

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J2027/00

In the matter between:

ANGLO AMERICAN CORPORATION OF SA LIMITED Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION** First Respondent

TUCKER RAYMOND NO Second Respondent

TSHISHONGA MPFARISENI ERIC Third Respondent

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JUDGMENT

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JAMMY AJ

1. The Applicant in this matter seeks an order reviewing and setting aside the award of the Second Respondent, a Commissioner of the First Respondent, on the grounds defined in s145(2)(a)(i) and (ii) of the Labour Relations Act 1996 ("the LRA"), namely that the Second Respondent exceeded his powers and committed gross irregularities in his conduct of the arbitration proceedings.
2. The issue before him was defined by the Second Respondent in his award as follows:
 - "1. **The issue for determination is whether the termination of the employment of the Applicant by the Respondent was fair. More specifically this concerned the issues of whether the termination was -**
 - 1.1 in consequence of the incapacity of the Employee in consequence of his HIV status; or**
 - 1.2 in consequence of his HIV status.**
 2. **The issue also involved the provisions of s10 and 11 of Schedule 8 of the Labour Relations Act which deal with incapacity: ill health and**

injury and provides guidelines in cases of dismissal arising from ill health and injury respectively."

3. In the course of what he termed the "Background to the Issues", the Second Respondent presented an exhaustive and thorough analysis of the testimony and documentation adduced and tabled in the course of the arbitration hearing. For reasons which will become apparent, I do not consider it necessary for me to traverse that analysis in the context of this judgment. What is of factual importance however, is that the issue referred by the Third Respondent for conciliation and subsequent arbitration was what he considered to be the unjustified determination by the Applicant that he was medically unfit to work in consequence of the undisputed fact in that regard, that he was diagnosed as HIV positive.

4. The following extract from the record of the arbitration proceedings, an exchange between the Second Respondent and the Applicant's representative, a Mr Hyde, has relevance.

"COMMISSIONER

No, there is no allegation of misconduct. It is only the allegation of unfair dismissal which relates to being medically unfit to work.

MR HYDE:

And, what is also important for me is that there is no allegation of discrimination in respect of his HIV-status because if there were, then it could be, as I understand it, this would be a matter for the Labour Court to decide in terms of discrimination."

5. Having, as I have stated, reviewed the testimony and the documentation before him in commendable detail, the Second Respondent, at the conclusion of that review, says this:

"In any event no evidence which was led supports the view that this less than optimum performance was attributable to the HIV status. The only aspect which may be attributable to his HIV was his inability to climb koppies (especially at night) and the Applicant suggested a means of dealing with this.

The Respondent has failed to satisfy me that it conducted a proper enquiry as to whether the Applicant was capable of performing his work. Indeed if one looks at the nature of the complaints against him, none deals pertinently with this question. More significantly however

is the failure to conduct any enquiry whatsoever after Dr Brink's report of 9 June was received. His recommendations were simply translated into a dismissal without any further ado. That is not what s10 of Chapter 7 is all about. Neither HIV or Aids means that the person is unable to work."

6. Having so determined, the Second Respondent concludes that -

"In the circumstances I am satisfied that the termination of the employment of the Applicant was substantively unfair and effected without a fair procedure. I am also satisfied that in the light of the manner it was handled from the time of Dr Brink's report, and the failure to investigate the degree of his incapacity, *that the reason for the dismissal was not the incapacity but the fact of his HIV status.*"
(my emphasis).

7. The only rational interpretation of that conclusion is that, notwithstanding the express and undisputed recordal at the outset of the arbitration proceeding that no allegation of discrimination had at any time been made or suggested as the basis of the termination of the Third Respondent's employment, the cardinal finding of the Second Respondent was that that termination was a consequence of a *mala fide* act amounting to discrimination against him as an Aids victim - in his own words, "..... the fact of his HIV status."

8. It is trite Labour Law that the adjudication of issues of alleged discrimination is the exclusive preserve of the Labour Court.

Labour Relations Act 1995: Section 191(5)(b)(i) read with Section 187(1)(f).

9. In that context, not only was it not competent for the Second Respondent to have made the finding of discrimination which he unequivocally records but, as has been indicated, he purported to do so when that issue had at no time been raised as, and had expressly been stated not to be, a factor in the dispute.

10. The Labour Appeal Court, in a recent line of cases, has pronounced authoritatively on the general test for reviews of the decisions of Commissioners of the First Respondent. See for example -

Carephone (Pty) Ltd v Marcus NO & others 1998(19) ILJ 1425 (LAC)

Toyota SA Motors (Pty) Ltd v Radebe & others 2000(21) ILJ 440/ (LAC)

and see also -

Vita Foam SA (Pty) Ltd v CCMA & others 2000(21) ILJ 244 (LC) at 247/248.

11. It matters not, in my view, that the ultimate conclusion thus reached by the Second Respondent was a consequence of unfolding evidential material in the course of the arbitration hearing and that, having been informed at the outset that discrimination was not an issue, he could not at that stage reasonably have anticipated that it would in fact prove to be so. Once, in his perception, the basis for that conclusion had been established, he did not have the authority or competence to make the determination which he did. What, even at that late stage of the proceedings, he was in my opinion obliged to do, was to record that the true issue which, in his perception, had now emerged was one of discrimination, that this was an issue falling outside his and the First Respondent's jurisdiction and that the matter was one, by statutory decree, to be finally adjudicated upon by the Labour Court.
12. My finding in that context renders it unnecessary for me to deal with and pronounce upon the other issues raised by the Applicant in this matter and relating to the justification or otherwise of the Second Respondent's conclusions of substantive and procedural unfairness. I reiterate that having purported finally to determine the matter on the basis upon which he did so, the Second Respondent exceeded his statutory powers and that his conduct in so doing constituted a gross irregularity in the face of which his award cannot be sustained.
13. I accordingly make the following order:

The Arbitration Award of the Second Respondent dated 25 April 2000 under Case No GA73625, conducted under the auspices of the First Respondent, is reviewed and set aside.

The dispute to which it related is referred back to the First Respondent for determination by a Commissioner other than the Second Respondent.

This application having been unopposed, there is no order as to costs.

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B M JAMMY
Acting Judge of the Labour Court

23 August 2000

Date of hearing: 11 August 2000

**Representation: For the Applicant: Adv R J Sutherland SC, instructed
by Perrott Van Niekerk & Woodhouse Inc.**