

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE No: JR 583/04

In the matter between:

MTHIMKHULU TSEDISO JOHANNES

FIRST APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

FIRST RESPONDENT

KHOMOTJO MATJI N.O

SECOND RESPONDENT

SOUTH AFRICAN POST OFFICE

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is an application in terms of which the applicant who I shall in this judgement refer to as “the employee” sought to review and set aside the arbitration award of the second respondent (the

commissioner) issued under case number GA 552-03 on the 5
December 2003 in terms of which his dismissal was confirmed.

- [2] At the beginning of the hearing the employee raised a point in limine concerning the late filing of the heads of argument by the respondent. Prior to raising this issue there was also confusion about the historical chronology of events relating to filing of the papers and condonation. As a result the matter stood down for the parties to sort out the papers in the court file.
- [3] The respondent's attorney contended that the heads of argument were served on the applicant. He requested that he be given an opportunity to go and search for proof of service of the heads or argument as he was confident that they were served on the applicant.
- [4] The following day the legal representative of the respondent submitted an affidavit of the respondent attested that the heads of argument were served on the applicants' union but could not locate in its file the record of service.

- [5] The applicant could not dispute the possibility that the heads of argument could have been served on him through his former union which was his representative of record but withdrew the representation on the 12 December 2002. He indicated that he never formerly withdrew the representation by the union.
- [6] It was on the basis of the above that I ruled that the probabilities exist that the heads of argument were served on the applicant at the address of the union which on the record was still the legal representative of the applicant. In arriving at this decision, I considered the prejudice that the applicant may suffer if it was to transpire that the heads of argument were never properly served.
- [7] Having read the heads of argument and having regard to the founding papers, I am of the view that the heads of argument did not contribute anything beyond what was already in the founding papers and therefore the applicant would not suffer any prejudice even if it was to turn out that the heads were not properly served. What also influence my view was the fact that the matter stood down on a number of occasions because of the manner in which the papers were compiled and other technical issues that caused the delay in finalising the matter within the available time.

Background Facts

- [8] The applicant a former employee of the respondent was disciplined and dismissed for fraud. He was found guilty of defrauding a pensioner, Mrs Moloi, of her pension payment.
- [9] According to Mrs Moloi, the applicant paid her R6030.00 on the 25 July 2003 and advised her to come the following day to collect the remainder of the amount which was R200-00. She was apparently required to sign a voucher the contents of which she had no knowledge of.
- [10] It is common cause that Mrs Moloi was accompanied by her daughter when she went to the Post Office to collect her pension on the day in question. The following day, the 26 July 2003, after receiving the R200-00 she approached the Post Master who was at that stage standing outside the Post Office to thank him for the payment. The Post Master apparently told her that the payment was incomplete.
- [11] Immediately after speaking to Mrs Moloi, the Post Master confronted the applicant about this matter and enquired from him

as to why Mrs Moloi was not paid in full. The applicant indicated that he had paid her the full pension pay which according to him was R9760-78.

[12] The Post Master further testified that the money which the applicant alleged to have paid to Mrs Moloi was not recorded in the cash book and that it is irregular to pay a pensioner in instalments.

[13] In his defence the applicant testified that Mrs Moloi had attended at the Post Office to enquire about her pension payment and because there was no cash available, he loaned her money with the understanding that she will refund him when she receives her pension payment.

[14] He conceded that it was irregular to pay a pensioner in instalments. He further conceded and stated that because there were insufficient funds on the 25 July 2003, he made part payment to Mrs Moloi. This he did because she was insisting that her pension be paid on that day according to him.

- [15] It is common cause that the applicant gave Mrs Moloi's daughter a R20-00 on the day in question for taxi fare and subsequently visited her at home on a number of occasions. It would appear that part of the purpose of the visit was to persuade Mrs Moloi to change the version of the events relating to the issue of her pension payment.

