

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

NO D317/98

2000/06/30

In the matter between:

T ZULU AND OTHERS

Applicants

and

CCMA AND OTHERS

Respondents

***EX TEMPORE* JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE VAN NIEKERK
ON 30 JUNE 2000**

ON BEHALF OF APPLICANTS

MR M M NDWANDWE

ON BEHALF OF RESPONDENTS

MS STIRLING

J U D G M E N TVAN NIEKERK A J

- 1] The history to this matter is a long and tardy one. An application was launched, it appears, in June of 1998 in terms of section 145 and 158 of the Labour Relations Act 1995 for the review of an arbitration award issued by a Commissioner of the CCMA.
- 2] The basis for the application for review is set out in the affidavit filed in support of the application and certain supplementary affidavits which were filed thereafter from time to time. The applicant eventually abandoned its reliance upon the provisions of section 158 and now relies upon the provisions of section 145(2).
- 3] Mr **Ndwandwe**, who appeared for the applicant, argued that the Commissioner in question committed misconduct in relation to her duties, that she committed a gross irregularity in the conduct of the arbitration and that she exceeded her powers. The basis for the application has been somewhat amplified in the heads of argument and in the argument that Mr **Ndwandwe** made to me during the course of argument today. The argument may be summarised as the following.
- 4] Firstly, it is alleged that the Commissioner committed a gross irregularity by disregarding important evidence, that evidence being the evidence of a Mr Zulu, a Miss Dolly Mthethwa and a Sarah Msibi, to the effect that they were poorly trained and that Mrs Neethling, the branch manager, did not perform her duties adequately. Secondly, it is argued that a statement contained in the arbitration award to the effect that those persons who were not directly involved in the loss became responsible therefor by default, that is by failing to report the cause of the losses, is a gross irregularity. Thirdly, it is alleged that certain crucial evidence was ignored by the Commissioner. This was amplified by a statement from the Bar that she at times

shook her head when evidence was heard and did not trouble to take notes of the evidence that was being led in front of her. Fourthly, Mr **Ndwandwe** takes issue with a statement in the arbitration award, to the effect that those who hired casual workers became responsible for the losses caused by them. Fifthly, it was argued that certain crucial evidence had been placed before the Commissioner, that evidence being contained at page 120 of the record, and that this was ignored by her. Finally, it was contended that the Commissioner exhibited signs of bias, and that was manifested by the fact that she did not consider all the evidence before her or all the important points that were argued in front of her.

5] During the course of argument I pointed out to Mr **Ndwandwe** that there is a material difference between review proceedings and appeal proceedings. In my view many of the points which he has raised as grounds for review are, in effect, grounds of appeal. That, of course, does not support a case brought in terms of section 145(2). The Commissioner may well have been wrong in some of her findings that she made, but the fact that she was wrong does not mean that the award is reviewable.

6] I briefly intend dealing with each ground referred to above. Firstly, as far as the allegation that the Commissioner ignored important evidence is concerned, I do not agree that that is so. It is clear from the arbitration award, that the supposedly ignored evidence was dealt with by the Commissioner at page 5 of the arbitration award, page 60 of the documents in front of me. She specifically says, that the complaint that the applicants were inadequately trained is not substantiated by the applicants' evidence under cross-examination. In other words, she took it into account but rejected the contention that they were poorly trained.

7] The second and fourth grounds of appeal, also do not have any merit. The first passage,

read on its own, may lead a superficial reader to believe that there is a finding of guilt by default, but if one reads the statement in the context of the entire arbitration award, it becomes clear that that is not the approach that the Commissioner in fact adopted when she found those who had been charged guilty of the misconduct charged. This applies equally to the second passage relied on.

8] As far as alleged bias is concerned, I do not believe that any proper case has been made out to demonstrate that the Commissioner was biased or perceived to be biased. It appears from her arbitration award that she grappled with the evidence in front of her, she took into consideration the arguments put to her and she came to a finding in a proper manner. There is no indication, either on the papers or in the award that she was at any stage biased. The fact that she at times may have shaken her head or not written something down is not an indication of bias.

9] For these reasons I come to the conclusion that there is not a proper case in front of me for the review of the Commissioner's award. I, accordingly, dismiss the application for review with costs.

G.O. VAN NIEKERK S.C.
Acting Judge