

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: C700/02

In the matter between:

NATIONAL UNION OF SECURITY
OFFICERS AND GUARDS
Applicant

First

VALENTINO VICTOR MUTHIEN and 10
Applicant

Second

THE MINISTER OF HEALTH AND

SOCIAL SERVICES (WESTERN CAPE)
Respondent

First

WPRINSN.O. (Cited in her

capacity as Commissioner for the
Public & Health & Welfare Bargaining 15 Council)

Second Respondent

THE MINISTER OF PUBLIC SERVICE

AND ADMINISTRATION
Respondent

Third

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REVELAS,J:

1. This is an application for the review of an arbitration award in which the first

respondent, a commissioner for the Public Health & Welfare Bargaining Council ("the Council"), held that the dismissal of the applicant by the first respondent was substantively and procedurally fair.

2. The applicant seeks to set aside the award in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("the Act"). The award is dated 27 November 2001.

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3. The applicant was notified of the dismissal on 10 May 2000. The dismissal was for alleged misconduct and that was that he allegedly misrepresented facts when he initially applied for the position he thereafter held with the first respondent. He made this application in September 1994. 5 It is common cause that he declared in his application for employment on 14 September 1994 that he was still employed by his former employer, the WCRSC, and that his reason for wanting to leave its employment was for job security.

10 4. The charge levelled against him was based on alleged misrepresentation, in that the applicant did not disclose on the same application form in 1994, that he had in fact been dismissed for misconduct on 17 January 1994.

15 5. The explanation advanced by the applicant for the aforesaid way in which he described events and reasons for his departure from his former employer was that he actually had referred a dispute to the erstwhile Industrial Court in which he sought to compel the WRSC to convene an appeal hearing. The matter was eventually settled on 1 December 1994.

20 Such action by him, he believed on the advice of his lawyers, had the effect of suspending the operation of the dismissal and that he could perceive himself as being a person employed by the former employer.

6. The arbitrator made much of the fact that the applicant's argument as 25 to the aforesaid meant that he as at the time he was appointed by the first respondent, and prior to the matter being settled with his former employer on 1 December 1994, he was employed by two employers. On this basis the arbitrator rejected his explanation and also found that he was not a credible

witness.

7. The applicant also argued that as at the commencement of his employment with the

first respondent, the applicant had informed certain 5 employees of the first respondent about the situation surrounding his dispute with his erstwhile employer and at all relevant times the first respondent was aware thereof that the applicant and his former employer were in dispute and had a matter in the Industrial Court which affected his departure. In other words, it was argued that the first respondent knew all along that the reason 10 for his departure from the first respondent was not solely for purposes of job security.

8. The arbitrator regarded this evidence as irrelevant and declined to make a finding thereon. On the evidence before her there were two versions,
15 since the first respondent had placed this explanation in dispute; in other words, its case was that it did not know. The basis upon which the second respondent failed to make a credibility finding in this regard was that, as she reasoned, an employer could not condone such dishonest misconduct on any basis, particularly where such an employer is in the public sector. It
20 appears that she would have had certain policy considerations in her mind.

9. It is common cause that during 1998, certain criminal charges relating to alleged sexual abuse were investigated, with the applicant as a suspect. He was suspended during 1998. The allegations began in April 1998. 25 Thereafter, in 1999, the investigation into the alleged offence currently under scrutiny before me was commenced. Several months lapsed before the matter was finalised. The applicant attacked the above findings in the arbitration on certain grounds, to which I will deal with hereinafter, and alleged

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a further ground of review in that the applicant contended that the second respondent engaged in substantial questioning of the applicant during his evidence. In this regard I was referred to the transcript record pages 505-531. It was contended that the commissioner's questioning of the applicant ran 5 through 26 pages whereas his actual evidence was only 31 pages and that meant that there was a certain justified perception of bias on the part of the applicant and on this ground alone the award should be set aside and the matter should be remitted to the Council for determination by another arbitrator. 10

10. The first respondent rebutted this argument by submitting that the first time the question of this perceived bias, or rough questioning by the commissioner was raised, was at the argument of this matter. It was never raised at the arbitration hearing, no application for a recusal of the
 15 commissioner was brought and it does not appear from the founding papers. The first respondent accepted that the commissioner may have had a robust and inquisitorial style, but argued that nonetheless she treated the parties even-handedly. Her questioning amounted to no more than clarifying of the issues.

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11. Before I return to the grounds of review, it is necessary to just shortly summarise what the arbitrator in effect found as the reasons for her award. In her award the commissioner concluded that the applicant's dismissal had been substantively fair and in reaching this conclusion she reasoned firstly 25 that it was not possible for an employer to condone the misconduct in question and accordingly her enquiry was only limited to the question of whether the applicant acted dishonestly in completing the application

form. She also found that he was not a credible witness and therefore, as I have

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described hereinbefore, she rejected his explanations. Due to his dishonesty she found that the sanction of dismissal was justified.

