

Sneller Verbatim/CT

CASE NO. J1500/99

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2000-10-10

(10)

In the matter between:

A MDA

Applicant

and

CCMA

1st Respondent

2nd Respondent

L-MAP

3rd Respondent

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**J U D G M E N T**

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(20)

NGCAMU J:

1. In this matter the applicant was employed by the third respondent up until the date of dismissal on 26 June 1998. The charge that resulted in the dismissal of the applicant was the unauthorised use of funds. The dispute was referred to the first respondent for conciliation. The conciliation proceedings were conducted on 11 September 1998. During the conciliation an offer was made by the third respondent to make payment to the applicant of an amount equal to applicant's remuneration

(30)<sup>1</sup>

from the date of dismissal to the date of the conciliation. The offer was refused by the applicant and the dispute went to arbitration.

2. The second respondent conducted the arbitration proceedings on 16 February 1999. The award was handed down on 30 March 1999. The arbitrator found that the dismissal was substantively fair, but was procedurally unfair. The arbitrator made an award that applicant be compensated by payment of the nett amount payable by the third respondent from the date of dismissal to the date of the conciliation. The arbitrator held that the applicant had caused a delay by refusing to accept the offer during the conciliation.

3. The applicant now seeks to review and set aside the decision of the second respondent in that -

- (a) the arbitrator based his award on the information conveyed during the conciliation process, whereas the proceedings at the conciliation process are confidential and any offer is made without prejudice;
- (b) the arbitrator misinterpreted and/or wrongly applied the provisions of Section 184(1) of the Labour Relations Act.

4. The third respondent is opposing the review on the basis that the second respondent was correct in his award.

The following questions arise as a result of this review.

- (a) whether the reward is reviewable; and
- (b) whether the arbitrator is entitled to, in making a reward for compensation, to refer to the offer made during the conciliation;
- (c) if the proviso in Section 194(1) is applicable;
- (d) whether compensation should be the nett or gross value of the earnings.

5. The questions set out above arise because it has been submitted that the grounds for the review raised by the applicant are a matter of law and therefore this court has no jurisdiction to review the award.

6. In Pep Stores (Pty) Ltd vs Laka NO and Others 1998 9 BLLR 952 LC at 960 MLAMBO J said the following:

"I want to suggest that in addition to procedural defects, Section 145 gives the Labour Court the power to enquire whether the award in question is appropriate within the meaning of Section 138(9). The pre-occupation of the court in reviewing awards on this basis would be whether there has been a failure of justice. In time the labour court will have to establish when has justice failed. For purposes of this judgment I want to suggest that an award would be found to be inappropriate if it is shown that: (1) the commissioner ignored direct evidence placed before him, (2) the commissioner relied on evidence not placed before him, (3) the commissioner committed a serious error of law. Where it is shown that one or more or a combination of these factors is present, this court will review an award of the commission."

7. I fully agree with the sentiments expressed by MLAMBO J. The court cannot ignore serious omissions or commissions on the basis that those defects do not relate to misconduct or gross irregularity. The court has a duty to see to it that justice has been done.

8. The question is whether the second respondent's award stands to be reviewed. The argument presented on behalf of the applicant is that the second respondent referred to confidential discussions during the conciliation and made an error in the interpretation of Section 194(1). In my view the award can be reviewed if it results in the miscarriage of

justice. I therefore come to the conclusion that this court has jurisdiction to review the third respondent's award.

9. It was submitted by Mr Malan on behalf of the third respondent that the present review is based on the interpretation of Section 194(1). I reject this submission for the reasons stated herein.

10. The next question to be answered is whether the third respondent is entitled to refer to the offer made during conciliation. Mr Tucker for the applicant submitted that it is irregular for the commissioner to refer to the conciliation proceedings. Mr Malan did not make any submission regarding this point. When the commissioner made the award, he referred to the offer made during the conciliations and that influenced him in making the award and in making the compensation in terms of the provisions of Section 184(1).

11. It is well known that conciliation proceedings are private and confidential and conducted on a without prejudice basis and no party can refer to the statements made during the conciliation and subsequent proceedings. For this reason Section 135(4) prescribes who should attend the conciliation. At the conciliation the parties do not have the benefit of legal advice. In the circumstances I hold that the commissioner committed irregularity when he referred to the offer made during the conciliation for purposes of reaching settlement. Section 194(1) provides as follows:

"If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the

case may be, calculated at the employer's rate of remuneration on the date of dismissal. Compensation may, however, not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim"

12. In the present case it was accepted that the dispute was referred in time and there was no delay on the part of the applicant. In terms of Section 194(1) once the commissioner has decided to award compensation, he has to follow the procedure provided for in this section. The employee is, however, not entitled to compensation for a certain period if there was unreasonable delay by him in initiating or prosecuting a claim. The delays that the commissioner referred to was caused by the applicant not accepting a reasonable offer made at the conciliation. I have stated that the conciliation proceedings were private and confidential and no party can refer to such proceedings. The date of arbitration is not fixed by the applicant, but by the first respondent, and any delay in the arbitration proceedings in this case cannot be attributed to the applicant. However, on procedural unfairness, the employer can only avoid paying compensation by reinstating the employee. The proviso in section 194(1) is accordingly not applicable.

13. The award has to be reviewed on this ground. The commissioner, in deciding to award limited compensation, misinterpreted the purpose of the conciliation. In so doing he made use of "without prejudice" offer. When the commissioner calculated the award, he limited the compensation to the nett remuneration for the period between 16 June 1998 and 11 September 1998. Applicant was denied compensation for the period between 11 September 1998 to 16 February 1999. He then came to a figure of R23 229,10. The word remuneration is not found in the Act, but

counsel for the parties correctly accepted that it refers to all the benefits the employee receives.

14. It is not clear how the commissioner arrived at the figure of R23 229,10 as nett income. The total remuneration of the applicant according to the payslip dated May 1998 is R18 128,46 made up as follows. Basic salary: R11 085; housing allowance R334; travel less 40% tax R4 900,08; annuity R1 423,13; group life R86,26. Gross pay amounts to R18 128,46. The total deductions amounted to R9 291,64, leaving a nett salary of R8 832,52.

15. The third respondent in his affidavit stated that the applicant earned a nett salary of R7 743,03 per month. And if you multiply this figure by three months, you get R23 239,09. This figure is less than the nett remuneration as contained in the payslip if you multiply R8 836,82 by three.

16. Whatever the position, the commissioner is not entitled to award only the nett remuneration. The monthly remuneration of the applicant at the time of the dismissal is R18 128,46. I have stated that the commissioner committed an irregularity which nullifies this award when he referred to the without prejudice discussion. I have said that the calculation of the compensation is based on the gross remuneration and not the nett. The applicant is entitled to the full compensation. In terms of Section 194(1) of the Labour Relations Act.

17. The order therefore is as follows: The arbitration award is hereby reviewed and set aside. The court determines the dispute in terms of Section 145(4)(a) in the following terms. The third respondent is

directed to pay the applicant gross remuneration for the period 26 June 1998 to 16 February 1999 subject to the tax directives by the South African Receiver of Revenue less the amount already paid to the applicant. The third respondent to pay costs of this application.

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APPEARING ON BEHALF OF APPLICANT: Mr R J Tucker

APPEARING ON BEHALF OF RESPONDENT: Mr G F Malan