'Reportable'

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. J5012/00

In the matter between:

SAVVAS NATHANIEL Applicant

and

NORTHERN CLEANERS KYA SANDS (PTY) LTD 1ST
Respondents

COMMISSIONER M MILES N.O 2ND
Respondents

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION 3rd
Respondents

JUDGEMENT

GAMBLE AJ

1. The applicant previously ran a dry cleaning business which went insolvent. Pursuant to an arrangement with the liquidator of that business, the 1st respondent ("NCK") purchased certain of the more lucrative outlets to add to its enterprise. NCK decided that it was necessary for the business efficacy of the newly formed group that the applicant should be employed by it. In this regard on 13 April 1999,

the parties concluded a written agreement which made provision, inter alia, for:

1.1 The acquisition by NCK of certain of the dry cleaning businesses from the liquidators of the insolvent close corporation;

1.2 the employment of the applicant by NCK on certain specified terms;

1.3 the payment of certain commissions to applicant by NCK additional to the applicant's salary;

1.4 an enforceable restraint of trade over the applicant upon his termination of employment with NCK.

2. It is common cause that the applicant commenced working for NCK at the beginning of April 1999 and that his employment terminated during September 1999. The precise nature of the termination is in issue between the parties.

3. The applicant avers that he was unlawfully dismissed by NCK on 17 September 1999. Accordingly, he referred a dispute to the third respondent ("the CCMA") on 6 October 1999.

4. The matter eventually went to arbitration before the second respondent ("the Commissioner") where NCK alleged that the applicant had not been dismissed but that he had left its service

voluntarily and by mutual consent.

5. After a protracted arbitration, the commissioner upheld the company's contentions and found that the applicant had not been dismissed.

6. The applicant now seeks to review and set aside the commissioner's award which was handed down on 18 October 2000, in terms of section 145 of the Labour Relations Act, 66 of 1995 ("The LRA").

INCOMPLETE RECORD

7. It is common cause between the parties that the record of the proceedings before the commissioner is incomplete in that various passages thereof are simply incapable of transcription. The parties have gone to great lengths to reconstruct the record, including perusal of their legal representatives notes, the commissioner's notes and the employment of a specialist transcriber to re-asses the tapes. Notwithstanding all of these endeavours, the record is incomplete in certain material aspects of the evidence.

8. Mr. Smit, who appeared on behalf of the applicant, argued that, since the record was hopelessly inadequate for a proper determination of the review, the matter should be remitted to the CCMA for a fresh

hearing. Failure to do so, he said, would result in an inequity towards the applicant, relying on the judgement of the Labour Appeal Court in *Department of Justice v Hartzenberg* (2001) 22 IJL 1806 (LAC).

9. Mr. Barrie, for NCK, argued that the matter was not as simple as that. He said that the grounds for variation and/or rescission of an arbitration award are limited to either section 144 of the LRA, which provides for a commissioner to vary or rescind the award on certain limited grounds which do not apply in the present case, and section 145 of the LRA, which provides for this court to review and set aside in accordance with the principles which have been laid down by the Labour Appeal Court in cases such as *Carephone (Pty) Ltd v Marcus N.O. and others* (1998) 19 IJL 1425 (LAC), *Shoprite Checkers (Pty) Ltd v Ramdaw N.O and others* (2001) 22 IJL 1603 (LAC), *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and others* (2002) 23 IJL 863 (LAC).

10. Mr Barrie argued further that the *Hartzenberg case*, supra, did not apply to review proceedings and that the judgements of Francis J in this court in *Shoprite Checkers LTD v CCMA and others* (2000) 23 IJL 943 (LC) and *Uee – Dantex Explosives (Pty) Ltd v Maseko and others* (2001) 22 IJL 1905 (LC) were clearly wrong.

11. It was contended that the power of this court to review was limited to the grounds developed in the LAC cases referred to above which require an award to be objectively rational and justifiable in relation to the reasons given by the commissioner. A deficient or missing record, however, did not constitute grounds for setting aside a CCMA commissioner's arbitration award.

12. I agree with Mr. Barrie that the decision in the *Hartzenberg* case, supra, does not apply to reviews under section 145 of the LRA – that case was an appeal under the old LRA.

13. I have considered the decisions of Mr. Justice Francis in the *Shoprite Checkers* and *Uee – Dantex* cases referred to in para 10 above and respectfully find that they are distinguishable from the present case on the facts. In both of those cases, there was no record made available by the commissioner and the court found that the commissioner's failure to produce the record constituted a reviewable irregularity under the LRA. As I have pointed out above, in the present case both the parties and the Commissioner have gone to great lengths to reconstruct as complete a record as possible.

