166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: **C630/98**

In the matter between:

MOGAMAT RASHAAD SOLOMON	Applicant
And	
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	First Respondent
COMMISSIONER E M JAWA	Second Respondent
CITY OF CAPE TOWN	Third Respondent

JUDGMENT

STELZNER AJ

1. In this matter the applicant seeks to review the award of the second respondent, sitting as a commissioner under the auspices of the Commission for Conciliation, Mediation and Arbitration, in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("the Act").

2. The applicant is currently employed by the third respondent as its Chief Building Inspector. During November 1997 the post of Principal Building Control Professional ("the professional position") was advertised by the third respondent by way of internal advertisement. Applicant applied for the position along with seven others, but following a selection procedure which involved both a written test as well as an interview, one Moir was appointed to the position.

3. The applicant was aggrieved by this appointment and appealed against the appointment by means of an in-house grievance procedure. The substance of applicant's complaint was twofold. In the first instance he argued that Moir was not

qualified for the position in terms of the National Building Regulations and Building Standards Act, 103 of 1997 ("the 103 Act") when, by implication, the provisions of the 103 Act are applicable to appointments to the professional position. Secondly, his complaint was based on an argument that he, the applicant, was better qualified and possessed more experience than Moir and, accordingly, should have been preferred for the professional position.

4. The appeal was dismissed and the applicant then referred his dispute, after conciliation had failed, to the first respondent for arbitration. The arbitration took place on 6 October 1998 before the second respondent. The arbitration proceeded and at the conclusion thereof the second respondent reserved his award. The award was eventually handed down on 27 October 1998 and the application was dismissed.

5. In his founding affidavit the applicant raised three grounds of review but one of these grounds was subsequently abandoned. The two remaining grounds were as follows:

1 that the second respondent misconducted himself during the proceedings; and

2 that the second respondent acted unreasonably in finding as he did (or, put differently, that there was no rational objective basis between the evidence before him and the conclusion he eventually arrived at.)

6. When the matter was argued before me it became apparent that applicant's real complaint under the first heading referred to above was, in fact, that second respondent had committed a gross irregularity in the conduct of the arbitration proceedings. The relief which the applicant seeks is that the arbitration award be reviewed and set aside and that the matter be remitted back to first respondent for

consideration afresh before a commissioner other than the second respondent and, preferably, a Senior Commissioner.

7. It is common cause that at the commencement of the arbitration proceedings the applicant sought to be represented by one Mogamat Zane Solomon. It was pointed out by the third respondent's representatives that Mogamat Zane Solomon was not permitted to represent the applicant by virtue of the provisions of a collective agreement concluded between the third respondent and the South African Municipal Workers' Union and on that basis Mogamat Zane Solomon was excluded from the proceedings save to the extent that he testified as a witness on the applicant's behalf for a limited portion of the proceedings. It was common cause by the time the matter came before me that Mogamat Zane Solomon was correctly excluded from the proceedings as applicant's representative. It was also common cause that a shop steward, one K Fortune, was present and available to assist applicant as his representative in the proceedings but that applicant declined to make use of his services and instead elected to represent himself.

8. It was clear from the papers before me that at the commencement of the proceedings the second respondent sought to establish the exact nature of the issue/s in dispute before him. In conjunction with the parties he conducted an exercise designed to clarify and/or narrow the issues in dispute. The conclusion of this process is summed up in the second respondent's arbitration award as follows:

"*The only issue in question is the qualifications of the successful candidate and whether the appointment was in keeping with the provisions of the 103 Act*".

The issue in dispute thus appears to have been limited to cover only one aspect of applicant's complaint as framed by him on appeal and as outlined above. Various extracts from the transcript of the proceedings before second respondent confirm that what the parties had in mind was that second respondent had to determine whether or not Moir had the qualifications required by the 103 Act and whether that Act applied to his appointment to the professional position. That was the case which applicant sought to make out at the arbitration proceedings.

9. The conduct of the arbitrator in the narrowing of the issues exercise conducted by him was the subject of one of the applicant's grounds of review. It was submitted that in dealing with an unrepresented applicant the arbitrator acted in an irregular fashion in limiting the issues to such an extent that he in effect at best deprived the applicant of one leg of his case and at worst engineered a process in terms of which the applicant could not have succeeded even on a best case scenario. In other words, even if he were successful on the issue as defined he would still not have made out a case for the relief sought by him.

10. It is also common cause that pursuant to the issues having been limited as set out above the third respondent chose to only call two witnesses and, in fact, released the other witnesses who were present and who had been prepared to testify on other potential aspects of the dispute, more particularly, the selection process conducted by the third respondent and criteria such as experience and competency.

