

SOUTH AFRICA / JUDGMENT

## Netshisumbewa v Africa Glass and Others (JR594/05) [2007] ZALCJHB 57 (25 May 2007) [2007] ZALCJHB 57

COURT

Labour Court Johannesburg

BEFORE

Moshoana

CASE / FILE NUMBER

JR594/05

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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR594/05

2007/05/25

In the matter between

N N NETSHISUMBEWA

Applicant

And

AFRICA GLASS and Others

Respondents

### J U D G M E N T

MOSHOANA A J: This is an application for review, brought in terms of Section 145 of the Labour Relations Act. The award that is been attacked, was issued by the second respondent acting under the auspices of the first respondent. The said award was issued on 11 February 2005.

The court will return to the contents of the awards later in the course of this judgment. The applicant was not satisfied with the award and brought an application to review as pointed out earlier. Mainly the applicant relies on five grounds and the court shall deal with them in turn.

The first ground is in relation to an incomplete record. Mr Maluleke for the applicant argued that the respondent failed to submit a record to this court for the purpose of review. On that submission he relied on the decision of this court in the matter of UEE- Dantex Explosives (Pty) Limited v Maseko & Others, 2001 (7) BLLR 842 (LC). In that judgment, the court said the following at paragraph 24:

The Arbitrator and the Commissioner failed to comply with their duty to assist the court in discharging a statutory duty to determine the review applications. The costs order alone would not assist the applicants, since it would leave it with the dispute of fact, and the inability of this court to discharge its review functions. This is an appropriate case for setting aside the award because of the failure by the Arbitrator and the Commission to keep or furnish the court with a record of the arbitration proceedings, and to direct that the Arbitrator and Commission pay the applicant's cost on an attorney and client's scale.

What is quickly discernible from that judgment is the court saying that case been an appropriate case for setting aside an award, because of the failure to keep or furnish the court with the record.

In this matter, a record was produced; there is no doubt that that record was produced by the first and the second respondent. In fact during argument, the court referred Mr Maluleke to the record that was in the court file. After lunch adjournment Mr Maluleke argued that that record was only filed late. But obviously that in itself defeats his whole argument relying on the UEE- Dantex judgment. The judgment says; failure to keep and furnish the court; so the court was furnished with the record. On that basis, there is no justification to interfere with the second respondent's

award on that ground.

The second ground related to the so-called *functus officio*. The argument, as it went, was that Mr Lucilo was not allowed to represent the respondent; Africa Glass Industries in the arbitration proceedings, simply because he was from a company or an organisation called Gedar. The issue according to Mr Maluleka's submission is that there was already a ruling made by another Commissioner acting under the auspices of the same Bargaining Council.

But when one has regard to the ruling, the ruling relates only to Mr Roberts. It does not say anything with regard to

Mr Lucilo. Nonetheless, even if it referred to Mr Lucilo, the first difficulty is that no objection was raised that Mr Lucilo is not entitled to represent. Nor was it argued before the second respondent that he should make a finding that he is not entitled to represent.

In reviews, the court considers matters that were properly before the Commissioner, and not anything beyond. Mr Maluleke

referred the court to various passages in the record in an attempt to prove his point. However, some of the references he made related to Mr Lucilo stating on record that he is appearing as a SEIFSA representative. When the court indicated to Mr Maluleke that that in itself defeats his entire argument, he referred to certain portions in the record where there was a debate whether Gedar is part of SEIFSA. That was a debate; as the record reflects between Mr Lucilo and Mr Brown, who at some point was confused with the status of the two. Nonetheless, that does not take the argument anywhere.

The second difficulty is simply based on the fact that there will never be a sustainable argument to the effect that there was already another ruling in relation to Mr Lucilo. The only ruling is in relation to Mr Roberts. In fact the court referred Mr Maluleke to portions of the record where he himself mentioned the so-called colleagues of Mr Roberts. This ground, in the court's view cannot be the basis to interfere with the award made by the second respondent.

The third ground related to the reasons for compensation. In the heads of argument, the point was articulated as follows at page 10, paragraph 3 thereof:

Having found that the dismissal was only procedurally unfair, on 11 February 2005; the second respondent ordered the third respondent to pay R16 518 to the applicant before 1 April 2005. He failed to give reasons for this meagre compensation award.

