

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Not Reportable
Caseno: JR 668/10

In the matter between:

MAFIKENG LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL

First Respondent

M MOSALA N.O
(in her capacity as Arbitrator)

Second Respondent

T KGOSIMORE

Third Respondent

K W MOGORISI

Fourth Respondent

Date of hearing: 7 July 2011

Date of Judgment: 8 July 2011

J U D G M E N T

FOURIE AJ

[1] The third and fourth respondents (the claimants) applied for employment with the applicant (the municipality). They were duly interviewed. The interviewing panel recommended their appointment, and the Human Resources department drew up draft

letters of appointment, to be placed before the Municipal Manager for approval.

[2] The appointment of the claimants was at all times subject to and conditional upon approval being granted by the Municipal Manager, who had not sat in on the interviews. The process of approval by the Municipal Manager before an appointment is made is required by law (see section 55(1) (e) of the Local Government: Municipal Systems Act.¹ This is standard practice within the municipality and was known to the personnel that interviewed the claimants. It was also communicated to the claimants themselves.

[3] The Municipal Manager never approved the appointments, but due to an administration error, the claimants were informed that they should report for duty. The claimants were not presented with any offers of employment, and no details pertaining to their appointment (salary etc) were agreed upon. They duly reported for duty on 1 September 2009. Two days later after reporting for duty, the Municipal Manager learnt of their apparent appointment for the first time and immediately saw to it that the claimants were informed that they had not been appointed. The claimants were asked to leave the premises on the same day.

[4] The claimants referred a dispute of an alleged unfair labour practice to the first respondent Bargaining Council, who duly appointed the second respondent (the arbitrator) to arbitrate the dispute. The referral form describes the nature of the unfair

¹ 32 of 2000.

labour practice as the failure by the municipality to provide them with appointment letters confirming their employment, and a failure to pay their salaries.

[5] The municipality denied that the claimants were ever employed, as their appointment was conditional upon approval by the Municipal Manager, which he never granted.

[6] In the arbitration award, the arbitrator held that the municipality dismissed the claimants unfairly, and ordered that they be reinstated with full backpay. The municipality seeks to review and set aside the award. The review application is unopposed.

[7] The primary grounds of review are that the arbitrator misconceived the nature of the dispute before him, and that the result is grossly unreasonable.

[8] The arbitrator's reasoning can be summarised as follows:

8.1 The claimant's employment was subject to approval by the Municipal Manager;

8.2 The Municipal Manager never approved their appointment;

8.3 As a result, no contract of employment came into existence in respect of either claimant;

8.4 The claimants do not seek to enforce any alleged contract of employment with the municipality, but merely seek to have the

municipality's conduct declared an unfair labour practice;

- 8.5 The claimants were informed (albeit incorrectly) that they were to be appointed, and reported for duty at the municipality for 2 days before being told to leave.
- 8.6 The municipality drew up contracts of employment 'with a clear intention of appointing the [claimants]'
- 8.7 This amounts to an unfair dismissal, and not an unfair labour practice as alleged by the claimants.
- 8.8 The claimants were unfairly dismissed, and should be reinstated with backpay, which is to be calculated on the figures contained in the unsigned appointment letters.

[9] In my view the arbitrator completely misconceived the nature of the enquiry before him. He failed to apply his mind to a crucial jurisdictional fact – was there an employment relationship between the parties? In the absence of an employment relationship, no unfair labour practice or dismissal could occur. By definition, both require the existence of an employment relationship as a jurisdictional prerequisite. This seems to have escaped the arbitrator entirely.

[10] For present purposes, the only possible definition of 'dismissal' which could apply, is section 186(1) (a) of the Labour Relations Act², which defines 'dismissal' as "an employer has terminated a contract of employment with or without notice".

² 66 of 1995.

[11] The issue of whether a dismissal occurred is a jurisdictional fact. A finding of a ‘dismissal’ as defined in section 186(1) of the LRA is a prerequisite for the dispute-resolution mechanism provisions (section 191 of the LRA) and subsequent powers of arbitrators (sections 136, 138 and 142 of the LRA) to take effect. If the question of a dismissal is placed in dispute, the employee bears the onus to prove it (section 192(1) of the LRA).

[12] The CCMA has no power to determine its own jurisdiction. Obviously an assessment and provisional finding will normally 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 Court³.

[13] Accordingly, in determining the issue of whether a dismissal occurred, a court sitting on review is not limited to an assessment of whether the arbitrator’s decision was reasonable (in the *Sidumo* sense), but will consider the issue *de novo*⁴.

