REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN) CASE NO: C284/99

DATE: 10-3-2000

In the matter between:

HEALTH & HYGIENE (PTY) LTD **APPLICANT**

and

YAWA M, N.O. **FIRST RESPONDENT**

COMMISSION FOR CONCILIATION, **SECOND RESPONDENT**

MEDIATION AND ARBITRATION

SUSAN OLIPHANT **THIRD RESPONDENT**

J U D G M E N T

WALLIS,AJ:

The third respondent, Susan Oliphant, was formerly employed by the applicant, Health & Hygiene (Pty) Ltd., which trades as Control Specialised Cleaning.

The history of that employment is not dealt with in the papers before me prior to 3 February 1998. On that date an agreement was concluded between Ms Oliphant's trade union acting on her behalf and the employer at proceedings before a Commissioner appointed by the CCMA for the purpose of conciliating a dispute. I infer from the terms of the agreement that the dispute concerned Ms Oliphant's dismissal. The agreement reads as follows:

"The employer to reinstate Susan Oliphant at the same salary. She would be placed at Claremont (Woolworths) branch with effect from 4 February 1998. This offer is without prejudice (the employer to pay whatever is due to the employee)."

On reporting for duty on 4 February 1998, Ms Oliphant was suspended and given notice that a disciplinary hearing would take place at 8am on 9 February 1998 at Woolworths in Claremont. Various complaints relating to the inaccurate completion of time schedules, suspected dishonesty and unreliable reporting and

inability to follow company rules and regulations were said to form the basis of the enquiry.

On 9 February 1998 a disciplinary enquiry was apparently convened in a coffee shop in Cape Town. The enquiry was chaired by Mr Labuschagne and present on behalf of the employer was Mr De Bruyn. The undisputed evidence before me concerning what happened at that enquiry appears from the affidavit of Ms Oliphant. What she said is as follows:-

The employer party dismissed me in that :

19.1 it held the disciplinary enquiry in a coffee shop, a public place with no privacy whatsoever;

19.2 as the hearing proceeded, the complainant De Bruyn kept on telling the Chairman of the enquiry Labuschagne what to do and that he must not listen to me;

19.3 when I questioned De Bruyn's conduct, De Bruyn answered that Labuschagne did not fully understand disciplinary hearings;

19.4 I felt embarrassed and frustrated by the way the hearing was conducted and the fact that it was conducted in a coffee shop where members of the public and the employees of the coffee shop were watching;

19.5 I could not continue with people like that;

19.6 De Bruyn gave me a pen and paper and told me to put her statement in writing;

19.7 De Bruyn pressurised me to resign and told me what to write in me (sic) resignation letter;

19.8 I never intended to resign but for the pressure exercised on me by Dr Bruyn and the way the hearing was conducted

Nowhere in the papers before me is any evidence directed at challenging that version of what occurred on the day of the enquiry.

What is common cause between the parties is that at the expiry of these proceedings in the coffee shop, a piece of paper was produced and the following was written on it:

"Ek Susan Oliphant bedank by Controlled Specialised Cleaning."

Then follows the signature of Ms Oliphant and the document is dated (apparently erroneously) 8 February 1998. It is not disputed that the trade union to which Ms Oliphant belonged then referred a dispute to the CCMA claiming that she had been unfairly dismissed. That dispute was referred for conciliation on 16 February 1998 and a certificate that it was not resolved by way of conciliation was issued on 19 March 1998.

Thereafter, the dispute was referred for arbitration in terms of the relevant provisions of the Labour Relations Act. The Commissioner appointed to hear the arbitration was Mr Mzie Yawa. A date for the arbitration was allocated being 4 June 1998. A notice of set-down was issued by the case management officer on 7 May 1998 and it was telefaxed to both the trade union and the employer.

On 4 June 1998 when the arbitration was convened, there was no appearance on behalf of the employer. The explanation for this in the papers before me is as follows. There is uncertainty as to what happened to the telefaxed communication of the notice of set-down. Whilst the report in the file of the CCMA reflects that the notice was properly sent and received, the applicant says that it did not come to the attention of the appropriate people in its organisation. There is no express denial of receipt but apparently it is suggested that one of two situations arose. It is said that either the notice of set-down was not received, or, if it was received, it was not directed through the proper channels within the applicant's organisation so that it found its way to the right person to deal with it.

