



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR 697/08

In the matter between:

RENIER REYNEKE VERVOER CC

trading as PREMIUM TRUCKING

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER HAROLD MATSEPE N.O

Second Respondent

E D MEYER

Third Respondent

Heard: 27 October 2011

Delivered: 2 December 2011

Summary : Review – jurisdictional point- arbitrator required to determine whether employee resigned or was dismissed - had no jurisdiction to determine whether dismissal unfair – granted.

JUDGMENT

BHOOLA J:

Introduction

- 1] This is an application in terms of section 145 of the Labour Relations Act¹ (the Act) to review and set aside the arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent on 4 March 2008, in which the dismissal of the third respondent (the employee) was held to be procedurally and substantively unfair.

Background facts

- 2] It is common cause that the employee was summoned to a meeting with Anna Reyneke, the General Manager of the applicant, a family business on Friday 16 January 2004. She was issued with a notice purportedly issued in terms of section 189(3) of the Act indicating that the applicant was in financial difficulty and was required to retrench staff. The letter invited her to make representations notice either orally or in writing, by 20 or 21 January 2004. The retrenchments were envisaged to take effect in February 2004. At the end of the meeting the employee requested a letter of reference, and Reyneke undertook to provide one. She left the office shortly after the meeting, having requested a colleague, Bridget Marais, to inform Reyneke that she wanted her furniture returned to her. Marais conveyed this message to Reyneke that afternoon. It is further common cause that the employee did not return to work that afternoon and that her furniture was returned to her that weekend. Furthermore she did not report for work on Monday 19 February, but delivered a letter to the applicant alleging that she had been dismissed on the Friday.
- 3] The employee referred a dispute to the first respondent arising from her dismissal. A default arbitration award was issued which was subsequently reviewed and set aside by this Court. The matter was then remitted to the first respondent for an arbitration *de novo*. At the second arbitration the only issue before the arbitrator was “whether the applicant was dismissed

¹ 66 of 1995.

or walked away on her own accord”.

The award

[6] The arbitrator found that the applicant believed that the employee had resigned because:

- after the retrenchment process was explained to her she requested a reference letter;
- she informed a co-worker that she was going home and that her personal effects should be returned to her; and
- she failed to report for duty on Monday, 19 January 2004, after having left work and having failed to carry out her duties the previous Friday afternoon.

[7] The arbitrator therefore found that in these circumstances the applicant could reasonably have concluded that she had resigned. However, notwithstanding this conclusion, the arbitrator went on to find that “the misunderstanding or myth under which [the employee] was regarding the status of [the applicant] between 16/1/04 and 18/1/04 was clarified or put to rest on 19/1/04 when [the employee] wrote to [applicant] and alleged that she was unfairly dismissed. At that stage [the applicant] now knew that [the employee] alleges that she has not resigned but was unfairly dismissed, as alleged”. The arbitrator accordingly found that, in response to the employee’s letter of 19 January 2004, the applicant ought to have called her in to correct the situation and explained to her *inter alia*:

- that she was not dismissed;
- that her job was still intact;
- that the company was only going through a retrenchment process;

- that representations are still awaited from her; and
- that she should return to work immediately, failing which the company code would take its course on absence without permission or on abscondment with all the consequences.

[8] The arbitrator concluded that "it is unfortunate that [the applicant] concluded, on the face of the facts before it, that [the employee] indeed resigned on her own free will. This was not an unreasonable belief but [the applicant] could easily have verified the actual situation".

[9] This was followed by the finding that although the employee was not initially dismissed on Friday 16 January 2004, she was subsequently dismissed by the conduct of the applicant as per paragraph 7 of its letter in reply to her letter of 19 January. In paragraph 7 the applicant stated that it accepted her voluntary departure from her employment. In other words, the arbitrator found that the employee had not been dismissed on Friday 16 January 2004 as she alleged, but on a later date when the applicant accepted her resignation. On this basis the arbitrator ruled that her dismissal was procedurally and substantively unfair and awarded her five months' salary as compensation.

Merits of the review

[10] Mr Fourie submits that the arbitrator's finding that the employee had been unfairly dismissed could not be sustained on the facts by virtue of the following:

(a) Firstly, the employee alleged that she was dismissed on Friday 16 January 2004 but did not discharge the onus of proof in this regard. Even if, as the arbitrator accepts on the employee's version, Reyneke had said that she should look for alternative employment, this did not discharge the onus of proving her dismissal. The arbitrator found that she had not been dismissed on the Friday but mistakenly believed so. This should have ended the matter but the arbitrator nevertheless proceeded to determine whether the employee was dismissed a week later. The issue before him was simply whether the employee had resigned or had been dismissed on the Friday. In failing to confine himself to the issue before him the arbitrator failed to appreciate the true nature of the

enquiry before him and committed a material error of law.

