

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1144/09

In the matter between:

GLENAIRE HYPER MEAT AND CHICKEN
FRANCHISE CC

Applicant

and

BARGAINING COUNCIL FOR MEAT TRADE GAUTENG

First Respondent

DEACON, C N.O.

Second Respondent

SERRAO, JS

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) in terms of which the commissioner found that the applicant could not prove the substantive and procedural fairness of the dismissal or the contemplated retrenchment of the third respondent and ordered the applicant to pay the third respondent R200 000.00 compensation which is ten months remuneration.
2. The third respondent was employed by the applicant as an assistant manager. His rate of earnings is in dispute. He claims that he was unfairly dismissed on 1 September 2008 and referred an unfair dismissal dispute to the Bargaining Council for Meat Trade Gauteng (the first respondent) on 14 October 2008. The conciliation meeting took place on 2 December 2008 and a certificate of non resolution was issued on the same day. The

matter was referred for arbitration and the hearing took place on 21 January 2009. The applicant contended that no dismissal had taken place and that the third respondent was retrenched. The third respondent contended that his dismissal was procedurally and substantively unfair and that no disciplinary hearing had taken place.

The evidence led at the arbitration hearing

3. The third respondent testified at the arbitration hearing and said that he previously worked as a store manager for Supersave Butchery in Johannesburg from mid November 2006. In February 2007 he became a 30% shareholder at Supersave Butchery until the end of April 2008. Tony and Frank were the other shareholders. At the end of April 2008 Frank and Tony offered him employment at the applicant. Salary was discussed as well as a bakkie and petrol expenses. He was employed as an area manager, and would earn a net salary of R20 000.00 per month. Part of his duties was to go to the stores and assist the managers with problems. At the end of June 2008 he was forced to work at the Hillfox store under the supervision of one Joe. His salary package was changed to R12 000.00 cash and the balance would be paid by the applicant's head office. His duties were to be Joe's right-hand man.
4. The third respondent testified that on Sunday, 31 August 2008 at about 17h30 he asked for his salary as he usually got paid on the last day of the month. On Monday, 1 September 2008, at closing time, Joe called him in and told him that they could not work together, and he must go. He then phoned Emmanuel, the applicant's representative but could only get hold of Terrance - Emmanuel's secretary. He told the secretary that the applicant could not just dismiss him. On 4 September 2009 Joe phoned him and told him to bring back the uniform. When he got to the shop, a notice of contemplated

retrenchment was handed to him. He was surprised to see this letter and attended a meeting on 17 September 2008 as requested. At this meeting, Robbie the shareholder and Emmanuel offered him one month's salary and severance pay. No reasons were given for the retrenchment nor was he given a counter proposal. During the meeting he went outside to telephone his representative, Thabo Sethiba and was informed not to sign any documentation. The letter that he was given said that it was a 'contemplated retrenchment'. No other employee was consulted or retrenched and the applicant did not attempt to avoid the retrenchment. He believes that the retrenchment was a smokescreen for his unfair dismissal, because they did not follow any procedure to dismiss him. He was dismissed on 4 September 2008 and was given a notice of contemplated retrenchment. No disciplinary action was involved in his dismissal.

5. The applicant called Thabo Sethiba as its witness. He testified that on 5 September 2008 the applicant gave the third respondent a notice of a contemplated retrenchment. At a meeting on 17 September 2008, the applicant made the third respondent an offer which he declined. He was the last person who was employed and was the first person to be retrenched. The applicant believes that there was not a dismissal but a retrenchment.

The arbitration award

6. The commissioner has set out in his award the evidence led at the arbitration. It is not necessary to repeat it. He said that in evaluating and analysing the evidence presented by the parties, he must reach an unambiguous award. He said that in dealing with the procedural aspect of this case it was common cause that no hearing was held. The

commissioner said that this clearly lacked any basis of procedural fairness. The applicant attempted to remedy this situation by giving the third respondent a 'Notice of Contemplated Retrenchment' on the 4 September 2008. The commissioner said that he had to look at the intention of the applicant with a contemplated retrenchment after dismissing the third respondent. The conclusion one draw from this act was that the applicant wanted to remedy a wrong and in so doing effecting a dismissal that has been dealt with procedurally. The commissioner found that the offer of 'contemplated retrenchment' was not unconditional but one that had the intent of terminating the third respondent after having covered the procedural defect in the original dismissal. The applicant at no time cross examined or challenged the third respondent's evidence.

