

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NOs D343/2000
 D1556/2000

DATE 2001/03/08

In the matter between:

SITHEMBISO ERIC SHABALALA

Applicant

and

KHANYA HIGH SCHOOL
C/O DEPARTMENT OF EDUCATION

Respondent

**JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE GERING
ON 8 MARCH 2001**

[NO APPEARANCE]

ON BEHALF OF RESPONDENT

MR T A SISHI

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

GERING AJ

I have read the voluminous papers in this matter. I have also listened to the careful argument of Mr **Sishi**, who has compiled heads of argument. Mr **Sishi** handed in to me a notice that the applicant, Mr Shabalala, abides the judgment of the Court. This is dated 7 March of this year. There is obviously no appearance by or on behalf of Mr Shabalala, the original employee in this case.

This matter concerns two separate court files. One is D343/2000 and the other is D1586/2000. I will refer to Mr Shabalala as the employee for purposes of this judgment. The employee had an award in his favour and applied under section 158 of the LRA to have the award made an order of Court. The respondent, namely the Department of Education, has brought proceedings for review and setting aside of two awards made under the auspices of the CCMA. The one award is dated 15 February 2000. This is the award made in favour of the employee and ordering his reinstatement. The other award is dated 20 September 2000.

The two awards were made by two different persons and the Department of Education, the respondent, has raised a legal point which is described as a point *in limine* as to whether the second commissioner, the commissioner who gave the award dated 20 September 2000, had authority or jurisdiction to rescind the arbitration award made by the first commissioner on 15 February 2000. The second respondent was a commissioner other than the one who originally heard the arbitration proceedings.

I indicated that in regard to the question of condonation, because the application was made a few days late, that I would grant condonation. It is clear from the authorities that condonation can be granted under section 145 even though the section does not specifically make provision for this. See *Mbatha v Lyster NO & Others* [2000] 7 BBLR 795; and *Queenstown Fuel Distributors CC v Labuschagne & Others* [2000] 1 BBLR 45. As the amount of the delay was minimal, I have no hesitation in granting condonation.

The respondent has submitted that once the Court decides to review and set aside the refusal to

rescind, it follows that it will also set aside the original award. Authority for this is to be found in the case of *Cash Paymaster Services (Pty) Limited v Mogwe and Others*, (1999)20 ILJ 610 (LC) at 616 paragraphs 19 and 21 in particular. This case was cited with approval in the later case of *M.I.T. v Theron and Others* [2000] 8 BLLR 947(LC) at 951 paragraph 19. These cases clearly support the view that once the Court decides to set aside the refusal to rescind the award, it follows that the original award should also be set aside.

In the case of *SACCAWU v CCMA and Others* [2000]10 BLLR 1215, a decision of JAMMY AJ in the Labour Court, at page 1218, paragraph 15, the learned judge, after carefully considering the provisions of section 144 of the Act and Rule 24(3) of the Rules of the CCMA (see paras [6]-[12], of his judgment found that the second respondent, the second commissioner, did not have the authority or jurisdiction to rescind the arbitration award in question and that the ruling made by him was invalid and was of no force or effect. The second respondent was a commissioner other than the one who originally heard the arbitration proceedings. This is the case in the present situation where the award of 20 September 2000, the commissioner was Mr Shangase; the commissioner in the award of 15 February 2000, was Mr. Grobler.

I have no reason to differ from the judgment of JAMMY AJ in that case and it seems to me, on a proper reading of the provisions of the Act, only the original commissioner has jurisdiction to hear an application for rescission under section 144 of the Act. It may well be, as the learned judge has stated, (see para [12] of the judgment) that the rule of the CCMA empowering the CCMA to enable another commissioner to hear a rescission application is *ultra vires* the Act. It is not necessary for me to decide that here. There is no indication on the papers that the CCMA acted in terms of Rule 24(3) by specifically appointing another commissioner to hear the matter, on good cause shown.

It seems to me on this legal basis the commissioner who refused to rescind the original award granted on 15 February 2000, had no jurisdiction or authority and therefore his decision is invalid, must be set aside and that being so, in accordance with the authorities I have already quoted, the original award must also be set aside.

I may say, quite apart from this, I am satisfied on the papers before me, to which there has been no reply at all by the original employee, no proper notice whatsoever was given to the employer of the employee, namely the Department of Education. It is clear on the papers that the employer was the Department of Education, not the particular school. For the arbitration to be a valid arbitration on the 15th of February, it was necessary that proper notice had to be given to the Department of Education. In the absence of any notice to the Department of Education, it is clear that the original arbitration award had to be set aside in terms of sections 144, 145 and 158.

I am surprised that the officials of the CCMA, knowing that the respondent was a government department, namely the Department of Education, did not take the elementary precaution once there was no appearance on behalf of the department, either at the conciliation or at the arbitration, to telephone (a otherwise communicate with) the Department of Education to find out why it was that there was no appearance either at the conciliation or the arbitration. The failure to do this has meant that the original proceedings became invalid because of lack of notice justifying an application for rescission under section 144, which application should have been granted and I am satisfied on reading through the papers that the second commissioner, apart from the fact that he lacked jurisdiction to hear the matter, also did not pay proper regard to the fact that notice was sent to a wrong fax number and that no notice was received by the employer, namely the Department of Education.

It seems to me that the correct course to adopt is to set aside the original award and to remit the matter to the CCMA with directions that proper notice be given to the parties in terms of the rules and that the commissioner hearing the matter should be a commissioner other than any of the commissioners who were involved in the previous matters, and that the commissioner hearing the matter should give specific attention to the following:

- a) whether there ever was a valid dismissal;
- b) whether the provisions of the Act quoted in the papers – which I have been informed by Mr. Sishi is Act 76 of 1998- obviate the need for an employer to have a procedural hearing in order to ensure that the dismissal is procedurally fair in compliance with the provisions of the LRA;

- c) how it is that a letter on 22 December 1998 terminating the employment with effect from 4 December 1996 had been given;
- d) what happened for the whole period from 3 December 1996 when it is alleged the employee never since that date ever reported for duty, (see record p.16) although on the papers I see a reference to the fact that there was a reporting for duty on 10 October 1997, but the salary of the employee was stopped in or about July 1998.

I think it is necessary for the commissioner hearing the matter to look into these matters and to ascertain what happened during this long period of time when it seems no work was done by the employee in question and whether he had adequate reasons for not turning up to work.

But the legal basis of my judgment is

- a) that the point *in limine* raised by the respondent is a sound one; and
- b) that no adequate or proper notice, or any notice indeed, was given to the employer, namely the Department of Education, either of the conciliation or of the arbitration. It seems to me that the cause of justice requires that I should set aside the refusal to rescind the judgment given on 20 September 2000 and to set aside the award given on 15 February 2000 and to remit the matter to the CCMA for an arbitration to take place in compliance with the provisions of the Labour Relations Act, proper notice being given to both parties.

This is not an appropriate matter for any order as to costs to be made and I decline to give such an order.

Mr Sishi has informed the Court that the correct reference is Act No 76 of 1998. The reference on page 21 of the papers, in the affidavit, is actually incorrect, it is 1998, not 1988. I will correct a number of grammatical and linguistic errors in this rather hurried judgment but I am satisfied that what I have done is in accordance with the law and in accordance with justice and I think it is a great pity that the original arbitration proceeded when no steps were taken to ensure that the Department of Education was properly notified of the proceedings.
