



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2969/10

In the matter between:

DRS HAAGENSEN & LURIE INC

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MOAHLOLI NYAMA (Cited in

his capacity as Commissioner of the Commission

for Conciliation and Arbitration)

Second Respondent

MADELEIN CLOETE

Third Respondent

Heard: 05 September 2013

Delivered: 07 February 2014

Summary: Review application of two arbitration awards made- first ruling on jurisdiction and the second on merits of the alleged unfair dismissal. The applicant abandoning the review of the first arbitration award. Legal presumption- the first award remains in force and valid. The Commissioner in the second arbitration award bound by the jurisdictional ruling in the first

arbitration award. The second arbitration award fair and reasonable in finding the dismissal of the employee to be substantively unfair.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number GAJB 2415-10 dated 31 October 2010, in terms of which the dismissal of the third respondent was found to be both procedurally and substantively unfair.

Background facts

- [2] The applicant is involved in the medical practice. The third respondent (the employee) was prior to the termination of her employment employed by the applicant as a credit controller. It is common cause that during the course of her employment the employee regularly took sick leave.
- [3] Mr Sher, the manager of the applicant, approached the employee regarding her capacity to perform her duties as a result of her health problems. An incapacity inquiry was subsequently held where the problem arising from the health condition of the third respondent was discussed.
- [4] The incapacity hearing was held on 15 July 2010. It transpired at that time that the employee was due to undergo an operation which would have seen her away from work for two months.
- [5] During the enquiry, the employee suggested as a solution to her health problem that she be allowed to take work home. The suggestion was rejected by the applicant on the basis of the risk that would pose on the confidentiality of the files she had to work on.

- [6] The third respondent further suggested that a temporary person be employed during her sick leave. That was also rejected on the basis that it would take time to train such a person.
- [7] The outcome of the engagement between the parties was an agreement in terms of which the employment contract of the employee be terminated on the grounds of medical boarding. Clause 2.1 of the agreement provides:
- ‘With effect from the termination date, the employment of the employee with the Practice is terminated by mutual agreement.’
- [8] The effective date of the termination was 29 January 2010. Clause 4 of the agreement provides:
- ‘This agreement constitutes the full and final settlement of all or any claims, which either party may have against the other of whatsoever nature arising from or in conjunction with the employee’s employment with the Company and the subsequent termination thereof.
- This agreement constitutes the entire agreement concluded between the parties and no variation, alteration or addition thereto shall be of any force or effect unless reduced to writing and signed by both parties.’
- [9] After the termination of the employment contract, the employee referred an alleged unfair dismissal dispute to the CCMA. At the conciliation hearing, the applicant raised a point in *limine* regarding the jurisdiction of the CCMA to entertain the dispute.
- [10] The objection for the CCMA to entertaining the matter was dismissed and accordingly the CCMA was found to have jurisdiction to entertain the matter. The matter proceeded to arbitration where at the end thereof the termination of the employment contract of the employee was as indicated earlier found to have been unfair and a 10 months compensation was for that reason made in favour of the employee.

The adjudication history of the matter

- [11] There are two arbitration awards in this matter. The first arbitration award dealt with the narrow issue of the jurisdiction of the CCMA to entertain the dispute. The jurisdictional point as was raised by the applicant concerned the issue of whether the employee was dismissed by the applicant. This matter served before Commissioner Phala (the first Commissioner).
- [12] The contention of the applicant during that hearing was that the CCMA did not have jurisdiction because the employee's employment contract was terminated by agreement between the parties.
- [13] In determining the issue of whether the employee was dismissed, the first Commissioner made the following findings:
- '3.4 The submissions of the respondent were muddled and confusing. As much as the CCMA did not have the power to set aside the settlement agreement, it is clear that what the document sought to achieve (the settlement agreement) was inconsequential because the applicant supposedly resigned.'
- [14] It was on the basis of the above that the Commissioner found that the CCMA did have jurisdiction to arbitrate the dispute. Once the issue of jurisdiction was resolved on the basis that the CCMA had jurisdiction the matter proceeded for determination of both the procedural and substantive fairness of the dismissal before Commissioner, Mr Nyama (the second Commissioner).
- [15] As indicated earlier in this judgment, the second Commissioner found the dismissal to have been unfair and ordered compensation for that reason in the amount equivalent to 10 months' salary.
- [16] The applicant being unhappy with the outcome of both arbitration awards filed the present review application. In the cause of the review application the issue of joining the first Commissioner arose. It would appear that although the employee opposed the joinder application, she later consented thereto. The application to join the first Commissioner in the review application was

granted. However, despite the leave to join the first Commissioner in the proceedings, the applicant failed or neglected to effect the joinder.