7. The commissioner said that considering the third respondent's length of service with the employer and the merits of this matter he concluded that the employer should compensate the third respondent remuneration equal to the amount of 10 months salary. The commissioner found that the applicant could not prove the substantive and procedural fairness of the dismissal, or the 'contemplated retrenchment'. The applicant was ordered to pay the third respondent the sum of R20 000.00 x 10 months = R200 000.00 within 14 days from receiving this award.

The grounds of review

8. The applicant contended that the commissioner committed a gross irregularity, alternatively misconduct, in the performance of his duties for the following reasons:
 - 8.1 The commissioner failed to consider the evidence properly before him that the third respondent worked for Glenaire Hyper Meat and Chicken Hillfox CC and

not the applicant at the time of his dismissal.

- 8.2 The commissioner failed to consider the evidence properly before him and incorrectly recorded the salary as R20 000.00 when in fact not supported by the third respondent's own bank account detail which was R12 000.00.
- 8.3 The commissioner seems to have viewed the conversation between the third respondent and the representatives of the applicant on 31 August 2008 and 4 September 2008 as constituting a dismissal. He has concluded that the section 189 notice on 4 September 2008 was nothing more than a rise to deal with an unlawful dismissal. The evidence does not suggest that the third respondent was dismissed before 4 September 2008. The conclusion reached by the commissioner is simply not supported by the evidence properly before him. If he was so dismissed, it follows that the referral made by the third respondent to the first respondent was out of time since in his 7.11 he states that the dismissal occurred on 17 September 2008. If the conclusion is incorrect, the commissioner simply failed to consider the evidence that the third respondent frustrated the consultation process by walking out of the consultations on 17 September 2008.
- 8.4 The commissioner ought not to have admitted or had reference to the evidence led in relation to the settlement discussions held on 17 September 2008. The settlement discussions are by its nature without prejudice and there are sound reasons for the trier of the fact not being made aware of same. The commissioner's conclusions were based in part on his being privy to those discussions.
- 8.5 To the extent that the commissioner found that the dismissal rather than the retrenchment of the third respondent was neither procedurally nor substantively

unfair, the referral was brought out of time and condonation was not sought for the late filing thereof, a factor which the commissioner failed to consider. If there was a dismissal then same would have taken place on either 31 August 2008 or 1 September 2008 and his referral should have been made before 30 September 2008. The commissioner was precluded from hearing such a complaint without a condonation application.

Analysis of the facts and arguments raised

9. The applicant has raised a number of review grounds. The applicant has abandoned the first ground of review which relates to who the third respondent's employer was. The third respondent had pleaded in his answering affidavit that he was employed by the applicant. The applicant admitted this. At the arbitration hearing the applicant's representative did not dispute that the third respondent was an employee of the applicant.

10. It is not necessary to deal with all the other grounds of review save for the issue of whether a dismissal had taken place. One of the issues that the commissioner had to decide is whether a dismissal had taken place. Obviously if a dismissal had taken place, the commissioner had to make such a finding. Once he had made such a finding he had to decide when the dismissal had taken place and of so whether the referral was made on time. It is not entirely clear whether the commissioner has made a finding that a dismissal had taken place. He said that the applicant could not prove the substantive and procedural fairness of the third respondent or the contemplated retrenchment. It is also not clear why the third respondent had tried to speak to Emmanuel and complained to his secretary that Joe could not just dismiss him. It is also unclear why he attended the

meeting on 17 September 2006 if he had already been dismissed on 1 September 2006. It is also unclear why in his referral to the first respondent he stated that his dismissal took place on 17 September 2006. If he was dismissed on 17 September 2006 his referral would have been on time.

11. It cannot be said that the commissioner's award is one that a reasonable decision maker would have made. The application stands to be dismissed.

12. I do not believe that this is a matter where costs should follow the result.

13. In the circumstances I make the following order:

13.1 The arbitration award dated 31 March 2009 made under case number MTG-0537-2 by the commissioner is reviewed and set aside.

13.2 The dispute is referred to the first respondent for a *de novo* hearing before another commissioner other than the second respondent.

13.3 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : M LENNOX INSTRUCTED BY MONI ATTORNEYS

FOR THIRD RESPONDENT : H P VAN NIEWENHUIZEN INSTRUCTED BY
BOUWER CARDONA INC

DATE OF JUDGMENT : 26 OCTOBER 2010