14. The problem of an incomplete record recently came before the Labour

Appeal Court in *Lifecare Special Health Services (Pty)Ltd t/a Ekuhlengni Care Centre v CCMA and others* [2003] 5 BLLR 416 (LAC). In that case, the record of arbitration proceedings before the CCMA was incomplete because certain of the tapes on which the proceedings had been recorded were physically lost. In the result, Comrie AJA gave directions as to how the record should be reconstructed (including the Commissioner and the parties' representatives sitting together and attempting to utilize their notes to reconstruct the record). The matter was then postponed to enable this to be done.

15. The approach suggested by Comrie AJA in the *Lifecare case,* supra, has already been undertaken in the instant case and, it is common cause, these is nothing further which can be done to reconstruct the record.

16. I agree with Mr. Barrie that it is not legally permissible in the circumstances of the present case to remit the matter back to the CCMA for a re-hearing due to the defective record. The applicant cannot contend that the award of the Commissioner is not rationally justifiable merely because the evidence which was adduced before him (and which presumably influenced him in his decision) cannot be

placed before this court. In the present circumstances, then, the court must look at the award of the Commissioner together with all the documentary and other evidence before him (including a clandestine tape recording of certain important discussions between the employee and employer's representatives) as well as the available transcript of proceedings, and then decide whether the award passes muster in accordance with the jurisprudence set out in para 9 above.

17. In a case such as the present, it would, in my view, be open to the parties to depose to the material (missing) facts in their affidavits filed in the review and if there is a dispute in that regard, have that dispute determined by oral evidence. The parties did not, however, adopt such an approach.

18. While accepting that this court was established as a court of law and equity in terms of section 151(1) of the LRA, it does not follow that in all cases where the equities may be more favourable to one party than another, the court must simply set aside proceedings an order re-hearings *de novo*. The applicant in a review has an onus to prove his/her case and must do so on all the evidential material properly placed before the court. If, after consideration of all of that material (defective as it may be) the court is unable to find a reviewable irregularity then

the applicant will obviously fail. A defective record in such circumstances is but one of the vagaries which accompany the litigation process.

19. Mr. Barrie printed out that a case such as the present differs materially from an appeal, for example, from the Magistrates Court to the High Court, where a party has a statutory right of appeal. He argued that a party's rights in the present context were limited to just and fair administrative action. If it happened that the matter could not be properly placed before the reviewing court because of a incomplete transcription (and there was no failure by the Commissioner in the discharge of his statutory function) then so be it, he said.

20. Even where there is such a statutory right of appeal, the High Court has held, in the case of an incomplete record, that the court would have to be convinced, on the existing record, that the magistrate was wrong. *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W). I consider that a similar approach would be appropriate in the present case.

21. In the circumstances, I do not consider that the application for remittal is well-founded and I decline the request to do so. I shall then

proceed to determine the case on all the available evidential material.

THE MATERIAL FACTS

22. It was common cause that a meeting took place on 31 August 1999 between the applicant and Messers Pansegrouw and Bate who represented NCK. The precious financial state of NCK was discussed and Pansegrouw suggested that Bate and the applicant take a reduction in salary. Understandably, neither was amenable to do so.

23. The applicant, either at that meeting or shortly thereafter, suggested then that his services be terminated as part of a cost-cutting measure. In evidence at the arbitration he said:

> *"My attitude was I have a contract, I would rather leave and take my commission".*

24. The commission referred to was to be calculated in accordance with a formula stipulated in the written contract of employment referred to above. If the applicant terminated his services before the expiry of a period of 12 months calculated form April 1999 he would only be entitled to commission up to the date of termination. If the company terminated within the 12 month period, the applicant would be entitled

to the full commission.

25. I was informed from the Bar during argument that the full commission was a substantial amount – apparently in excess of R700 000.

26. Both Pansegrouw and Bate regarded the applicant as an important cog in the corporate wheel and did not wish to lose his services immediately, particularity because he was busy implementing a new computer system for NCK. Pansegrouw then suggested that the applicant stay on at least until the end of September 1999 – a proposal which appears to have been acceptable to the applicant.

27. Thereafter there were on-going discussions between the parties in relation to payment of the applicant's commission. Having taken legal advice, the applicant believed that he had an entitlement to a substantial payment pursuant to the written agreement.

28. Pansegrouw, on the other hand, believed that the written agreement was not binding for want of compliance with the suspensive conditions stipulated therein. He wanted to negotiate a different agreement with the applicant involving payment of a reasonable sum to the applicant in exchange for a 3 year restraint of trade in favour of NCK. The

commissions referred to in the written agreement would serve as a "starting point" for discussions in this regard.

