

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Johannesburg

Case no: DA 12/05

In the matter between

Comtech (Pty) Ltd

Appellant

And

Commissioner Shaun Molony N.O

1st Respondent

**Commission for Conciliation
Mediation and Arbitration**

2nd Respondent

Hodoul, JD

3rd Respondent

JUDGMENT

Zondo JP

- [1] This is an appeal against a judgment of the Labour Court in terms of which it dismissed an application by the appellant to have a certain arbitration award issued by the first respondent reviewed and set aside. The arbitration award had been issued by the first respondent as a commissioner of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”), the second respondent in this matter, in respect of a dispute between the appellant and the

third respondent about the fairness or otherwise of the dismissal of the third respondent by the appellant from its employ.

- [2] The first respondent's arbitration award was to the effect that the third respondent's dismissal by the appellant for operational requirements was both substantively and procedurally unfair and it ordered the appellant **"to reinstate [the third respondent] on the same terms and conditions as existed on the 3rd April and with effect from that date."** The award further ordered the appellant to pay the third respondent a sum of R 22 500 **"on the date on which she returns to work"**. Finally, the third respondent was ordered **"to tender her services to the [appellant] on or before the 4th August 2003."**
- [3] The appellant was aggrieved by the arbitration award and brought an application in the Labour Court to have the award reviewed and set aside. As already stated, the Labour Court dismissed the review application but subsequently granted the appellant leave to appeal to this Court. This then is the appeal heard pursuant to that order granting leave to appeal.
- [4] In the founding affidavit filed on behalf of the appellant in support of its application for review in the Labour Court no facts were set which relate to how the dispute between the parties occurred. Under the heading **"Facts"**, the deponent to the founding affidavit simply set out the date when the arbitration award was issued, what happened thereafter and his submissions as to why the award should be reviewed and set aside. The appellant did not say in his founding affidavit that the commissioner's summary of the

evidence led in the arbitration proceedings was not accurate. It seems that there was an attempt in the heads of argument to raise some complaint in this regard, but, in the light of the case which Counsel for the appellant argued in this Court, nothing turns on this.

- [5] In his arbitration award the commissioner has summarised the evidence led in the arbitration proceedings. As the appellant has not in its affidavits challenged that summary of the evidence, I propose to rely on that summary. I do not consider it necessary to do another summary of that evidence. I propose to simply quote the summary of that evidence as it appears in the arbitration award from paragraph 7 thereof to paragraph 16. It reads thus:

“[7] Ms J D Hodoul worked for the Respondent from the 1 July 2001. While there was some argument over the title of the position, it became clear during evidence that she was employed as the Depot Manager and was based at all material times in the Durban branch. On the 17th February 2003 the Applicant and all the employees in the Durban branch, as well as those in the Cape Town and Johannesburg offices, were informed via email from Mr Brian Edmonds that the Respondent and Navcomm, a competitor of the Respondent, have “joined forces” i.e merged, and that Mr Mike Egling the owner/founder of Navcomm will join the Respondent together with 4 other staff members from the 1 March 2003. The email further advised that Egling would “take over the running of the Comtech DBN [i.e. Durban] branch”. Various

meetings then took place at while Egling and Hodoul were present. The Applicant was then retrenched from the 3rd April 2003 by Egling.

- [8] A bundle of documents labelled 1 to 7 were tendered by the parties. It was agreed that these documents are what they purport to be, but their contents were placed in dispute by Mr Bush.
- [9] It is common cause that the onus is on the Respondent to show that the dismissal of the Applicant was fair.
- [10] Mr J Du Plessis stated under oath that he is the general manager, operations. He stated that after the merger Egling replaced the manager of the Durban branch. Hodoul was considered for the position, and was appointed as depot manager. After the merger they needed someone who understood the industry and so Elging was brought in a newly created position of regional manager. After the 17th February he had two or three meetings with Hodoul who asked him about the structure, during which she said was concerned about her position, and he told her that the company was reviewing the structure of the 2 companies. The Exco, a committee which was a combination of the directors and senior management, then decided that the position of depot manager was no longer required, while the company needed some one who could drive the Durban area, which as a result of the merger was second only to Johannesburg in turnover and customer base size – someone was needed to manage the entire region. Du Plessis gave evidence concerning meetings

