



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

Case no. JR2901/2010

In the matter between:

CTR PROTECTION SERVICES (PTY) LTD

Applicant

and

ALEX WAINWRIGHT N.O

First Respondent

CCMA

Second Respondent

FISHER, WAYNE

Third Respondent

LANGLEY, RUSSELL DAREEL

Fourth Respondent

Heard: 17 May 2012

Delivered: 04 October 2012

Headnote: Review – constructive dismissal – existence of employment relationship - jurisdictional point raised for the first time in review application – irregularity in not considering jurisdiction – irregularity in evaluation of evidence – award reviewed and set

aside.

JUDGMENT

WHITCHER, AJ

Introduction

- 1] The applicant seeks to review and set aside the arbitration award issued on 25 September 2010 under case no KNDB7895-10 by the First Respondent [“the commissioner”]. The third and fourth respondent [“the respondents”] referred a ‘constructive dismissal’ dispute to the CCMA. The commissioner found that the applicant had constructively dismissed the respondents on 18 June 2010; alternatively had dismissed them before they resigned. He awarded the respondents compensation.
- 2] The applicant relies upon the following grounds of review:
 - 2.1 The CCMA did not have jurisdiction to entertain the dispute as the respondents were independent contractors and not employees of the applicant.
 - 2.2 To the extent that it may be accepted that they were indeed employees, the respondents did not show that continued employment would be objectively intolerable.
 - 2.3 The commissioner misconducted himself in making an ‘alternative’

finding that the respondents had been unilaterally dismissed prior to their resignation.

2.4 The commissioner adopted an unfair arbitration procedure.

Jurisdictional point raised for the first time in review proceedings

- 3] The applicant contends that the CCMA did not have jurisdiction to entertain the dispute as the respondents were independent contractors and not employees of the applicant.
- 4] It is common cause that the nature of the relationship between the parties was not raised as an issue for adjudication at the arbitration. This contention was raised for the first time in the applicant's review application.
- 5] The respondents deny that they were independent contractors and contend that the applicant is estopped¹ from raising such an issue at this stage because it did not deny the existence of an employment relationship at arbitration. During the arbitration proceedings, the third respondent testified that the applicant had "employed" him as a security driver and the commissioner stated that it was 'common cause that the [respondents] were offered employment on a fixed term contract for the period 1 June 2010 to 12 July 2010 by the [applicant].'
- 6] The applicant admits that it did not deny these statements, but contends, for the reasons set out below, that this does not prevent the issue being considered by this court:

6.1 The issue of jurisdiction is a question of law and where it is alleged in a review application that the true relationship between the parties is not one of

¹ Estoppel is a rule of evidence or a rule of law that prevents a person from denying the truth of a statement he has made or from denying the existence of facts that he has alleged to exist. The denial must have been acted upon (probably to his disadvantage) by the person who wishes to take advantage of the estoppels or his position must have been altered as a result. Estoppel by conduct arises when the party stopped has made a statement or has led the other party to believe in a certain fact. Estoppel by record prevents a person from reopening essential elements of a claim or defence that have been adjudicated upon by a court of competent jurisdiction between the same parties.

employee and employee, the reviewing court is enjoined to consider whether the CCMA in fact had jurisdiction to entertain the dispute before it.

6.2 The commissioner ought to have explained the concept and checked whether the CCMA had jurisdiction over the parties at the commencement of the proceedings. The applicant was represented at the arbitration by a layperson, its director, Mr Houston, who was not aware that the CCMA did not have the power to consider the dispute in light of the relationship between the parties. The respondents do not dispute this claim.

6.3 The record shows that the commissioner read and referred to the written contract between the parties. Had he applied his mind to the contract and other evidence that was led at the hearing, he would have been alerted to the fact that the relationship was an issue that needed to be pertinently raised and inquired into. A proper reading of the written contract clearly indicated that the respondents were independent contractors. Further, the fourth respondent testified that he had had another “private job”.

