



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1563/10

In the matter between:

PULENG MOKHETHI

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

PANELIST J MTHEMBU N.O

Second Respondent

MEMBER OF THE EXECUTIVE COUNCIL

FOR POLICE, ROADS AND TRANSPORT,

FREE STATE PROVINCIAL GOVERNMENT

Third respondent

Heard on: 26 October 2011

Delivered on: 25 November 2011

JUDGEMENT

BOQWANA AJ

Introduction

- 1] This is an application to review and set aside the arbitration award made by the second respondent (“the commissioner”) under case number GPBC1075/2009 and dated 01 April 2010 in terms of which the commissioner found that the applicant, Ms P C Mokhehi did not have an ‘employment relation’ with the Department of Traffic Management (“the department”) and could accordingly not have been unfairly dismissed. The commissioner accordingly dismissed the unfair dismissal claim.
- 2] This application was preceded by an application for condonation filed by the applicant for the late filing of the review application, which I granted. I do not want to burden this judgment with my findings on the condonation application. My reasons for granting the condonation would clearly appear on record.
- 3] There are essentially two issues to be decided by this Court. The one issue relates to the conduct of the commissioner who is alleged to have deprived the applicant of an opportunity to lead evidence and the other issue relates to the finding by the commissioner that the applicant was not an employee.
- 4] The applicant brought this application on the basis of the *Sidumo*¹ test. She seeks an order to set aside the commissioner’s award on the basis that it is unlawful, unreasonable and procedurally unfair. This in my view is a completely wrong test for the kind of review sought by the applicant. The question before the commissioner was whether an employment relationship existed and if so, whether the dismissal of the applicant was fair. The issue before the commissioner went to the jurisdiction of the first respondent.
- 5] The approach to be adopted in dealing with review of jurisdictional ruling has been set out in *SA Rugby Players’ Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another*,² where the court held that the CCMA being a creature of statute did not have the power to

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

² [2008] 9 BLLR 845 (LAC).

determine its jurisdiction but may do so for convenience. In other words, the CCMA or the bargaining council cannot grant itself jurisdiction which it does not have. This means the question of whether the CCMA or a bargaining council has jurisdiction is a matter to be determined by the Labour Court. The Labour Court determines the existence or otherwise of the jurisdiction of the CCMA or the bargaining on the basis of the existence of objective facts.³

- 6] It is common cause that the proceedings before the commissioner were not mechanically recorded and accordingly there is no transcribed record of the arbitration proceedings. There are also no hand-written notes or copies of the submissions made before the commissioner at the arbitration hearing.
- 7] I am however satisfied that based on the affidavits and submissions made before me by the parties read together with the arbitration award, the facts placed before me are sufficiently clear in order to objectively determine the existence of an employment relationship.

Facts

- 8] On 07 July 2009, an official of the third respondent, one Mr M P Nkhi, wrote and addressed a document ("a submission") to the third respondent requesting 'approval for a counter offer for senior provincial inspector ME P Mokhethi, (the applicant)'. This was said to have been a re-submission of an earlier submission that had apparently been made but went missing. This submission was approved by the third respondent on 14 July 2009.
- 9] It is common cause between the parties that at the time the submission was made and approved the applicant was not an employee of the third respondent.
- 10] It also seems to be common cause that the applicant had previously been in the employ of the third respondent. She was transferred to the Free State Traffic

³ See *J & J Freeze Trust v The Statutory Council for the Squid and Related Fisheries of SA and Others* (unreported judgement dated 20 July 2011 P 530/09) at para 21.

Management Directorate on 31 August 2004. She then resigned from the public service on 12 August 2008 to take up a better position with the Public Servants Association ("the PSA").

11] It is the applicant's case that on 03 August 2009, she rejoined the department after she was contacted telephonically by the officials of the third respondent, in particular one Mr Sease who is the Director of Traffic Management and Chief Director Phahlo.

12] Mr Sease had verbally informed her that the submission was approved by the third respondent to 're-appoint' her as the Control Provincial Inspector. Mr Sease advised her to report at the department in order to resume her duties.

