



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not reportable

Case no: PA 1/14

In the matter between:

**BUILDERS WAREHOUSE (PTY) LTD**

**Appellant**

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First respondent**

**JULIA CAMERON NO**

**Second respondent**

**JOHANNA PETRONELLA BENADE**

**Third respondent**

**Heard: 24 February 2015**

**Delivered: 05 May 2015**

**Summary: Review of jurisdictional ruling – employee and employer agreeing on demotion as alternative to dismissal due to employee's incapacity for ill health – employee referring unfair dismissal dispute to the CCMA – commissioner ruling that CCMA lacking jurisdiction because of the existence of the agreement – Existence of the agreement for demotion not preventing the employee from referring an unfair labour practice dispute. Labour Court correct in setting aside the jurisdictional ruling and referring matter to the CCMA. Appeal dismissed.**

**CORAM: Waglay JP, Ndlovu et Landman JJA**

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## JUDGMENT

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LANDMAN JA

### Introduction

- [1] The appellant, Builders Warehouse (Pty) Ltd, appeals against the whole of the judgment of the Labour Court (Lagrange J) delivered on 22 August 2013, which, at the instance of Ms Johanna Petronella Benade, the third respondent, reviewed and set aside a ruling on jurisdiction made by the second respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration (the CCMA) and remitted the matter to the CCMA for arbitration to be held afresh. The appellant appeals with the leave of the court *a quo*.

### Background

- [2] The third respondent was employed by the appellant in its Pretoria store as from September 2004. She requested a transfer to a store in Port Elizabeth for medical reasons. Her request was granted and she was transferred there in January 2009.
- [3] The third respondent worked at the Port Elizabeth store as an Administrative Manager. In the course of the years 2009 to 2011, she was often absent from work owing to ill health. A number of meetings were held during 2010 and 2011 with her regarding her absenteeism. One of such meetings took place on 24 May 2010. A further meeting took place on 4 August 2010. At this meeting, the third respondent and the appellant signed an agreement in terms of which she undertook to make every endeavour to minimize her absenteeism due to illness. The third respondent acknowledged the seriousness with which the appellant viewed her absenteeism and understood that future absenteeism would

necessitate the continuation of the counselling process due to incapacity and that this could constitute a substantive ground for the termination of her employment.

- [4] On 22 December 2010, the Branch Manager of the Port Elizabeth store, complained that it was difficult to run the operation because the third respondent could not be relied upon to attend work when the business needed her the most.
- [5] The third respondent's absenteeism during critical periods was again discussed with her on 30 June 2011. On 9 September 2011, the third respondent was admitted to hospital and placed on medication. She was obliged to continue with medication after her discharge. She informed the appellant that this medication had side-effects which made her sleepy and impaired her concentration levels. She indicated that the side-effects were expected to be of a temporary duration.
- [6] On 11 October 2011, the third respondent left the store because she was feeling sleepy. She left through the front entrance and not the staff entrance of the store. In doing so, she failed to clock out. She also failed to declare that she was off-site. As a result, the appellant instituted disciplinary action against her. The third respondent said that the side-effects caused by the medication were the cause of her incapacity. She was issued with a final written warning.
- [7] The position did not improve. The third respondent was then suspended pending an investigation into her capacity to undertake the functions of an Administrative Manager owing to her health and performance. An incapacity hearing, chaired by an external chairperson, was convened on 11 January 2012. The chairperson ruled that owing to the third respondent's excessive absenteeism during 2009 to 2011 and her response to previous counselling sessions (where she had made a commitment to improve but was subsequently absent from work for a longer period), dismissal was the appropriate sanction. However, as an alternative to dismissal, the chairperson offered her a demotion to the position of the receiving supervisor.

- [8] The offer to accept or decline the demotion was kept open until 23 March 2012. After some communication, the third respondent accepted the demotion on 28 March 2012 by means of an email.
- [9] Subsequently, the third respondent complained to the CCMA that the appellant had committed an unfair labour practice by demoting her. An attempt to conciliate the dispute failed and the matter was set down for arbitration on 24 May 2012.

#### The commissioner's ruling

- [10] The commissioner explained in her ruling that, in light of the complexity of the issues, she had heard evidence on the merits and then she made her ruling as regards jurisdiction. The commissioner found that the third respondent had agreed to accept demotion as an alternative to dismissal and reasoned that because of this the CCMA did not have jurisdiction to arbitrate the dispute. The commissioner added that if the CCMA had had jurisdiction, she would have found that the appellant had not committed an unfair labour practice.
- [11] The third respondent was dissatisfied with the ruling. She launched an application in the Labour Court to review and set aside the ruling. The appellant opposed the application. However, the Labour Court granted the relief sought.

#### The judgment of the court *a quo*

- [12] The issue before the commissioner, which the Labour Court correctly identified, was whether, in the face of an agreement between the parties that the third respondent accepted demotion to a lower position, she was nevertheless entitled to refer an unfair labour practice dispute concerning her demotion to the CCMA.
- [13] The court *a quo* approached the matter this way:

[10] [T]his matter concerns a referral of an alleged unfair labour practice relating to the applicant's demotion in terms of s 186(2)(a) of the LRA, which states:

*'Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –*

*'unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits.'*

(emphasis added.)

