

**NOT REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN**

**CASE NO:**

**617/00**

**IN THE MATTER BETWEEN:**

**MERIT RECRUITMENT**

**APPLICANT**

**AND**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**FIRST  
RESPONDENT**

**MS. C. PILLAY C/O**

**SECOND  
RESPONDENT**

**BONGUMUZI REGINALD DLAMI**

**THIRD  
RESPONDENT**

**JUDGMENT**

**Ngcamu AJ:**

[1] This is an application for the review of the Commissioner's award made by the second respondent in favour of the third respondent. The review is being opposed by the third respondent. The third respondent has in a separate application heard together with the review filed an application for the award to be made an order of this court.

[2] The review is brought on the grounds that the Commissioner placed onus on the applicant before the third respondent had discharged the onus of proving the

dismissal. It is being submitted that this constitutes a gross irregularity in the conduct of the proceedings. It was further submitted that the Commissioner based his award on facts other than those put before her and for that reason exceeded her powers.

[3] Section 145 (1) of the Labour Relations Act entitles a party to approach this court for the review and setting aside of the arbitration award if such party alleges a defect in any arbitration proceedings. In terms of section 145 (2) (a) the defect may mean that the Commissioner committed misconduct in relation to the duties of the Commissioner as an arbitrator, committed a gross irregularity in the conduct of the arbitration proceedings, or exceeded the Commissioner's powers.

[4] The applicant is a close corporation carrying one business as a supplier of contract labour. The applicant employed the third respondent until his employment was terminated on 18<sup>th</sup> October 1999. The third respondent disputed the termination of employment and referred the dispute to the first respondent ("CCMA") for conciliation. The dispute was unresolved at conciliation and the matter went for arbitration before the second respondent. At the conclusion of the arbitration proceedings the second respondent made the award and declared the dismissal of the third respondent unfair. The compensation of the R 23 503-20 was awarded.

[5] The applicant employed the third respondent and placed him with the Durban Metro Water. A written agreement was signed. The agreement is entitled "Fixed Term Contract of Employment". Clauses 2, 3 and 4 of the said agreement are relevant in this matter and they read as follows:

“2. Merit Recruitment is not in a position to offer permanent employment to the assignee or predict the duration of the project and hence the duration of this contract of employment. At this stage, is envisaged that the project will last until the project is completed.

3. The assignee shall be employed as a diesel mechanic at the company’s premises to assist in the project.

4. The engagement shall commence on the date of signature hereof and shall terminate either, on completion of task for which the assignee was employed, or on completion of the project for which the assignee was employed, whichever occurs first.”

[6] Clause 12 of the agreement provides that the termination shall be given by either party one week prior to termination and shall be in writing. Clause 13 entitles the applicant to terminate the employment if the third respondent is found guilty of any conduct justifying dismissal.

[7] Section 192 (1) provide that the dismissal must be established by the employee. Section 192 (2) obliges the employer to prove the fairness of the dismissal. It stands to reason that whenever the question of the dismissal is in dispute, the employee bears the onus to prove it. It was submitted on behalf of the applicant that the Commissioner erred in placing the onus on the applicant before the third respondent had discharged the onus. This submission is based on the interpretation placed on the answers given by the applicant during the commencement of the arbitration hearing. The Commissioner put certain questions to the parties to establish if the dismissal was in dispute.

[8] The pertinent questions and answers put by the Commissioner were the

following:

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Arbitrator: Okay. Initially both the parties would make their opening statements, okay, outlining the issue involved, so that would be - well, briefly outlining the issue that's involved. And can I take it that the existence of the dismissal is not in dispute?

Mr. Wood (pg 3): Well I would say it was a dismissal, I think...

Arbitrator: It was a dismissal, are both the parties ... (incomplete)?

Mr. Wood: No, I think it was a termination of contract.

Arbitrator: But did it amount to a dismissal? Is Mr. Dlamini in your employ at the moment?

Mr. Wood: No. He's not.

Arbitrator: No, then that would be regarded as an alleged dismissal.

Mr. Wood: I see, okay.

Arbitrator: Which means now the onus would be on you to show that the dismissal was fair.

Mr. Wood: Okay.

[9] The Commissioner came to the conclusion that the issue to be decided was whether the employee's dismissal was fair. He came to this conclusion on the basis that the dismissal was not in dispute. The main ground for this review is that the arbitrator placed the onus on the applicant. The arbitrator's conclusion indicates that once the employee is no longer in the employment of the employer there is a dismissal. This is in my view a misdirection as the Commissioner failed to apply his mind to the answers given.