(b) Secondly, having found that the applicant was reasonably entitled to conclude that the employee had resigned on Friday 16 January 2004, the arbitrator proceeded to conclude that she had been dismissed when the applicant accepted her voluntary departure thereafter. This amounts to a finding that the applicant dismissed the third respondent by accepting her resignation. Mr Fourie submitted that the arbitrator was not required to accept that resignation constitutes a unilateral act. This is trite law.² It is therefore not possible in law for an employer to dismiss an employee by accepting her resignation. This finding accordingly constitutes a further material error of law.

[11] Mr Fourie submitted that this was a jurisdictional review and therefore this Court was not constrained by the standard test on review. He relied on the following *dictum* of Tlaletsi AJA (as he then was) in *SA Rugby Players' Association and Others; SA Rugby (Pty) Ltd v SA Rugby Players' Union and Another*.³

'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute⁴. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) at 804 C-D, the court said:

"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be fool hardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to

² *Rustenburg Town Council v Minister of Labour and Others* 1942 TPD 221; *Maade v MEC of the Northern Province for Finance and Expenditure and Another* (2003) 24 ILJ 937 (LAC); *Samuels v B and G Displays* (2005) 26 ILJ 1145 (BCA).

³ (2008) 29 ILJ 2218 (LAC) at paras 39-41.

⁴ Counsel's emphasis.

abort the proceedings because of a jurisdictional challenge which is clearly without merit.”

[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.’

[12] Mr Fourie submitted that even if the jurisdictional point were to fail the award is still reviewable on the merits. There is no assessment undertaken by the arbitrator in regard to an alleged dismissal for operational requirements. The arbitrator in fact finds that it is not necessary to determine the issue. Even though the arbitrator finds correctly that the employee’s belief that she had been dismissed on the Friday was a misconception, he fails to indicate on what grounds her subsequent dismissal was unfair. On the basis of the conclusion that “there is a case for dismissal of applicant by respondent” he awards her five months’ compensation.

[13] Ms Anderson, in opposing the review on behalf of the employee, conceded that the first respondent could not determine its own jurisdiction, but submitted that it was for this Court to determine the issue on the merits. In this regard Ms Anderson submitted that it was reasonable for the arbitrator to find that the applicant could assume (following the departure of the employee on Friday and her failure to return on Monday) that she had either resigned or absconded. However, the arbitrator went further to find that the applicant could not continue to operate on the basis of this assumption once it received correspondence in which she made it clear that she understood that she had been dismissed on the Friday, and alleging that this was unfair. The fact moreover that the applicant had employed Marais in the employee’s position, who gave evidence honestly had occurred on 15 January in contradiction of Reyneke’s version, underscores the finding that it was the applicant’s incontrovertible intention to proceed with her retrenchment. The employee’s evidence to the effect that Reyneke told her that she might as well look for alternative employment is consistent with the arbitrator’s conclusion that she

understood that she had already been retrenched. The applicant had simply ignored the employee's letter alleging unfair dismissal when it could have clarified the misunderstanding, and only raised this issue two years later at the arbitration. The arbitrator made the correct finding in this regard.

[14] Ms Anderson submitted that the arbitrator was faced with two mutually destructive versions and made a reasonable conclusion on the probabilities in accepting that of the employee, and this cannot be said to have resulted in an unreasonable conclusion. Once the arbitrator found that the employee had made out a *prima facie* case of dismissal, the applicant attracted the burden of proving that it was not unfair and it failed to discharge this. Ms Anderson conceded however that the arbitrator made some mistakes (for instance in relation to the date and the events of the Friday) but submitted that on the whole, applying the *Sidumo* test, the award itself was not unreasonable.

[15] It was conceded by Ms Anderson that the question of whether the dismissal occurred a week later than was alleged by the employee was not before the arbitrator. Nor was the issue of whether the dismissal was unfair for operational reasons. The only issue before the arbitrator was whether the third respondent had been dismissed on 16 January 2004 or had resigned, and the arbitrator had no jurisdiction to determine whether a dismissal had taken place at some point thereafter. I am therefore satisfied that this matter can be disposed of on the jurisdictional point alone. However, if I am wrong I am nevertheless satisfied that on the merits on the review standard decided in *Sidumo*⁵ the award is one that could not have been made by a reasonable decision-maker on the evidence before him. The award is flawed by virtue of the material errors of law committed by the arbitrator. Although in his oral submissions Mr Fourie suggested that substitution might be more appropriate, in that *inter alia* seven years have elapsed since the dismissal and this is the second review brought by the applicant. However, the relief sought in the notice of motion is to remit the matter to be determined by a commissioner other than the second respondent. Although the review succeeds, I am of the view that it is not in the interests of law or fairness to order the employee to pay the costs.

⁵ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

Order

[16] Therefore I make the following order:

1. *The award issued on 4 March 2008 is reviewed and set aside.*
2. *The matter is referred to the first respondent to be determined by a commissioner other than the second respondent.*
3. *There is no order as to costs.*

BHoola J
Judge of the Labour Court

APPEARANCES

APPLICANT: G Fourie
Instructed by Thomas & Swanepoel Attorneys,
Tzaneen.

THIRD

RESPONDENT: Ms R Anderson, Riki Anderson Attorneys,
Silverton.