IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 1389/97

MALELANE TOYOTA **Applicant**

AND

THE COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Respondent**

JUDGMENT

MLAMBO J.

1. This is an application in which it is sought to review and set aside an award of the second respondent ("Laka"). At the outset it is proper to dispose of what the third and fourth respondents ("Numsa" and "Ngwenya") regard as a procedural irregularity. It was argued that the application was lodged two weeks late and that no condonation application was made. It is so that applications to review awards of the Commission for Conciliation Mediation and Arbitration ("the Commission") must be brought in terms of section 145 i.e within six weeks. The present application is brought in terms of section 145 and 158(1)(g).

2. I have decided not to take issue with the late lodging of the application. In the first place the application was brought during a period when the position was not clear as to the applicable section relevant for the review of arbitration awards. In view of this situation parties brought their applications in terms of both

sections without adherence to the six week period in section 145 as section 158(1)(g) has no similar provision. Secondly it is also correct that the applicant did not sit and do nothing when the award was received. The applicant first tried to rescind the award in terms of section 144. It was only when that failed that the present review proceedings were instituted. Under the circumstances it is understandable why the application was filed beyond the six week period found in section 145.

3. Ngwenya was employed by the applicant as a forecourt patrol pump attendant. On 2 October 1996 Ngwenya, during the course and scope of his duties, handled two speed point transactions. In the first transaction. 480, 78 litres of diesel were purchased amounting to R990.42. The second transaction, performed 12 minutes later, was for the purchase of 194.18 litres of diesel amounting to R400-00. The second transaction was rejected by Stannic, the banking house concerned. This led to an investigation by the applicant which culminated in charges of fraud being proffered against Ngwenya. The subsequent disciplinary hearing was scheduled for 6 March 1997 but was postponed. On 13 March 1997 it could not proceed as Ngwenya objected thereto . He felt that as a shop Stewart his union, Numsa, had to be notified and a union official had to attend. The hearing was postponed to 24 March 1997. On that day a union official ("Ncongwane") was present and the hearing proceeded.

4. Ngwenya was found guilty and was dismissed. Conciliation failed to resolve the dispute and Ngwenya referred it for arbitration by the Commission. The second respondent was the commissioner appointed to arbitrate the dispute. He found that:

"No misconduct was proved at the disciplinary hearing - as no valid and admissible evidence was adduced whereon a valid decision could be made."

He then reinstated Ngwenya in employment and ordered that he be paid retrospectively to 5 September 1997.

5. The applicant now seeks to review this award. The grounds on which the award is attacked are:

"Whether the second respondent ignored and/or failed to take into account material evidence of witnesses who testified on behalf of the applicant when there was no reason for him to do so and when he was not entitled to do so.

Whether the second respondent incorrectly made certain factual findings and/or assumptions against the applicant when he was not in a position to do that.

Whether the second respondent did not properly and fairly apply his mind; therefore misconceived the nature of the discretion conferred upon him.

Whether the second respondent failed to properly and fairly apply his mind to the dispute before him and in reaching his decision in making the award.

Whether the second respondent erred in holding that arbitration proceedings are not proceedings *de novo*."

6. It needs to be said that the founding affidavit on which the applicant relies for this application leaves much to be desired. The affidavit contains bald allegations against Laka's award. Such allegations are mostly wild and irrelevant with no substantiation of any kind. The applicant's whole case is set out in two paragraphs stating:

"9. The basis for the review of the arbitrator's decision is that in making his award the arbitrator:
9.1. Ignored material evidence of witnesses who testified on behalf of the applicant when there was no reason for him to do so and when he was not entitled to do so; and/or
9.2. Failed to take account of relevant evidence; and/or
9.3. Took into account evidence which was either not led or which was uncorroborated; and or
9.4. Took into account inadmissible evidence; and/or
9.5. Incorrectly made certain factual findings and/or assumptions against the applicant when he was not in a position to do so; and/or
9.6. Did not properly and fairly apply his mind in reaching his decision and in making the award; and/or
9.7. Took into account considerations not based on the evidence before him and failed to take into account material evidence led on behalf of the applicant and accordingly misconceived the nature of the discretion conferred upon im and failed to apply his mind properly, fairly and reasonably to the dispute between the parties; and/or
9.8. In acting as aforesaid, failed to resolve the dispute between the applicant and Ngwenya in a fair way and failed to exercise his functions and
9.9. Exceeded is statutory powers by basing his decisions on considerations other than those he is enjoined to take into account in terms of section 188(2), read together with items 4 and 7 of schedule 8 of the Act.
9.10. Erred in holding that arbitration proceedings are not proceedings *de novo,* that this is a material error of law, ad, as it cannot have been the intention of the legislature to grant a CCMA commissioner the exclusive authority to decide this question of law;
9.11. Failed to perform his statutory duty in terms of section 188(2), alternatively, wrongly performed his duty in terms of section 188(2) by failing to evaluate the reasons and procedures, as proved in the

