

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J 1612/00

In the matter between:

Applicant

and

First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION

Second Respondent

Third Respondent

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REASONS FOR JUDGMENT

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FRANCIS AJ

1. On the 19<sup>th</sup> April 2001 after I had heard arguments in this application, I made the following order:

(a) The arbitration award of the first respondent made on the 3rd March 2000 under

CCMA case number GA 66329, is hereby reviewed and set aside;

(b) The dispute is referred back to the second respondent to be heard by another

commissioner other than the first respondent;

(c) The first and second respondents are directed jointly and severally to pay the costs of this application on an attorney and client scale.

2. These are my reasons for that order.

3. The applicant seeks the review and setting aside of an award by first respondent (“the arbitrator”) dated 3<sup>rd</sup> March 2000. The arbitrator found that the applicant had constructively dismissed its employee, the third respondent

(“Maluleke”). He ordered the applicant to reinstate Maluleke from 1 April 2000 and to pay him compensation equivalent to his loss of earnings during the period between the date of dismissal and the last day of the arbitration hearing.

4.The basis of the review application relates to the arbitrator’s conduct during the arbitration proceedings, which applicant contended amounted to misconduct or a gross irregularity at the proceedings such that it was denied a full and fair hearing.

5.Both the arbitrator and the second respondent (“the Commission”) have failed to provide the Registrar of this Court with a record of the arbitration proceedings. The applicant attempted to reconstruct the record but was unable to do so.

6.At the commencement of the arbitration proceedings, the arbitrator informed the parties that they would be entitled to present their case, call witnesses, ask questions and submit closing arguments. He promised the parties that he would adopt an adversarial rather than an inquisitorial procedure when conducting the arbitration.

7.The applicant contended that during the arbitration proceedings, the arbitrator prevented the applicant’s representative from introducing the applicant’s case and outlining its nature; prevented the applicant from adducing evidence through a Mr Hardman, one of the witnesses at the arbitration proceedings; prevented the applicant from calling a Mr Erasmus, a second witness; prevented the applicant from asking Maluleke any questions; failed to give the applicant a full and proper hearing and rushed through the arbitration proceedings in a manner which prejudiced the applicant’s right to be heard.

8.Maluleke admitted that the arbitrator explained the nature of the proceedings and the manner in which they would be

conducted. He denied the remainder of the allegations made by the applicant about the arbitrator's improper conduct. Maluleke contended that the applicant's representative was given an opportunity to outline the applicant's case. The applicant was also given an opportunity to adduce evidence through Hardman. It declined the opportunity to call a further witness and it closed its case after the evidence of Hardman was led. Maluleke denied that the applicant was prevented from asking any questions. Maluleke contended that the applicant declined to do so after asking him only one question. Maluleke contended that in the circumstances, the arbitrator was not guilty of misconduct or gross irregularity in the arbitration proceedings.

9. The notice of application and the founding affidavit were served upon the second respondent ("the Commission") and the arbitrator. They were given full notice of the basis of the review application, which essentially amounts to a very serious and material criticism of the arbitrator's conduct at the arbitration proceedings.

10. The Commission was called upon to furnish the Registrar of this Court with the record of the arbitration proceedings and the arbitrator was called upon to furnish reasons additional to those in his award and, of course, to respond to the criticism of his conduct.

11. The applicant contended that the arbitrator operated a tape recorder at the arbitration proceedings but that it was unclear whether he recorded the entire arbitration proceedings. Maluleke did not admit or deny the applicant's contentions but merely noted it. Before launching the review application, the Commission was asked for the tapes on which the proceedings were recorded. The Commission refused to provide the tapes until a formal review application was launched.

12. In a letter dated the 21<sup>st</sup> August 2000, the Commission informed the applicant's legal representative that in compliance with rule 7A(3) of this Court Rules, the record of the arbitration proceedings was despatched to the

Registrar. The Commission also gave notice that in terms of Rule 7A(5) applicant had to arrange with the Registrar to make copies of such portions of the record as may be necessary for the purposes of the review application and to certify each copy as true and correct.

13. In a notice dated the 23<sup>rd</sup> August 2000, the Commission gave notice that there is no record of the proceedings before the arbitrator and that it had notified the applicant of this fact. The Commission did not furnish any reason for the absence of the record. It is unclear for example whether the arbitrator simply never kept a record or whether he did, but it was subsequently lost, who lost it and what efforts have been made by the Commission to find the record or to reconstruct it.

14. In a notice dated the 23<sup>rd</sup> August 2000, the arbitrator confirmed that he had read the notice of motion and founding affidavit in the review application, confirmed that he had nothing to add to his award and gave notice of his opposition to the cost order sought. There was nothing more from the arbitrator, or for that matter from the Commission.

15. The arbitrator did not deny the criticism of his conduct or the averments of impropriety on his part. He is silent. The notice of motion and particularly the founding affidavit called for a response from the arbitrator.

