



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: PR 09/15

In the matter between

EDCON LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

F FATAAR N.O

Second Respondent

RANLEY PRINCE

Third Respondent

Heard: 17 November 2016

Judgment: 9 December 2016

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 10 December 2014. Also before the court is an application to condone the late filing of the review application, an application by the third respondent to dismiss the review application and an application to enforce the award brought up by the third respondent under s 158(1)(c) of the LRA. The latter application was previously postponed and set down for hearing simultaneously with the review application.

Preliminary issues

- [2] Turning first to the condonation application, the primary reason for the failure to comply with the statutory time limit established by s145 is some initial confusion on the part of the applicant as to who was representing the third respondent which led to delays in the service of some documents. The review application ought to have been served and filed by 23 January 2015. It was filed on that day, but not served on the third respondent until 27 January 2015. The record and the Rule 7A (6) were served on the third respondent's erstwhile attorneys of record 16 days late, but for reasons unknown to the applicant, filed about four months late. The Rule 7A (8) notice and supplementary affidavit were served on the third respondent's erstwhile attorneys two days late, and filed 3 ½ months late because the applicant only then discovered that they were not in the court file. The application for condonation was filed on 4 September 2015. The third respondent's main complaint is that the application for condonation was filed only in September 2015, in circumstances where the applicant had been aware of the delays and the need to seek condonation well before that date. While the third

respondent is correct to note that parties are generally required to file applications for condonation as soon as possible after becoming aware of the need for condonation, this is an inflexible rule. In accordance with the relevant authorities, the applicant's prospects of success must necessarily be taken into account, and, as would appear hereunder, these are good. In my view, the applicant's conduct is not such that it warrants the refusal of the application for condonation. The delays are not excessive and the applicant has provided a reasonable explanation for each period of the delay. For these reasons, the application for condonation is granted.

- [3] Turning next to the application to dismiss, the application is predicated primarily on the assertion that the record of the proceedings under review is incomplete. This is not disputed, but the applicant contends that in terms of both the rules and the practice manual, it has elected to file those parts of the record that it regards as relevant to the matter. Indeed, paragraph 11.2.6 of the practice manual reminds applicants that rule 7A (6) requires an applicant to copy and deliver only those parts of the record necessary for the purposes of the review and that the filing of unnecessary portions of the record may well have consequences in relation to an order for costs. The applicant's view is that the matter can be heard on the papers before the court because the defects of which it complains appear from the face of the arbitrator's award. In my view, there is nothing inherently wrong with this approach. The applicant must stand or fall by the election it has made. If the matter proves incapable of determination on the papers that the applicant avers are sufficient, then it must fail. It is not open to the third respondent to contend, as he does, that merely because certain parts of the record were not filed by the applicant in support of its application, he is inherently prejudiced and that the court ought to dismiss the application on that basis alone. In my view, there is no merit in the application to dismiss.

Factual background

[4] The material facts are not in dispute and are set out in some detail in the award under review. The arbitrator records that the applicant is a retailer and has a store at the Greenacres centre in Port Elizabeth, as well as a warehouse located in Kensington in the same city. There is also a stockroom in the Greenacres store from which goods are dispatched to the shop floor.

[5] The third respondent was employed by the applicant for some eight years as a store assistant. He was employed on what was termed a 'casual contract' (referred to in some jurisdictions as a 'zero-hours contract'), an integral term of which was that the third respondent could be placed at any site as operational needs dictated. The relevant term of the contract reads as follows:

Due to the inherent flexible nature of this type of employment contract, Edcon reserves the right to schedule you in accordance with business requirements. This may mean that you may be required to work in different departments within the store. You will also be asked to fulfil the tasks of the different positions that you are competent in. This means that you will be expected to work in any department for which you are competent as business needs require.

[6] In other words, the contract permitted the applicant to hire the third respondent with no guarantee of work, other than when needed by the applicant. The third respondent had rendered services on this basis for some 8 years, mostly at the warehouse, but now and then at the Greenacres store. During his employment, the third respondent was dismissed on two occasions. The first was in May 2012 when the third respondent was dismissed for gross insubordination. The third respondent disputed the fairness of his dismissal and referred the matter to the CCMA. After an arbitration hearing, the presiding commissioner directed as follows:

The respondent must reinstate the applicant on the same terms and conditions as governed at the date of dismissal. The applicant, Ranley Prince must report for duty on 25 September 2012.

