



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR1809/13

In the matter between:

CARLBANK MINING CONTRACTS (PTY) LTD

Applicant

and

N S MAKHUBELA

First Respondent

LANCE CELLIER N.O.

Second Respondent

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT AND LOGISTICS INDUSTRY

Third Respondent

Heard: 10 July 2015

Delivered: 16 February 2016

JUDGMENT

VAN AS, AJ

Introduction

- [1] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (“the LRA”) to review and set aside the arbitration award which the second respondent handed down on 5 August 2013 (“the arbitration award”).
- [2] The first respondent opposes the review application. The second and third respondents abide the decision of this Court.
- [3] The applicant seeks to review and set aside the arbitration award on the following grounds:
- 3.1 The second respondent displayed bias in favour of the first respondent and against the applicant during the arbitration proceedings (“the first ground of review”);
- 3.2 The second respondent committed a gross irregularity during the conduct of the arbitration proceedings by taking into account irrelevant evidence, alternatively, evidence which was not properly before him during the arbitration proceedings (“the second ground of review”);
- 3.3 The second respondent arrived at a conclusion which no reasonable decision-maker could have reached and thereby committed a reviewable irregularity in finding that the applicant had coerced the first respondent into concluding a fixed term contract (“the third ground of review”).

The material facts

- [4] The applicant is a temporary employment service as contemplated in section 198 of the LRA. The applicant places and supplies employees to various clients, including RTT Couriers.

- [5] On 7 February 2011, the applicant and the first respondent entered into a fixed term contract of employment in terms of which the first respondent was to be placed as a driver at RTT Couriers. This fixed term contract was due to expire on 31 March 2012.
- [6] On 24 February 2012, the applicant notified the first respondent in writing that the fixed term contract was to expire on 31 March 2012. The first respondent confirmed receipt of this notice in writing.
- [7] On 23 March 2012, the first respondent returned his uniform and requested his UIF card. The applicant offered alternative employment to the first respondent which he refused to accept.
- [8] The first respondent thereafter referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in which he alleged that RTT Couriers had unfairly dismissed him.
- [9] The matter was transferred to the third respondent and the applicant was substituted as the employer party.
- [10] The dispute was thereafter arbitrated before the second respondent who found that the applicant had coerced the first respondent into concluding the fixed term contract but thereafter retrospectively reinstated the first respondent on another fixed term contract for a further period of some thirteen months.
- [11] I shall now deal with the three grounds of review.

The first ground of review

- [12] Mr Van der Westhuizen who appeared for the applicant argued that it is clear from the transcript of the arbitration proceedings ("the transcript") and the arbitration award that the second respondent was biased in favour of the first respondent. I have read and considered the transcript and the arbitration award. Whilst it is so that the second respondent made

a number of unsubstantiated comments in the arbitration award, there is no evidence before me to suggest that the second respondent displayed bias against the applicant during the arbitration proceedings. The fact that the second respondent may have taken judicial notice of irrelevant and unsubstantiated evidence in arriving at an incorrect conclusion does not, *per se*, create a reasonable apprehension of bias in favour of the first respondent and against the applicant.

[13] There is, therefore, no merit in the first ground of review.

The second ground of review

[14] Mr Van der Westhuizen also submitted that it is apparent from the arbitration award that the second respondent took into account evidence which was not placed before him during the arbitration proceedings in concluding that the first respondent's dismissal was unfair. He specifically referred me to paragraph 17 of the arbitration award where the second respondent observed

'It would then be most convenient for the employer to simply insert the termination date of the contract at a time suitable to them or their client. This and other ploys by employers to bypass fair employment procedures relating to dismissals are regrettably a common, but hopefully a declining feature brought to the table at the CCMA and other dispute resolution forums.'

[15] As stated hereinabove, I have read and considered the transcript. There was, in my view, no basis for the second respondent to tar the applicant with the same brush as those unscrupulous employers who, according to the second respondent, regularly mislead unsuspecting and unsophisticated employees into concluding fixed term contracts of employment.

