THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 2991/12
J 209/13

LIFE HEALTHCARE GROUP t/a EUGENE MARAIS HOSPITAL	**Applicant**
and	
COMMISSIONER HELLEN HLATSHWAKO, *NO*	**First Respondent**
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
EMMA MATHONSI	**Third Respondent**

Heard: **8 July 2015**

Delivered: **10 July 2015**

JUDGMENT

HULLEY, AJ

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Introduction

[1] There are two applications before me. The first is brought by the Life Health Care Group in which it seeks to review and set aside an arbitration award issued by the first respondent (to whom I shall here refer to as the arbitrator) and substituted with an award declaring that the second respondent lacked jurisdiction to determine the dispute which had been referred to it by a former employee, Ms Emma Mathonsi, alternatively, referring the matter back for arbitration afresh before an arbitrator other than the first respondent.

[2] Ms Mathonsi is the applicant in the second application. She seeks an order making the award of the arbitrator an order of court. The outcome of this application is dependent upon the outcome of the first.

[3] For the sake of convenience I shall refer to the parties as "the Hospital" and "Ms Mathonsi", respectively.

Factual background

[4] Ms Mathonsi was employed by the Hospital as a nursing sister in its General ICU. It seems that she suffered from some type of degenerative spinal condition which impacted upon her ability to perform some of the tasks which related directly to her work. It is unclear from the evidence whether her performance was actually affected when she was at work, but what is clear is that Mathonsi was compelled to take excessive amounts of sick leave.

[5] Ms Mathonsi underwent three back operations in an effort to correct her condition. Arising from the third (which was performed in October 2011) her treating physician booked her off for three months in order to convalesce and recommended that she be accommodated elsewhere.

[6] Ms Mathonsi was due to return to work on 3 February 2012. According to her at some stage between 22 and 24 January 2012 she met with Ms Nadia Matthysen (the Hospital's HR Manager) who informed her that she ought to apply for a post in Neonatal ICU.

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[7] On 25 January 2012 Mathonsi submitted a written application for a post in Cardio ICU and a few days later, on 1 February 2012, met with Ms Matthysen and the managers of the Neonatal ICU and the Cardio ICU unit. It was indicated during the course of this meeting that there were at that stage no positions in the Neonatal ICU but one was available in the Cardio ICU. Ms Mathonsi expressed concerns that she may be unable to perform her tasks at the Cardio ICU and it was decided that she would have to be assessed by a medical doctor to ensure that she was capable of performing her tasks.

[8] Ms Mathonsi returned to her regular duties at General ICU on 3 February 2012, but on 7 February 2012 her treating physician, Dr Hefer, booked her off for a further three months.

[9] On 30 March 2012 a meeting was held between Ms Mathonsi, on the one hand, and between the Hospital's Regional Manager, Ms Schutte and Ms Matthysen, on the other, to discuss the temporary disability of Ms Mathonsi and how the Hospital could accommodate her in an alternative position. It was pointed out that the Hospital currently had no positions available in the Neonatal ICU and that Ms Mathonsi was to consult a doctor to provide a report regarding her ability to work in an alternative capacity without jeopardising her health. The Hospital afforded Ms Mathonsi an opportunity to consult her own physician or one of three physicians suggested by the Hospital. Because the Hospital was prepared to pay for a consultation with one of its physicians (which would not apply if she elected to make use of her own physician), Ms Mathonsi decided to consult Dr Basson who was employed within the Hospital.

[10] The consultation with Dr Basson appears to have taken place on 16 April 2012 and on 25 April 2012 Ms Mathonsi again met with Ms Schutte and Ms Matthysen. During the course of this meeting the report of Dr Basson was made available to Ms Mathonsi and it was explained to her that Dr Basson was of the view that she was permanently disabled. The Hospital indicated that an application would be put in to Old Mutual for permanent disability benefits.

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[11] Such application was in due course submitted and on 25 May 2012, Old Mutual approved the application for disability benefits.

[12] On 4 June 2012 Ms Mathonsi signed the relevant forms to receive the permanent disability benefits from Old Mutual.

[13] On 3 October 2012 the Hospital completed a so-called UI19 form to enable Ms Mathonsi to apply for UIF benefits. A copy of this document was included in the bundle of documents submitted to the arbitrator. The document indicates that Ms Mathonsi's services were terminated on the basis that she was permanently disabled. The form requires the employer to indicate the basis of the termination by selecting a relevant code from amongst various codes contained within the form. The employer marked the code which corresponded with "illness/medically boarded".

[14] Ms Mathonsi submitted a claim for UIF benefits but was apparently informed that she did not qualify for such benefits since she had been dismissed. It is unclear why the officials of the Unemployment Insurance Fund had adopted this stance in light of the content of the UI19 form as explained above. However, whatever the reason might have been, this spurred Ms Mathonsi into action. Until then, she testified, she had been unhappy about the fact that she had been medically boarded, but felt that the Hospital had foisted this outcome upon her and informed her that she had no choice in the matter. Armed with this new information (i.e. that she had been dismissed), however, she immediately referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. In her referral form Ms Mathonsi alleged that the date of the dispute arose on 27 September 2012. (It is unclear what this date was based upon, but it became apparent during the course of the arbitration proceedings the date of dismissal was in fact 30 May 2012.)