13] Upon her arrival at the third respondent on 03 August 2009, the applicant contends that she was introduced to staff as a 'new appointee' after which she was issued with an appointment card under persal number 17276439, given a new uniform and attended an induction. This is not disputed by the third respondent.

14] The applicant accordingly contends that these actions meant that she was an employee and further constituted 'tools of work' serving to prove that there was an employment relationship between her and the third respondent.

15] The applicant alleges that she resigned from her employment with the PSA as result of her 're-appointment' by the third respondent.

16] On 04 August 2009, the applicant was verbally advised that the submission had been withdrawn and that she should leave the department's premises. This, the applicant contends, was done without affording her an opportunity to be heard.

17] On 05 August 2009, the submission was rescinded by the third respondent, based on the recommendation to do so by the HRM & Office Administrator and Head of Department.

Grounds for Review

18] The applicant has not crystallised her grounds for review in a clear manner apart from grouping a set of facts, which she called 'Chronology of facts relating to the review application'. Based on the reading of the founding affidavit and the applicant's heads of argument, the grounds for review can be summed up as follows:

- The commissioner committed a gross irregularity in that, at the commencement of the arbitration hearing, he did not afford the applicant an opportunity to testify and give evidence in relation to her case, despite being present. The commissioner simply heard opening addresses from both parties' representatives and thereafter requested the parties to submit closing argument. This conduct amounts to a mistrial of the hearing proceedings;
- The commissioner committed a further gross irregularity by concluding that the applicant was no longer an employee and that the third respondent was misled in approving the submission, for the reason that, although the applicant was not afforded an opportunity to testify whilst being present at the arbitration, her representative told the commissioner that both the Chief Director Phahlo and Director, Traffic Management, Mr Sease had called her to come to work and resume her duties with the third respondent. Her representative further told the commissioner that the applicant was given a work uniform, attended induction and also introduced to the staff employees of the third respondent. The commissioner committed gross irregularity when he ignored and departed materially from the provisions of section 200 A (f) of the Labour Relations Act 66 of 1995 as amended.
- The commissioner committed a gross irregularity when he unlawfully misdirected himself to the fact that the applicant was unfairly dismissed without the third respondent having followed a fair procedure nor ever giving her a fair reason for her dismissal in terms of the law relating to termination of her employment.

- The commissioner committed a gross irregularity in that his recommendation at paragraph 31 of his arbitration award that the third respondent should take disciplinary action against Mr Nkhi and Mr Sease for the handling of this matter was compelling him to find that the applicant was an employee.

Evaluation

19] The question I have to answer in this matter is whether the objective facts presented by the applicant establish jurisdiction of the first respondent. The question will be answered in the positive if facts that assert jurisdiction of the first respondent are present. If such facts do not exist, the first respondent had no jurisdiction irrespective of its finding to the contrary.⁴

20] Relying on the judgment in *Sanlam Insurance Life Insurance Limited v CCMA and Others*,⁵ Molahlehi J in *J & J Freeze Trust*⁶ held that:

‘In *Sanlam Insurance Life Insurance Limited v CCMA and Others*,⁷ the court held that in determining jurisdictional reviews, the Labour Court was called upon to decide *de novo* whether there was an employer/employee relationship between the parties. In other words, as stated by this Court in the recently unreported case of *Pick It Up v Marwashe*,⁸ the test in reviews concerning the jurisdiction of the CCMA or the bargaining council is not that of a reasonable decision maker as is the case in the general review cases but whether the objective facts as they existed formed the basis upon which the CCMA or the bargaining council could assume jurisdiction. It would seem even the issue of the correctness or otherwise of the decision of the commissioner is in this respect irrelevant. In other words the court in the jurisdictional review may well find that the decision of the commissioner or the arbitrator was correct, but it is critical that the court has to apply its own mind and determine whether the objective facts as presented gave the commissioner or the arbitrator the

⁴ See *Global Outdoor Systems Ltd v Du Toit and Others* (2011) 32 ILJ 1100 (LC).

⁵ Unreported Case JA38/08.

⁶ *J & J Freeze* supra at paragraph 22.

⁷ Unreported Case JA38/08.