11. It was also clear from the papers before me and, it seems, it emerged during the arbitration proceedings before the second respondent, that two different appointments came under discussion and consideration during the proceedings. It

was also apparent that the distinction between these two appointments had, quite possibly, been confused by the applicant. The position which was advertised and for which the applicant had applied was the professional position already referred to above. The third respondent also appoints what is known as a Building Control Officer ("the officer position"). The officer position is not a post to which some one person is appointed but rather is a title conferred upon a person who already occupies some other position or post. More than one person can be appointed as Building Control Officer at the same time (in fact this is usually what happens) and the position is one of title rather than particular substance, being a non-remunerative position. Put differently, the person or persons appointed as Building Control Officer/s will inevitably hold some other post within the third respondent's establishment.

12. What emerged on the papers before me and in argument and what appears to have emerged in the proceedings before the second respondent, is that it is the officer position which is governed by the provisions of the 103 Act. Certain qualifications are required in order for a person to perform the functions of the officer position. If third respondent wishes to appoint someone to the officer position when that person does not possess the statutory qualifications then it is possible to approach the South African Bureau of Standards for an exemption to allow that person to perform the officer functions. This appears to have, as a matter of fact, occurred in respect of Moir some time subsequent to him having been appointed to the professional position and as a result of such an exemption application being successfully made.

13. On the evidence before him it appears that the second respondent found that

there are no statutory qualifications required for appointment to the professional position. On that basis the appointment of Moir to the professional position was not irregular *vis-à-vis* the 103 Act. However, second respondent in his award went on to consider the question of whether or not Moir had the qualifications as set out by the third respondent when it advertised the professional position. It also appears that on the basis of the issues as narrowed it was not open to second respondent to consider this further aspect. In that regard the second respondent concluded that the third respondent acted unfairly in that it appointed someone on the basis of experience or competency rather than the specific qualifications which it had advertised. He concludes that this is misleading and unfair. The post was advertised as requiring "*a degree in Architecture, Planning or an equivalent qualification*." Moir had certain courses towards a diploma where it appears common cause that the applicant had the stipulated qualification. The third respondent concludes that the appropriate course of action in the circumstances would be for the employer to re-advertise the post stipulating the "relaxed" qualification requirements. This would allow for potential candidates without the degree to apply and be considered and would not mislead people into thinking that the successful candidate would have a degree. On the issues as framed at the outset he ought not to have considered this aspect at all.

14. The second respondent goes on in his award to reaffirm the fact that "*the process of the interview and selection as well as the factors considered to appoint the candidate, except the formal qualifications, are not in dispute.*" Having confirmed the agreement to the effect that the selection process was not in dispute, the second respondent proceeds to consider whether in all the circumstances the applicant ought to be appointed to the position because on the face of it he had the degree

qualifications called for in the advertisement. He then states that an employee does not qualify for appointment simply on the basis that he possesses the required formal qualification. Accordingly, as he finds that he cannot grant the relief sought by the applicant, so it seems, he dismisses the application.

15. Thus, it appears that third respondent finds that the formal 103 Act requirements were not applicable to the professional appointment. That, on the issues as narrowed, ought to have been the end of the matter. Second respondent, however, goes on to find that the third respondent appointed Moir without his having the formal qualifications identified by it in its advertisement. This second respondent finds was misleading and unfair. It seems on this basis (and if the issues had not been narrowed to exclude this argument) that he ought to have found for the applicant. However, he says that he cannot find for him because he cannot give him the relief he seeks and he cannot do that because a person cannot simply be appointed to a position because he has a degree. If a candidate contended that he met all the requirements for the job but for the degree, he says, the conclusion *"may have been different*". The issue of whether the applicant met all the requirements for the job, however, he did not and could not consider because "*the process of the interview and selection as well as the factors considered to appoint the candidate … are not in dispute.*"

16. In arguing the matter before me both parties were *ad idem* that the now established principles as set out in *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC) should be followed. On the basis of the *Carephone* decision the award of third respondent must be "*justifiable in relation to the reasons given for it.*"

(At 1434B). "*When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equalled to justness or correctness*

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge in determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order." (At 1435A-C).

17. Mr Whyte, who appeared on behalf of the applicant, argued firstly that there was an irregularity in the very process of narrowing the issues conducted by the second respondent in that it ought to have been clear to the second respondent that applicant's case amounted to more than the mere allegation that the appointment of Moir was irregular because of a failure to adhere to the 103 Act requirements. At all times, so it was submitted, it was clear that his case also concerned the averment that he had the requisite experience for the position, was in that sense better qualified than Moir, and ought to have been appointed. Although on the face of it there appears to have been an agreement reached in regard to narrowing the issues in dispute Mr Whyte sought to argue that an agreement requires a meeting of the

minds and that it was quite clear that this had not in fact happened in the instant case.