Arbitration proceedings

[15] The matter was conciliated and when conciliation failed it proceeded to arbitration before the first respondent.

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[16] On 30 October 2012 the arbitrator delivered an award in which she found that Ms Mathonsi had "discharged the onus to prove that a dismissal exist[s]" and the Hospital failed to prove that the dismissal was fair. She ordered the Hospital to reinstate Ms Mathonsi and to pay her an amount of R86 544.00 as compensation.

[17] It is apparent from the award that the arbitrator found that the Hospital had dismissed Ms Mathonsi on 30 May 2012.

[18] With regard to the question of whether a dismissal had been established the arbitrator noted that the Hospital had not disputed the fact that the contract of employment had been terminated. Based on this she reasoned that –

> "therefore a termination of a contract of employment does exist. The Labour Relations Act 66 of 1995 (LRA) states that "dismissal means that an employer has terminated a contract of employment with or without a notice". I can, therefore, conclude that the applicant [Mathonsi] was dismissed".

Grounds of review

[19] In seeking to review the decision of the arbitrator the Hospital contended that the arbitrator had lacked jurisdiction to determine the dispute. It relied upon two distinct grounds for this contention. In the first place, it pointed out, given the arbitrator's finding that Ms Mathonsi had been dismissed in May 2012 it was apparent that the referral to the CCMA was out of time and that in the absence of an application for condonation the arbitrator had no jurisdiction to entertain the dispute. Secondly, it contended that Ms Mathonsi had not been dismissed and had in fact failed to establish that she had been.

[20] With regard to the second ground it was contended in argument that Ms Mathonsi had consented to applying for medical boarding and this precluded her from instituting a claim for unfair dismissal. Such consent, it was submitted, stemmed, at worst, for the Hospital, from Ms Mathonsi's acquiescence in the outcome of the application for permanent disability.

Consideration of the arguments

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[21] In terms of section 191(1)(a) of the Labour Relations Act, 1995 a dismissed employee may refer a dispute concerning the fairness of his or her dismissal to the CCMA or a Bargaining Council and, in terms of paragraph (b) of that sub-section, must do so within "30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal".

[22] In terms of sub-section (2) the bargaining council or CCMA may permit an employee to refer a dispute "after the relevant time limit in sub-section (1) has expired" provided that the employee "shows good cause at any time".

[23] In *Van Rooy v Nedcor Bank Limited*[1] Mlambo J (as he then was) considered that the provision of section 191(1) was a jurisdictional fact necessary for the CCMA to consider an application. The learned judge held that compliance with the 30 day time period in section 191 was peremptory and that condonation was 'necessary' for a dispute to be referred beyond the time period contemplated in that section. The learned judge noted that 'the fatality of a late referral is cured by condonation if granted and only [then] will the Commission have jurisdiction to conciliate the dispute'[2]. The learned judge continued in the following paragraph to note that the CCMA was 'entitled to check and ensure compliance with the Act' and where it found that there had been no compliance because the referral was late then it 'must consider if good cause has been shown' and if so 'it will condone the lateness and it will then have jurisdiction to conciliate the dispute'. If good cause had not been shown and condonation had not been granted, the *CCMA* 'does not have jurisdiction to conciliate the dispute'[3].

[24] This view was subsequently rejected by Pillemer AJ[4] whose view was upheld on appeal[5] and has been applied since[6].

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[1] [1998] 5 BLLR 540 (LC)
[2] at paragraph 14
[3] at paragraph 15
[4] *Fidelity Guards Holdings (Pty) Ltd v Epstein & others* (2000) 21 ILJ 2009 (LC)
[5] *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* (2000) 21 ILJ 2382 (LAC)
[6] *Magalies Water Board v La Grange NO & others* (2002) 23 ILJ 1055 (LC)

[25] The contention was raised in the present case that the question of condonation or the absence thereof had not been raised during the course of the arbitration proceedings and that the applicant is accordingly precluded from doing so now. In the *Fidelity Guards'* case, *supra*, the failure to raise the condonation point timeously was considered fatal.

[26] In my view, there are several indications in the language of section 191 which suggest that the failure to refer the dispute timeously is a jurisdictional fact, necessary for the proper adjudication of the dispute. While the concerns raised by Pillemer AJ in *Fidelity Guards* regarding the potential for abuse, are not irrelevant, it seems that those concerns are more catered for by an application of the principles of waiver or estoppel, not by an exercise in statutory construction. The consequence of the interpretation given to the wording of section 191 in the *Fidelity Guards* case is that entire sub-section (i.e. subsection (2)) is rendered nugatory.