- [7] The third respondent did not report for work on 25 September 2012. At the end of October 2012 the third respondent was contacted and informed that he was required to report to the Greenacres store and that he would be working in the stockroom. This decision, according to the applicant, was driven by its current operational needs. The third respondent did not report for work. He formed the view that the terms of the award issued in his favour required him to be placed at the warehouse, where he had been working at the time of his dismissal. He was also concerned that there would be fewer hours of work available to him at the store. Various discussions took place between the parties, but on 30 May 2013, the applicant wrote a letter to the third respondent instructing him to report to the store. The applicant did not report for duty. On 15 June 2013, the applicant wrote another letter requiring the third respondent to report at the store on 20 June 2013, and that a failure to do so may result in disciplinary action being taken against him. It is not disputed that the third respondent again failed to report for duty.
- [8] The third respondent was then called to attend a disciplinary hearing on a charge that he was grossly insubordinate when on 25 September 2012 and 20 June 2013 he refused to comply with an instruction to report for duty. The third respondent was found guilty of this charge and dismissed on 23 August 2013.

The award

- [9] The arbitrator commenced his analysis of the evidence by noting that it is trite that an instruction given by an employer must be reasonable and lawful. In his view, the charge of gross insubordination was not a reasonable one, for two reasons. The first is *'whether an employer can charge an employee for gross insubordination if he fails to attend work on a certain day after instruction was given to him to do so (sic).'*' In the arbitrator's view, the charge of insubordination in the present instance was unfair. The arbitrator sought to draw an analogy was

a dismissal for insubordination for refusing to attend a disciplinary hearing after being instructed to do so and held that similarly, '*an employee has an inherent right to decide whether he/she wants attend work or not* (sic)'. This was particularly so in a case such as the present where the relationship is of a casual nature. The arbitrator noted that:

'The days of slavery are long gone when people are forced to work without any direction given. If an employee has this right, it cannot therefore be said that any instruction to report for duty is reasonable and lawful. If the employee does not attend work, he will have to face the consequences thereof, one of which is absence without leave for desertion.'

- [10] The second issue identified by the arbitrator related to the third respondent's compliance to otherwise with the award issued in his favour on 2 September 2012. The arbitrator observed that in terms of the award, the third respondent was to be reinstated on the same terms and conditions. In regard to the meaning of the word 'reinstate', the arbitrator took the view that it was a term and condition of the third respondent's employment that he work at the warehouse, and not the store. In the arbitrator's reasoning is apparent from the following paragraph (para 31 of the award):

If we observe the evidence relating to the applicant's employment, he had been working at the Warehouse for 8 years, even though he was classified as a casual. In my view, even though the applicant had signed the casual contract, by custom and practice, the respondent had created a situation where the applicant was permanently is placed and stationed the applicant to work at the Warehouse. Though this practice in custom, working at the Warehouse had become part of the applicant's conditions of service (sic).

Grounds for review

- [11] The applicant contends that the arbitrator committed misconduct in relation to his

duties alternatively, that he committed a gross irregularity rendering the award reviewable. The applicant relies on two principal grounds – the first is that the commissioner committed a material error and exceeded his powers when he decided that the applicant had not complied with the arbitration award issued in September 2012. In particular, the applicant contends that the arbitrator ignored the formal agreement between the parties to the effect that the third respondent could be placed on any site depending on the applicant's operational needs. Secondly, the applicant contends that it was unreasonable for the arbitrator to conclude that the third respondent was permanently placed at the warehouse and and that the applicant was not entitled to require the third respondent to report for duty at the store.

Analysis

[12] I deal first with the arbitrator's conclusions regarding the place of work and in particular, the conclusion that the applicant failed to comply with the September 2012 award by failing to reinstate the third respondent on the same terms and conditions. It is clear to me from the third respondent's affidavit that his perceived right to refuse the instruction to work at the Greenacres store room arose from the first award given in his favour. The arbitrator accepted the submission on the basis of a finding that the third respondent working in the warehouse had become a term and condition of his employment by custom and practice. There was no basis on the evidence before the arbitrator to come to this conclusion. Although there is authority to support the proposition that a long-standing practice can give rise to a desert term of the contract of employment, the regularity of an occurrence (for example, the provision of the benefit) does not in itself constitute or give rise to a contractual term, unless the parties are becoming intention of creating a contractual right (see *CEPPWAWU obo Konstable & others v Safcol* [2003] 3 BLLR 250 (LC)).

