

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR1370/04

In the matter between:

BIG SKY COACHES

APPLICANTS

AND

MOTHUPI, T N.O.

1ST RESPONDENT

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

MARUMO STEVEN

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the First Respondent (the Commissioner) under case number FS1949-03 dated 20th April 2004. In terms of that award the Commissioner found that the Third Respondent (the employee) to have been unfairly dismissed by the Applicant.

Background facts

[2] It is common cause that the employee was employed as a bus driver of the Applicant prior to his dismissal. At the arbitration hearing the parties were in dispute about the nature of the employment contract. The Applicant contended

that the employee like most of its employees was employed on a temporary contract in terms of which his services would be engaged as and when work was available. The work was allocated to any of the drivers who would be available at the Applicant's premises on any particular.

- [3] The person responsible for allocating trips to be undertaken by the available drivers was the traffic manager, Mr Mitchel. According to the Applicant trips for driving would not be allocated to a person who is not present at the time the allocation is made and drivers were paid only for the trips actually undertaken. These trips are allocated on the basis of "*first come first serve*" and no disciplinary action would be taken against any driver who does not present himself at the Applicant's premises for work allocation.
- [4] The employee was however disciplined for reckless and negligent driving during January 2003, was found guilty and dismissed. The dismissal was reversed at the appeal hearing on the ground that the dismissal was a severe sanction. The dismissal was replaced with a final written warning which meant that, the casual employment relationship, on the version of the Applicant continued.
- [5] During February 2003, another employee, Mr Struis was disciplined and dismissed for fraudulently claiming kilometres he never travelled. According to the Applicant, the employee was also implicated into forging his travel claims during that hearing.

- [6] After the outcome of Struis disciplinary hearing Mitchel informed the employee that disciplinary proceedings would be instituted against him and no work would be allocated to him pending the finalization of the hearing. This was the last time the Applicant heard from the employee and thus assumed that he was no longer interested in his employment. The next time the Applicant heard from the employee was when it received the CCMA papers.
- [7] The employee's contention is that he was an employee of the Applicant and employed as such in terms of section 213 of the Labour Relations Act 66 of 1995, read with section 1 of the Basic Conditions of Employment Act 75 of 1997.
- [8] The version of the employee is that he travelled on duty to Cape Town on 9th March 2003 and returned on the 10th March 2003. He was off duty on the 11th March 2003. When he returned to work on the 12th March 2003, he was summoned to the office of Mitchel where he was told that there was no more work for him and that his services were terminated. According to him his insistence that he be given the reason for the dismissal did not help as Mitchel insisted that he was dismissed.

The grounds for review and the award

- [9] The grounds for review upon which the Applicant attacks the Commissioner's award are based on the complaints that he:
- did not determine the evidence before him in a reasonable and justifiable manner.

- failed to have regard to the nature of the employment relationship between the parties.
- failed to have regard to the probabilities in the version which were before him.
- drew a negative inference against the Applicant without affording the opportunity to rebut information upon which the Commissioner based such inference.
- failed to provide reasons for his twelve months compensation.
- failed to correctly construe the true nature of the dispute before him.

[10] After ruling on the *locus standi* and the application for his recusal (these two issues are not subject of this review), the Commissioner proceeded to deal with both the procedural and substantive nature of the dismissal.

[11] In as far as procedural fairness is concerned the Commissioner found that the Applicant had failed to adduce evidence as to the date when the employee was notified of the disciplinary hearing and also as to when did the hearing take place. The Commissioner further found that the Applicant failed to produce the notice which the employee refused to sign as an acknowledgment of receipt of notice of the disciplinary hearing.

[12] It was on the basis of the above that the Commissioner rejected the version of the Applicant that the employee left on his own accord. The Commissioner

made this finding after noting that the employee was to have been charged with misconduct related to dishonesty.

[13] After finding that the Third Respondent was indeed dismissed the Commissioner proceeded to determine the procedural and substantive fairness of the dismissal.

[14] The Attorney for the Third Respondent initially argued that the Commissioner was entitled to determine the issues of procedural and substantive fairness on the basis of the evidence led concerning the issue of whether or not there was a dismissal. He contended that the approach adopted by the Commissioner was justified by the fact that the evidence before him indicated very clearly that there was no hearing before the dismissal. However when invited to address the Court as to whether the approach would be correct as concerning the substantive fairness he conceded that it would not. In other words the Commissioner failed in his duties when he did not conduct the enquiry as to the substantive fairness of the dismissal. In the absence of an agreement between the parties authorising him to use the evidence led during the enquiry as to whether there was a dismissal, the Commissioner could not use that evidence to determine the substantive fairness of the dismissal.

