

IN THE LABOUR COURT OF SOUTH AFRICA
REPORTABLE

CASE NO **D199/03**

DATE HEARD 2004/02/09

DATE DELIVERED 2004/02/09

In the matter between:

COATES SA (PTY) LIMITED

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

H MOLOTSI N.O.

Second Respondent

SACTWU (on behalf of MAGCABA)

Third Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE MADAM JUSTICE PILLAY
ON 9 FEBRUARY 2004**

MR B MacGREGOR

MR D CRAMPTON

JUDGMENT9 FEBRUARY 2004PILLAY J

[1] The record in this review is not available. I have a discretion as to whether the dispute should be reheard at arbitration.

[2] The employee was dismissed for misappropriation of company property and insubordination. On the misappropriation charge, the evidence for the applicant at the arbitration was in the form of two affidavits, which make out a strong *prima facie* case against the employee. It is not evident from the award why the second respondent Commissioner preferred the employee's version and whether that preference was justified by the material before him.

[3] The main focus of the award is on the assault allegedly perpetrated on the employee by the investigators. The Commissioner found that the employee's refusal to co-operate with the investigators, which led to the charge of insubordination, was not wilful and deliberate as he had a legitimate excuse for not talking to them because they assaulted him.

[4] It is common cause that the investigators who allegedly assaulted the employee were not called to testify. However, in order to determine whether the employee's conduct was justified, the record is required to make such an assessment. What form the assault took, when and by whom it was perpetrated, what the employee's own conduct was, whether it was proportionate to, reasonable or justified by the assault can only be determined after considering the evidence at the arbitration.

[5] In the circumstances the Court finds that the review cannot be determined without a record. Given the strong *prima facie* case against the employee an injustice would result if the matter is not remitted for a rehearing.

[6] The purpose of remitting the matter is not, however, to allow the applicant a second bite at the arbitration cherry. Consequently, Mr *Crampton* for the employee submitted that the Court should direct that the applicant should not be allowed to call witnesses who were not called at the previous arbitration.

[7] Arbitration is a dynamic process. Who the arbitrator is, how he or she intervenes or does not intervene in the process, how this impacts on the parties and the proceedings, whether it results in the calling or not calling of witnesses cumulatively determine whether the hearing is fair. In the absence of a record I cannot say that the Commissioner conducted the arbitration fairly or not. If, for instance, the circumstances were such that the Commissioner ought to have warned the parties that the failure to cross-examine and to call witnesses would lead to adverse inferences being drawn, omitting to do so could amount to a gross irregularity. Likewise, if, for instance, the applicant only became aware that the employee would raise the alleged assault as a defence after it had closed its case, then the applicant should not be barred from calling evidence regarding the alleged assault.

[8] For the same reason that arbitration is a dynamic process this Court should not fetter the discretion of the Commissioner who rehears the matter, by prescribing whom he or she should allow as witnesses. All that is required is a fair hearing with a minimum of legal formalities appropriate to a matter that has been remitted for rehearing.

[9] As regards interim relief pending the new award, there is no basis for it as the award is set aside. The employee's loss of remuneration should be factored into the fresh hearing.

[10] As this matter was vigorously opposed, I see no reason why costs should not follow the result.

[11] In the circumstances the award is set aside, the matter remitted to the CCMA to be reheard by a Commissioner other than the second respondent, the employee to pay the costs.

Pillay D, J

12/02/2004