Grounds of review

- [17] Initially, the applicant sought to review both the first arbitration award dealing with the jurisdictional point and the second arbitration award dealing with the fairness of the dismissal.
- [18] As indicated earlier, the applicant abandoned the review application of the first arbitration award after failing to effect the joinder of the first Commissioner. That being the case, the focus in this judgment shall be on the review grounds raised against the second award.
- [19] In challenging the second arbitration award, the essence of the applicant's complaint is that the Commissioner committed gross irregularity in several respects. The applicant contends that the Commissioner in arriving at the conclusion that the dismissal was unfair, failed to take into account the fact that the employee was not dismissed but that the contract was terminated through the agreement. The other point raised by the applicant is that the Commissioner made incorrect factual and legal findings in as far as the dismissal of the employee was concerned.

The arbitration award

- [20] In the arbitration award, the second Commissioner noted two issues for his determination. The first issue concerns legal representation which does not arise in these proceedings. The second issue concerns the substantive fairness of the dismissal.
- [21] In arriving at the conclusion that the dismissal of the employee was unfair, the Commissioner relied on the provisions of item 11 of schedule 8 of the Code of Good Practice the provisions of which are discussed later in this judgment.
- [22] The Commissioner found that the employee was required to go for a hip replacement which required her to take leave from 25 January 2010 to 07 March 2010. The period that the employee would have been absent from

work due to the ill-health was not appreciated by the applicant and it was for that reason that incapacity enquiry due to ill-health was conducted.

- [23] The Commissioner criticised the approach adopted by the applicant in conducting the incapacity enquiry. He found that the applicant did not conduct ill health incapacity enquiry properly and in particular, that sufficient time was not provided for the consideration of the proposals made by the employee. The enquiry according to him was done in haste and accordingly no proper consideration was given to the alternatives to dismissal.
- [24] It was for the above reasons that the Commissioner found that there were no fair reasons to dismiss the employee for incapacity.
- [25] In awarding costs against the applicant the commissioner found the applicant to have been reckless in that it proceeded to oppose the employee's claim despite knowing that it did not conduct a proper enquiry. The Commissioner also disapproved of the failure by the applicant to produce in evidence the report into the employee's incapacity.

Evaluation

- [26] It is trite that the existence of dismissal is a jurisdictional fact which must exist before the CCMA can acquire the power to consider a dismissal dispute.¹ The duty to establish the existence of a dismissal in terms of section 192 of the Labour Relations Act 66 of 1995, rests with the employee. Once the employee has established the existence of a dismissal then the employer has the duty to show that the dismissal was for a fair reason.
- [27] In the present matter, the CCMA had jurisdiction to entertain the dispute as formulated by the employee which was raised by the applicant at the commencement of the first arbitration hearing before the first Commissioner.
- [28] The transcript of the proceedings before the first Commissioner reveals very clearly that the issue of whether the employee was dismissed was fully ventilated by the parties. The case of the applicant at that stage was that, the

¹ See *Bombadier Transportation (Pty) Ltd v Mtiya and Others* (2010) 31 ILJ 2065 (LC) at para 13.

CCMA did not have jurisdiction to entertain the dispute because the employment relationship was terminated by consensus between the parties. In this respect, the applicant presented evidence of mutual termination of the contract by settlement and made extensive submissions as to why the CCMA lacked jurisdiction.

- [29] It is apparent from the reading of the record that the employee did not dispute having signed the agreement terminating the employment relationship. It was however argued on behalf of the employee that the settlement agreement was “nothing other than the employer disguising a letter of dismissal.”
- [30] After listening to the submissions made on behalf of both parties, the Commissioner adjourned the hearing to consider the matter and thereafter issued his decision as to the point in *limine* raised by the applicant.
- [31] The essence of the ruling was that the applicant dismissed the employee and therefore the CCMA had jurisdiction to entertain the dispute.
- [32] I have indicated earlier that the applicant had subsequent to failing to effect the joinder of the first commissioner abandoned the review of the first arbitration award.
- [33] The case of the applicant in the present instance seems to be that the second Commissioner should have considered the jurisdictional issue of dismissal before proceeding to entertain the question of the fairness or otherwise of the dismissal.
- [34] The general principle of our law is that an arbitration award once issued is final and binding until rescinded or set aside on review. This principle is enunciated in *Taung Local Municipality v Mofokeng*,² as follows:

‘12. It has been pointed out in *Oudekraal supra* that whilst an unlawful act is void in law it is however in fact valid and derives its validity and the force of law from its factual basis. Thus the enquiry generally is not whether the decision has its basis in law but rather whether such a decision exists in fact. The next enquiry once it has been established that the

² (2011) 12 BLLR 1243 (LC).

decision is unlawful but exists in fact would be to determine whether it has been set aside on review. In general this question arises in the determination of whether or not the decision is enforceable or whenever there is an attempt at coercing such unlawful administrative act.”

