



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Not Reportable

Case no: JR2515/11

In the matter between

T. CHISENO AND 190 OTHERS

First and Further Applicants

NATIONAL UNION OF MINEWORKERS

Second Applicant

and

NORKIM RAISEBORING CC t/a NORTH WEST

MINING CC AND NORTH WEST MINING

SERVICES (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

SIMON MALAZA N.O.

Third Respondent

Heard: 20 December 2012

Delivered: 09 May 2013

JUDGMENT

NTSABA-LETELE AJ

Introduction

- [1] This is an opposed application to review and set aside the arbitration award made by the third respondent (“the Commissioner”) under case number MP1866/2011 dated 25 July 2011 and issued under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (“CCMA”).
- [2] In terms of the arbitration award, the Commissioner made a determination that the CCMA has no jurisdiction over the dispute referred as the dispute related to contracts of employment. The Commissioner further ruled that the dispute be referred to the Labour Court or Civil Court in terms of section 77(3) of the Basic Conditions of Employment Act (“BCEA”) 1997.
- [3] The applicants have also applied for condonation for late filing of the review application. In the circumstances of this case, taking into account the short period of two (2) weeks and four (4) days delay, I find no reason why condonation should not be granted.

Background facts

- [4] The applicants referred an unfair dismissal dispute to the CCMA which was set down for hearing on 29 June 2011. The first respondent raised four (4) points *in limine* before the CCMA but the main contention by the first respondent was that there was no unfair dismissal of the applicants as the contracts of employment of the applicants were fixed term contracts and they expired.
- [5] The applicants contended that they were dismissed by the first respondent and that the dismissals were both procedurally and substantively unfair. The applicants were therefore seeking compensation of five months wages for each applicant; that each applicant be paid their 50% outstanding wages of January 2011; and that each applicant be paid UIF benefits and annual bonuses and outstanding leave as relief for the alleged unfair dismissals by the first respondent.

- [6] During the arbitration proceedings whilst the applicants and the first respondent were making oral submissions with regard to the points *in limine*, the first respondent suggested to the Commissioner that perhaps the applicants and the first respondent, (hereinafter also referred to as “the parties”) should make written submissions to the Commissioner concerning the points *in limine*. The Commissioner would, thereafter, make a determination on the points *in limine* and a determination on whether or not there was a basis for the first respondent to dispute the alleged unfair dismissals of the applicants based solely on the written submissions by the parties.
- [7] After some deliberation before the Commissioner, the applicants agreed to the proposal made by the first respondent for the parties to make written submissions to the Commissioner regarding the points *in limine* raised by the first respondent, but most importantly to make submissions on the issue of the alleged unfair dismissal of the applicants that was being disputed by the first respondent. The parties further agreed on the timeframe for the submissions to the Commissioner and that the Commissioner should make the determination based on the written submissions. The submissions were made to the Commissioner as agreed and the Commissioner made a determination based on the written submissions as per the agreement of the parties.
- [8] However, the applicants in their written submissions to the Commissioner raised a concern that it was unusual for the Commissioner to agree that parties should present only written submissions without giving oral evidence and allowing cross examination of the evidence presented given that the issue of unfair dismissal was being contested by the first respondent. Regardless of this issue being raised by the applicants in their closing arguments and submissions to the Commissioner, the Commissioner did not afford the parties an opportunity to present oral evidence and to cross-examine witnesses but made his determination based on the written submissions only as per the agreement of the parties.
- [9] In their submissions before the court, the applicants allege that they were dismissed on the basis of ill-discipline and not because their contracts of

employment came to an end. This submission was also made before the CCMA. The first respondent in its submissions before the CCMA alleged that the applicants embarked on an illegal strike on 31 January 2011 despite having been requested by management to refrain from any illegal action and being advised that all grievances would be resolved. As a result of this illegal action by the applicants, on 01 February 2011 Harmony Gold Mining Company Limited informed the first respondent that the contract at Evander 8 shaft would be terminated. The contract at Evander 8 shaft appears to have been directly linked with the applicants' contracts of employment with the first respondent.

[10] According to the first respondent, all the applicants were then informed of the termination of the contract between Harmony Gold Mining Company Limited and the first respondent which led to the termination of the applicants' fixed term contracts with the first respondent. In my view, it is clear from these submissions that the termination of the contracts of the applicants by the first respondent were triggered by the applicants so called ill-discipline because the decision to terminate came after the ill-discipline occurred despite the applicants having been warned not to engage in such ill-discipline. What is not clear is whether the contracts of employment were for a fixed term as alleged by the first respondent or whether they were for an indefinite period as alleged by the applicants. Disputes of fact surrounding the issue of fixed term contracts vis-a vis contracts for indefinite period were not canvassed and argued adequately before the CCMA nor before this court to determine whether or not the applicants were employed on fixed term contracts or on indefinite contracts of employment.

