IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Reportable

Case number P309/09

In the matter between:

UNATHI BALASANA	**Applicant**
And	
THE MOTOR BARAGAINING COUNCIL	**1st Respondent**
G EDSWARDS	**2nd Respondent**
TIGER WHEEL AND TYRE	**3rd Respondent**

Judgment

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number MICT6941 dated 5th June 2009. In terms of that arbitration award the commissioner found the dismissal of the applicant to have

been substantively unfair consequent to the inconsistent application of the discipline by the third respondent.

[2] On the 19 August 2010, the order set out at the end of this judgment was made. The reasons for that order are set out below.

Background facts

[3] The brief background facts are that the applicant was charged with an offence relating to the allegation that he had instructed another employee to clock in on his behalf. The applicant disputed the charges and contended that the other employee did that on his own accord. The applicant was found guilty as charged and consequently dismissed. He referred a dispute concerning an alleged unfair dismissal dispute to the first respondent. The dispute was ultimately arbitrated and as indicated above the commissioner found that the dismissal was substantively unfair but directed the applicant be compensated. The commissioner found that reinstatement would in the circumstances be inappropriate.

Grounds for review and the commissioner's award

[4] The applicant contended that the commissioner's award was grossly irregular because his finding that reinstatement would be

inappropriate was not supported by the evidence served before him. It was further contended on behalf of the applicant that because the commissioner failed to apply his mind to the evidence which was properly before him, his conclusion was irrational and unreasonable. The essence of the applicant's contention that had the commissioner applied his mind to the evidence before him he ought to have ordered the reinstatement of the applicant in terms of s193 of the Labour Relations Act 66 of 1995 (the LRA).

[5] In terms of s193 of the LRA a commissioner or the court that finds the dismissal to have been substantively unfair must require the employer to reinstate the employee unless the employee. The court or the arbitrator would of course not order reinstatement if the employee has expressed a contrary wish or if the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

[6] In the present instance the commissioner in his reasoning accepted that the primary remedy for substantive unfair dismissal is reinstatement. He however reasoned that because of the surrounding circumstances, continued employment of the applicant would be intolerable. It would appear that the commissioner found that

reinstatement was inappropriate because there was a breakdown in the relationship between the parties. The respondent in defending the commissioner's arbitration award raised two points. The first point concerns the failure by the applicant to ensure that a proper record was placed before the court in order to determine whether or not the arbitration award was reviewable. The second point concerns the issue of waiver by the applicant. For convenience I deal first with the second point also because if it was found to be sustainable that would be the end of the case of the applicant. If that was to be the case, it would not be necessary to even consider the second point.

The issue of waiver or peremption rule

[7] The second point raised by the respondent concerns the fact that the respondent had by the time the applicant filed his review complied with the terms of the arbitration award and the applicant had accepted such compliance. In this respect the respondent contended that the applicant was not entitled to have the arbitration award reviewed in the light of having accepted and received the compensation ordered by the commissioner. The conduct of the applicant according to this contention amounted to waiver, firmed up by the fact that the

applicant never even offered to repay the money once he commenced with the review proceedings.

[8] Based on the legal principles discussed below, a finding that the applicant's right to review has become perempted will be justified only if it could be found that the applicant, by having elected to accept the payment in compliance with the arbitration award, unequivocally abandoned or waived his right to institute this review proceedings.

[9] The concept of peremption which is sometimes referred to as approbate and reprobate, is well established in our law. Its acceptance in our law dates back to many years when the decision in ***Hlatshwayo v Mare & Deas 1912 AD 242,*** the authority relied upon by the respondent, was made.

[10] The concept as I understand it is based on the general notion that a litigant in whose favour an award or judgment has been given has two elections to make. The applicant either accepts or rejects the outcome of the judgment or the arbitration award.