[11] There is no dispute that a demotion took place. Rather, there is a dispute over whether the demotion was fair. The determination of whether a demotion took place, unlike the determination of dismissal, does not require an arbitrator to determine if there was consent or not. It is true that will be an issue which will be relevant, and may well be decisive, in determining the fairness of the demotion, but is not a jurisdictional prerequisite for entertaining the unfair labour practice claim. Moreover, what may fall within the ambit of the definition of the unfair labour practice is described in broad terms, as 'unfair conduct ... by the employer... relating to ... demotion' (emphasis added). Conceivably, this could encompass something more than the act of demotion itself, and dismissing the claim based on a finding that consent occurred might indirectly curb the ambit of the claim.

[12] For these reasons, I am satisfied that the arbitrator misdirected herself in deciding the matter on a jurisdictional basis. Having said that, her obiter comments on how she would have dealt with the matter, if she had found she did have jurisdiction, are not without merit in my view, and the applicant might wish to consider these when proceeding further with her claim. Nonetheless, I accept that there might be some matters that were not canvassed by the arbitrator as a result of her jurisdictional ruling, such as the degree of the demotion, which the arbitrator might still have considered if she had ruled otherwise. For the sake of clarity, I wish to emphasize that I make no finding on the merits of the applicant's unfair labour practice claim despite my comments above.'

## Evaluation

- [14] Employers and employees are encouraged to settle their differences by agreement. When they have done so, a binding contract comes into existence. Contracts are binding unless there is a valid reason to have them set aside. The commissioner correctly appreciated that she did not have any power to set aside the contract (which is what the third respondent wanted). But the commissioner erred in concluding that the agreement between the parties meant that the CCMA did not have jurisdiction to hear the dispute. The court *a quo* is correct that a dispute about an alleged unfair labour practice extends to “unfair conduct relating to demotion”. The fact that the parties have agreed that the aggrieved employee accepts demotion is not a complete defence because the ambit of this unfair labour practice is wider than this. The implementation of an agreement to accept demotion, may constitute an unfair labour practice.
- 15] Mr Masuku, who appeared on behalf of the appellant, referred us to *Phaka and Others v Bracks and Others*.<sup>1</sup> This judgment does not assist the appellant. Rather it goes the other way. In this case, the Labour Court was faced with a situation where the applicants alleged that they were employees. The respondent contended that they were independent contractors. The Labour Court took into account the written contract that each of the applicants concluded with the third respondent that constituted a contract of an independent service. But the Court remarked that it was required to consider whether, notwithstanding the express provisions of the contract, the applicants were nevertheless employees by virtue of the presumption included in section 200A of the Labour Relations Act 66 of 1995. The Labour Appeal Court approved of this approach.
- [16] Mr Masuku also referred us to the judgment in *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO and Others*.<sup>2</sup> This decision was approved of in *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union*

<sup>1</sup> (JA 3/2014) [2014] ZALAC 73 (18 December 2014).

<sup>2</sup> (1994) 15 ILJ 801 (LAC) at 804C–D.

*and Another*<sup>3</sup> and applied to rulings by the CCMA on jurisdiction. The result is that the jurisdiction of the CCMA is not dependent upon any finding or view by a commissioner as regards jurisdiction but upon the objective presence of the necessary jurisdictional facts. But this does not assist the appellant because as the court *a quo* correctly found, the commissioner was wrong as regards the jurisdictional issue.

- [17] In the appeal before us, the commissioner was obliged to have regard to the statutory formulation of the concept of an unfair labour practice. The agreement between the appellant and the third respondent was part of the material relevant to a finding on jurisdiction but it was not decisive as regards the jurisdictional question. It may well be decisive when the merits of the complaint are adjudicated.

Should the court *a quo* have decided the merits?

- [18] Mr Masuku also submitted that the Labour Court erred by remitting the matter to the CCMA because it could and should have decided the issue. This submission overlooks the fact that because the commissioner found that the CCMA did not have jurisdiction to arbitrate the dispute; no decision was made on the merits.
- [19] I should mention that although the third respondent applied to the Labour Court to review the ruling, she did not seek an order setting the agreement between the appellant and herself aside or declaring it invalid. The Labour Court could have decided whether the agreement was entered into under duress. See *Ulster v Standard Bank of South Africa Limited and Another*.<sup>4</sup> But in the absence of a legal challenge to the agreement, the agreement stands.
- [20] The court *a quo*'s decision to review the ruling was correct as was its decision to remit the award for arbitration by another commissioner of the CCMA.

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<sup>3</sup> [2008] 9 BLLR 845 (LAC).

<sup>4</sup> [2014] JOL 31895 (LC).

[21] It follows that the appeal must be dismissed. Mr Masuku very properly did not press for the costs of appeal.

Order

[22] In the result, I would make the following order:

1. The appeal is dismissed.

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Landman JA

I agree

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Waglay JP

I agree

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Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:

Mr Bongani Masuku

Instructed by Mervyn Tabacks Attorneys.

FOR THE THIRD RESPONDENT:

No Appearances

LABOUR APPEAL COURT