

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not reportable

Case No: D484/10

In the matter between:

EMPILWENI MANAGEMENT

SOLUTIONS CC

1st Applicant

And

THE COMMISSION FOR MEDIATION

ARBITRATION AND CONCILIATION

1ST Respondent

COMMISSIONER SUGEN REDDY

2ND Respondent

KIRUBAN NAIDOO

3rd Respondent

Date of hearing: 7 June 2011.

Date of Judgment: 29 June 2011.

JUDGMENT

GUSH J

1. In this matter the applicant applies to have the award of the second respondent reviewed and set aside and substituted with an order dismissing the third respondent's referral alternatively referring the matter back to the first respondent to be arbitrated afresh by a commissioner other than the second respondent.

2. In his award the second respondent held that the dismissal by the applicant of the third respondent was both procedurally and substantively unfair and ordered the applicant to pay the third respondent an amount of R69,836.00.
3. The third respondent was represented by an attorney at the arbitration and the applicant by its human resources manager.
4. At the commencement of the arbitration the second respondent recorded that he was required firstly to determine whether the applicant was dismissed and if so whether the dismissal was unfair. It is clear from the record that the applicant through its representative at the arbitration disputed that the third respondent had been dismissed.
5. After inviting the parties to make opening statements the record reflects that the second respondent asked the question: “*The Issues in dispute?*” To which question the third respondent’s attorney replied: “*whether there was a dismissal*”. The second respondent then confirmed this by recording “*whether there was a dismissal, if so, when the same was unfair, procedurally and substantively, right, okay. We won’t go into this in detail; I’d rather hear more evidence on that.*”¹ (My emphasis).
6. The third respondent’s attorney confirmed that the onus was on the third respondent to establish the dismissal, and that third respondent would so and in so far as he was able to lead evidence on all issues and that applicant may wish to establish that the dismissal was fair “*if a dismissal is established*”.²

¹ Record page 84 lines 15 – 19.

² Record page 85/6 lines 21 - 04

7. The third respondent proceeded to give evidence and was cross examined by the applicant's representative. At the conclusion of the cross examination, before the third respondents attorney was given the opportunity to re-examine the third respondent the following exchange took place between the second respondent and the applicant's representative (Swanepoel).

“COMMISSIONER: Are you giving evidence?

MS SWANEPOEL: I will hand in that, I'll call them to send through the order, to deliver the order.

COMMISSIONER:Someone's going to have to give evidence as to, I am not just going ...

MS SWANEPOEL: Rina is, her husband is being retrenched socially accepted the position in Johannesburg so she is no longer with Empilweni, they've (inaudible) so I can't bring her in.

COMMISSIONER:okay, but you are with the HR, who represented people at, you know that I've got to, I'm not going to accept ...

MS SWANEPOEL: I will submit ...

COMMISSIONER:... Documents...

MS SWANEPOEL: I will submit the order that the client has given us on which you must invoice Kiruban, which states that there is no dates. I will get (inaudible).

COMMISSIONER:okay, we'll deal with that when we get to it. But just remember that I'm not going to accept any hearsay evidence.”³ (My emphasis).

8. At the end of this exchange the second respondent invited the applicant's representative to proceed with her cross examination. The applicant's representative indicated that she had no further cross examination and the

³ Record page 123/124 lines 12 – 03.

third respondent's attorney was invited to re-examine. He declined and indicated that he was closing his case. In response the second respondent adjourned proceedings. That concluded the arbitration. There is no record of the second respondent inviting the applicant's representative to lead evidence on the fairness or otherwise of the dismissal. This is particularly startling given his earlier insistence on hearing evidence or any indication from the second respondent of the consequences of a failure to lead evidence. The second respondent gave no indication whatsoever that he had concluded that there was a dismissal and that it was in the circumstances incumbent upon the applicant to prove that the dismissal was fair.

9. It is clear from the record and the award that at no stage did the second respondent invite the applicant to adduce any evidence regarding the fairness or otherwise of the dismissal. Under the heading background the second respondent discusses submissions made by the applicant's representative in her opening statement. Under the heading "evidence" he considers only the evidence lead by the third respondent and makes no reference to any evidence for the applicant. Likewise his assessment of the evidence is confined only to that of the third respondent.
10. Section 192 of the Labour Relations Act⁴ provides:
 - (1) *In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*
 - (2) *If the existence of the dismissal is established, the employer must prove that the dismissal is fair.*
11. Our courts on a number of occasions and held that there is a duty on an arbitrator to assist parties who are not represented in arbitration. This is

⁴ No 66 of 1995.

particularly so where the third respondent was legally represented. I am of the view that the matter was sufficiently complicated for the second respondent to have at least explained to the applicant's representative the niceties of the onus set out in section 192, or suggested to the applicant's representative that she seek legal advice. Conspicuous by its absence is any reference in the record to the application of rule 25(3)(c) of the Rules of the first respondent in the light of the fact that the dispute involved the fairness of a dismissal.

12. The only inference that can be drawn from the record is that the second respondent on a number of occasions unequivocally indicated to the applicant's representative that he required her to lead evidence, but inexplicably at the conclusion of the re-examination and closing of the respondent's case the second respondent simply adjourned proceedings and handed down his award without expressly giving the applicant's representative an opportunity to do so. It is surprising that the second respondent's failure to give the applicant's representative an opportunity to lead evidence was not pointed out to him by the third respondents attorney and that the matter was simply left to peter out after the third respondent insisted on seeing the original contract and the matter was adjourned.
13. I am satisfied that the second respondent committed a gross irregularity in the conduct of the proceedings by despite advising the applicant's representative that he required her to lead evidence did not specifically give her an opportunity to adduce evidence, but simply adjourned the matter and handed down an award without inviting the applicant to lead evidence to rebut the onus in section 192 (2) at the conclusion of the third respondent's case.

14. It is so that the applicant's notice of motion, founding and replying affidavits do not succinctly set out these facts as grounds of review. However the applicant's main ground of appeal is that the conduct of the second respondent in failing to advise her that in the light of the third respondent being legally represented that she should consider obtaining legal representation, is in the circumstances the effective cause of the irregularity.
15. I am satisfied in the circumstances, particularly the fact that nowhere in the record does it reflect that the second respondent explained the shift in the onus where it is disputed that the employee was dismissed and his subsequent conduct as set out above, that the award of the second respondent should be reviewed and set aside.
16. In the absence, however, of any evidence from the applicant regarding the fairness or otherwise of the dismissal the court has no option but to refer the matter back to the first respondent to be heard afresh.
17. In the particular circumstances of this matter fairness dictates that there should no order as to costs.
18. I accordingly make the following order:
 - 18.1. The award of the second respondent in CCMA case number KNDB682-10 is reviewed and set aside and referred back to the first respondent to be heard afresh before a commissioner other than the second respondent;
 - 18.2. There is no order as to costs.

GUSH J

Appearances:

For the Applicant: Adv P J Wallis; Instructed by Deneys Reitz
Attorneys

For the 3rd Respondent: Mr R B Donnachie; Henwood Britter and
Caney Attorneys.

LABOUR COURT