[10] It was submitted on behalf of the applicant that the arbitrator committed

gross irregularity in terms of section 145 (2) (a) (ii). It was further contended that the finding by the Commissioner that Mr. Wood had said the third respondent had been dismissed was a misinterpretation of the evidence which also constitutes a gross irregularity and accordingly a defect in the proceedings. The answers given by Mr. Wood are inadequate for reaching the conclusion that the dismissal was not in issue.

[11] It is not necessary for me to go into details regarding the question of whether the third respondent was employed on fixed contract as I have concluded that the review must succeed on the question of onus which was placed on the applicant. I have very strong reservations about the fairness of the the dismissal but I make no finding on it.

[12] It is the duty of the arbitrator to guide the parties at the arbitration hearing. This duty is even more where the parties have no legal background and unrepresented. No facts should be taken for granted. It was contended on behalf of the third respondent that the decision of the arbitrator was correct as Mr. Wood confirmed that he had dismissed the employee.

[13] Mr. Wood's answer is incomplete where he said "Well I would say it was a dismissal, I think ...". Mr. wood further said it was a termination of the contract. For the Commissioner then to conclude that the dismissal was admitted by the mere interpretation of these answers is to me insufficient. I therefore come to the conclusion that this was a defect in the proceedings.

[14] The proceedings proceeded on the basis that the employer had the onus to prove fairness of the dismissal. This prejudiced the employer right from the

beginning of the hearing. The Commissioner did not evaluate the answers given by the employer and assumed that because the employee was no longer in employment, that is a dismissal. The answers did not justify such conclusion.

[15] In *Standard Bank of South Africa v CCMA and Others* unreported case No. J642/97 at paragraph 24 Tip AJ said: “ Where a Commissioner sitting as an arbitrator has misconstrued oral or documentary evidence, or has ignored or misapplied relevant legal principle, to an extent that is in appropriate or unreasonable then the Commissioner has failed in the task assigned under the Act. It cannot be so that the legislator contemplated that an aggrieved party in such a circumstances would find itself without relief. That relief lies in a review application to this Court.” Similarly in this case when the Commissioner has misinterpreted the answers given his award can be reviewed if such misinterpretation resulted in that parties prejudice. This will in my view be a defect in the proceedings.

[16] In *the University of the North v Mthombeni No. and Another* unreported case No. J630/97 the following was said at paragraph 28: “It is open to this court in terms of section 145 to review the awards of the Commission even where a bona fide mistake of the fact or law is committed only where it can be shown that as a result thereof an injustice has been perpetrated. Where no injustice has been occasioned by such a mistake the award is immune to legal challenge in terms of section 145. An injustice is perpetrated where it is shown that a party was deprived of a fair hearing or that a Commissioner did not apply his mind to the matter before him either by ignoring direct evidence before him, or relying on evidence not placed before him”.

[17] The placing of onus on the applicant resulted in an injustice and it is on this ground that the award is reviewable, I do not find it necessary to deal with other grounds raised by the applicant in view of my findings on the first ground.

In the light of this, I make the following order:

- (a) The award is reviewed and set aside.
- (b) The matter is remitted back to the CCMA to be heard by another Commissioner.
- (c) The third respondent's application in terms of section 158 (1) (c) under case No D591/00 is dismissed.
- (d) There is no order as to costs.

**Cases referred to:**

1. Goldfield Investments LTD and Another v City Council of Johannesburg and Another 1938 TPD 551 at 560.
2. FAWU and Another v Lauschagne and Others (1999) 3 BLLR 220 (LC).
3. HART v Hullett Aluminium (Pty) LTD 231/97 (LC).
4. Venture Motor Holdings LTD t/a Williams Hunt Delta v Biyana and Others (1998) ILJ 1266 (LC).
5. Balfour/Siyathemba Transitional Local Authority v CCMA and Another (1998) 9 BLLR (LC).
6. Shoprite Checkers (Pty) LTD v A. Ramdan and Others: Case No D409/99 dated 5<sup>th</sup> April 2000.
7. Chetty and Motor Transport (Pty) LTD v National Transport Commission and Another 1972 (1) SA 156 (N).
8. Mthembu and Mahomed Attorneys V CCMA and Others (1998) 2 BLLR 150.
9. Standard Bank of S.A. v CCMA and Others (unreported) Case No. J642/97.

10. University of North v Nthombeni NO. and Another (unreported) Case No. J630/97.

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NGCAMU AJ

FOR THE APPLICANT: P. JAFTA

FOR THE RESPONDENT: K. HASLOP