

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

REPORTABLE

D719/02

CASE _____ NO _____

21-22/10/02

HEARD:

24/10/02

DELIVERED:

15/11/02

REVISED:

In the matter between:

T H KASIPERSAD

(Applicant)

and

CCMA

(1st Respondent)

COMMISSIONER LINDA BOTHA N.O.

(2nd Respondent)

LITHOTECH SALES (KZN)

(3rd Respondent)

**JUDGMENT DELIVERED BY
THE HONOURABLE MS JUSTICE PILLAY**

ON BEHALF OF APPLICANT

MS S REDDY

ON BEHALF OF RESPONDENTS

UNOPPOSED

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT

PILLAY J

1. The applicant seeks an order reviewing and setting aside the conciliation proceedings, including the certificate of outcome and the settlement agreement, and the remission of the dispute to the CCMA for conciliation afresh.
2. Section 158(1)(g) of the Labour Relations Act No 66 of 1995 ("LRA") empowers the Labour Court, subject to section 145, to review the purported performance of any function provided for in the LRA on any grounds that are permissible in law. Rule 7(a) of the Rules of the Labour Court prescribes the rules of this Court for reviewing such performance.
3. Unlike an arbitration where a Commissioner is obliged to keep a record of the proceedings, a similar obligation is not prescribed for conciliation. By its nature, conciliation is confidential. It often involves caucuses with the parties, separately and privately. Commissioners can therefore not be expected to keep a record of conciliation proceedings.

4. This approach to conciliation is underpinned by rules 7(3) and 7(4) of the rules of the CCMA, which provide:

"7(3) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis so that no party may make reference to statements made at conciliation proceedings during any subsequent proceedings unless the parties have so agreed in writing.

7(4) Neither the Commissioner dealing with the conciliation nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process."

5. The prohibition against reference to statements made at the conciliation during any subsequent proceedings and the prohibition against the Commissioner or any other person testifying about the conciliation process conflicts with the right of the applicant to administrative justice and the power of this Court to review the performance of any function by the CCMA.
6. The CCMA rules, as subordinate legislation, must therefore yield to the LRA and to the Constitution. (*Baxter Administrative Law* 1984, page 388.)

7. That shores up difficulties when reviewing conciliation proceedings. In the absence of a record or a response by the Commissioner to the review application, or if there are disputes of fact, the Court has a dilemma in determining what transpired during the conciliation.
8. In this matter, the second respondent Commissioner delivered a response to the review application without opposing the relief sought.
9. As Ms Reddy for the applicant correctly submitted, the application must be determined on the basis of the Commissioner's affidavit, the facts that are common cause, admitted or not in dispute.
10. Furthermore, this is a review of the conduct of the Commissioner during the conciliation. What she said may be as important as how she said it.
11. Unlike the situation in *J D G Trading (Pty) Limited, trading as Russells v Whitcher NO & Others* (2001) 3 BLLR 300 (LAC), this review can therefore proceed without a transcript of the

discussions at conciliation.

12. Essentially, the applicant's first complaint is that the Commissioner was not impartial and that she pressured and bullied him into agreeing to withdraw his dispute.

13. The Commissioner admits having told the applicant that he had a 50/50 chance of success; that it would take between two to three days before the matter would be heard in the Labour Court and that he might have to pay for legal representation and, if he lost, the third respondent's costs. She explains that she wanted the applicant to understand that the matter would not take 30 days, as in the CCMA. She also informed him that it was his decision whether he proceeded with the matter.

14. She denied advising him to withdraw the case. However, she acknowledges that he withdrew the matter based on the advice that she had given him.

15. Except for her assessment of the prospects of success being a 50/50 chance, the other three outcomes sketched by the Commissioner present a negative scenario for the applicant. She did not advise the applicant of the possible outcome if he

succeeded.

16. It is an undisputed fact that the applicant acted on what he believed was her advice.

17. The function of a Commissioner is to steer the parties towards a mutually agreed outcome. The guidelines on conciliation proceedings, Notice 896 in Government Gazette 18936 of June 1998 were developed to achieve this purpose. However, no hard and fast rules can be prescribed for conciliation.

18. The process of conciliation is such that Commissioners need to have flexibility to apply appropriate techniques to guide the parties to consensus. Different techniques have been developed for different disputes and personalities involved in the conciliation. To attempt to compile a complete list of do's and don'ts during conciliation is neither feasible nor desirable. Instead, jurisprudence should be developed incrementally, case by case, to guide conciliators as to what is acceptable and unacceptable conduct during conciliation.

19. Guideline 9 of the CCMA Guidelines behoves Commissioners to be

impartial. Commissioners must conduct themselves in a way that they avoid any inference of bias being drawn.

20. By sketching only the four possible outcomes, the Commissioner manifested bias against the applicant. As the Commissioner elected to use the technique of scenario sketching, she ought to have presented fully and dispassionately all the consequences of proceeding with and withdrawing the dispute. If she did not intend to advise the applicant to withdraw the application, then her conduct had precisely that effect. It was not unreasonable for the applicant, a lay person, to infer from what she said that he was being advised to withdraw the dispute.

21. The Commissioner also did not correct his perception when he advised her that he was withdrawing the dispute on her advice.

