



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1383/12

In the matter between:

AIR TRAFFIC NAVIGATION SERVICES (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

NASIMA RAFFEE N.O.

Second Respondent

WILFORD WANDEKHA MKHANDAWIRE

Third Respondent

VIRUTAL HR (PTY) LTD t/a CONTRACT ACCOUNTS

Fourth Respondent

Delivered: 16 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This application was brought before the Court in terms of section 145 of the Labour Relations Act¹ (the LRA). The Applicant seeks an order to review and set aside the award dated 28 May 2012 issued by the Second Respondent (Commissioner) under case number GAJB33921-11.
- [2] In the award, the Commissioner dismissed preliminary points raised on behalf of the Fourth Respondent and found that the Third Respondent (Mkhandawire) was dismissed by the Applicant, which dismissal was procedurally and substantively unfair. The Commissioner had also ordered that Mkhandawire be reinstated by the Applicant, and awarded him back-pay in the sum of R164 475.00.
- [3] An issue pertaining to the need for an application for condonation in respect of the delay in respect of the launching of the review application and non-compliance with the provisions of Rule 7A (6), and Rule 7A (8) (b) notice was raised by Mkhandawire. Nevertheless, his counsel submitted that the matter could be dealt with on the merits. Condonation in respect of the late filing of the transcribed record of proceedings is accordingly granted.

Background:

- [4] The Applicant was a client of the Fourth Respondent (a TES). Mkhandawire was employed by the TES as a bookkeeper with effect from 20 February 2008, and thereafter his services were offered to the Applicant by the Fourth Respondent for a reward. Thus a tripartite relationship existed between Mkhandawire, the TES and the Applicant.
- [5] The Applicant had advertised a permanent position of bookkeeper in January 2011. At the time, Mkhandawire was employed by another company, Macsteel. He applied for the position advertised by the Applicant, was interviewed and found to be most suitable. According to the Applicant, his appointment was subject to him providing proof of his qualifications.
- [6] On 10 February 2011, an e-mail was sent to him by Corney Mazin (his agent from the TES), which was also copied to one of the Applicant's managers,

¹ Act 66 of 1995 as amended.

Makaya, informing him that he was successful in his application and should thus resign from Macsteel in order to take up the position with the Applicant. In the e-mail, Mazin had also informed Mkhandawire that his temporary assignment with the Applicant was confirmed starting from 14 February 2011, and that he would be permanently employed with effect from 1 March 2011

- [7] In February 2011 the Applicant had requested Mkhandawire and the TES to submit proof of his qualifications. These however were not forthcoming according to the Applicant. As at 3 March 2011, the proof of qualifications had not been submitted. As a result, the Applicant refused to offer Mkhandawire a contract of employment, and had instead offered the position to the second best candidate that was interviewed.
- [8] According to the Applicant, when Mkhandawire failed to provide proof of his qualifications, it had entered into another agreement with the TES for the purposes of placing him on another assignment for a period of three months. That contract was to expire at the end of May 2011. As the new appointment had not been made, an agreement was entered into with the TES for a further three months period expiring on 21 August 2011. This was however according to the Applicant was done without proper authorisation, and the manager who extended the contract has since been disciplined and dismissed. The extension however went into September 2011 in order to enable Mkhandawire to do a proper handover to the new candidate appointed in the permanent position.
- [9] The new candidate commenced her employment with the Applicant on 1 September 2011, and Mkhandawire had refused to do a handover. The Applicant then informed the TES that Mkhandawire's services would not be utilised during the month of September 2011 as a result of his refusal to do a handover.
- [10] Mkhandawire initially referred an alleged unfair dismissal dispute against the TES to the CCMA under case number GAJB23826-11, and alleged that he was dismissed on 31 August 2011. Arbitration proceedings in respect of this dispute were held on 27 October 2011. In the award issued on 2 November

2011, Commissioner Sibongiseni Sithole found that Mkhawire was not dismissed by the TES when a contract between the parties came to an end on 17 September 2011.

- [11] On or about 30 December 2011, Mkhawire then referred another unfair dismissal dispute against the Applicant to the CCMA. He alleged that he was dismissed by the Applicant on 16 August 2011 for unknown reasons and sought compensation. That referral was out of time and Mkhawire had also applied for condonation. Condonation appears to have been granted as the matter came before the Second Respondent for arbitration.

