



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 2615/13

In the matter between:

VUSA-ISIZWE SECURITY (PTY) LTD

Applicant

and

RAMPAI, N B N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

SOLOMON HUMANE & 2 OTHERS

Third and Further Respondents

Heard: 28 February 2017

Judgment: 4 April 2017

Summary: Unopposed application to review and set aside arbitration award – contentions that CCMA lacked jurisdiction to entertain the dispute without merit – however Commissioner’s award of reinstatement unreasonable because such not reasonably practicable. Award set aside to that extent and order granted remitting the matter to the CCMA for a fresh determination on the question of relief only.

JUDGMENT

BARNES AJ

Introduction

- [1] This is an application to review and set aside an arbitration award handed down by the first respondent (“the Commissioner”) on 12 November 2013 in favour of the third to further respondents (“the employees”).
- [2] The Commissioner found that the employees had been dismissed by the applicant and that their dismissals were substantively and procedurally unfair. The Commissioner granted the employees reinstatement together with backpay.
- [3] The applicant is a labour broker who placed the employees with China African Precious Metals (Pty) Ltd, known as CAPM Gold. The employees rendered services to CAPM Gold as investigators from December 2012 until their services were terminated on 22 August 2013.
- [4] The applicant seeks to review the arbitration award on a number of alternative grounds. First, the applicant contends that the employees’ employment terminated automatically upon the termination of the service agreement

between itself and CAPM Gold. Therefore, contends the applicant, the employees were not dismissed and the Commission for Conciliation Mediation and Arbitration (“the CCMA”) had no jurisdiction to entertain the dispute.

- [5] Second, the applicant contends that that even if the employees were dismissed, the Commissioner found that they ought to have been dismissed for operational reasons. Therefore, contends the applicant, the dispute before the Commissioner was one about retrenchment which the CCMA lacked jurisdiction to entertain.
- [6] Third, the applicant contends that even if the employees were dismissed and such dismissals were unfair, the termination of the service agreement between itself and CAPM Gold meant that reinstatement is not reasonably practicable within the meaning of section 193(2)(c) of the Labour Relations Act¹ (“the LRA”). There is, as the applicant puts it “nowhere to reinstate the employees to.” The applicant contends that the award of reinstatement in these circumstances was unreasonable and cannot stand.
- [7] Finally, the applicant contends that the Commissioner’s calculation of backpay was incorrect in that only one of the employees earned R12 500.00 per month while the other two earned R8 000.00 per month. The Commissioner awarded backpay on the basis that all three employees earned R12 500.00 per month.
- [8] The employees, despite proper service upon them, have not opposed the application.

The Record

- [9] The record in this matter is incomplete. For reasons which have not been explained, the Commissioner failed to electronically record the arbitration proceedings. The CCMA’s notice of filing in terms of Labour Court Rule 7A(3) records that:

¹ Act 66 of 1995.

“The Commissioner confirmed that he did not electronically record the proceedings, only the handwritten notes were done.”

- [10] The Commissioner’s handwritten notes have been filed. They are however of a poor quality. They are illegible in part and do not appear to constitute a complete record of either the evidence led or the argument presented at the arbitration.
- [11] Despite this, the applicant has not attempted to reconstruct the record. Nor has it sought to persuade the Court that the defects in the record cannot be cured, despite its best efforts to do so. The applicant is content to rely on the incomplete record filed in this matter which consists only of the documentary evidence handed in at the arbitration and the unsatisfactory notes kept by the Commissioner.
- [12] In circumstances such as these, the court will decide whether or not the award is reviewable by looking at all the evidence available, the documentary evidence and the record as incomplete as it may be.² It is however well established that an applicant who seeks relief in a review on the basis of an incomplete or defective record runs the risk that it will be unsuccessful on that ground alone.³

The Applicant’s Grounds of Review

- [13] Mr Snyman, who appeared for the applicant, submitted correctly that the applicant’s first and second grounds of review pertain to whether the CCMA had jurisdiction to entertain the dispute before it and that, this being the case, the review test of constitutional reasonableness established in the *Sidumo*

² *Doornpoort Kwik Spar CC v Odendaal and Others* (2008) 29 ILJ 1019 (LC) at para 7.

³ *Metologik Engineering & Manufacturing CC v Fernandes and others* (2002) 23 ILJ 1592 (LC) at para 10. See also *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO and others* (2001) 22 ILJ 648 (LAC) at para 9 and *Doornpoort Kwik Spar CC v Odendaal and Others* (2008) 29 ILJ 1019 (LC) at para 7.

judgment⁴ does not apply. Instead, the applicable test is whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed.⁵

[14] The applicant's contention that the employees were not dismissed but that their employment terminated automatically is founded on two key factual allegations, namely:

14.1 that each of the employees was employed on a fixed term contract directly linked to the continuation of the service agreement between the applicant and CAPM Gold; and

14.2 that on 11 August 2013, CAPM Gold gave written notice of the termination of the service agreement with the applicant and of the fact that it would no longer require the services of investigators.

[15] In argument, Mr Snyman accepted that the applicant's contention that the employees' employment terminated automatically depends on establishing the existence of these two facts.

