



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR1384/10

In the matter between:

HONEST BRANDY SIMBA

Applicant

and

MOTHOKA'S TRADING

First Respondent

BRAAM VAN WYK

Second Respondent

MARGARET COETZEE

Third Respondent

Heard: 02 July 2015

Delivered: 29 October 2015

JUDGMENT

SNIDER, AJ

- [1] This is an application in terms of which the applicant seeks to review and set aside an arbitration award (“the award”) dated 24 May 2010 issued by the commissioner (“the commissioner”). The applicant further seeks costs or alternative relief.
- [2] It appears that the applicant was employed by the first respondent as a boiler-maker for two successive periods of two months on what were allegedly fixed term contracts. After the end of the period specified in the second contract, when the first respondent would not allow the applicant to continue tendering his services, the applicant referred an unfair dismissal dispute to the commission for conciliation, mediation and arbitration (“the CCMA”).
- [3] The applicant’s case at the CCMA was apparently based on section 186(1)(b) of the Labour Relations Act¹ (“the LRA”) which states –
- ““Dismissal” means that:
- ‘(b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it...’
- [4] At the outset, I must state that both the manner in which the arbitration was conducted by the commissioner and the award leave much to be desired.
- [5] As will be set out below, the commissioner demonstrated bias, xenophobia, and woeful disrespect for the applicant.
- [6] As a point of departure, reference is made to the transcript of the arbitration.²

¹ Act 66 of 1995 as amended

² Page 54 of the index of “record”

- [7] A perusal of the transcript as a whole demonstrates that the commissioner descended into the arena to a far greater degree than is permissible and made it virtually impossible for the applicant to properly articulate his case; thus abrogating the fundamental natural justice principle, *audi alteram partem*.
- [8] The commissioner, in his persistent diatribe directed at the applicant, not only derailed him from giving evidence in a proper orderly fashion, but in addition, advises him as to legal principles, which advices are patently incorrect. For example, he says to the applicant:
- ‘Only when you prove to me that you were dismissed then you have to cross the second level to prove to me that it was unfair. I am brutally honest with you, you have not remotely convinced me that you were dismissed...’³
- [9] The commissioner was woefully misguided in this regard. It is trite, and emerges from section 192(2) of the LRA, that it is for the employer, not the employee, to prove the fairness of a dismissal once same has been established.
- [10] The commissioner goes to the extent of threatening the applicant with “content of the commissioner”. I take this to mean contempt of the commission.⁴ There seems to be no conceivable basis upon which this threat could have been made on the strength of what is contained in the transcript.
- [11] It is correct that a perusal of the transcript does not reveal a coherent body of evidence by the applicant indicating why he had a reasonable expectation that his employer would renew his fixed term contract.
- [12] However, bearing in mind the manner in which this arbitration was

³ Transcript page 68 lines 10 to 15

⁴ Transcript page 79 lines 15 to 20.

conducted by the commissioner, it is hardly surprising that the evidence was not produced. The applicant was severely hampered in giving evidence by the commissioner's constant intervention and badgering.

- [13] The initial fixed term contract was from 19 October to 19 December and it was then renewed from 20 December to 20 February.
- [14] The first respondent elected not to lead any evidence and, accordingly, there is no explanation as to why the contract was renewed on one occasion and then not subsequently renewed. The absence of an explanation should, at the very least, have sensitised the commissioner in respect of what evidence he may have expected and what the possible point of departure for his enquiry should have been.
- [15] Immediately after the applicant is put under oath, the commissioner commences to not only cross-examine him but also prescribe to him precisely how he wants him to answer the commissioner's questions.⁵ The commissioner vigorously and unfairly cross-examined the applicant.⁶
- [16] Coupled with the above, there is evidence which the commissioner, in his haste to dismiss the applicant's case, overlooked, alternatively failed to appreciate the significance of. If the commissioner had decided to descend into the arena to the extent that he did, he should also have assisted the applicant in properly presenting his evidence. The applicant clearly states that one, Mr Makhe ("Makhe"), apparently a director of the first respondent, said words to the effect that the applicant's contract was over and that 'you were complaining about so and so...'⁷
- [17] It seems to me, although the commissioner has made it very difficult to determine with any precision, that what the applicant was saying was that his fixed term contract was not renewed because he had complained about

⁵ Transcript page 62 lines 7 to 16 ff.

