IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J3103/98

In the matter between:

THEMBA MTSHALI Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION Respondents

JUDGMENT

MARCUS A J:

INTRODUCTION:

I. This matter has a complicated history. In various forms it has come before three judges of the Labour Court and has been the subject of two hearings before the Commission for Conciliation, Mediation and Arbitration ("CCMA").

II. The applicant, to whom I shall refer as “the employee”, was formerly employed by the Greater Johannesburg Transitional Metropolitan Council ("the Council"). A dispute concerning the dismissal of the employee was referred to the CCMA. On 12 October 1998, the second respondent (“the Commissioner”) issued an arbitration award in terms of which the employee was reinstated in his employment with the Council. The dispute giving rise to this award, to which I shall refer as “the original award”, is not presently germane. It suffices to say that the employee claims he was constructively dismissed. The Council claims he resigned. The dispute was only referred to the CCMA on 10 July 1998, some seven months after the alleged dismissal. On that date, the matter was heard in the absence of the Council.

III. In the original award the Commissioner found that on the undisputed evidence before her, the Council forced the employee to resign by deploying him in a department where it was known that he had experienced difficulties with his superiors. These difficulties had led to his resignation and the employee was held to have been constructively dismissed.

IV. The employee applied to the Labour Court to have the original award made an order of court. The application was heard by Grogan AJ on 18 December 1998. The order was granted.

V. The Council thereafter applied to have the order granted by Grogan AJ rescinded in terms of section 165 of the Labour Relations Act 66 of 1995 ("the Act"). The matter came before Revelas J who, after a careful analysis of the facts, concluded that the order of Grogan AJ had been erroneously granted in the absence of the Council and should accordingly be rescinded. The order of rescission was granted on 12 March 1999.

VI. At the arbitration hearing which took place in the absence of the Council, the Commissioner was at pains to point out that the possibility of rescission loomed large. According to the transcript of that hearing, the Commissioner explained to the employee that because the matter was being heard in the absence of the Council, it was possible that the Council may apply for rescission. The Commissioner emphasized this fact. She stated the following:

"You need to be aware, Mr Mtshali, that the Municipality may bring a rescission which means we may

have to meet again and hear both sides of the story."

VII. Fortified by the judgment of Revelas J, the Council applied to the CCMA for rescission of the original award. The matter was heard by the same Commissioner on 15 March 1999. On 18 March 1999, the Commissioner rescinded the original award. She reasoned as follows:

"BACKGROUND:

The case was initially heard on the 12th of October 1998. A default award was given as the respondent party did not arrive and it appeared from the papers that they had been notified. Condonation was granted in this award. The employee party subsequently made the award an order of court. This was set aside by the court and referred to the CCMA for rescission as it appeared that there had been no proper service. The rescission application was heard on the 15th of March 1999. Mr Mtshali, the employee, represented himself and Mr Van Tonder, the legal officer of the Council represented the Greater Metropolitan Council.

RESCISSION:

Mr Mtshali argued that he served the documents on the Town Clerk who mislaid them and he should not be prejudiced for this. Moreover, he argued that he did

not know the correct person on whom to serve the documents as he was no longer working at the Council. He stated that he did contact various people to find out where he should serve the documents but he kept being referred to different places. Mr Mtshali argued that he exhausted all relevant channels. He stated that he served the documents where he collected his last payment from the Council being Diepmeadow. Mr Van Tonder argued that the Council's postal address is in Braamfontein. He stated that the fax and telephone numbers were incorrect. Mr Van Tonder argued that Mr Mtshali, who had worked for the Council for 10 years, knew whom to contact and neglected to choose an address that was not the Johannesburg Council's. Mr Van Tonder argued that as the referral was deficient the award be rescinded in terms of section 144 of the Labour Relations Act, 65 of 1995.

RULING:

The underlying reason that the Labour Relations Act, Form 7.11, requests that the employee notify the employer is to make sure that both parties are aware of a dispute and the grounds for such a dispute. The principle underlying this procedure is the audi alteram partem rule which means that in a dispute in order for there to be justice and equity, both sides must be heard. In this case the respondent was never notified

and consequently did not attend either the mediation or the arbitration. Therefore both sides were not heard and the audi alteram partem rule was not fulfilled. It is apparent from the argument and the accompanying affidavits that an error in service has occurred. In order for justice and equity to prevail the award issued on the 12th of October is rescinded in terms of section 144 of the Act.

POINT IN LIMINE:

The next issue that was raised was condonation. Certain factors are taken into account when considering condonation. These are the degree of lateness, the reason for the late-referral, prospects of success and the prejudice to the parties. Condonation was heard on the affidavits and in arguments.