[16] In my view, neither of these facts is established on the record before me. In relation to the former, the employees' contracts of employment do not appear to have formed part of the documentary evidence presented at the arbitration. A single page of a contract of employment does form part of the record. It is however not clear who it belongs to. It is incomplete and unsigned. Notably, it does not appear to be a fixed term contract.

[17] Relevant to the second factual question is a letter from CAPM Gold to the applicant dated 11 August 2013 which reads as follows:

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2008) 2 SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

⁵ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at paras 40 and 41; *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para 27.

“CAPM-Orkney has reviewed the contract we have with Vusisizwe (Pty) Ltd and have come to a conclusion that we no longer require your services of investigators. We therefore formally instruct you to terminate your investigation services with CAPM with immediate effect due to the fact that CAPM is not operational as planned initially.”

- [18] While it is apparent from this letter that CAPM Gold sought to terminate the services of the investigators placed with it by the applicant, it is by no means clear that it sought to terminate the entire service agreement with the applicant. Moreover, neither this letter nor any other aspect of the record, provides any clarity as to the nature and extent of the service agreement between the applicant and CAPM Gold.
- [19] So much for the documentary evidence handed in at the arbitration. The Commissioner's hand-written notes fail to shed any further light on these issues. That, as stated above, is the full extent of the record before me.
- [20] The applicant has therefore failed to demonstrate that the key facts asserted by it in support of its contention that the employees were not dismissed were in existence at the time of the arbitration. This ground of review must accordingly fail.
- [21] The applicant's second ground of review is based on the contention that because the Commissioner found that the employees ought to have been dismissed for operational requirements, the dispute before him was one about retrenchment, which the CCMA lacked jurisdiction to entertain. This contention is, in my view, illogical on its face. It is, moreover, at odds with the applicant's own version of events pertaining to the termination of the employees' contracts of employment. The applicant's version is as follows:

22.1 On 13 August 2013 the applicant suspended the employees. No reasons were given.

22.2 On 22 August 2013 the applicant terminated the employees'

employment. The reason given was that their “period of employment had expired.”

22.3 No hearing was held prior to the termination of the employees’ employment.

22.4 No consultation in terms of section 189 of the LRA was held prior to the termination of the employees’ employment.

22.5 There has never been any suggestion by the applicant that it was retrenching the employees.

[22] There is accordingly, on the applicant’s own version, not a single fact in support of the contention that the employees were retrenched. The Commissioner ruled that the applicant ought to have followed the procedure set out in section 189 of the LRA prior to dismissing the employees, not that it did so.⁶ Plainly, it did not. The dispute before the Commissioner was therefore not one about retrenchment.

[23] It follows that the applicant’s attempts to review and set aside the award on the basis that the CCMA lacked jurisdiction to entertain the dispute must fail.

[24] The applicant did not seek to impugn the Commissioner’s findings that the employees were dismissed by the applicant, and unfairly so, on any other basis. Those findings must accordingly stand.

[25] I am however of a different view in relation to the applicant’s third ground of review, namely whether the reinstatement granted by the Commissioner was reasonable. Irrespective of whether or not CAPM Gold terminated the entire

⁶ The Commissioner made this clear in his award when he said the following: “*The Respondent should have, but did not, dismiss the Applicants for operational requirements. It simply terminated their contracts. In this case, section 189 of the LRA provides clear directives on how such dismissals are to be effected. It is my view that the respondent seriously flouted the Applicants’ right to fair treatment simply to satisfy the demands of its client. Such demands were, from the evidence submitted by the Respondent, not even substantiated by any form of details.*”

service agreement it had with the applicant, it is clear from the letter quoted above that it indicated that it no longer required the services of the investigators placed with it by the applicant. Those were the positions held by the employees prior to their dismissal.

- [26] The ordinary meaning of “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions.⁷ On the record before me, the investigator positions occupied by the employees at CAPM Gold no longer existed after August 2013. This is therefore a case in which the reinstatement of the employees is not reasonably practicable within the meaning of section 193(2)(c) of the LRA.
- [27] I am therefore of the view that the Commissioner’s award, to the extent that it awarded the employees reinstatement, is unreasonable.⁸
- [28] With reinstatement being excluded on the basis that it is not reasonably practicable, the employees would be entitled to compensation. While I am of the view that there is sufficient in the record to enable me to set aside the Commissioner’s reinstatement order, the record as a whole does not place me in a position in which I can with confidence substitute a determination with regard to the compensation that ought to be awarded to the employees. This is particularly so having regard to the allegations made by the applicant to the effect that the Commissioner got the salaries of certain of the employees wrong and therefore incorrectly calculated their backpay.
- [29] I am therefore of the view that the appropriate order would be one remitting the matter to the CCMA for the question of the relief to be granted to the employees to be determined afresh.

⁷ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* 2009 (1) SA 390 (CC) at para 36; *Gijima AST Ltd v Hopley* (2014) 35 ILJ 2115 (LAC) at para 48

⁸ *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and others* (2016) 37 ILJ 2313 (LAC)

[30] I therefore make the following order:

1. The finding in paragraph 21 of the award, namely that the dismissals of the employees were substantively and procedurally unfair is upheld.
2. The findings in paragraphs 22 to 25 of the award concerning the relief granted to the employees is set aside.
3. The matter is remitted to the second respondent for the purpose of a fresh determination on the relief to be granted to the employees.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicant: S Snyman of Snyman Attorneys