18. There appears little doubt on the papers before me that a meeting of the minds in fact occurred. There are a number of references in the transcript of the proceedings in which the parties clarified and confirmed that the issues had been so limited and in which applicant pursued his case which at that stage was clearly that the 103 Act applied to the professional appointment. (It was only later that he realised that he had made a mistake in that regard.) I also agree with Mr Brown, who appeared for the third respondent, that second respondent was acting within the scope of his powers under s 138(1) of the Act when he conducted the exercise designed to identify and narrow the issues. The fact that applicant was not represented during this process (his own choice) cannot in itself render the process irregular. Many if not most parties appeared before the CCMA on an unrepresented basis. In my view it is both necessary and desirable that CCMA commissioners make an effort with the parties to identify and narrow the issues in dispute. There is no indication on the papers that applicant did not understand what was being done in that regard or that he was in some way misled by the process.

19. I am satisfied that having narrowed the issues in dispute, however, the reasoning of the second respondent and the manner in which he conducted the arbitration thereafter was not logical or consequential. Although the outcome of the arbitration on the face of it favoured the third respondent in that the application was dismissed, and although the outcome may very well be the correct one in the end, I am not satisfied that the process of reasoning adopted by the arbitrator is rationally

justifiable or that, having so narrowed the issues, he stuck to the issues as limited, either in regard to the evidence which he allowed or in the regard to the issues on which he pronounced. I have, on the *Carephone* approach, entered into the merits not in order to form a view on the correctness of the award (and I do not purport to make any definitive pronouncements in that regard) but to consider whether the Constitutional values of accountability, responsiveness and openness have been upheld.

20. If I were simply required to consider whether the outcome was rational on the basis of the evidence properly before second respondent and on the issue as identified at the outset, in a vacuum so to speak, I would not have been inclined to set aside the award. However, although the second respondent reached what appears to have been the correct decision on the issues as narrowed he did so on the basis of faulty reasoning and after introducing and pronouncing upon issues which he ought not to have been considering. If I consider all the material before the second respondent (some of which he ought to have excluded after the issues had been narrowed) and the various conclusions he arrives at, then I am not satisfied that the matter was rationally or properly dealt with. Certainly, in the body of the award, findings were made against the third respondent on issues on which the third respondent deliberately did not lead evidence in the light of the narrowing of the issues at the commencement of the proceedings. Moreover, on second respondent's reasoning and after he considered Moir's qualifications in relation to the position as advertised (which he ought not to have done) he ought to have found in applicant's favour. The basis on which he refuses to do so is flawed. He says in essence that he cannot grant relief because he has no evidence before him to show that applicant had

more than the formal degree qualification to justify his appointment to the position. Yet he acknowledges that the "*factors considered to appoint the candidate, except the formal qualifications, are not in dispute*" so applicant would not have been in a position to lead evidence on the issues which he would have needed to lead evidence on in order to justify the relief sought by him.

21. I considered the advisability of taking a very narrow view of the *Carephone* ratio, which it seems would enable me to simply say that the "conclusion eventually arrived at" by second respondent, namely, to dismiss the application, was justifiable in relation to the "material properly available" to him, being that evidence in relation only to the issues as narrowed. Such an approach might have produced a "correct" result but that is not, in my view, what I am called upon to do. The review process is designed to ensure that certain fundamental values are upheld, that "due process" is followed in regard to administrative action, in this instance being arbitration proceedings under the auspices of the CCMA. I am satisfied that these values were not upheld and that "due process" did not occur when this matter was dealt with by second respondent. To allow the award to stand in the circumstances would set an undesirable precedent and would send a wrong message to CCMA commissioners, in the effect, that it really does not matter how you reach the result as long as the result is correct.

22. In all of the circumstances I am satisfied that a case has been made out for the review and setting aside of the award and that this is a matter which ought appropriately to be referred back to the first respondent for a hearing *ab initio* before a new arbitrator. As the issues in dispute are not uncomplicated I am of the view that

it would be appropriate for a Senior Commissioner to be appointed.

23. I have come to the conclusion that, in a sense, both parties were prejudiced by virtue of the manner in which the second respondent dealt with this matter. In the circumstances I do not believe that it was unreasonable either for the applicant to bring this application or for the respondent to oppose it. This appears to be sort of case, therefore, where it would be appropriate to make no order as to costs.

24. In the circumstances I make the following order:

24.1 The award of the second respondent under case number WE12914 of 27 October 1998 is hereby reviewed and set aside.

24.2 The matter is referred back to the first respondent for a hearing *ab initio* before a Senior Commissioner.

24.3 There is no order as to costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 20 August 1999

DATE OF JUDGMENT:	27 August 1999
APPEARANCE FOR APPLICANT:	Mr J Whyte
OF:	Chennells Albertyn
APPEARANCE FOR RESPONDENT:	Mr R Brown
OF:	