

REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2360/10

In the matter between:

SOUTH AFRICAN EXPRESS

AIRWAYS (PTY) LTD

Applicant

and

AG SJOLUND N.O

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

MT NHLENGETHWA

Third Respondent

Heard: 19 October 2011

Delivered: 18 November 2011

JUDGMENT

BHOOLA J

Introduction

- 1] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 to review, set aside and correct the ruling under case number GAJB35373-08 handed down by the first respondent (the commissioner) dated 28 July 2010.

Background facts

- 2] The third respondent was employed by the applicant as a pilot under training during May 2008. He was as a result enabled to fly the CRJ200 as a first officer, but constantly had difficulty executing safe landings. The applicant provided him with more training than was required in terms of its flight operations manual, but despite this, he was unable to perform to its satisfaction. The applicant made a decision to convene an incapacity hearing in the interests of the safety of its operations and customers.
- 3] The third respondent was informed on 10 September 2008 that an incapacity hearing was to be convened on 6 October 2008 to address and determine the consequences of his poor work performance. He raised various grievances in which he alleged *inter alia* that he was being victimised on account of his race and that the appraisal and incapacity process was instituted in order to delay his progress. In order to enable it to address these grievances, the applicant postponed the incapacity hearing.
- 4] On 30 October 2008, prior to the final step in the grievance process being finalised, the third respondent resigned. In his letter of resignation, he stated that he was forced to resign due to 'prejudice since I am the only African pilot in the jet crew'. He alleged that all the events leading up to his resignation occurred on account of his race.
- 5] On 25 November 2008, the third respondent referred a constructive dismissal dispute to the second respondent (the CCMA) in which he sought maximum compensation for his alleged dismissal on the ground of his race. The dispute

remained unresolved at conciliation and was set down for arbitration on 28 July 2010. At the arbitration, the applicant raised a point *in limine* that the CCMA lacked jurisdiction to determine the dispute on the following grounds :

- 5.1 Section 191(5)(a)(ii) of the Act prohibits the CCMA from determining a dispute where the employee alleges that the contract of employment was terminated (either by the employer or employee) for a reason contemplated in section 187;
- 5.2 The third respondent alleged that his constructive dismissal is based on race discrimination, which is a ground envisaged in section 187(1)(f) of the Act; and
- 5.3 Section 191(5)(b) provides that the employee may refer the dispute to the Labour Court for adjudication if he alleges that the reason for dismissal is one envisaged in section 187 as being automatically unfair .

- 6] The commissioner found that the CCMA did in fact have jurisdiction to determine the dispute.

The ruling

- 7] The commissioner noted in the ruling that: '[t]he applicant alleges that the respondent's unfair conduct towards him was based on his race and that he resigned due to the situation created by the respondent'. He dealt with the point *in limine* by stating that:

'[t]he respondent believes the applicant's claim relates directly to the fact that the applicant is black and that the matter falls within section 187(1)(f) of the LRA. Should I find that the CCMA has jurisdiction to arbitrate the matter the respondent states that the applicant should not be allowed to use the argument of discrimination due to race during the arbitration proceedings'.

- 8] In his analysis, the commissioner stated :

'The applicant resigned claiming unfair dismissal. Section 187 states that "(1) a dismissal is automatically unfair if the employer, in *dismissing* the employee, acts contrary to section 5 or, if the reason for *dismissal* is (f) that the employer unfairly discriminated against an employee. As previously indicated the applicant resigned claiming constructive dismissal and was not dismissed on grounds stated in section 187(1)(f) of the LRA. Constructive dismissal is considered as a dismissal in terms of the LRA. Therefore, the CCMA would have jurisdiction to arbitrate the matter in terms of section 186(1)(e) as stated in the LRA. The applicant bears the onus of proof in this matter and alleges that the reason for his resignation was due to his race. The respondent's submission in stating that the applicant may not refer to discrimination cannot be considered as the applicant believes that this is the reason why he felt he had no other option but to resign'.