29. Ultimately the negotiations came to nought because, according to Pansegrouw, the applicant's demands were too high.

30. Pansegrouw called a meeting with the applicant on 17 September 1999. Bate had insisted on the meeting because, as he said, he had a business to run and the applicant was absent a lot of the time. He wanted to know whether the applicant was staying or leaving.

31. The applicants version of events at the arbitration in regard to this meeting was as follows:

> "I was just called into Mr. Raymond Bate's office and I was told leave the premises with immediate effect and I again stated that I did not accept this termination of employment, but obviously I couldn't stay on the premises because I was being told to leave and I then asked for my salary to be paid until the end of the termination period, and I was told, firstly
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> that I was not entitled to any salary from the 1*st to the 17th or for the entire month, initially and then after which*

deliberation, Mr.Kosie Pansegrouw came around and said to me "well if that's the case then I'll give you half your salary, for a half a month", which I still told him I do not accept but I would obviously take the money."

I should point out that the agreed monthly salary was R20000.

32. Pansegrouw and Raymond Bate denied this version of events and alleged that the applicant left voluntarily. While the record of the arbitration proceedings is incomplete in regard to the meeting of 17 September 1999 the following passage from the evidence of Bate is clear:

> "Mr. Nathaniel stated to Mr.Pansegrouw that he cannot carry on in this company with this …(unclear)… Now that he has gone to see lawyers, etc, etc. He opted to leave there and then. Mr. Pansegrouw said, yes if that's your choice then you can leave. Mr. Pansegrouw did say to Mr. Nathaniel that he's not going to pay him a full salary, because its (sic) 17*th* *of the month. He would give him half his salary which Mr. Nathaniel agreed to."*

The applicant was also offered (and received) use of his company vehicle until the end of September 1999.

33. Raymond Bate denied the applicants suggestion that the real reason for the dismissal was that there had been conflict between his brother Tom Bate and the applicant.

34. From the aforgoing it can be seen that the issue for determination by the Commissioner at arbitration was a crisp one. Regrettably not all of the cross-examination on this point was capable of transcription. The evidence-in-chief is, however, sufficiently complete to understand the parties respective versions.

THE COMMISSIONER'S FINDINGS.

35. The award of the Commissioner dated 16 October 2000 is a document of some 25 pages. It contains a thorough summary of the evidence (10 pages) and a reasoned evaluation thereof (15 pages).

36. The Commissioner has demonstrated through his award that he was very much alive to the issues before him. To the extent that there may be gaps in the record due to poor transcription, the Commissioner's award provides a very useful summary of the evidence and in particular of the cross-examination of the applicant and Pansegrouw.

37. The Commissioner thoroughly reviewed the evidence before him and carefully evaluated it. To the extent that he has made credibility findings against the applicant it is clear that he had the opportunity of seeing and hearing the witnesses give evidence and to evaluate them first-hand. He was also able to consider the veracity of the witnesses in relation to the other evidential material before him, particularly the clandestine tape recording made by the applicant of a meeting with Pansegrouw at which the applicant intimated that there was on-going discussion between the parties in relation to the mutual termination of his employment.

38. In my considered view Mr. Smit was not able to refer to any passages in the record of the arbitration proceedings which demonstrate that the commissioner committed any reviewable irregularities.

39. I am mindful, too, of the fact that the matter before me is a review of the arbitration proceedings and not an appeal. While it may be argued that the boundary between appeals and reviews has become somewhat blurred in the context of a constitutionally based right of review which permits consideration of the merits of a matter, the distinction is nevertheless very clearly still there. (*Roman v Williams N.O.* 1998 (1) SA 270 (C) @ 285 A; *Carephone case* supra at para

32)

40. The approach on constitutionally based review was well summarized by Nicholson JA in the *Crown Chickens case*, supra @ para 19.

> *"By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order."*

41. I have carefully considered the arguments advanced by counsel in this case and the relevant passages of the record upon which they rely for their submissions. I am unable to conclude that the commissioner erred in the manner contended for by the applicant. On the contrary the award appears to be a model in logic and conclusion which, in any event, accords with the probabilities. In my view, therefore, the application cannot succeed.

42. In the result I grant the following order:

42.1 The application to review the award of the second respondent dated 16 October 2000 is dismissed.

42.2 The applicant is to pay the 1st respondents' costs of suit herein.

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P A L GAMBLE
Acting judge of the Labour Court

Date of hearing	:	26 June 2003
Date of judgement	:	9 July 2003
For the Applicant	:	Adv. M. Smit instructed by David C. Feldman Attorneys
For the 1st Respondent	:	Adv. F.G. Barrie instructed by Jac Van Niekerk And Partners Inc.