Grounds for Review

- [16] In essence the applicant challenged the decision of the commissioner on the following grounds:

- “1. the commissioner in his award did not deal with the cross-examination of Mrs Moloi and his version concerning the loan he made to her.*
- 2. Pages 51 and 52 of the record does not reflect the cross-examination of Mrs Moloi and his version.*
- 3. The commissioner does not deal with the version of the agreement concluded between him and Mrs Moloi that he could deduct from her pension payment the amount of R1700-00.*
- 4. The commissioner did not deal with his evidence in arriving at the decision to confirm his dismissal.”*

Commissioner's Decision

[17] In his award the commissioner found that although the applicant testified that Mrs Moloi owed him R1700, the amount he withheld was in excess of this amount. The commissioner also found that the applicant did not challenge the evidence of Mrs Moloi and her daughter that he told them to collect R200-00 the following day. The commissioner further found that:

“14.1 The entries in the cash book on the 25 July 2002 did not reflect the first payment of R6030-00. The impression created in the entries of the 26 July 2002(sic) that a single transaction of R9760-78 was effected. This is deceitful as the entries do not truly reflect what has transpired during the days.”

Evaluation

[18] In terms of s145 of the Labour Relations Act 66 of 1995 (LRA) arbitration awards may be reviewed and set aside if any party to a dispute alleges a defect in any arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) or any of the bargaining councils. An

arbitration award can be reviewed if there is a defect in it. A defect may in terms of s145 of the LRA, as a result of a commissioner having -

- “(i) *committed misconduct in relation to the duties of the commissioner as an arbitrator;*
- (ii) *Committed a gross irregularity in the conduct of the arbitration proceedings; or*
- (iii) *Exceeded the commissioner's powers; or that an award has been improperly obtained.”*

[19] The test that has been consistently applied by the courts in considering whether or not an arbitration award should be reviewed was enunciated in *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC), where Froneman DJP, at paragraph 37 stated that:

“is there a rational objective basis justifying the connection made by the decision-maker between the material properly available to him and the conclusion that he or she eventually arrived at?”

[20] O'Regan J, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (4) (CC) at paragraph 45 held:

“the court should take care not to usurp the functions of the administrative agencies. Its task is to ensure that the decision taken by the administrative agencies fall within the bounds of reasonableness as required by the constitution.”

- [21] It has now become clear from a number of judgments that one of the constitutional imperatives is that the decisions of the CCMA commissioners must be justifiable in relation to the material presented to the arbitrator.
- [22] In this case, the decision and the reasons given do not support an inference of misconduct, irregularity or impropriety on the part of the commissioner. The decision is rationally justifiable in terms of the reasons given for upholding the dismissal the employee.
- [23] I do not agree with the applicant’s argument that the commissioner did not deal with his version. It is apparent from the reading of the award that the commissioner after summarising the evidence of both himself and the three witnesses of the third respondent, accepted the version of the three witnesses. The commissioner does so by indicating, more importantly the contradiction that exist in the evidence of the applicant. In this regard the commissioner

agreed with the decision of the employer to terminate the employment of the applicant.

[24] The applicant contended that the record was not proper and that the matter should be referred back to the CCMA for a rehearing. Whilst I agree with the applicant that the record is not as would have been expected, I do not agree that it is in such a state that a closer scrutiny thereof does not give a broader sense to be able to arrive at a fair conclusion of what transpired at the arbitration hearing. The short coming in the record is complemented by hand written notes of the commissioner which were submitted as part of the record. It follows that the arbitration award issued by the commissioner must stand.

[25] In the circumstances the application to review and set aside the award issued under case number GA 552-03 on the 5th December 2003 is dismissed.

[26] There is no order as to costs.

MOLAHLEHI AJ

DATE OF HEARING: 19 MARCH 2007

DATE OF JUDGMENT: 29 JUNE 2007

APPEARANCES

THE APPLICANT IN PERSON

**FOR THE RESPONDENT: P T MOTAUNG OF RANAMANE PHUNGO
ATTORNEYS**