IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 1147/03

In the matter between:

ROBERT MOTELA MOLLO	**APPLICANT**
AND	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	1ST RESPONDENT
PAT STONE N.O	2ND RESPONDENT
JEANNE GAYLARD N.O	3RD RESPONDENT
ARCEKIR – MITTAL SA LIMITED	4TH RESPONDENT
(PREVIOUSLY KNOWN AS ISCOR FLAT STEEL)	

JUDGMENT

NYATHELA AJ

Introduction

1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) of an arbitration award issued by the second respondent on 26 May 2003.

2] In terms of the award, second respondent ruled that: *"The dismissal of the applicant by the respondent on 07/05/02 is upheld as being substantively fair"*.

3] It is this award which applicant seeks to review and have it set aside.

4] The application is opposed by fourth respondent

The parties

5] The applicant is Robert Motela Mollo a former employee of the fourth respondent.

6] The first respondent is Metal and Engineering Industries Bargaining Council, a statutory body established in accordance with the provisions of the LRA.

7] The second respondent is Pat Stone N.O, a commissioner employed as such by the first respondent. The second respondent is cited in his capacity as a commissioner who arbitrated the matter.

8] The third respondent is Gaylard N.O a commissioner employed as such by the first respondent. The third respondent is cited in her capacity as a commissioner who initially presided on the arbitration hearing.

9] The fourth respondent is Iscor Flat Steel, a juristic person duly registered and incorporated in accordance with the company laws of the Republic of South Africa.

The facts

10] The applicant was employed by the fourth respondent as a locomotive driver. Following an incident of 21 March 2002, applicant was charged with misconduct.

11] The following charges were preferred against applicant: *"1. Committing fraud*

(by allegedly faking an incident / injury). 2. Abuse of medical benefits (by reporting for light duty while not being officially booked off light duty). 3. Contravention of applicable legislation or safety regulation".

12] A disciplinary hearing was conducted. Applicant was found guilty on all the charges. He was dismissed form duty on 07 May 2002. Applicant appealed and the appeal was dismissed on 30 May 2003.

13] On 19 June 2002 applicant referred a dispute concerning his alleged unfair dismissal to the first respondent. The dispute was conciliated on 19 September 2002, remained unresolved and was subsequently referred to arbitration. On 27 November 2002 applicant's case was scheduled for arbitration hearing on 03 February 2003 before the third respondent. Both applicant and fourth respondent presented their opening statements before third respondent. Both parties together with third respondent also narrowed the issues after presenting opening statements.

14] The arbitration was then postponed after issues were narrowed and scheduled again for the 02nd & 3rd April 2003.

15] On the 02nd April 2003 third respondent did not attend the arbitration hearing. Second respondent instead attended the hearing and informed the parties that he will proceed and arbitrate the matter. The applicant objected to second respondent conducting the arbitration contending that the matter was part heard. Second respondent nonetheless proceeded to arbitrate the matter.

16] Applicant seeks to review the award and have it side aside.

Grounds for review

17] The applicant's grounds for review are amongst others the following:

a) The second respondent should not have arbitrated the dispute as the case was part heard before 3rd respondent.

b) The second respondent exceeded his powers when he disallowed Khumalo as a witness on behalf of the applicant in that despite him (Khumalo) having worked on a different shift, Khumalo's evidence as to what the handover book contained and whether or not he knew and had informed the fourth respondent, via its planner that there was a brake problem with locomotive Number 8 and / or that it was meant to go to service was critical to the applicant's case at arbitration. The ruling by the second respondent deprived applicant of an opportunity to adduce evidence proving its defence that 4th respondent knew that the locomotive in question had brake problems and that this had been reported by Khumalo to the planner.

Analysis

18] The first issue which I must deal with is whether the matter which was before the second respondent was part heard or not.

19] Applicant argued that opening statements also form part of evidence in the wider sense because it is in the opening statements that parties set out their versions and the testimony of their witnesses. The commissioner has a duty to stop the

proceedings where he is advised that the matter is part-heard. There was no need for the commissioner to hear arguments on the issue.

20] Fourth respondent argued that in the High Court, an opening address has the status of argument and has no binding effect unless an admission of fact is made. In *Standard Bank of SA v Minister of Bantu Education 1966 (1) SA 229 (N) at 242H-243A* the court stated the following regarding opening statements: *"...it seems undesirable that counsel's opening of a case should be accorded decisive effect in regard to proof of facts necessary to a party's case or defence. Opening remarks are, in common with counsel's closing argument, usually not recorded. If such matters are to be used in coming to the conclusion in a judgment, they must be set out therein and used, in the ordinary course of events, with considerable circumspection".* The same principle should apply to arbitration proceedings.

21] It is common cause that parties presented their opening statements before 3rd respondent. I agree with the fourth respondent's submissions regarding the status of opening statements. However in this case, parties proceeded and engaged in the process of narrowing the issues. On page 26 line 25 of the record before third respondent, the following is recorded: *"Commissioner: ...we are going to spend some time narrowing the issues".* In the process of narrowing the issues, it is clear from the record that certain admissions were made regarding the nature of evidence to be led and issues which were not in dispute. Furthermore, third respondent on page 22 line 7 stated the following: *"...we are going to then have to part hear this and I will obviously have to start the 1:30 matter".*

22] The *Standard Bank* case referred to above deals with the weight accorded to opening and closing statements only. The difference between the *Standard Bank* case and the case at hand is that, the third respondent did not only listen to opening statements but proceeded and engaged parties in the process of narrowing the issues. Although no evidence was led, parties made certain concessions regarding the nature of evidence which was to be led and evidence which was irrelevant and not necessary to call witnesses to support the allegations. Furthermore as stated above, even the third respondent was of the view that the matter was part heard. I am satisfied that second respondent should not have recommenced with the case as it was part heard.

