

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NUMBER:

JR2673/2004

In the matter between:

TOMMY MUDAU t/a VHADAU BOTTLE STORE

APPLICANT

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

FIRST RESPONDENT

KGANYETSI DAVID MATEE

SECOND RESPONDENT

ISHMAEL MOGARI THIRD RESPONDENT

JUDGMENT

NEL A J:

1. This is a review application to set aside the arbitration award granted by the second respondent ("the Commissioner") in matter GA19693-04 in the first respondent ("the CCMA"). The applicant complains bitterly about numerous aspects relating to the conduct of the Commissioner with relation to the third respondent, who was the applicant in the matter before the Commissioner in the CCMA. I will refer to the third respondent further herein as Mr Mogari.
2. Mr Mogari, amongst the many things that the applicant complains of, requested the Commissioner to recuse himself. He also complained that the Commissioner was found by himself to be sitting with the applicant and his witness and he therefore expressed serious doubts as to whether the hearing would take place honestly and fairly.
3. Mr Mogari further indicated to the Commissioner that he had reason to believe that prior communications had taken place between the Commissioner and the applicant.
4. I do not intend further dealing at all with the many complaints which the applicant herein lodges against the way Mr Mogari behaved himself during the inquiry as it did not play any role in the reasons for my conclusion which I arrive at herein.

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5. From the evidence presented to the Commissioner as it appears from the record before me, as well as from the Commissioner's summary of the evidence before him, it is patently clear that it was common cause between the applicant and Mr Mogari that on 15 May 2004, the applicant called Mr Mogari and another employee, a Mr Mbedzi, to the applicant's office for the purpose of laying them off from work. The applicant testified that he needed to do so as the business was in financial difficulties.

6. From the applicant's evidence it is accordingly clear that at least two employees were involved in what further is apparent is a termination of their employment for operational reasons.

7. Section 191(12) of the Labour Relations Act reads as follows:

"(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court."

8. What is apparent from the evidence before the Commissioner is that the applicant called in two employees in order to embark on discussions with them relating to laying them off by reason of the applicant's operational requirements.

9. The applicant further testified that on commencing these discussions, the one employee (Mr Mbedzi) agreed to being laid off and accepted a termination package offered to him. Mr Mogari however did not do so, but indicated that he would seek legal assistance.

10. The question which I believe needs first to be determined is whether, if two employees are dismissed by reason of the employer's operational requirements and the one employee accepts such termination for operational reasons and the severance package offered, but the other employee decides to not do so, but as in the present instance, to rather seek legal assistance and eventually declares a dispute, does this mean that this is a dismissal for operational requirements applying to that employee only.

11. I am of the view that where, as in the present instance, an employer contemplates the termination for operational reasons of the employment of two employees, and after having commenced consultations on such termination, the one employee accepts his termination for operational requirements and the other one does not, this is not an instance of a single employee being dismissed by reason of the employer's operational requirements.

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12. It is apparent from the Commissioner's award that he did not apply his mind at all to this particular issue. This is strange, as a perusal of the record discloses that Mr Mogari very clearly argued that this was a termination of his employment to which section 189 of the LRA applied.

13. It is also apparent that Mr Mogari argued before the Commissioner that the applicant had failed to comply with the requirements of section 189 of the LRA particularly in so far as he failed to consult Mr Mogari on appropriate measures to avoid the dismissal, to minimise the number of dismissals, to change the timing of the dismissals and to mitigate the effects of the dismissal.

14. In fact there can be no doubt that section 189 of the Labour Relations Act was what the Commissioner had in mind when determining whether the dismissal in the present case was substantively fair as he specifically indicated that consultation, information sharing and joint decision sharing were required in dealing with the employees.

15. It is to be noted that the Commissioner used the plural "employees" when he stated the afore-mentioned requirements of consultation, information - and joint decision sharing.

16. The Commissioner then, strangely, refers in his award to the fairness of the hearing. No evidence was adduced before him of any hearing. As indicated, the common cause facts were that all that took place was an initial discussion during which the applicant wished to advise two of his employees, including Mr Mogari, that he wanted to lay them off by reason of his, the employer's, operational requirements.

17. Another issue which I do not believe the Commissioner applied his mind to sufficiently, or at all, is that the applicant testified before the Commissioner that Mr Mogari was not dismissed but simply laid off. The applicant went further and explained that the difference between being laid off and being dismissed is that being laid off meant that you could be called back to come and work again. On the other hand, so the applicant testified at the arbitration, if you are dismissed, that is a permanent position and the employee will not come back to the company again.

18. It should be noted that the other employee who was laid off by the applicant was in fact called back later on. This issue is also not dealt with by the Commissioner at all. In this regard it should also be noted that the applicant testified that he tried to establish contact with Mr Mogari after Mr Mogari had left, to recall him, as the applicant did with Mr Mbedzi, but that he could not make contact with Mr Mogari at all.