The arbitration proceedings:

- [12] The issues before the Commissioner were the following;
- a) Whether or not the Applicant had employed Mkhawire;
 - b) If it is found that Mkhawire was employed by the Applicant, whether or not he was dismissed by it (Applicant);
 - c) Since Mkhawire had also cited the TES as a party to the dispute, whether the matter against the TES was *res judicata* in view of the award issued under GAJB23826-11.
- [13] Evidence at the arbitration proceedings was presented by Mkhawire and Mazin. The Applicant had called upon its then acting Senior Manager in its HR Department, Randa, Ndlovu its Chief Financial Officer, Ngobese the HR Manager to testify on its behalf. Having heard the evidence, the Commissioner in her analysis made the following findings;
- 13.1 The dispute against the TES was *res judicata* in view of the award issued under case number GAJB23826-11 where it was found that “The Second Respondent (TES) was found not to be the Applicant’s (Mkhawire) employer”².
 - 13.2 The documentary evidence in the form of Mazin’s e-mail of 10 February 2011 to both Makaya and Mkhawire indicated that the

² Award at p27 of Index to Pleadings

latter was employed by the Applicant; if this was not the case Makaya ought to have immediately notified Mazin of that fact.

- 13.3 At no stage was Mkhandawire informed that his position was invalid on the basis that he was not properly employed by Makaya.
- 13.4 Mkhandawire had submitted the copies of his qualifications as requested.
- 13.5 An adverse inference was to be drawn from the fact that the Applicant failed to call upon Makaya to testify on its behalf to refute that she had appointed Mkhandawire.
- 13.6 It was 'common cause' that Mkhandawire was dismissed on 2 September 2011 after he failed to train the new employee appointed to his position. He was not charged or called to a hearing and was simply told to return on 5 September 2011. The evidence indicated that Mkhandawire's dismissal was procedurally and substantively unfair.

Grounds of review and evaluation:

- [14] It was submitted on behalf of the Applicant that the Commissioner committed a gross irregularity in the conduct of proceedings and exceeded her powers. The gross irregularity related to the mistake of law concerning the issue that the matter in respect of the TES was *res judicata*, and her failure to consider the material put before her.

Did the Commissioner commit a mistake of law?

- [15] When it is alleged that a Commissioner misapplied the law to a particular matter, the implication is that there was gross irregularity in the conduct of proceedings as contemplated in section 145(2) (a) (ii) of the LRA. It can be accepted as trite that not every error in law committed by a Commissioner would vitiate an arbitration award to justify interference by the reviewing court. Thus, it is only in circumstances where the error of law is so material that it denies the other party a fair hearing that the reviewing court would interfere with the award. To the extent that it can be established that the Commissioner

failed to apply his or her mind to the relevant issues before him or her, the court is entitled to intervene³.

- [16] In regards to the alleged mistake of law, it was submitted that in regards to the first award, the Commissioner had found that there was no dismissal and the referral was dismissed in circumstances where the facts were substantially the same as in the subsequent referral. In respect of the second award under review, it was submitted that the Commissioner nevertheless stated that the TES had raised a point *in limine* that the matter against it was *res judicata* without making a proper determination in that regard.
- [17] Mkhawire according to the Applicant was employed by it in terms of section 198, and the termination of an agreement between the Applicant and the TES led to the termination of the contract. To the extent that in the first referral the Commissioner had found that Mkhawire was not dismissed but was on a fixed term contract with the TES, this should have been the end of the matter, and it was irrelevant that the Applicant was not cited in that matter. Furthermore, it was submitted that to the extent that the Commissioner had partially applied the principles related to *res judicata*, it was submitted that the mistake of not upholding the preliminary point raised was flawed.
- [18] In considering whether a plea of *res judicata* is sustainable, the Court or tribunal must be satisfied that the following requirements are met⁴, viz;
- a) That there has already been a prior judgment;
 - b) The parties to the dispute were the same;
 - c) The relief claimed is the same as the previous one in material respect;

³ See *Irvin & Johnson Ltd v CCMA & others* [2006] 7 BLLR 613 (LAC) and *Maneche & others v CCMA and others* [2007] JOL 20281

⁴ See *Herbstein & Van Winsen*, The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th edition, Juta, 2009. See also of *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (B) at page 566F where the court held that;

“from the foregoing analysis, I find that the essentials of threefold, the *exceptio res judicata* are threefold, namely that the previous judgement was given in an action or application by a competent court (1) between the same parties,(2) based on the same cause of action...(3) with respect to the same subject-matter or thing. Requirement 2 and 3 are not immutable requirements of *res judicata*....conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed. A court must have regard to the object of *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse action, with the concomitant deleterious effect of conflicting and contradictory decisions.”

d) The issue(s) in dispute are the same as is the issue of law raised.

