IN THE LABOUR COURT OF SOUTH AFRICA

AT JOHANNESBURG

Case Number: J1134/98

In the matter between:

O D Zaayman	Applicant
and	
Provincial Director: CCMA Gauteng	First Respondent
M Miles Commissioner: CCMA	Second Respondent
Motion Engineering (Pty) Ltd	Third Respondent

JUDGMENT

Pooe AJ

[1] The Applicant was employed as a turner by the Third Respondent on 7 February 1997. Although initially employed subject to a 3 months probation period, the appointment was confirmed after the Applicant had been employed for only two weeks. The Applicant was, on 25 March 1997, dismissed for poor work performance following a disciplinary hearing.

[2] After failed attempts at conciliation, the Applicant referred the dispute to the Commission for Conciliation, Mediation & Arbitration ("the CCMA").

[3] Following an arbitration hearing conducted under the auspices of the CCMA by the Second Respondent, an award was made in favour of the Applicant on 1 April 1998. The Second Respondent found that the Applicant's dismissal was both procedurally and substantially unfair. The Second Respondent awarded the Applicant compensation in the amount of R11 352,00, being the equivalent of 43 days' remuneration calculated at R264,00 per day.

[4] The Applicant now seeks to have the award made by the Second Respondent regarding compensation reviewed and set aside. The review application is being brought in terms of Section 145(2)(a)(iii), alternatively Section 158(1)(g), of the Labour Relations Act, No. 66 of 1995 ("The Act").

[5] The grounds on which the Applicant relies for the relief is set out in paragraphs 6.1 to 6.8 of his founding affidavit.

[6] The Labour Appeal Court has recently held that review of arbitration proceedings conducted under the auspices of the CCMA must proceed under Section 145 and not Section 158(1)(g) of the Act. In so doing, the Labour Appeal Court resolved finally the difference of opinion that prevailed in this Court for some time on this question. I am bound by this decision of the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus NO and Others** (Unreported Decision of the LAC, Case Number JA52/98). I cannot, therefore, invoke the review powers given to this Court under Section 158(1)(g) of this Act in the present case. The Labour Appeal Court held in this decision that where a commissioner exceeds the Constitutional constraints on his or her powers on arbitration, this can be reviewed by the Labour Court under Section 145, in particular Section 145(2)(iii) and that it is not necessary to resort to Section 158(1)(g) to achieve this end.

[7] It follows from the aforesaid that the only bases on which this Court may review arbitration proceedings are those set out in Section 145 of the Act namely :

145(2)(a) that the commissioner -

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b)that an award has been improperly obtained.

[8] The Labour Appeal Court in the decision referred to above gave consideration to the standard of review and stated as follows in this regard:

Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as 'reasonableness', 'rationality', proportionality' and the like (Cf. E.g. Craig, ***Administrative Law***, above, at 337-349; Schwarze, *European Administrative Law*, 1992 at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA.

(At para 37, my underlining)

[9] In the present case, no reliance is placed on the grounds that the commissioner committed a misconduct in relation to his duties as an arbitrator (145(2)(a)(i) or that he committed a gross irregularity in the conduct of the arbitration (145(2)(a)(ii)). No averment is made in the papers nor was any submissions made in argument in this regard.

[10] The Applicant has confined himself to the ground that the Respondent exceeded his powers when determining compensation due. He has sought to rely on Section 145(2)(a)(iii).

[11] The basis on which Mr Aggenbach, who appeared on behalf of the Applicant, argued that the Second Respondent's award should be reviewed and set aside is, firstly, that the Second Respondent erred in the calculation of the compensation due to the Applicant in that he did not abide by the formula provided for in Section 194 of the Act. Mr Aggenbach argued further that the Second Respondent took the backlog at the CCMA in setting down arbitration hearing improperly into accounts. He further contended that the Second Respondent misinterpreted Section 194(1)(2) and thereby exceeded his powers when he calculated the compensation due. In support of his arguments, Mr Aggenbach relied extensively on the decisions of this Court in **National Union of Metalworkers of SA v Precious Metal Chains (Pty) Ltd** (an unreported decision of the Labour Court, Case Number J109/97) and **CWIU v Johnson & Johnson (Pty) Ltd** [1997] 9 BLLR 1186 (LC). These decisions in short are to the effect that an arbitrator or this Court has no discretion when determining compensation payable in terms of Section 194(1) of the Act and should award compensation calculated on the formula provided for in the subsection. Mr Aggenbach urged the Court to come to the conclusion that the Second Respondent incorrectly interpreted the provisions of Section 194(1) and (2) of the Act and therefore exceeded the limits of his discretion insofar as the calculation of compensation is concerned. Other than the two cases mentioned, Mr Aggenbach referred to no other authorities in support of his argument.

[12] The Applicant's first complaint seems to be that the Second Respondent made a mistake when calculating the compensation due to him.

[13] It has been held that where an award is wrong in law, this is not enough to set it aside. See **Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd and another**

1992 (1) SA 89 (WLD) at 100:

> Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such case a Court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct.

See also **Doyle v Shenker & Co., Ltd.** 1915 AD 233 at page 236 of the judgment where Innes J said the following:

> Now a mere mistake of law in adjudicating upon a suit … cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review so carefully drawn by statute and observed in practice, would largely disappear.

[14] A *bona fide* mistake by the arbitrator, whether it be a mistake as to fact or law would likewise not render an arbitration award reviewable unless such mistake is so gross or manifest that it would be evidence of misconduct or partiality (See **Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd** (1993) 14 ILJ 1431 (A) at 1435E)).

[15] There is no suggestion in this case that the Respondent misconducted himself. It has also not been contended that there was *mala fides* on the part of the Respondent when he made his award. I have to accept therefore that the mistake, if any, was a *bona fide* mistake and as such does not render the award reviewable.

