JUDGMENT

Sneller Verbatim/HDJ CASE NO. J1939/99

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

2000-09-01

In the matter between:

Applicants

and

CCMA AND OTHERS Respondent

J U D G M E N T

PILLAY AJ:

1. This is a review of an arbitration reward issued by the second respondent. The background to the dispute was that Mr Minnaar, an employee of the third respondent, had come on duty on the evening in question. He had been informed by the foreman who had been on duty before him, that he (the foreman) had left a welding machine next to a preheater. When Mr Minnaar went to inspect the welding machine he found that it was not at the preheater. He continued his inspection of the plant and found the welding machine at or near the spinner.

2. He subsequently observed the second applicant driving a fork lift which had been loaded with the welding machine. About fifty metres away a bakkie was parked outside the perimeter fence or wall. These facts, which were not in dispute, led to the second applicant being charged with the unauthorised possession of company property. He was dismissed. The

second respondent, the commissioner confirmed the dismissal at the arbitration.

3.The ground on which it was submitted that the award was reviewable was that the second respondent had committed a gross irregularity by (a) entering the arena and aggressively cross-examining the second applicant; and (b) by failing to take material evidence into account and by making findings in regard to evidence which was not led.

4.The court was referred to parts of the record of the arbitration. It was submitted that the second respondent descended into the arena by interrogating the second applicant about where the welding machine was and why it was there.

5.Mr Minnaar had marked as "A" the position of the preheater where he was told he would find the welding machine. It was put to Mr Minnaar under cross-examination that the second applicant had moved the welding machine from the preheater, that is, from point A to point B, for safety reasons. Mr Minnaar disputed this by saying that point B was more dangerous. This evidence had not been challenged.

6.By posing the questions that she did, the second respondent was clarifying as she was duly bound to do, where on the plan that was apparently being used at the arbitration, did the second applicant find the welding machine. As it transpired, he confirmed that it was at point B and that he had moved it to point C.

7.The second applicant’s reason for moving the machine, was that the welding machine was near the conveyor where waste, that is fine coal, was being

removed and the welding machine could have been damaged.

8. When the second respondent expressed doubts about the second applicant's version, the applicants' representatives explained that the issue was not whether the welding machine would have been damaged or not if it had not been moved, but whether the second applicant "perceived" that it would have been damaged. The second applicant had also testified that he did not take the welding machine to the workshop as he should have done because it would have taken him too long to go there and get back to work at the furnace. These explanations appeared to be artificial and improbable. The second respondent was entitled to probe the second applicant.

9. It would have been remiss of the second respondent not to have asked the questions that she did. She had a duty to express her reservations about the credibility of the second applicant and his version and to give the parties an opportunity to clarify the issues for her. If in so doing the applicants perceived her to be biased, then such perception cannot be reasonable in the circumstances. The second respondent was merely trying to do her duty by ensuring that she understood the evidence.

10. It is required of commissioners to conduct arbitrations under the auspices of the CCMA "in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly with the minimum of legal formalities". Section 138(1) anticipates that a degree of robustness will be tolerated. Consequently, whether a commissioner has regard to submissions from the bar as opposed to evidence, will depend on the materiality of the submissions to the case as a whole and whether they are disputed.

11. In this case it was submitted for the applicants that the second respondent's conclusion that the "disciplinary and appeal hearings were held according to company procedure and he was dismissed for alleged possession of company property", was not based on any evidence led by the parties, but upon a statement from the bar. In the absence of any evidence or submission to the contrary the second respondent was entitled to come to this conclusion. The second respondent did not consider the submission to be sufficiently serious in the circumstances of this case to warrant it being treated more formally. The acceptance of submissions from the bar in these circumstances does not vitiate the award.

12. The second respondent's rejection of the second applicant's evidence was not based only on a statement from the bar, but on the evidence of Mr Minnaar. The second applicant had not advanced a defence that was reasonably probably true. Nothing from the record of the arbitration proceedings suggest that the second respondent disregarded any evidence that supported the second applicant's case.

13. The fact that co-employee Khuta was not charged is irrelevant to deciding whether the second applicant had committed the offence. On the contrary, the second respondent would have been entitled to draw an inference adverse to the second applicant because of his failure to call Khuta as a witness if he was available.

14. The second respondent's conduct of the proceedings was in the circumstances consistent with the provisions of section 138(1) and (2) of the Act. The reasons for her findings and her conclusions of facts

justify the outcome.

15.The application is dismissed with costs.

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Pillay J

APPEARANCES IN CASE J1939/99

For the Applicants	:	Adv G I Hulley
For the Respondents	:	Adv M J van As