The Law

7] In *Rand Water v Bracks N.O. and Others*,² the reviewing court stated:

‘In respect of the contention ... that these jurisdictional points were not raised during the arbitration, I am satisfied that that does not constitute a bar to the point been raised at this stage of the proceedings. As it also related to the issue of jurisdiction the fact that it was not raised before the commissioner, did not relieve the commissioner of the obligation to consider whether the CCMA had jurisdiction or not to hear the matter. In *Legal Aid Board v John N.O*³ the [reviewing court] held: ‘... the matter was not pertinently raised before the arbitrator, it being an issue of jurisdiction of course does not preclude the applicant from raising the issue at this stage.’

8] In *Legal Aid Board* (supra), the court set aside the decision because the commissioner had not considered the issue of jurisdiction *meromotu*.

²(2007) 28 ILJ 2310 (LC) at para44.
³(1998) 19 ILJ 851 (LC).

- 9] The Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*⁴ indirectly confirms the procedural rule. It held that:

[68] ... Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *meromotu*, to raise the point of law and require the parties to deal therewith. Otherwise the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality....

[132] ... In the context of labour disputes, it is important to recall that parties are often not legally represented in proceedings before the CCMA ... It might well be that a material irregularity could thus be overlooked by the parties themselves.'

- 10] The Labour Appeal Court in *S.A. Rugby Players Association and Others v S.A. Rugby (Pty) Ltd and Others*⁵ held:

[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 ... The CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties... [The CCMA] would be short-sighted if it made no such enquiry before embarking upon its task.

[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

4 (2008) 29 ILJ 2461 (CC).

5 (2008) 29 ILJ 2218 (LAC) at para40 and 41 relying on *Benicon Earthworks and Mining Services (Edms) Bpk v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC) at 804C-D.

finding of the commissioner that there had been a dismissal....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 fact did not exist the CCMA had no jurisdiction irrespective of its findings to the contrary.’

11] The Labour Appeal Court in *Sanlam Life Insurance Ltd v CCMA and Others*⁶ respectively adopted the same approach in stating:

‘[17] It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute. The issue of jurisdiction is dependent on the answer to this question ... The Labour Court is called upon to decide *de novo* whether there was an employer-employee relationship between the parties...’

12] The case law set out above confirms that questions of jurisdiction may be cognisable even if raised for the first time on review. This is more so where the parties were unrepresented laymen unfamiliar with the intricacies of labour law.

13] It is thus an exception to the rule that applicants for review are confined to issues raised during the arbitration in circumstances where the parties or the arbitrator proceeded on an incorrect interpretation of the law, in particular the law relating to the powers of jurisdiction of the arbitrator. Where that is the case, a party is free to raise the *legal point* on review. Indeed, the reviewing court is bound to apply the law even if the point was not raised by the parties.

14] The CCMA’s jurisdiction over a subject matter and parties is conferred by the law. It cannot be acquired through waiver or enlarged by the omission of the parties or conferred by the acquiescence of the CCMA.

15] I accordingly find that the applicant is entitled to raise the issue of jurisdiction

⁶(2009) 30 ILJ 2903 (LAC) at para 17.

at the stage of review.

16] As set out in *SA Rugby, Tao Ying, Rand Water and Legal Aid Board (supra)*, commissioners have a duty to confirm that the CCMA has the jurisdiction over the parties and the dispute, irrespective of whether this is raised by the parties. This is especially so where the parties are unrepresented laymen, as was the case in this arbitration.⁷

17] I agree with the applicant that a perusal of the record in this case indicates that the commissioner read and referred to the written contract between the parties during the course of the leading of evidence. A perusal of the contract further indicates that if he had properly applied his mind to this document and other evidence, he would have realised that the contract contained numerous features which, on the face of it, indicated that the relationship between the parties may not be one of employer and employee, despite the third respondent testifying that he was “employed” by the applicant. Given the equivocal nature of the evidence on this point, it was incumbent on the commissioner to inquire further into this matter.

