



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no. JR 2276/10

In the matter between:

AIR AND ALLIED TECHNOLOGIES CC

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATIONS

First Respondent

BONGANI KHUMALO N.O.

Second Respondent

SHADRACK MASINA

Third Respondent

Heard: 11 July 2012

Delivered: 11 December 2012

Summary:

JUDGMENT

WOODHOUSE, AJ

- 1 This is a review application brought in terms of section 145 of the Labour Relations Act, No. 66 of 1995 ('the Act'). The background to this matter is set out below.
- 2 The Third Respondent ("Masina") was employed by the Applicant as a site foreman. As at 2 February 2010, he reported to Eugene Lottering ("Lottering").
- 3 Masina had been employed on a contract of employment of limited duration dated 13 October 2009. The contract was meant to have expired on 9 November 2009.
- 4 It also appears that Masina had been employed by the Applicant prior to 9 October 2009.
- 5 On or about 2 February 2010, a meeting was held between Lottering and Masina. There is a dispute between the parties as to what was agreed at this meeting. According to the Applicant, Lottering dealt with Masina's alleged poor timekeeping and required him to make certain undertakings concerning this and the reliability of his vehicle. Masina's version is that he was required to make certain undertakings which he could just not fulfil. These undertakings related to a variety of issues.
- 6 It was common cause that Masina was to revert to Lottering on 4 February 2010 with his response to what had been discussed in that meeting.
- 7 Masina did not return to work on 4 February 2010. Instead, he mandated the Federated Council of Retail and Allied Workers Union ("FEDCRAW") to send a letter to the Applicant on his behalf. This, they did on 4 February 2010.¹ In this letter, a number of allegations and/or demands were made, including that:

7.1 Masina had been dismissed;

¹ Pages 229 to 231 of the record.

7.2 Masina had been demoted and somebody else had been employed to replace him;

7.3 Masina had been required to comply with the unreasonable undertakings put to him by Lottering on 2 February 2010;

7.4 Masina should be allowed to return to resume his duties as site foreman.

8 The Company, through its consultants HHA, responded to FEDCRAW in a letter dated 16 February 2010. They effectively disputed the contents of FEDCRAW's letter dated 4 February 2010 and stated that if Masina was dissatisfied, he should invoke the procedures contained in the Act.

9 On 19 February 2010, FEDCRAW also received a letter from the Applicant.² In this letter, they advised that Masina was appointed on a limited duration contract which had expired at the end of January 2012.

10 At the arbitration, Masina testified that:

10.1 he signed a contract of employment with the Applicant on 9 October 2009;

10.2 on 28 and 29 January 2010, he had worked at Modderfontein. Lottering had threatened to fire him;

10.3 he was called to a meeting on 2 February 2010 by Lottering who told him that he could not work with him and would utilise him on a contract basis. He also told Masina that he was dismissing him;

10.4 at the meeting on 2 February 2010, Lottering had said to him that he had to go home and think about whether he could work and commit to certain undertakings regarding his timekeeping reliability and his family's illnesses. He also said that he had

² Page 232 of the record.

employed someone else to replace him and that there was no job for him;

10.5 after he was dismissed on 2 February 2010, he shook hands with Lottering and they parted ways;

10.6 he responded to Lottering's request to revert by 4 February 2010 through FEDCRAW;

10.7 when he demanded a letter of dismissal, he was told to go home and think about the issues discussed and confirm whether he could comply with the undertakings sought.

11 Lottering testified on behalf of the Applicant and stated, *inter alia*, that:

11.1 the letter sent to FEDCRAW on 19 February 2010 was not sent by him;³

11.2 his limited duration contract extended beyond 9 November 2009;

11.3 Masina was never dismissed and no-one was employed to replace him;

11.4 a meeting did take place between himself and Masina on 2 February 2010. At the meeting, he expressed his concern about Masina's late coming. If his late coming could not be resolved, it was possible that the Company would use him as a subcontractor. The meeting on 2 February 2010 was about Masina's performance. Masina requested a letter of dismissal which he refused to give him;

11.5 if Masina could resolve his problems regarding his vehicle and time keeping, then he would be able to be used on another contract;

³ Page 232 of the record.

11.6 Masina never reverted to Lottering after 4 February 2010 as requested. This despite Lottering having received the letter from FEDCRAW of 4 February 2010;

11.7 he did not respond to the letter from FEDCRAW dated 4 February 2010 because they had handed the matter over to HHA.

Arbitration award

12 The Commissioner found that:

12.1 Masina was dismissed and that his dismissal was both procedurally and substantively unfair. It is this finding that the applicant seeks to review and set aside;

12.2 the Applicant's version was improbable and that Masina was a credible witness. His version was to be favoured over that of the Applicant. He found that Lottering had conceded that Masina had been dismissed. This is an issue which the Applicant disputes and which I will deal with more fully later;

12.3 the Applicant contended during arbitration that Masina had deserted, which the Commissioner found improbable given that the Applicant had conceded under cross-examination that he had dismissed Masina;

12.4 the Applicant's version that Masina should address the issue of his transport before he returned to work was not tested at a disciplinary enquiry. In any event, these versions could not be sustained.

