IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **P290/2001**

DATE 2002/06/19

In the matter between:

GILLILAND AND PHILLIPS BOOTH & ASSOCIATES (t/a TAXAID) Applicant

and

MARTIN KOORTS N.O. First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

JOSEPH HENRY PIERRE TURRO Third Respondent

KAREN McGRATH Fourth Respondent

CHRISTOPHER JAMES VIVIERS Fifth Respondent

BEFORE THE HONOURABLE MR ACTING JUSTICE NGCAMU

ON BEHALF OF APPLICANT: MR DE WET

ON BEHALF OF RESPONDENTS: ADV. KROON

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN
CASE NO: P290/2001

DATE: 19 June 2002

In the matter between:

GILLILAND & ASSOCIATES

and

CCMA & OTHERS

J U D G M E N T

NGCAMU AJ

[1] This is an application for the review and setting aside of the arbitration award. The application is brought in terms of Section 145 of the Labour Relations Act.

[2] The third to the fifth respondents were employed by the applicant. The applicant informed the respondents that they would be laid off for a period of three months, after which they would have to come to see if work was available for them. The

respondents lodged an urgent application for an order directing the applicant to pay their salaries. The application was dismissed on the basis of urgency. The respondents resigned on the basis that their employment had been made intolerable. The dispute was referred to the CCMA for conciliation. When conciliation failed the dispute was arbitrated by the first respondent. The first respondent issued an award in terms of which the dismissal of the respondents was declared unfair. The applicant was ordered to compensate the respondents. The applicant seeks to review and set aside this award.

[3] The applicant has submitted that the Commissioner failed to arbitrate the dispute fairly and equitably. It was alleged that the arbitrator was partial and biased towards the respondents and failed to hand down an award that is justifiable. It was also argued that the award is muddled, misdirected and contradictory and contains inaccuracies of a material nature. It was further submitted that the arbitrator failed to take into account the material evidence. Another ground for the review was that the record was incomplete.

[4] The applicant filed the record of the arbitration proceedings.

The transcript was served. The respondents submitted that the applicant failed to place before Court the complete record in that the bundle submitted to the Commissioner was not filed. The applicant has taken a view that the first and second respondents are obliged to file the record with the Registrar. Respondents submitted that the failure by the first and the second respondents to file the record is in itself a ground for setting aside the award.

[5] In support of this submission Mr *de Wet* cited the case of *UEE-Dantex Explosives (Pty) Ltd v Maseko & Others* [2001] 22 ILJ 1905 LC. This case is not relevant in a matter where the record is available and applicant fails to file it. Rule 7A places an *onus* on the applicant to furnish the record. If the record is available and the applicant fails to place it before Court, the Court is entitled to dismiss the application on that ground alone. [See in this case *JDG Trading (Pty) Ltd (t/a Russells) v Whitcher & Others* [2001] 3 BLLR 300 LAC.

[6] Rule 7A(5) and (6) obliges the applicant to file the portion necessary for the review. The applicant submitted that it did not have this bundle that was submitted to the CCMA. If the

record is available and the applicant fails to file it the Court canot set aside the award on the basis of the absence of the record. The Court in such instance will dismiss the application.

[7] The applicant submitted that the portion of the record that is missing is not relevant. If the arbitrator fails to file the record, the applicant is entitled in terms of Rule 11 to compel the filing of the record. Such an application becomes necessary for the reason that it is the applicant who wants the award to be reviewed. There is, therefore, an obligation on the applicant to file the complete record.

[8] The respondent has in this case filed the record that was missing. The applicant submitted that if the record was necessary it tenders costs of the record. I will return to the question of costs at a later stage.

[9] The respondents were served with the application by the applicant. They failed to file a reply in time. An application has been filed for the Court to condone the late filing. The record was served on 28 August 2001. The answering affidavit was only served and filed in January 2002. This is five months

late. The respondents have submitted that they did not have to file the answering affidavit when the record was materially defective. Respondents' attorney explained that the delay was due to illness. The attorney was not in the office as a result of being incapacitated. The applicant submitted that the delay was gross and that condonation should not be granted.

