
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO. 12 of 2009/10

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF FAILURE BY THE CCMA TO ISSUE AN ARBITRATION AWARD IN TERMS OF THE LABOUR RELATIONS ACT, 1995
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Executive summary

i. The Office of the Public Protector investigated a complaint by Mr J T Makhaye in which he alleged that Commissioner Nayager of the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Management of the CCMA had failed to issue an award or ruling in terms of the Labour Relations Act, 1995, following an arbitration hearing into his complaint of unfair dismissal lodged against his former employer, a Mr F Olsen, held on 6 June 2005.

ii. The following key findings were made from the investigation:

   a) Commissioner Nayager did not issue the arbitration award or ruling on the arbitration hearing into the complaint of unfair dismissal lodged by Mr Makhaye against Mr Olsen;

   b) The omission on the part of Commissioner Nayager to issue an award or ruling constituted a gross breach of the provisions of section 195 of the Labour Relations Act, 1995; and

   c) The omission by Commissioner Nayager unfairly and improperly deprived Mr Makhaye of his right to be informed of the outcome of his complaint against his former employer and therefore caused him to suffer improper prejudice.

iii. The Public Protector recommended that the Governing Body of the CCMA and the Director of the CCMA take steps to ensure that:

   a) An award or ruling in the arbitration hearing held on 6 June 2005 into the complaint of unfair dismissal lodged by Mr Makhaye against Mr F Olsen is issued within a period of one month from the date of this report;
b) The award or ruling mentioned above is served upon both Mr Makhaye and Mr Olsen within fourteen days from the date of its issue; and

c) The original award or ruling is filed with the Registrar of the Labour Court as required in terms of the Labour Relations Act, 1995.
REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF FAILURE BY THE CCMA TO ISSUE AN ARBITRATION AWARD IN TERMS OF THE LABOUR RELATIONS ACT, 1995

1. INTRODUCTION

1.1 This Report is submitted to:

1.1.1 The Minister of Labour;

1.1.2 The Director-General of the Department of Labour;

1.1.3 The Governing Body of the Commission for Conciliation, Mediation and Arbitration (CCMA); and

1.1.4 The Director of the CCMA, in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

1.2 It relates to an investigation into an allegation of failure by the CCMA to issue an arbitration award or ruling in terms of the Labour Relations Act 66 of 1995 (the Labour Relations Act).

2. BACKGROUND

2.1 The CCMA is an independent institution established in terms of Section 112 of the Labour Relations Act. Its Governing Body is its supreme policy making body.

2.2 The Governing Body of the CCMA consists of a Chairperson, three state representatives, three representatives from organised labour and three from organised business.

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¹ Section 116 of the Labour Relations Act 66 of 1995
2.3 The Director of the CCMA is appointed by its Governing Body\textsuperscript{2}.

2.4 The main function of the CCMA is to attempt to resolve through conciliation and arbitration, in appropriate cases, any labour dispute referred to in terms of the Labour Relations Act\textsuperscript{3}.

3. THE COMPLAINT

3.1 Mr J T Makhaye (the Complainant) lodged a complaint with the Office of the Public Protector (OPP) in July 2007 alleging that:

3.1.1 He had lodged a complaint of unfair dismissal with the CCMA against his former employer, a Mr F Olsen, in 2005;

3.1.2 The CCMA had attempted to resolve the dispute between him and Mr Olsen in 2005, without success, and the matter had been set down for arbitration on 6 June 2005, at which both parties were present;

3.1.3 Having heard oral evidence of both parties on 6 June 2005, Commissioner Berlin Nayager of the CCMA (the Commissioner) had announced that he would issue an award or ruling within a period of fourteen days from the date of the hearing on whether or not Mr. Makhaye had proved the existence of a dismissal;

3.1.4 The Complainant had patiently waited for the CCMA to inform him of its award or ruling on his complaint for a period of more than a year, after which he visited its offices on numerous occasions;

3.1.5 The Commissioner could not provide him with a cogent and clear response on the outcome of his complaint, except that he always told the Complainant that he must accept that he had lost the case; and

\textsuperscript{2} Section 118 (1) of the Labour Relations Act, supra

\textsuperscript{3} Section 115 of the Labour Relations Act, supra
3.1.6 The Complainant believed that the Commissioner had breached the relevant laws of the Republic of South Africa and had violated his right to be informed of the outcome of his complaint.

