

Revised and of interest
N E LABOUR COURT OF SOUTH AFRICA

CASE NO: D1200/00

DATE: 24/08/2001

In the matter between

FOOD AND ALLIED WORKERS UNION

Applicant

and

LUCRACIA BAPHUMZILE NGUBO

1ST Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2nd Respondent

COMMISSIONER R. SEGGIE

3rd Respondent

JUDGMENT

PILLAY J

[1] With some difficulty I have managed to distil the grounds of review in this matter. The first ground was that the Commission for Conciliation, Mediation and Arbitration, the CCMA, the first respondent, and the Commissioner, the second respondent, had issued two awards which were dissimilar. One of the awards was allegedly reconstructed to justify a biased conclusion in favour of the third respondent employee.

[2] Two awards were filed with the review application which, for convenience, will be referred to as A and B. The difference between them was material. The Court directed the applicant's representative to obtain a certified true copy of the award from the CCMA. The CCMA, per

another Commissioner, submitted a certified copy of award A. The Court was dissatisfied with the response and issued a directive in the following terms on 6 July 2001 to the Registrar of the CCMA,

"We advise further that the copy which was filed with the Labour Court on 26 June 2001, and which was certified a true copy of the award, appears to be irregular in the following respects:

- (a) Page No 25 is missing.
- (b) There are two pages numbered page 26.
- (c) The last paragraph of page 24 is not properly continued on to the next page. There appears to be material omitted.
- (d) The copy certified to be a true copy differs significantly from another copy given to the applicant."

The Court directs the Commissioner, Robert Seggie, the third respondent, to furnish an explanation for the discrepancy within seven days."

The Commissioner's explanation for the discrepancies, which was filed on 13 July 2001, was as follows,

"I note with concern, and embarrassment, the comments made by the Honourable Judge. According to my database, the award is complete. I have made enquiries and it appears that the irregularities must have come about either because I sent the award by e-mail to the CCMA, using WordPerfect, and the CCMA converted it to Word, or else the CCMA scanned my award and the problem came about during this process. The original award on my computer is made up of 27 pages, all are complete and all consecutively numbered."

- [3] The applicant was given an opportunity to make submissions in response to this explanation. The explanation is speculative and inadequate. The Commissioner filed his original 27-page award which is, in substance, award B. The material difference between award B, on the one hand, and award A, on the other hand, is that in the former the Commissioner found that the

dismissal was "at least substantively unfair". In the latter he found that the dismissal was procedurally and substantively unfair.

[4] A further error common to both awards is that the Commissioner awarded "Compensation set out in section 196(1) of the Labour Relations Act". Section 196(1), which had been repealed in 1997, related to severance pay. That was not an issue in this dispute. The Commissioner probably meant section 194(1), which refers to compensation for procedurally unfair dismissals. This inference is strengthened by the manner in which the Commissioner calculated the compensation and the finding in award A of procedural unfairness. The nature of the discrepancy is therefore substantive and not merely typographical or a conversion error. For this reason, the Commissioner's explanation is rejected.

[5] The award filed by the Commissioner, however, is the award that he stands by and which, for the purposes of this application, the Court is prepared to accept in order to determine the application.

[6] The second ground of review is that the Commissioner was biased against the applicant, in that he made statements to the effect that a lot of cases involving unions come to the CCMA when procedures are not followed, yet unions defend workers daily.

[7] The Commissioner admitted making the remarks "in general terms". However, he denied accusing the applicant's witness, Govindsamy, of lying. Such generalisation was a stereotyping of trade unions which manifested a predisposition against the applicant. Any apprehension of bias the applicant's representatives might have had immediately after the statement came to their attention must be weighed against the applicant's delay in bringing the application for recusal. The applicant's explanation for the delay was that it could not be made on the basis of hearsay

evidence. It had to be brought only after the evidence of Govindsamy, its witness, had been led about what the Commissioner had said.

[8] The applicant's representative was obviously unaware that an application for recusal could be interposed at any stage of the proceedings. However, I deduce from the applicant's explanation that the fear of bias was genuine and not motivated by an ulterior purpose. The apprehension also had to be reasonable.

[9] The nature of the dispute was such that the facts were substantially in dispute. In order to resolve the disputes of fact, the Commissioner would have had to make a credibility finding. Having articulated his perception of trade unions, the applicant could not reasonably trust his findings. Furthermore, the Commissioner actively participated in questioning the witnesses. Some questions suggest that he was not impartial. For instance, at page 20 of the award submitted to Court by the Commissioner, he asked the applicant's witness whether she was trying to be spiteful. This is not a dispassionate question.

[10] The applicant's apprehension of bias was therefore reasonable and the Commissioner should have recused himself. However, his failure to do so does not necessarily render the award reviewable. For instance, if his reasons are based on facts that were not in dispute at the arbitration or in this review or if they were based on the applicant's version, the award may stand. The Commissioner records as a basis for his finding of substantive fairness the following, "Respondent's case was[sic] been that she was absent for six weeks; Yet, Mr Manzini, who was the Respondent's own witness, confirmed that the Applicant was at work in the old office on 31 May 1999."

[11] Apart from the contradiction amongst the applicant's witnesses, on the version of Manzini, the

applicant's witness, the third respondent was at work. Substantively, therefore, the applicant failed to discharge the *onus* of proving that the third respondent had absconded. I do not rely on the Commissioner's further finding that the third respondent's "failure to be present inside the new office was due to the fact that she did not have a key", as this must be premised on a credibility finding.

[12] It is common cause that the first respondent had been dismissed without a hearing. It is also the applicant's evidence that she had been seen in the office between the date of her return and the date of her dismissal but that she had not been asked for an explanation for her absence from work. The applicant's stance was that she had not been called to an inquiry before the Regional Executive Committee of the applicant had decided to dismiss her because she could not be contacted. When she returned to the office, the decision to dismiss her had already been taken.

[13] Such a decision is not irreversible. The Regional Executive Committee did not become *functus officio* after it made its decision. The failure to observe elementary principles of affording an employee a hearing before dismissal must result in procedural unfairness. Why the Commissioner avoided deciding this issue is not explained. On the basis of the material properly before him, the Commissioner should have concluded that the dismissal was also procedurally unfair.

[14] In view of these findings, it is not necessary to deal with the remaining grounds of review. I accordingly make an order in the following terms. The award is reviewed and corrected as follows,

"(a) The dismissal was procedurally and substantively unfair.

(b) The respondent employer is ordered to pay the employee the sum of R38 681,80 within 30 days

of date of the award."

There is no order as to costs.

PILLAY J The Court is adjourned.

/CERTIFICATE

IN THE LABOUR COURT

DURBAN

CASE NO D1200/00

DATE 2001/08/24

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FOOD AND ALLIED WORKERS UNION

APPLICANT

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

1ST RESPONDENT

COMMISSIONER R SEGGIE

2ND RESPONDENT

MS B NGUBO

3RD RESPONDENT

BEFORE THE HONOURABLE MS JUSTICE PILLAY

MR PONOANE

JUDGMENT

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