[11] As a general rule a party that perempts the arbitration award would not be entitled to subsequently challenge that arbitration award. The basic requirement however, to sustain a claim of peremption entails

having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal. The basis of the peremption principle was explained in the ***Hlatswayo*** (*supra)* as follows:

> *"[A]t bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate."*

[12] In labour matters the principle was endorsed in the case of the ***National Union of Metalworkers of SA & others v Fast Freeze (1992) 13 ILJ 963 (LAC),*** wherein the court had the following to say preemption:

> *"If a party to a judgment acquiesces therein, either expressly or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be preempted, i.e. he cannot thereafter change his mind and note an appeal. Peremption is an example of the well known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot and cold, or have one's cake and eat it.'*

See also***, Jusayo v Mudau no & Others (2008) 29 ILJ 2953 (LC)***

Public Servants Association of South Africa on behalf of Strydom v SA Revenue Services (2007) 28 ILJ 2037 (LC).

[13] The approach adopted in the ***Hlatswayo*** mater (supra) was followed in ***Dabner v SA Railways and Harbours 1920 AD 583 (at 594),*** where in dealing with the concept of peremption the court had the following to say:

> *"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."*

[14] It has also been accepted that the onus of proving peremption rests with the party alleging it. See ***Liberty Life Association of Africa v Kachelhoffer no & Others (2001) 22 ILJ 2243 (C).*** The threshold for

satisfying the requirements of peremption was summarized by the court in ***National Union of Metalworkers of SA & Others v Fast Freeze (Supra),*** in the following terms:

> *"(1) Where a right to appeal (review) exists, the party desiring to appeal loses the right (review) to appeal where it has acquiesced in the judgment arbitration.*
>
> *(2) Such acquiescence may be express or implied from the conduct of the party.*
>
> *(3) Acquiescence by conduct requires an overt act by the party, i.e. conduct which conveys outwardly to the other party its attitude towards the judgment.*
>
> *(4) The overt act must be consistent with an intention to abide by the judgment (arbitration award) and inconsistent with an intention to appeal review against the (award) judgment.*
>
> *(5) The test is objective. It is the outward manifestation of such party's attitude in relation to the (award) judgment that must be looked at, not its subjective state of mind or intention.*

(6) Where there is such overt conduct, a mental reservation or resolve not to acquiesce in the judgment will not avail the party which by its conduct evinces an intention to abide by the (award) judgment.

(7) The state of mind of the party mentally reserving its right to appeal must yield to its conduct which plainly contradicts such an intention.

(8) The court must be satisfied that the conduct in question, when fairly construed, necessarily leads to the conclusion that the party intends abiding by the judgment.

(9) If more than one inference may fairly be drawn from the conduct in question, this will not be sufficient to prove renunciation. The conduct must be unequivocal.

(10) The onus of proving that a party has renounced its right to appeal rests on the party alleging such renunciation.

(11) Voluntary payment or acceptance of payment, as the case may be, in terms of a judgment will usually be sufficient to satisfy a court that the party has acquiesced in the judgment."

[15] In ***Venture Otto SA (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others (2005) 26 ILJ 349 (LC),*** the court held that:

> *"The threshold required to be satisfied before the principle of peremption might be successfully invoked is high. The matter, as in all cases, must be approached on the basis of a conspectus of all the facts, for it is only in the light thereof that a determination of what may often be a vexing question falls to be made."*

[16] There is authority that says in doubtful cases acquiescence must be held non proven. See ***Blou v Lampert & Chipkipn NNO & Others 1970 (1) Sa 185 (T)*** and ***Cohen v Cohen 1980 (4) SA 435 (ZA).***

[17] As indicated earlier in this judgment the arbitration award was issued on the 5th June 2009. The payment in compliance with the terms of the arbitration award seems to have been made on the 10th June 2009. The review application was filed on the 13th July 2009, which was within the time frame prescribed in terms of s145 of the LRA. There is no evidence as to when after accepting the payment from the respondent did the applicant approach the Legal Aid SA for assistance to challenge the arbitration award. However, what is clear is that it must

have been some time before 13 July 2009. It has also to be noted that the amount was not given to the applicant in hand but deposited into his bank account. There is also no evidence that he acknowledged to the respondent receipt of the money. There is therefore no evidence of the subjective state of mind of the applicant at the time he decided to accept the money which evidence could have assisted as me of the factors in determining whether it could be said that the applicant had objectively elected to comply with the arbitration award.