[15] When invited to address the Court as to what should be made of the intervention of the Commissioner at page 1014 of the transcript, the Third Respondent's attorney initially contended that that issue was not before the Court because it was not raised by the Applicant as a ground for review. The Commissioner

intervened and stopped the Applicant's representative from cross-examining the Applicant's witnesses regarding the issue of the true nature of the employment relationship. The argument relating to the above issue was not pursued further when the Court invited the Third Respondent to address the connection between the intervention and the complaint by the Applicant that the Commissioner failed to have regard to the nature of the employment relationship between the parties.

[16] In my view, the Commissioner misconstrued the nature of the investigation he needed to conduct and thereby committed a gross irregularity. The Commissioner failed to appreciate that whilst he has wide powers to determine the process to follow in conducting the arbitration proceedings in terms of section 138 of the Labour Relations Act 66 of 1995 (the LRA), he had to exercise such powers in a manner that ensures that fairness prevails. Fairness can not prevail where the Commissioner exercising his powers under section 138 of the LRA, designs a process that prevents the parties from ventilating the material issues. The Commissioner by preventing the Applicant's representative from cross-examining the Third Respondent on the true nature of the relationship prevented a fair and full ventilation of the issues for determination by him.

[17] The other issue that arises in this matter is that the Commissioner misconstrued the case which was put before him. He misconstrued the version of the Applicant which was never that the Third Respondent was summoned to a disciplinary hearing or given notice to attend the disciplinary hearing but that he

was informed that the disciplinary hearing against him would be instituted. It was further the case of the Applicant that pending the finalisation of the disciplinary hearing no work would be allocated to the Third Respondent.

[18] It is trite that the duty to show the existence of a dismissal rests with the employee. In the present instance had the Commissioner applied his mind and appreciated the task before him he ought to have found that the Third Respondent had on the balance of probabilities failed to discharge his duty of showing the existence of the dismissal.

[19] The Commissioner was faced with two competing versions. The version of the Applicant was that he was dismissed by Mitchel, whereas the Applicant's version on the other hand was that he was never dismissed but simply told that no work would be allocated to him pending the disciplinary action.

[20] The version of the Third Respondent is on the balance of probabilities not sustainable, in particular having regard to the inconsistencies in his version. There is a fair amount of fabrication of the facts by the Third Respondent. In his answering affidavit he states that Mitchel told him *"you are fired."* This is not supported by the transcript of what transpired at the arbitration hearing.

[21] The transcript reveals the Third Respondent having stated during examination in chief that:

"... I then said I didn't know what happened. He just got me aside and said that my duties have been terminated (sic) since and then came to the union I told them that my services has being terminated (sic). They asked

me where the charge sheet was. I told them that I was then dismissed, he then filed a case with the CCMA.”

[22] When asked during examination in chief whether he could remember any person who could have been present when told that was dismissed the Third Respondent indicated a certain Johannes Motshwane was present and that he would be calling him as a witness to confirm his version. Motshwane was never called as a witness to confirm the version of the employee. This is the version presented by the employee during evidence in chief. Earlier on when asked during evidence in chief what happened on 12th March 2003, the employee, states that he had left for Cape Town on the 9th March 2003 and came back on 10th March 2003 and was off duty on 11th March 2003. He further states:

“I went back to work on 12th to look at trips while I was busy looking at the board where the trips are booked... so... (inaudible) called me aside he said telling me that I should leave and I asked him why ... (inaudible).”

[23] The other version of the Third Respondent as put by his representative was that he was suspended by Mitchel. He persisted with this version even when the Commissioner put to him that he did not remember the Third Respondent saying that he was suspended by Mitchel.

[24] In the light of the above, it is my view that had the Commissioner applied his mind and appreciated the task before him, he ought to have found that the employee had failed to show that he was dismissed. And in this regard, the

Commissioner ought to have found that the Second Respondent did not have jurisdiction to entertain the dispute.

[25] In my view, in the circumstances of this case it would not be fair to grant costs.

[26] In the circumstances the arbitration award of the Second Respondent issued under case number FS1949-03 dated 20 April 2004, is reviewed and set aside.

[27] The arbitration award is substituted with the following:

“(a) The Applicant, Mr Marumo Steven, was not dismissed.

(b) The CCMA does not have jurisdiction to entertain the Applicant’s disputes, and accordingly the claim is dismissed.”

Molahlehi J

Date of Hearing : 17th February 2009

Date of Judgment : 25th February 2009

Appearances

For the Applicant : Mr S Snyman of Snyman Attorneys

For the Respondent: Mr M Lehong of Medupi Lehong Incorporated