VAN NIEKERK J

Not reportable

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO JR 515/08

In the matter between:

COMPUTERSHARE INVESTOR SERVICES (PTY) LTD **APPLICANT**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **1ST RESPONDENT**

COMMISSIONER R BRACKS N.O **2ND RESPONDENT**

THEMBINKOSI VICTOR MABUZA **3RD RESPONDENT**

Date of hearing: 26 August 2011

Date of judgment: 26 September 2011

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent ('the commissioner'). In his award, the commissioner held that the third respondent ('Mabuza') had been unfairly dismissed and ordered the applicant to pay him compensation in a sum equivalent to five months remuneration.

The award

[2] At issue in the arbitration was whether Mabuza had been dismissed and if so, whether his dismissal was unfair. The commissioner summarised the evidence in his award, and I do not intend to repeat that summary here. For present purposes, it was common cause that Mabuza was employed by the National Empowerment Fund (NEF). He was offered employment by the applicant, and it is not disputed that a written agreement was concluded in terms of which Mabuza would be engaged by the applicant with effect from 1 October 2007. Mabuza intended to take off the month of September, on the basis that he would be available to assist with the completion of a project at the NEF. It is also not disputed that on 28 August 2007, two days before Mabuza was scheduled to leave the NEF, the applicant's CEO, Lorge, called Mabuza to a meeting at the Grill House. Lorge told Mabuza that he had had a visit from the NEF's senior management who expressed their unhappiness with the applicant's approach to Mabuza and at his subsequent appointment. Further, given the nature of the relationship between the NEF and the applicant a number of governance issues had been raised, all triggered by Mabuza's appointment. Lorge had replied that it was Mabuza who had approached the applicant, but he nevertheless took the decision to withdraw the offer made to Mabuza on account of the relationship that the applicant enjoyed with the NEF and his concern that the relationship should not be prejudiced. Lorge told Mabuza that for these reasons, he was withdrawing the offer of employment.

[3] Lorge's version was that he had made it clear to Mabuza prior to making the offer of employment that the management of the NEF would have to be happy for him to accept employment with the applicant, and that Mabuza has assured him that he had spoken to the NEF's management and that there was no such objection.

[4] Mabuza's version was that in the absence of the CEO who was overseas at the time, he had informed the chairperson of the NEF in mid-July of his decision to resign, and disclosed that would be commencing employment with the applicant. He stated that while the NEF was not happy with his decision in the sense that they were reluctant to lose him, they raised no objection to it, nor to his accepting employment offered by the applicant.

Analysis

[5] The basis on which an award can be set aside is well –established. The court may interfere if and only if the decision to which the commissioner came was so unreasonable that no reasonable person could have come to that decision (*Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC)). The arbitrator's analysis of the evidence before him extended to three elements. The first was whether in the face of the applicant's contention that there was a suspensive condition to the effect that Mabuza's appointment was conditional on him having secured the NEF's agreement to his employment by the applicant a valid agreement had been concluded. The second question was whether Mabuza was an employee of the applicant. The third condition was whether Mabuza's dismissal was substantively and procedurally fair.

[6] The award is not a model award, but I do not think, for the reasons set out below, that it represents a decision to which no reasonable decision-maker could come.

[7] Mr. Crawford (correctly) did not seek to attack the commissioner's finding as to Mabuza's employment status. It is now well –established that a person who is party to an employment contract but who has not commenced work is an 'employee' as defined in s 213 of the Act. (see *Wyeth SA (Pty) ltd v Manquele & others* [2003] 7 BLLR 734 (LAC)).

[8] The second element, which the commissioner cast as an enquiry into the validity of the agreement, is really an enquiry into the existence or otherwise of any suspensive condition. Here, the commissioner found that there was no suspensive condition. It was common cause that the written agreement concluded between the parties did not contain a clause to the effect that Mabuza's employment was conditional on the NEF's agreement to his being employed by the applicant. The commissioner applied the parol evidence rule and held that in determining the dispute before him he was confined to the terms of the written contract. The applicant's case had been that there was a verbal agreement between Lorge and Mabuza to the effect that Mabuza would secure from the NEF that there was no objection to his being employed by the applicant. Mabuza's case

was that he had advised the NEF of the identity of his new employer, and that there was no objection to his employment by the applicant. In other words, Mabuza's version was that if there was any suspensive condition that attached to the contract, it had in any event been fulfilled. The commissioner notes the dispute of fact:

> "*The Respondent contended that there was an agreement that he would inform his ex-employer of his intention to resign. He advised that he had done so while his ex-employer disputes this. No satisfactory explanation had been given why the Respondent chose to believe the NEF and not the Applicant. The only plausible reason one can ascribe to the Respondent accepting the word of the NEF's management is because of the business relationship."*

In other words, the commissioner clearly acknowledged Lorge's dilemma. Either he accepted that Mabuza had told him the truth and honoured the contract that had been signed with him, or he accepted the NEF's version that Mabuza had not told them that he intended accepting an offer of employment from the applicant. In his evidence, Lorge was candid about this, and gave his reasons for choosing to accept the NEF's version. But this does not establish that Mabuza was lying when says that he told Lorge that he had spoken to the chairperson of the NEF and that he had expressed no objection to his employment by the applicant. The commissioner appears to accept that Mabuza's version, and it follows from that finding that any suspensive condition that there may have been was fulfilled. Contrary to what the applicant submits, there is no contradiction in this formulation, nor is there any flaw in the commissioner's logic.

[9] In so far as the applicant submits that the commissioner erred in making the factual findings that he did on the evidence before him, the threshold for interference is set high. In *Bestel v Astral Operations Ltd & others.* Davis JA emphasised that the ultimate principle on which a review is based is justification for the decision as opposed to the decision being correct. The court confirmed that a review court deals with a test of 'reasonableness, not the rightness of agency findings of fact. The question is whether the evidence is such that the reasonable person acting reasonably could have reached the same decision from the evidence and the inferences' (at paragraph [16] of the judgment). It is only where a commissioner makes a finding that is based on

speculation, or is not supported by evidence that is sufficiently reasonable to justify the decision, or that is made in ignorance of evidence that was not contradicted, that the commissioner arrives at a decision to which no reasonable decision-maker could reach. In the present instance, in my view, it cannot be said that the commissioner's finding of fact or the conclusions that he drew from the evidence fall into this category.

[10] It was not contested that Mabuza had not been afforded a hearing prior to his dismissal.

[11] The applicant also seeks to have the amount of compensation awarded to Mabuza reviewed. The record discloses that it was not disputed that as a consequence of the applicant's actions, Mabuza was unemployed for a period of three months. Given the fact that that there was no procedural fairness established, and given the not unreasonable finding that the applicant had in effect made a choice between Mabuza's interest and it own commercial interests, the amount of compensation awarded is not so unreasonable that interference is warranted. Finally, there is no reason why costs should not follow the result.

I make the following order

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Mr. J Crawford, Crawford and Associates.

For the respondent: Adv T Manchu instructed by Mashiane, Moodley & Monama Inc.

VAN NIEKERK J