arbitration process, as against the normative provisions of item 4 and 7 of schedule 8 of the Act.

The arbitrator accordingly committed a misconduct and/or a gross irregularity for each of the reasons set out above, and on the basis of his decision was grossly unreasonable, alternatively unreasonable."

7. It is trite that in application proceedings, the applicant's notice of motion and founding affidavit must contain all essential allegations upon which the applicant's cause of action is found. See **Lipschtz & Swart NNO v Markowitz 1976 (3) SA 772 (W)**. Whilst this is so this court has held that in every case where there is a challenge to an award, it is enjoined to consider if the award is appropriate and should not hesitate to set it aside should a reviewable irregularity be evident. See **Linda Deutch v Pinto & Another (1997) 18 ILJ 1008 (LC).** Therefore whilst it is correct that the present application is wanting in certain 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.

8. The standard of review of arbitration awards of the Commission is found in **Carephone (Pty) Ltd v Marcus N.O & Others (1998) 19 ILJ 1425 (LAC).** In that judgment the court found that the arbitration function performed by the Commission was administrative and as such had to be in line with the constitutional imperative of fairness justifiability. Froneman DJP, delivering the judgment, said at page 1435 (para 35)

"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 equated to justness or correctness."

Froneman DJP also noted that this constitutional imperative introduced a requirement of rationality in the outcome of the administrative action which goes beyond mere procedural impropriety. Froneman DJP, however, sounded the warning that a judge determining whether administrative action is justifiable in relation to the reasons given for it, does so **"not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable."**

It is therefore incumbent upon me to consider if the award "can be justified in relation to the reasons given for it".

9. It is apparent from the award that the evidence placed before Laka by the applicant was more extensive than that adduced during the internal disciplinary enquiry. For instance only one witness testified for the applicant during the disciplinary enquiry whereas four witnesses gave evidence before Laka. Laka stated in his conclusion that:

"Arbitration proceedings in the CCMA is not a trial *de novo*. The process is meant to determine whether or not the decision to dismiss was fair in that a fair procedure as (sic) Followed and a fair reason existed at the time of the decision."

He further stated that a fair procedure and a fair reason **"should not be established *ex post facto."*** He then concluded that :

"In the present case, procedurally the respondent (applicant) erred in not informing the union prior to the institution of the disciplinary process. See schedule 8 of the LRA: Code of Good Practice: Dismissal item 4(2): "Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union."

10. It is clear that Laka was preoccupied with what occurred during the internal disciplinary process. It is apparent from his award that the applicant presented more extensive evidence than it did during the internal hearing. This is borne out by his conclusion that**"no misconduct was proved at the disciplinary hearing - as no valid and admissible evidence was adduced whereon a valid decision could be made".**

11. Laka is silent on the evidence placed before him. He makes no findings about the cogency thereof or whether he found such evidence acceptable or not. The issue before Laka was whether Ngwenya had committed fraud. He was therefore obliged to consider evidence placed before him to determine whether Ngwenya committed fraud. i.e whether there was substantion to the charge laid against Ngwenya. Laka

seems to have regarded the process to mean that the parties had to report to him what they did internally and to pass judgment thereon.

12. The evidence placed before Laka by the applicant covered material aspects of the matter. Evidence was led to the effect that staff (including Ngwenya) were trained on the rules and procedures applicable to their duties. The driver of the truck served by Ngwenya on 2 October 1996 testified that he signed only one slip on that day being the one for R 992 - 42 (480,78 litres). He stated that the second slip for R 400.00 (194,18 litres) did not bear his signature. Evidence was presented that the driver presented only one slip for 2 October 1996, presumably the one acknowledged by him for R 990.42. The award does not set out what version Ngwenya presented regarding the commission of the offence. The recorded part of Ngwenya's version deals with the failure by the applicant to notify his union before instituting disciplinary proceedings against him, the postponement of the matter and eventually the finding of guilt and dismissal.

