IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: D483/06

REPORTABLE

In the matter between:

DOUGLAS ARANGIE Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

COMMISSIONER I MADONDO N.O. Second Respondent

ABERDARE CABLES Third Respondent

JUDGMENT

MOSHOANA, AJ:

INTRODUCTION

[1] This is an application brought in terms of Section 145 of the Labour Relations Act, seeking an order that the award issued by the Second Respondent be reviewed and set aside. The application was opposed

by the Third Respondent. The Applicant, upon receipt of an Opposing Affidavit, deposed by one Erica Da Silva, raised a point *in limine* to the effect that her affidavit should be ignored by the court as it amounts to hearsay evidence and does not meet the requirements in terms of the Evidence Amendment Act 45 of 1988, in particular Section 3 thereof. In court, when the matter was argued, it appeared that this point was not persisted with. Advocate Seggie appearing for the Applicant; made no submissions in relation to this point. I assumed that the point has been correctly jettisoned. Even if the point has not been jettisoned, I am of the view that same is bad and should be dismissed. I say so because in Review Applications what really matters for the Reviewing Court is the record of the proceedings sought to be reviewed. It really does not matter what the parties' observations were outside what is properly transcribed. The basis for the point *in limine* was that Da Silva recounted what had occurred at the arbitration proceedings when she was not present. On that basis so the argument went, she presented hearsay evidence. Even if the court were to uphold the point, what remains is the record of the proceedings which ought to be taken into account for the purpose of Review Applications. Accordingly if the point was persisted with, which I do not believe it was, it was a bad one in law and I accordingly dismiss it.

BACKGROUND FACTS

[2] The Applicant, an employee of the Third Respondent, on 30 November 2005 refused to take an Alco Scan Breathalyser Test. The basis for his refusal was that the testing was unreliable. At or around 21H00 on that day (30 November 2005) the Applicant was notified of his suspension and the reason for suspension was stated as follows:-

"*Refusing to comply with a reasonable request to undertake an Alco Scan when reporting for duty which is viewed very seriously by the Company."*

[3] On or about 05 December 2005, the Applicant received a notification to attend a disciplinary enquiry for the offence that he had committed on the 30 November 2005. The offence was set out as follows:-

"*Refusing to comply with a reasonable request to undertake an Alco Scan when reporting for duty on 30 November 2005 which is viewed very seriously by the Company".*

[4] The disciplinary enquiry was held from 05 December to 08 December 2005. The Applicant was found guilty and dismissed with immediate

effect. In terms of the Disciplinary Hearing Action Form, the details of the misconduct that led to dismissal were set out as follows:-

"*Refusing to comply with a reasonable request to undertake an Alco Scan when reporting for duty".*

[5] Aggrieved by the dismissal, the Applicant referred the dispute to the First Respondent for resolution. The Second Respondent was then appointed to resolve the dispute through arbitration. On 06 June 2006, the Second Respondent issued an award, in terms of which he found that the Applicant's dismissal was substantively fair. His referral was accordingly dismissed with no order as to costs. The Applicant was aggrieved by the outcome and sought to bring this Review Application.

THE AWARD

[6] In the award, the Second Respondent sought to ask himself a question, which he had couched in the following terms:-

"The question to be decided is whether the Applicant contravened the rule or practice of the company by refusing to blow into an alcohol scanner and to leave the company site after he had refused to blow into the alcohol testing instrument"

[7] What immediately become discernable by the question couched by the Second Respondent, is that same is not consistent with what the Applicant was charged and dismissed for. The Second Respondent, added an allegation of refusal to leave the company site after having refused to blow into the alco testing instrument. It is not clear where this would arise from since the Applicant was charged with refusal to undertake the alco scan when reporting for duty and he was dismissed for that allegation.

[8] In the body of the award, the Second Respondent stated the following:-

"The rule to subject any person suspected of being under the influence of alcohol testing and the practice of requesting the person refusing to subject him or herself to alcohol testing to leave the company premises were necessary in order to ensure safety on the company premises. The evidence shows that the rule and the practice have been consistently applied by the company so as to ensure the safety of its employees or of any visitor on its premises."

[9] Quite interestingly, at the end of the body of the award, the Second Respondent stated the following:-

"I am satisfied that the offence of which Applicant had been found guilty of is of sufficient gravity to render continued employment relationship between the parties intolerable. I accordingly find that the dismissal in this case was an appropriate sanction".

ANALYSIS

[10] It is clear to me that the Second Respondent has indeed committed gross irregularity in the conduct of the proceedings before him. It is clear that he paid little attention to the Security Procedures. For the purposes of this judgment, I shall consider paragraph 24, dealing with alcohol and drugs and paragraph 24.2 dealing with the Breathalyser Test, most importantly paragraph 24.4 which provides as follows:-

"No employee will be obligated to take such a test, however the company reserves its right to refuse entry to the premises to such an employee suspected to be under the influence of alcohol or other substances".

[11] The provision of this procedure was critical for the determination of the question whether the Applicant was guilty of the misconduct, more so, whether he was justified in refusing to take such a test. It

occurred to the Second Respondent that that aspect is not determinative of the guilt or otherwise of the Applicant. It is also apparent that the Second Respondent paid too much attention to the fact that the Applicant was requested to leave, he refused and on that basis dismissal was justified. However the Applicant as I have pointed out earlier was not charged with refusal to leave the premises. The Applicant was charged with refusal to take the test, which in terms of the Third Respondent's own procedures he is not obligated to take. (See **Edcon v Pillemer NO and others (2008) 5 BLLR 391 (LAC)** at page 399 para 25 – 26)

[12] It is interesting to note what the Labour Appeal Court has said in the matter of **Maepe v CCMA and Others (2008) 29 ILJ 2189 (LAC)** at paragraph 11. The court had the following to say:-

"The answer to this argument is that where the law is that a Commissioner must take into account a certain factor in deciding a certain question he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account. If the factor was a critical one and he did not take it into account he may well have committed a gross irregularity justifying the reviewing and setting aside of his award.

