VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 10 September 1999 CASE NO. J2341/98

In the matter between:

PRITCHARD CLEANING SERVICES Applicant

and

LEBEA, J N First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION Second Respondent

MASHODI, P Third Respondent

J U D G M E N T

NGWENYA, AJ

[1] This is a review application in terms of section 145 of the Labour Relations Act. Briefly the parties are the following: Fidelity Guards Holding (Pty) Limited v Lebea, J N N.O. and Others. The first respondent is the commissioner who arbitrated in this matter and the second respondent is the Commission for Conciliation, Mediation and Arbitration which is a statutory body in terms of the Labour Relations Act, tasked with the duties to arbitrate and conciliate

labour disputes. And the third respondent is the employee of the applicant who brought the dispute between her and the applicant to the CCMA, the second respondent.

[2] On 3 August 1998 the first respondent issued the award in the following terms, amongst others that the

dismissal/..

dismissal of the third respondent for poor work performance on 31 October 1998 by the applicant was both substantially and procedurally unfair and the company was ordered to reinstate Miss Mashodi, the third respondent, on terms and conditions of employment not less favourable to her than those that would have applied to her had she not been unfairly dismissed and that the applicant was ordered to pay the third respondent an amount equivalent to eight months remuneration for the period which she has stayed without employment and that the reinstatement was to be effected within 14 days of the date of the award.

[3] This arbitration award was as a result of the arbitration proceedings which were conducted by the first respondent on 29 June 1998.

[4] A brief background in this matter is as follows: That respondent was employed by the applicant and at the time of her dismissal on 31 October 1998 was a site

supervisor and posted to one of the Holiday Inns in Johannesburg. She was employed by the applicant sometime in 1996 and at the time of her dismissal she was a supervisor earning a salary of R1 600,00 a month.

[5] According to the first respondent this matter was initially scheduled for arbitration on 11 February 1998 but due to non-attendance by applicant the matter was postponed sine die. The reasons why the applicant referred the matter to CCMA are the following. That after a disciplinary hearing in which she was charged with the following counts: Poor work performance and failure to carry out an instruction by the area manager

she/..

she was found guilty and dismissed. She then referred the matter for conciliation, to the Second Respondent.

Conciliation could not resolve the matter and then subsequently she requested an arbitration which was presided over by the first respondent as a commissioner

[6] On the date of the arbitration, 29 June 1996, the matter was heard before 11:00 midday but it had to be stood down until 13:45, the reason being that there was no appearance on behalf of the applicant. The first respondent phoned applicant and spoke to one Ms C Venter and subsequently one Matela, a supervisor employed by the applicant, was sent. According to the

founding affidavit filed by the applicant Matela was sent to explain the following to the first respondent:

1. That there was no one entrusted with the responsibility of dealing with arbitrations at the CCMA at applicant available;

2. that in any event, the applicant only became aware of the proceedings upon receiving the telephone call from the first respondent that there was arbitration that was supposed to be attended by the applicant; and

3. that therefore the applicant sought postponement so that it could prepare as well as to get the right person designated for that specific job to attend to the arbitration proceedings.

Those averments are placed in the form of an affidavit and could not be ascertained elsewhere.

[7]/..

[7] The first respondent, upon the arrival Matela, proceeded with the arbitration proceedings. Matela led evidence on behalf of the applicant and the third respondent led evidence on her own behalf. After the conclusion of the hearing first respondent reserved his decision and it was then released on 3 August 1998. It is this decision that is now the subject of this review.

[8] The grounds of review set out in the founding affidavit of the applicant are brief as follows:

1. He says the first respondent exceeded his powers and acted grossly irregular and male fide in proceedings in the face of strenuous application for postponement.

2. That the first respondent did not have regard to the evidence before him, alternatively that he selectively evaluated the evidence before him.

Now in the course of my judgment I will examine those grounds in detail.

[9] The applicant further raises the point but does not take it further on papers, it says it is not sure whether all the jurisdictional facts were complied with but it cannot take that any further because of some reasons which I will come to shortly.

[10] The standard for review by this court is now well settled by this the Labour Appeal Court in the case of Carephone (Pty) Ltd v Marcus N.O. and Others (1998) 11 BLLR 1093 and I make specific reference to page 1102 para 35 and 36.

"When/..

"When the Constitution require administrative action to be justifiable in relation to the reason given for it, it does seek to give expression to fundamental values

of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves which would be the effect if justifiability in the review process is equated to justness and correctness. In determining whether administrative action is justifiable in terms of the reasons given for it, the value judgment will have to be made which will almost inevitably involve the consideration on the merits in some way or another. As long as the judge determining this issue is aware that he or she enters the terrain not in order to substitute his or her own decision on the correctness thereof but to determine whether the outcome is rationally justifiable the process would be in order."