with the Applicant one of which took place on the 26th Mrch 2003, and his letter of the 27th March confirms what took place. Du Plessis stated that Hodoul was informed that, as a result of the acquisition of Novacomm the Respondent had to review its structure in Durban to **“best meet the Company’s future needs and requirements.”** The Applicant was also informed that **“the position of Depot Manager has become redundant in the new structure, and this has resulted in Comtech having to institute a redundancy process in this position you are requested to consider any alternatives and recommendations with regards to your future position in Comtech and to table and discuss these with Management on Monday 31 March 2003. Management will likewise investigate future alternatives or possibilities.”** A further meeting took place on the 31st March 2003 [page 3], at which he was not present. During this meeting the Applicant was offered the position as stores controller; there were no alternatives other than this position. The minutes of this meeting were signed by Hodoul. A further meeting took place on the 2nd April 2003 at which he was not present. According to the minutes [page 4] Hodoul was not prepared to discuss alternatives to her position as Depot Manager, will not accept less, and is not prepared to take a cut in salary to R3000, that she “wants the matter sorted out today and does not want to continue any further discussion.”

The Applicant was then retrenched on the 3rd April 2003 [page 6]. Du Plessis stated that Hodoul was paid notice pay of one month and severance pay in terms of the company policy. He agreed that the company does not in fact have a policy, but that the severance was paid in accordance with the provisions of the legislation i.e. one week for each year, and that there was no attempt to reach consensus on the amount of severance pay. Hodoul was assisted as she was not required to serve notice but was permitted to leave immediately. Du Plessis stated that the meeting on the 26th March was to consult with the Applicant as the decision to make her job redundant had already been made. In response to my question as to how the structure of the Durban branch changed as a result of the merger. Du Plessis stated that the resources of the two were brought into one. The human resources of Navcomm were two technical employees, who were placed into the technical section of the Respondent, a sales rep, who went into the sales division, an accountant who was moved into the accounts section, and Egling. The only restructuring necessary as result of the merger was that Egling was made regional manager, and this meant that the position of depot manager fell away. He distinguished the function of the former by saying Egling's responsibility was largely with the network of clients, while the depot manager simply managed the branch – took care of the administration, stores and so on. As for the

alternative job offered to Hodoul he agreed that the salary of a stores controller was 20% of the salary of the depot manager, and stated that any job is better than no job. He stated that Hodoul was urged to come up alternatives but failed to do so. He denied that she suggested an administration manager position. He agreed that as he was not present at the meetings on 31st March and 2nd April 2003 his evidence as to what took place was hearsay.

- [11] Mr Hinds then stated that, as a result of the last point, he wished to call Mr Egling. Mr Bush objected as Mr Egling had been present during the evidence of Du Plessis. I ruled that Egling could be called, and noted that I would note that he was present during Du Plessis's evidence.
- [12] Mr Mike Egling stated that he is the regional manager of Comtech. He was present at the meeting on the 31st March and 2nd April confirms that the minutes properly reflect what took place during those meetings. The business was restructured 'from the ground up to the top', with responsibility and accountability being place where they should be, by which he meant that the accounts section were responsible for accounts, sales for sales and so on. He denied that it was not a question of himself or Hodoul – it was evident that there was no work for the position of Depot manager after the office was restructured. She wandered around the office with nothing to do. He agreed that he made the suggestion

the Hodoul's position was redundant. He denied that Hodoul said that she wanted to do the admin.

[13] Egling stated that after the sales of his business to Comtech it was agreed that he would be employed, and subsequently that he be appointed to the position of regional manager. The job of Depot manager is a separate job entirely. Hodoul assumed the functions in the departments, and took authority for the performance of the various sections. When this inefficiency was corrected by him she no longer had a job. Some people were trained or retained, processes were stream lined and redundant systems were changed. He brought this about, as a result it became clear that Hodoul no longer performed a function in the structure.