[14] On an objective assessment of the facts, no contracts of employment came into existence, as the suspensive condition (approval by the Municipal Manager) was not fulfilled. The fact that draft letters of appointment were prepared, and the unfortunate error that was made by inviting the claimants to report for duty, did not serve to fulfil

³ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Union & another* (2008) 29 ILJ 2218 (LAC), *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2903 (LAC).

⁴ *Chabeli v CCMA and Others* (2010) 31 ILJ 1343 (LC).

the suspensive condition.

[15] As no consensus was ever reached regarding the employment of the claimants by the municipality, the claimants do not have a claim in law against the municipality based on either unfair labour practice or unfair dismissal.

[16] Furthermore, the award is reviewable as the conclusion reached (and reasoning process followed) is not one that a reasonable arbitrator could have reached.

[17] In a recent paper⁵, Anton Myburgh SC summarizes the review test to be applied as prescribed in *Sidumo*, and as interpreted by the Labour Appeal Court and Supreme Court of Appeal (most recently in *Samancor*⁶) as follows:

“

- the *Sidumo* test is a result-based test, which test the reasonableness of the result / outcome of the award;
- in order to assail an award on the basis of the *Sidumo* test, the applicant must thus assail not only the commissioner's reasons, but also the result of the award;
- the reasonableness of the result of the award stands to be determined on all the material that was before the commissioner (with the result that the award can be sustained for reasons not considered by the commissioner);
- the focus is on whether the result of the award falls within a range of reasonable outcomes, as opposed to whether it was correct (this so as to maintain the distinction between a review and an appeal); and

⁵ Reviewing the Review Test: Recent Judgments and Developments (not yet published).

⁶ *National Union of Mineworkers v Samancor Ltd* (625/10) [2011] ZASCA 74 (25 May 2011).

- seen in the context of the above, the fact that a commissioner (as occurred in *Samancor*) commits an error in the process of his reasoning will not result in the *Sidumo* test being met, unless the result of the award is incapable of justification on all the material before the commissioner.”

[18] Van Niekerk J held as follows in *Southern Sun Hotel Interests(Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁷:

“In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”

[19] In *Lithotech Manufacturing Cape, A division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper and Packaging Industries and Others*,⁸, Basson J held:

“... there may be cases where, although the ultimate conclusion reached by the commissioner... is reasonable, the reasoning adopted by [him] is so flawed (even if the ultimate

⁷ *Southern Sun Hotel Interests* (2010) 31 ILJ 452 (LC) at para 17.

⁸ *Lithotech Manufacturing* [2010] 6 BLLR 652 (LC) at para 18.

result is reasonable), that it cannot be concluded that [he] duly exercised his... functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances, the reviewing court may well be inclined to review and set aside the award.”

[20] It is plain that no claim for an alleged unfair labour practice was established by the claimants. In fact, the complaints raised by them do not amount to an ‘unfair labour practice’ as defined in section 186(2) (a) of the LRA. But even if a valid unfair labour practice complaint was raised, this does not entitle the arbitrator to conclude in his award that the real dispute is that of alleged unfair dismissal, and then to make a finding to that effect. At the very least (and leaving aside the problem that this was not the dispute referred to conciliation), this issue should have been properly canvassed with the parties during the arbitration, and an opportunity should have been provided to present evidence. The arbitrator’s failure to do so amounts to a gross irregularity in the conduct of the proceedings. His subsequent award of reinstatement with backpay to positions and at salaries that the parties had never agreed upon, is further indication of the complete failure by the arbitrator to apply his mind to the matter.

[21] In light of my finding on jurisdictional facts, it is not necessary to elaborate further on other grounds of review. It can safely be stated that the reasoning and conclusion in the arbitration award are so incompetent as to be reviewable on both a process and result based approach.

[22] In the result, the review application succeeds.

[23] I now turn to consider whether to refer the rescission application back to the Bargaining Council for hearing afresh, or to substitute the award. In *Southern Sun Hotel Interests*⁹, 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.”

[24] In this matter, all of the above factors are present. I made the following order:

24.1 The arbitration award under CCMA Case no NWD 110906 dated 10 March 2010 is reviewed and set aside.

24.2 The award is replaced with an award in the following terms:

“The applicants’ claims are dismissed.”

⁹ *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 452 (LC) at para 33.

24.3 No order as to costs.

Greg Fourie AJ

Acting Judge of the Labour Court

Appearances:

For the applicant: Ms TS Sethosa, Maserumule Inc Attorneys

For the respondents: No appearance for any respondents (unopposed)