

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG**

**CASE NO:JR 1128/ 03**

In the matter between:

**Society for Family Health**

**Jerry Maotlhodi**

**The Commisssion for Conciliation**

**Mediation and Arbitration**

**Matee, Kganyetsi**

**Applicant**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**

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**JUDGMENT**

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**Justice Ngcamu AJ**

1. This is an application to review and to set aside the arbitration award issued by the third respondent in which he found that the dismissal of the first respondent was procedurally and substantively unfair. The commissioner awarded compensation amounting to R118800-00. The applicant seeks to have this award reviewed and set aside.
2. The first respondent is opposing the application.
3. The first respondent was employed by the applicant as a Behavioural Change Communications Co-ordinator on a project conducted by the applicant in the Eastern Cape. During the interview the first respondent

was informed that he would be relocated to Gauteng at the end of the term of the contract that was to be performed in the Eastern Cape.

4. The period of the contract in the Eastern Cape lasted for 18 months. Towards the end of the 18 months period, the first respondent and one Oupa Mapheele received notice advising them of the termination of the project. They were invited for consultation and eventually retrenched. The first respondent referred a dispute to the second respondent. The conciliation failed to resolve the dispute. The dispute was referred for arbitration before the third respondent.
5. At the arbitration hearing, the applicant was represented by Mr. Bekker. The commissioner was not satisfied that Mr. Bekker was an employee of the applicant and required Mr. Bekker to prove his status. The matter was postponed for Mr. Bekker to submit documentation to prove his status. Mr. Bekker later claimed that documents proving his status were personally delivered to the commissioner but did not produce any copies or bring the person who submitted them. This resulted in an altercation between the commissioner and Mr. Bekker.
6. Mr. Bekker applied for the commissioner to recuse himself. The application was refused by the commissioner. As Mr. Bekker could not prove his status, the commissioner ordered Mr. Bekker to leave the hearing. A replacement representative took over and the matter proceeded which resulted in the issue of the award that is now being challenged on review.
7. The award is being challenged on five grounds. The grounds of review are that :

- (a) The commissioner misdirected himself and exceeded his powers by adjudicating a retrenchment dispute when he was not empowered to do so.
- (b) The commissioner was biased.
- (c) The commissioner committed an irregularity in failing to recuse himself and failing to consider an application for his recusal.
- (d) The commissioner committed an irregularity in refusing the applicant's chosen representative and employee to act on its behalf in the arbitration.
- (e) The finding on procedural and substantive unfairness had no merits.

8. The first ground of review is that the dispute that was arbitrated concerned a retrenchment. It was submitted that at the time of the arbitration hearing, a dispute relating to the retrenchment had to be referred to the Labour Court. On the other hand, it was submitted on behalf of the first respondent that the dispute fell under Section 191(5) (a) (iv) of the Labour Relations Act 66 of 1995.

9. Section 191(5) (a) (iv) provides that the council or the commissioner must arbitrate the dispute at the request of the employee if the dispute concerns an unfair labour practice. Section 191(5)(a)(iv) was added by Section 46 (f) of Act 12 of 2002. The arbitration hearing took place in July 2002 before the amendment came into effect.

10. The dispute that was arbitrated was not an unfair labour practice but an unfair dismissal in terms of Section 189 of the Labour Relations Act. In the request for arbitration form, the first respondent recorded the issue in dispute as "Unfair dismissal according to Section 186."

He went further to state that:

"I reasonably expected previous employer to renew my contract of employment on the same terms. I was relocated to the Eastern Cape and after 19 months I was retrenched."

11. The first respondent testified that he was employed on permanent basis and that for the first 18 months he was placed in the Eastern Cape. The first respondent's counsel also submitted that the respondent was not employed on a fixed term contract. This matter was treated as an unfair dismissal and not as an unfair labour practice. This is also clear from the commissioner's analysis of the evidence. At page 5 of the award, the commissioner reasoned that:

"It became clear during my analysis of the evidence that the respondent had failed to prove that the dismissal of the applicant was for a fair reason and that he did not follow and or exhaust all necessary procedure in terms of Section 189 of the Labour Relations Act before terminating the applicant."

12. The argument by the first respondent's counsel that the dispute concerned the unfair labour practice has no merit and it is rejected.

13. The dispute was arbitrated as a retrenchment as I have indicated. Section 191 (5) (a) sets out the disputes that must be arbitrated. These are disputes relating to the dismissal for reason of the employee's conduct or capacity, constructive dismissal, where the employee is provided with substantially less favourable conditions after a transfer in terms of Section 197 or 197 A, where the reasons for dismissal is unknown and unfair labour practice.

14. The retrenchment is dealt with in Section 191(5) (b). This Section deals with the disputes to be dealt with by the Labour Court. Section 191(5)(b)(ii) provides that:

"The employee may refer the dispute to the labour court for adjudication if the employee has alleged that the reason for dismissal is based on the employer's operational requirements."

15. The parties did not agree to the arbitration of the dispute relating to retrenchment. Mr. Bekker who initially represented the applicant raised the issue of the CCMA's jurisdiction but the commissioner disagreed with his submission.

16. Section 191(5A)(12) provides that:

“If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of Section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.”

17. Section 191(5A) (12) was added by Section 46 (i) of Act 12 of 2002. At the time the dispute was referred and the arbitration commenced, the CCMA had no jurisdiction. The employee could not refer the dispute for arbitration. Accordingly, the first respondent had no choice but to refer the dispute to the Labour Court.

18. In the circumstances, I agree with the applicant's counsel that the CCMA had no jurisdiction to arbitrate the dispute. In the result the applicant's first ground of review should succeed. In the light of this finding there is no need for me to deal with further grounds raised by the applicant.

19. I see no reason why the costs should not follow the results. In the circumstances the following order is made:

- (a) The arbitration award issued by the third respondent is reviewed and set aside.
- (b) The first respondent is ordered to pay the costs.

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**Ngcamu AJ**

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| Date of hearing:          | 26 October 2006.  |
| Date of Judgment:         | 05 February 2007  |
| For the applicant:        |                   |
| For the first respondent: | Adv. M.H. Mokale. |