

REPUBLIC OF SOUTH AFRICA



Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO: JR2793/11

In the matter between:

MARANDA MINING CO (Pty) Ltd

1st Applicant

CAMDOR RESOURCES (Pty) Ltd

2nd Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1st Respondent

DONALD KGALAKE NKADIMENG

2nd Respondent

SWART, LEON

3rd Respondent

Heard: 12 February 2013

Delivered: 15 February 2013

Summary: Review: application dismissed.

EX TEMPORE JUDGMENT

GUSH, J:

[1] This matter involves an application by the applicants to to review and set aside the award of the second respondent¹, following the arbitration of a dispute referred by third respondent to the 1st respondent, regarding the third respondent's alleged dismissal. At the arbitration the arbitrator was required to decide:

- a. Which one of the two applicants was the third respondent's employer;
- b. Whether the third respondent was dismissed;
- c. If so whether the dismissal was substantively and procedurally fair; and
- d. the appropriate remedy should it be found that the dismissal was unfair.

[2] The 2nd respondent found that the third respondent was employed by the 2nd respondent; that he had been dismissed; that the dismissal was both substantively and procedurally unfair and awarded the third respondent compensation in an amount of R150,000 the equivalent of three months' salary.

[3] At the arbitration the applicants denied that the 3rd respondent had been

¹ The original award by the 2nd respondent was apparently vague and had been varied by the 2nd respondent. The award as varied is the subject of the review.

dismissed.

[4] The third respondent was employed by the second applicant and had been seconded to the first applicant. During the course of his employment, he became involved in an altercation with a Mr Bryant, who was a Director of both first and second applicants. According to the 3rd respondent, the altercation culminated in Mr Bryant dismissing the 3rd respondent. The third respondent referred a dispute to the first respondent, who in turn enrolled the matter to be arbitrated by the second respondent.

[5] At the arbitration, both the first and second applicants were represented by their attorney, Mr Vorster. As the applicants had denied that the third respondent had been dismissed, the third respondent commenced by giving evidence in order to discharge the onus that he had been dismissed as is required by section 192 of the LRA.

[6] During his evidence, the third respondent described the circumstances surrounding his dismissal *inter alia* as follows:

So one word let to another and I said to Michael Briant that, 'It appears to me that you do not want me to work for you any longer, why do you not pay me a severance package?' He said that why he should pay a severance package, why I not just resign. And I said on what grounds, and he said he already sought legal advice and that because I could not give him the figures he had asked for, he could dismiss me on those grounds because I was a General Manager, I was a senior man in the operation. So I said, 'In that case, I will also seek legal advice'. And he said, 'Oh, so you want to make it legal? In that case, you no longer have a job. I am sorry it has come to this'.

[7] Despite Mr Bryant being present at the arbitration, the only evidence

adduced by the applicants in response to the evidence of the third respondent regarding his dismissal was that of a Mr Smit who was unable to take the issue of the 3rd respondent's dismissal by Mr Bryant any further.

[8] It appears from the record of the arbitration that the applicant's case was simply based on a denial that Bryant had dismissed the third respondent. The applicants' averred that it was simply that Bryant had terminated the 3rd respondent's secondment to the first applicant, and that the 3rd respondent had remained an employee of the second applicant. It is equally clear from the record that the applicant did not call Bryant to give evidence to gainsay the 3rd respondent's evidence that the interchange between Bryant and the third respondent had culminated in the termination of his employment. The applicant's lead no evidence to show that Bryant had merely terminated the secondment and that the 3rd respondent's employment remained intact.

[9] Unsurprisingly and justifiably and bearing in mind that Bryant was present at the arbitration and did not give evidence, the second respondent after having analysed the evidence concluded in his award:

- a. Firstly that it was common cause that the third respondent was employed by the second applicant;
- b. Secondly that he had reported to Bryant, who was a Director of both companies;
- c. Thirdly that he was satisfied on the evidence regarding Bryant's "utterances and written communications" that it had been proved that the third respondent had been dismissed; and

d. Finally that the 3rd respondent was entitled to compensation which he awarded.

[10] The 2nd respondent in the award states:

In my view the second [applicant's] attorney was unable to discredit the [3rd respondent during cross-examination, and the evidence of the 3rd respondent on whether or not he was dismissed stands alone and uncontradicted by any other evidence. My finding is, therefore, that the applicant has succeeded in proving on a balance of probabilities that he was dismissed as required by section 192(1) of the Act

[11] Somewhat startlingly the applicants led no evidence regarding the fairness of the dismissal should the 2nd respondent find that the 3rd respondent had in fact been dismissed. The 2nd respondent specifically records that the attorney representing the applicants at the arbitration simply argued that if it was in fact found that the third respondent had been dismissed, the second respondent should find that the dismissal was fair "in that it appeared that the parties mutually agreed to terminate the employment relationship".