[10] The delay of five months is a long delay. I also have to consider the fact that the respondent was always of the view that a complete record had to be filed before they could be expected to file a reply. This is the point which was debated in this court as a preliminary issue. The respondents contended that the complete record was necessary. I accept that the attorney for the applicant was ill. However, he was not away from the office all the time. The attorney was in the office when the documents were served. This must be weighed against the respondent's attitude regarding the filing of the record. It must be considered further that the respondents are not to blame for the attitude taken by the attorney. Respondents have an award in their favour. This should count in their favour as well when it comes to the Court’s discretion regarding the granting of the condonation. The applicant has

not shown any prejudice in the matter. I, however, consider it unfair to unsuit a litigant who already has an award in his favour. In the circumstances I grant the application for condonation.

[12] The test for the review was considered by the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus N.O. and Others* [1998] 11 BLLR 1093 [LAC]; *Countyfair Foods (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [1999] 20 ILJ 1701 [LAC] and *Shoprite Checkers (Pty) Ltd v Ramdaw N.O. and Others* [2001] 22 ILJ 1603 [LAC].

[13] The question to be asked is whether there is a rational objective basis justifying the connection made by the arbitrator between the material properly available to him and the conclusion he eventually arrived at. [See in this case *Carephone* at page 1103, paras A-D.]

[14] In *Countyfair Foods* the Court held that the decision of the Commissioner must be supported by the facts and the applicable law. The reviewing court must ask itself whether the award can be sustained by the facts and the applicable

law. If the award can be sustained by the facts and the law, interference with the award is not warranted. If it cannot, interference is unwarranted. [See in this case *Countyfair Foods* at page 1712 paras H-J.

[15] The applicant submitted that the respondents made opening statements but the Commissioner did not invite the applicant to make an opening statement. The applicant further submitted that the Commissioner based the award on the respondents' opening statement. A party in proceedings is not obliged to make an opening statement. If a party wishes to make such a statement he may do so. The purpose of the opening statement is to indicate to the presiding officer what the dispute is all about and what issues are involved, and the evidence that would be led to prove the matters in dispute. Put differently, the opening statement is meant to alert the presiding officer of the relevance of the evidence to be led. The respondents' representative made an opening statement as it was entitled to do so. The respondents' representative had to make his statement first because the *onus* was on the respondents to prove the dismissal. The opening statement is not evidence.

[16] After the opening statement the evidence of the respondents was led. The applicant elected not to lead evidence at the end of the respondents' case. It was, therefore, unnecessary for the applicant to make an opening statement. The arbitrator could only ask the applicant if it wanted to make an opening statement in the event of the applicant wishing to lead evidence. The applicant elected to close its case without any *viva voce* evidence. There is, therefore, no merit in the argument that the arbitrator committed an irregularity by not inviting the applicant to make an opening statement. The applicant's case was never opened.

[17] It is common cause that the arbitrator had the affidavit submitted by the applicant. It is further common cause that the applicant cross-examined the respondent. The applicant has failed to show which portion of the findings was not supported by the evidence. There is nothing in the opening statement not supported by the evidence. This ground of review cannot succeed.

[18] It was submitted further that the arbitrator failed to apply his mind to the facts and the case presented to him. This is based

on the fact that the respondents amended their claim for four months' notice pay to three weeks. The Commissioner made an award for compensation for five months. The Commissioner did not make any award in respect of the notice pay for the reason that he could not reconcile the question of notice and the situation which had become intolerable. The compensation awarded by the Commissioner was from the period of resignation to the date of conclusion of the arbitration. The error recorded by the arbitrator does not render the award reviewable. This is so because the question of the notice pay is irrelevant if one considers the reasoning of the arbitrator. This ground of review is, therefore, dismissed. The award in this regard is justifiable on the facts before the Commissioner.