[14] Mr Hinds then closed his case.

[15] Ms Hodoul stated that she started in July 2001 as a depot manager but all correspondence referred to her as a branch manager. The email of the 17th February surprised her, as she had no inkling that the merger was about to take place. She got calls from other branches and it made her wonder about her position. Mr Schmittgen, a director came down from Johannesburg and met with all the staff in the board room. He said **"No one has no worry about no retrenchments"** Egling came into the company thereafter, as the regional manager while she remained he depot manager. She became concerned when Egling took away her functions, as she was overseeing

the staff and dealing with problems. She asked Du Plessis and he said he could not guarantee her position. At the meeting on the 26th March she was very emotional, and asked Egling to leave the office as she did not know him. Du Plessis told her to go home and take some leave. She was told to come up with alternatives, rather than the company proposing alternatives, and she suggested that she be given an admin manager position. Despite her suggestion that they would not put this in the minutes, and only offered her stores position. She did sign the minutes, and was very emotional. She can not afford to earn R3000 a month instead of the R15000 she earned at the time as she lives in “Toti and the job is in Springfield- but it is not that it is the change which devastated her. There was no joint consensus seeking during the consultation, and she was informed in writing why her job was redundant. She was not told in writing of any alternatives, the number of employees likely to effected, discussion of re-employment, and the number of employees dismissed of ops req in the last 12 months. He job as depot manager meant that she was responsible for he day to day running of the branch. The previous manager had committed suicide, and there was no manager for 11 months before she arrived and the depot was a mess, and took her months to get sorted out. There was also staff problems and she made them into a team. She was worried by the phrase “**Mike would take over**”

in Edmonds email as its says nothing about her remaining as the depot manager. Nothing changed for a few days but then Mike came over and everything changed. Then she asked what was to happen to her, and Du Plessis said that he could not tell her. To her understanding she lost her job on the 26th March – the date of the email from Edmonds. If she was offered an admin position i.e. call centre and would have considered the job with a pay cut, she kept on mentioning the admin position. If they said the salary for a stores controller was R3000 and they did not offer it at R5000 at which level she would have taken it. She agreed the suggestion of the job as an admin manager is not minuted but they were not prepared to move. Every time she made a suggestion it was not take note of, and when she could not come up with anything else, she was told there is only the store position, take it or leave it. She did say that she wants the matter sorted out that day – the 2nd April 2003, she would have accepted a salary cut up to half of her salary. It was put to her that she did not suggest this to the company, and she replied that their minds were already made up. She wants to be reinstated. She is not employed and can not find a job.

[16] Mr Bush closed his case.”

I have quoted this part of the award without correcting any spelling errors.

The proceedings in the Labour Court

- [6] As I have already said above, the Labour Court dismissed the review application but did grant the appellant leave to appeal.

The appeal

- [7] In this case, when one reads the review founding affidavit it appears as if there are only two grounds of review upon which the appellant sought to have the arbitration award set aside in the Labour Court.

- [8] These appear to be:

- (a) that the arbitrator had no jurisdiction to arbitrate the dispute in this matter because it was not covered by the provisions of sec 191(12) of the Act. This provision provides in effect that an employee who is the only one affected by a dismissal for operational requirements where there has been consultation may elect to refer the resultant dismissal dispute to arbitration or to the Labour Court for adjudication.
- (b) that the arbitrator committed a reviewable irregularity by taking into account written argument presented to him by the third respondent outside of the agreed period without giving the appellant an opportunity to reply.

- [9] Before us Counsel for the appellant, very wisely, informed us that he was not pursuing the point referred to in (a) above. Although he did not say that he was also not pursuing the second point, he did not pursue it in oral argument. On the assumption that he did not

intend abandoning it let me dispose of it quickly. In my view the appellant was entitled to file a reply to the third respondent's written argument before the arbitrator could decide the matter.

