

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J630/97

In the matter between:

UNIVERSITY OF THE NORTH

Applicant

and

M MTHOMBENI NO

First Respondent

S MASHEGOANE

Second Respondent

J U D G M E N T

MLAMBO, J:

[1] This is an application in terms of Section 145 in which the applicant (“the University”) seeks to review and set aside an award made by the second respondent (“the Commissioner”) sitting as a commissioner of the Commission for Conciliation, Mediation and Arbitration (the Commission).

[2] The third respondent (“Mashegoane”), a Lecturer employed by the university, referred a dispute to the commission alleging that an unfair labour practice had been committed against him. Mashegoane’s nomination as Dean of

the Faculty of Arts was rejected by the University Senate. Mashegoane felt that the Senate's decision amounted to an unfair labour practice and referred this dispute to the commission for conciliation. Conciliation was unsuccessful and arbitration was requested. The commissioner arbitrated the dispute and found in favour of Mashegoane.

[3] The major complaint raised by the university in these proceedings is that the commissioner committed a gross irregularity or committed misconduct in his conduct of the arbitration proceedings. The gravamen of this complaint is that the commissioner refused the university the opportunity to testify and to call witnesses in support of its case. The commissioner denies these allegations in his explanatory affidavit.

[4] Indeed, if one considers the award, it is clear therefrom that the commissioner was of the view that the university had not led any evidence and considered the matter solely on the basis of evidence led the Mashegoane.

[5] The court is therefore requested to consider the conduct of the arbitration proceedings. In this regard, although no record of the arbitration proceedings was kept the commissioner's notes taken during the proceedings were availed. The commissioner has also filed an explanatory affidavit.

[6] It is common cause that at the commencement of the arbitration proceedings the university raised two points in limine which were dismissed. This however is not relevant for purposes of the present enquiry. After the dismissal of the points in limine Mashegoane's representative made an opening statement.

[7] The commissioner's notes suggest that after this opening statement Mashegoane gave evidence. Thereafter, Advocate Teffo, who apparently represented the university during the arbitration proceedings, cross-examined Mashegoane.

[8] After Mashegoane's cross-examination the commissioner's notes reveal an entry that says "university". Underneath this entry is an address which I shall, for convenience sake, refer to as Teffo's address. It is common cause that when Teffo was presenting his address, he attempted to hand to the commissioner certain documents. It is not disputed that the commissioner refused to accept and consider these documents as he was of the view that Teffo was not giving evidence but merely addressing him. Despite this episode Teffo continued with his address to the end. Throughout Teffo's address the Commissioner took copious notes. After this address by Teffo the next entry, is a closing statement by Mashegoane's representative. Thereafter is a note of a closing statement on behalf of the university and a reply on behalf of Mashegoane. The contents of both closing statements are recorded fully.

[9] Further it is not disputed that after Teffo's address Mashegoane's representative declined to cross-examine him as he, was of the view that he was not testifying but merely addressing the commissioner. It is not apparent from the papers and the commissioner's notes what was Teffo's response to these comments. The Commissioner proceeded to listen to closing argument by both parties. It is not seriously disputed that a certain document was handed to the commissioner or relied on by Mashegoane's representative during the latter's closing address. It is further correct that the commissioner relied on this document in his award.

[10] The university argues that the commissioner did not explain the procedure he intended to follow during the proceedings, hence the confusion in the minds of Teffo and Franks representing the university. It is further argued that the commissioner did not determine the dispute fairly as the university was not allowed to lead evidence nor was it informed that it was required to lead evidence under oath. It is further argued that Mashegoane was allowed to make an opening statement but not the university. It is further argued that the university was allowed to put forward its case by means of an address to the commissioner without being made aware that such address would not be taken into account as evidence unless given under oath.

Does the award fall to be reviewed and set aside?

[11] This court plays a supervisory role to the commission's activities. In performing its duties as supervisor, the court is required, especially in review proceedings, to set consistent standards in terms of which it will measure the conduct of commissioners. It would be of no assistance were this court to set contradictory and inconsistent standards. The Court therefore must enquire whether the university received a fair and proper hearing and whether the commissioner performed his duties and complied with the Act.

[12] I have no reason to disbelieve the commissioner in his explanatory affidavit when he says that he asked the university's representatives on about three occasions at different stages of the proceedings whether they intended to call witnesses to which they responded in the negative. However, that does not dispose of the matter. The crux of the enquiry is the commissioner's attitude to Teffo's address, the refusal to consider documents handed in during such address and the acceptance of documents handed in during closing argument by Mashegoane's representative.