[19] The rules require that the award be issued within a period of fourteen days. The arbitrator is permitted to ask for an extension of time in terms of section 138(8) of the Labour Relations Act. The extension is requested from the Director of the CCMA and not from the parties. The applicant submitted that the Commissioner was biassed because he requested an extension of time from the respondents and not from the

applicant. There is no merit in this argument. Even if the request was made from the respondents, or not made at all, that would not render the award reviewable. The fact that an award is issued outside the fourteen day period does not make the award null and void and reviewable. The submission made, therefore, should fail. [See in this case *Free State Buying Association Ltd (t/a Alpha Pharm) v SACCAWU and Another* [1999] 3 BLLR 223 [LC].]

[20] The Commissioner has a discretion with regard to the award of costs. It was submitted on behalf of the applicant that it was not shown that it acted frivolously in defending the constructive dismissal. The Commissioner does not have to explain meticulously any findings he makes. The fact that the Commissioner did not explain why he made an order for costs cannot make the award reviewable. It must be noted that the applicant elected not to pay the employees' salary when it was able to do so and decided to defend the dispute. In the light of this, the Court cannot interfere with the Commissioner's discretion.

[22] Mr *de Wet* submitted that the Commissioner misinterpreted

the evidence in that he recorded that the third to the fifth respondents were laid off on 8 June 2000 and were to report for duty on 9 October 2000. The Commissioner also recorded in his award that:

"The applicants' representative's claim is based on the circumstances that the respondent acted unilaterally in laying off the applicants for an indefinite period without any remuneration at all."

[23] It is necessary that I quote the full paragraph of the letter of 7 June 2000 in terms of which the employees were laid off. The letter reads:

"That it was at that point that the employer decided to revert to the implementation of the lay-off with effect from Monday, 3 June 2000, as indicated in the meeting on Monday, 5 June 2000. The office will be closed with immediate effect and the employees will be paid in lieu of notice of the lay-off and will receive payment of this remuneration at the end of June 2000.; that in essence the duration of the lay-off will be until Monday, 9 October 2000, the date on which all affected employees will be required to report to the employer's premises to determine the availability of work; that during the lay-off period affected

employees will be provided with their duly completed unemployment insurance fund cards, if applicable, and will be entitled to take up alternative employment on a permanent and/or temporary basis."

[24] In the letter I have quoted above, the purpose of returning on 9 October 2000 would not have been for the purpose of commencement of work but to see if the work was available. There was, accordingly, no guarantee that the employees would work. This is strengthened by the fact that the employees would be issued with unemployment cards. Moreover, the employees were specifically advised that they would be entitled to take up alternative employment on a permanent or a temporary basis. The result of this would have been that the employees would lose any benefits from the applicant. If they took new employment on a permanent basis the applicant would not have had to pay them any retrenchment package. It follows then that if they did not take alternative employment and return on 9 October 2000 and find no work available, they would remain on lay-off without any income. This is what led the Commissioner to conclude that the lay-off was indefinite. I, therefore, reject the submission

that the Commissioner was under the incorrect impression that employees were laid off for an indefinite period.

[25] The applicant has applied a microscopic examination of Turro's evidence to find contradictions in his evidence. It was submitted that Turro testified on one hand that there was no lay-off agreement and on the other said there was a lay-off agreement on additional terms. It is the applicant who relies on the agreement on lay-off. It is not the employees who must prove it. It does not assist the applicant to point out contradictions. The evidence of Mr Turro is that proposals were discussed with the sole purpose of saving jobs. An agreement was reached as to what could be done if the applicant agreed the proposal made by the employees. The applicant did not come back to the employees but wanted the employees to sign that they agreed to the reduction of their salaries. The employees could not sign when the company had not responded to their proposals. There was, therefore, no agreement between the applicant and the employees. This resulted in the applicant laying off the employees. No agreement was proved by the applicant before the Commissioner. The Commissioner cannot be faulted on this.