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

4.1 The Public Protector is part of a cluster of institutions established by Chapter 9 of the Constitution to strengthen the constitutional democracy of the Republic of South Africa.

4.2 Section 182 of the Constitution provides that the Public Protector has the power to:

4.2.1 "Investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;"

4.2.2 Report on the conduct investigated; and

4.2.3 Take appropriate remedial action."

4.3 In terms of section 6(4) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

4.4 The complaint of a failure by the CCMA to issue an arbitration award or ruling in terms of the Labour Relations Act falls within the powers, functions and jurisdiction of the Public Protector to investigate.
5. **THE INVESTIGATION**

5.1 The investigation comprised:

5.1.1 An assessment of the complaint;

5.1.2 Correspondence with the CCMA;

5.1.3 Meeting with the CCMA;

5.1.4 Obtaining and examining the transcript of the tape recording of the arbitration proceedings held on 6 June 2005;

5.1.5 A study of all the relevant documentation obtained during the investigation; and

5.1.6 The consideration and application of the relevant provisions of the Labour Relations Act and the CCMA Rules for the Conduct of Proceedings.

6. **THE LEGAL FRAMEWORK**

6.1 **The Labour Relations Act**

6.1.1 Section 138(7) provides that: "Within 14 days of the conclusion of the arbitration proceedings-

a) the commissioner must issue an arbitration award with brief reason, signed by that commissioner;

b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and"
c) the Commission must file the original of that award with the registrar of the Labour Court."

6.2 Once an arbitration award or ruling has been issued, certain remedies are available to the parties. Section 144 provides, inter alia, that "Any commissioner who has issued an award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling."

6.3 Section 145(1) provides, inter alia, that "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission [CCMA] may apply to the Labour Court for an order setting aside the arbitration award."

6.4 Section 145(1A) provides that the Labour Court may on good cause shown condone the late filing of an application in respect of setting an arbitration award aside.

7. ANALYSIS OF THE APPLICABLE LEGAL PRESCRIPTS AND EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1. Common Cause

7.1. It was established during the investigation that the following facts were not in dispute:

7.1.1 The Complainant had indeed lodged a complaint of unfair dismissal against Mr Olsen, with the CCMA;

7.1.2 The CCMA had attempted to resolve the dispute between the Complainant and Mr Olsen through conciliation without success;
7.1.3 The dispute had accordingly been set down for an arbitration hearing on 6 June 2005 and both parties were present at the hearing; and

7.1.4 The Commissioner had heard oral evidence from both parties.

7.2 The response of the CCMA

7.2.1 The CCMA denied the Complainant's allegations that the Commissioner had failed to issue the arbitration award or ruling.

7.2.2 The CCMA argued further, as per the report it had received from the Commissioner, that he (the Commissioner) had in fact issued a verbal ruling during the hearing and that the Complainant's complaint had been dismissed on the grounds that he had failed to prove the existence of a dismissal.

7.3 The Complainant's comments on the response from the CCMA

7.3.1 When informed of the response of the CCMA to his complaint, the Complainant vehemently denied that the Commissioner had made any ruling at the hearing and argued instead that the Commissioner informed both parties that he would issue his ruling within 14 days.

7.4 Was the Commissioner under a legal obligation to issue his award in writing?

7.4.1 In light of the above-mentioned circumstances, the OPP requested the CCMA to specifically comment on whether or not the Commissioner had been under any legal obligation to issue his award in writing.