[10] The facts relating to this issue can be given very briefly. According to the appellant's founding affidavit, at the end of the leading of oral evidence in the arbitration an agreement was reached between the appellant's and, the third respondent's representative, on the one hand, and, the commissioner, on the other, to dispense with oral argument and replace it with written argument. Dates were then agreed upon as to when the third respondent would deliver her written argument and when the appellant would deliver its written argument. The third respondent failed to deliver her written argument within the agreed period. The appellant then delivered its written argument. Thereafter the third respondent delivered her written argument.

[11] The delivery of the third respondent's written argument was late. It seems to me that the appellant should have made an approach to the commissioner and the third respondent for an agreement to enable it to reply to the third respondent's written argument if it wished to reply because it had filed its written argument before it could see the third respondent's written argument. It is true that in terms of the original agreement the appellant would have responded to the third respondent's written argument. However, it was the appellant which decided to file its written argument before the third respondent filed hers without making any arrangements to be allowed to file a reply later once the third respondent had filed her written argument.

[12] The appellant went outside the terms of the agreement when it filed its written argument before the third respondent filed hers because the agreement was that it would file its heads of argument after the third respondent had filed his. Obviously it did this because the third respondent was fairly to comply with the agreed time frames. I think that the appellant ought to have secured the agreement of both the first respondent and the third respondent before, or, at the time of the, filing its written argument. Accordingly, I am unable to say that the commissioner committed a reviewable irregularity in this regard. In so far as the appellant may not have intended to abandon this point, same is rejected.

[13] The only ground of review that the appellant's Counsel pursued in argument before us was the one captured in par 15 of the founding affidavit. There the deponent to the founding affidavit said:

“Furthermore the first Respondent erred in his award in that he failed and/ or neglected and/or refused to apply his mind to the evidence lead (sic) at the arbitration proceedings, and furthermore did not apply his mind to the relevant case law, applicable to the facts of the matter which was presented to him, and therefore exceeding his powers as commissioner in not applying the relevant statutory authorities to the applicable facts of the case.”

[14] The question which arose during argument was whether the appellant was entitled to seek to overturn the declaratory order of the commissioner that the dismissal was both substantively and procedurally unfair because it did not appear clearly from the

founding affidavit that such findings were being challenged. It seems to me that the appellant was entitled to pursue whatever case fell within the ambit of par 15 of its founding affidavit.

[15] The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by **"an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside."** Rule 7A requires the notice of motion to call upon, in this case, the commissioner **"to show cause why the decision or proceeding should not be reviewed and corrected or set aside."**

[16] In my view, the contents of par 15 of the founding affidavit relate to conclusions of law. There is nothing either in par 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In par 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he **"failed and or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings"** but did not motivate this bald allegation by reference either to the evidence or the award.

[17] The deponent to the founding affidavit also said in par 15 thereof that the commissioner **"furthermore did not apply his mind to the relevant case law, applicable to the facts of the matter"**

which was presented to him, and therefore exceeding his powers as commissioner in not applying the relevant statutory authorities to the applicable facts of the case.” He did not say what case law he was referring to that the commissioner failed to apply nor did he specify the so-called “**relevant statutory authorities**” applicable to the case that he complained that the commissioner failed to apply. There is absolutely no factual basis advanced for these complaints.

[18] It is arguable that the award in this case could possibly be reviewable if the founding affidavit had been properly drawn and the correct grounds of review had been relied upon and proper factual basis for such grounds had been set out. But, as the papers stand, it seems to me that I have no choice but to find that the appeal falls to be dismissed for the absence of a factual basis for the appellants complaints on review.

[19] Accordingly, such of the legal grounds of review as may be contained in par 15 cannot assist the appellant as no factual bases therefor were set out in the affidavit. In those circumstances the Court a quo was justified in dismissing the review application. Both Counsel were agreed that costs should follow the result in the event of this result. Accordingly, the order I make is one in the following terms:

1. The appeal is dismissed with costs

I agree.

Jappie JA

I agree.

Patel JA

Appearances

For the Appellant	:	Adv Van As
Instructed by	:	Anthony Hinds Attorneys

For the Respondent	:	Adv PT Bush
Instructed by	:	Weber Attorneys

Date of judgment	:	21 December 2007
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