



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 355/13

MAGNIFIED DESIGNS (PTY) LTD

Applicant

and

ROBERT TYRONE LITTLER

First Respondent

COMMISSIONER KAIZER MAKOELE

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

Third Respondent

Delivered: 14 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This opposed application was brought before the court in terms of section 145 (a) of the Labour Relations Act¹. The applicant seeks an order to review and set aside the arbitration award dated 7 February 2013, issued by the Second Respondent (Commissioner) under case number GAJB25924-12. In the award, the Commissioner concluded that the First Respondent (Littler) was dismissed, and further that the dismissal was procedurally and substantively

¹ Act 66 of 1995 as amended

unfair. The applicant was ordered to pay Littler compensation in the amount equal to R143 400.00.

Background:

- [2] Littler was employed by the applicant as head of security. He was approached by the receptionist of the applicant on 20 August 2012 and informed that there was a vacant position for the receptionist opening soon. Littler contacted his stepdaughter and gave her CV to the senior manager of the applicant. The senior manager conducted an interview with Littler's stepdaughter. The director of the applicant called Littler to enquire as to the reason he was employing family into positions within the company, as this was against company policies and procedures.
- [3] According to the applicant, Littler was informed that he will be required to attend a formal disciplinary enquiry at a date to be scheduled, and upon this, he had left the premises of the applicant and failed to come back to work.
- [4] Littler however contends that other than being informed of the disciplinary enquiry, he was also informed that he was suspended and told to leave the premises. He further contends that a week later he was telephonically informed that he was dismissed.
- [5] He had then referred a dispute to the CCMA claiming unfair dismissal. The arbitration proceedings were held on 28th of January 2013, where both parties were legally represented.

The award:

- [6] In the award, the Commissioner recorded that no bundles were submitted and that the applicant (respondent in arbitration proceedings) had not led evidence. The Commissioner had also stated that he was required to decide whether a dismissal took place and if so whether it was procedurally and substantively fair. In summarising Littler's evidence, the Commissioner stated that the former was informed of his suspension on 21 August 2012 and had then left. He had called the "Respondent" the following week to enquire as to what was happening and was then told that he was dismissed. The Commissioner further recorded that under cross-examination, Littler was

confused of the date he was informed of his dismissal even though he had stated that it was on 29 August 2012.

- [7] The Commissioner recorded that the applicant's representative had argued that dismissal was placed in dispute and that the evidence led by Littler was hearsay. The Commissioner however held that the applicant should have called a witness and that the probative value of Littler's evidence was higher than the arguments raised by the applicant's representative. He further found that Littler could not have simply decided to stay at home as he was told by the applicant on 29 August 2012 that he was dismissed. Furthermore, since the applicant had not made any attempts to ascertain Littler's whereabouts, the Commissioner was convinced that he was dismissed, which dismissal was unfair.

The grounds of review:

- [8] The essence of the applicant's submissions is that as its legal representative at the arbitration proceedings had alluded that his instructions were sketchy, and that the primary issue was the existence of a dismissal, the cross-examination of Littler was limited to whether or not he was dismissed.
- [9] It was further submitted that since the applicant had raised the jurisdictional objection, the Commissioner was first required to determine whether the CCMA had jurisdiction to adjudicate the matter, and only thereafter would the applicant have been required to prove that the dismissal was fair. The Commissioner however had according to the applicant, and without an express agreement to do so, dealt with the jurisdictional objection and the dismissal dispute as one enquiry. To the extent that the Commissioner had done so, it was contended that he had exceeded his powers in dealing with the dispute in the manner in which he did, and the award accordingly as far as it exceeded the ruling on jurisdiction fell to be reviewed and set aside.
- [10] Submissions made on behalf of Littler were essentially that the applicant has not set out any valid grounds for the review and the setting aside of the award. Furthermore, it was submitted that to the extent that the jurisdictional issue was raised before the Commissioner, there was no other evidence led

by the applicant before the Commissioner to persuade him that a dismissal did not take place.

The legal framework and evaluation:

- [11] The Commissioner had correctly identified the issue for determination as to whether Littler was dismissed or not. The record of proceedings indicates that Littler had testified in relation to the incident that led to the alleged dismissal and thereafter, the Commissioner had then informed him that he could not recall him saying how he was dismissed, and further proceeded to ask him whether he was indeed dismissed during a telephonic conversation². Littler had responded in the positive, proceeded to testify that having been suspended he had then called Norman Tloubatla, who had informed him that he was not suspended but 'fired'. Cross-examination of Littler centered on his confusion regarding the actual date of his dismissal, whether the dismissal took place on 21, 27 or 29 August 2012.
- [12] Section 192 (1) of the LRA provides that in any proceedings concerning a dismissal, the employee must establish the existence of a dismissal. It is trite that once a jurisdictional point such as that was before the Commissioner as to whether or not a dismissal existed, the applicable test is not that as set out in *Sidumo*³. The approach is as set out by Tlaletsi AJA (as he then was) in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd*⁴ where it was held that;

"The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience.

