

SOUTH AFRICA / JUDGMENT

Kimberley Ekapa Mining Joint Venture v Setlhodi and Others (C634/2019) [2021] ZALCCT 89 (19 November 2021) [2021] ZALCCT 89

COURT

Labour Court Cape Town

BEFORE

BN Conradie

CASE / FILE NUMBER

C634/2019

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Source record

IN

THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Not

Reportable

Case

Number: C634/2019

In

the matter between:

KIMBERLEY
EKAPA MINING JOINT
VENTURE Applicant
and
EMILY
SETLHODI First
Respondent
COMMISSION
FOR CONCILIATION
MEDIATION
&
ARBITRATION Second
Respondent
COMMISSIONER
LEON JOUBERT N.O. Third
Respondent
Date
heard: 12 October 2021
Date
of Judgment: This judgment was handed

down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 19 November 2021.

Summary: Review – Commissioner accused of influencing employee not to testify after employer closed its case. Award reviewed and set aside and referred back to CCMA.

JUDGMENT

CONRADIE AJ

Introduction

1. This is an application in terms of section 145 of the Labour Relations Act in which the Applicant (the company) seeks to review the award of the Third Respondent (the commissioner) handed down on 19 September 2019.
2. The application is unopposed.

Background

3. The company operates a diamond mine.
4. The First Respondent (the employee) was employed by the company as a security officer for nearly ten years.
5. The employee's job was to guard against the theft of diamonds and other property at the mine.
6. In terms of her employment contract the employee was subjected to an annual security vetting process. This included polygraph testing.
7. After the employee failed two polygraph tests, she was charged with a breach of her contract of employment in that she failed to maintain and retain an approved security vetting status. She was dismissed.
8. The employee referred a dismissal dispute to the Second Respondent (the CCMA) who in turn appointed the commissioner to arbitrate the matter.
9. At the arbitration, the security manager and the polygrapher testified on behalf of the company.

10. After the company closed its case, the employee did not give evidence nor did she call any other witnesses to testify on her behalf.
11. The commissioner found that the dismissal of the employee was substantively unfair and awarded her one month's salary in the amount of R9 014.20.

Grounds of Review

12. Dissatisfied with the award, the company seeks to review it on several grounds. The only ground which is relevant for my conclusion in this matter is the complaint that the commissioner was biased towards the company and that it was prejudiced by his conduct.
13. In support of this the company states the following in its founding affidavit:

"It must be placed on record, which is not stated on the Arbitration Award, that after the employee closed its case, the Commissioner

stated to the 1st Respondent: "You are surely not going to testify now, nothing is in dispute". "

14. According to the company, prior to this comment by the commissioner, the employee was going to testify. However, after the comment she decided not to testify and closed her case.
15. The company submits that the failure by the commissioner to conduct the arbitration proceedings in a fair manner inevitably meant that the he committed misconduct in relation to his duties as an arbitrator or alternatively committed a gross irregularity in the conduct of the arbitration proceedings.

Evaluation

16. If it is indeed correct that the commissioner made the comment referred to above then this would amount to misconduct on the part of the commissioner and an irregularity in the conduct of the proceedings.
17. A perusal of the transcribed record indicates the following exchange:

"COMMISSIONER: Okay. Then it's the case of the employee.

Are you just going to argue?

MR RATSHILUMELA: Ja.

COMMISSIONER: Are you going - just going to provide an argument? I would like to hear – you will have to please to address me. Shall we continue – is it necessary for her to testify? Because you already admit that she failed it and because of the failure, that she failed, she was found guilty of misconduct and dismissed."

18. While what is recorded on the record does not tie up exactly with what is stated in the founding affidavit in support of the review, in the absence of an affidavit from the commissioner or the employee denying that the commissioner made the comment in question, I am left with no choice, but to accept that the words attributed to the commissioner were uttered.
19. In the circumstances, I am of the view that the award should be reviewed and set aside. However, in this matter, I do not believe that I am in position to substitute my own decision for that of the commissioner as no evidence was presented by the employee. The matter will have to be referred back to the CCMA.
20. I make the following Order:
 1. The arbitration award issued by the Third Respondent under case number NC2274-19 on 19 September 2019 is reviewed and set aside.
 2. The matter is remitted to the Second Respondent to be heard by a commissioner other than the Third Respondent.

BN. Conradie

Acting Judge of the Labour Court

Appearances:

For the Applicant: Peyper Austen Incorporated.

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Prepared on 10 October 2026 · Esheria