

SOUTH AFRICA / JUDGMENT

**Mackay v Niehaus NO and Others, Starbuck
v Niehaus NO and Others (P671/00, P672/00)
[2000] ZALC 128; [2001] 3 BLLR 365 (LC);
(2001) 22 ILJ 186 (LC) (9 November 2000)**
[2000] ZALC 128

COURT

Labour Court

BEFORE

A A Landman

CASE / FILE NUMBER

P671/00, P672/00

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CASE NO. P671/00

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

DATE 9.11.2000

In the matter between:

DEON MACKAY Applicant
and
MINNAAR NIEHAUS N O First respondent
COMMISSION FOR CONCILIATION, MEDIA-
TION AND ARBITRATION Second respondent
SOUTH AFRICAN POST OFFICE Third respondent
A N D
CASE NO. P672/00
MORNE STARBUCK Applicant
J
U D G M E N T

LANDMAN, J:

[1] Two matters were set down for hearing on 8 June 1999
before a senior commissioner of the CCMA. The two
matters involved MACKAY v S A POST OFFICE and
STARBUCK
v S A POST OFFICE. The Post Office was not in a
posi-
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tion to proceed despite having had adequate notice and

as a result its representatives tendered the wasted

costs of the applicants for that day, being 8 June 1999, on a non-litigious scale and the matter was postponed. This order is recorded in writing by the senior commissioner. As a result, the attorney representing Mackay and Starbuck, prepared a bill of costs which was submitted to the CCMA for taxation. The CCMA appointed the first respondent as its taxing master in terms of the Rules Regulating the Practice and Procedure for Resolving Disputes through Conciliation and Arbitration Proceedings, Government Notice R245 of 31 March 2000. These regulations were promulgated by the governing body of the CCMA in terms of Sec 115(6) of the Labour Relations Act 66 of 1995.

[2] The first respondent heard argument and expressed the view that the senior commissioner's letter indicated that payment of wasted costs was only ordered

in respect of that specific day. As such he was of

the opinion that those items in the bill of costs re-

flecting costs incurred prior to the arbitration day

had to be excluded. In the circumstances he ruled that

items 1 - 4 of the bill of costs had to be excluded.

[3] The applicants were dissatisfied with this ruling and

sought to review the decision of the first respondent

in this Court.

[4] Rule 15(6) of the CCMA provides that:

"Any decision by a taxing master is subject to the review of the Labour Court on application."

It is quite clear, however, as Mr Laubscher, who

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5 appeared on behalf of the applicants, correctly pointed out, that a subordinate legislature such as the governing body of the CCMA is unable to confer

jurisdiction on the Labour Court and to empower the

Labour Court to do its bidding. See L.C. Steyn *Die uitleg van Wette* 4th edition 233-234.

[5] In the circumstances the present application for review cannot be founded on Rule 15(6). However, Sec 158(1)(g) of the Labour Relations Act is applicable and in terms of that section, this Court may review any function of the CCMA on grounds permissible at law. This, however, means that the Court would have to apply the normal tests which have been found to be applicable in review situations. It would seem that the reviewing method of a taxation, as it is commonly handled in terms of the Rules of the High Court, is not entirely applicable in this particular instance. It appears from such decisions as *WELLWORTHS BAZAARS LTD v CHANDLERS LTD. AND OTHERS* 1947 (4) SA 453 (T) that when a superior court reviews a taxation by a taxing master it will correct the taxing master and substitute its own opinion for his or her opinion where the matter is one in which the Court is at least as well able to judge as the taxing master is.

[6] In this case the only question is whether the commissioner misdirected himself or committed a gross irregularity when it came to interpreting the order made by the senior commissioner. The language used by the senior commissioner is language which has been used in courts and tribunals in this country for at least two

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centuries. It has acquired a well-founded meaning. Wasted costs are in principle the same as costs of the

day. See *CRAIG v KOPERMIJN, LTD.* 1926 TPD 63 and 66, *DELFOF AND ATLAS CO-OP (EDMS) BPK v V V BANDE (EDMS) BPK* 1972 (3) SA 907 at 911B-C and *MBEKENI v JIKA* 1995

(1) SA 423 (TK) at 424. *PICKERING, J* who delivered the judgment in *MBEKENI*'s case goes on to say at 424F:

"'Wasted costs' are additional costs in-

curred by a party through the fault of
his opponent or costs previously incurred
which have become useless by reason of
his opponent's fault."

See also the DELFOS case at 910H which says:

"Die algemene reël is dat die verkwiste
koste die ekstra koste is."

[7] It follows in my opinion that the first respondent did
not properly apply his mind to the proper meaning of the term "wasted costs of the day" and that
he committed a gross irregularity which entitles this Court to intervene in his decision. In the
premises the two

applications under case no. P671/00 and P672/00 must

succeed. The decision made by the first respondent under the auspices of the CCMA in both
matters is

REVIEWED and SET ASIDE. The matters are remitted to the
CCMA to have them taxed afresh and the taxing master,
whoever that may be, is enjoined to have regard to the
proper meaning of the concept of wasted costs as ex-
plained in this judgment and in the decisions to which
I have referred.

[8] The applicants seek costs against the taxing master
being the first respondent and the CCMA being the
second respondent. Generally speaking, costs are not
awarded against a public official unless the public
official was mala fide in exercising jurisdiction.

That is not the case here. In the circumstances
there will be NO ORDER for costs.

A A LANDMAN

JUDGE OF THE LABOUR COURT

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