[12] In the applicants' initial review application the order sought was for an order that "the rescission application" be set aside on the grounds *inter alia* that despite no evidence to the contrary having been led, the 2nd respondent should have found that Briant had set about terminating the secondment only.

[13] The applicants subsequently filed an amended notice of motion in which the applicants now sought an order reviewing setting aside and substituting the 2nd respondent's award. For reasons which were unexplained, the amended notice of motion is immediately followed in the indexed

pleadings by an affidavit by the applicants in support of an application to stay a writ of execution.

- [14] It is appropriate at this stage to comment on the manner in which the pleadings in the applicants' application were prepared, indexed and paginated. One indexed and paginated bundle was filed that included all notices, all fax sheets, covers, for some reason known only to the applicants themselves, courier address sheets, and blank forms together making up at least 25% of the papers.
- [15] Most surprisingly, however was the fact that the transcript of the arbitration hearing appeared in the bundle immediately after the amended notice of motion and before the 3rd respondent's answering affidavit. For reasons best known to them only the applicants attorneys included in the bound indexed and paginated bundle not only the superfluous documents referred to above the Heads of Argument as well.
- [16] What was not filed indexed or paginated were the documents handed in at the arbitration, and it appears as if the applicants had not deemed to even file a Rule 7(A) notice or Supplementary Affidavit.
- [17] In argument the applicant submitted that the award fell to be reviewed and set aside on the grounds that the procedure adopted by the second respondent constituted a gross irregularity. This argument was premised on the misconception that the determination of the issue pertaining to whether or not the third respondent had been dismissed was a preliminary issue relating to the jurisdiction of the first respondent to hear the matter. The applicants contended that accordingly the procedure adopted by the second respondent should be found to be reviewable and the award set

aside.

[18] This argument was raised by the applicants' despite the fact that section 192 of the Labour Relations Act specifically records that the onus is on the employee in a dispute regarding an alleged unfair dismissal to establish firstly that he was dismissed. This has nothing whatsoever to do with jurisdiction but is a fact to be proved by an applicant in discharging the onus. Once an applicant has established that he was dismissed the employer is required, by the same section, to prove that the dismissal was fair.

[19] The applicants, at arbitration, relied simply on the averment that Bryant only terminated the secondment and then never led any evidence to establish this despite the applicant's evidence to the contrary. In the absence of any evidence to gainsay the 3rd respondent's evidence and establish that the third respondent was told that it was his only secondment that was being terminated, and that he was to return to work for the second applicant, in accordance with his contract of employment, the conclusion reached by the second respondent that he had been dismissed is reasonable and justifiable, taking into account the material placed before him, and is accordingly not reviewable.

[20] In the light of the applicants' approach to the issue and given that there was no serious attempt to prove that the 3rd respondent's dismissal was fair, the 2nd respondent's conclusion that the 3rd respondent was unfairly dismissed is also reasonable, justifiable and therefore not reviewable.

[11] The record of the arbitration and second respondent's award demonstrates not only that the second respondent took into account all the evidence adduced, but that his analysis of the evidence and the

conclusions he drew in coming to his award eminently satisfy the test formulated by the Constitutional Court in the *Sidumo* matter, and the many decisions that have followed.

[12] The second respondent's award is eminently a decision to which a reasonable decision maker would come based on the evidence placed before him.

[13] At the conclusion of the argument, the applicants' counsel submitted that should the Court dismiss the application and be inclined to make an order for costs against the applicant, such order should be confined to an order against the second applicant only. The third respondent's counsel did not take issue with this proposal. I am satisfied that there is no reason why costs in this matter should not follow the result.

[14] In the circumstances and for the reasons set out above, I am not persuaded that the award of the second respondent is reviewable, and accordingly, the applicants' application falls to be dismissed. As far as costs are concerned, there is no reason in law and fairness why the 2nd applicant should not be ordered to pay the 3rd respondent's costs. I therefore make the following order:

- a. The first and second applicants' application is dismissed.
- b. The second applicant is ordered to pay the third respondent's costs.

D H Gush

APPEARANCES

APPLICANTS:

L Grundlingh

Instructed by Vezi and de Beer Attorneys

3rd RESPONDENT:

M van AS

Instructed by Basie Gey von Pittius

LABOUR COURT