

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Not Reportable
Case no: JR 1385/2007

In the matter between:

RHAM EQUIPMENT (PTY) LTD

Applicant

and

GCINI MAFANI N.O

First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

THEO BRINK GENIS

Third Respondent

Date of hearing : 5 July 2011

Date of judgment : 8 July 2011

JUDGMENT

FOURIE AJ

[1] Following an altercation in which he had been told to ‘f-off’ by Mr

Alcaraz, the applicant's chairman and controlling shareholder, the third respondent ("the employee") left the company premises, and claimed to have been dismissed. The applicant's attempts to persuade the employee that he had not been dismissed, and that he should return to work, were unsuccessful.

[2] The employee referred a complaint of unfair dismissal to the CCMA, and the matter ultimately came before the first respondent ('the arbitrator') for arbitration. The issue of whether a dismissal occurred was placed squarely in dispute.

[3] The arbitrator found that the employee had been dismissed, that subsequent offers of reinstatement were not genuine, and awarded compensation equivalent to 3 months' salary, an amount of R120, 000.

[4] The applicant duly launched proceedings to review the arbitration award. The matter is unopposed.

[5] For present purposes, the only possible definition of "dismissal" which the employee sought to rely upon to discharge the onus of proving a dismissal, is s 186(1)(a) of the LRA, which defines "dismissal" as "an employer has

terminated a contract of employment with or without notice". The employee did not allege a constructive dismissal.

[6] The issue of whether a dismissal occurred or not is a jurisdictional fact. A "dismissal" as defined in s 186(1) must have occurred (if this is placed in dispute, the employee bears the onus to prove it - see s 192(1)) before the dispute-resolution mechanism provisions (s 191) and subsequent powers of arbitrators (ss136, 138, 142) take effect.

[7] The CCMA has no power to determine its own jurisdiction. Obviously an assessment and provisional finding will be made by an arbitrator (who, having assumed jurisdiction, will normally proceed to arbitrate on the merits), but this is always subject to final determination by the Labour Court¹.

[8] Accordingly, in determining the issue of whether a dismissal occurred, a review Court is not limited to an assessment of whether the arbitrator's decision was reasonable (in the *Sidumo and Another v Rustenburg Platinum*

¹ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Union and Another* (2008) 29 (2008) 29 ILJ (2008) 29 ILJ 2218 (LAC); *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2903 (LAC)

Mines Ltd And Others² sense). The Court will consider the issue *de novo*³.

[9] The transcript placed before the Court is incomplete. In particular the evidence of the applicant's witnesses has not been transcribed. While I am not entirely satisfied that all reasonable steps were taken to reconstruct the record, I intend dealing with the application on the evidence placed before Court. Given the extent of delays that have occurred, and the fact that the CCMA is at least partially responsible for the failure to place a complete record before the Court, this seems to be a fair approach.

[10] In order to ascertain whether the employee was dismissed, it is necessary to consider the events of 21 February 2006 in the context of the working environment and relationships between the individuals involved.

[11] Alcaraz was known to the employee (who had worked at the company for 10 years, and occupied a senior position) to have a volatile temper. They had from time to time in the past been involved in heated altercations, and had made peace thereafter. On the day in question, an altercation initially arose between Alcaraz and Mr Lloyd, the managing director. This occurred in a

² 2008 (2) SA 24 (CC)

³ *Chabeli v CCMA & Others* (2010) 31 ILJ 1343 (LC)

management meeting attended by the employee. After Alcaraz repeatedly told Lloyd to “f-off”, Lloyd responded that he was resigning with immediate effect, and left.

[12] Shortly thereafter an altercation arose between Alcaraz and the employee, relating to Lloyd’s work. When the employee rose to leave the meeting, Alcaraz shouted after him that if he walks away “he will go the same way as Lloyd”. The employee returned and asked Alcaraz what he meant, and whether he was being told to leave, to which Alcaraz repeatedly replied “you can f-off”.

[13] The employee left the premises. Shortly thereafter, he received telephone calls from both Alcaraz and Mr Naidoo (the financial director) to the effect that he had not been dismissed, and that he should return to work. This was confirmed a few days later in a letter from the applicant inviting the employee to resume his duties. The employee refused to return to work. He took up employment elsewhere approximately 1 month thereafter. The applicant paid the employee’s medical aid for a further 2 months after he had left. The employee testified that the aim of this was that the applicant wanted him to come back to work.

[14] On an objective assessment of the available evidence, I find that the employee decided to terminate the employment relationship, following the altercation with Alcaraz. Alcaraz did not intend to dismiss the employee, and his words (although harsh) were not intended to convey a dismissal, and were not understood as such. At best the employee understood that he had the option of resigning if he refused to work with Alcaraz, as Lloyd had done.

[15] In my view the employee failed to discharge the onus that the employer terminated his services. It follows that the CCMA lacks jurisdiction to entertain the claim.

[16] Even if I am wrong, and a dismissal occurred, the fact of the repeated (and genuine) offers for the employee to resume employment would strongly militate against the granting of any compensation whatsoever.⁴

[17] The review application accordingly succeeds and the award is set aside. I now turn to consider whether to refer the rescission application back to the CCMA for hearing afresh, or to substitute the award. In *Southern Sun Hotel*

⁴ *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC); *Rawlins v Kemp* (483/09) [2010] ZASCA 102

*Interests*⁵, van Niekerk J explained the correct approach to this issue as follows:

“The LAC and this court have held that they should correct a decision rather than refer it back to the CCMA for a hearing de novo in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the court is in as good a position as the CCMA to make the decision itself.”

[18] In this matter, factors (ii) and (iv) are present. For these reasons I made the following order:

1. The arbitration award under CCMA Case no GAJB4938/06 dated 30 April 2007 is reviewed and set aside.
2. The award is replaced with an award in the following terms:

“The applicant has failed to discharge the onus resting on him to

⁵ *Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others* (2010) 31 ILJ 452 (LC) at para 33

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prove the existence of a dismissal. The claim is dismissed.”

3. No order as to costs

GA Fourie

Acting Judge of the Labour Court

Appearances:

For the applicant: Paul Farinha

Paul Farinha Attorneys

For the respondents: Unopposed