

-----LABOUR NEWS-----

28 September 2010

Compiled by: Adv J Delpont
Delpont Labour Consultants



Inzuzu I.T. Consulting (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2010] ZALC 85

JUDGEMENT: DE SWARDT, A J

This application concerns an Order for costs which the applicant has sought against the CCMA and the Commissioner respectively. The application has its origin in the dismissal of third respondent ('Jacobus') by the applicant and her subsequent reinstatement by the Commissioner in terms of an arbitration award granted by default.

BACKGROUND FACTS

Jacobus and a colleague with whom she had apparently conducted an intimate relationship, one Melanie Westphal, had placed documents containing derogatory documents of a sexual nature on the walls of the applicant's office premises in East London. The documents were seen by all of the employees as well as by the applicant's independent auditors. Jacobus and Westphal were both dismissed at a joint disciplinary enquiry.

-----LABOUR NEWS-----

CCMA CON/ARB

Jacobus referred an unfair dismissal dispute to the CCMA . The matter was scheduled for conciliation/arbitration ('con/arb'). Jacobus appeared in person, but there was no appearance for the applicant. The Commissioner had regard to the fact that the notice of set-down had been sent by registered mail to the applicant's address, as it was reflected on the referral form which had been completed by Jacobus, and continued with the proceedings. He issued a certificate stating that the dispute remained unresolved and, at the request of Jacobus, proceeded to arbitrate the dispute. After hearing evidence by Jacobus, the Commissioner made an award declaring Jacobus's dismissal to have been unfair and ordering her reinstatement with retroactive effect, inclusive of 1 month's back pay.

ENFORCEMENT

Jacobus presented herself at the offices of the applicant and handed over a copy of the arbitration award in support of her demand that she be reinstated. The award came as a surprise to the applicant, who had not known that a date for the hearing of the dismissal dispute referred by Jacobus to the CCMA, had been fixed.

RESCISSION



-----LABOUR NEWS-----

The applicant thereupon brought an application for the rescission of the arbitration award in terms of section 144(1)(a) of the LRA. The Notice of Motion which was filed with the CCMA indicated inter alia, that the address to which the notice of set-down had been sent (and which was reflected on the referral form) was incorrect. The notice had been sent to 4 Leicester Avenue, Vincent, East London, whereas the applicant's correct address was 4 Lancaster Road, Vincent, East London. The applicant accordingly did not know that the matter was to come before the CCMA for con-arb and submitted that it had not been in wilful default when it failed to appear at the those proceedings on the aforesaid date.

RULING

A ruling was subsequently issued. In terms of the Ruling, the Commissioner dismissed the application for rescission on the grounds that the applicant had failed to appear and was deemed to be in wilful default. It is evident from the Ruling that the Commissioner, once again, relied on the fact that the notice of set-down in respect of the hearing of the rescission application had been sent to the applicant at 4 Leicester Avenue – the incorrect address provided by Jacobus. The Ruling also referred to an e-mail copy of the notice of set-down having been sent to the applicant. However, it subsequently transpired that the e-mail address which had been used, had also been incorrect. The e-mail message was intended to reach applicant's Ms Engelbrecht, but the letter 'b' in her surname was omitted. In the result, the e-mail address was incorrect and the notice



-----LABOUR NEWS-----

of set down sent by e-mail failed to reach the applicant. The service address provided by the applicant, being that of the employers' organisation SAUEO, was wholly ignored.

The applicant thereupon brought an application to this Court for the review of the Rescission Ruling aforesaid and for an Order that the CCMA and the Commissioner pay the costs of such application. In support of its prayer for costs, the applicant has alleged that the Commissioner failed to apply his mind properly to the evidence before him, that his findings of fact are not justifiable in relation to the evidence that was before him and that he exceeded his powers.

LEGAL ISSUES

Section 126 of the LRA expressly provides that the CCMA (inclusive of persons acting as commissioners in terms of the Act) is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising the functions of the CCMA. The question which arises, is whether the provisions of section 126 of the Act and the principle that a judicial officer is not liable for damages unless they have acted maliciously or mala fide, also preclude the making of a costs order against the CCMA or the Commissioner.

EVALUATION



-----LABOUR NEWS-----

The court held that there appeared to be a fundamental difference between a damages claim and a claim for costs which have been incurred as a consequence of a judicial officer's conduct. As was pointed out in the Telematrix -matter, the first principle of the law of delict, is that damages rest where they fall. That means that each person has to bear the loss he or she suffers. Acquilian liability provides for an exception to the rule and in order to be liable, the defendant must have acted wrongfully and negligently and must have caused the loss. In the instant case, the applicant has not sought to claim damages as against the CCMA or the Commissioner and it appeared that the principles applicable to delictual actions cannot simply be extended to prayers for costs against a judicial officer without any modification, because different considerations apply.