At Page 11 , paragraph 2 thereof, a point was made that the second respondent's failure to give reasons for compensation award, renders the award to be reviewed and set aside, there was reference to the decision of *Armstrong v T and Others*, 1999 (20) ILJ 2568 (LC).

In the course of his argument, Mr Maluleke conceded rightly so; that the Labour Appeal Court in the matter of *ABSA Broker (Pty) Limited v Moshwana N.O and Others*, 2005 (10) BLLR 939 (LAC) ,the Labour Appeal Court, specifically on this question stated that; the fact that a Commissioner does not give reasons; that in itself does not amount to a reviewable irregularity.

However, Mr Maluleke faced with that decision of the Labour Appeal Court, argued that the case for the applicant is that the Commissioner should have taken into account factors like that the dismissal happened on a particular date and there has been certain correspondence that were exchanged.

The difficulty with that argument is that compensation being a discretionary award, the court is not certain whether in fact, when the Commissioner considered this issue, did ask himself those questions, and did consider them. The fact that they do not appear on the award cannot readily lead to a conclusion that he did not take that into consideration, when he was exercising his discretion.

The court is loath to interfere on issues relating to discretion, particularly in the context of a review. There has been decision that even at the point of appeal, interfering with a discretionary ruling; an appeal court will do so loathly. On the basis of that; it is my view that that ground cannot disturb the award made by the second respondent.

The other ground related to the finding of consistency of the evidence of the respondent employer. During the submissions it became very clear that an attempt was being made to say that the Commissioner was wrong in his finding, almost close to appealing. The basis thereof being that given the very same evidence that is common cause according to the submission of the Mr Maluleke, the Commissioner should not have arrived at the conclusion that he arrived at, he should have come to a different one. That in itself is tantamount to an appeal, because one is then questioning the results as apposed to the process. I suppose that that point was well articulated in the Rustenburg (Sidumo) judgment that in a review process, all what one is concerned with is the process, whether the decision was at the end right or wrong; is not the question.

However, as I have indicated that I will return to this point when I deal with the award, I now do so. The Commissioner made his findings very clear, at page 240 of the papers he said:

It is my finding that the employer's representatives, at the meeting felt sufficiently threatened and that their appreciation of fear was reasonable.

This finding is consistent with the evidence that was presented before him, which Mr Maluleke admitted was led by Mr Short, to the effect that when the statement kill was mentioned; all what rang in mind was what happened three months ago when somebody was murdered in the sister company adjacent to theirs.

How then can the court fault the Commissioner in finding that the evidence before him leads to a conclusion that their representative felt sufficiently threatened by the word; kill?. Mr Maluleke took issue with the fact that the employee's version was contradictory. The Commissioner in dealing with that issue states at page 239 of the record the following:

In his evidence in chief, the employee mentioned that he spoke in his vernacular language which is Venda; strangely enough, his witness made no reference thereto and the employer's witnesses were never questioned as to whether they understood Venda or not.

Further the Commissioner went on page 240 to say:

The employee subsequently admitted under cross examination that he spoke in English. This puts his own credibility as a witness in doubt.

Mr Maluleke in his submission says; the issue is not whether that was said in the manner in which it was said, but is whether it was relevant. In the court's view, two statements which do not marry each other leads to contradiction and nothing else. The court cannot falter the Commissioner in making a conclusion that the version of the employee was contradictory.

As pointed out, this ground has difficulties as same is close to an appeal, which this court cannot do, and that there are good reasons, supported by evidence, for the Commissioner to come to whatever conclusions he came to. On those basis the court reject that ground.

The last ground related to parity principle. The basis thereof, is that there should have not been a selective dismissal. Mr Maluleke conceded that at best his case is that there should have not been selective charging. He also conceded that this principle suggests that an employee, who raises that defence should be saying that I am at the same level, i.e. guilty as well.

But the issue would be whether the Commissioner was wrong in finding that that which was said, was ground enough to dismiss. And in this instance the court considers dismissal as a sanction; not as an act. Obviously this will lead the court to fall back to what was said in the Rustenburg decision; that in terms of sanction that should be deferred to the employer. In fact recently the Labour Appeal Court followed that decision in the Engen Petroleum matter.

So, that concludes all the grounds that were persisted with. It is clear that no case has been made to interfere with the award made by the second respondent. In the results I make the following order.

The application for review is dismissed with costs.

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