7.4.2 The CCMA responded that the Commissioner had indeed been under a legal obligation to issue his ruling in writing, but also indicated that nothing prevented him from making a verbal ruling in the circumstances.
not."

7.7 The request for a response and comments of the Commissioner

7.7.1 On 10 November 2008, the OPP addressed a letter to the Commissioner informing him, amongst other things, of what the examination of the transcript of the proceedings had revealed. A copy of the transcript was also enclosed in this letter.

7.7.2 In its letter, the OPP specifically drew the attention of the Commissioner to the fact that, based on the available evidence, adverse findings may be considered in respect of his alleged failure to issue an arbitration award, which would constitute a gross breach of the provisions of the Labour Relations Act and is depriving Mr Makhaye of his right to be informed of the outcome of his complaint⁴.

7.7.3 Furthermore, the Commissioner was afforded an opportunity to provide the OPP with his response and/or comments and any other information or evidence he might have wished to bring to the attention of the OPP for consideration before a final finding or determination could be made.

7.7.4 The Commissioner was requested to revert to the OPP within fourteen working days.

7.7.5 On 20 November 2008, the Commissioner responded in writing wherein he informed the OPP that he had forwarded his letter to the CCMA and that the latter would respond to the OPP directly.

7.7.6 The CCMA did not respond to the OPP letter dated 10 November 2008, despite the expiry of a period of fourteen days. The OPP hand-delivered a written reminder to the CCMA, requesting its response and granting it a further fourteen working days within which to reply, but to no avail.

⁴ Section 7(9)(a) of the Public Protector Act 23 of 1994
7.8 Consideration of the legal framework vis-a-vis the evidence and the facts established

7.8.1 It is clear that, in terms of the relevant provisions of the Labour Relations Act, the Commissioner was under an obligation to issue an award within a period of fourteen days.

7.8.2 It is also clear that copies of the award had to be served upon both the Complainant and Mr Olsen.

7.8.3 Furthermore, the original award had to be filed with the Registrar of the Labour Court.

7.8.4 It would be only once the parties had been duly served with copies of the award that either the Complainant or Mr Olsen would have been able to exercise their rights of further recourse in terms of, for example, sections 144, 145(1) and 145(1A) of the Labour Relations Act, in the event of them being dissatisfied with the award.

7.9 It is concluded, on the available evidence, that the Commissioner indeed did not issue his award or ruling in terms of the Labour Relations Act.

7.10 The allegations of the Complainant have therefore been substantiated.

8. FINDINGS

8.1 From the investigation, the following key findings were made:

8.1.1 Commissioner Nayager did not issue the arbitration award or ruling on the arbitration hearing into the complaint of unfair dismissal lodged by Mr Makhaye against Mr Olsen;
8.1.2 The omission on the part of Commissioner Nayager to issue an award or ruling constituted a gross breach of the provisions of section 195 of the Labour Relations Act, 1995; and

8.1.3 The omission by Commissioner Nayager unfairly and improperly deprived Mr Makhaye of his right to be informed of the outcome of his complaint against his former employer and therefore caused him to suffer improper prejudice.

9. RECOMMENDATIONS

9.1 In terms of section 182(1)(b) of the Constitution, 1996, and section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that the Governing Body of the CCMA and the Director of the CCMA take steps to ensure that:

9.1.1 An award or ruling in the arbitration hearing held on 6 June 2005 into the complaint of unfair dismissal lodged by Mr Makhaye against Mr F Olsen is issued within a period of one month from the date of this report;

9.1.2 The award or ruling mentioned above is served upon both Mr Makhaye and Mr Olsen within fourteen days from the date of its issue; and

9.1.3 The original award or ruling is filed with the Registrar of the Labour Court as required in terms of the Labour Relations Act, 1995.
10. CONCLUSION

10.1 The Public Protector will monitor the implementation of these recommendations on a monthly basis.

ADV ML MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 11/08/09

Assisted by: Mr M M Nkosi, KZN Provincial Representative
Mr R B M Mthembu, Senior Investigator, KZN Office