



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1347/12

In the matter between:

TRESSO TRADING 578 (PTY) LTD

t/a WISANI PETROLEUM

and

COMMISSIONER JFM VERHOEF N.O

NBCRFLI

MICHAEL JABULANI BALOYI

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Heard: 7 September 2015

Delivered: 8 September 2015

JUDGMENT

VAN NIEKERK J

- [1] This matter originally served before the court as an unopposed application in terms of Rule 11 in terms of which the third respondent cited above sought to dismiss a review application filed by the applicant. The parties agreed, after the record of the proceedings under review was belatedly filed, to proceed with the review application. That application was technically also unopposed, although the third respondent appeared in person and made a number of submissions.
- [2] In the review application, the applicant seeks to review and set aside an award issued by the first respondent on 8 May 2012. In his award, the arbitrator found that the applicant had unfairly dismissed the third respondent and awarded him compensation in an amount equivalent to nine months' remuneration, some R 62 300.
- [3] The relevant factual background is set out in the arbitration award, and I do not intend to repeat it here. It suffices to say that the third respondent was employed in April 2006 as a driver. During the opening addresses, it became apparent that the applicant disputed that the third respondent had been dismissed. The applicant's case, broadly speaking, was that the third respondent had absconded from his employment and that despite attempts to contact him, he failed to return to work. On 4 October 2011, the letter was issued to the third respondent recording that in terms of his contract of employment, his employment terminated automatically. The applicant relied in particular on clause 4 of the contract which provided that absence from work for four weeks or more without notice constituted abscondment for which automatic dismissal would be applicable.
- [4] In his award, the arbitrator recorded that the issues to be decided were whether the third respondent was dismissed, and if so, whether his dismissal was

procedurally and substantively fair. The arbitrator concluded that it was common cause that the third respondent had been in the employee of the applicant since April 2006 and that he worked until 31 August 2011. The third respondent's evidence was that on 31 August 2011 he went on family responsibility leave to attend his grandmother's funeral thereafter, on 5 September 2011, he was given permission to go on annual leave. When he noticed that his salary had not been paid into his account at the end of September 2011, contacted the applicant and was informed that his services had been terminated due to his absconded. This much is confirmed in the letter dated 4 October 2011 referred to above, which the third respondent received on 10 October 2011. The applicant's version was that it had established that the third respondent did indeed attend a funeral on 2 September 2011, but that he failed to return to work until 10 October 2011 after he was informed to collect his letter of termination of employment.

- [5] Insofar as the applicant relied on those judgments which deal with deemed dismissals in the public sector (e.g. *Phentini v Minister of Education & others* (2006) 27 ILJ 477 (SCA) the arbitrator took the view that those cases were distinguishable on the basis that they dealt with statutory provisions. The arbitrator recorded that while a termination in the circumstances did not constitute a dismissal for the purposes of the LRA, the proper approach to be adopted in the private sector was that where an employer had the effective means of communicating with an employee who is absent from work, the employer is obliged to give effect to the obligation to accord the employee hearing before taking any decision to dismiss (see *SA Broadcasting Authority v CCMA* (2002) 23 I'Il J1549 (LAC)). The arbitrator made specific reference to paragraph 16 of the latter judgment which required that the employer ought to have arranged for disciplinary hearing when the employee reported for work after she was telephonically contacted. The arbitrator concluded as follows:

47. The employee had provided service to the employer since 2006 and his absence from work should have raised alarm bells for the manager. The manager had all the contact details of the employee and even, on his own

evidence, has visited the employee's wife at a workplace when it was established that the employee was attending a funeral. Nothing had prevented the manager to again visit the wife of the employee in order to establish why the employee had not returned to work after the funeral. Even on the return of the employee on 10 October 2011 a disciplinary hearing could and should have been held. The manager did not even ask whether the employee was. It is accordingly my view that the employee had in fact been dismissed and that the employer has failed to afford the employee a fair hearing before terminating his employment.

- [6] As I have indicated above, the arbitrator went on to find that the third respondent had been unfairly dismissed and that he should be awarded the compensation he sought.
- [7] The applicant's grounds for review rely on the decision by the Constitutional Court in *Rustenburg Platinum Mines (Pty) Ltd v CCMA & others* [2006] 11 BLLR 1021 (SCA). The case made appears to be that the arbitrator committed an act of misconduct or a gross irregularity in the conduct of the proceedings under review. The grounds for review attack the factual findings made by the arbitrator by reference to the evidence and sets out what in essence are grounds for appeal against those findings.
- [8] The primary finding that is the subject of attack in these proceedings is the arbitrator's conclusion that the third respondent was dismissed for the purposes of the LRA. That being so, the test on review is not one of reasonableness, and the *Sidumo* threshold has no application. An applicant challenging a jurisdictional ruling made by a commissioner or arbitrator must necessarily make out a case to the effect that the decision was incorrect. In *SA Rugby Players Association v SA Rugby (Pty) Ltd and Others*, (2008) 29 ILJ 2218 (LAC), the court said the following:

'[39] 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.

[40] 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. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties...

[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.'

This approach has been applied by the LAC in at least two subsequent decisions - see *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC); *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* (2013) 34 ILJ 2960 at [17] – [18].

- [9] The fact that the applicant has failed to plead its case on the proper basis is in itself a reason for this application to be dismissed. Even if I were to disregard the founding affidavit and approach the application on the basis of whether or not the arbitrator's decision that the applicant had been dismissed is correct, this would make no difference. The authority referred to by the arbitrator makes clear what is a well-established principle frequently applied in this court – i.e that an employer may not rely on a contractual term to circumvent its obligations to act fairly and in particular, to dismiss an employee only after having a substantively good reason to do so and after following a fair procedure. The 'deemed' or 'automatic' termination of employment principle to be found in clause 4 of the third respondent's contract of employment means no more than that provision which entitles the applicant simply to give notice of termination of employment. In other words, a contractual term such as that referred to cannot trump the statutory protections extended to employees in relation to their security of employment.
- [10] The authority referred to by the arbitrator, and in particular *Jammin Retail (Pty) Ltd v Mokwane & others* (2010) 31 ILJ 1420 (LC) make it abundantly clear that the automatic termination of employment on account of protracted absence principles such as that incorporated into section 14 of the Employment of Educators Act and section 17 of the public service act have no place in the public sector. This is particularly so, as the Labour Appeal Court observed in the *SA Broadcasting Authority* case referred to above where it is possible for the employer to trace the employee concerned and to establish a disciplinary hearing to ascertain the reason for absence.
- [11] For that reason, I'm not persuaded that the arbitrator's decision was incorrect. In so far as the applicant relies on the unreasonableness of the arbitrator's decision in relation to remedy, it should be recalled that this court is entitled to intervene if and only if the decision reached by the arbitrator is so unreasonable that no reasonable decision-maker could come to that decision. In the present instance, the arbitrator had specific regard to relevant factors including the personal

circumstances of the third respondent, the period of his employment the manner in which he was dismissed and the fact that he had been unemployed since September 2011. There is nothing unreasonable, in my view, about the decision to which the arbitrator came.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION:

For the applicant: Adv. MD Teffo, instructed by RS Ntloedibe Attorneys

For the third respondent: In Person