18] This is not to suggest that a written contract is the sole determining evidence in a dispute concerning whether an employment relationship existed. It is established law that the CCMA and Labour Court must consider *all* the factors and are entitled to look behind the contract to ascertain the real relationship between the parties, i.e. the ‘realities’ of the relationship. However, the terms of a written contract still constitute highly relevant and the ‘best’ evidence in the inquiry.

19] The applicant submitted that this court may finally determine the jurisdictional question. I disagree. The terms of the written contract are compelling but I have concerns about the third respondent’s testimony that Houston offered to “employ him” and the commissioner’s statement at the commencement of the

⁷ This duty is reiterated in the ‘CCMA guidelines on how to conduct arbitration’, effective from January 2012. According to the guideline, statutory arbitrators have a duty to confirm that the CCMA or relevant bargaining council has jurisdiction to hear the dispute, irrespective of whether this issue is raised by the parties and to raise any preliminary concerns that the arbitrator may have as a result of reading the referral form or other documents before them.

proceedings that “it was common cause that the [respondents] were offered employment on a fixed term contract for the period 1 June 2010 to 12 July 2010 by the [applicant].” These disputes will have to be resolved through a ‘live’ evidentiary hearing.

20] For the reasons set out above, the award falls to be reviewed, set aside and remitted to the CCMA for adjudication on the jurisdictional point. The commissioner committed a gross irregularity in the conduct of the proceedings in failing to raise and consider the issue of jurisdiction.

Constructive dismissal

21] The applicant contended that, to the extent that it may be accepted that they were indeed employees of the applicant, the third and fourth respondent did not show that continued employment would be objectively intolerable.

The test on review in constructive dismissal disputes

22] The review test is not whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach, but whether, objectively, there was a constructive dismissal.⁸

Test for constructive dismissal

23] The onus borne by an employee in claiming a constructive dismissal requires him or her, on a balance of probabilities, to prove *inter alia* the following elements:

22.1 That he or she terminated the contract of employment (this is common cause); and

⁸Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others (2011) ZALCCT 21 which relied upon the LAC’s reasoning on jurisdiction in SA Rugby Players Association and Others (2008) 29 ILJ 2218 (LAC).

22.2 That continued employment had become intolerable due to circumstances of the employer's making and that it was because of those circumstances that the employee terminated the contract of employment.⁹

24] In order to show his or her continued employment was intolerable, the employee must allege and prove facts that show that this was *objectively* the case.¹⁰ The enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employee and employer. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.¹¹

25] When an employee terminates a contract of employment as a result of constructive dismissal, such employee is indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee terminates the contract on the basis that he or she does not believe that the employer will reform or abandon the pattern of creating an unbearable work environment. If the employee is wrong in this assumption and the employer proves that his or her fears were unfounded then the employee has not been constructively dismissed and his conduct proves that he had in fact resigned.¹²

26] The mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing

9 See sections 186(1)(e) and 192; See also *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) per Trengrove AJ at para 48.

10 *Smithkline Beecham (Pty) Ltd v CCMA and Others* (2000) 21 ILJ 988 (LC) at para 38; *Mafomane v Rustenburg Platinum Mines Ltd* (supra) at para 49. See also *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* [2010] 7 BLLR 785 (LC); *Asara Wine Estate* (supra).

11 *Asara Wine Estate* (supra); *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC).

12 *Pretoria Society for the Care of the Retarded v Loots* (supra).

the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. However, even if the employer is responsible, it may not be to blame. There are certain actions an employer may fairly and reasonably undertake that makes an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked 'reasonable and proper cause'.¹³

27] The employee need not establish that he or she had no choice whatsoever but to resign. However, where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee. The emphasis is on whether a reasonable alternative existed.¹⁴

28] In summary therefore, the respondents must show not only that the conduct of the applicant created an intolerable situation at the time of the resignation, but also that the future relationship was threatened to such a degree that it could be regarded as being objectively intolerable. Where an employee does not give the employer a chance to rectify the relationship "going forward", it cannot easily be concluded that the resignation amounted to a constructive dismissal. Furthermore, the respondents must demonstrate that the reason for the resignation was linked to the objectively intolerable conduct of the applicant.

