

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 3921/98

In the matter between:

SPRINGBOK PATROLS

Applicant

and

MAMBA, K

First Respondent

MALEKANE, JACOB

Second respondent

JUDGMENT

BENJAMIN A J

- [1] This is an ex tempore judgment. It concerns an award of a CCMA commissioner, Ms K Mamba, who heard an arbitration concerning the dismissal of the first respondent on 13 November 1998.

The applicant, Springbok Patrols, has sought to review that arbitration award which was handed down on 3 December 1998. At the same time the dismissed employee has sought that the arbitrator's award be made an order of the labour Court. The commissioner found that the Second respondent had discharged the onus of proof and that he had proved that he had been dismissed. The commissioner further found that the applicant company had not established that the dismissal was procedurally and substantively fair. The award made by the commissioner was one of financial compensation, that the applicant must pay the Second respondent an amount of R7 945,00.

The applicant was represented in court by its legal officer, Ms Taylor. The Second respondent represented himself in court. The attack on the commissioner's award was based on the fact that the first respondent, the commissioner, had misinterpreted certain of the evidence given by one of the company's witnesses, a Mr van Wyk. When I asked Ms Taylor on what basis she was bringing the review, she stated it was brought under section 145 but was unable to refer to a particular provision in that section on which it was based. Therefore I have to consider whether there was a defect in the arbitration award as contemplated by sections 145(1) and (2). I also have to consider whether the commissioner either committed misconduct in relation to her duties as an arbitrator or committed a gross irregularity or exceeded her powers or that the award was obtained improperly.

When I asked Ms Taylor as to which portions of the evidence in the arbitrator's award she was challenging as a basis for the misinterpretation, she was only able to point to one paragraph in the arbitration award in which the arbitrator appears to have used the words "chased away" rather than words that indicated that an instruction had been given to the employee to leave the premises. In essence, at the arbitration there was a conflict of the evidence between the employee and Mr van Wyk, a representative of the employer. The evidence of the employee was that he had been ordered to leave or in the words he used "chased away from" particular premises and that he interpreted this as a dismissal. The evidence of Mr van Wyk was that an instruction to leave did not amount to a dismissal but that the employee should report to the head office thereafter for an enquiry.

Before I make my conclusion, I consider it important to remind the Applicant of the difference between a review and an appeal. I do so by quoting from a recent judgment in the matter of Johannes Coetzee v Justice Libiya by Cheadle A J in which he deals with a difference between a review and an appeal:

"A review concerns itself with the manner in which a tribunal comes to its conclusion rather than with its result. An appeal, on the other hand, is concerned with the correctness of the result. The two remedies for challenging the decision of a tribunal may on occasion be co-extensive, particularly if it is the very process of reasoning that is the subject of the review but this should never constitute a

basis for blurring the essential differences between the two. The fact that a reviewing court may come to a different result if the matter has been brought on appeal, can never be on its own a basis for attacking the process of reasoning."

As the Carephone judgment says, I can only set aside an arbitrator's decision on review if it is not rationally justifiable.

When we look at the decision it is evident how the commissioner approached her task. She first set out the evidence of the employee who is now the Second respondent, and thereafter the evidence of the witnesses of the company. She then analysed the evidence and gave her reasons for finding in favour of the employee rather than the company. She was persuaded by the fact that Mr van Wyk of the company had admitted to the arbitration that he had broken company policy before and that therefore there was no reason that he could not have done so on this occasion. In my view, the arbitrator did what is required of her. She evaluated the facts and she came to a conclusion which is objectively justifiable. I find no reason for setting aside the arbitration on review. My finding is that the arbitration should be confirmed and that it should be made an order of court. There is no basis in the papers before me or in the argument made by the representative of the company that would justify me on the test in the Carephone case in intervening in this matter. In fact, underlying this case, I think, is the complaint by the applicant that its witness was disbelieved and that the Second

respondent was believed by the arbitrator. A finding of credibility of that type which has been justified in the decision is not one that I can interfere with.

I therefore make the following order:

1. The application for review in Case No. J3921/98 is dismissed with costs. I point out to the Second respondent, Mr Malekane, that his costs will be limited to those actual disbursements he has made in defending this review, for instance his travel costs in coming here or any expenditure that he has made. I would suggest that after the hearing he goes to the Registrar to seek assistance with these matters; alternatively, as I am sure it is not a great amount of money involved, he should try and seek agreement with the applicant company as to what these costs will be and the payment.
2. In Case No. 3911/98 I make an order that the arbitration award handed down by the Commissioner K Mamba, the date of the handing down being 3 December 1998, be made an order of the Labour Court. The respondent in that application, Springbok Patrols, is directed to pay an amount of R 7945,00 to Mr Malekane within five days of the date of this order, plus such interest as he is entitled to, as calculated in terms of s 143(2) of the Labour Relations Act.

P BENJAMIN

Acting Judge of the Labour Court

SIGNED AND DATED THIS 10th DAY OF MARCH 1999

DATE OF HEARING: 4 March 1999

DATE OF JUDGEMENT: 4 March 1999

For the Applicant: Ms Taylor

For the Respondent: Mr J Malekane