⁶ Transcript page 70 lines 15 to 20.

⁷ Transcript page 66 lines 7 to `3.

various issues, which is true.

- [18] He had in fact complained to the Metal and Engineering Industry Bargaining Council ("the MEIBC") in relation to payments due to him by the first respondent.
- [19] This should have been an important consideration for the commissioner to take into account. He completely ignored it. Again, it must be borne in mind that the first respondent elected not to have any evidence led on its behalf.⁸
- [20] Higher up in the same paragraph the applicant gives a reason as to why he may have had a reasonable expectation of the renewal of his contract when he says 'the other guys they worked without a contract even 'til now'.⁹
- [21] The commissioner also repeatedly advises the applicant that he will have an opportunity to cross-examine the first respondent's witness (es)¹⁰ without explaining that this may not be the case. This would clearly mislead a lay applicant. As it was, the first respondent led no witnesses so there was no opportunity to cross-examine.
- [22] Having given that brief synopsis of the transcript and the background to this matter, I now turn to the grounds of review articulated by the applicant in his founding affidavit.
- [23] In the affidavit, unsurprisingly, given the torrid time given to the applicant at the arbitration, he is far more articulate about his complaint. In the first instance, he refers to the complaints that he has against his employer and his attempts to address them through the MEIBC and the Labour Department.
- [24] The answering affidavit lacks any particularity at all and does not constitute what would be considered a proper affidavit dealing with the allegations set

⁸ Transcript page 69 lines 17 to page 70 line 2.

⁹ Transcript page 66 lines 7 to 13.

out in the applicant's affidavit *ad seriatim*. The evidence of the applicant is, accordingly, largely unchallenged. Similarly, the failure of the first respondent to lead a witness at the arbitration left the allegations concerning Makhe's alleged statement and other employees not working on fixed term contracts uncontradicted.

[25] The applicant makes the allegation that the commissioner, before the commencement of the arbitration, told him that the CCMA 'is not money "come come" or an open road to Bulawayo Zimbabwe'.

[26] The applicant is a Zimbabwean. It is trite that employees who are not South African have full access to the South African Labour Dispute Resolution processes.

[27] Bearing in mind what is set out in the award, I am inclined to believe the applicant in relation to this allegation.

[28] The applicant also complains of discrimination by the commissioner.¹¹ The applicant's complaint is that:

'If you are a citizen of Zimbabwe with a valid passport you don't get a fair hearing according to section 23(1) according to the constitution of Republic of South Africa , you are not represented you are even brushed aside as if xenophobia is occurring at the deepest for conciliation mediation and arbitration.'

[29] Clearly, what the applicant is complaining of, when distilled to its basic core meaning, is that the commissioner was biased. There is a second document in the bundle which is also in the form of an affidavit but not on the *pro forma* document provided by this court. It is, however, very much in the same vein as the founding affidavit. Again, the point is made that the contract was not renewed because the applicant challenged his alleged

¹⁰ Transcript page 79 lines 15 to 20, page 81 lines 10 to 14.

¹¹ Page 8 of the application bundle.

underpayment.¹² He further makes the point again that the company has employees working without contracts.¹³ Both of these issues were overlooked by the commissioner.

[30] The applicant once again states that any employee raising a complaint will be dismissed.¹⁴ He also says that the commissioner did not give him a chance to explain the whole story and to give him the documents relating to his dismissal by Makhe. He complains that the CCMA dismissed his case without a proper hearing being held.

[31] I now turn to the award handed down by the commissioner.¹⁵ Without referring to the evidence which may have supported the applicant's case as set out above, the commissioner came to the conclusion that the applicant did not have a reasonable expectation that his contract of employment would be renewed.

[32] Apart from coming to this conclusion without having regard to important evidence and conducting the arbitration in the manner set out above, the commissioner makes certain comments which are nothing short of xenophobic, bigoted and disrespectful. For example he states:¹⁶

'I stand amazed at the audacity of this foreign national to then arrogantly prescribe to his former employer on page 25 of exhibit 1 that he will still REPORT for duty, and adding insult to injury, to INSTRUCT his former employer to pay him monies which he undeniably was not entitled to.'

