

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 667/2010

In the matter between:

IN TOUCH COMMUNITY DEVELOPMENT
AND PROJECT MANAGERS (PTY) LTD

Applicant

and

DONALD KGALAKE NKADIMENG N.O.

First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

LUCIA MERRIAM NHLANGWANA

Third Respondent

Date of hearing : 06 July 2011

Date of judgment : 08 July 2011

REASONS FOR JUDGMENT

FOURIE AJ

[1] On 6 July 2011 I granted an order in the following terms:

1.1 The arbitration award under CCMA Case no LP6760-09 dated 10 February 2010 is reviewed and set aside.

1.2 The award is replaced with the following award:

“The applicant failed to discharge the onus of proving a dismissal. The claim is dismissed.”

1.3 No order as to costs.

[2] The reasons for judgment follow.

[3] The applicant (the employer) employed the third respondent (the employee) in terms of a fixed term employment contract, which expressly provided that employment would terminate on 31 October 2009.

[4] On 28 September 2009, the employer reminded the employee that her employment contract was due to expire at the end of October, and informed her that the contract would not be renewed or extended. A letter to this effect was handed to the employee.

[5] The employee then left the employer's premises on the same day, and failed to return to work. She referred a dispute of alleged unfair dismissal to the CCMA. The issue of dismissal was placed in dispute.

[6] The employee testified that when she was handed the letter informing her of the termination of her employment, she was told to leave the premises immediately and that she would be paid until the end of October. She also alleged a legitimate expectation of renewal of her contract.

[7] The employer testified that the employee was requested to assist with training a new appointment, and was never advised not to work her notice period. As she never worked during October, she was not paid for this period, but was never dismissed. Any expectation of a renewed contract was denied.

[8] The arbitrator dismissed the employee's claim of an alleged legitimate expectation of renewed employment, but upheld the claim that the employee's fixed term contract was prematurely terminated. The employee was awarded compensation equal to 2 months' remuneration.

[9] The applicant now seeks to review this award. The review application is unopposed.

[10] For present purposes, the only definition of "dismissal" which the employee sought to rely upon to discharge the onus of proving a dismissal, is section 186(1)(a) of the Labour Relations Act 66 of 1995 (LRA), which

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defines “dismissal” as “an employer has terminated a contract of employment with or without notice”. The alternative claim of “dismissal” in the sense of a failure to renew a fixed term contract of employment was (correctly) dismissed by the arbitrator, and is not supported by any evidence.

[11] The issue of whether a dismissal occurred or not is a jurisdictional fact. A finding of a “dismissal” as defined in s186(1) is a prerequisite for the dispute-resolution mechanism provisions (s191) and subsequent powers of arbitrators (ss136, 138, 142) to take effect. If the question of a dismissal is placed in dispute, the employee bears the onus to prove it (s 192(1)).

[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 Court.¹

[13] Accordingly, in determining the issue of whether a dismissal occurred, a Court sitting on review is not limited to an assessment of whether

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 ILJ 2218 (LAC); *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2903 (LAC)

the arbitrator's decision was reasonable (in the *Sidumo and Another v Rustenburg Platinum Mines Ltd And Others*² sense). The Court will consider the issue *de novo*³.

[14] On an objective assessment of the evidence before the arbitrator, I am not persuaded that the employee discharged the onus of proving that she was dismissed. Her version seems inherently unlikely. It directly contradicts the contents of the letter handed to her on 28 September 2009, which serves to confirm the termination of her employment contract on 31 October 2009, as expressly stipulated in her employment contract. Her version also seems less likely than that of the employer, whose version is supported by the uncontested documentary evidence. At the very least, the employee's version is not more probable than that of the employer.

[15] In the premises, the review application succeeds, and the award is set aside. I now turn to consider whether to refer the matter back to the CCMA for arbitration afresh, or to substitute the award. In *Southern Sun Hotel Interests*⁴, van Niekerk J explained the correct approach to this question as

² 2008 (2) SA 24 (CC)

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

⁴ *Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others* (2010) 31 ILJ 452 (LC) at para 33

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.”

[16] In this matter, the factors listed under (i) and (iv) were present. For these reasons I made the order as set out above.

GA Fourie

Acting Judge of the Labour Court

Appearances

For the applicant: Nukeri Moundy

Maropeng Ramoshaba Incorporated

C/O Nukeri Inc

For the respondents: Unopposed