The applicant was aware that an arbitration was pending and had apparently made enquiries at the CCMA some days before the hearing as to the question of whether a date for hearing had been allocated. The information given at that stage was that no such date had yet been allocated in accordance with CCMA procedures.

On 4 June the Arbitrator waited for about one hour for the employer to turn up. When nothing happened the Arbitrator sought to contact the employer telephonically and spoke to some representative of the employer. It appears from the affidavits filed by Mr De Bruyn that this person was Mr De Bruyn. The Commissioner is adamant that this conversation took place with someone in Cape Town. Although that is recorded in both arbitration awards which were eventually made, it is not dealt with specifically in any affidavit filed on behalf of the applicant. I must, therefore, take it that it is not disputed that on the day in question the Commissioner was able to communicate with the employer's representative in Cape Town.

In terms of the judgment of the Labour Appeal Court in Carephone (Pty) Ltd v Markus N.O. & Others 1998(11) BLLR 1093 LAC para 52 at 1106 the proper approach to these issues is that the factual statements by the Commissioner must be accepted as correct in the absence of any application for oral evidence to be heard on disputed issues properly raised on the affidavit.

Whilst Mr Snyman initially challenged that approach, I did not understand him to persist in that challenge. It is hardly surprising that he would not do so, bearing in mind that there is also undisputed evidence on the

application papers that at the relevant time in June 1998, the employer had an office in Cape Town and Mr De Bruyn was contactable, according to the document which appears at page 51 of the application papers, at a pager which had a Cape Town telephone number.

It is common cause that after the conversation between the Commissioner and Mr De Bruyn, Mr De Bruyn contacted a Mr Raubenheimer in Johannesburg, who is the representative of a body describing itself as the "National Employers' Forum" which is apparently registered as an employers' organisation in terms of section 96(7)(a) of the Labour Relations Act. Apparently Mr Raubenheimer had been dealing with this matter on behalf of the employer and that is the reason why he was contacted by Mr De Bruyn. According to Mr Raubenheimer he contacted a Mr Jabu at the CCMA at about 10:50am on 4 June 1998. I assume that this is in fact a reference to Mr Yawa, the Commissioner who records such a conversation at that time and that the letter reflecting the name "Jabu" arose from a mishearing of the Commissioner's name in the course of a telephone discussion.

It is agreed on the papers that Mr Raubenheimer asked the Commissioner to postpone the case further. The reason for that was that he was in Johannesburg and was the person dealing with the application on behalf of the applicant. For obvious reasons it would not have been possible for him to attend arbitration proceedings in Cape Town on that day. No suggestion appears to have been made as to when the arbitration should be adjourned to, or how long the postponement should be. Following upon this conversation, Mr Raubenheimer addressed a letter to the CCMA reiterating the request for a postponement.

The only other issue of fact at this stage of the proceedings is as to what Mr Raubenheimer said or did not say to the Commissioner. The Commissioner records in his award at page 44 of the papers the following: that after he had spoken to Mr Raubenheimer and indicated to him that the matter would not be further postponed, Mr Raubenheimer threatened that in that event he would instruct his member not to attend the hearing. An affidavit to similar effect has been filed on behalf of Ms Oliphant's trade union by Mr Mike Tsotetse, the general secretary of the union. Nowhere in the affidavits is there any endeavour to refute those statements from the side of the applicant.

In reply, Mr Snyman recognised that this was so and accepted the possibility that Mr Raubenheimer might have told the Commissioner that in the circumstances he would advise the applicant not to attend, but he contended that there was no evidence that he had in fact carried out that threat. It is, however, common cause that nobody on behalf of the applicant thereafter attended the arbitration.

It is clear from the arbitration award that the Arbitrator considered what he should do in those

circumstances. He records that at the initial telephone conversation with Mr De Bruyn he had been asked to stand the matter down until 11 o'clock to enable someone from the employer to arrive at the hearing. It is not clear what the applicant's response to that is. In paragraph 7.6 of the founding affidavit it is said that the applicant never "promised" to attend the arbitration. That, however, hardly meets the statement by the Arbitrator which is to the effect that the initial application that the matter stand down was to enable a representative of the employer to appear.