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19. In argument before me it was suggested that Mr Mogari intimidated the Commissioner to such an extent that the conduct of Mr Mogari in and by itself rendered the Commissioner's award reviewable. Although it would appear as if Mr Mogari pushed the Commissioner to the limit in terms of the manner in which Mr Mogari conducted himself, I do not believe that I am in a position to agree that the conduct of Mr Mogari warrants a review and setting aside of the Commissioner's award.

20. However, having considered the evidence as it appears from the record before me, I do not believe in the first instance that the Commissioner properly, if at all, considered the question whether he, by reason of section 191(12) of the LRA had jurisdiction to hear the matter as it clearly involved the termination of employment for operational reasons as contemplated in section 189 of the LRA. Only if one employee is dismissed by reason of the employer's operational requirements, may that employee refer a dispute either to arbitration or to the Labour Court. If more than one employee is dismissed by reason of the employer's operational requirements in terms of section 189, only the Labour Court has jurisdiction to hear such dispute.

21. I am accordingly of the view, as I indicated earlier herein, that in the present instance, as two employees were involved in termination of their employment by reason of the employer's operational requirements, the CCMA did not have jurisdiction to hear the dispute in question.

22. I am further of the opinion that the Commissioner did not apply his mind properly to a number of evidentiary issues before him. By way of example only, I refer in this regard to the fact that the applicant testified that he did not want to permanently dismiss Mr Mogari, but only temporarily lay him off. The Commissioner in my mind did not properly consider this issue.

23. A further issue which I do not believe received proper consideration by the Commissioner is the fact that after the applicant had indicated to Mr Mogari that he was considering laying off Mr Mogari, Mr Mogari left, indicating that he was going to seek legal advice and thereafter the applicant could not establish contact with Mr Mogari again.

24. A further, and last issue which I intend referring to, to which I do not believe the Commissioner applied his mind sufficiently, or at all, is the fact that the applicant testified before the Commissioner that, after his discussions with Mr Mogari on 15 May 2004, Mr Mogari went to one of the applicant's other business sites and that he misconducted himself there. It would appear as if the Commissioner in fact indicated to the applicant that such evidence was irrelevant to the

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question whether Mr Mogari's services had been fairly terminated by the applicant.

25. I am accordingly also of the view that the Commissioner's conclusions are not justified having regard to the reasons given therefore. I am of the view that the Commissioner's award is tainted by a degree of irrationality.

26. A last aspect which I need to deal with is in relation to the compensation awarded by the Commissioner. In this regard one finds from the record that in the proceedings before the Commissioner, there is on the one hand evidence from Mr Mogari that he earned R1 250,00 per week. On the other hand, however, one sees that the applicant testified before the Commissioner that Mr Mogari was earning R2 500,00 per month. This issue is similarly not properly considered by the Commissioner. In light of the clear contradiction in the evidence adduced by the applicant and Mr Mogari, I believe that it was necessary for the Commissioner to at least have sought clarity on this issue. Even if the Commissioner's ruling that the dismissal was procedurally and substantively unfair was upheld, whether Mr Mogari earned R1 250,00 per week or R2 500,00 per month will make a significant difference to the amount of compensation awarded to Mr Mogari.

27. This failure by the Commissioner to apply his mind sufficiently, or at all, to the question of determining more precisely what Mr Mogari earned at the time of his dismissal, in and by itself warrants review and setting aside at least of the compensation awarded.

28. I am, however, satisfied, particularly by reason of the fact that I am of the view that the CCMA did not have jurisdiction to hear this matter, and for the other reasons which I have dealt with above, that the award herein should be reviewed and set aside.

29. Before I conclude, it is necessary to deal with the suggestion by Mr Mogari that the applicant's review application herein was late and requires condonation.

30. In this regard the applicant's founding affidavit does, as Mr Mogari suggests, state that the applicant herein received the arbitration award on 14 September 2004. However, in his replying affidavit, the applicant denies that he received the

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arbitration award on 14 September 2004 and then, whilst his statement is not at all clear, he appears to give an explanation that what he meant was that the award was issued on 14 September 2004, that it was highly impossible that parties could have received it on 14 September 2004 as applicant had received it through the postal services "some days after 14 September 2004".

31. What appears to be common cause on the papers is that the applicant filed an application for the variation and rescission of the Commissioner's award of 14 September 2004 and that this application is dated 29 September 2004.

32. Inelegant as this rescission/variation application is worded, it is apparent that the applicant tries to address the Commissioner's compensation order in which he awards Mr Mogari compensation based on the Commissioner's finding that Mr Mogari earned R1 250,00 per week. To this application the applicant attached a document which is not clear what exactly it is, save that one sees an entry which on the face of it appears to indicate that Mr Mogari received R2 500,00 for the month of May.