[18] Thus, regard being had to the time period within which the applicant filed his review application and the earlier period of consultation with his attorney to have the award reviewed, it cannot be said that the objective facts support the view that he accepted the money unconditionally and withouth reservation of his right to challenge the arbitration award on review.

[19] It is my view that in the light of the above discussion, the respondent has failed to discharge its duty of having to show that the applicant in accepting the payment effected in compliance with the terms of the arbitration award waived his right to subsequently challenge that arbitration award.

Failure to initiate reconstruction of the record

[20] The issue of how the commissioner arrived at the conclusion that reinstatement was inappropriate remain contentious between the parties. I hold a different view to that argument on behalf of the applicant that it can, in the absence of a full record of the arbitration proceedings, be inferred from the arbitration award that there was no basis for the conclusion reached by the commissioner. There is no doubt that the commissioner was alive to the provisions of s193 of the LRA. What is not clear however is what factors influenced his decision.

[21] Whilst it is accepted that commissioners in providing reasons for their arbitration awards need not give elaborate and detailed reasons for their conclusions, it is important that they indicate in a reasonably clear manner what factors or evidence influenced their conclusion. In the absence of clear indication from the arbitration award as to what evidence influenced the commissioner in not granting the primary relief, the court is in terms of ***Fidelity Cash management Service v Commission for Conciliation, Mediation & Arbitration & Others (2008) 29 ILJ 964 (LAC),*** faced with having to see if those factors exist from the record of the arbitration award.

[22] In the present instance the difficulty faced by this court is that there is no transcript of the arbitration proceedings because the commissioner for unknown reasons did not tape record the proceedings. His typed written notes which were subsequently transcribed are of very little assistance. In fact whilst the arbitration award is about six pages the hand written notes are only two pages.

[23] The contention of the third respondent that the problem of the incomplete record has to be placed on the applicant because he failed to reconstruct the same even after being called upon to do that has merit. The question is however, would it be just and fair to deny the applicant the right to have his dispute fully and finally determined for that reason in particular when regard is had to the circumstances within which the applicant failed to have the record reconstructed.

[24] The general approach that the courts have adopted in cases involving defective or incomplete record is to refuse to entertain the review application particularly where the applicant has failed to show what steps he or she took to find the missing parts of the record or to have it reconstructed.

[25] The difficulty with the present case is that it does not involve the missing tapes or inaudible in the recordings but rather involves a

strange approach by the commissioner in not only failing to electronically record the proceedings but also at the same time failed to take detailed notes. It would also appear that the commissioner, with due respect, never informed the parties about the approach he had adopted. In my view the commissioner ought to have warned the parties about the approach that he had adopted. It would seem to me that had the parties being aware of the approach adopted by the commissioner they may have made some means of ensuring that they take their own notes.

[26] I have already indicated my view in relation to the respondent's criticism of the applicant for failing to take steps to have the record reconstructed. However, I do agree with the applicant's legal representative that the reconstruction is likely to have been an exercise in futility. The respondent who seem to have had the capacity to have taken its own notes did not do so because it was not made aware of the approach adopted by the commissioner and for the applicant it seems as a lay person that capacity may not have existed.

[27] It is for this reasons that I am of the view that dismissing the applicant's review application and bringing the matter to finality on that basis would equal both an injustice and unfairness. During the

debate at the hearing of this matter I did put to the parties the option of ordering them to go back and reconstruct the record. The inherent risk in that approach is that in the light of the earlier discussion there is a high risk that that may end up in a futile exercise. It is therefore my view that the practical approach based on the dictates of justice and fairness is to remit the matter back to first respondent for the dispute to consider afresh before a commissioner other than the second respondent.

[28] In the premises the following order is made:

1. The applicant has not acquiesced to the arbitration award by accepting payment from the respondent.
2. The arbitration award is set aside.
3. The dispute is remitted back to the first respondent for consideration afresh by a commissioner other than the second respondent.
4. There is no order as to costs.

Molahlehi J

Date of hearing: 17 August 2010

Date of reasons: 26 August 2010

Representation:

For the applicant: Mrs. E Van Starden from the Legal Aid South Africa

For the respondent: Mr. B Joubert from Joubert Attorneys