CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 33/09
[2009] ZACC 17

STRATEGIC LIQUOR SERVICES — Applicant

versus

MVUMBI, T NO — First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — Second Respondent

REDGARD, WESLEY — Third Respondent

Decided on : 18 June 2009

JUDGMENT

THE COURT:

[1] The applicant (the employer) seeks leave to appeal against a judgment of the Labour Court dated 20 February 2007, which dismissed with costs an application to review a Commission for Conciliation, Mediation and Arbitration (CCMA) award in favour of Mr Wesley Redgard, whom it had employed as a merchandising supervisor and then regional manager from October 2003 until February 2004. Despite the fact that Mr Redgard had tendered his resignation, the CCMA held that he had been constructively dismissed, and, notwithstanding the short period of employment, granted him compensation equivalent to ten months' salary (R121 500). Incensed by

this outcome, the employer brought review proceedings in the Labour Court, but failed. It unsuccessfully sought leave to appeal to the Labour Appeal Court, and then petitioned the Supreme Court of Appeal for special leave to appeal. That application, too, was dismissed with costs.

[2] The application to this Court has scant basis and can be disposed of quite briefly. According to the CCMA's award, Mr Redgard was the only witness to testify. Although the employer's case was conducted by its manager, Mr Jason Sellars, who was involved in the events leading up to Mr Redgard's departure, he did not testify under oath, but proffered only arguments and submissions. The result was that Mr Redgard's evidence was the only version before the tribunal. His evidence was not disputed in cross-examination and the CCMA commissioner (Mr Mvumbi) accepted it. Mr Redgard testified that after one of the employer's biggest customers complained about him, Mr Sellars gave him a choice between resigning (with one month's salary and a good reference), and being warned and placed on a poor work performance programme with training. Mr Redgard testified that the complaints were unfairly instigated and false, but that management was against him. After consideration he told Mr Sellars that he accepted management's "offer" that he should resign "because what is the point of staying if I'm gonna get fired anyway." Shortly after, he initiated proceedings for unfair dismissal.

[3] Section 185(a) of the Labour Relations Act[1] confers "the right not to be unfairly dismissed". Section 186(e), defines "dismissal" as including a situation where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee". This definition gives statutory embodiment to the jurisprudence of constructive dismissal that preceded it. The CCMA concluded that Mr Redgard had been constructively dismissed. In its application to this Court, the employer contends that the CCMA – and the Labour Courts in refusing to review its determination – misconceived the jurisdictional prerequisites for constructive dismissal, since on Mr Redgard's own version he had a choice whether to resign or be subjected to poor performance procedures. It asks this Court to step in.

[4] There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no "choice". The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.[2]

[1] 66 of 1995.

[2] Compare *Murray v Minister of Defence* [2008] ZASCA 44; [2008] 3 All SA 66 (SCA); [2008] 6 BCLR 513 (SCA) at paras 12 and 67.

[5] There are no grounds for disturbing the CCMA's finding that this was the case, (and no independent attack on the amount of compensation awarded). The employer's quest to overturn the award was therefore misconceived and its application to this Court must be dismissed.

[6] But there are troubling features of this case. The one is the severe delay that beset it. The other is that the Labour Court, despite repeated requests, failed to furnish written reasons for its decision. To elucidate it is necessary to set out some of the litigation history.

[7] The CCMA proceedings took place on 8 October 2004. The Commissioner's award was handed down three months later on 19 January 2005. The employer's review application was lodged promptly in the Labour Court in February 2005, but was set down for hearing only two years later, on 20 February 2007. On that day, the employer states, an *ex tempore* judgment was handed down by the presiding judge, Nel AJ, dismissing the review application. No written reasons were forthcoming. The employer therefore filed a formal request for written reasons on 11 April 2007. Still no reasons were forthcoming. The employer had in the meanwhile filed an application for leave to appeal, reserving its rights to supplement once written reasons were received. Still they did not come. Instead, a letter from the Labour Court's legal administration officer communicated a directive from Nel AJ requiring the parties to deliver written submissions on the application for leave to appeal. The employer

complied with this in October 2007. Nel AJ dismissed the application on 20 December 2007. Again he furnished no reasons.

[8] Against this extraordinary background, the employer petitioned the Labour Appeal Court for leave to appeal. This it did promptly in January 2008. The Labour Appeal Court took nearly twelve months to determine the application, which it dismissed on 8 December 2008. Again, no reasons were furnished.