[16] This is especially so since the first respondent conceded under cross-examination that he has not 'signed a blank paper in [his] life'.

- [17] It is undesirable for a CCMA commissioner to make blank or general statements about the general behaviour of employers or for that matter, employees who appear before him at the third respondent or the Commission for Conciliation, Mediation and Arbitration (“the CCMA”).
- [18] However, such a statement, whilst undesirable does not, in my view, constitute a reviewable irregularity as contemplated in section 145 of the LRA.
- [19] There is, therefore, also no merit in the second ground of review.

The third ground of review

- [20] It is apparent from the arbitration award that the second respondent essentially concluded that the applicant had coerced the first respondent into concluding the fixed term contract of employment.
- [21] It is also apparent from the arbitration award that the second respondent, in concluding that the applicant had so coerced the first respondent, made a credibility finding in favour of the first respondent and against the witnesses of the applicant. It is trite that a Court of review should be extremely reluctant to interfere with credibility findings made by a trier of fact such as the second respondent.¹
- [22] I am, however, satisfied that the contradictions and inconsistencies in the first respondent’s evidence during the arbitration proceedings are so material as to allow me to disturb the credibility finding which the second respondent made in favour of the first respondent and against the applicant’s witnesses.
- [23] The second respondent also does not furnish any reasons for rejecting the evidence of the applicant’s witnesses other than to blandly state that he found the third respondent’s testimony to be credible despite his confusion concerning certain of the dates.

¹ *Cox v CCMA and Others* (C360/99) [2000] ZALC 111 (02 October 2000).

- [24] In my view, there was simply no credible evidence before the second respondent which allowed him to conclude that the applicant had duped the first respondent into signing a “blank” fixed term contract. This is again especially so since the first respondent, somewhat categorically, conceded under cross-examination that he had not previously signed “a blank paper”.
- [25] It is also extremely unlikely and indeed fanciful that the applicant would have duped the first respondent into signing such an inchoate contract of employment so as to allow it to simply insert the period of employment at a later date should the applicant want to get rid of the first respondent.
- [26] Mr Sithi who appeared for the first respondent argued that an incomplete or unenforceable fixed term contract of employment meant that the first respondent was a permanent employee of the applicant at the time of his dismissal. I disagree. An inchoate or unenforceable contract of employment between the parties simply meant that there was no contract of employment between the parties. It certainly did not allow the second respondent to rewrite another fixed term contract of employment for the parties which is exactly what the second respondent did in paragraph 27 of the arbitration award.
- [27] Accordingly, I find that the conclusion reached by the second respondent, namely, that the applicant coerced or duped the first respondent into concluding an inchoate or incomplete fixed term contract of employment is not a conclusion which a reasonable decision-maker could have reached on the evidence before the second respondent during the arbitration proceedings.²
- [28] I therefore uphold the third ground of review.

² See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

Conclusion

[29] Mr Van der Westhuizen argued that I am in as good a position as another arbitrator to determine the merits of the matter and that I should therefore not remit the dispute to the third respondent but should instead substitute the arbitration award with an order that the applicant did not dismiss the first respondent. Mr Sithi made no submission concerning the remission of the dispute to the third respondent.

[30] In my view, there would be no purpose in remitting the dispute to the third respondent to be arbitrated before an arbitrator other than the second respondent.³

[31] Accordingly, I make the following order:

31.1 The arbitration award is reviewed and set aside;

31.2 The arbitration award is substituted with an order that the applicant did not dismiss the first respondent and the third respondent therefore lacked the requisite jurisdiction to arbitrate a dispute concerning the fairness of the alleged dismissal of the first respondent;

31.3 There is no order as to costs.

Van As, AJ

Acting Judge of the Labour Court

³ See *Tedco Plastics (Pty) Ltd v NUMSA and Others* (2000) 21 ILJ 271 (LC); *Protekon (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 1105 (LC).

Appearances:

For the applicant: Advocate G van der Westhuizen

Instructed by: MacRoberts Attorneys

For the first respondent: Mr Sithi of Mkhonto Attorneys

LABOUR COURT