16. The arbitrator did not deny the applicant's version of his conduct at the arbitration proceedings. He did not say that he also read the answering affidavit and that he agreed with Maluleke's version of what had transpired at the arbitration proceedings. This is a case where the arbitrator was under a duty to admit or deny or to confess and avoid direct allegations about his conduct.

17. There is a material dispute of fact going to the very heart of this review application which could only be resolved by

looking at the record of the arbitration proceedings. Disputes of fact in application proceedings generally result in the Courts either dismissing the applications or referring the disputes to oral evidence.

18. The dispute of fact in this application could easily have been resolved if a record of the arbitration proceedings was filed. The very reason the Commission should keep a record of the arbitration proceedings is precisely to overcome potential disputes of fact. The records of arbitration proceedings present an objective account of what transpired at the arbitration proceedings and, this Court is entitled to rely on such records for the purpose, *inter alia*, of resolving potential disputes of fact. The absence of a record provides an almost insurmountable problem. It is untenable to expect disputes of this nature, which are easily determined by reference simply to the record, to be resolved by cross-examination in a referral to oral evidence.

19. Section 138 of the Labour Relations Act 66 of 1995 (“the Act”) provides generally for the conduct of arbitration proceedings held under the auspices of the Commission. Rule 7A casts a duty upon the Commission to provide the Registrar of this Court with the record of the arbitration proceedings. The absence of the record places me in a dilemma. I am unable properly to discharge my statutory function of review. In my view where the Commission fails to provide the Registrar with the record of the arbitration proceedings and if it fails to explain its failure to provide the record, a Court may make a cost order against it.

20. Although the Act does not expressly oblige the Commission or the arbitrator to keep a record of the arbitration proceedings, there is an implied duty on the arbitrator or Commission to keep and provide this Court with a record of the arbitration proceedings. It will always be necessary to have the record of the arbitration proceedings available to this Court when arbitration awards are reviewed under section 145 of the Act.

21. That it is not eminently reasonable and practical to keep such records, but also necessary, is self-evident. Keeping a record of the arbitration proceedings provides objective material upon which this Court exercises its review

powers. It eliminates, or keeps to a minimum, disputes of fact about what transpired at the arbitration proceedings. Such disputes would bedevil the work of this Court when exercising its review powers. It is also self-evident that keeping a record of the arbitration proceedings assists the Courts in the proper exercise of its review powers.

22. When this Court exercises its powers of review under section 145 of the Act, the point of departure for any debate concerning challenges made to the conduct or decisions of a commissioner is what was before the commissioner during the proceedings. What was before the commissioner, is constituted by the record of the proceedings. If a commissioner complies with the provisions of rule 7(A) and provides this Court with a record of the proceedings, the Court will be entitled to accept that such a record constitutes a complete and comprehensive record created for the purposes of the proceedings and to regard that record on the face of it as a definitive record of the proceedings. Any party wishing to challenge the commissioner on the composition of the record would then attract an onus to demonstrate that it was in one or another respect incorrect.

23. When a commissioner or the Commission declines to comply with a duty imposed by the Rules, or declines to provide an explanation for its failure to comply with the provisions of rule 7A, an unfair choice is forced upon an applicant. That choice is either to proceed before this Court without a record provided for by the commissioner or to postpone the hearing in order to compel the record to be produced. The delay consequent upon an application to compel, constitutes a profound inhibition to many applicants taking the longer route. It is not fair that applicants are put to this election. The fundamental considerations behind the enactment of the Act include a commitment to expeditious and efficient dispute resolution which is transparent and accountable. The reluctance or tardiness of commissioners or the Commission to comply with rule 7A is inconsistent with these objectives.

24. The arbitrator and the Commission have failed to comply with their duty to assist the Court in discharging its

statutory duty to determine review applications. A cost order alone would not assist the applicant, since it would leave it with a dispute of fact and the inability of this Court to discharge its review function. This is an appropriate case for setting aside the award because of the failure by the arbitrator and the Commission to keep or to furnish the Court with a record of the arbitration proceedings and to direct that the arbitrator and Commission pay the applicant's costs on an attorney and client scale.

25. The failure to keep a proper record is in itself a ground for the setting aside of an arbitration award. But it would not assist to refer the dispute to oral evidence if a record was indeed kept but has been lost. Assuming that the arbitrator will be a witness subject to cross-examination at the hearing, he would have great difficulty in explaining his omission to answer the allegations against him in the founding affidavit. The Commission too, will experience considerable discomfort under cross-examination explaining its abject silence when called upon to explain whether a record was kept at all and, if it was, why it no longer exists.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: MR T BRUINDERS  
INSTRUCTED BY WEBBER WENTZEL BOWENS

: IN PERSON

: 18 APRIL 2001

: 18 APRIL 2001

: 26 APRIL 2001