[35] It is apparent that the second Commissioner approached the matter on the basis that he was bound by the findings made in the first arbitration award and in this regard had the following to say:

‘6. The applicant referred her dispute to the CCMA on 22 January 2010. The conciliation remained unresolved. The initial arbitration scheduled for the 26th April 2010 was postponed. The second arbitration was scheduled on 5 July 2010 and the respondent raised the preliminary jurisdictional point. A ruling was issued on 16 July 2010.’

[36] In light of the above, the second Commissioner was duty bound to proceed to determine whether the dismissal was for a fair reason, the jurisdictional point regarding the issue of dismissal having been resolved in favour of the employee. In this respect, the second Commissioner identified the key issue for determination as being whether the dismissal of the applicant was both procedurally and substantively unfair.

[37] I turn to deal with the review of the second arbitration award. The enquiry to conduct in this respect is to determine whether the decision reached by the second Commissioner is one that a reasonable decision-maker could not reach.³

[38] It is trite that an employer is entitled to terminate the employment contract of an employee on the grounds of incapacity due to ill-health, on condition that it is substantively and procedurally fair.

[39] The enquiry to conduct in determining the fairness of the dismissal for incapacity due to ill-health is set out in item 11 of the Code of Good Practice: Dismissal which provides:

³ See *Sidumo and Another V Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) and *Phalaborwa Mining Company Ltd V Cheetham and Others* (2008) 29 ILJ 306 (LAC).

- Whether or not the employee is capable of performing the work; and if the employee is not capable,
- The extent to which the employee is able to perform the work,
- The extent to which the employee's work circumstances might be adapted to accommodate disability or where this is not possible, the extent to which the employee's duties might be adapted
- The availability of any suitable alternative work.'

[40] The factors to take into account in determining the fairness or otherwise of a dismissal for incapacity due to ill-health is set out in item 10 of the Code of Good Practice in the following terms:

- An employer investigates the extent of the incapacity if the employee is temporarily unable to work.
- If the employee is likely to be absent for a time that is unreasonably long, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness and the possibility of securing a temporary replacement for the ill employee.
- In the process of the investigation the employee should be allowed the opportunity to state a case in respondent and to be assisted by a trade union representative or fellow employee.
- The degree of incapacity is relevant to the fairness of any dismissal.'

[41] The issue which the Commissioner had to determine was set out in the pre-arbitration minutes and as indicated earlier entailed having to determine the procedural and substantive fairness of the dismissal.

[42] It is common cause that the applicant convened an incapacity hearing regarding the ill-health of the employee. It is also common cause that the

employee made two proposals as to how to address her incapacity which was rejected by the applicant. The applicant made no proposal as to the alternative to dismissal.

- [43] In his analysis after summarising in detail the evidence of the parties, the second Commissioner applied the facts of this case to the principles set out in schedule 8 of the Code of Good Practice, items 10 and 11. In arriving at the conclusion that the dismissal of the employee was unfair, the second Commissioner took into account the period it took the applicant to conduct the investigation and the fact that the applicant failed to provide its investigation report. He further found that there was no evidence that the hip replacement which the employee had to undergo would incapacitate her from performing work as a credit controller. In my view, the applicant did not submit sufficient facts that would support the proposition that the dismissal of the applicant was substantively fair.
- [44] In light of the above discussion, I am of the view that the second Commissioner cannot be faulted for the approach he adopted. The conclusion he reached is reasonable and there is no basis for accusing him for gross irregularity.
- [45] In light of the above, I am of the view that the applicant's application stands to fail.
- [46] The employee has prayed for a punitive cost order. As indicated above initially this matter involved the review of the two arbitration awards. It is common cause that the applicant had failed to join the first Commissioner and accordingly a joinder application had to be made. The employee abandoned the initial opposition to application for joinder in order to expedite the prosecution of the review.
- [47] As indicated above after obtaining an order permitting joinder, the applicant failed to effect the joinder. The applicant then abandoned the review of the first arbitration award. It has to be noted that the applicant abandoned the application after a protracted period of instituting and prosecuting the joinder application.

[48] The other aspect of the conduct of the applicant which the employee complains about concerns the delay in the prosecution of the review application and in particular the delay in filing the Rule 7A(8) notice.

[49] Having regard to the manner in which the applicant conducted the review application, I am in agreement with the applicant that the appropriate order should be costs on a punitive scale.

Order

[50] In the circumstances, the following order is made:

1. The review application is dismissed.
2. The applicant is to pay the third respondent costs on attorney and own client scale.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv JM Bezuidenhout

Instructed by: Clifford Levin Attorneys

FOR THE RESPONDENT:

Adv J.W Lamprecht

Instructed by: Spector Attorneys