[16] I am alive to the fact that in the abovementioned decisions, the Courts were there dealing with the interpretation of the applicable section of the Arbitration Act, 42 of 1965. That Act applies to private, consensual arbitration (in contrast to the compulsory arbitration under the

LRA) and its provisions were assessed and interpreted in a different constitutional context. The Labour Appeal Court in the **Carephone** matter has cautioned against the meaning accorded to the applicable section of the Arbitration Act being taken over without qualification. I hold the view therefore that while the authorities which I have cited above are good law in respect of voluntary arbitrations under the Arbitration Act, the correct approach in the present case would be that formulated in the **Carephone** matter already referred to. An award of a CCMA commissioner would have to be rationally justifiable in terms of the reason given therefore to escape interference by the Courts.

[17] I cannot find that the award of the Second Respondent is reviewable on the basis that he did not follow the approach of the Labour Court in the **National Union of Metalworkers of South Africa v Precious Metal Chains** and **CWIU v Johnson & Johnson** cases. At the time when the Second Respondent made his award, this Court had adopted different interpretations of Section 194. In two judgments, namely **Chotia v Hall Longmore & Co (Pty) Ltd** (1997) 18 ILJ 1090 (LC) and **Heigers v UPC Retail Services** [1998] 1 BLLR 45 (LC), this Court had approached Section 194 in a different manner to that in the first two mentioned cases. Basson J reasoned as follows in the **Chotia** case:

> It is trite that compensation is awarded as a sum of money for something lost ... Further, it is incumbent on any applicant who wishes to be so compensated to prove the extent of his or her losses ...
>
> I am of the view that the ... provisions of s194(1) and (2) do not mean that the court is under a statutory duty, if it finds that the dismissal is unfair, to award 'compensation' in the amount of at least the equivalent of the remuneration that the employee would have been paid between the date of dismissal and the last day of adjudication, regardless of the real losses suffered and proven in court.

(At 1095H - 1096F)

[18] That the Second Respondent appears to have been alive to the different interpretations that had been adopted by the Labour Court and elected to follow one of them is evident from the

reasoning of the Second Respondent when he deals with the issue of relief. He commented as follows:

> There is generally a duty on an Applicant seeking compensation as relief to show what efforts he has made to mitigate his loss of remuneration.
>
> I am not of the school of thought which believes that s. 194(1) and (2) of the Act requires a mandatory amount equivalent to that which Applicant would have earned from the date of his dismissal to the date of this arbitration hearing …. I am entitled to award an amount which is just and equitable in the circumstances and there is no good cause why Applicant should be enriched by more than the remuneration he would have earned from the date of his dismissal to the date of commencement of his new employment.

(At p.9 of the award)

[19] The Second Respondent applied his mind to the different interpretations and adopted one of them. I am not persuaded that by so doing the Second Respondent made an award which is reviewable. I might note that the Labour Appeal Court has in the meantime resolved the conflict that existed regarding the interpretation of s194 of the Act. In essence the Court has held that s194 does not allow a discretion and is mandatory (see **Johnson & Johnson v CWIU**, an unreported decision of the LAC, Case No. PA15/97). However, as at the time when the second Respondent made the award the different interpretations still existed.

[20] The Second Respondent thereafter considered the material before him in order to determine what compensation to award. That much is evident from the following passage from his award:

> Applicant worked, I understand, a 5 day week at 44 hours per week. This gives him8.8 hours per day, and he was paid R30 per hour. His normal daily rate was therefore R264. According to my calculations he was out of work for 43 working days or days on which he would normally have been remunerated. Thus his loss of earnings amounted to 43 x R264 = R11 352. This is the amount of the remuneration he would have been paid between the date of his dismissal and the date he commenced new employment at a better rate of pay.

(At pp. 9 - 10 of the award)

[21] The reasoning of the Second Respondent on the question of compensation is rationally connected to the material before him. His conclusion and the reason he gave for it do not support an inference that he exceeded his powers. The decision to award compensation as he did is rationally justifiable in terms of the reasons given. The Second Respondent did not accordingly exceed the substantive constitutional limits to the exercise of his powers in arbitrations under the Act. There is no basis in the circumstances to review the decision made by the Second Respondent.

[22] One of the factors the Second Respondent took into account when he made his award is the fact that the CCMA's Gauteng backlog had cost a long delay in the setting down of this case. Mr Aggenbach argued that the Second Respondent did not properly take this factor into account and that had he done so, he should have found that the Applicant ought not to be prejudiced by the backlog. In my view, the fact that there is a backlog in the setting down of hearings by the CCMA is irrelevant for purposes of determining compensation due to an applicant in matters such as this. Had this been the only factor on which the Second Respondent had based his award, I would have not hesitated to review and set aside the award. However, as it would appear, this was only part of the reasoning by the Second Respondent and appears to have been more a remark in passing than anything else. Purely, the essence of the Second Respondent's reasoning was that he should award an amount which would be "just and equitable" and that as the Applicant had only suffered a loss amounting to 43 days' remuneration, that was what was just and equitable in the circumstances. I am not persuaded that by so doing the Second Respondent made an award which is reviewable.

[23] I am accordingly of the view that no case has been made out for this Court to interfere in the decision and award of the Second Respondent. The application for review accordingly fails.

[24] There is no reason in this case why the costs should not follow the result. The Applicant is accordingly ordered to pay the costs of the application.

M Pooe AJ

DATE OF HEARING: 20 August 1998

DATE OF JUDGMENT: 13 October 1998

For the Applicant: Adv. M. Aggenbach

Instructed by: Van Werner Moolman Attorney and Aggenbach, Pienaar & Associates, Labour Consultants

For the Respondent: Yusuf Nagdee Attorney