

Not reportable

Delivered 26 April 2011

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR 31/09

In the matter between:

J VAN SCHALKWYK

APPLICANT

and

COMMISSIONER

1ST RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

2ND RESPONDENT

LIBERTY GROUP OF COMPANIES

3RD RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a ruling made by the first respondent ('the commissioner') on a point *in limine* raised after the referral of a dispute to the CCMA for conciliation. The point raised was to the effect that the applicant was an independent contractor, and thus not an 'employee' as defined by s 213 of the Labour Relations Act. In his ruling, the commissioner upheld the point *in limine*.

The application for review

[2] The basis for the application for review is not entirely clear. In the founding affidavit, the applicant contends the arbitrator committed gross misconduct on the basis, it would seem, that he failed to have regard to the relevant code of good

practice and other sources and authorities concerned with the determination of the existence of an employment relationship. The applicant places particular reliance on what is contended to be a misconception by the commissioner as to the nature of his duties, and a failure properly to apply his mind to the legal issues before him. The heads of argument filed on the applicant's behalf adopt a more expansive line of attack. Here the applicant relies on the grounds established in *Sidumo & another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC), without specifically asserting that the commissioner's ruling represented a decision to which no reasonable decision-maker could come. The applicant submits further that in making his ruling, the commissioner was exercising a judicial function (which required him to enquire properly into all of the relevant facts and to have regard to the applicable law) and that the contract signed by the parties amounted to a prohibited 'contracting out' of the rights to work security established by the Constitution and the LRA.

Evaluation

[3] The application is entirely misconceived. I do not intend to consider the merits of the grounds for review, some of which border on the astonishing, to say the least. The approach to be adopted in a matter of this nature has been the subject of a number of decisions of the Labour Appeal Court, none of which contemplate a determination on the rationality or reasonableness of the commissioner's ruling. The CCMA is a creature of statute – it cannot decide its own jurisdiction. Any 'jurisdictional ruling' that a commissioner makes is made for convenience (see *SA Rugby Players Association & others v SA Rugby (Pty) & others* (2008) 29 ILJ 2218 (LAC)). It follows that the question in the present proceedings is not whether the commissioner's finding is justifiable, rational or reasonable (or, in the *Sidumo* formulation, whether it was a decision to which no reasonable decision maker could come); the question is whether the applicant was an 'employee' for the purposes of the Act. In *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 ILJ 2337 (LAC), a case that concerned the existence or otherwise of a constructive dismissal, Japhtha AJA made the point in the following way:

Having established what the requirements are for a constructive dismissal, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a

jurisdictional fact that –even on review- must be established objectively. That is so because if there was no constructive dismissal- the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner’s finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one – even on review- is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner’s award will stand to be reviewed and set aside (at paragraph [29] of the judgment).

[4] In other words, the test to be applied in when a jurisdictional ruling made by a CCMA commissioner is reviewed is correctness, not reasonableness. That being so, it seems to me that an applicant seeking to review a jurisdictional ruling made by a CCMA commissioner must necessarily set out the facts for which that party contends, and the basis of that contention. Whether or not an applicant is entitled to plead new facts in the affidavits filed in the review proceedings is not a matter I need decide, but the applicant ought at least to set out a sufficient factual basis for this court to decide whether the commissioner’s ruling was correct. Where there is a dispute of fact on the papers, as far as it is possible, the court must resolve that dispute and then apply the legal principles relevant to the determination of an employment relationship for the purposes of the definition in s 213.

[5] In the present matter, the applicant has failed to make out a case within the parameters of the above approach. Although the record of the proceedings before the commissioner has been filed, it is not for this court to construct a factual matrix from the papers that would be determinative of the correctness or otherwise of the commissioner’s decision. To do so would run the risk of making out a case for the applicant. The third respondent has been brought to court on the basis of the papers filed, and it is entitled to have the merits of the application determined on that basis.

[6] For these reasons, the application must fail. In regard to costs, Adv Gauntlett SC, who appeared for the third respondent, submitted that the costs of two counsel were warranted. I am not persuaded that for the purposes of s 162 of the LRA, it would be fair to allow the costs of two counsel. The dispute between the parties clearly had the potential to raise significant and difficult issues and principles. As matters transpired, the application was a damp squib.

I accordingly make the following order:

1. The application is dismissed with costs, such costs to include the costs of one counsel.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 19 April 2011

Date of judgment: 26 April 2011

Appearances:

For the applicant: Ms R Anderson of Riki Anderson Attorneys

For the third respondent: Adv JJ Gauntlett SC and Adv P LeR Theron, instructed by Du Plessis Attorneys.