If the applicant relies on the existence of an agreement, the *onus* is on it to prove it and not the employees. The applicant was obliged to consult on lay-off as this affected the respondents' wages and conditions of employment. [See in this case *TAWU v Motorvia (Pty) Ltd* [1996] 9 BLLR 1189 [IC] at page 1190 para.D-F.]

[26] The applicant submitted that the respondents' attorney shut the doors for consultation for the purpose of resolving the dispute. This submission is taken from the letter dated 29 June 2000. Paragraph 12 of the said letter reads:

"Unfortunately our clients do not see their way clear to resolving this matter on any basis whatsoever."

This portion of the letter must be read in conjunction with the whole contents of this letter. This is so because the letter goes further to state in para.13:

"As far as our clients are concerned they are and continue to be employed by yourselves and as such are entitled to be paid."

Para.14:

"If you disagree with the contentions raised herein please be courteous enough to advise us thereof. If you do not disagree

but are not in a position to pay, please advise us."

This letter cannot be interpreted as having closed the doors for the discussions.

[27] The applicant has attacked the award on the basis that there was no evidence led to justify the conclusion reached by the arbitrator. I must pause here to point out that the material before the Commissioner did not consist only of oral evidence. It included the documents and correspondence. The respondents first engaged the applicant in discussions and the correspondence. They then instructed attorneys. They also launched an application to this Court. They were still not paid.

[28] As an indication that they were not going to be paid, I have to look at the letter dated 19 June 2000 appearing on page 46 of the bundle. The first paragraph on page 47 records the following:

"By virtue of the fact that the principle of 'No Work No Pay' applies in this instance, your clients will not be remunerated during this period. Notwithstanding they will be paid their monthly earnings for June 2000 in lieu of notice of the pending lay-off."

This letter was delivered to the Commissioner. The submission

that there was no evidence justifying and supporting the conclusion therefore has no basis and is rejected.

[29] The respondents were placed in an untenable position although the employment was not terminated by the applicant. The three months' unilateral lay-off was hard for them. This is what caused them to approach the Court. The issue before the Court was the payment of salaries. It was not concerned with the question of retrenchment. There had been no consultation envisaged in Section 189 of the Labour Relations Act. The Court did not deal with the constructive dismissal. The Court did not make a finding on the retrenchment process. The Court also did not hear oral evidence as the Commissioner did. The Commissioner was therefore not precluded from coming to the conclusion that the applicant was not in the process of retrenchment exercise. Even if the notice of possible retrenchment was before the Commissioner, no consultation in terms of Section 189 were proved by the applicant. The position is that the applicant did not dismiss the respondents. They were, however, left with no alternative. The applicant had to perform its obligation of paying their salaries which it failed. The respondents were not

invited to consult for purposes of retrenchment. The Commissioner was, therefore, entitled to find that the applicant acted unfairly. The submission that the findings were irrational is, therefore, rejected.

[30] It was submitted that the Commissioner failed to evaluate the evidence and show why he accepted the evidence of the employees. There is no merit in this submission. The Commissioner was aware that the *onus* was on the employee to prove constructive dismissal. He was aware that he had to determine if employees had endeavoured to resolve the grievance prior to their resignation. He found that the evidence indicated that the employees made attempts by way of discussions, letter and through attorneys and the Court application. Based on this he concluded that the employees fulfilled the requirement of attempting to resolve the dispute. When all these attempts had failed it was inevitable for the Commissioner not to conclude that the applicant made continued employment intolerable. The Commissioner properly applied his mind on the question of constructive dismissal and explained why he came to the conclusion he reached. According to the evidence the arrangement was for

a fifty percent reduction in salary and one month lay-off. The applicant did not implement this arrangement. With regard to the business of Turro there is no evidence that it was making any profit or that he received any income.