DEGREE OF LATENESS:

The dispute arose on the 13th of December 1997 and the case was referred to the CCMA on the 10th of July 1998. This is a substantial delay of about five months and 28 days.

REASONS FOR LATE-REFERRAL:

The employee stated that the reason why the dispute was so late is that he had handed his case to certain business in Soweto which was posing as the CCMA. He stated that these individuals kept pushing him off by

telling him that they were attempting to liaise with his employer. Mr Mtshali stated that he often approached them. After some time had passed he went to the bargaining council. They then referred him to the CCMA. A letter was sent to the CCMA on the 10th of July 1998 confirming that they (the bargaining council) had no jurisdiction in the matter. Mr Van Tonder argued that given Mr Mtshali's intelligence and experience that the above was an unreasonable explanation as he had knowledge of the procedures to be followed as set down in the Labour Relations Act. This, he argued, could be shown from Mr Mtshali's initiative to make the initial award an order of court.

<u>PROSPECTS OF SUCCESS</u>:

Mr Mtshali stated that he had worked for the Council since 1990. He stated that he had been assaulted in 1990 and that he was then transferred to various departments and Councils which resolved the issue. Mr Mtshali stated that with the deployment of the Metropolitan Councils into Substructures he was due to be transferred into the same department where the initial problem occurred. He stated that he did object and when nothing could be done, he resigned. Mr Van Tonder argued that Mr Mtshali, as he had been in the employ of the organisation for some time, was aware of the disciplinary structures. He stated that he was not

aware that Mr Mtshali made use of any of the grievance procedures or had approached the dispute committee with an objection about his employment.

PREJUDICE TO THE PARTIES:

Mr Van Tonder argued that if the issue in dispute went back until 1990, it would be extremely difficult to find the people involved in reconstructing events. He further stated that some of the individuals involved had left the employ of the organisation. Further, one of the key individuals was deceased. He argued that it would prejudice the employer party if the condonation was granted.

FINDING:

Using a holistic approach, all factors are taken into consideration. Mr Mtshali's explanation as to why the referral was so late was vague and improbable and he could not produce any evidence as to the existence of these alleged consultants. The prospects on the facts appears slim. It appears that Mr Mtshali resigned because his request could not be accommodated. The inference is then that he resigned because the situation did not suit him anymore and was therefore voluntary. It appears that the prejudice to the respondent party outweighs the prejudice to the employee party in terms of the fact that certain witnesses no longer are employed at the Company and one of the individuals involved is deceased. To expect the employer party to recreate evidence of an event that occurred a number of years ago, is to expect the impossible.

For the above reasons, coupled with the degree of lateness, which is excessive, I cannot condone the late-referral of the case and therefore dismiss the application."

I shall refer to this award as "the rescission award."

VIII. In the matter presently before me the employee seeks to review the Commissioner's refusal to condone the late-referral of the dispute. This was not how the relief was originally formulated. The failure to formulate the relief sought correctly is immaterial and has occasioned no prejudice. The matter will be dealt with in terms of the notice of motion as amended.

IX. It seems that the principal ground of review relied upon by the employee is that the question of condonation was decided in his favour by the Commissioner in the original award. In the original award the Commissioner dealt with condonation on the following basis:

"Condonation: The dispute arose in December 1997 and was referred to the CCMA on the 10th of July 1998. The matter is approximately seven months out of time. The applicant stated that the reason he was out of time is that he approached a business in Soweto that pretended

to be the CCMA. He stated that he was then sent to the bargaining council and the council then referred him to the CCMA who informed him that they do not employ subconsultants. I find that the applicant's reason for late-filing is acceptable and condonation is granted. The Company did not appear at arbitration and had therefore waived their rights."

X. As already indicated, the Commissioner did not at that stage, have the benefit of argument or evidence from the Council. However, she made it clear that it was possible that the Council may seek rescission of the original award.

I.

XI. The first issue which requires consideration is whether it was open to the Commissioner to reconsider the question of condonation when the matter came before her for purposes of rescission or whether she was "bound" by her original decision. The employee, who appeared in person before me, placed this at the centre of his argument. The essence of his contention is that once having found in his favour, the Commissioner was thereafter bound to find in his favour a second time.

XII. Applications for the rescission of arbitration

awards are governed by section 144 of the Act which provides:

"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 an 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 omission 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."