² Line 1-2 p 16 of the Record

³ See *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abraham Mongatane and Others* [2014] JOL 31668 (LC) at paras [24] to [29]

⁴ (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 (LAC) at paras [39]-[40]

Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.....”

- [13] Central to the applicant's submissions is whether the Commissioner was entitled to deal with the issue of whether there was a dismissal, and the merits without the parties' consent⁵. The raising of a jurisdictional point relating to whether there was a dismissal or not always presents a conundrum in arbitration proceedings, more specifically in the light of the question of onus and a proper process to follow.
- [14] By virtue of it being a jurisdictional point, which obviously has to be determined prior to dealing with the merits of the main claim, and since the employee bears the evidentiary burden in this regard, he or she must lead evidence specifically on that issue alone to prove the fact of a dismissal. Once all the evidence on that specific issue has been dispensed with, it would then be expected of the Commissioner to make a ruling on the matter. The Commissioner may make an ex tempore ruling or adjourn the proceedings to consider the matter. If the fact of a dismissal is not established, then obviously the Commissioner would lack jurisdiction, and it would be the end of the matter. However where the employee has established the existence of a dismissal, it would then be for the employer to present evidence to establish that the dismissal was fair. This process is what may ordinarily be referred to as a two-stage enquiry. To the extent that the Commissioner follows this process, which shall be dictated by the merits of the case, the parties should obviously be made aware of it.
- [15] A further scenario may however arise where the issue of whether there was a dismissal or not may be intrinsically linked to the merits of the case. It is in these instances where the question of onus gets conflated. As it had happened in this case, Littler was the first to testify in view of the jurisdictional issue having been raised. Nevertheless the bulk of his evidence pertained to circumstances leading to the alleged unfair dismissal, until he was prompted by the Commissioner to answer to questions as to whether he was indeed dismissed.
- [16] Due to the reason that the Commissioner had not warned the parties that he would adopt a one-stop enquiry, he had heard evidence from Littler in respect

⁵ With reference to *ABSA Bank Ltd v Wabile NO & others* [2014] ZALCJHB 278 at paras [29] to [31]

of the jurisdictional point and the merits all at once and issued his award. This in my view was grossly irregular in that a determination had to be first made as to whether the Commission had jurisdiction or not. Where the Commissioner had adopted this one stop enquiry, it was incumbent upon him to then warn the parties and inform them that the jurisdictional issue would be determined together with the merits of the matter.

- [17] It is appreciated that in terms of the provisions of section 138 (1) of the LRA, the Commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. This however should not be read to be a license to conflate jurisdictional issues with the merits of the main claim where circumstances arise, or to deal with these issues haphazardly, with the result that the parties are deprived of a fair hearing. There is an obligation to determine these issues fairly and quickly. The one-stop enquiry when dealing with such jurisdictional issues may be expedient. Expediency however should not be achieved at the expense of fairness.
- [18] The review test as enunciated in *Sidumo*⁶ is that of a reasonable decision maker. Effectively, the enquiry is whether the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits. The function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material⁷.
- [19] Once the parties are not afforded a full opportunity to state their respective cases, it follows that the Commissioner cannot arrive at a reasonable outcome. The finding of the Commissioner on whether Littler was dismissed is unassailable as this was the issue that the applicant's representative at the arbitration proceedings had come prepared for and argued. No evidence was led to controvert Littler's testimony that he was informed telephonically that he was dismissed. No attempt was made by the applicant at that stage to call upon

⁶ 2007] 12 BLLR 1097 (CC)

⁷ *Goldfields Mining South Africa (Pty) Ltd v CCMA* (2014) 35 ILJ 943 (LAC) at para [20]

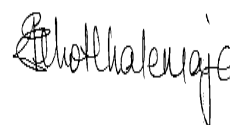
Tloubatla who had allegedly dismissed Littler to rebut that evidence. The applicant as the record reflects chose not to call any witnesses in that regard, and the limited cross-examination of Littler was more concerned with the date of the dismissal than with the fact of the dismissal itself. This in my view did not assist the applicant's case at arbitration.

[20] The award is however reviewable in the light of the one stop-enquiry the Commissioner had adopted without warning the parties. This constituted a reviewable irregularity as the applicant was entitled to a ruling on the preliminary issue raised, or where no such ruling was to be issued immediately, to be advised by the Commissioner that the merits of the claim would be simultaneously dealt with the preliminary issue, as it was not only expedient but also fair to do so. I am in agreement with the applicant that the Commissioner exceeded his powers in adopting the approach as he did, which had the result of depriving the applicant of a fair hearing.

[21] To the extent that the review application is partially successful, there is no basis in law or fairness for any cost order to be made.

Order:

- i. The arbitration award issued by the second respondent under case number GAJB25924-12 is reviewed and set aside.
- ii. The matter is remitted back to the Third Respondent for a determination by another Commissioner on whether the dismissal of the First Respondent was procedurally and substantively fair.
- iii. There is no order as to costs.



Tlhotlhamaje, AJ
Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv AJ Nel

Instructed by:

Lee and McAdam Attorneys

On behalf of the Respondent:

S Singh of LS Attorneys

LABOUR COURT