13. A fundamental requirement in any arbitration process is that the arbitrator must consider and assess relevant evidence placed before him. See **Venture Holdings Ltd t/a Williams Hunt Delta v Biyana & others (1998) 19 ILJ 1266(LC)** at paragraph 26. It is clear therefore that Laka committed a reviewable irregularity by ignoring the evidence placed before him regarding the commission of the offence. He failed to consider the import of the evidence placed before him. In particular he failed to grasp the import of the driver's evidence that he signed one slip which is the one eventually approved by the bank. The fact that Ngwenya handled both slips must mean that Ngwenya was directly involved in the fraud. In my view had Laka to applied his mind to the matter and not ignored the material evidence before him he would have come to a different conclusion to the one appearing in his award.

14. In my view therefore Laka's award cannot be justified in relation to the reasons given for it. His preoccupation with the internal disciplinary process, whilst understandable in certain respects, was erroneous in regard to the substantive fairness of Ngwenya's dismissal. To determine the substantive

fairness he had to consider the evidence placed before him which he didn't. The reasons he gives for his finding of procedural unfairness are also suspect. Whilst it is correct that initially the applicant did not notify Ngwenya's union, about the disciplinary proceedings, this was rectified and the eventual hearing was attended by Ngwenya's trade union official.

15. Laka's finding that "no misconduct was proved at the disciplinary hearing as no valid and admissible evidence was adduced whereon a valid decision could be made" is correct only insofar as procedural unfairness is concerned. It is not disputed that only Kemp gave evidence against Ngwenya at the internal disciplinary hearing. Kemp's evidence during the arbitration proceedings related to staff training. It is therefore justified to conclude that during the disciplinary enquiry Kemp did not produce evidence relating to the commission of the offence to which Ngwenya could reasonably respond to.

16. The code of good practice regarding dismissals for misconduct provides that:

"4(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision"

A checklist approach is not a pre-requisite but the accused employee must be confronted with a set of facts that are sufficiently particular to enable him to respond thereto and offer a rebuttal or explanation that sets out his innocence. Kemp did not possess any credible evidence against Ngwenya which would have justified a verdict of guilt against Ngwenya at the hearing.

17. Is the award of reinstatement justifiable? It is clear that Laka's award of reinstatement is based on his finding regarding procedural unfairness. Section 193 (2)(d) provides:

"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

Therefore reinstatement can only be considered when a dismissal is found to have been procedurally and substantively unfair. In this matter Laka should have considered compensation as a case was made out in respect of procedural unfairness. There is however another important principle that militates against reinstatement in this case. Ngwenya had committed an offence based on dishonesty in which he enriched himself at the expense of his employer. An act of dishonesty destroys the trust an employer places on an employee. Once such trust is destroyed there can be no hope of the employment relationship continuing. See **Standard Bank of South Africa v CCMA & others (1998) 6 BLLR 622 (LC)** at 630 F-G and 631B-C**.** The award of reinstatement can therefore not stand. In my view Ngwenya is only entitled to compensation for a procedurally unfair dismissal from the date of his dismissal to the last day of the arbitration proceedings. I am further of the view that no purpose would be served by a remittal of this matter for a fresh arbitration. The evidence is clear and this Court is in a good position to determine the matter itself.

18. In the circumstances I make the following order:

1. The award made by the second respondent on 17 November 1997 is reviewed and set aside.
2. There is substituted for the award the following:

   "The dismissal by the employer of the employee is determined to be substantively fair but procedurally unfair."
3. The applicant is ordered to pay the fourth respondent six months remuneration based on his rate of earnings at the time of his dismissal. This amount is payable within 10 days.
4. There is no order as to costs.

MLAMBO J.

ent: 9 February 1999.

nt: Mr M Aggenbach instructed by General Allied Employers Organisation.

For the third and

ents: Mr B Vally instructed by Routledge-Modise attorneys.