IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg **CASE NO. J 1434/97 & J1308/97**

In the matter between:

BENICON EARTHWORKS &
MINING SERVICES (PTY) LTD ***Applicant***

and

K L DREYER N.O. ***First Respondent***

FRANS HLATSWAYO ***Second Respondent***

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JUDGMENT

BASSON J

[1] This is an application for review in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act") in terms of which the applicant, Benicon Earthworks & Mining Services (Pty) Limited, seeks an order to review and set aside the arbitration awards made by the first respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") on 18 October 1997 and 19 November 1997 at Witbank under case number MP2760.

[2] On 18 October 1997 the commissioner concerned (the first respondent) made the following award (at page 20 of the papers):

"I find that the dismissal of Mr Hlatswayo (the employee) was both substantively and procedurally unfair in terms of the Labour Relations Act 1995. He is therefore reinstated to his position in the company before the dismissal but without the rank of supervisor and

with the issuance of a final written warning for the unauthorised removal of company property."

Mr Hlatswayo is, of course, the second respondent in this matter.

[3] The said commissioner filed an affidavit, not an opposing affidavit but an explanatory affidavit, in terms of which she abides by the decision of the Court and in terms of which she explains this award as follows (at page 28 of the papers, paragraph 4.1 of her affidavit):

"At the arbitration hearing the applicant was unable to prove that the dismissal of the second respondent for theft on a balance probabilities was fair. Amongst other things, the company complainant in the case, died before the second respondent could argue his case at any of the company's disciplinary hearings, the second respondent, therefore, being unable to challenge the version of the complainant in his presence. A strict interpretation of section 192 (2) and 193(1)(a) of the Labour Relations Act of 1995 would require the second respondent to be unconditionally reinstated. As it was common cause that the second respondent was in unusual possession of company property (which he argued was with the permission of the deceased official) he was a supervisor of some seniority in the company,and bearing in mind section 193(1)(b) of the said Act, I considered it appropriate, at the time, to order the re-employment in a slightly lesser capacity than that of supervisor."

[4] It is clear from the aforegoing that the commissioner (the first respondent) decided against unconditionally reinstating the second respondent (the employee) because of the fact that he was in "unusual possession of company property" and she accordingly, in spite of using the word reinstatement, decided that he should be re-employed and that he should be demoted from the rank of supervisor with a final written warning for the unauthorised removal of company property.

[5] Soon after the award was issued, both parties sought clarification from the commissioner (the first respondent) in regard to her award, especially in regard to the question of demotion. The parties were unable to agree on what such demotion

would entail and eventually on 19 November 1997 the commissioner issued a so-called variation of the arbitration award.

[6] In terms of the amended relief now granted, the commissioner (the first respondent) stated:

"I find that the dismissal of Mr Hlatswayo (the employee) was both substantively and procedurally unfair in terms of the Labour Relations Act of 1995. He is, therefore, reinstated to his position in the company before the dismissal and is to be paid for the days the company refused him access to the premises."

[7] This amended relief was, of course, granted without hearing the company (the applicant) properly in terms of the *audi alteram partem* rule and for this reason alone the award can be set aside because of such gross irregularity in the proceedings. There is, however, another reason why the so-called variation of the initial award is reviewable in terms of section 145 of the Act.

[8] Section 144 of the Act deals with the variation and rescission of arbitration awards and reads as follows:

"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 the arbitration award -

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

(b) in which there is an ambiguity, or an obvious error or ommission, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings."

[9] It would appear that the commissioner *in casu* purported to act in terms of section 144(b) of the Act.

[10] In my view, this competence to vary an award in which there is an

ambiguity or an obvious error or omission (and only to the extent that ambiguity, error or omission) does not entail the competence to replace such award by a completely new award.

[11] It is clear that the commissioner concerned (the first respondent) made a complete about-turn.

