

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

REPORTABLE

P314/2000

DATE: 12 AUGUST 2000

In the matter between:

INDEPENDENT DEVELOPMENT TRUST

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First respondent

COMMISSIONER M MGANU

Second respondent

N MGANDELA

Third respondent

K NOMPUKU

Fifth respondent

JUDGMENT DELIVERED ON 12 AUGUST 2000

REVELAS, J:

[1] In this matter the applicant seeks to set aside and replace with an appropriate order, the awards made by the second respondent on 25 October 1999 under Case No. EC10930 as well as an award issued by the second respondent on 29 November 1999 under Case No. EC10845. Further, the applicant seeks to review and set aside a decision of the second respondent not to rescind the aforementioned awards.

[2] In essence this application for review relates to three decisions taken by the Commissioner, namely:

the dispute referred under Case No. EC10930;

2. The decision taken on 29 November 1999 to proceed with the arbitration of the dispute; and
3. The refusal by the Commissioner on 23 March 2000 to grant the application application for rescission of the awards referred to.

The application is unopposed.

[3] The third respondent, Ms Ncumisa Mgandela ("the third respondent" or "Mgandela") and the fourth respondent, Kanya Nompuku ("Nompuku" or "the fourth respondent"), were both dismissed by the applicant. Mgandela was employed by the applicant as an office assistant and she was implicated on 11 November 1998 in an incident as a result of which she was suspended pending the outcome of a disciplinary enquiry investigating an allegation of improper conduct on her part. She was found guilty and dismissal on 11 December 1998. On 17 January 1999 Mgandela referred a dispute to the CCMA. A conciliation meeting followed and the applicant was never notified thereof and the dispute appears to have been conciliated when the applicant was not present.

[4] Nompuku was employed by the applicant on 1 January 1996 as a community facilitator. On 11 November 1998 he was implicated in an incident as a result of which he was suspended pending the outcome of a disciplinary enquiry also investigating an allegation of improper conduct. He was found guilty and dismissed on 11 December 1998. On 17 January 1999, following an unsuccessful appeal, Nompuku referred a dispute concerning his dismissal, which he states was unfair, to the CCMA.

[5] A representative of the applicant on 6 April 1999 attended a conciliation meeting convened by the

CCMA in Durban to resolve the dispute. It was not resolved and a certificate to that effect was issued by the Commissioner appointed to preside at the conciliation meeting. Both Mgandela and Nompuku subsequently referred their disputes concerning their respective dismissals to arbitration. The arbitration hearings in both cases were subsequently set down for 22 July 1999 on which day the applicant raised the point *in limine* that the referral of the disputes to the CCMA, by both Mgandela and Nompuku, had not been made within the required period and that the CCMA therefore did not have the necessary jurisdiction to arbitrate the disputes. The Commissioner in question, Mr Botha du Plessis, upheld the applicant's point *in limine*. In other words the matter was disposed of. Mgandela and Nompuku thereafter filed an application for condonation in respect of the late referral of the same dispute to the CCMA. Despite the applicant's opposition to this application, it appears that condonation was in fact granted. At no stage did the applicant receive written notification that either Mgandela or Nompuku had succeeded in their applications for condonation.

[6] The applicant first became aware that condonation for the late filing of the referrals had been granted when Mr Mark Haylett, the applicant's Human Resources Consultant, received a telephone call from Ms Aletta van Wyk who was employed by the CCMA who advised him telephonically that condonation had been granted for the late referral of the disputes. During this conversation Ms van Wyk enquired whether the applicant would be agreeable to the disputes being dealt with after, by way of a process which she termed "con-arb". By "con-arb" Mr Haylett says he understood Ms van Wyk to mean a collapsing of the separate conciliation and arbitration proceedings provided for by section 105 and 106 of the Labour Relations Act 66 of 1995 ("the LRA") respectively.

[7] Mr Haylett indicated that he would agree to such a process because he thought that it would facilitate a more expeditious resolution of the disputes between the parties. He also indicated to Ms van Wyk that he was willing to accept her proposal only on condition that the applicant would receive timeout notice of the proceedings. He insisted on this condition because the applicant was in the process of relocating its head office to Johannesburg. He was aware of the administrative disruption that was being caused and was concerned that in the circumstances, the applicant would not be given adequate time to prepare the case. Ms van Wyk gave Mr Haylett the assurance that the matter would not be heard before late November 1999.

[8] However, the matter proceeded on 25 October 1999 and on the morning, when Mr Haylett was in his Cape Town office, he learnt that the hearing would be conducted on that day in Umtata. Mr Haylett made attempts to have the matter postponed telephonically but the arbitration proceeded in his absence. In my view, the arbitrator did not exercise his discretion judicially by proceeding with the matter in these circumstances. His actions were so unreasonable as to warrant interference with the decision not to rescind the two awards.

[9] The effect of the award was to reinstate Nompuku into the employ of the applicant, with back pay retrospective to the date of dismissal. In respect of Mgandela, the effect of the award was to compensate her in an amount equivalent to the remuneration she would have received between the date of her dismissal and the date of the arbitration hearing. She was awarded an amount of R38 295,96.

[10] Since this application is unopposed, I only have the uncontested evidence of the applicant which must be accepted, except to the extent that it is found to be inherently improbable. (See: *PLASCON EVANS PAINT LTD v VAN RIEBEECK PAINTS 1984 (3) SA 623 (A)*).

[11] The following decisions and aspects of the arbitration proceedings are under attack:

1. The first respondent's decision to merge the conciliation and arbitration proceedings;
2. The respondent's decision to continue the arbitration hearing in the applicant's absence;
 3. The manner in which the arbitration hearings were conducted;
 4. The awards themselves;
5. The subsequent decisions by the second respondent not to rescind the awards; and
6. The first respondent's decision to vary his awards rather than to rescind it altogether.

[12] Insofar as the process of "con-arb" is concerned, such a process cannot be precluded on any grounds, provided the requirements of the Act are complied with.

[13] Much was made by the applicant in its heads of the argument with regard to the various procedures that were followed. I do not wish to spend much time thereon. In my view the matter is quite simple. When Commissioner du Plessis on 5 August 1999 upheld the point *in limine* raised by the applicant that the CCMA lacked jurisdiction because the late referral of both cases had not been condoned, that was the end of the matter. Even though both cases were then dismissed, neither the third nor the fourth respondents submitted fresh referrals to the first respondent. Accordingly, the second respondent lacked jurisdiction to conciliate or arbitrate the disputes on 25 October 1999 and the awards that followed from that process were also a nullity.

[14] Whether or not Mr Haylett's actions in agreeing to a "con-arb" process induced the CCMA to take the steps it did, is irrelevant. Litigants cannot confer jurisdiction on a statutory body when it has none.

[15] Accordingly, the awards made by the second respondent in favour of the third and fourth respondent are SET ASIDE and the ruling refusing to rescind the awards is also SET ASIDE.
There is no order as to costs.

E REVELAS

JUDGE OF THE LABOUR COURT