Having considered these factors, the Commissioner decided to proceed with the arbitration in terms of section 138(5)(b) of the Labour Relations Act. His reasons for doing so were the following. Firstly, proper notice of set-down had been given approximately one month earlier. Secondly, the employer had a representative in Cape Town who had been informed on the very morning of the fact that the arbitration was proceeding and, who, putting it in the negative, had not indicated that he could not be present. Thirdly, he had had discussions with the employer's representative and in effect a threat had been made that if he would not grant a postponement the employer would, in any event, not attend the hearing.

In refusing the postponement, the Commissioner no doubt had in mind what was said in this regard in the Carephone case in paragraphs 54 and 55 of the judgment:

. In a court of law the granting of an application for postponement is not a matter of right, it is an indulgence granted by the Court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised.

There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with the dispute fairly and quickly (section 138(1)). Secondly, it must be done with 'the minimum of legal formalities' (section 138(1)). Thirdly, the possibility of making costs orders to counter-prejudice in good faith postponement applications is severely restricted (section 138(10))."

Having declined to grant a postponement, the Commissioner proceeded to hear evidence and to dispose of the arbitration. He came to the conclusion that the "resignation" was not a genuine exercise of free will by Ms Oliphant. His view was that in the circumstances which she described of being embarrassed and frustrated by the manner in which the hearing was being conducted and the fact that it was being done in a coffee shop in the presence of members of the public and employees, was such as to render her position intolerable and unacceptable. It was in those circumstances that she signed the statement which I have quoted earlier.

Having found that the termination was a constructive dismissal and was unfair, the Arbitrator decided that reinstatement would be inappropriate. He accordingly ordered the employer to pay Ms Oliphant an equivalent of 12 months' remuneration and to make such payment within seven days from the date of the award.

After this award had been handed down, which occurred on 8 June, an application was made on 6 November 1998 for the rescission of that award. It was supported by an affidavit by Mr De Bruyn which was ultimately signed on 24 March 1999. That application was opposed and disposed of by Mr Yawa by way of a further award dated 25 May 1999. In that further award he records that the application for rescission is based upon section 144(a) of the Labour Relations Act which permits a Commissioner to rescind an arbitration award erroneously sought or erroneously made in the absence of any party affected by the award. Mr Yawa's conclusion was that the award had not been erroneously sought or erroneously made and in those circumstances he refused the application for rescission. It is in the light of that history that the present application falls to be considered.

On 12 July 1999 an application was filed with this Court in which an order was sought claiming that both of the two arbitration awards to which I have referred be reviewed and set aside. In addition, it was claimed that I should exercise the powers conferred upon me by section 145(4)(a) of the Labour Relations Act to order the rescission of the first award and to direct that the dispute be set down for arbitration hearing before a Commissioner appointed by the CCMA for that purpose. It is that application which has come before me today.

Although the prayer for relief is a prayer that both arbitration awards be reviewed and set aside, that is not quite how the application should be construed. The primary argument by Mr Snyman, on behalf of the applicant, is that the Commissioner's second award dated 25 May 1999 in which he refused the application for rescission, should be reviewed and set aside. If that prayer for relief succeeds it is then that an order is sought under section 145(4)(a) of the LRA rescinding the earlier award and referring the matter back to the CCMA. In the alternative, and if the later arbitration award cannot be successfully reviewed, Mr Snyman sought the review and setting aside of the original award. I will deal with the matter in that order.

Mr Snyman advanced various criticisms of the reasoning of the Commissioner in making the award in terms of which he refused to set aside and rescind the original award. Central to that refusal was his finding:

"That none of the arguments advanced by the employer render the award in question erroneously sought or granted."

