

SOUTH AFRICA / JUDGMENT

Haraeus Refinery (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (P 315/11) [2013] ZALCPE 15 (13 March 2013)

[2013] ZALCPE 15

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

P 315/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

not reportable

Case No: p 315/11

In the matter between:

HERAEUS REFINERY (PTY) LTDApplicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATIONFirst Respondent

COMMISSIONER N SESANISecond Respondent

LEON POTGIETERThird Respondent

heard: 23 august 2012

delivered: 13 march 2013

Summary: The commissioner's failure to apply her mind to the issue of legal representation before consenting thereto constituted gross irregularity which rendered her arbitration award reviewable.

LALLIE, J

This is an application for review in which the applicant seeks an order reviewing and set aside an arbitration award of the second

respondent (the commissioner).

Background Facts

The third respondent was employed by the applicant until his dismissal for misconduct.

The dismissal was preceded by two disciplinary enquiries. In the first he was charge with:

‘Unauthorised use and/or abuse of company telephone facilities in that between May 2010 and September 2010 you without authority and/or permission used/abused the company telephone for private purpose’.

No pronouncement was made on the first disciplinary enquiry as the chairperson abandoned it midstream. The second disciplinary enquiry was then held, with a different chairperson in which the following charges were preferred against the third respondent:

1. ‘Gross dishonesty, in that during period January 2010 until August 2010 you deliberately, intentionally and fraudulently manipulated the company telephone system in a fraudulent/dishonest manner, for personal gain,
2. Unauthorised use and/or abuse of company telephone facilities in that between May 2010 and September 2010 you without authority and/or permission used and/or abused the company telephone for private purposes’.

The disciplinary enquiry culminated in the third respondent’s dismissal, a decision which was partly influence by the fact that he was on final written warning for misconduct involving dishonesty.

When the third respondent challenged the fairness of his dismissal at the CCMA the commissioner found that the applicant had failed to show that the third respondent’s dismissal was fair and reasonable. She further found that the final written warning issued against the third respondent for unauthorised use of the applicant’s telephone system for personal gain should stand with effect from the date of the third respondent’ dismissal and ordered his reinstatement which involved the payment of R118 300.00, an equivalent of his seven (7) months’ remuneration.

Grounds for Review

In the founding affidavit the applicant sought to rely on a number of grounds for review, however, it abandoned some. The remaining

grounds were based on the submission that the commissioner committed gross irregularity.

The applicant submitted that the commissioner committed a gross irregularity by not permitting it to call Mr Greef (Greef) to

testify. I agree with the third respondent that this allegation is not supported by the record which reveals that the applicant's

representative during the opening statement intimated that Greef would be called as a witness. However when given an opportunity to call his witness he closed the applicant's case without calling Greef to testify. It cannot under those circumstances be said that the applicant was denied by the commissioner the right to call a witness. The commissioner did not violate the applicant's right to call witness and this ground for review is not valid.

I will now consider the applicant's submission that the commissioner failed to apply her mind to the question of legal

representation. It is common cause that at the commencement of the arbitration Mr Bakker who represented the third respondent was identified as an attorney and that the commissioner did not consider the question of legal representation. Legal representation in arbitrations at the CCMA is governed by Rule 25(b) of the Rules for the conduct of proceedings before the CCMA (the CCMA Rules) which provides as follows:

'In any arbitration proceedings, a party to the dispute may appear in person or be represented only by:

- (1) a legal practitioner
- (2) ...
- (3) ...

(C) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for dismissal relates to the employees' conduct or capacity, the parties, despite sub rule (1) (b), are not entitled to be represented by a legal practitioner in the proceedings unless-

The commissioner and all the other parties consent;

The commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation'.

The applicant relied on *Ndlovu v CCMA Commissioner Mullins and Another*¹ in which the decision in *Coyler v Essack*² was applied. In these matters the court, dealing with the repealed section 140 of the Labour Relation Act 66 of 1996 (the LRA) with provisions identical to Rule 25 held that section 140 (1) (a) of the Act does not give a commissioner the right to act on a mere whim when consenting to legal representation. The court explained that consent is a discretion to be exercised by the commissioner who is duty bound to do so judicially. When the parties want legal representation the commissioner must nevertheless not allow legal representation by withholding his or her consent. The court also expressed the view that the no different principle does not rescue the award from being reviewed and set aside. The applicant, relying on *CUSA v Tao Ying Metal Industries and Others*³ argued that there was an obligation on the arbitrator, in determining legal representation to set out at least brief reason for her decision in the absence of

which it cannot be concluded that she applied her mind to the issue.

The third respondent argued that it was clear to everybody at the arbitration that the third respondent was legally represented and that both parties had mutual consent to such representation. It was further argued that the applicant was also suitably represented by a person with a level of skills substantially equivalent to those of an attorney. The third respondent concluded by arguing that it would have been alarming to find the commissioner allowing the applicant, a major corporate employer, to be represented by an employer's organisation representative, while, disallowing the third respondent the benefit of legal representation.

It is common cause that there was a duty on the commissioner to consent to legal representation. The source of the obligation is Rule 25 of the CCMA Rules. The commissioner did not express her consent, neither did she deal with the question of consent in her award. Rule 25 clearly provides that if a party has alleged that the reason for dismissal relates to the employee's conduct, parties are not entitled to be legally represented. By not giving her consent before the third respondent was legally represented, the commissioner acted in contravention of Rule 25 in that the third respondent was legally represented as if he was entitled to such representation. The commissioner merely stated at the commencement of the arbitration that the third respondent was legally represented by Mr Johnny Bakker of Francois Le Roux Attorneys.

The least that the commissioner was required to do in terms of Rule 25(c) (1) was to consent to legal representation. The third

respondent submitted that everyone at the arbitration was aware that the third respondent was legally represented as he was introduced as an attorney. That argument may be valid to explain that the applicant tacitly consented to the legal representation. However the commissioner was in a different position and different rules applied to her conduct. As an arbitrator she had a statutory mandate to carry out in conducting the arbitration. She had to consent to legal representation and consent implies that she had to agree to legal representation. Without the precursor of considering whether legal representation should be allowed, consent to such representation cannot exist. The commissioner failed to apply her mind to the question of legal representation before the third respondent was represented by a legal practitioner at the arbitration and the omission constituted a gross irregularity.

The gravity of the commissioner's conduct is highlighted when looked through the prism of the following dictum of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 4 at paragraph [105] 'Section 145 therefore must be read to ensure that the administrative action by the CCMA is lawful, reasonable and procedurally fair'. The commissioner's failure to consent to legal representation rendered the way she conducted the arbitration proceedings unreasonable and procedurally unfair. This flaw in the arbitration award on its own is material enough to render it reviewable.

As the third respondent did not act unreasonably by opposing this application it will not be appropriate to make a costs order.

In the premises the following order is made:

14.1. the arbitration award issued by the second respondent under Case Number ECPE 5244-10 and dated 10 June 2011 is reviewed and set aside;

14.2. the matter is remitted to the first respondent to be arbitrated de novo by a commissioner other than the second respondent;

14.3. no order is made as to costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Unwin of

Chris Unwin Attorneys

For Respondent: Mr Le Roux

Instructed by: Bakker Attorneys

1[1993]3 BLLR 231 (LC)

2[1997]9 BLLR 1173 (LC)

3[2008] ZACC 15; 2009

(2) SA 204 (CC).

4[2007] 28 ILJ 2405 (CC).

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Prepared on 12 October 2026 · Esheria