioner's own accord or on the application of any affected party may vary or rescind an arbitration award -

(a) erroneously sought or erroneously made in the absence of any party affected by that award."

Rule 24.3 of the CCMA rules provides:

"The commissioner who issued the arbitration award or ruling must hear the application for variation/rescission in terms of section 144 of the Act provided that the commissioner may, on good cause shown, appoint any commissioner to hear the application."

[12] The first ground of review of the Ruling of Commissioner N was that the rescission application was not heard by the commissioner who issued the award. Mr Blomkamp relied on the Labour Court decision in *Fidelity Guards v Epstein* 2000 (3) BLLR 271 (LC) to resist this ground on the basis that the employer did not object to commissioner N hearing the application when it was being made.

[13] It must be pointed out that the *Fidelity Guards* case does not seek to confer legality on that which is *ultra vires*. Although Pillemer AJ refused to hold that in the absence of an application for condonation the issuing of a certificate outside the 30 day time limit was a reviewable irregularity, he accepted that a certificate issued out of time can be set aside on review. The basis on which the court refused to review and set aside the award for want of jurisdiction was that the certificate was not challenged timeously. That does not apply in the circumstances of this case.

[14] The plain meaning of section 144(a) is that only the commissioner who issued the award may vary or rescind it. Rule 24.3 of the CCMA rules has been held to be inconsistent with the statute and therefore *ultra vires*. (*SACCAWU v CCMA* 2000 21 ILJ 2098.) However, if the plain meaning of section 144(a) was adhered to strictly, it could lead to an absurdity. It would mean that if a commissioner is unavailable, incapacitated or deceased, nothing can be done

to rescind the award. The award will have to stand. The practice in the High Court, as in this Court and the Magistrate's Court does not require the same judge or magistrate, as the case may be, who issued the judgment to rescind it. (*Rule 42 of the Rules of the High Court; rule 16(a) of the Rules of the Labour Court; Civil Practice of the Magistrate's Court in South Africa, Vol 1, Erasmus and van Loggerenberg at page 148.*)

[15] I cannot see what the rationale is for requiring the same commissioner to rescind his/her award. It would be wholly inconsistent with the spirit of the LRA to saddle a party with an award that was granted erroneously in the absence of such party, or which contains an ambiguity or error or omission, or was granted as a result of a mistake common to the parties. In coming to this conclusion I respectfully decline to follow my brother JAMMY AJ in *SACCAWU v CCMA* above.

[16] Turning to the substance of the review of the ruling, the employer submitted that it was unreasonable and not justifiable in relation to the reasons given for it. The employer's explanation for not attending the arbitration on 7 December 1999 was that he had not received notice of set-down of the arbitration. To this commissioner N responded as follows: "There is one argument advanced by Mr Blomkamp which I find to be overwhelming. That is the argument that in terms of the Act section 213 service by telefax is sufficient. The employer party does not argue that there was no service. It said merely that this service of notification did not come to its attention. On this basis alone I am inclined to agree with the employee party and dismiss the application for rescission."

Commissioner N preferred the approach of SUTHERLAND AJ in *Duarte v Karrim NO & Another* 1998 (3) LLD 482 (LC) instead of that of PRETORIUS AJ in *Construction and Allied Workers Union & Another v Federal Steen* 1998 19 ILJ 642 (LC). He applied his mind to both decisions. His choice might have been wrong. However, a wrong decision is not a ground of review in the circumstances of this case. (*Carephone (Pty) Ltd v Marcus & Others* 1998 19 ILJ 1424; *Toyota (SA) Motors v Radebe & Others* 2000 21 ILJ 340 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdau NO & Others* 2000 21 ILJ 1232 (LC).)

[17] Commissioner N also applied his mind to the period of delay of two months and concluded

that it was not reasonable considering that the employer was assisted by a labour consultant and attorneys. He also considered and rejected the jurisdictional objection that the certificate of non-resolution of the dispute had been improperly issued and therefore that the arbitration should not have proceeded. These findings do not render his ruling reviewable.

[18] Commissioner N then attempted to deal with the merits of the dispute thus:

"With regard to the question as to whether or not the applicants misappropriated the diesel fuel, I cannot make up my mind whether the employer party would have succeeded in proving to the arbitration that it had a fair reason to dismiss the employees. In so far as it relates to the employees leaving the arbitration before it was concluded, the employer may well have had a strong defence to resist the allegation that the disciplinary hearing was procedurally unfair."

The commissioner could not make up his mind as regards the substantive basis for the dismissal. As regards procedural unfairness, he entertained some doubt as to whether the employees would succeed. Whether commissioner N eventually concluded that there were prospects of success on the merits or not, is not apparent from his ruling. He concludes thus: "As stated above, I do however find that in the light of all the relevant factors the employer party has not established a case that would persuade me to rescind the award."

[19] However, that is not the end of the inquiry to determine whether the award should be reviewed and set aside. Commissioner N failed to apply his mind to a material fact that was properly before him. I refer here to the date of the dismissal of the employees. In setting out the background to the dispute, commissioner N appears to have accepted that the employees were dismissed about 14 April 1999. It ought to have been evident from the award of commissioner R, which he should have had regard to, that there was a discrepancy in the date of dismissal. The date was material as commissioner R stated in the award that he had found that there had been procedural unfairness. That would have been critical to determining the amount of the compensation. As it transpired, commissioner R awarded compensation from the date of dismissal to the date of the award, and not the last day of the hearing. It should therefore also have been obvious to commissioner N that the award was defective in that commissioner R had exceeded his powers in terms of section 194(1) and (2)

of the LRA by awarding 15 months' salary as compensation. (*Chetty v Scotts Select A Shoe* 1998 19 ILJ 1465 (LC).) The failure by commissioner N to apply his mind in these circumstances and to have regard to material properly before him amounts to a gross and reviewable irregularity.

[20] The ruling of commissioner N is reviewed and set aside. The award dated 31 January 2000 under case No KN37578 is rescinded. The dispute is referred to the CCMA to be arbitrated before another commissioner. There is no order as to costs.

JUDGE PILLAY

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that, so far as it is audible, the foregoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

ELS TRANSPORT versus CCMA

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IN THE LABOUR COURT OF SOUTH AFRICA Revised/Reportable

HELD AT DURBAN

Case No D1136/2000

In the matter between:

ELS TRANSPORT **Applicant**

and

BEN DU PLESSIS (In his capacity
As Commissioner for the National
Bargaining Council for the Road
Freight Industry) **First Respondent**

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY** **Second Respondent**

COMMISSIONER A RAMDAW **Third Respondent**

COMMISSIONER AUBREY NGCOBO **Fourth Respondent**

CCMA **Fifth Respondent**

ERIC SHEZI **Sixth Respondent**

ROBERT SHELEMBE **Seventh Respondent**

PRESIDING OFFICER JUDGE PILLAY

FOR APPLICANT ADV. POSEMANN

FOR RESPONDENT MR BLOMKAMP

JUDGMENT
28 FEBRUARY 2001

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