[31] The applicant further submitted that the Commissioner erred in finding that no severance pay was proposed. It was submitted that the severance pay was discussed. Mr Turro's evidence is that it was discussed but he was not present in that discussion. The fact is that it was not offered to the respondents as an alternative. There is no evidence from the applicant before the Commissioner to prove that severance pay was offered to the respondents. The award can be set aside where the Commissioner has ignored material evidence placed before him. See in this case *SASCO (Pty) Ltd v Buthelezi and Others* [1997] 12 BLLR 1639 [LC], in which LANDMAN J at page 1643, para. D commented on this by stating the following:

"The third respondent simply ignored this evidence. Had he not ignored it but dealt with it then this judgment may possibly have had a different result. However, as he simply ignored relevant evidence, this is grossly unreasonable and amounts to

a misconduct which is a defect as envisaged in section 145(2) of the Act."

[32] The award can also be set aside if the findings are based on erroneous inference of facts. See *Kynoch Feeds (Pty) Ltd v CCMA and Others* [1998] 4 BLLR 384 [LC] at 398 para.58. In the present case in my view there was sufficient evidence before the Commissioner.

[33] The applicant acted in serious breach of the employment contract in laying off the respondents without agreement. The applicant's actions were unilateral. This went into the heart of the employment relationship. Although the applicant did not dismiss the respondents and expected them to return to work, it does not mean no breach of contract was committed. The respondents were, therefore, entitled to cancel the contract or keep the contract. Respondents accordingly elected to terminate the contract by resigning.

[34] The applicant did not consult with the respondents in terms of Section 189 of the Labour Relations Act. He did not pay their salaries and indicated to the employees that they could obtain

alternative employment. In my view they were placed in an invidious position. Their further employment was uncertain. The applicant clearly acted unfairly towards them. In *Coetzee and Another v Pitani (Pty) Ltd [t/a Pitani Electrification Projects and Others* [2000] 8 BLLR 907 [LC] at 916 paras 50-51 BASSON J stated:

"Should an employer that contemplates dismissing employees not consult with the affected employees in terms of the duty to do so contained in section 189 of the Labour Relations Act, the employer is acting in a manifestly unfair manner towards them. Should such an employer then further exacerbate matters by committing a breach of contract that goes to the root of the employment or contract, it may well be that the affected employees are being placed in an invidious position. Such employees can, of course, elect to accept the breach of contract and cancel or terminate the contract of their own accord and claim contractual damages. More important, however, is the fact that such employees may become entitled to claim constructive dismissal in terms of Section 186[e] of the Labour Relations Act."

[35] The evidence proved that the applicant acted unfairly towards

the respondents. I am satisfied that the Commissioner clearly applied his mind to the evidence before him. The award was fair. It cannot be said that he misinterpreted the evidence before him. I cannot find any irregularity or misconduct on the part of the Commissioner.

[36] In the light of what I have stated, it follows that the application for review should fail.

[37] It will be fair in the circumstances of the case that the costs follow the result. I will, therefore, make the order for costs in favour of the respondents.

[38] I have considered the question of costs of the additional record filed by the respondents. I have made use of this bundle with regard to the assessment of the material that was before the Commissioner. I, therefore, conclude that this bundle was relevant. The applicant tendered costs of this bundle in the event the Court finds that it was necessary. I will, accordingly, make an order in favour of the respondents regarding such costs.

[39] I am satisfied that the application in terms of Section 158(1)(c) is in order. I, therefore, intend making the award an order of Court. The order that I make is the following:

(a) The application for review is dismissed.

(b) The arbitration award is hereby made an order of Court.

(c) The applicant is ordered to pay the respondents' costs including the cost of the additional bundle filed by the respondents.

(d) The applicant is to pay the costs of the respondents in the application to make the award an order of Court.

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THE HONOURABLE MR JUSTICE NGCAMU
LABOUR COURT JUDGE

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