23] I must mention further that the approach in the *Standard Bank* case is not entirely appropriate to arbitration proceedings. This view is informed by the fact that in the *Standard Bank* case, the court was dealing with a case where pleadings have been exchanged and the admissions were contained in the pleadings. It was therefore easy for any party to determine from the pleadings and possibly pre-trial minutes what was admitted and what was disputed. It is in that context that the court held that opening statements should be accorded less weight and be used with circumspection.

24] In arbitration proceedings like the current one where there are no pleadings and the parties not having entered into a pre-arbitration minute, opening statements are a first opportunity for parties to make certain admissions and place certain issues in dispute as well as the type of evidence which will be led and on what issues the evidence will be required, it will be inappropriate for that case to

proceed before a different arbitrator.

25] In my view, such a case is part heard since apart from what the arbitrator has recorded as admissions, issues in dispute and the type of evidence which the parties have undertaken to lead, there are no pleadings from which a different arbitrator will be able to determine what has been admitted or disputed. I therefore conclude that the *Standard Bank* case is distinguishable from the current case. In my view, this matter was part heard before third respondent.

26] The second issue which I must determine is whether second respondent exceeded his powers by refusing to allow applicant's witness (one Khumalo) to present evidence at the arbitration hearing.

27] Applicant's representative argued that second respondent exceeded his powers when he disallowed Khumalo as a witness for the applicant. Despite Khumalo having worked a different shift, his evidence regarding the contents of the handover book was important. Second respondent's ruling meant that the applicant's defence that the fourth respondent knew that the locomotive was having brake problems and that this has been reported to the planner by Khumalo was nullified.

28] Respondent argued that Khumalo was not present when the incident occurred and that his evidence could not have contributed anything about the incident itself. The commissioner's decision is not one that a reasonable decision maker who wants to decide the dispute quickly and fairly and with a minimum of legal formalities could not reach.

29] Page 291 of the transcribed record provides the following: *"Mr Khumalo (sworn-in)*

EXAMINATION IN CHIEF

Maake: *What position are you employed at, at the Respondent?*

Khumalo: *I am a Loco driver working at Iscor. I have 22 years at Iscor Company*

Maake: *On 23 March 2002 what shift were you on?*

Khumalo: *I was on the shift from 14h00 to 22h00*

Van Vuuren: *I object to the use of this witness as he was not even on duty at the time of the alleged incident.*

Comm. Stone: *Objection sustained this witness is unnecessary".*

30] Section 138(1) of the LRA provides the following: *"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".*

31] In the unreported case of *Sondolo IT (Pty) Ltd v Gordon Howes and others case number JR321706,* Basson J held that: *"Section 138(1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to*

determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In deciding the matter the commissioner may rule on the evidence which may be presented to the arbitration and may also restrict the range of issues which parties are required to give evidence".

32] In the present case, second respondent's decision to disallow Khumalo as a witness is a decision made within the powers conferred to him in terms of section 138(1) of the LRA. However, in making the decision, second respondent failed to afford the applicant a chance to respond to the objection before he could make the decision. Second respondent did not state the reason why he considered Khumalo's evidence unnecessary. I agree with the applicant that the fact that Khumalo did not work on the same shift with the applicant does not mean that his evidence would be irrelevant. Second respondent should have allowed applicant an opportunity to explain the relevance of bringing Khumalo as a witness before making a ruling whether the witness was necessary or not. 2nd respondent therefore failed to act fairly in conducting the arbitration proceedings since he made a ruling to disallow a witness without first allowing the party who called that witness to motivate the relevance of the witness's evidence. I am satisfied that second respondent has committed gross irregularity by making a decision on the objection raised without first affording the applicant an opportunity to show the relevance of the evidence he intends leading. Moreover, 2nd respondent did not even provide reasons for his ruling and thus the ruling was capricious and arbitrary.

33] The test for review of arbitration proceedings has been stated in the case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)* at para 119 as follows: "*...having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach?"*.

34] In this matter, I have already come to the conclusion that the matter was part heard when second respondent presided over it. Furthermore, I have also come to the conclusion that the second respondent committed a gross irregularity when he disallowed Khumalo as a witness stating that the witness was unnecessary. In my view, given the irregularities mentioned above, the decision reached by the 2nd respondent is not one which a reasonable decision maker could have reached given the materials which were before him.

35] In the light of the above analysis, I am of the view that second respondent's award stands to be reviewed and set aside.

Order

36] In the premises I make the following order:

(i) The award issued by the second respondent under case number MENT.1304 on 26 May 2003 is hereby reviewed and set aside.

(ii) The matter is remitted to the first respondent to be heard by another commissioner other than the second and third respondents.

(iii) Fourth respondent is ordered to pay the costs of this application.

Nyathela AJ

Date of Hearing : 22 June 2009

Date of Judgment : 22 September 2009

Appearances

For the Applicant : R. Sutherland SC

For the Respondent: G. Pretorius SC