REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 2413/11

In the matter between:

DEPARTMENT OF EDUCATION, NORTH WEST PROVINCE	**First Applicant**
and	
EDUCATION LABOUR RELATIONS COUNCIL ('ELRC')	**First Respondent**
COMMISSIONER E MAREE *N.O*	**Second Respondent**
DAVID SELLO SACHA	**Third Respondent**

Heard: 17 February 2016

Delivered: 23 February 2016

Summary: (Review – hearsay evidence – arbitrator's failure to raise her concerns about admissibility of evidence with the parties and ask them to make submissions on the question – patent gross irregularity in terms of s 145((2)(*a*)(ii) - referral to bargaining council not condoned - no jurisdiction)

JUDGMENT

LAGRANGE J

Introduction

[1] The Department of Education in the North West Province dismissed the third respondent for sexually assaulting a learner at a secondary School in breach of section 17 (1) (b) of the Employment of Educators Act, 76 of 1998. The arbitrator in this matter found his dismissal was procedurally fair but substantively unfair and ordered his reinstatement.

The award and review

[2] All the evidence led at the arbitration was hearsay evidence. Not even the third respondent who was present testified on his own behalf. In the disciplinary enquiry, the complainant obviously with some difficulty did testify but only on condition that the third respondent was not in the room when she did so because she felt intimidated by him.

[3] The arbitrator was ambiguous in her award about whether she actually admitted the hearsay evidence at all or whether, having admitted it, discounted it because of its hearsay character, though I am inclined to believe that she decided it was all inadmissible because the parties had failed to satisfy her that it met the requirements for admission. It is apparent that she never raised her qualms about the hearsay character of the evidence with the parties and did not ask them to address her on its admissibility or probative value. Despite this her decision that the employer had failed to discharge the onus was based entirely on “the nature of the evidence”. The parties had no prior warning of how decisive her view of the evidence would be.

[4] Although she recited the test for the admission of hearsay evidence as contained in the law of evidence amendment act 45 of 1998, she seems to have adopted the view that because the parties did not make any

submissions motivating why the evidence should be admitted, she did not have to consider the issues they did not address either. Further, if I assume that the arbitrator did admit the evidence but discounted its weight because it was hearsay, she completely failed to evaluate the evidence by any other criteria such as the extent to which the evidence of witnesses tended to corroborate each other, nor did she make any assessment of the credibility of any of the witnesses. She also completely failed to consider the undisputed evidence that the complainant had felt intimidated in the original enquiry, in deciding whether the admission of hearsay would be relevant.[1]

[5] Plainly, if the parties had been aware of her misgivings about the evidence they presented, they might well have taken additional steps to reinforce that evidence, such as confirming the accuracy of the minutes of the disciplinary enquiry or subpoenaeing additional witnesses. The wholesale discounting of the evidence without warning the parties was obviously highly prejudicial and amounted to a patent gross irregularity in the proceedings in terms of s 145(2)(*a*)(ii). For these reasons alone, I would be inclined to set the award aside.

Jurisdiction

[6] However, another issue raised belatedly was a jurisdictional question relating to the referral of the dismissal dispute to the Education Labour Relations Council. The final word on the third respondent's internal appeal against his dismissal was conveyed to him on 5 November 2010. The referral to the bargaining Council was only lodged on 14 January 2011. Measured by the standard of section 191(1)(a)(i) read with (1)(b)(ii) of the LRA, the 30 day period for referring his dispute lapsed on 6 December 2010, which would make his referral five weeks out of time. Even if I accept that in terms of the Constitution of the bargaining Council a party has 45 days to refer such a dispute, then the period for lodging the referral

[1] The court's observations on the context which might dictate the necessity of accepting hearsay evidence in **Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 *ILJ* 1654 (LC)** at 1672-4, paras [40] to [43] are particularly pertinent in this matter.

would have ended on 20 December 2010. Consequently, it would still have been approximately three weeks late. It was argued that in counting days for the purpose of determining the cut-off that only working days should be counted, but that is contrary to the definition of 'days' in the LRA and in the ELRC Constitution.

[7] It is trite law that a bargaining council or the CCMA does not have jurisdiction to conciliate or arbitrate a dispute unless a dispute has been referred timeously in terms of s 191(1)[2], failing which the party referring the dispute has obtained condonation in terms of s 191(2) of the LRA[3]. In this case no condonation was obtained. In this instance, the referral was late and no condonation was obtained at any stage. Accordingly the arbitration award was a nullity and must be set aside for want of jurisdiction.

Order

[8] The arbitration award of the second respond is set aside as being *ultra* vires the powers of the second respondent.

[9] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

[2] See e.g ***Zimema v CCMA & others*** **[2001] 2 BLLR 251 (LC)**

[3] See e.g ***Shoprite Checkers (Pty) Ltd v CCMA & others*** **[1998] 5 BLLR (LC),** ***Alternative Finance Ltd v Adair NO & others*** **[1998] 10 BLLR 1011 (LC)** and more recently **SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality & Others (2015) 36 ILJ 2581 (LAC) at [42]-[43**] where the LAC expressly overruled its previous decision in **Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others (2000) 21 ILJ 2382 (LAC)** insofar as that decision suggested it was necessary to set aside a certificate of outcome before the issue of jurisdiction could be entertained.

APPEARANCES

APPLICANT:

THIRD RESPONDENT:

FOURTH RESPONDENT: