



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR01/13

In the matter between:

VISKO SEA PRODUTS (PTY) LTD

Applicant

and

JJ FOURIE

First Respondent

COMMISSIONER BULELANI BUSAKWE

Second Respondent

STATUTORY COUNCIL FOR THE SQUID AND

RELATED INDUSTRIES OF SOUTH AFRICA

Third Respondent

Heard: 28 January 2014

Delivered: 13 February 2015

Summary: The provisions of section 192(1) that the employee must establish the existence of a dismissal are peremptory. The arbitrator's decision of the existence of dismissal based on the applicant's failure to prove that the first respondent had resigned constitutes a reviewable irregularity.

JUDGMENT

LALLIE, J

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent (the arbitrator) and replacing it with a finding that the first respondent resigned voluntarily from the applicant's employment. It is opposed by the first respondent.

Factual background

- [2] The first respondent worked for the applicant as a skipper for about 13 to 14 years before the employment relation was terminated. Aggrieved by the termination, he referred an unfair dismissal dispute to the third respondent which was arbitrated by the second respondent (the arbitrator). At the arbitration, the applicant denied having dismissed the first respondent and submitted that he resigned. The arbitrator, however, found that the first respondent did not resign but was dismissed by the applicant in a manner which was both substantively and procedurally unfair. He ordered the applicant to pay the first respondent compensation in the amount of R 151 181, 44. It is that award which the applicant seeks this court to review and set aside.
- [3] The applicant sought to rely on a number of grounds. Firstly, it submitted that the arbitrator committed a material irregularity on the manner in which he conducted the arbitration in that instead of requiring the first respondent to prove his dismissal, he called upon the applicant to prove that the first respondent did not resign. The first respondent denied and submitted that the allegation that the applicant's approach constituted an irregularity was the applicant's irrelevant opinion which stands to be struck out. He added that even if the opinion is admissible, it holds no credence as the commissioner's reasons for rejecting the applicant's version was fair and based on objectively ascertainable facts contained in correspondence and undisputed evidence.
- [4] Section 192 (1) of the Labour Relations Act 66 of 1995 (the LRA) provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. In Section 192(2), the employer is required to prove the fairness of the dismissal after the existence of the dismissal has been established.

[5] It was argued on behalf of the applicant that a reading of the award leaves one with an impression that the arbitrator required the applicant to prove that the first respondent had resigned and if that was done, he would be satisfied that the first respondent was dismissed. The applicant sought to rely on excerpts of the award where the arbitrator expressed the view that none of the witness convinced him that the applicant resigned. He also made a finding that as the first respondent did not resign, he had to determine whether he was dismissed. The applicant argued that the arbitrator's reasoning was flawed in that the arbitrator was obliged to determine whether the first respondent had established his dismissal. As the irregularity is fundamental and an error of law, it constitutes sufficient ground to have the award reviewed and set aside. The first respondent conceded that he had the onus to prove his dismissal, he however, argued that one needs to prove a resignation then a dismissal. He denied that there was any flaw in the process and that the letter confirming his resignation contained fabrication.

[6] Section 192 of the LRA was interpreted thus in *State Information Technology Agency (Pty) Ltd v Sekgobela*¹

'It is clear that section 192 provides for a two stage process in dismissal disputes. First the employee who alleges that he/she was dismissed must prove that there was in fact dismissal and once the existence of the dismissal is established then the employer must prove that the dismissal was fair. It is clear, therefore, that the onus to prove the existence of the dismissal lies first on the employee. The word "must" in section 192 means that the provisions of the section are peremptory. The employee must set out the facts and legal issues which substantiate his assertion that a dismissal occurred. Once the employee has proved that dismissal did take place, the onus is shifted to the employer who must prove that the dismissal was for a fair reason such as for instance misconduct.'

[7] Both the applicant and the first respondent were not legally represented at the arbitration and relied on the arbitrator to lend a helping hand. The arbitrator failed to apprise the first respondent of his obligation to present facts which established his dismissal. A proper reading of the award reflects that the

¹ [2012] 10 BLLR 1001 (LAC).

arbitrator based his decision of the existence of the first respondent's dismissal on the applicant's failure to prove that the first respondent resigned. He was wrong. He should have based his decision on facts presented by the first respondent as section 192(1) is peremptory. Absent a decision of the existence of a dismissal based on facts presented by the first respondent, the arbitrator had no jurisdiction to determine the fairness of the disputed dismissal. His decision of the fairness of the dismissal is a nullity. This ground, on its own, rendered the award reviewable.

[8] The arbitration award stands to be reviewed and set aside as the arbitrator committed a gross irregularity which placed his award outside the band of reasonableness by not applying section 192(1) of the LRA in determining the existence of the first respondent's dismissal.

[9] I have considered the issue of costs. I am of the view that granting a costs order against an employee who attempted to assert his right in terms of an award would not be appropriate. It would be in conflict with the letter and the spirit of the LRA.

[10] In the premises, the following order is made:

10.1 The arbitration award issued by the second respondent under case number SCSi 01-2013 and dated 4 March 2013 is reviewed and set aside.

10.2 The matter is remitted to the third respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

Appearance

For the Applicant: Ms Maeso of Shepton & Wylie

For the Respondent: Ms Curtain of J&R Bester & Associates

LABOUR COURT