[11] It is obvious that the Commissioner would not have been in a position to make a determination of whether or not the contracts of employment between the parties were fixed term contracts or whether the contracts were for indefinite periods because of the manner he approached the process of arbitration before him. By not allowing oral evidence and cross examination to interrogate the issues in dispute before him, the arbitrator found himself in a position where the only way out was to refer the matter for determination to

the Labour Court or the Civil Court as it was not possible to come to any conclusion with so many issues in dispute by making a determination based on written submissions only.

Grounds for review

- [12] The applicants in their review application before the court are challenging the award on the basis that the Commissioner made the determination based solely on written submissions and argue that they wanted to lead evidence, but that the Commissioner acceded to the first respondent's request and disregarded oral evidence and that this therefore, constituted misconduct on the part of the Commissioner.
- [13] The applicants further are requesting the court for an order setting aside the award and an order that the second respondent has jurisdiction to arbitrate this dispute. Furthermore, the applicants are requesting the court to order the dispute to be referred back to the second respondent for arbitration by a Commissioner other than the third respondent.

The arbitration award

- [14] The Commissioner in his award relied on the agreement made between the parties that points *in limine* be decided on the basis of written submissions. The Commissioner ignored the fact that the applicants raised the issue of not presenting oral evidence and affording cross examination of witnesses as a critical point in their submissions as they felt that this denied them the opportunity to be heard. In my view, this aspect was very pertinent to the determination to be made by the Commissioner as the main bone of contention was whether the applicants were dismissed or whether their fixed term contracts came to an end as alleged by the first respondent.
- [15] The record of the proceedings before the CCMA clearly reveal that the applicants agreed with the first respondent to make written submissions and that the Commissioner should make determination based on the written submissions by the parties. However, in their closing argument the applicants realised their mistake and raised this issue as a concern that on a dispute of

this nature, it was unusual for the Commissioner to make a determination solely on written submissions without hearing oral evidence.

- [16] I find that the said agreement was binding on both parties and that it cannot be raised as a basis on which the award should be set aside as in abiding by the agreement between the parties, the Commissioner did not commit any misconduct. However, in failing to advise the parties that fully blown arbitration would assist in making a determination before him, the Commissioner short-chained himself in reaching a conclusion on the issues in dispute placed before him.
- [17] As a result of this approach, the Commissioner in his determination did not answer the question that he set out to determine which was mainly whether the applicants were dismissed or whether their fixed contracts came to an end. In my view, it was not possible for the Commissioner to answer the question he set out to determine and answer because no oral evidence and cross examination was presented before him. The Commissioner found that there were a lot of issues being raised in the written submissions which were in dispute involving the said contracts of employment and the only fair and justiciable way to deal with the matter having come thus far, and having decided to determine the matter only on written submissions, would be for the referral to the Labour Court or Civil Court under section 77 of the BCEA for determination hence he decided that the CCMA had no jurisdiction on the matter.
- [18] The Commissioner in his analysis of evidence and argument which was based on the written submissions, made an observation from the submissions by the first respondent that the services of the applicants were terminated by the first respondent as a result of the expiry of the contract of service between the first respondent with their client, Harmony Gold Mine. Furthermore, the Commissioner made an observation that the alleged unprotected strike as the reason for termination of contracts of employment with the applicants was raised as an alternative argument by the first respondent.

- [19] The Commissioner went on to say, that there could be no unprotected strike when employees collectively withdraw labour in demand of mandatory compensation they have worked for in line with the common law principle that puts in place a reciprocal relationship to perform employment and be remunerated in return, and that failure by one party to honour the contract would amount to revocation of the contract. After this analysis, the Commissioner concluded that the dispute related to contracts of employment and that the issue fell within the exclusive jurisdiction of the Labour Court or Civil Court in terms of section 77 of the Basic Conditions of Employment Act. Consequentially, the Commissioner made a finding that the CCMA lacks jurisdiction over the matter and ordered that the matter be referred to Labour Court or to the Civil Court.

Evaluation

- [20] The essence of the applicants challenge to the arbitration award is that the Commissioner made the determination based solely on written submissions and disregarded oral evidence and cross-examination of witnesses by the parties and that this therefore, constituted misconduct on the part of the Commissioner. The applicants further are requesting the court for an order setting aside the award and an order that the second respondent has jurisdiction to arbitrate this dispute as the dispute relates to unfair dismissal of the applicants. The applicants are further requesting the court to order the dispute to be referred back to the second respondent for arbitration by a Commissioner other than the third respondent.
- [21] The question to ask is whether or not the Commissioner misconducted himself and therefore, reached an unreasonable conclusion in finding that the CCMA has no jurisdiction over the dispute referred as according to the Commissioner the dispute relates to contracts of employments over which the Labour Court or Civil Courts have exclusive jurisdiction. The applicants' argument is based on the premise that the dispute referred to the CCMA was that of unfair dismissal which was being contested by the first respondent on the basis that the applicants were not dismissed but that their contracts were fixed term contracts and they simply came to an end.

