THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: J484/99

In the matter between:

A & A ENGINEERING (PTY) Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Respondent

JUDGMENT

MARCUS AJ:

I. This is an application for the review of an arbitration award in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act").

II. On 18 November 1998, the second respondent handed down an arbitration award in terms of which he held that the dismissal of the third respondent was procedurally and substantively unfair. The award gives relief in the form of compensation for

six months wages.

III. There are a wide variety of attacks on the award. The review is not opposed by the third respondent. The third respondent is in fact in court today and has indicated to me that he does not oppose the relief claimed. There is no answering affidavit by the second respondent who has contented himself simply with furnishing a transcript of the proceedings before him. The applicant's averments therefore stand unchallenged. I mention only the more significant attacks. For ease of reference, however, the arbitration award forms an annexure to this judgment.

IV. Under the heading *"ISSUES TO BE DECIDED"* the second respondent stated:

"I am requested to decide allegations made by an employee that whilst still in employment of the Company he was ordered to stop performing his duties as a fitting turner."

The founding affidavit states that the employee's contention was that he was constructively dismissed. It is further stated, however, that it became common cause that the employee was unable to work due to ill health. The issues to be decided were in fact whether the employee was dismissed or whether he resigned and, if dismissed, whether such dismissal was fair. The second respondent thus entirely misconceived the very issue he

was called upon to decide.

V. The applicant states further in the founding affidavit that under the same heading in the arbitration award, it is stated that:

"The Company later dismissed him (the third respondent) unfairly. I must decide whether the alleged dismissal was unfair."

The applicant states, however, that the true issue was whether there was a dismissal and if so, whether the dismissal was fair or unfair. The statement by the second respondent, however, indicates that the issue of dismissal itself was common cause while the only issue to be decided was the fairness thereof. As the applicant rightly points out, the implications of this error in respect of the onus are substantial. This too indicates a basic misconception of the issues to be decided.

VI. Under the heading *"SUBMISSION OF EMPLOYEE"* the second respondent stated:

"On 16 September 1997 he (the third respondent) was instructed to stop discharging his duties."

The applicant states that while this was said by the third respondent, it was common cause that he could not discharge his duties due to his permanent disability. Consequently, says the applicant, the issue of suspension never arose. Again, I

emphasize, there is no answer to this averment.

VII. Also under the heading *"SUBMISSION OF EMPLOYEE"* in the arbitration award, it is stated:

"In the disciplinary enquiry which was held on this particular date the employee was terminated." (sic)

The applicant states that it was not the submission of the third respondent nor of the applicant that the latter's employment was terminated at the disciplinary enquiry. The applicant states that no enquiry was actually held as the meeting was adjourned without reaching a conclusion after the third respondent had failed to attend. The applicant submits that this error was highly prejudicial to it. It indicates a failure to understand the issues in dispute.

VIII. Under the same heading, namely, *"SUBMISSION OF THE EMPLOYEE"* the second respondent stated:

"In June 1998 the employee was formally served with a notice which confirmed the dismissal."

The applicant submits, however, that neither the third respondent nor the applicant made any submission in respect of a notice confirming dismissal. The applicant states that there was never such a notice. This demonstrates a failure to appreciate the evidence that was presented.

IX. In the founding affidavit reference is made to that part of the arbitration award under the heading *"SUBMISSION OF EMPLOYER"* where the second respondent stated:

"In their opening statement the Company stated that as they did not have any position internally as the employee requested to be shifted to an alternative position."

The applicant states that no such submission was made. What was stated is that when the idea of an alternative position was mooted, the third respondent indicated that he was not interested . The reason for this, according to the applicant, was that the third respondent was not prepared to accept a reduction in his salary. The applicant contends that this error, like the others, was highly prejudicial to it. It demonstrates a lack of appreciation of the issues to be determined and a misunderstanding of the evidence presented.

X. The applicant also draws attention to that part of the arbitration award under the heading *"SUBMISSION OF EMPLOYER"* in which it was stated:

"The employee failed to attend the disciplinary hearing."

The applicant points out that at no point did the applicant ever allege or submit that the third respondent was required to attend and failed to attend a disciplinary hearing.

XI. There are many other attacks launched by the applicant.

Where an arbitration award is taken on review, the arbitrator has a choice either to abide the decision of the court or actively to oppose the relief claimed. It is also permissible for the arbitrator to file an affidavit setting out facts which he or she considers may be of assistance to the court (See Hyperchemicals International (Pty) Ltd and another v Maybaher Agrichem (Pty) Ltd and another 1992 (1) SA 89 (W) at 92 A – E). A court of review is not bound by the record of proceedings which are the subject of review (Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 T.S 111 at 114 – 115; Rose Innes Judicial Review of Administrative Tribunals in South Africa (1963) at 15–17). Were it otherwise, an applicant for review might encounter difficulties in establishing a reviewable irregularity. As a result of the attacks set out in the founding affidavit, to which there has been no answer, it is submitted by the applicant that the award is reviewable on the basis of a number of gross irregularities. The defects relied upon are, inter alia,that the second respondent failed to listen to the parties; and as a result of such failure, the second respondent failed to understand both parties' cases.

XII. In the present case, the applicant has made out a formidable attack on the arbitration award. Some of these attacks strike at the very basis of the ultimate findings by the arbitrator and the manner in which the conclusions were reached.

The arbitrator could have responded to these attacks, as could the third respondent. Both have elected not to do so.

I.

XIII. It is now settled by the Labour Appeal Court that arbitration awards fall to be reviewed under section 145 of the Act. (See Carephone (Pty) Ltd v Marcus NO & Others, (1998) 19 ILJ,1425 (LAC)). The nature of the attacks launched by the applicant suggest, in my view, that not only did the arbitrator fail to understand the evidence but that he positively misconstrued such evidence as was led before him. In such circumstances it seems to me that the applicant was simply not afforded a proper hearing.

XIV. In dealing with the failure by a person vested with a discretion to apply his mind to the matter, Colman J in Northwest Townships Ltd v The Administrator, Transvaal & Another, 1975 (4) SA 1(T) observed at 8G:

"The last mentioned possibility has been held in other English and South African cases to include capriciousness, a failure on the part of the person enjoined to make the decision to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach and an application of wrong principles."

(See also Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another, 1988 (3) SA 132(A); During NO v Boesak & Another, 1990 (3) SA 661(A) at 671I–672D; Jacobs & 'n Ander v Waks & Andere, 1992 (1) SA 521(A) at 550H–551C.)

XV. I have little doubt that having regard to the seriousness of the attacks made by the applicant, that a number of gross irregularities occurred in the proceedings.

I accordingly make the following order:

1. The arbitration award made by the second respondent acting in his capacity as a commissioner of the third respondent on 18 November 1998 under case number GA35071 is reviewed and set aside;

2. The dispute between the applicant and the third respondent is referred back to the first respondent for arbitration by a commissioner other than the second respondent;

3. I make no order as to costs.

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G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 4 JUNE 1999

DATE OF JUDGMENT: 4 JUNE 1999

For the applicant: Mr H Ebersohn of NICHOLETTS ATTORNEYS