12. I will now deal with the commissioner's approach to the question of the 5 alleged condonation of non-disclosure on the application form. It was not open, in my view, for the commissioner to decide not to consider the points whether or not the employer all along knew about the fact or had long since been aware of the circumstances of the applicant's employment relationship with the WCRSC. In doing so, she did not consider the evidence of both the 10 first respondent's witness as well as the evidence presented by the applicant on these points. This is a serious oversight in my view, particularly since she eventually found him guilty of dishonesty and rejected his version in its entirety. It is an irregularity to limit the scope of an enquiry to the extent that certain evidence is excluded, and then go on to make credibility findings on

15 them. The commissioner had a duty to consider whether or not the first respondent had knowledge of the misrepresentation, right from the beginning, when he applied for the job but failed to take any action against the applicant. This is very important because it is very probable that the first respondent, or at least some of its employees to whom the applicant had reported, had

20 indeed had knowledge thereof. It is difficult to hide a pending court case from one's employer. Because there was this possibility that the employer was aware - or even probability - that the applicant's version might be true on this aspect, it was inherently irregular for the arbitrator not to deal therewith.

25 13. It might be so that an employer in the public sector should not condone this type of conduct and that it is dishonest, but the enquiry does not lie with the arbitrator alone. In my view it would be unfair if the employer was aware of a matter for six years of a certain situation but then takes steps only when

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a new matter arises. In this regard I refer to the question of the alleged sexual abuse.

14. It is also trite, as submitted by the applicant's counsel, that a dismissal 5 will be substantively unfair if the employer fails to prove that the stated reason for the dismissal was in fact the true reason for the dismissal. In this matter it was virtually

common cause that the question against the applicant's non-disclosure of his dismissal was only investigated once the other matter surfaced. This will not always be a sign that that was not the true reason, but 10 once again I must stress the commissioner failed to consider these aspects by limiting the enquiry in the way she did.

15. This brings me to the other cause of complaint and that is the question of the alleged gross procedural irregularity, namely the commissioner's
15 conduct during questioning of the witnesses. I will first deal with the complaint by the first respondent that the first time, this particular aspect was raised was during argument of the review application. In this regard I was referred to the matter of Malelane Toyota v CCMA [1999] 16 BLLR 555 (LC) at 558 (7) where Mlambo, J referred to the fact that it is trite in application proceedings that the
20 applicant's notice of motion and founding affidavit must contain all the allegations upon which the applicant's cause of action is founded. In this regard he referred to Lipschitz & Swartz NN0 v Markowitz 1976(3) SA 772 (W). He then went further to say "whilst this is so, this Court (the Labour Court) has held that in every case where there is a challenge to an award it is enjoined to
25 consider if the award is appropriate and should not hesitate to set it aside should a reviewable irregularity be evident (see Linda Deutsch v Pinto & Another [1997] 18 ILJ 1008 (LC)). Mlambo held further:

"Therefore whilst it is correct that the present application is wanting in certain

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material respects, I am still duty-bound to consider if the award is appropriate in terms of section 138(9). I am further influenced in this approach by the fact that the applicant's papers were drafted by lay people."

5 16. The facts before Mlambo. J are not at all similar to the question which I have to decide, but the principle is apparent, i.e. when considering whether an award was fair, all the evidence (and that which is evident) before me should be considered in the light of all the evidence that was presented. The record is clear. The examination conducted by the commissioner is apparent
10 from the transcript. No party is prejudiced if the transcript examined to establish whether or not those proceedings were fair or the manner in which the arbitrator questioned. I do not wish to refer to each and every sentence uttered by the arbitrator or each and every question she had asked the

applicant. Suffice to say, that in my view, she exceeded the bounds of her
15 enquiry and created an impression that she was biased in favour of the first respondent. This is supported by the fact that I found that the manner in which she dealt with certain witnesses to be deferential to them as a result of their political positions or for any other reasons she may have had. Her generosity in respect of those witnesses did not extend to the applicant and,

20 in my view, he was entitled to hold the view that she was biased.

17. Courts have warned on several occasions that trial judges or arbiters often, and unfortunately quite unwarrantedly, intervene in proceedings while for instance the

defendant's counsel is cross-examining certain witnesses 25 and during the hearing of argument (see Solomon v De Waal 1972(1) SA 575 (A) at 580E-) For this reason alone the award falls to be set aside.

18. It is argued on behalf of the applicant that I should substitute the
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arbitrator's finding that the dismissal was fair with an award which reads that the "dismissal was procedurally and substantively unfair".

19. I do not believe that on the evidence before me I should make such a 5 finding. That would mean that I would be subverting certain credibility findings that the arbitrator had made before all the evidence is tested. The applicant's complaint is precisely that the enquiry was limited and therefore it should be remitted back to the Council to be arbitrated by a different commissioner to reassess all the evidence from the onset. 10

20. In the circumstances I make the following order:

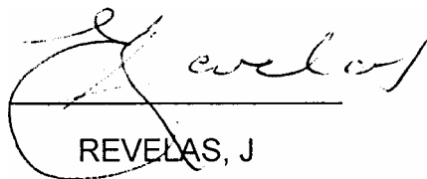
1. The award of the second respondent dated 27 November 2001 is hereby set aside. 15
2. The dismissal dispute is referred to the

Public & Health Bargaining

Council to be arbitrated by a different commissioner. 3.

The first respondent is to pay the applicant's costs.

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REVELAS, J