[12] In terms of the "first award" (according also to her affidavit in this regard - *supra* at paragraph [3]) the commissioner decided not to unconditionally reinstate. In terms of the "second award" (of 19 November 1997), however, she unconditionally reinstated the second respondent. The commissioner explains this as follows (at paragraph 4.3 of her affidavit):

"When it became clear that it would not be possible to mediate a solution I reverted to the variation option in section 144(b) of the Labour Relations Act of1995, and a strict interpretation of section 192(2) of the said Act, by reinstating the second respondent."

[13] However, the commissioner (the first respondent) was not competent to do so in terms of the powers given under section 144(b) of the Act. The commissioner namely gave a completely new award by granting unconditional reinstatement. The commissioner thus exceeded her powers as she was clearly *functus officio* after issuing the "first award", having decided that the second respondent should merely be re-employed with a demotion and on a final warning.

[14] The "second award" of 19 November 1997, therefore, stands to be set aside in terms of section 145(2)(a)(iii) of the Act.

[15] Section 145 of the Act reads as follows:

"(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.

(2) A defect referred to in subsection (1) means -

(a) that the commissioner -

...

(iii) exceeded the commissioner's powers."

[16] Clearly, the commissioner concerned exceeded her powers by replacing her award of 18 October 1997 with an award which was a substantially different award. This does not amount to a mere variation of her previous award in terms of section 144 (b) of the Act.

[17] Turning now to the "first award" of 18 October1997 which was attacked by the applicant on the basis that there was allegedly no proper opportunity for cross examination by the applicant-party (the employer).

[18] The second respondent (the employee) in his answering affidavit refers to the explanatory affidavit of the commissioner where this is denied. Further, in the correspondence concerning the clarification of the order, no mention at all was made of this alleged defect by the employer party (the applicant).

[19] In the event, on a balance of probabilities, I am not satisfied that such defect existed. Also, in applying the well-known test expounded in the case of **Plascon Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634E - 635C**,** I accept the second respondent's version in this regard.

[20] However, it is clear that the commissioner (the first respondent) was not in a position to properly clarify her award of 18 October 1997. It is clear that she did not have the necessary evidence at her disposal in order to explain what she meant by a demotion "in a slightly lesser capacity than that of supervisor".

[21] In terms of section 138(9) of the Act, a commissioner may make "any

appropriate arbitration award" in terms of the Act. In my view, the arbitration award made on 18 October 1997 was inappropriate in that it was not capable of proper clarification and understanding.

[22] It is clear from the first respondent's explanatory affidavit that she was unable to clarify the award, especially in regard to the requirement of demotion. Accordingly, in not making an appropriate arbitration award on 18 October 1997, the commissioner exceeded her powers as defined in terms of section 138(9) of the Act. The first arbitration award therefore also falls to be set aside in terms of section 145(2)(a)(iii) of the Act (quoted at paragraph [15] above).

[23] In the event, the matter must be remitted to the CCMA for a fresh arbitration before another commissioner.

[24] In regard to an order as to costs, it must be noted that the first respondent did not oppose the relief prayed for by the applicant. It would therefore be inappropriate to make an order as to costs against the first respondent.

[25] The second respondent opposed the relief prayed for. The Court has a very wide discretion in terms of section 162(1) of the Act to make an order as to costs according to the requirements of the law and fairness. As I am of the view that this matter must be referred back to arbitration because of the defects in the decisions made by the first respondent, whereas the second respondent played no role in regard to these defects, I regard it as fair to make no order as to costs against the second respondent.

[26] It also follows from the aforegoing that the application to make the arbitration award *in casu* an order of Court, must fail.

[27] In the event, the Court makes the following order:

1. The first respondent's awards dated 18 October 1997 and 19 November 1997 at Witbank under case number MP2760, are reviewed and set aside.
2. The matter is remitted to the Commission for Conciliation, Mediation and Arbitration for a fresh arbitration before another commissioner.
3. No order is made as to costs.

BASSON J

Date of hearing: 24 June 1998

Date of judgment: *ex tempore* (edited version)

On behalf of the applicant: Adv JNW Botha instructed by JPA Swanepoel Attorneys On behalf of the second respondent: Mr H Kruger of Hilmer Kruger Attorneys