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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR347/2007

2008-02-21

In the matter between

THEMBA E MDLALOSE Applicant

And

SOUTH AFRICAN NUCLEAR ENERGY CORPORATION Respondent

J U D G M E N T

MOSHOANA J: This is an application brought in terms of the provisions of Section 145 of the Labour Relations Act, wherein the applicant, one Themba Mdlalose applied to this court to have an award issued by the second respondent acting under auspicious of the first respondent to be reviewed and set aside.

Mr Mdlalose was an employee of the third respondent and in the course of his employment there were certain issues which are dealt with clearly in the summary of the evidence in the award that is being attacked and for the purpose of this judgment, I do not want to repeat the entire evidence. But what stands out is that the applicant was then charged with

a number of charges and he went through a disciplinary enquiry and at the disciplinary enquiry he was found guilty of all the charges and he was then afforded an opportunity to appeal and the appeal found him not guilty in some of the charges. The remaining five charges were then the basis upon which the third respondent justified its dismissal when challenged by the applicant.

The arbitration proceedings commenced with some points *in limine*, which again for the purposes of this judgment, it will not be material to refer to them, suffice to mention that in the end the conclusion was, the concentration would be on the charges to justify the dismissal.

Owing to the facts that the third respondent had a duty in terms of the provisions of the Act to justify the dismissal as in bearing the onus to justify the dismissal, it led evidence of various witnesses. At the end, after hearing all the evidence, the second respondent issued an award which is being attacked by the applicant.

The applicant placed a lot of attack in terms of the award and the sense that the court got was that he was almost wanted an appeal against the award. The court, before he started with his submissions, owing to the fact that he is not represented, attempted to make a distinction between an appeal and a review and the court got the impression that the applicant understood but nonetheless the court gave the applicant leeway to delve into issue, that in the court's view were not necessarily important for the purpose of determining the application before it.

When Mr Maserumole who appears for the third respondent, sought to address the court, the court indicated that having read the

award and having read the papers, it had concerns with two issues. The first issue was in relation to paragraph 84 of the award where the commissioner, correctly so at the time, relied on what was considered to be good authority of the Rustenburg Platinum Mines before the Constitutional Court overturned that decision. The question the court posed to Mr Maserumole was whether by mere reference to that decision; it can be said that the second respondent deferred the issue of the sanction to the employer, to the extent that he would have been guilty of gross misconduct in relation to his duties as a commissioner.

Mr Maserumole's submission was that, with reference to the award itself, which I am going to quote:

> "I am of the view that it was not necessary for the respondent to prove any further charges. The gross insubordination insolence was sufficient to warrant a summary dismissal. It appears as if applicant communicated with his superiors by means of email and what was contained in the emails is fact.
>
> In an attempt to water down what was communicated is almost impossible. An attempt by applicant to put the emails in context and to explain why it was mailed does not make sense for an employee in the position of the applicant and for any employee for that matter.
>
> I am of the view that the applicant was the author of his own fate and nothing that he testified in this regard added to the benefit of his case. Applicant's attitude

> and approach was clear, applicant was not prepared to obey his superiors at the time".

From that paragraph, it is very clear that the commissioner in assessing the sanction of dismissal, applied his mind to the evidence that was before him and took a view that what is contained in the emails is a clear indication of gross insubordination which warrants a summary dismissal.

It may be important for the purpose of this judgment just to quote one of the emails that, according to the award, were not placed in dispute. The email dated 19 October 2004 that applicant said the following:

> "Trying to drag me by the scarf of my neck, screaming and kicking back to this Bantu Stan, it always requires a supreme effort to suppress a strong involuntary edge to throw up when one is subjected to such abuse. I have now decided that the only practical method which is within my power to handle such situation is that I shall forthwith disengage from any discussions on the Bantu Stan project".

Clearly, emails of this nature can only mean that there is an aggravated level of insolence on the part of the applicant.

So, it is the court's view that based on the evidence and the reasoning as quoted earlier, the second respondent did not just simply take an approach of folding the arms and say that is the decision of the employer imposing a sanction of dismissal I cannot interfere with, as in what was the situation in the Rustenburg decision before the Constitutional

Court decision. You find reason that having looked at the emails and having looked at everything else, the sanction of dismissal was justified. So therefore he performed his duties in determining the appropriateness of the sanction.

The second issue which the court raised with Mr Maserumole relates repeated relevance to the concept *audi alteram partem* which had not been complied with. The commissioner in his award, in about two paragraphs, paragraph 92 and 94, made reference to the fact that the *audi alteram partem* has not been complied with and the court commented to the argument by Mr Maserumole that, by just looking at that, that in itself would send shivers down the spine in terms of the conclusion, whether there was procedural unfairness. However, in his submission, he conceded rightly so that the choice of words seem to be not appropriate, however, he referred the court to the conclusion arrived at by the commissioner which I quote:

> "Materially speaking, respondent followed a fair procedure prior to the dismissal of the applicant, despite my remarks pertaining to not granting legal representation and how the application for recussal of the chairperson was held".

In view of that, it is the court's view that the award is reasonable, that being the test that has just been given recently by the Constitutional Court. It is not for me sitting as the reviewing judge to agree with the commissioner but it is for me to say that, having looked at the award and having looked at the evidence, any reasonable commissioner could have

come to the conclusion which this commissioner has arrived at. As I have pointed out, I might not like the award but that is not the test.

In the result, I make the following order: **The application is dismissed and I make no order as to costs**.

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On behalf of the Applicant: In Person

On behalf of the Respondent: Mr Maserumole

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