Grounds of review

13 The Applicant contends that the Commissioner's award is reviewable for the following reasons:

- 13.1 he committed misconduct or a gross irregularity by disregarding or failing to properly record certain relevant evidence when arriving at his decision;
- 13.2 he committed misconduct or a gross irregularity by failing to properly apply his mind to the evidence;
- 13.3 the factual legal conclusions which the Commissioner arrived at were not rationally justifiable;
- 13.4 the main area of criticism is the Commissioner's finding in paragraph 22 of his award.⁴ The gist of the complaint relates to the Commissioner's finding that Lottering conceded under cross-examination that he had dismissed Masina;
- 13.5 Mr Hollander, acting on behalf of the Applicant, conceded that the Applicant's case rested on this issue. He argued that Lottering had never conceded that he had dismissed Masina. He further argued that the Commissioner incorrectly recorded a concession as contained in his typed transcript of his handwritten notes where the following is stated -

'Can you still say you never terminated employee? Not unfair?

What do you say? Yes. (Termination)⁵

Test on review

- 14 The Act allows a party to launch a review application in circumstances where there is a defect in arbitration proceedings.⁶ A defect is where the Commissioner has:

- 14.1 committed misconduct in relation to his or her duties as a commissioner;

⁴ Page 17 of the record.

⁵ Paragraph 9, page 217 of the record.

⁶ Section 145 (1) of the Act.

14.2 committed a gross irregularity on the conduct of the arbitration proceedings;

14.3 exceeded his or her powers;

14.4 that the award has been improperly obtained.⁷

15 In interpreting or applying section 145 of the Act, the test on review has now been settled by the Constitutional Court.⁸ In essence, the test is –

‘Is a decision reached by the Commissioner one that a reasonable decision-maker could not reach?’⁹

16 I was referred to the judgment of the Labour Appeal Court of South Africa in the matter between *Herholdt and Nedbank Limited*.¹⁰ I was asked by Mr Hollander to take into account references in that judgment to this Court’s and the Labour Appeal Court’s attitude to where a commissioner fails to consider material facts. These cases have found that where a commissioner fails to consider material facts, this will constitute a gross irregularity in the conduct of arbitration in terms of the Act. This was submitted to this Court on the basis that the Commissioner in this case had taken into account material that was not properly before him, in particular a concession by Lottering that he had dismissed Masina.

17 There is no proper transcript of this arbitration. The parties were required to reconstruct it. Reliance is had to the Commissioner’s typed notes and those of the Applicant’s representative at the arbitration. The Commissioner also states in his award quite clearly that Lottering had conceded that Masina was dismissed.¹¹ Mr Hollander submits that this is incorrect and that the Commissioner’s own transcript contradicts his findings in this regard.¹² As referred to earlier, the Commissioner records

⁷ Section 145 (2) of the Act.

⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 12 BLLR 1097 (CC).

⁹ At para 110.

¹⁰ (2012) 23 ILJ 1789 (LAC).

¹¹ Para 22, page 82 of the record.

¹² Paragraph 9, page 217 of the record.

'can you still say that you never terminated employee? Not unfair? What do you say? Answer: yes (termination).'

- 18 Mr Hollander submitted that this did not mean that Lottering had conceded that Masina had been dismissed. I would have agreed with him had the Commissioner not used the word "termination" and placed this in brackets after the word "yes". By doing so, the logical interpretation of this is that the Commissioner recorded that the witness had conceded the point that Masina's employment had been terminated.
- 19 What also undermines the Applicant's version that Masina was not dismissed is the following:
- 19.1 the content of the letters sent by the Applicant and/or its consultant on 16 and 19 February 2010;¹³
- 19.2 Lottering's evidence during the arbitration that Masina had deserted. Mr Hollander conceded that it would be hard to argue that Masina had deserted in the context of the circumstances of this case;
- 19.3 the fact that neither the Applicant nor its consultants had responded to the views of Masina as set out in his Union's letter dated 4 February 2010;¹⁴
- 19.4 in that letter, Masina makes a number of allegations but importantly alleges that he was dismissed or unfairly demoted or had conditions placed upon him which he could not meet. The letter concludes with a demand that he be entitled to return to work as a site foreman within seven days of date of that letter;
- 19.5 Mr Hollander correctly conceded that the manner in which the Company and/or its consultants responded to that letter could

¹³ Pages 58 and 59 of the record.

¹⁴ Page 54 of the record.

have allowed Masina to labour under the impression that his views as expressed in his letter were correct.

20 In light of the above, the Court finds that:

20.1 the Commissioner correctly found that there was a dismissal based on the evidence before him and that Lottering conceded this under cross-examination;

20.2 the Commissioner made a credibility finding regarding Lottering's evidence. It is often difficult, without hearing the evidence, to undermine such a finding. However, his finding in this regard has not been challenged on review. It is in fact supported by the various versions given by Lottering at arbitration or those that were put on behalf of the Applicant to Masina. These versions appeared often to be inconsistent. Such versions related, *inter alia*, to whether Masina's employment ended by virtue of the expiry of his limited duration contract or because he had deserted;

20.3 it is clear from reading Lottering's evidence that he tried to distance himself from the contents of the Applicant's letter to FEDCRAW and that of his consultants. His answers to questions on these issues were completely unsatisfactory. The only reasonable inference that one can draw from the manner in which the FEDCRAW letter was responded to is that Masina was dismissed.

21 In light of the above, the Commissioner has not committed a reviewable irregularity.

22 In light of the above, I make the following Order:

22.1 the Applicant's review is dismissed;

22.2 the Applicant is ordered to pay Masina's costs.

WOODHOUSE

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Advocate L Hollander

Instructed by: Darryl Furman and Associates

For the Respondent: Ramushu, Mashile, Twala Inc.

LABOUR COURT