At page 1103B-C Froneman DJP goes on to say:

"It seems to me that one will never be able to formulate a more specific test other than in one way or another asking the questions is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at".

[11] In this case no record has been filed. Maybe I may deal with that briefly as follows. Where a party seeks to review the proceedings of a person or tribunal which is entrusted with the duty to form an

administrative

function/..

function, such a party has got the duty to ensure that there is a record of proceedings before court. Where such record is not available for any reason, it would be important and incumbent upon that party to reconstruct the evidence that was placed before a body or person whose decision is under review.

[12] I now revert back to the question of exceeding the powers or gross irregularity as set out in the applicant's founding affidavit. I may say at this stage that it would appear that fundamentally in this case the applicant take issue with the first respondent that he refused postponement in spite of the fact that first respondent was aware that there was no service on the applicant that there was arbitration proceedings taking place on that day, namely 29 June 1998. Further that first respondent was fully aware that the person that appeared before him was a junior employee who did not have with him the relevant file, who did not come to him prepared for that day, and lastly, who was not empowered by the applicant to conduct arbitration proceedings. This is manifestly so if one has regard to the founding affidavit filed on behalf of the applicant, in particular paragraph 7. It says in

7.1.1:

"It was at all times the contention of the applicant that it did not receive any notification of the arbitration date nor of the fact that this matter had been referred to arbitration."

[13] The applicant does not attempt in these proceedings to explain what steps were taken to reconstruct the record in/..

in the absence of the record and in the absence of this contention being recorded by the commissioner. Indeed, if this contention was justifiable on facts, it would be a serious consideration that this court will have to make. But I must say further that to the extent that the applicant contends that there was no service by the second respondent to it that there was an arbitration process taking place on 29 June 1998, on that point I find for the applicant, the reason being that in his explanatory affidavit Commissioner Lebea specifically attaches a fax result sheet which indicates that the notification was faxed. It is quite clear because he even mentions the time which correlates with this annexure that it was served on the third respondent. If that be the case that there was no proper service to the applicant, then applicant will of course be justified in not attending an arbitration process and

of course he would be further entitled to seek postponement on the grounds of not being ready, and therefore of being ill prepared. As such there would be no basis to hold that the applicant's non-attendance was mala fide. I accept that applicant is correct when it says it was not aware of the preceeding on this day [14] But the matter does not end there, it goes further. Once first respondent phoned applicant and spoke to Venter and the latter facilitated the presence of somebody in the name of Matela, the question now that warrants serious interrogation is whether did Matela put an application for postponement? Did the first respondent refuse an application for postponement on

the/

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the face of the facts which I have referred to?

According to the applicant, the first respondent insisted that the matter proceed and Matela present applicant's case and that Matela was of the view that he was compelled to do so and accordingly proceeded without any form of preparation or prior notification of the hearing and at a distinct disadvantage presented the applicant's case as instructed by the first respondent to do so.

[15] In his explanatory affidavit this is the following direct response by the first respondent.

"Mr Matela never made any application or request for postponement or adjournment of the proceedings. In this regard I find it strange why I would have refused an application for postponement whilst I have previously postponed the proceedings on 11 February 1998 without any such application or request having been made. Furthermore, on 29 June 1998 I stood down the proceedings from 11:00 until 13:45 waiting for the appearance by or on behalf of the applicant."

[16] There is no indication on record or on the papers filed before me that Matela made any attempts to phone the respondent or to ask the matter to stand down so that he can get instructions or that he ever indeed made the application as contended for. The reason why I am saying that is the following, that the applicant here is seeking a final relief and therefore it would be important to resolve that dispute of facts on paper as follows: In the oft quoted judgment by this court and

High/..

High Court is the case of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (A) at 634 in particular E-H. This judgment is followed in

National Union of Mineworkers v Free Gold Consolidated Gold Mine Operations Ltd, President Steyn Mine and Western Holdings (1998) 9 SALR 122. Zondo, J at page 142 para 66 has the following to say:

"As applicant is seeking final relief, the decision of the court must be based on the respondent's version of what happened if there is a dispute of fact between the versions of the parties unless the respondent's version is so untenable that a court would be justified in rejecting it on paper."

[17] For that reason I hold that I would decide that point on the respondent's version, that Matela did not put an application for postponement, that Matela did not make the allegation that he said he made namely that he advised the first respondent that he was not the right person to proceed; that he was not prepared to proceed on that day.

[18] It is true that if my finding was otherwise, this point alone would have serious consequences in this matter, in the sense that it would have constituted a ground for review as set out in the Carephone case. It would indeed be irregular for a commissioner or a body instead to have refused a postponement on the face of such facts. I therefore proceed on the basis that after Matela was advised to attend to the arbitration

proceedings he proceeded as if he was ready and presented the evidence as he did.