The evidence on record relating to intolerability

29] It was common cause that the applicant secured a contract with the European Sports Production Network ["ESPN"] to transport their personnel around during the 2010 World Cup in Johannesburg and in this regard approached the respondents who lived in Durban.

30] The third respondent testified that Houston "offered to employ" him as a security driver at R1 250 per day without deductions from 1 June to 12 July

¹³*Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 12 and 13.

¹⁴*Asara Wine Estate* (supra).

2010. He would be required to work about 12 hours per day and, where this was exceeded, Houston would “put in claims for some form of overtime from the client”. Although the third respondent was told to get a security officer board number, Houston told him that he would not be employed as a “body guard” or “VIP protection personnel” since the applicant had a “specific stand-by team” to perform such services if required. The applicant would, and did, provide the respondents with hired vehicles to perform their jobs. Houston further agreed that the third respondent could use the hired vehicle to drive to and from his lodgings, which were about 50km out of Johannesburg, because he would not have his private vehicle in Johannesburg.

31] The respondents reported for duty on 1 June but only commenced their duties on 3 June. In the meantime, they used the fourth respondent’s vehicle to become familiar with the routes.

32] During the night of 17 June, Houston’s son told them that they would be redeployed from 18 June 2010 to provide security services on satellite vehicles operated by the applicant’s clients and that they must hand in the hired vehicles. On 18 June, they went to applicant’s premises and requested a meeting with Houston.

33] The third respondent testified that he told Houston that he was ‘not happy that [he] would be employed as a security guard instead of a driver and that it would obviously become intolerable for me to continue because I did not have transport to and from my residence and if I had to use public transport it would be too costly...and therefore I was *prepared to continue if I was employed as a driver*. Houston said he was not prepared to do that. I then told [him] that I was leaving.”

34] Houston then asked him to complete the day’s assignment but he refused. The transcript is not clear at this point. It appears that the third respondent wanted certain payments before he agreed to complete the day’s work. In any event, Houston response to this was: “F...off you will not get a cent”. The third and fourth respondent then left.

35]The fourth respondent did not testify because according to him his version was the same as that of the third respondent.

36]Houston testified that the fourth respondent did most of the talking at the meeting on 18 June. He basically told Houston that the third and fourth respondent “had not signed up to be (security) guards ... were leaving and wanted [their] money”. Houston told them that since they had contracted to be “security drivers” they had in fact “signed up” to be security guards. They disagreed and asked to be paid off. Houston swore because they refused to complete that day’s job and he had no replacements. At no stage, during the meeting, did the respondents raise, or attempt to engage him on, the issue of private or alternative transport before resigning.

37]Houston then put a number of questions to the third respondent. Key questions included the following:

‘Q: What were you doing when you were driving the vehicles around?

A: I was ensuring that they get there safely.

Q: Is that not safeguarding?

A: It is ensuring the safety....it is not specifically guarding.

Q: The only specific reason is that you did not have transport?

A: The reason was I did not want to be a security guard either.

Q: Did you ask me how long the re-deployment would last?

A: No.

Q: Did I tell you?

A: You said maybe one day I do not know. You could not tell us how long.

Q: How did you leave after the meeting?

The third respondent explained that he had arranged for his mother-in-law to take off work to collect him.

38] Houston put the following question to the fourth respondent:

‘Q: Have you at any time asked for remuneration for using your private vehicle?

A: No.’

39] The fourth respondent then conceded that the real reason for his resignation was that he had not wanted to “be a security guard.” He intimated that he had referred the dispute primarily to get the money owed to him for the work he had done and the expenses he had incurred because Houston had ignored all their invoices.

40] After Houston questioned the respondents, the commissioner allowed the third respondent to give further testimony. He testified that he would not have accepted the job without the use of a company vehicle. Houston was not invited to respond to, or question the third respondent on this statement.