XIII. It is quite clear that a Commissioner may reconsider an award *"erroneously sought or erroneously made in the absence of any party affected by that award"*. In this respect the CCMA differs from many other statutory bodies which, in the absence of a specific power of reconsideration, are not ordinarily entitled to reopen decisions once made. There is authority for the proposition that once a statutory body makes a decision, it thereafter becomes <u>functus officio</u> (See, for example, <u>Minister of Agricultural Economics & Marketing v Virginia Cheese and Food Co.</u>

(1941) (Pty) Ltd, 1961 (4) SA 415(T) and Durban City Council v Local Road Transportation Board, 1964 (3) SA 244(D). However, the matter is not entirely free from doubt. See the comments of Jansen, JA in Transair (Pty) Ltd v National Transport Commission & Another, 1977 (3) SA 784(A) at 792A–793H).

XIV. Under section 144 of the Act, a Commissioner is given the express power to vary or rescind an award already given. In this respect, the Commissioner enjoys powers the equivalent of those conferred on the High Court by Rule 42 of the Uniform Rules of the High Court.

XV. Where an award is wrongly made in the absence of an affected party, it is particularly appropriate that the matter be considered afresh with the full benefit of evidence and arguments not previously available. The audi alteram partem rule is designed to facilitate informed decision making. In the words of Milne JA in South African Roads Board v Johannesburg City Council, 1991 (4) SA 1(A) at 13B–C, the rule has a twofold effect:

"It satisfies the individual's desire to be heard before he is adversely affected; and it provides an

opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."

XVI. In this regard it is also apposite to refer to Administrator Tvl & Others v Zenzile & Others, 1991 (1) SA 21(A) in which Hoexter JA at 37E quoted with approval the following observation by Megarry J in John v Rees [1970] Ch 345 at 402:

I. *"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*

XVII. The centrality of the audi alteram partem rule is underscored by the fact that at common law the failure to afford a hearing in circumstances where one is required, renders the decision invalid (See Momomiat v Minister of Law and Order, 1986 (2) SA 264(T) at 274D; Attorney General Eastern Cape v Blom, 1988 (4) SA 645(A) at 669J and 658H-I; Administrator Tvl & Others v Zenzile & Others (supra), at 28H-I, 37C-F and

40A-B).

XVIII. I am accordingly of the view that the Commissioner was not only entitled to consider the question of condonation afresh, but was obliged to do so in the light of the evidence and argument duly presented to her. After Revelas J had rescinded the order granted by Grogan AJ, it would have been competent for her to have directed that the matter be heard by a new Commissioner. There was nothing to suggest, however, that the matter should not be heard by the same Commissioner. I am not unmindful of the obvious frustration which this has engendered in the employee. Indeed, given the turns and twists that this particular matter has taken, he may be forgiven for his obvious bewilderment at these processes.

XIX. Having regard to the reasons furnished by the Commissioner in the rescission award, I am unable to decern any misdirection or error on her part. The test for review under section 145 of the Act is now settled by the decision of the Labour Appeal Court in Carephone (Pty) Ltd v Marcus NO & Others (1988) 19 ILJ 1425 (LAC). The question that must be posed is whether there is *"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" (at 1435E-F). In my view the reasons furnished by the Commissioner satisfy the constitutional standard of justifiability. It is quite clear that the Commissioner was alive to the factors relevant to condonation (see Melane v Santam Insurance Co. Ltd 1962 (6) SA 531 (A)). It is equally clear that these factors were appropriately weighed and considered. The employee did not seriously attack the reasoning of the Commissioner. His principal complaint was that she changed her mind when the matter came before her a second time.

XX. The enquiry for present purposes does not end with a consideration of the Commissioner's reasons for refusing condonation. This is so because in the affidavit filed in the present proceedings, the employee seeks to adduce further reasons to explain his delay. These are not easy to fathom but in essence amount to the following: He states that he approached George Sithlabani about his case. He states further that those who were assisting him with his case approached one Shumi Khotu who delayed the process.

Thereafter one Izak Moweshe also delayed the process and, once again thereafter, one Anne van Tonder failed to take the process further.

XXI. At the second hearing before the Commissioner, the employee was given every opportunity to explain the reasons for his delay. The Commissioner explained to the employee that she was hearing the condonation application afresh and that it was therefore necessary for him once again to give his reasons for the late referral. After the employee had furnished his reasons for the late referral, the Commissioner asked him whether there was anything else he would like to add. The employee answered in the negative.

