



THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JS 1138/11

In the matter between:

BOROTHO NALEDI

Applicant

and

ROYAL SERVE CLEANING (PTY) LTD

First Respondent

ROYAL SERVE CATERING (PTY) LTD

Second Respondent

Heard: 15 October 2012

Delivered: 23 January 2013

Summary: Application for joinder - application to lift the corporate veil.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] After his unfair dismissal claim was dismissed by the Commission for Conciliation, Mediation and Arbitration (the CCMA), the applicant launched the same claim in this Court. The Commissioner found that the CCMA lacked jurisdiction because there was no employment relationship between the applicant and the first respondent.
 - [2] The late filing of the heads of argument by both parties were condoned.
 - [3] The parties have made several interlocutory applications following the filing of the applicant's claim with the Court. Firstly, the first respondent filed an exception to the applicant's claim, contending that the statement of claim is vague and embarrassing.
 - [4] The applicant then filed application seeking the following order:
 - 'a) Directing that the exception proceedings be suspended pending finalisation of the hearing on the application for condonation;
 - b) Directing that the exception proceedings be suspended pending finalisation of the hearing on the application for the joinder of Royalmnandi (Pty) Ltd
 - c) That the costs of this application be costs in the cause;
- Part 2
- d) Directing that the applicant be granted condonation for the late filing of the amended statement of claim;
 - e) That the costs of this application be costs in the cause.

Part 3

- f) That the Applicant be granted leave to file the amended statement of claim in the form in which is set out in ...applicant's affidavit;
- g) That Royalmnandi Food Services Solutions (Pty) Ltd be joined as First Responded herein;
- h) An order directing timelines to be followed by the parties in this matter in respect of service and filing of further court documents to be exchanged between the parties;

That the costs of this application be costs in the cause.'

- [5] In addition to applying to have the arbitration award made an order of the Court in terms of section 158(1) (c) of the LRA, the first respondent has also raised a special plea of *res judicata*.

Background facts

- [6] The applicant commenced employment with Royal Serve Cleaning (Pty) Ltd as a General Manager on 01 November 2008. Royal Serve (Pty) Ltd and Royal Serve Catering (Pty) Ltd merged and the applicant was appointed as the National Supply Chain Manager for Royal Serve (Pty) Ltd.
- [7] The company split in January 2011 and Mr McGregor, the Chief Executive of Royal Serve Catering (Pty) Ltd offered the applicant position of Commercial Executive within the catering company. The applicant accepted the position on 17 January 2011 but on or about 21 February 2011, he wrote a letter to the company in which he requested to decline the position as it was too stressful and impacting on his health.
- [8] When the applicant could not find a less stressful job in the catering company, he approached the sister company, Royal Serve Cleaning (Pty) Ltd for a position. The position that was available was that of a project manager which carried a

salary of R15 000 lower than the position he held at a catering company. As a result, the applicant was unable to accept the position offered to him.

- [9] When it was evident that the applicant was not amenable to accepting the position of a Project Manager, Royal Serve Cleaning (Pty) Ltd instituted retrenchment proceedings. The first respondent terminated the contract of employment on 13 May 2011 on the basis of operational requirements.
- [10] On 16 May 2011, the applicant declared a dispute at the CCMA, alleging substantive and procedural unfair dismissal. Following unsuccessful conciliation, the matter was referred to arbitration. The outcome of the arbitration hearing was that Royal Serve Cleaning (Pty) Ltd was not the employer of the applicant when it dismissed him. The Commissioner concluded that Royal Serve Cleaning (Pty) Ltd did not have requisite *locus standi* to dismiss the applicant as there was no employment relationship between the two. The Commissioner ruled for this reason that the CCMA did not have jurisdiction to entertain the dispute.
- [11] On 20 December 2011, the applicant filed with the Court the current claim based on the same cause of action as that which served before the arbitration proceedings.

Issues for this Court's determination

- [12] In my view, the two issues that require an answer above all others are: the joinder application and the application to have the arbitration award made an order of the Court.
- [13] I deal firstly with the application to make the arbitration award an order of Court. The Commissioner who considered the unfair dismissal claim made the following award:

‘[73] Royal Serve Cleaning Ltd did not have the requisite *locus standi* to dismiss the applicant as there was no employment relationship between the two parties.