[13] Section 138(1) and (2) provide that:

“(1) The Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and

quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

(3) - (8)

(9) The commissioner may make any appropriate arbitration award in terms of this Act, including but not limited to, an award -

- a) that gives effect to any collective agreement;
- b) that gives effect to the provisions and primary objects of this Act;
- c) that includes, or is in the form of, a declaratory order.”

[14] The commissioner has a duty at the commencement of the arbitration proceedings to advise the parties what procedure he will follow. Section 138 does not require the commissioner to adhere to strict legal formalities but it is important that parties are advised what procedure is to be followed. Whilst it is not expressly stated in the commissioner’s notes whether he advised the parties what procedure he intended to follow, I am of the view that the procedure he followed was not a complicated one. I am also of the view that he followed a fair procedure in that the parties' representatives seemed to have been at liberty to make opening addresses, to lead evidence, to cross-examine witnesses and to

make closing statements. Those are the bare minimum formalities necessary in any arbitration proceedings.

[15] What happened after Mashegoane gave evidence and was cross-examined need to be scrutinised very closely. What should have happened thereafter was testimony by the university or simply an indication that the university did not intend to adduce evidence. In the event of the latter scenario the logical next step was for Mashegoane's representative to make his concluding argument followed by the university if it so wished. Neither scenario occurred. Teffo simply started addressing the commissioner.

[16] The commissioner took copious notes of Teffo's address. The commissioner did not clarify with Teffo whether he was testifying or simply addressing him. Clearly this was called for because what Teffo was doing was unprocedural. It was unprocedural in the normal sense as well as in terms of the procedure the commissioner had established. Although not explicit from the Commissioner's notes it is clear that Mashegoane was sworn in before he testified. Therefore it would have been irregular not to require Teffo to take the oath.

[17] It seems that the commissioner did not require Teffo to take the oath because, probably his view was that, whatever Teffo was saying was not

testimony. The question is if it was not testimony what was it and why was he allowed to do it? The court is of the view that the commissioner at least had a duty to alert Teffo that whatever he was saying was of no value and could only be considered if he said it under oath. I say this as it appears that in Teffo's mind he was under the impression that he was testifying, hence his attempt to hand in documents. It is my view that had the commissioner at least alerted Teffo the present problem would not have materialised.

[18] One is left with the inescapable impression that in Teffo's mind he was testifying when he made his address, hence his attempt to hand in documents in support of what he was saying. One is also left with an impression that the Commissioner initially, at least, viewed Teffo's address as testimony that is why he took copious notes of it. It seems that the Commissioner changed this view when he allowed the objection against Teffo handing in certain documents. The wisdom of hindsight dictates that at that stage he should have intervened and clarified from Teffo if he was testifying and to require him to take the oath. His failure to intervene perpetrated an obviously anomalous development. He has, also, not dealt with this issue whatsoever in his explanatory affidavit.

[19] The purpose of holding arbitration proceedings is to enable parties thereto to present their cases. In the presentation of their cases parties should receive a fair hearing. As Section 138(2) provides parties must be allowed to present their

cases, cross-examine any other party's witnesses and make concluding arguments. Parties however cannot be forced to testify or call witnesses if they expressly decline to do so.

[20] I am of the view that the Commissioner had a duty in terms of Section 138(1) to guide the parties throughout the process. He breached this duty when he:

1. allowed Teffo to address him which in itself was unprocedural in terms of his own procedure and in terms of normal procedure;
2. failed to stop Teffo and clarify with him whether he wished to testify and if so require him to take the oath;
3. failed to warn Teffo at the end of his address that he would not take into account whether Teffo said as same was not testimony and again clarify with him whether he wished to testify properly.

Surely had Teffo been warned that whatever he had said was worthless as evidence he would have requested to testify under oath. This failure by the Commissioner to perform his duty in terms of Section 138(1) clearly undermined the right to receive a fair hearing.

[21] Furthermore the commissioner acted in an irregular manner when he allowed Mashegoane's representative to hand in a document during his closing argument. Clearly having disallowed the university from handing documents as

evidence during Teffo's address, he could not simply allow the same thing from Mashegoane. This deviated from the procedure he and established.

Does the commissioner's conduct amount to misconduct within the meaning of Section 145:

[22] Section 145(2)(i) is identical to Section 33(1)(a) of the Arbitration Act 42 of 1965. The High Court has stated that misconduct within the purview of Section 33(1)(a)

"Does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award."

Amalgamated Clothing Textile Workers Union v Veldspun Ltd 1994(1) SA 162 AD:

In **Montagu Liquor Licencing Board v Idelson** 1957(1) SA 262 (A) the Appellate Division said:

"The answer to this question [viz the determination of unreasonableness] requires the pronouncement of a value judgment based upon the principles to be extracted from the Act applied to the facts of the case."