- [19] In the first referral under GAJB23826-11, Mkhandawire had referred an alleged unfair dismissal dispute against the TES. In the award⁵ under background, the Commissioner had stated that Mkhandawire was employed by the TES on 28 February 2008 and was allegedly dismissed on 31 August 2011. The issue the Commissioner had to decide was whether there was an employment relationship between Mkhandawire and the TES; whether Mkhandawire was dismissed, and if so whether the dismissal was procedurally and substantively fair.
- [20] In analysing the evidence before, Commissioner Sithole stated that she was satisfied that Mkhandawire was employed by the TES on a fixed term contract which came to an end on 17 September 2011; that the TES had arranged with the client (ATNS) (Applicant in this case) a contract for six months, and understood that he was employed on a fixed term contract, and therefore Mkhandawire had not established the existence of a dismissal (A dismissal by the TES).
- [21] It needs to be pointed out that the Commissioner in the second award misinterpreted the findings of the first Commissioner by stating that the former had found that Mkhandawire was found not to have been employed by the TES. At paragraph 14 of the first award, it is specifically stated by Commissioner Sithole that;
- “Based on the evidence presented I am satisfied that the applicant (Mkhandawire) was employed by the respondent – Contracts Account (The TES) on a fixed term contract which came to an end on 17 September 2012”*⁶
- [22] Notwithstanding the second commissioner’s misinterpretation of the first commissioner’s findings, in considering whether the dispute between Mkhandawire and the TES was *res judicata* in respect of the second referral under the award which is the subject matter of the review application, it should therefore be accepted to the extent that he had made a claim of alleged unfair

⁵ Annexure “SDB11” to the founding affidavit

⁶ At page 49 of the indexed pleadings Annexure “SDB11”

dismissal against the TES, that dispute had been disposed of in the first award, with a finding that even though he was employed by the TES, it did not dismiss him.

- [23] The first duty of the Court is to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both cases⁷. The issue before Commissioner Sithole was whether Mkhawire was employed by the TES. The finding that Mkhawire was not dismissed was made in respect of the Applicant as it was not cited as a party to the proceedings.
- [24] To the extent that the issue of *res judicata* was raised in the second arbitration proceedings by the TES, and further to the extent that the matter in respect of the TES had been disposed of in the first award, the Commissioner, despite the misinterpretation of the findings of the first award was correct in upholding the point *in limine* in favour of the TES, since Mkhawire had cited the TES in the second referral. That dispute did not involve the same parties. To this end, since the first referral did not involve the Applicant in this case, and further since the issue for determination was the alleged dismissal or existence of an employment relationship between Mkhawire and the TES, it cannot be said that the Commissioner misapplied the law in upholding the point *in limine* as raised on behalf of the TES. The Applicant in the second arbitration proceedings had not as the TES had done, raised the same defence of *res judicata*, and I fail to appreciate how it can be said the Commissioner failed to uphold that point when it was not raised on its behalf.
- [25] It is nevertheless accepted that the issues for determination before the first Commissioner were similar to those before the second Commissioner, although the focus in the second arbitration was in respect of the Applicant.

Is the award reviewable under any grounds?

⁷ *Janse van Rensburg & others NNO v Steenkamp & Another v Myburgh & Others* 2010 (1) SA 649 (SCA) at paragraph [25]

[26] The issue before the Commissioner in the second referral was whether or not Mkhandawire was employed by the Applicant, and if so, whether the Applicant had dismissed him. When faced with a review of jurisdictional points such as those that were before the Commissioner, the standard of review is not that as enunciated in *Sidumo*⁸. The test to follow is that as expressed by Tlaletsi AJA (as he then was) in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd*⁹, 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. 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 (Pty) Ltd 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 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

⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC). See also *Universal Church of the Kingdom of God v Myeni and Others* (DA 3/14) [2015] ZALAC 31 (28 July 2015) at para [27] where the LAC held that;

'Given the fact that the review proceedings concerned a ruling by the commissioner on the CCMA jurisdictional challenge, the review test of constitutional reasonableness in terms of the *Sidumo* decision, does not apply. It is said that the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the Church, there existed facts which objectively established that Mr Myeni was indeed the employee of the Church. If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.'

⁹ [2008] 9 BLLR 845 (LAC) at paras 39-41

dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.”

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.’

[27] In proceedings before the Commissioner, Mkhawire had alleged that he was employed by the Applicant, which the Applicant denied. The onus was therefore on him to prove that he was indeed an employee as envisaged in the LRA. In the absence of it being established that Mkhawire was employed, the Commissioner would have lacked jurisdiction to determine the dispute before her.