Accordingly the Commissioner's omission under discussion is capable of constituting a gross irregularity even if the First Respondent did not ask the Commissioner to take into account the Appellant's conduct in giving false evidence under oath. Accordingly, I am unable to uphold the submission advanced by counsel for the Appellant in this regard."

[13] It is understood by this Court that if a factor is a critical one, even if neither of the parties raised it, it ought to be considered by a Commissioner, otherwise his/ her award is reviewable. In the matter before me, the security procedure was presented. It is very clear that the procedure is critical for the purpose of determining whether the conduct of the Applicant by refusing to undergo the test amounted to misconduct. Proper reading of the procedure suggests that employees are not obligated and therefore any refusal would not amount to insubordination, which according to the Second Respondent was gross to justify a dismissal. As pointed out earlier the Second Respondent says little about the applicability of the procedure when it is such a critical document. In the Maepe decision the Labour Appeal Court went on to say the following:-

"I agree, at a general level, with what Conradie JA said in this passage. Indeed, I have probably said the same thing myself in some

or other judgment in the past. Although a Commissioner is required to give brief reasons for his or her award in dismissal dispute he or she can be expected to include in his or her award brief reasons those matters or factors he took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a Commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such a matter or factor into account. In the present matter the Appellant's conduct in giving false evidence under oath was so critical to the issue of the relief that, in my view, the only explanation for the Commissioner's failure to mention it in his reasons as one of the factors that he took into account is that he did not take it into account. If the Commissioner had considered such a critical factor, he definitely would have mentioned this in his award. In my view the fact that the Commissioner did not mention the very critical factor in his award justifies the drawing of the inference that he did not take it into account. Furthermore, his award is very comprehensive and cannot be said to have been intended to be brief.

Accordingly, the matter must be decided on the basis that the Commissioner did not take this factor into account in considering what relief if any should be granted to the Appellant. In the light of the conclusion I have reached above that the Commissioner did not take into account the fact that the Appellant had given false evidence under oath in the arbitration proceedings in dealing with the matter the next question to consider is whether or not the Commissioner's failure to take this fact into account constituted a gross irregularity".

[14] In the end the Labour Appeal Court in that matter concluded that the Commissioner has committed a gross irregularity and it set aside his award on reinstatement and substituted same with a compensation of twelve (12) months. In the matter before me, it is clear that the defence as set out in the Security Procedures was critical to the determination of the fact that the applicant was not obliged and therefore was not guilty of misconduct that he was charged with.

[15] Again what renders the Second Respondent's award reviewable is the fact that he effectively found justification for a dismissal on the basis of a charge that the Applicant was never charged with. In my view that alone amount to misconduct on the part of the Commissioner and in fact a gross irregularity.

(See **Nedcor Bank Ltd v Frank and others (2002) 23 ILJ 1243 (LAC)** at para 15 G –H also **Louw v Delta Motors Corporation (1996) 2 BLLR 205 (IC)** at 209 D – F**)**

[16] The Second Respondent in his analysis of evidence and argument casually referred to the provisions of clause 24.3 which provides that an employee is not obligated to take the alcohol test as provided for in the Security Procedures.

However he went on to refer to a practice which allegedly is the one that the Applicant had breached, which provided that the company should not allow a person who has refused to blow into the alcohol testing instrument an entry into the premises or to ask such a person to leave the premises if he is already on the premises. All of this, much as reference is made to the practice, matters not, the charge that the Applicant faced was that of refusal to comply with the reasonable request to undertake an Alco scan when reporting for duty. The Applicant was not charged with an allegation that he refused to leave the premises after having refused to take the Alco scan. The Second Respondent went on to find on the balance of probabilities that the Applicant was aware of the practice in question. In the Court's view the issue is whether the Applicant is guilty of the

charge, which led to his dismissal not that he is aware of some practice, which suggest that the refusal to take the Alco scan or any test prevents his entry into the premises of the employer and if he refuses to leave that amounts to misconduct. It is therefore clear on this basis alone that since the Applicant was not charged with refusal to leave, any justification for a dismissal, particularly where there is no obligation to take the test, suggest that the Second Respondent committed an irregularity in the proceedings and his award is liable to be set aside on review.

CONCLUSION

[17] In this matter, as I have demonstrated above, what the Commissioner was concerned with was not what led to the dismissal of the Applicant. He was concerned with the practice that allegedly the Applicant had breached, which he was aware of, which states that once you refuse to take the test you are supposed to leave. Such a practice seems to be clearly inconsistent with the procedures, which provides that there is no obligation to undergo the test. If it is suspected that an employee is being under the influence of alcohol or other substances, only in that event entry into the premises is refused. Proper reading of the clause of the Security Procedures

suggest that the Third Respondent can only ask the testing if any employee is suspected to have been under the influence of alcohol. It is clear from the record that no evidence was led to suggest anything with regard to the Applicant being under the influence of alcohol.

[19] In the premises I make the following order:-

1. The award issued by the Second Respondent is hereby reviewed and set aside;
2. The matter is remitted back to the First Respondent to be heard by another Commissioner other than the Second Respondent;
3. I make no order as to cost.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of hearing: 11 November 2008

Date of Judgment: 18 December 2008

APPEARANCES

For the Applicant: Adv R J Seggie

Instructed by PKX Attorneys

For the Third Respondent: Adv P H N Schuman

Instructed by Tomlinson Mnguni James Attorneys