

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: JR 2140/05

In the matter between:

ESKOM HOLDINGS LIMITED

APPLICANT

AND

SICELO MTHETHWA NO

FIRST RESPONDENT

THE COMMISSION FOR MEDIATION

CONCILIATION AND ARBITRATION

SECOND RESPONDENT

SEYA SHAYI

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI AJ

Introduction

- 1] The applicant seeks an order to review and set aside the arbitration award issued by the first respondent under case number GA 33878 -04 dated 11 July 2005. The late referral of the review application was condoned by this court on the 07 March, 2007.

- 2] The third respondent (the employee) filed a counter review application which was accompanied by an application for condonation for its late filing. The application was for the simple reason that the arbitration award could not withstand the review, not dealt with in this judgment.

Background facts

- 2] The employee was charged and dismissed for misconduct relating to dishonesty. The employee was accused of having authorized payment in the sum of R148, 040, 20 to Technitrade Technology Holding (TTH) for work done by the employee of the applicant.
- 3] It is common cause that there was an agreement in terms of which TTH was to develop training material use for the applicant.
- 4] The version of the applicant is that it discovered after conducting an investigation that despite the training modules having been developed by its employees, the third respondent authorized payment in the some of R148, 040, 20 for TTH.
- 5] The employee contended that the development of the training modules was properly outsourced to TTH as the employees of the applicant where not coping with the work load. The third respondent further contended that TTH

being on the data base of the applicant was appointed properly in accordance with the procurement procedures of the applicant.

Grounds for review

- 6] The commissioner found the dismissal of the employee to have been both substantively and procedurally unfair and ordered compensation in the amount of R26, 000, 00.
- 7] The first issue which the applicant took with the arbitration award relates to the finding that the dismissal was procedurally unfair. This issue arose because prior to the arbitration hearing the parties held a pre-arbitration meeting where it was agreed that the only issue to be considered by the arbitrator would be the substantive fairness of the dismissal.
- 8] It is apparent from the record that the issue of the pre-arbitration hearing agreement was addressed by both parties in their opening statements at the arbitration hearing. In his opening statement Mr Mabuza, the representative of the applicant said the following:

“Parties had a pre-arbitration in which they agreed that the only issue was the substantive fairness of the dismissal.”

- 9] The third respondent in his opening statement, after confirming the pre

-arbitration meeting said:

“It was indicated only [sic] in alleging substantive fairness.”

10] However, at the arbitration hearing the employee raised the issue of procedural fairness which the arbitrator entertained. The employee based his procedural unfairness on the complaint the applicant failed to avail to him an audit report relating to this matter.

11] After finding that in terms of *“pre-trial minutes, the procedural fairness of the dismissal of the applicant was not in dispute,”* the commissioner concluded that *“failure to provide the employee with the investigation report amounted to an irregularity.”* It was for this reason that the commissioner found the dismissal of the employee to be procedurally unfair. He reasoned as follows:

“My view is that the Constitution of the Republic guaranties the Applicant the right to fairness and equity. The procedural challenge is based on an alleged failure by Govender to furnish the Applicant with a copy of the investigation /audit report.”

12]It is quite clear that at the time of concluding the pre-arbitration agreement, the parties had intended to circumscribe their dispute. The agreement became part of the terms of reference within which the

commissioner was required to operate within. The terms of the pre-arbitration agreement were binding on both parties including the commissioner to the extent that he was required to consider the dispute within the precinct of the agreement. The rationale for this approach is informed by the policy of the Labour Relations Act 66 of 1995 (“LRA”) which encourages settlement of disputes through agreements. In this regard see, *Fuel Retailers Association of SA v Motor Industry Bargaining Council* (2001) 22 ILJ 1164 (LC), *Shoredits Construction (Pty) Ltd v Pienaar NO & others* (1995) 16 ILJ 390 (LAC); [1995] 4 BLLR 32 (LAC) and *Checkers Shoprite (Pty) Ltd v Busane* (1996) 17 ILJ 701 (LAC).

13] In terms of the facts of this case the parties had agreed to limit the dispute to substantive fairness of the dismissal. In other words the powers of the commissioner were limited to the determination of whether the dismissal was substantively fair and excluded him from considering the procedural aspect of the dispute.

14] The commissioner committed a gross irregularity, firstly by allowing the respondent to raise the issue of procedural fairness without allowing the applicant an opportunity to address him on the same issue. Secondly the commissioner committed a gross irregularity in ignoring the pre

-arbitration agreement between the parties. In essence the approach adopted by the commissioner denied the applicant a fair hearing and on this ground alone the arbitration award stands to be reviewed and set aside.

15]Turning to substantive fairness, the commissioner found that the dismissal was unfair because of the inconsistent treatment of the employee in relation to other employees of the applicant. The inconsistency arose according to the commissioner, because the applicant did not take action against those of its employees who failed to follow proper procumbent procedures and rules.

16] The test to be applied in determining whether to review and set aside the decision of the commissioner in this matter, is that of justifiability and rationality as set out in *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC). In that case the court held that the administrative action must be justifiable in relation to the reasons given for it. In other words there must be an objective logical connection between the material placed before the commissioner and the award.

17]It is evidently clear from the reading of the arbitration award that there is a total disjuncture between the issues raised and put before the

commissioner on the one hand and the conclusion arrived at by him. The evidence before the commissioner had no relationship or bearing on the failure to follow procurement procedures. It was not the case of the applicant that the employee did not follow proper procurement procedures.

18] The simple issue which the commissioner was enjoined to consider was whether or not the evidence presented created the basis upon which he could conclude that the employee was justified in authorizing payment to TTH. The issue which required the attention of the commissioner was whether the payment of TTH was justified. The commissioner needed to address this issue by focusing his mind on whether or not the training materials were produced by TTH and not the employee of the applicant.

19]The commissioner's award is unjustifiable and irrational because he considered irrelevant and unrelated issues in relation to the question he was supposed to have answered. He for some unknown reason, considered the issue of black economic empowerment (BEE) credentials and whether TTH was properly awarded the tender.

20] I see no reason in fairness why costs should not follow the result.

21]In the premises the award issued by the first respondent is reviewed and

set aside.

22]The matter is remitted back to the second respondent for arbitration before a commissioner other than the first responded.

23]The costs to follow the results.

MOLAHLEHI AJ

DATE OF HEARING : 31 MAY 2007

DATE OF JUDGMENT : 30 AUGUST 2007

APPEARANCES

For the Applicant: Advocate N H Maenetje

Instructed by : Mabuza Attorneys

For the Respondent: Advocate J Mani

Instructed by : Ponoane Attorneys