Weichers in his book “Administrative law” 1985 Butterworths also discusses this issue. He says at 252 that the approach by the Appellate Division in Montagu above is that the criteria as laid down in the statute or Common Law must be applied to the proven facts. If the facts, viz the real or potential unreasonable effect, cannot be proved in a particular case, these legal criteria naturally cannot be applied.

[23] Should misconduct within the meaning of Section 145(2)(i) be given the same interpretation as the High Court did not the Veldspun case in relation to Section 33(1)(a) of the Arbitration Act. The purpose of the Act is to advance, inter alia, social justice and Labour peace as well as to promote, inter alia, the effective resolution of Labour disputes. Parties who are required by the Act to have their disputes arbitrated expect the commissioner arbitrating the dispute to give them a fair hearing, apply his mind to the matter, and produce an appropriate award.

[24] A commissioner commits reviewable misconduct where he does not allow a party to lead evidence, cross-examine witnesses or even make concluding argument: Mutual & Federal Insurance Co Ltd v CCMA & others unreported case no.J 533/97.

[25] A commissioner who ignores established legal principles and produces an

award that flies in the face of these principles commits reviewable misconduct in relation to his duties as commissioner. **Standard Bank of SA Ltd v CCMA a.o.** unreported case no 642/97. This is misconduct as it is testimony that the commissioner did not apply his mind to the matter before him.

[26] A commissioner who adopts an inconsistent procedure during the proceedings commits reviewable misconduct if it can be shown that such inconsistent procedure was prejudicial to one party. **Mthembu & Mahomed Attorneys v CCMA a.o.** (1998) 2 BLLR 150 (LC) .

[27] Therefore if one takes into account the preamble to the Act, its stated objective of promoting an effective dispute resolution regime and its choice of arbitration as the main process of resolving disputes by the commission quickly and finally then it so that this court when invited to review an award it shall do so mindful of the foregoing. Within the context of the Act conduct is reviewable if it can be shown that it resulted in a failure of justice. **Pep Stores (Pty) Ltd v Adv Laka a.o.** unreported case no J1011/97. With this in mind the test of misconduct adopted by the High Court in relation to Section 33(1)(a) of the Arbitration Act does not seem applicable to Section 145(2)(i) in this court.

[28] It is open to this court in terms of Section 145 to review awards of the commission even where a bona fide mistake of fact or law is committed only

where it can be shown that as a result thereof an injustice has been perpetrated. Where no injustice has been occasioned by such a mistake the award is immune to legal challenge in terms of Section 145. An injustice is perpetrated where it is shown that a party was deprived of a fair hearing or that a commissioner did not apply his mind to the matter before him either by ignoring direct evidence before him, or relying on evidence not placed before him.

[29] In this case the proven unreasonable effect of the commissioner's conduct is that the university has not received a fair hearing. The right to a fair hearing is a constitutionally entrenched right. The issue in the present matter is of crucial importance. It concerns the appointment of a Dean of a Faculty. It is crucial that a correct decision be made in this regard. Further it might be correct that the commissioner relied on outdated guidelines in his award. This can only be cured if the correct and applicable guidelines are relied on. I am therefore of the view that the commissioner's conduct has led to injustice and his award should be set aside.

[30] Mr Mashego on behalf of Mashegoane has argued that Teffo is an admitted advocate, as well as being a professor of law employed by the university and that he should have known what the procedure is. Whilst this may be so, the commissioner is not entitled to rely on parties' qualifications, he has a duty to restate to them the procedure he will follow and consistently guide them

during the proceedings.

[31] This leads me to discuss the role by Teffo. I have no reason to disbelieve Mr Mashego when he says that Teffo is an admitted advocate and therefore he is expected to have known what the procedure is during arbitration proceedings. To say the least, Teffo's representation of the university's case during the arbitration was shocking. A professor, presumably in the Faculty of Law, and an admitted advocate of the High Court, could and should have done better in the circumstances.

[32] Relating to the issue of costs, it is this court's view that the parties would not have come to this court had the commissioner performed his duties properly. In that event the court has also not found any maliciousness or vexatiousness by either party in instituting these proceedings. The problem that required the university to come to this court was occasioned by the commissioner, I feel that under the circumstances no costs should be awarded either way.

I therefore make the following order:

1. The award of the first respondent is reviewed and set aside.
2. The matter is remitted back to the commission for a fresh arbitration in front of another commissioner, preferably a senior commissioner.

3. There is no order as to costs.

MLAMBO J

For the applicant: Mr JJ Coetzee of . Stemmett & Smith Attorneys.

For the Second respondent: Mr M Mashego of Mashego Attorneys.

Date of hearing: 16 April 1998.

Date of judgment: 18 June 1998.

This judgment is available on the internet at <http://www.law.wits.ac.za/labourcrt>