COST ORDERS

Costs orders cannot be equated with damages awards. However, it did appear to court that judicial officers, inclusive of commissioners and arbitrators, must enjoy a measure of immunity from costs orders. Commissioners and arbitrators, like judges, are required to adjudicate upon matters without fear or favour. Commissioners and arbitrators are, however, not judges of the Supreme Court of Appeal or of the Constitutional Court and it is to be expected that mistakes will be made. If a commissioner or arbitrator were to be liable to pay the costs of every review application which arises from a mistake on his/her part, or if the CCMA were to be liable for such costs, it would serve to undermine



-----LABOUR NEWS-----

their independence. For this reason, the CCMA as well as arbitrators and commissioners clearly ought to be protected against costs orders being granted in instances where bona fide mistakes have been made, or in instances where a measure of negligence has occurred.

On the other hand, litigants before the CCMA, Bargaining Councils or other arbitration institutions, are entitled to have their matters adjudicated upon by commissioners and arbitrators who are properly qualified for the position which they hold and who perform their duties in a fair and responsible manner. If a commissioner or arbitrator acts in a frivolous or vexatious manner, acts maliciously or mala fide, commits a gross dereliction of duty or is grossly negligent in the performance of his/her tasks, it would be manifestly unjust and unfair to deprive an aggrieved litigant of the costs which he/she is obliged to incur in order to set matters right.

The Commissioner was employed to adjudicate upon and to determine disputes referred to the CCMA in terms of the Act. In order to enable himself to perform this task, the Commissioner must acquaint himself with the relevant law, inclusive of the Rules of the CCMA, and with the facts of the case which is brought before him. The latter exercise entails that the Commissioner must, at the very least, read the documents on the file before him, listen to the evidence and/or argument(s) advanced to him, consider



-----LABOUR NEWS-----

and apply his mind to all of the foregoing and make a ruling or order which determines the dispute before him.

GROSS DERELICTION OF DUTY

In this matter the conclusion is accordingly inescapable that the Commissioner either failed to read the application for rescission, or failed to give any consideration thereto, prior to making the Ruling. Such conduct on the part of the Commissioner clearly constitutes a gross dereliction of duty. If the application for rescission was not on the file which had been placed before the Commissioner, such fact cannot serve to excuse his subsequent conduct. He was clearly aware of the fact that an application for rescission had been made and if the application itself was not before him, he was duty bound to search for it and to read and consider it, before making any Ruling.

APPLY HIS MIND

It is also clear that the Commissioner failed to apply his mind and/or exceeded his powers when he made the arbitration award. CCMA Rule 17(1) provides that the CCMA must give parties 14 days' written notice that a matter has been scheduled for con-arb in terms of section 191(5A) of the Act. Rule 17(4) expressly provides that if a party fails to appear, or to be represented at a hearing scheduled in terms of subrule (1) 'the commissioner must conduct the conciliation on the date specified in the notice issued in subrule (1)'. Rule 17(9) provides that if the arbitration does not



-----LABOUR NEWS-----

commence on the date specified in terms of the notice in sub-rule (1), the CCMA must schedule the matter for arbitration in the presence of the parties or by issuing a notice of set-down in terms of Rule 21.

ULTRA VIRES

The provisions of CCMA Rule 17 make it clear that a commissioner is not empowered to proceed with the arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. When a party is in default of appearance, the commissioner concerned may deal with the conciliation proceedings, but not the arbitration. The arbitration must be scheduled for a later date. In the instant case, the Commissioner was either unaware of the provisions of Rule 17(4), or he disregarded or failed to apply his mind to such provisions. As a result, he acted outside the ambit of his powers and/or authority.

It is clear from what has been stated above that the applicant has been constrained to launch review proceedings in this Court in order to enable it to have its case adjudicated upon in accordance with the rights it derives from the Constitution and the Act. In so doing, the applicant has incurred legal costs and expenditure and such costs have been incurred as a direct consequence of the failure of the Commissioner to perform the task(s) he was appointed to perform in terms of the Act. The Commissioner's conduct in



-----LABOUR NEWS-----

the matters before him constituted nothing other than a gross dereliction of duty and borders on recklessness. In these circumstances, I am satisfied that the applicant should not be out of pocket. It was ordered that the rescission ruling be reviewed and the CCMA and Commissioner jointly and severally pay the cost of the applicant.