Section 144(a) is the only possible provision of the Act under which the Commissioner was entitled to act. The expression "erroneously sought or erroneously made in the absence of any party affected by the award" is derived directly from the provisions of Rule 42(1)(a) of the Rules of the High Court. Indeed, the whole of section 144 is taken from that Rule. Rule 42(1)(a) provides that:

"The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

In regard to that Rule the authors of Erasmus Superior Court Practice page B1-308 say the following:

"An order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made such an order or if there existed at the time of its issue a fact of which the Judge was unaware which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment. Though in most cases such an error would be apparent on the record of the proceedings, it is submitted that in deciding whether a judgment was erroneously granted, a Court is not confined to the record of the proceedings. Judgments have been rescinded under this sub-Rule where the capital claimed had already been paid by the defendant; where the summons had not been served on the respondent; where counsel for the applicant in an ex parte application had led the Court mistakenly to believe that the respondent had deliberately decided not to consult his attorney or to appear at the hearing; where a final order had been granted in an ex parte application which had not been served on the respondent whose rights were affected by the order; where parties had not been represented at an application for leave to appeal because they had no knowledge of the set-down of the application. Rescission was refused where the applicant had failed to notify the Registrar of Companies of a change of address and a summons had been served in accordance with the Rules that the office properly notified to the Registrar as the applicant's registered head office. The Courts have also consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney."

I am firmly of the opinion, in accordance with well-established principles of interpretation, that where the legislature in a statute takes over wording from another source, be it another statute or the Rules of Court, and reproduces them in the same form, it is the intention of the legislature that they be given the same meaning as they have in the original source, subject to any changes required by the context. I can see no changes which are required by the context in this case. In the circumstances it seems to me that the approach taken to the equivalent Rule in the High Court is the correct approach to adopt to section 144(a) of the Labour Relations Act.

On that approach the problem confronting the applicant is to identify the error which gave rise to the Commissioner granting his original award. There was no error of fact. He was aware, because he had been apprised of the fact, that the applicant contended that it had been unaware until that morning of the fact that

the arbitration proceedings were due to proceed that day. He was aware of that because it was he who had conveyed that information to the applicant at approximately 10 o'clock in the morning. He was aware that the applicant's representative was in Johannesburg and manifestly was not available to appear at the arbitration that day. There is no fact which he is said to have overlooked. There is no matter which, had he known it, would have caused him to act any differently. In those circumstances I am unable to see on what basis it can be contended that the original award was erroneously sought or erroneously made.

Mr Snyman submitted that the error lay in the decision which the Commissioner made in regard to the question of postponement. That is not, however, an error of the type contemplated by section 144. If the Arbitrator's approach was erroneous in that regard, then it was an erroneous decision in the conduct of the proceedings. If it was to be challenged it had to be challenged in terms of the provisions of section 145 of the Labour Relations Act on the grounds that the Arbitrator either misconducted himself or perpetrated a gross irregularity in the conduct of the proceedings. Neither of those courses was followed.

In the course of argument Mr Snyman referred me to a judgment, apparently handed down by Landman, J, in the matter of Burger v Louw dealing with an application for rescission. Unfortunately he was not able to furnish me with a copy of that judgment but I have listened carefully to his description of the circumstances giving rise thereto. From that description, it seems to me, that the facts of that matter are materially different from the facts of the present case and therefore that there is nothing in that judgment which would contradict the conclusions which I have reached in this case.

It follows from that view that far from having committed reviewable error in refusing the application for rescission, the Commissioner was quite correct in saying that none of the arguments advanced by the employer rendered the award in question one which had been erroneously sought or erroneously granted. In those circumstances, his decision to refuse the application for rescission is manifestly correct and cannot be set aside by this Court.

That brings me to the alternative ground upon which this application is based. It is an endeavour at this stage to review the original award. That immediately gives rise to the problem that considerably more than the statutory period of six weeks in terms of section 145(1)(a) of the Labour Relations Act had elapsed prior to the commencement of these proceedings since the original award was made. In those circumstances an application for condonation was essential. No such application was, however, made. In argument Mr Snyman made such an application informally from the Bar on the following basis. He contended that his client had taken the course, which I have described in detail above, on the advice of its attorneys. He submitted that the advice was bona fide and reasonably arguable. In those circumstances where the Court

has now held that the advice was wrong, he submitted that his client should not be penalised in consequence of that erroneous advice and accordingly its failure to bring the requisite review proceedings in regard to the original award, should be condoned.