⁸ Unreported Case number, JR1613/09.

jurisdiction upon which the dispute could be entertained by the CCMA or the council. It therefore follows from the above discussion that, I am called upon to determine whether the objective facts provided the first respondent with the necessary jurisdiction to entertain the alleged unfair dismissal dispute of the third respondent.'

21] Although the key issue in the present matter concerns jurisdiction which this Court has the power to determine from the facts as presented by the papers of the parties, for the purposes of completeness I deal first with the grounds for review which relate to the process of how the proceedings were conducted by the second respondent.

22] The applicant contends that she was not given an opportunity to lead evidence at the arbitration hearing in relation to her employment status. In the case of *Southern Sun Hotel Interests (Pty) Ltd and Others*⁹, Van Niekerk J held that:

'...section 145 requires that the outcome of CCMA proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising 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.'

23] This approach was also followed in the *SA Airways (Pty) Ltd v Blackburn and Others* case.¹⁰ The court in that case held that these errors (flowing from gross irregularity) also constitute acts of what may be termed as 'process-related unreasonableness'.¹¹

24] The applicant submits that she was not afforded an opportunity to give evidence. According to the applicant, the commissioner, after listening to the opening

9 [2009] 11 BLLR 1128 (LC) at para 17.

10 [2010] 3 BLLR 305 (LC).

11 *SA Airways* at para 21

addresses of both parties simply requested the parties to file closing argument without being allowed to testify and to give evidence under oath.

25] I am not convinced that the commissioner's conduct was grossly irregular for a number of reasons. The first reason being that the applicant was represented by a union official, a certain Mr Greef of the PSA who in the applicant's own version submitted the facts to the commissioner. There is no evidence nor any submission made on behalf of the applicant that Mr Greef or the applicant insisted that the applicant wanted to give oral evidence instead of only submitting argument and that the request was refused by the commissioner.

26] In the unreported judgement of *BHP Billiton Klipspruit Colliery v NUM obo Dlamini Alexander and Others*¹², Savage AJ held as follows:

'Section 138(1) of the LRA permits commissioners in the course of arbitration proceedings to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. In undertaking such task, a commissioner is entitled to 'conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly'. Commissioners must however be guided by at least three considerations: the resolution of the real dispute between the parties; as expeditiously as possible; and in a matter which is fair'.¹³

27] It is normal in instances where a jurisdictional issue is raised for parties to agree to determine the issue at hand on papers or by way of argument. For example, in the case of *Wyeth SA (Pty) Ltd v Manqele and Others*¹⁴ where the arbitrator had to determine an existence of an employment relationship, parties agreed that this point could be determined on the papers.¹⁵

28] It would have been expected that the applicant's representatives would raise any

¹² Case no: JR 650/10.

¹³ *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1.

¹⁴ [2005] 6 BLLR 523 (LAC).

¹⁵ *Wyeth* at paragraph 7.

unhappiness with the commissioner in respect of how the proceedings were conducted. There is no suggestion in the founding affidavit that Mr Greef requested or that he insisted that the applicant wished to lead evidence. On the contrary, the applicant alleges that her representatives told the commissioner what the facts were and the commissioner ignored those facts.

29] In any event, it seems to me that the applicant would have presented no additional evidence apart from the submissions made to the commissioner by her representatives. Mr Ponoane who appeared on behalf of the applicant conceded to such during oral argument.

30] I am therefore satisfied that the commissioner's conduct was not grossly irregular. Even if I am wrong on this, this Court has to look at the facts independently and objectively to determine whether the first respondent had the necessary jurisdiction to entertain the dispute in the first place.

Did an employment relationship exist?

31] In determining the employment relationship, the first question that should be asked is whether an employment contract was concluded. In *Jack v Director-General Department of Environmental Affairs*¹⁶, Pillay J held that:

'Historically, the requirements for a contract of employment were derived from the statutory definition of "employee". It is logical to follow that approach as there cannot be a contract of employment unless the parties thereto are employer and employee either at common law or as defined in statutes. At common law, a contract of employment (*locatio condition operarum*) was a consensual contract whereby an employee undertook to place his personal services for a certain period of time at the disposal of an employer who in turn undertook to pay him the wages or salary agreed upon in consideration for his services.'¹⁷

32] Section 213 of the LRA defines an "employee" as –

'(a) any person, excluding an independent contractor, who works for another person or for

¹⁶ [2003] 1 BLLR 28 (LC) at paras 11-12.