[33] Not only do the above have absolutely nothing to do with the issues in respect of which the second respondent was obliged to make a decision but they are also intended as nothing more or less than an attack on the applicant.

¹² Page 12 of the application bundle.

¹³ Transcript page 66 lines 7 to 13.

¹⁴ Page 12 of the application bundle.

¹⁵ Pages 1 to 13 of the record bundle.

¹⁶ Page 6 of the application bundle para 22.

[34] The commissioner gratuitously includes the following in his award:¹⁷

'I purposely, yet entirely respectfully, attach the following excerpt specifically for Mr Simba to ponder on as he contemplates his future in the robust business world in South Africa which may differ somewhat from the scenario in Zimbabwe. Marcus C commented as follows on the stressful 'nature' attributed to the modern 'workplace' in *Visser v Amalgamated Roofing Technologies t/a Barlow World* (2006) 27 ILJ 1567 (CCMA):

"A modern workplace is not a heavenly garden of smiling Buddha's focused on the welfare of others. More often than not it presents the contrary picture of a highly stressful and robust environment in which the pressures and demands to perform on staff and, even more so, members of management to carry the can, can on occasion contribute to managers conducting themselves in a manner that is less desirable. Managers are after all not infallible. They are subject to human limitations like the rest of us, and cannot reasonably be expected to conform to the standards of a saint in their conduct towards staff..."

[35] Further, the commissioner has the following to say:¹⁸

'Mr Simba should regard himself as fortunate that I have elected not to issue costs against him personally for pursuing a frivolous and vexatious matter such as this at the CCMA. More so – as the South African taxpayer has to bear the full costs for Mr Simba's case at the CCMA.'

[36] Again, this is nothing short of bias and xenophobia. None of the above have any place in a CCMA award, and are, to say the very least, extremely distasteful to any person who associates him or herself with the values enshrined in the Constitution.

[37] It is also noteworthy that the commissioner states that it is only with reluctance that he does not make an order for costs against the applicant.

¹⁷ Page 8 para 29 onto page 9.

Again, this demonstrates his bias.

- [38] There is a rather peculiar document which appears towards the very end of the record bundle which, on the face of it, is a copy of the award.¹⁹
- [39] It seems as if the document may be a version of the award which was edited by someone. It is interesting that on page 110, paragraph 22 the words “will still report” and ‘instruct” are in bold capitals, underlined, whereas in the final award referred to above the words are in normal capitals and not underlined. The comment appears under paragraph 22 on page 110 “Please don’t use bold caps the language is already rather strong” there is then another correction underneath that. Then in paragraph 31 on page 113, there is similarly an editing which is largely carried through to the final award and the editorial comment is “Please Braam tone it down a bit”.
- [40] I am not entirely sure what to make of these editorial comments. I point them out merely to illustrate that the commissioner could not have been unaware of the perception that his conduct and the award created.
- [41] This review application should not have been opposed by the first respondent. The award and the conduct of the commissioner are manifestly outside the bounds of what can be regarded as acceptable, just, fair and reasonable.
- [42] I also find it somewhat astonishing that the commissioner has elected not to file an affidavit and allow allegations of the nature contained in the applicant’s affidavits to go unchallenged.
- [43] Whilst there are procedural difficulties as far as this review is concerned, I was enjoined, in the first respondent’s heads of argument, to deal with the matter on its merits, which I have duly done.

¹⁸ Page 9 para 31.

¹⁹ Page 105 to 114.

[44] There is no possible basis, in justice and when applying the relevant principles and the fundamental requirement for a hearing that at least meets the standard of *audi alteram partem*, that the award can survive a review application.

[45] As a result, at least to a serious degree of the commissioner's conduct as set out above, there is insufficient evidence to place me in a position to substitute the commissioner's award.

[46] I have taken into consideration the fact that the first respondent failed to file a proper answering affidavit.

[47] In the premises, I make the following order:

47.1. The award is set aside;

47.2. The matter is referred back to the CCMA for adjudication by a commissioner other than the second respondent; and

47.3. The first respondent is to pay the costs of this review.

Snider, A J

Acting Judge of the Labour Court

Appearances

For the Applicant: In person

For the First Respondent: Advocate Roeloffs

Instructed by: De Villiers and Du Plessis Attorneys

Labour Court