XXII. Mr Beckenstrater, who appeared on behalf of the Council, rightly submits that no criticism can be directed at the Commissioner for failing to take into account factors not placed before her by the employee and which fall within his exclusive knowledge. In Carephone (Pty) Ltd v Marcus NO & Others (supra) the Labour Appeal Court was careful to stipulate that the enquiry into the justifiability of a decision required objective scrutiny of the material *"properly available"* to the arbitrator. The new evidence sought to be

adduced in the present proceedings was not properly available to the Commissioner. I have grave reservations about the competence of a court of review to entertain evidence that was never placed before a Commissioner (cf Loxton v Kenhardt Liquor Licensing Board 1942 AD 275 at 293).

XXIII. Even it were open to this court to consider evidence not placed before the Commissioner, it would have to be accompanied by a satisfactory explanation as to why it was not tendered in the first place. It is conceivable that a court of review, may have the power to receive fresh evidence by reason of its inherent powers and equitable jurisdiction (See section 151 of the Act, as amended by section 11 of Act 127 of 1998). Were this possible, it would at least have to satisfy the long established requirements for receiving fresh evidence on appeal. Wessels CJ in Colman v Dunbar, 1933 AD 141 laid down certain guidelines for receiving fresh evidence on appeal at 160–162:

I. *"That this court can hear further evidence itself or remit the case to the court a quo to hear further evidence is beyond doubt; but in the words of Innes, CJ in Shein's-case, (1912 AD at p428), 'it is clear the court should be very chary of admitting fresh evidence*

after a case has been tried more especially upon points which have been contested and decided at the trial. The danger of sanctioning such a course save under exceptional circumstances is manifest'. To do so may often open the door to fraud and would offer a strong temptation to perjury .... We ought only to do so 'where special grounds exist and where it is clear that such a course would not unfairly prejudice the other side and would enable the court to do justice between the parties' (per Innes ACJ loc cit). It is impossible to lay down definite rules when such an application will be allowed and when not, but we may adopt certain guiding principles upon which such applications may be granted.

1. It is essential that there should be finality to a trial and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances. To allow fresh evidence on a point which calls in question evidence already lead, would necessitate a rehearing of the witnesses whose evidence is questioned so as to give them an opportunity of answering the fresh evidence. This means that the case would be largely reopened which militates against finality (Shein's case at p429).

2. The party who makes the application 'must show

that the fact that he had not brought it forward, was not owing to any remissness on his part (per Collins LJ in Young v Kershaw 16 TLR 52,54). He must satisfy the court that he could not have got this evidence if he had used reasonable diligence.' ...

3. The evidence tendered must be weighty and material and presumably to be believed and must be such that if adduced, it would be practically conclusive for if not, it would still leave the issue in doubt and the matter would still lack finality. It is not enough that the fresh evidence merely corroborates evidence which has been investigated and rejected. It must go further. In the words of Vaughan Williams, J in Warham v Selfridge & Co (30 TLR 344,345), 'in order to justify the granting of a new trial on the ground that fresh evidence had been discovered, this evidence must be of such a character as to justify one in saying that the verdict could not, in the interest of justice, be relied on because it was based on mistake, surprise or fraud' ....

4. If the conditions have so changed that the fresh evidence will prejudice the opposite party, the court will not grant the application (Shein's case (supra)). Thus, if the witnesses of the opposite party have been scattered and cannot be brought back to refute the fresh evidence or to explain their own evidence in the

light of the fresh evidence, the court will not grant the application."

XXIV. Even if it were open to me to consider the fresh evidence, it would not meet the requirements of the second, third and fourth guiding principles mentioned by Wessels CJ. A similar approach to the receipt of fresh evidence is adopted in English law. (See Ladd v Marshall [1956] 3 All ER 265 (CA) at 768 and Stone v Stone [1971] 2 All ER 582 (HL) at 586.)

XXV. I am accordingly of the view that the Commissioner's reasons for refusing of condonation for the late-referral of the dispute are justifiable.

XXVI. I should emphasize that my task is one of review and not appeal. (See Carephone (Pty) Ltd v Marcus NO & Others (supra) at 1434D). Views may legitimately differ over the acceptability of a particular period of delay. That is beside the point. My task is to scrutinise the reasons furnished against the standard of justifiability. That standard has been met in this case.

XXVII. In the light of this conclusion it is not

necessary for me to consider the other issues raised by the employee. I should mention, however, that the Commissioner also found that the employee's prospects of success were slim. There was no real challenge to this finding by the employee.

XXVIII. In the circumstances the application is dismissed. Each party is to pay its own costs.

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G.J. Marcus

Acting Judge of the Labour Court

Date of hearing: 3 June 1999

Date of judgment: 3 June 1999

For the Applicant:In person

For the Respondent:Mr C Beckenstrater of Moodie and Robertson