22. That Commissioners should not give advice during conciliation was not pertinently raised as a ground of review. It is a matter that I need to deal with for reasons that will become obvious in due course.

23. Section 115(2)(a) provides:

"The Commission may:

- a. If asked, advise a party to a dispute about the procedure to follow in terms of this Act."*

24. The advisory function of the CCMA is limited to disputes about procedures. Any recommendation a Commissioner makes to the parties during conciliation may be in the form of an advisory award. (Section 135(3)(c).)

25. The rationale underpinning these provisions, is that Commissioners should not give advice or make recommendations that result in them being or being seen to be partial. A Commissioner who gives advice on any matter other than about procedure acts *ultra vires*. But, if the parties jointly ask the Commissioner for advice on any matter, that would be similar to acting in terms of section 135(3)(c).

26. Any advice, including advice about procedure that compromises the impartiality of a Commissioner is a breach of the CCMA Guidelines on conciliation proceedings.

"Impartiality requires a capacity on the part of the mediator to

separate from personal opinions to direct the parties to find a solution of their own to a problem."

(Negotiating Conflict, Mark Anstey, page 251.)

27. Even if a Commissioner is invited by a party to give advice, such an invitation should be resisted. A Commissioner has to be even-handed in dealing with the parties. If she gives advice to one party, she would have to do likewise for the other party. That would create conflicts of interest for the Commissioner. A Commissioner who puts herself in such a situation would have great difficulty in acting with honesty, integrity and impartiality. Ethically, it is therefore untenable.

28. Giving advice is also counter-productive to the objectives of conciliation. A party who is advised that she has a good case is unlikely to settle. One who is advised that he has a bad case is likely to capitulate, as happened in this case.

29. The Commissioner ought not to have made statements or conducted herself in such a manner that resulted in the applicant drawing the reasonable inference that she was advising him to withdraw his dispute. When he informed her

that he would withdraw the dispute based on her advice, ethically she was required to correct his perception, which she failed to do.

30. In the quest to clock up high settlement rate scores, Commissioners should remember that successful mediators are those who always remain acceptable to the parties. Research has shown that employers and trade union officials agree that mediators should have such qualities as honesty, integrity, trust, fairness, impartiality, general reliability, patience and persistence, be physically fit, have the ability to grasp ideas and be good listeners, be tactful, persuasive, self-controlled, dignified, respectful, intelligent, to have a sense of humour, firmness of action and originality of ideas, be sympathetic, modest and to "be one of us". (Mark Anstey at 257 - 258.)

31. The second complaint was that the Commissioner did not allow the applicant an adequate opportunity to consult his legal representative. In contrast, she allowed the third respondent, an opportunity to check an agreement signed during the retrenchment for a definition about broken service in order to

assess the severance pay.

32. The applicant does not state how much time he had asked for to consult his legal representative. According to the Commissioner, he had asked for a couple of days. It was not unreasonable for her to allow him, as she did, an opportunity to telephone his representative. If he had difficulty doing so, he ought to have communicated this to the Commissioner. Contrary to Ms. Reddy's submissions, the Commissioner had no obligation to enquire whether he had access to a telephone. There is also no evidence that the Commissioner was aware that he did not have easy access to a telephone. It is not clear from the applicant's affidavit whether he attempted to but failed to reach his attorney.

33. It appears from of his founding affidavit that the issue of severance pay was discussed only after he had requested time to telephone his attorney. The Commissioner could not have anticipated then that there might be a need later to postpone the matter to assess the severance pay.

34. On the Commissioner's version, the third respondent merely

requested an opportunity to check its records and to revert to the applicant. It was not a postponement that was sought. The Commissioner's refusal to postpone the matter for a few days for the purposes of getting legal advice is not improper or irregular as she offered him an opportunity to telephone his attorney. If he omitted to inform her that such opportunity was inadequate she cannot be faulted.

35. The Commissioner also did not manifest bias in favour of the third respondent by allowing it an opportunity to revert to the applicant whilst denying the applicant a few days to consult with his attorney. The requests were not the same.

36. However, the Commissioner anticipated that there would be problems with the severance pay and therefore:

"... stated specifically that the applicant was withdrawing the dispute of the alleged unfair retrenchment in order to enable him to challenge the severance pay issue should he so wish."

37. That the calculation of severance pay was incorrect was noted as a special feature in the referral form. The Commissioner failed to realise that once the dispute was withdrawn there was no basis on which the applicant could pursue his claim for

severance pay.

38. Anticipating, as she did, that there would be problems in the severance pay, she ought to have postponed the conciliation for a definite time to enable the applicant and the third respondent to engage each other about the severance pay and the issue of the broken service. Subject to the outcome of that engagement, the appropriate certificate should have been issued thereafter without necessarily reconvening the conciliation. In that way there would also have been no extra costs for the CCMA.

(36) In these circumstances, the order I make is as follows:

- i. The conciliation proceedings including the certificate of outcome and the purported settlement agreement under case No KN4623/02 is reviewed and set aside.
 - ii. The dispute about the applicant's dismissal from the employment of the third respondent is remitted to the first respondent to be conciliated afresh by a Commissioner other than the second respondent.
 - iii. There is no order as to costs.
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JUDGE D PILLAY