[74] CCMA accordingly has no jurisdiction in the matter in the absence of an employment relationship.'

[14] Turning to the issue of making the arbitration award an order, it is trite that the Court has the power to make an arbitration award an order in terms of section 158(1) of the LRA. Section 158 (1) (c) of the LRA reads as follows:

'(1) The Labour Court may-

....

(c) make any arbitration award... an order of the Court.'

[15] In deciding to make or refuse to make an arbitration award an order, the Court has discretion to exercise which is to be exercised judicially. In general applications that come before this Court to have arbitration awards made orders are those relating to compensation or reinstatement of an employee. The essence of those applications is to enforce the arbitration award where the other has failed to perform what he or she has been directed to do by the arbitrator. The general principle, however is that any arbitration award can be made an order of the Court.

[16] In its founding affidavit, the first respondent says that it is seeking to make the arbitration award an order of the Court because the applicant has instituted a claim against it on essentially the same basis as those upon which the CCMA determined that there was no case against it. The first respondent further contends that the applicant has ignored the arbitration award.

[17] In the supplementary heads of argument, the first respondent contends that the applicant has failed to make out a defence in his opposition to the application to make the arbitration award and order of the Court and that he does not have prospects of success in the review application.

[18] In the present case, the order sought in the application is not for the purposes of enforcing the arbitration award but to achieve the goal of creating the basis for a

pleading of *res judicata*, because once the award is made an order of Court, the legal status of the arbitration award changes to become an order of the Court and can therefore not be challenged on review.

- [19] As a general principle, the Court makes arbitration award orders for the purposes of enforcement in instances where the other party has failed to comply. It is clear, in the present instance, that the underlying purpose of the application is not enforcement but something else. It is for this reason that I believe that I should exercise my discretion against making the arbitration award an order of the Court.

Joinder application

- [20] The applicant in his joinder application says that he launched the application for joinder after he received the first respondent's exception. His contention is essentially that the arbitration award should for the purpose of considering his joinder application be ignored because it is a nullity. The applicant contends that the arbitration award is a nullity because the Commissioner did not consider that which he was required to do, which was the fairness of the dismissal.
- [21] An application for joinder is governed by the provisions of rule 22 of the Rules of the Labour Court, which gives the Court the power to join any party to the proceedings before it, if the right to the relief depends substantially on the same question of law or facts.
- [22] It is trite that the test to apply in considering whether a party should be joined in proceedings is whether the party sought to be joined has "substantial interest in the subject matter of the proceedings. It follows that the Court can only join a party in a matter that is properly before it.
- [23] The applicant's joinder application is based on the strength of the unfair dismissal claim which he has filed with this Court. That claim is the same as the one upon which the Commissioner has ruled that that CCMA did not have jurisdiction because the first respondent is not the employer of the applicant. There is some

indication that although late, the applicant has filed an application to review and set aside the arbitration award. The applicant contends that for the purpose of joinder, the Court should ignore the arbitration award because it is invalid and did not deal with the substance of the claim which was before the Commissioner, namely his unfair retrenchment.

- [24] In terms of section 143 of the Labour Relations Act, an arbitration award is final and binding until set aside on review or is rescinded. It is also a principle of our law that decisions of public officers, such as Commissioners of the CCMA are binding even if they are invalid unless and until they are set aside on review or on rescission.
- [25] In the present instance, the arbitration award in terms of which it was found that the first respondent is not the employer of the applicant is still to be reviewed as would appear from the papers before this Court. There is no need for the purposes of considering the joinder application to express any view regarding the prospects of success of the review application, including the prospects of succeeding with the condonation application as it would appear that the review, if at all filed, is out of time.
- [26] In my view, the jurisdiction of the Court is temporarily ousted pending the outcome of the review of the arbitration award. It follows therefore that there is no basis upon which the second respondent can be joined with the first respondent at this stage. Accordingly, the applicant's joinder application stands to fail.
- [27] As concerning the costs, I am of the view, in the circumstances of this case, that no order as to costs should be made.

Order

- [28] In the premises, the following order is made:

1. The application to make the arbitration award an order of the Court is dismissed

2. The application to join the second respondent is dismissed.

3. There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: In Person

For the Respondent: Adv. Jason Brickhill

Instructed by Ramantsi Attorneys