- [22] The second question to ask is whether the Commissioner would have reached a different conclusion had he given the parties an opportunity to present oral evidence and to cross-examine witnesses. I am inclined to believe that the Commissioner would have reached a different conclusion had he ventured to make a determination on whether or not there was unfair dismissal of the applicants or whether the applicants fixed term contracts came to an end and afforded the parties an opportunity to present oral evidence and the cross-examination of witnesses. The Commissioner failed to answer the question he set out to answer when he decided on the basis of the agreement between the parties to determine the dispute solely on written submissions. It is trite law that any arbitration conducted under the auspices of the CCMA is a hearing *de novo* and that being the case, one would expect the evidence to be more extensive and more deeply probed more so where the alleged unfair dismissal is in dispute and the onus is on the applicants to prove that there was dismissal as opposed to fixed term contracts coming to an end.
- [23] In my view an arbitration hearing is much like a court hearing, except that it is less formal. Subject to the discretion of the arbitrator, a party to a dispute may present evidence, call witnesses, question the witnesses or any other party and parties can address concluding arguments to the arbitrator. Where there are serious disputes of fact, the arbitrator as in a court of law should also exercise discretion to allow oral evidence and cross examination as it may not be adequate to make a determination based on the written submissions only despite the agreement of the parties. The same principles as enunciated in the matter of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹ should apply where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial.
- [24] The Commissioner should have foreseen that there would be serious dispute of facts in this matter given that the first respondent was at the commencement of the arbitration denying that the applicants were dismissed but was alleging that fixed term contracts of the applicants came to an end.

¹ 1949 (3) SA 1155 (T) at 1162

The onus to proof that dismissal occurred therefore shifted to the applicants and the applicants should have had an opportunity to lead oral evidence and to cross examine witnesses in order to assist the Commissioner to reach an informed decision in making a determination.

- [25] The test to apply in this case to determine whether or not the Commissioner acted contrary to section 145 of the Labour Relations Act (“LRA”) should be the dialectical or process-related test of unreasonableness which focuses on the logical path by which the decision maker arrived at his or her decision and which since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² became accepted in contrast to the substantive or results-based reasonableness test which considers whether the outcome reached by the arbitrator is one which a reasonable decision-maker could reach.
- [26] By disallowing oral evidence and cross-examination, the Commissioner failed to apply his mind properly to the issues before him and in consequence arrived at a conclusion that no reasonable decision maker could reach. It is obvious from his process of reasoning in the award that the Commissioner missed the point. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*³ van Niekerk J held that a CCMA award is reviewable where it is shown that the commissioner’s process related conduct is found wanting. The line of reasoning in that decision elaborates upon the standard of review enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (supra)*, which stated the test to be whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach.
- [27] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*⁴ van Niekerk J expressed the opinion that the reasonableness requirement is relevant to both process and outcome. In other words an award will be reviewable if it suffers either from dialectical unreasonableness or is substantively unreasonable in its outcome. Where a Commissioner fails to have regard to material facts, this

² (2007) 28 ILJ 2405 (CC).

³ (2009) 11 BLLR (LC).

⁴ Id at para 14.

will constitute a gross irregularity in the conduct of the arbitration proceedings because the Commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense.

- [28] The CCMA has jurisdiction to hear and determine matters of unfair dismissal arising out of contracts of employment and this cannot be the exclusive jurisdiction of the Labour Court and Civil Courts. The dispute referred to the CCMA before the Commissioner was that of unfair dismissal and not of breach of contract. The Commissioner's decision is therefore reviewable as it suffers from dialectical unreasonableness. The Commissioner's process albeit being agreed to by the parties led the Commissioner to make a determination on what he did not set out to determine whilst he failed to make a determination on whether or not there was unfair dismissal of the applicants or that the fixed term contracts came to an end. The Commissioner simply missed the point and erred in making a determination on the breach of contracts and deciding that the CCMA lacks jurisdiction on the matter. Had the Commissioner followed the process that would allow him to weigh all the issues before him and had given the applicants an opportunity to present their case as to the alleged unfair dismissal and not relied only on written submissions, he would have been able to determine whether or not fixed term contracts came to an end or whether the applicants were unfairly dismissed. In light of this the Commissioner's award stands to be reviewed and set aside.

Order

- [29] I accordingly order as follows:

29.1 The arbitration award issued by the second respondent under case Number MP 1866/2011 dated 25 July 2011 is reviewed and set aside.

29.2 The matter is remitted back to the second respondent for consideration by a Commissioner other than the third respondent.

29.3 There is no order as to costs.

Ntsaba-Letele, AJ

Acting Judge of the Labour Court

Appearances

For the applicant: E.S. Makinta Attorneys

For the respondent: Advocate C Goosen

Instructed by: Parsons Attorneys

LABOUR COURT