[13] There was no evidence before the arbitrator that the applicant had agreed or

intended to agree to a term that would afford the third respondent the right to be employed only at the warehouse, or that it ever waived the right to transfer the third respondent from the warehouse to the store should the need have risen. What the commissioner did by finding that the third respondent had a contractual right to work in the warehouse, was effectively to rewrite the contract between the parties, now making it mandatory for the applicant to continue to employ the third respondent in the warehouse. In doing so, the arbitrator not only made a material error of law (by misconceived the nature on which custom and practice may give rise to contractual terms), but he exceeded his powers. The terms of the contract, which were before the arbitrator, were clearly to the effect that the applicant was entitled to place the third respondent on any site if there was an operational need to do so. Despite the September 2012 arbitration award, the third respondent remained employed on the initial contract – the award did not give him a right that extended beyond the terms of that contract; it merely confirmed that he was entitled to be reinstated in terms of that contract. The arbitrator did not reject evidence proffered on behalf of the applicant that the operational needs at the time of the third respondent's reinstatement were to the effect that there was a need for an employee to work in the Greenacres store, since the staff complement at the warehouse was full.

- [14] The second ground for review in which the applicant relies is that of the arbitrator's analysis of the nature of gross insubordination. Even if I grant that the commissioner was correct in his view that in the circumstances of the present case, the third respondent had an inherent right to decide whether he wished to attend work or not, it does not follow that any instruction to report for duty is unreasonable or unlawful, or both. The commissioner's view that if an employee does not attend work (which he or she is entitled to do) that the consequences are limited to charges of absence without leave or desertion, this is a fundamental misunderstanding of the nature of the contract of employment. The primary obligation of an employee is to work. A refusal to work might result in a charge of desertion and/or absenteeism, but there is no reason were it ought

not, particularly where an instruction to report for duty is given in clear terms and understood by the employee, do constitute an act of insubordination. The analogy was slavery is entirely in apposite – in the present instance, the third respondent was not being forced to work. He wished to work, but only on his terms and without consideration for his contractual obligation to render work according to the applicant's operational needs.

[15] What the arbitrator ignored was the fact that the September 2012 arbitration award required the first respondent to restore the employment relationship. Had it not been for the award, the applicant could merely have retained the third respondent in the casual pool if he had refused to work as requested. But the effect of the award was to require the applicant to provide the third respondent with employment provided that he reported for duty as directed. It is not in dispute that of the third respondent breached a term of the award by not reporting for duty on the stipulated date. That breach was aggravated by the passage of time. By the time the final instruction to report for duty was given, the third respondent had not reported for duty for some 10 months. The applicant elected in these circumstances to charge the third respondent was gross insubordination for refusing to comply with an instruction to report for duty. The third respondent stubbornly refused to continue employment on the applicant's terms and on the terms that he had agreed to in terms of his contract with the applicant. To the extent that this evidence was ignored by the arbitrator and to the extent that he mistakenly concluded that even in the face of an arbitration award requiring him to report for duty, it was not insubordinate for the third respondent to refuse to do so on account of an inherent right to refuse to work, the outcome of the proceedings under review (i.e. that the charge of gross insubordination was not reasonable, that it was unfair and that it warranted the third respondent's reinstatement, in my view, the arbitrator's decision fails to meet the threshold requirement of reasonableness.

[16] In summary, the third respondent was contractually bound to render services as

required by the applicant in accordance with its operational needs. The arbitration award issued in September 2012 required him to report for duty on these terms. It was not open to the third respondent to elect not to work simply because he preferred to work at the warehouse rather than the store. The commissioner's findings that a refusal to work in the circumstances could not constitute an act of gross insubordination ignored basic legal principles and the evidence that served before him, and that the consequence of an unreasonable outcome. The award under review therefore stands to be set aside.

[17] Given that the award under review is to be set aside, it follows that the s 158(1) (c) application falls to be dismissed.

Costs

[18] Finally, in relation to costs, the court is a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In the present instance, the third respondent has argued the case on his own behalf and remains unemployed. In the circumstances, notwithstanding the applicant's success in the application, it seems to me that the appropriate order is one in terms of which each party should bear its own costs.

I make the following order:

1. The arbitration award issued by the second respondent on 10 December 2014 under case number ECPE 4486-13 is reviewed and set aside.
2. The matter is remitted to the first respondent for rehearing before a different commissioner.
3. The s 158(1) (c) application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. J Grogan, instructed by Norton Rose Fulbright

For the third respondent: In person