Grounds of review

- 9] The applicant submits that the commissioner failed to take account of the remainder of section 191(5)(a)(ii), which provides that the CCMA must arbitrate the dispute '...unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187'. Therefore, it is apparent that the commissioner failed to properly apply his mind to the issue of whether the CCMA has jurisdiction. If regard were had to the full text of section 191(5)(a)(ii), it would have been clear that although the power to arbitrate a constructive dismissal dispute is indeed conferred on the CCMA, this power is withdrawn where it is alleged that the constructive dismissal is based on a reason set out in section 187.
- 10] The applicant seeks to set aside the ruling on the grounds, firstly that the commissioner's failure to consider and analyse the full scope of section 191(5)(a)(ii) of the Act together with the facts placed before him, is so unreasonable as to constitute a gross irregularity and /or that it demonstrates a patent, alternatively latent failure to apply his mind to the evidence before him and /or it demonstrates that he misconceived the powers conferred on him by the Act. Secondly, the applicant submits that the commissioner's failure to take into account the submissions made by the applicant on the appropriate test for jurisdiction is so unreasonable as to constitute a gross irregularity and/or it demonstrates a patent, alternatively latent failure of the commissioner to apply

his mind to the issues and evidence before him, and/or it demonstrates that he misconceived the powers conferred on him under the Act.

Analysis

11] Ms Tolmay relied on *Toit's Menlyn Auto Traders v Van Jaarsveld NO and Others*¹ in which the court cited with approval the decision of Basson J in *Mawisa v CCMA and Others*², as support for the submission that the CCMA lacks jurisdiction to arbitrate the dispute in the present matter. In *Mawisa*, the court held as follows : '[t]he fact that the applicant has also alleged that the reason for the (allegedly unfair) dismissal is related to his (mis)conduct does not mean that the CCMA now also has jurisdiction in regard to this unfair dismissal dispute (in terms of section 191(5)(a)(i) of the Act). The very same unfair dismissal dispute stands to be adjudicated (also) by the Labour Court and, in the absence of a clear and unequivocal election on the part of the applicant, the CCMA therefore does not acquire the necessary jurisdiction to arbitrate this dispute'.³ [My emphasis]

[12] The employee persisted with his allegation that his dismissal was also due to victimization and the court held that the CCMA had no jurisdiction to arbitrate the dispute. Similarly, in the present matter given the plain meaning of section 191(5)(a)(ii), the fourth respondent would have to make an election to remove the allegations of race discrimination from the ambit of the dispute in order to afford the CCMA jurisdiction. Ms Tolmay relied further on *Jamela v Accord*⁴ where the court accepted that where the dispute concerns grounds which would render the dismissal automatically unfair, the employee had to refer the dispute to the Labour Court in terms of section 191(5)(b)(i).

[13] It is clear from the authorities cited as well as the plain reading of the Act that should the fourth respondent persist with his allegations of race discrimination, the CCMA would lack jurisdiction to arbitrate the dispute in terms of section 191(5)(a)(ii) of the Act. The ruling is vastly at odds with the law on this issue and appears to have been made without a proper application to the legal and factual issues. For this

1 (2006) 27 ILJ 2421 (LC).

2 (1998) 19 ILJ 1194 (LC).

3 *Mawisa* at para 18.

4 [2001] 2 BLLR 150 (LC)

reason, it is reviewed and set aside on the grounds sought by the applicant as emanating from the test enunciated in *Sidumo*.⁵ Having set aside the ruling, I am not inclined to correct it as is sought by the applicant in its notice of motion. There is in my view no reason why the normal rule that costs follow the cause should not apply. The fourth respondent's legal representative was afforded the opportunity, when the matter was stood down, to obtain instructions in regard to a possible resolution of the matter on the basis of a consent to jurisdiction or otherwise. This was however not forthcoming.

[14] Therefore, I make the following order :

1. The ruling of the first respondent dated 28 July 2010, made under the auspices of the second respondent on 11 August 2010 under case number GAJB35373-08 is set aside on review.
2. The fourth respondent is directed to pay the costs of the application.

U Bhoola
Judge

APPEARANCES

APPLICANT: E Tolmay
Instructed by Webber Wentzel Attorneys,
Johannesburg

FOURTH RESPONDENT: N Ralikhuvhana
Instructed by KRB Law Firm, Johannesburg.

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