[28] In this judgment, it is concluded that the findings by the Commissioner that Mkhawire was employed by the Applicant, and was accordingly dismissed by it in circumstances that were procedurally and substantively unfair cannot be sustainable in law and fact for the following reasons;

28.1 The Commissioner simply concluded that Mkhawire was an employee on the basis of the e-mail sent to him by the TES confirming his appointment. The Commissioner also relied on an e-mail addressed to the Applicant’s Dumisani Baai and representative in the second arbitration proceedings by ‘Labour Bulletin’. In that e-mail, it appears that Baai had made enquiries about withdrawing a job offer under the subject; *“Oops we made a mistake....can we withdraw a job offer?”*

28.2 Whether a person is or was an employee or not needs to be established from the definition of ‘employee’ as found in section 213 of the LRA¹⁰; from the provisions of section 200A of the LRA relating to

¹⁰ “employee” means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

'presumption as to who is an employee'; and from the Code of Good Practice: Who is an employee?, which sets out guidelines on the application of section 200A in the LRA.

28.3 The Commissioner in coming to her conclusions paid no regard to the above provisions and merely relied on the e-mails that could clearly not have been determinative of the issue before her even on the facts of the case.

28.4 Without even determining the legal question whether Mkhandawire was an employee or not, it is my view that on the facts alone, it should have been established that he was not an employee as defined of the Applicant for the following reasons;

28.4.1 It was common cause that Mkhandawire was interviewed and deemed suitable for the position. His appointment however was conditional upon him having submitted the required copies of his qualifications. At most, Mkhandawire did not dispute this condition.

28.4.2 There is a dispute as to whether Mkhandawire had furnished with the required copies of his qualifications. The fact that Mkhandawire had allegedly submitted his copies in 2008 when he started does not imply that this was sufficient for the purposes of the new appointment following the interview in February 2011. Nevertheless, on his own version, the Applicant was also unable to verify those qualifications, and it is my view that the Applicant was within its rights to insist on copies prior to employment being formalised. Be that as it may, this was not an issue that could have been simply determined on the basis of the e-mails, as subsequent developments indicate that no formal employment relationship was entered into between the Applicant

(b) any other person who in any manner assists in carrying on or conducting the business of an employer."

and Mkhandawire as a consequence of the copies not being provided.

28.4.3 From the award under GAJB23826-11, it was found that Mkhandawire was employed by the TES. That finding could not have been ignored or contradicted unless the award in question was reviewed and set aside. Submissions made in Mkhandawire's heads of argument that he does not agree with that award as it related to a separate issue does not in any way assist his case. The fact of the matter is that material jurisdictional findings had been made in that award, which clearly had an impact on his second referral.

28.4.4 Once it was determined by the first Commissioner that the TES was the employer during the period that Mkhandawire alleged he was employed and dismissed by the Applicant, in my view and as correctly pointed out on behalf of the Applicant, that should have been the end of the matter, moreso since a dismissal as contemplated in section 186 of the LRA could not have been established.

29.5 As I understood the facts before the Commissioner, it was not in dispute that between February and September 2011, Mkhandawire was placed at the Applicant on a fixed term contract, which was terminated on 17 September 2011. It was therefore not correct for the Commissioner to conclude that it was 'common cause' that the Applicant had dismissed Mkhandawire, when that very issue was in dispute, and secondly, when Mkhandawire was not an employee as defined.

29.6 In terms of the first award, it was established that Mkhandawire had accepted during cross examination in that matter that he was employed on a fixed term contract which came to an end. It therefore follows from the first award that the termination of Mkhandawire's services was as a result of the termination of his contract with the TES.

[30] In the light of the above conclusions, on considerations of both fact and law, it was never established that Mkhawire was an employee or that he was dismissed. The CCMA therefore lacked the requisite jurisdiction to determine the dispute before it. It follows that the Commissioner's award ought to be set aside. I am further of the view that there is no basis upon which a cost order can be made given the circumstances of this case.

Order:

- i. The arbitration award dated 28 May 2012 and issued under case number GAJB33921- by the Second Respondent is reviewed and set aside.
- ii. The award is substituted with an order that;
'The CCMA lacks jurisdiction to determine the alleged unfair dismissal dispute as referred by Mkhawire.'
- iii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. S July of Werkmans Attorneys

For the Third Respondent: Adv. AL Cook

Instructed by: Kalima Attorneys

LABOUR COURT