[9] The employer's subsequent approach to the Supreme Court of Appeal failed, but the Court dealt with it speedily (less than two months from lodging to order). But the judges considering the application, Van Heerden and Cachalia JJA, were troubled by the poor judicial service meted out to the employer. By long-standing practice of the Supreme Court of Appeal, reasons are not furnished when applications for leave to appeal are disposed of without oral argument.[3] Exceptionally, the Supreme Court of Appeal gave reasons in this case. It did so because "we have not had sight of a copy of the judgment of the Labour Court, which is the subject of the petition". The Supreme Court of Appeal reasons record that the tapes of Nel AJ's *ex tempore* judgment could not be located, and that the Labour Appeal Court struck off the employer's petition for leave to appeal because no copy of Nel AJ's judgment was annexed. This – through no fault of the employer – necessitated the lodging of a fresh petition, contributing to the delay already mentioned.

[3] See *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

[10] For the benefit of the employer, the Supreme Court of Appeal recorded that the test for review of CCMA determinations was narrow, and that, having carefully studied the papers, it was "satisfied that it has not been shown that the arbitrator has made himself guilty" of a reviewable breach. It added that the threshold for granting leave to appeal to it from the Labour Appeal Court was high.[4]

[11] These were the first written reasons the employer received for the failure of its challenge to the CCMA award.

[12] Some comment is necessary. First, the delay. It is lamentable that so many delays occurred, some (though not all) attributable to judicial management of the employer's case. The Supreme Court of Appeal has recently (in not incomparable circumstances, where the Labour Appeal Court took more than fifteen months to deliver judgment) deplored what it called "systemic delays" in the Labour Courts. It pointed out that:

> "The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure."[5]

[4] Applying *National Union of Metalworkers and Others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; 2005 (5) SA 433 (SCA).

[5] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZASCA 24; 2009 (3) SA 493 (SCA) at para 34.

[13] This Court has recently dealt with a matter where the Labour Appeal Court delivered judgment more than two and a half years after oral argument was concluded before it,[6] and the comments of the Supreme Court of Appeal must be endorsed.

[14] Second, the failure by the Labour Court to supply written reasons for its decision was equally lamentable. That the tapes recording the *ex tempore* judgment went missing did not excuse the lapse. The employer, being minded to appeal, was entitled to written reasons, and when it requested them, they should have been given. When the employer applied for leave to appeal, the first-instance judge was presented with a further opportunity to remedy the deficiency, since the challenge to his judgment gave him the opportunity to reconsider it. He should at that stage, at the latest, have supplied reasons.

[15] It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process. In *Botes and Another v Nedbank Ltd*,[7] Corbett JA pointed out that "a reasoned judgment may well discourage an appeal by the loser":

[6] *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau and Others* [2009] ZACC 10, as yet unreported.

[7] 1983 (3) SA 27 (A) at 28.

> "The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did."

[16] That the Labour Appeal Court considered the employer's application for leave to appeal without requiring Nel AJ to supply reasons, and without in their absence furnishing its own, is most regrettable. The application before that Court gave to it the opportunity that Nel AJ let slip through his fingers, namely to give the employer reasons for its failed attempt to review the CCMA outcome.

[17] In *Mphahlele*,[8] this Court noted that there is no express constitutional provision requiring the judges to furnish reasons for their decisions (and on this basis upheld the long-standing practice of the Supreme Court of Appeal not to furnish reasons when determining applications for leave to appeal). We add that there is likewise no express statutory provision requiring judges who have given judgment *ex tempore* to furnish written reasons when later required. Nonetheless, as this Court pointed out in *Mphahlele*, a reasoned judgment is indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons – and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons—

> "explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not

[8] Above n 3.

> the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters."[9]

[18] The Court in *Mphahlele* added that it may well be that where a decision is subject to appeal it would ordinarily be a violation of the constitutional right of access to courts, if reasons were to be withheld by a judicial officer. Although that opinion was tentatively expressed, there is much to support it. It is not necessary to decide the point generally, since we have not had the benefit of hearing oral argument in this matter. However, the failure by Nel AJ to furnish his reasons, when requested for the appeal process, cuts right across the employer's right of access to courts.[10]

[19] It is a grave matter when courts themselves infringe rights in the Bill of Rights and it must be hoped that this occurrence is and will remain extremely rare.

[20] The application for leave to appeal is dismissed with costs.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J, Van der Westhuizen J and Yacoob J.

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[9] Id at para 12.

[10] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."