¹⁷ As was expressed in *Smith v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 56E-F.

the State and who receives, or is entitled to receive, any remuneration; and

(b) Any other person who in any manner assists in carrying on or conducting the business of the employer,'

33] It is now established in our law 'that the definition of employee in section 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates.'¹⁸

34] The applicant's contention is that she was offered employment by the third respondent on the basis of the submission approved by the third respondent, which she accepted. It is common cause that at the time the submission was written and approved by the third respondent the applicant was not an employee of the third respondent.

35] The submission purported to motivate for a higher position for the applicant and was presented as a request for a counter-offer for the applicant. The applicant accepts that she was not employed by the third respondent during that time but by the PSA. She had long left the employ of the third respondent. The submission created a wrong impression that the applicant was still an employee at the time of the submission when she was not.

36] I am not convinced that the submission made by the third respondent constituted an offer. Firstly, the submission was an internal document which sought approval of a counter-offer (for an incumbent who was not in the employ of the third respondent). The applicant knew that this submission was misleading. The submission accordingly had no terms and conditions stipulated to establish a contract. It was merely a document seeking approval of the counter-offer to be made to the applicant.

37] Secondly, I am also not convinced that the telephone call made by Mr Sease or Mr Phahlo established an offer. The applicant bears the *onus* to show that an offer was made. She ought to provide clear terms of the offer that was

¹⁸ *Wyeth SA (Pty) Ltd v Manqele and Others* [2005] 6 BLLR 523 (LAC).

communicated to her and in my view she has not done that. She cannot simply rely on the content of the submission. In my view, she has failed to show what was offered to her by Sease or Phahlo apart from the contents of the submission which were clearly incorrect and misleading.

38] I accept that in terms of general principles of common law a contract need not be reduced to writing in order to be binding. The applicant, however, has in my view failed to show any elements of the alleged oral agreement. Typical elements of a contract of employment would be issues such as salary and benefits offered, commencement date of the agreement and the job description. The applicant has shown none of that.

39] Thirdly, the Public Service Act, 1994 ("PS Act") read with its regulations prescribe peremptory processes for appointment, which include advertisement and selection processes.¹⁹ It is not disputed that the applicant was not appointed in terms of the selection procedures applicable to public service employees, in that the post in which she was allegedly appointed was not advertised and consequently no applications were received from a pool of candidates. The applicant knew about these procedures. It would therefore be an anomaly for her to be appointed without those being followed and simply on the basis of a telephone call and assurances allegedly made by an official of the third respondent that the submission (which contained misleading information) had been approved.

40] It becomes irrelevant in my view that the applicant reported at the station, was given a uniform, attended an induction, obtained an appointment card and was introduced to staff as a new appointee, if the existence of a contract (i.e. offer made and accepted) has not been established.

41] In my view, the applicant has not placed before this Court facts which objectively speaking establish the existence of the employment relationship and accordingly, the first respondent does not have jurisdiction to entertain the dispute.

¹⁹ Sections 9-12A of the Public Service Act, 1994 read with Chapter 1, part VII of the Public Service Regulations.

Costs

42]I have also decided to deal with the issue of costs. The court has discretion on whether to award costs having regard to the requirements of law and fairness. I take into account that the applicant is unemployed and had submitted in her application for condonation that she was unable to raise funds to get legal assistance in bringing this review application. She resigned from her previous employ notwithstanding her reliance on an unlawfully obtained submission. She should not be penalised for the actions of the officials of the third respondent. It has not been proven that the applicant was party to the generation of that submission. Having regard to the above circumstances, I find that it will not be in the interest of justice to award costs.

43]I therefore make the following order:

1. The application is dismissed.
2. There is no order as to costs.

Boqwana AJ

APPEARANCES:

FOR THE APPLICANTS: M.J. Ponoane for Ponoane Attorneys

FOR THE RESPONDENTS: S.S. Jonase for State Attorney