[27] Moreover, no explanation is provided by Pillemer AJ as to why a lay employer who, ignorant of the time periods in section 191(1), fails to raise the point of delay, should be precluded from raising the point at a later stage. In such a case, the type of abuse contemplated by the learned Judge does not arise. Yet the delay may be substantial and the employer seriously prejudiced by it. It is unhelpful to say that the employer who finds itself in such a position was obviously not prejudiced if it was prepared to proceed with the hearing. The point is that the question of prejudice would only arise if it was relevant to an issue in dispute and, in the absence of any condonation application (of which the employer was on the facts posited by myself, unaware), it would be irrelevant.

[28] The facts of the present case demonstrate this point. While the representative of the applicant was a HR manager, there is no suggestion that she had any legal training. Moreover, Ms Mathonsi's indication in her referral form that the dispute arose on 27 September 2012 probably misled the arbitrator and probably misled the employer. (I do not contend that there was an intention to mislead.) No issue of condonation arose on a consideration of her referral form.

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[29] Nevertheless, I am bound by the decision of the LAC and the first point must accordingly be dismissed.

[30] I turn now to consider the second point.

[31] There is little doubt that proof of a dismissal is a jurisdictional prerequisite for the CCMA to exercise jurisdiction and it is ultimately for this Court to determine whether there was indeed a dismissal.[7] There was some dispute as to whether the issue had been raised before the arbitrator. The fact that the arbitrator found that Ms Mathonsi had discharged the onus of proving a dismissal, suggests that it had been. However, it is unclear from the record that it had been dealt with at all. At any rate, since it is a jurisdictional point, I am satisfied that it can be raised for the first time before this Court.[8]

[32] In the present case, the issue of whether the Hospital had dismissed Ms Mathonsi was a live issue. The essence of the Hospital's contention is that Ms Mathonsi was not dismissed, but that her services were terminated by agreement. For there to be an agreement to terminate the contract of employment there must be a 'meeting of the minds'. Both the offer and its acceptance must be unequivocal.[9] Since the onus to prove a dismissal rests with the employee it is for the employee to prove that no such agreement existed. Naturally, the employer would have an evidentiary burden.

[33] Counsel for the applicant has tried to persuade me that I am in a position to decide the matter on the papers, I do not agree. As previously indicated, there is doubt as to whether the issue was raised before the arbitrator and the parties may not have had a sufficient opportunity to deal with the matter. There are several indications on the record that Ms Mathonsi may have agreed to the termination of her employment in order to pursue her claim for disability benefits, but her own testimony was that while dissatisfied she believed she was bound to go along with that process. These conflicting

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[7] *SA Rugby Players Association & others v SA Rugby (Pty) Ltd; SA Rugby Players (Pty) Ltd v SA Rugby Players Union & another* (2008) 29 ILJ 2281 (LAC) at 2229G – 2230F
[8] *Legal Aid Board v John NO & another* (1998) 19 ILJ 851 (LC), at 857D – E; *CTR Protection Services v. Wainwright & others* 2013 JDR 0103 (LC)
[9] RH Christie & GB Bradfield, *The Law of Contract in South Africa* (6th ed.), p. 34

contentions do not appear to have been advanced in relation to the question of whether an agreement to terminate had been concluded.

[34] Whether there is a dismissal is a matter for this Court to determine. I have previously highlighted the practical difficulties with the application of that principle.[10] Although the decision is this Court's to make, I am unable to do so and it would be improper for me to attempt to do so on the record as it stands and without having afforded both parties the opportunity to deal with the matter fully. In light of my earlier observations[11] it seems appropriate to direct the employee, if so advised, to institute proceedings in this Court to determine whether she had been dismissed.

[35] I do not intend determining the remaining challenges to her award at this stage. That is an issue which may, depending upon the outcome of the first issue, arise at some stage in the future.

[36] Ms Mathonsi's application to make the award an order of court must be suspended pending the determination of the dispute relating to her dismissal.

[37] I do not think it is in the interests of justice and fairness to grant an order for costs in this matter.

[38] In the circumstances I grant an order in the following terms:

38.1 Ms Mathonsi is directed, within 10 days of this judgment, to deliver either a statement of claim in terms of Rule 6 or an application in terms of Rule 7, whichever she is advised to, seeking an order declaring that she was dismissed as contemplated in section 186(1)(a) of the Labour Relations Act, by the Life Health Group t/a Eugene Marais Hospital. Thereafter, the parties shall exchange pleadings in accordance with the applicable rule.

38.2 The determination of the remaining grounds of review raised by the applicant in case number JR 2991/2012 is postponed *sine die*, pending the outcome of the dispute in paragraph 38.1.

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[10] *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) & others* (2013) 34 ILJ 3184 (LC), at 3200D – E

[11] *Distinctive Choice*, *supra*, at par. 171

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38.3 The application to make the award an order of court in case number J209/2013 is suspended pending the outcome of the dispute referred to in paragraph 38.1.

38.4 There is no order as to costs.

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Hulley, AJ

Acting Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the Applicant:	Advocate Reghana Tulk
Instructed by:	Norton Rose Fulbright South Africa Inc
On behalf of the Third Respondent:	Mr A Goldberg
Instructed by:	Goldberg Attorneys

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