[19] The next point to consider therefore is the one which suggests that first respondent did not take into account and apply his mind properly to the evidence properly placed before him. The applicant for instance has set out in detail the step it took in counselling the third respondent but it does not suggest that, it had put before the first respondent the same evidence.

[20] Applicant further attacks First respondent on the following grounds: The first respondent was advised of the fact that the third respondent had a final written warning on file for poor performance. I cannot on the first respondent's written award find that that point was raised. The other ground is that the first respondent appears to have simply accepted the evidence of third respondent in preference to the evidence presented by Matela for no grounds or reason whatsoever. A further concern raised is that the first respondent finds in his arbitration award that dismissal for poor performance can be classified as no fault dismissal because it arises from circumstances for which it is not to blamed. Before I finalise my

concluding remarks here, I need to depart for a moment in one instance where it is said that the first respondent should have adjourned the proceedings to enable the applicant to present the necessary documentation. There is no evidence which can suggest that Matela sought postponement so that he could furnish documentary evidence and that such request was/...

was refused.

[21] Therefore this attack has no basis and falls to be rejected. The respondent did not make a factual finding or a statement of law that the third respondent's dismissal is a "no fault" dismissal. Instead this is what appears in his award, he says:

"The dismissal for incapacity or poor work performance has come to be accepted in our labour law as a no-fault dismissal because it arises from circumstances for which the employee is not to blame"

and in this regard he specifically says "see John Grogan in Workplace Law, 2nd ed. p134".

[22] As far as disregarding evidence properly placed before him the first respondent has given reasons for each and every conclusion he arrives at. In a review application the judge is not dealing with an appeal, the correctness of the decision in other words but he

is dealing with the process by which the person whose decision is being reviewed has arrived at his or her decision. It might well be that placed in the same situation as that person you may have arrived at a different conclusion but it is not your role to substitute your decision for his or hers unless the process through which the decision was arrived at is such that it does not pass the constitutional review mask.

[23] If one has consideration to the grounds set out in the notes/..

notes founding affidavit of the applicant, the first respondent is accused not only of failing to take into account evidence properly placed before me but also of failing to solicit enough evidence from the applicant's representative in the proceedings. There is no factual or legal basis to conclude that the first respondent did not apply his mind to the evidence properly placed before him. Secondly, there is no factual basis or justification advanced as to why respondent should have solicited the evidence which is alleged he did not solicit and if he had the rights to do so how far he should go. It is quite true that the Act enjoins commissioners appointed by CCMA to conduct arbitration

proceedings with less legal formalities but even that has got limits as to how far the commissioner can forego the legal formalities.

[24] I am aware that in this case if the applicant made a case as far as the postponement was concerned, my conclusion would be different to what I have arrived at. Other than that I have indicated that if applicant contends that there was evidence which is not reflected in the notes of the commissioner or in his award, it was up to the applicant to ensure that at least a copy of the record is before court. In the normal course of events where a party is reconstructing a record, he or she will compare the notes which he or she took during those proceedings and compare it with the notes of other interested parties who were present there. In this instance it would have made sense that after compiling the notes, if there were contemporaneous

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notes taken, he would ask for the notes of the commissioner, the first respondent in this case, which are readily available and from there construct a record. In the absence of that I cannot deal with the dispute of fact which is raised on these papers and which was not raised

before the commissioner. To illustrate this point, at page 11 of the applicant's founding affidavit for instance is set out what steps were taken to help the third respondent. It is said that the third respondent was in fact counselled, trained and given guidance over a period of more than four months. The third respondent was in all aspects assisted and trained in order to enable her to remedy her poor performance and prevent further action to be taken against her. That evidence might be coming for the first time to court, there is no justification in law to say this evidence was presented to the first respondent and that he did not note it.

[25] The other point raised by the applicant's papers is that the first respondent did not justify his award, namely the reinstatement and the compensation. I need only say that it is now settled how the commissioners should exercise their discretion in terms of section 193 and section 194 in the leading case of Johnson and Johnson. At paragraph 41 Froneman DJP had the following to say:

"The compensation for the wrong in failing to give effect to an employee's rights to a fair procedure is not based on patrimonial or actual loss, it is in the nature of a

solacium for the loss of the right and is punitive to the extent that an employer who breached the right must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress.The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in the same way or another."

He goes further to say that:

"The nature of an employee's right to compensation under section 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress".

[26] In my view the commissioner again has justified how he has arrived at the conclusion and for these reasons I have come to the conclusion that the applicant has failed to discharge that the decisions of the first respondent are reviewable and therefore the application falls to be dismissed with costs.

ACTING JUDGE NGWENYA

LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANT : ADV A J NEL

Instructed by	:	Snyman van der Heever Heyns
ON BEHALF OF 3RD RESPONDENT:	MR ALFREDPLAATJIE	
Instructed by	:	Hotelicca
DATE OF JUDGMENT	:	10 SEPTEMBER 1999