33. The Commissioner dismissed this variation application in an undated award. Mr Mogari, in his heads of argument, indicated that the award, in terms of which the Commissioner dismissed the applicant's variation application, was communicated by facsimile to the applicant on 27 October 2004.

34. The applicant filed his application to review the Commissioner's award on 12 November 2004, some 16 days after the despatch by facsimile to him of the Commissioner's award dismissing his variation application.

35. I am of the view that the time period within which the applicant should have brought his application to review the award started running from the date on which the Commissioner dismissed the applicant's variation application. That being my view, it follows that the applicant brought his review application well within the prescribed period.

36. If I am wrong in holding the view that the time period herein started running at the earliest on 27 October 2004, then it would appear as if the applicant herein requires condonation of the late filing of his application in terms of section 145(1) of the LRA.

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37. Why I say it would appear as if the applicant requires condonation is that the applicant's papers are, to say the least, ambivalent on this issue. In the first instance the applicant did say that he received the Commissioner's award on 14 September 2004. After Mr Mogari made the allegation in his opposing affidavit that the review application was late, the applicant in his replying affidavit appears to be stating that he did not receive the award on 14 September 2004, but that he intended to convey that the award was dated 14 September 2004. However, the applicant then does not state any date on which the award herein was served on him.

38. That presents me with the following situation. I do not have a substantive application on notice for condonation from the applicant to condone the late filing of his review application.

39. The question accordingly arises whether I may condone the late filing in the absence of a substantive application for condonation.

40. Section 145(1A) of the LRA reads as follows:

"The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)."

41. In considering whether I may grant condonation to an applicant in the absence of a substantive application, I had regard to Rule 12(1) of the Labour Court Rules, which reads as follows:

"(1) The court may extend or abridge any period prescribed by these rules on application, and on good cause shown, unless the court is precluded from doing so by an Act."

42. A reading of section 145(1A) of the Act and Rule 12 shows that the rule expressly requires an application to be brought if a party wishes this court to extend or abridge any period prescribed by the

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rules of the Labour Court. Section 145(1A) does not expressly require that an application be brought. It simply indicates that this court may on good cause shown condone the late filing of a review application.

43. In the present instance, from the facts before me, it is apparent that the applicant herein initially sought to rescind or vary the award of 14 September 2004. The very issue which drove him to bring his application to vary or rescind the award, namely the Commissioner's finding that Mr Mogari was earning R1 250,00 per week, is one of the reasons why I am of the view that the Commissioner's award should be reviewed and set aside. I have also, as indicated, concluded that there are other grounds on which I believe the Commissioner's award should be reviewed and set aside.

44. In addition to the applicant clearly having shown that good prospects of success exist, I am also, on the facts before me, satisfied that the delay of approximately 14 days appear to have been brought about by the fact that the applicant pursued his initial relief by way of an application to rescind or vary the Commissioner's award.

45. It is equally apparent from the facts before me that within 16 days, and possibly less, of receiving the Commissioner's award dismissing the variation/rescission application of the applicant, this review application was brought.

46. I am accordingly of the view that good cause has been shown on the facts as they are before me, even in the absence of a substantive application for condonation, to indeed condone the late filing of the applicant's application. I am of the view that I have the inherent jurisdiction, and discretion to do so.

47. In the result, I am satisfied that the Commissioner failed to apply his mind properly, or at all, to the evidence before him as a result of which his conclusions are not justified based on the evidence which was presented to the Commissioner. The award accordingly falls to be reviewed and set aside.

48. In considering the issue of costs herein, I do wish to mention that the manner in which the papers before me were indexed and paginated, leaves much to be said about. I do not intend further burdening this judgment with a comprehensive exposition of how the papers before me were compiled save to indicate, simply by way of example, that the order in which the papers appear, are completely back to front. So, for example, one finds the applicant's replying affidavit appearing in the papers, some 100 pages before one finds Mr Mogari's opposing affidavit.

49. The Court's dissatisfaction with the manner in which the applicant presented his case to this Court will be reflected in the cost

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order which I intend making herein.

50. The following order is made:

1. The award of the second respondent with case number GA19693-04 dated 14 September 2004 is reviewed and set aside.
2. In the event of the third respondent still wishing to resolve the dispute he has referred to the CCMA herein against the applicant, he is directed to refer the dispute to the Labour Court and is hereby granted condonation to do so within 30 days from the date of receipt of this order.
3. No order is made as to costs.

NEL A J

Date of hearing: 16 February 2006.

Date of judgment: _____

Appearances:

On behalf of the applicant: M J Makakavhule of Mulaudzi & Associates.

On behalf of the third respondent: In person

