

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR963/08

In the matter between:

WATLOO MEAT AND CHICKEN

APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1ST RESPONDENT

HAROLD MATSEPE N.O.

2ND RESPONDENT

JAN RESINGA MASHABA

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an unopposed application to review and set aside the arbitration award made by the second respondent (the commissioner) under case number LP5749-07 dated the 19th March 2008. In terms of the arbitration award the commissioner found the dismissal to have been both procedurally and substantively unfair.

Brief background facts

[2] The third respondent, Mr Mashaba, was employed by the applicant since 1999 as a freezer man. On the 20th June 2007, Mr Mashaba was arrested by the South African Police Services on a charge relating to the possession or use of a firearm and was initially released on bail. The matter was postponed on a number of occasions pending further investigation during which postponements Mr Mashaba contravened his bail conditions and failed to appear after the matter was duly postponed. For this reason Mr Mashaba was remitted in custody and his bail forfeited. He was released from prison on the 12th September 2007.

[3] After his release Mr Mashaba reported for duty at the workplace of the applicant where on arrival at the workplace he spoke to Ms Caroline Kriel, a personal assistant to the director of the applicant. On the version of the applicant Mr Mashaba was told by Ms Kriel to come back when the director Mr Faia was back at work. The applicant's case is further that since being told to come back when Mr Faia, was back it never again heard from Mr Mashaba.

[4] According to the applicant the next time the applicant heard from Mr Mashaba was after he had referred the dispute concerning his dismissal to the CCMA claiming that he was unfairly dismissed. The matter was conciliated and upon failure thereof referred to arbitration. In terms of the arbitration award the commissioner concluded that the Mr Mashaba was dismissed and that the said dismissal was both procedurally and substantively unfair. The commissioner awarded Mr Mashaba compensation equivalent to 12 (twelve) months' salary.

[6] The commissioner reasoned that Mr Mashaba was dismissed because after his release from prison he wanted to assume his duties with the applicant and never absconded or left on his accord. The commissioner further reasoned in this regard that the applicant acted in a manner that made it impossible for Mr Mashaba to resume his duties and was therefore deemed dismissed.

[7] The commissioner states that if the applicant had the will and determination Mr Mashaba would be back in his employment. It was for this reason it would appear that the commissioner concluded that by its conduct the applicant caused the dismissal of

Mr Mashaba.

[8] The applicant contended that the commissioner misconstrued the nature of his function and the legal principles that he was required to apply or failed to apply his mind properly to the issues before him and thereby denying the applicant its right to a fair hearing.

[9] It is trite that a commissioner commits a reviewable conduct if he or she fails to apply his or her mind to the issues before him or her. The commissioner commits a gross irregularity if he or she fails to apply the appropriate test in evaluating the evidence.

[10] In this matter the commissioner was confronted by two conflicting versions which were irreconcilable. The version of the applicant is that it never dismissed Mr Mashaba, thereby necessitating an investigation into the existence of dismissal as a matter of fact. Thus the commissioner was required to assess on the balance of probabilities whether or not the Mr Mashaba had on the evidence he presented proved that he was dismissed. The burden to adduce evidence that there was a dismissal in terms of section 192 of the Labour Relation Act rested on Mr Mashaba to show that he was indeed dismissed.

[11] It is apparent from the reading of the award that the commissioner proceeded to deal with the issue of the alleged unfair dismissal without resolving the respective conflicting versions of the parties which was before him. In this respect the commissioner ought to have reasoned why he accepted the version of Mr Mashaba over that of the applicant. The commissioner ought to have evaluated the versions of the parties on the balance of probabilities failing which used the credibility of the witnesses of the respective parties in the process of determining which version was more plausible.

[12] In my view the commissioner failed to make a finding on credibility and probability which resulted in him misconstruing the nature of his function and the application of the legal principles that he was required to apply and that as a result thereof failed to apply his mind properly to the issues before him and thereby denying the applicant its right to a fair hearing.

[13] In the light of the above I am of the view that the award of the commissioner stand to be reviewed and be remitted to the first respondent.

[14] In the premises the following order is made:

- (i) The arbitration award issued under case number LP5749-09 and dated 19th March 2008, is reviewed and set aside.
- (ii) The matter is remitted back the first respondent for consideration afresh by a commissioner other than the second respondent.

There is order as costs.

Molahlehi J

Date of Hearing : 21st April 2009
Date of Judgment : 14th August 2009

Appearances

For the Applicant : Mr J C Mulder of Geldenhuys C J @ Law Inc
For the Respondent: (Unopposed)