It is true that in general the client should not be penalised for errors by its lawyers. However, I confess that I have some difficulty with the proposition that the advice to bring rescission proceedings can properly be described as "reasonably arguable". As I have said, the language of section 144 is familiar to any qualified lawyer because it has its source in the Rules of the High Court. There is similar language to be found in the Rules of the Magistrates' Court, but it is the High Court Rules which provide the source for section 144. I have not checked this, but I would assume that standard textbooks on the procedures of this Court would identify that correlation. In any event, I find it hard to believe that such advice could have been given, without considering the cases dealing with Rule 42. I think it clear that any reading of those cases would necessarily drive the reader to the conclusion that the type of error referred to in section 144(a) does not include an error in the actual decision itself.

Be that as it may, there is another aspect to the application for condonation. It is, that it is necessary in order for condonation to be granted, for the applicant to persuade me that if it is granted there are reasonable prospects of success in having the original award set aside on review. That, in turn, would mean that there would have to be reasonable prospects of success of obtaining a different award from a Commissioner if the matter was sent back to the CCMA.

I am not persuaded that there are any such reasonable prospects of success. Earlier in this judgment I have set out the circumstances in which Ms Oliphant's employment came to be terminated. I agree with Mr Snyman that it is essential for an applicant claiming unfair dismissal, to show that there was a dismissal. However, Ms Oliphant's version is not challenged and it appears improbable that any serious challenge could be raised to her contention that she was brought before a disciplinary enquiry, in a public place, in the presence of strangers, in circumstances which constituted a gross invasion of her privacy and a gross infringement of her personal dignity. Her statements that this was distressing to her in the extreme, seem to me, overwhelmingly probable. I leave aside the fact that her distress became manifest in the course of the proceedings before this Court when that disciplinary enquiry was discussed in the course of argument.

Not only does Ms Oliphant make these claims, which seem to me overwhelmingly probable, there is no challenge to them. In those circumstances I have grave difficulty in thinking that any reasonable Commissioner would come to the conclusion that her writing out the "resignation" at the end of a disciplinary enquiry held in the circumstances she has described, where she had been told that she was

guilty of dishonesty and that the sanction would be dismissal without notice, constituted a truly voluntary act. One only has to think of the approach which Courts have taken to the voluntariness of confessions to realise that the explicit and implicit pressures imposed upon a person in that situation are such as to deprive the person of free will. Once that conclusion is reached, then there is no prospect in referring the matter back of a Commissioner making a different award. Mr Snyman fairly conceded, after some brief argument to the contrary, that it was inevitable that a Commissioner would hold that a disciplinary enquiry held in these circumstances was procedurally unfair.

In those circumstances the Commissioner would be bound in terms of section 194(1) of the Labour Relations Act to make an award of compensation which would be equivalent to 12 months' remuneration. Only if the Commissioner felt that there should be no compensation at all could any other award be made and this is manifestly not a case where a reasonable Commissioner could come to that conclusion.

The third and last aspect of an application for condonation is the question of the impact of granting that application on the other party. It is for the applicant for condonation to show that the other party will not be prejudiced if such condonation is granted. I am unable to conceive that Ms Oliphant would not be prejudiced by granting condonation, reviewing and setting aside the arbitration award and throwing back into the melting-pot of proceedings before the CCMA, a dispute of such long standing. The position is that her employment was terminated in February 1998 and she obtained an award in her favour for compensation in June of that year. I infer that she has received nothing as a result of that. The suggestion that sitting here 20 months later she would not be prejudiced were the whole process to commence again, seems to me, untenable. Certainly no evidence has been proffered on behalf of the applicant to suggest that this is the case.

On all three aspects of an application for condonation, therefore, it seems to me that the applicant has failed on these papers to make out a proper case. Mr Snyman accepted that there was nothing more that could be said than what is already on the papers, supplemented by the proposition that the erroneous procedure was adopted in consequence of legal advice. In those circumstances this is not a proper case to grant condonation.

That conclusion disposes of the application which is in its entirety dismissed with costs.

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WALLIS AJ