Analysis of evidence

41] In my view, the evidence led at the arbitration did not demonstrate that continued employment would be intolerable for the respondents. This is so for the reasons set out below.

42] It was common cause that the applicant did not change the respondents' hours or remuneration.

43] Houston's swearing came after the respondents had resigned so this issue cannot feature in this inquiry.

44] I accept that the redeployment arrangement placed the third respondent in a difficult position in respect of transport. Houston could easily have treated his complaint as a request for alternative transport and tendered suggestions. He did not do this.

45] However, this unhelpful and questionable conduct by Houston is not sufficient to prove constructive dismissal. The third respondent made no effort to press the issue of alternative transport with Houston before resigning. In fact he made it known that he was only prepared to continue working if he continued working a security driver and this is what Houston refused to do. At the time of the resignation the third respondent did not know how long the redeployment would last and had in fact not worked in the redeployed position. He resigned on the basis that it would "become" intolerable.

46] The fourth respondent had his own private vehicle. There was thus no basis to suggest that continued employment would become intolerable for him on the basis that he was unable to travel between work and his lodgings. This is especially the case in light of the fact that he admitted that he had not at any time asked for remuneration for using his private vehicle.

47] It is evident that the main reason for the resignations was because the respondents did not want to work as security "guards".

48] Houston's version that the respondents came to the meeting and asked to be paid-off because they did not sign up to be security guards was not rebutted. This does not appear to be the fault of the respondents because it is clear from the record that the commissioner directed the flow of the questioning and the evidence. In any event the commissioner gave the third respondent an

opportunity to testify again after Houston testified.

49]The fourth respondent conceded that his real reason for resigning was because he had not wanted to work as a security guard.

50]In respect of the third respondent, even if the issue of transport had been a relevant gripe, it became irrelevant because, on his own evidence, he would have resigned anyway because he did not want to work as a security *guard*.

51]There was no merit to the respondents' complaint about working as security guards. They were contracted to provide security services and conceded this when questioned by Houston. Considering that the duties of a security driver involved effectively being a security *guard* as well,there was no reasonable basis to their objection that their change of assignment was such that the employment relationship would become intolerable.

52]Accordingly, the respondents could not objectively establish that this change to their work practice would make continued employment intolerable.

53]Here, again, the point can be made that at the time they resigned the respondents had not in fact worked in the redeployed positions. They resigned on the basis that it would "become" intolerable.

54]The applicant submitted that it is also evident that the respondents had already decided to resign before their meeting with Houston because, when Houston asked the third respondent how he had left the applicant's premises after the meeting, the third respondent said he had arranged for his mother-in-law to collect him. I did not place much weight on this because it was not made clear when the third respondent had made the arrangement – before or after the meeting.

The commissioner's findings that the applicant unilaterally dismissed the respondent's prior to their resignation

55] This finding was based on the fact that Houston told the respondents to F....off. A perusal of the record indicates that there was no factual basis for this finding. When Houston did this, the respondents had already resigned. The finding of the commissioner is therefore reviewed and set aside.

Conclusion

56] In light of my findings on constructive dismissal, an order that the case be remitted to the CCMA in respect of the jurisdiction issue will be academic. In light of my findings on the issue of jurisdiction and constructive dismissal, there is no need to deal with the procedural grounds of review which does not impact upon the outcome of the review.

Costs

57] A consideration in respect of costs is that, although it is open to a party to raise a jurisdictional point subsequent to arbitration proceedings even though it did not raise such point at the outset, it nevertheless is so that, had the applicant been vigilant about its rights and raised the point at the arbitration it may well have had the result that the matter would have been then finalised.

Order

58] In view of the reasoning above:

1. The first respondent's award is reviewed and set aside.
2. The first respondent's finding that the third and fourth respondents were constructively dismissed is substituted with an order that the applicant did not constructively dismiss the third and fourth respondents.

3. There is no order as to costs.

Whitcher, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Advocate RJA Moultrie

Instructed by:

David Botha & Associates

For the Third and Fourth Respondent:

Carel Crafford of Crafford Attorneys