



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

-Case No: JR 1679/16

In the matter between:

CRONOS AIRLINES INTERNATIONAL (PTY) LTD

Applicant

and

COMMISSIONER DUMISANI JOHANNES NGWENYA N.O

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

WAYNE NICOLAS VINCENT FORGET

Third Respondent

Heard: 30 May 2018

Order: 30 May 2018

Date of Reasons: 11 June 2018

Summary: Review Application- Test for review restated-The employee was not dismissed by the employer, taking into account the totality of the evidence

presented before the arbitrator- Dismissal finding is set aside and replaced with an order that the employee was not dismissed.

JUDGMENT-REASONS FOR ORDER

MABASO AJ:

Introduction

[1] Forthwith arguments, on 30 May 2018, I made the following order:

1. The arbitration award made by the first respondent, acting under the auspices of the second respondent, under case number GAEK9450/15, dated 10 July 2016, is reviewed and set aside, and replaced with an order that,
“ the employee’s unfair dismissal referral to arbitration, under case number GAEK9450/15 is dismissed.”
2. That the third respondent be ordered to pay costs.

These are the reasons for the above order.

[2] Material errors of facts and weight attached to a particular set of facts are not ordinarily grounds for review, the only time whereby the reviewing court will interfere with an arbitration award, if asked to do so, is when such errors have an adverse effect on the outcome of the case which prevented the parties from having a fair trial of issues. A reviewing court has to take into account the totality of the evidence that was properly presented before the arbitrator.¹

[3] The applicant approached this Court, by way of a review application, seeking an order that an arbitration award issued by the first respondent acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAEK9450/15 dated 10 July 2016 be reviewed

¹ Herholdt v Nedbank Ltd 2013 (6) SA 224 (SCA)

and set aside, and be replaced with an order that the third respondent's referral to the CCMA be dismissed. The third respondent vigorously opposed this application. Both parties, the applicant and third respondent, emphatically asked for costs order against each other.

The parties

- [4] The applicant is Cronos Airlines International (Proprietary) Limited (hereinafter referred to as the 'Applicant'). The first respondent is the arbitrator who acted within the scope of the second respondent, which is the CCMA. The third respondent is Wayne Nicolas Vincent Forget (hereinafter referred to as 'the employee'), and he is the only party opposing the review.

Brief background

- [5] The employee joined the Applicant as a Flight officer on 10 November 2014.² On 19 October 2014 he attended a meeting which had been organised by Mr Lycos of the Applicant, therein the employee was presented with the letter ('the notice') which partly reads as follows:

'It is with regret that [the applicant] is obliged to inform you that your services are to be retrenched operational requirements, there are no practical alternatives to avoid the retrenchment, as you are aware [the applicant] is under extreme financial stress...'.³

- [6] After this meeting the employee declared an unfair dismissal dispute with the CCMA against the applicant claiming that he was dismissed and that his dismissal was both procedurally and substantively unfair. Following the non-resolution of the dispute during the conciliation, the dispute was referred to arbitration wherein the arbitrator was appointed to arbitrate the dispute. Before the arbitrator, the applicant disputed that it had dismissed the employee. Under those circumstances, the employee had to lead evidence to

² Records: p 3

³ Volume 1: p 48

show that he was dismissed.⁴ On the other hand, the applicant presented the testimony of Mr Laycos in its effort to dispel the allegations of dismissal.

- [7] At the end of the arbitration, the arbitrator proceeded to issue an arbitration award, which is the subject of this review application, concluding that the employee was dismissed and his dismissal was procedurally and substantively unfair. He then ordered the applicant to pay the employee compensation equivalent to 6 months of his salary, and no reinstatement order was made. The arbitrator in his arbitration award held that the main issue before him was whether the termination that took place on 19 October 2016 was the alleged dismissal or not. In concluding that it was a dismissal, he took into account the contents of the notice and proceeded to conclude that:

‘...the perusal of the content of the letter leaves one with no doubt that the applicant was confronted with a fait accompli in that the document is no more than an advise that the latter is been retrenched and expected to sign acknowledgement and acceptance of same. These foregoing established facts evinced the intention on the part of the respondent not to continue to be bound by the contract of employment it had with the applicant. There was no desire on the part of the respondent to continue honouring the contract. The reasonable deduction is that the respondent’s conduct was the trigger and the proximate cause for the termination of the employment contract and thus amounted to dismissal within the meaning of the Act. I accordingly determine that the applicant has established the existence of dismissal.’⁵

Grounds of review

- [8] The applicant’s grounds of review included the following: that the arbitrator made an error of facts by disregarding evidence which was presented before him, in that, the notice that was given to the employee was a discussion document intended to initiate negotiations towards possible retrenchment and it was not signed by either party, further that during this meeting the employee

⁴ Ss 192(1) of the LRA.

⁵ Volume 1: p 28.

was asked as to whether he was willing to accept such offer as he was also given an opportunity to communicate with his attorneys regarding the contents of the notice, which did and was advised that should not accept such a proposal and he acted in accordance with such advice.

- [9] During this meeting, the employee made it clear that he did not want to work for the applicant anymore as he had previously (on 25 September 2015) consulted with his attorney with the view of terminating his employment with the applicant and seek compensation.⁶ That when the employee was presented with the notice, he saw an opportunity to obtain financial benefit from the applicant.

Applicable principle and application thereof

- [10] In deciding whether or not an arbitrator made an error of facts which affected his outcome, in determining jurisdiction to arbitrate an alleged unfair dismissal dispute, the LAC summarised the law in *Kukard v GKD Delkor (Pty) Ltd*⁷ thus,

'I now turn to question of whether the CCMA had jurisdiction to deal with this dispute. Since the jurisdiction of the CCMA is intrinsic to the purported dismissal of the appellant as defined in s186 of the LRA, this Court must first determine whether, **on an objective assessment of the evidence**, the Labour Court was correct in setting aside the Commissioner's finding that the appellant was dismissed by Delkor within the meaning of s186(1)(a) of the LRA. **In determining whether the CCMA has jurisdiction to deal with a dispute, the Labour Court is not limited to the Sidumo (reasonableness) test of review, but may determine the issue de novo.**'⁸

⁶ Records: p 42

⁷ [2015] 1 BLLR 63 (LAC).

⁸ Ibid at para 12. See also *Fidelity Cash Management* at para 101, the LAC said: The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in sec 145 of the Act. *If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.*

- [11] Subsection 192(1) of the LRA places an onus of proof on the employee to prove that he was dismissed, and once it has been found that indeed he was dismissed, then the onus shifts to the employer to show that such dismissal was fair.⁹
- [12] To objectively assess the evidence that was properly presented before the arbitrator, the reviewing court has to take into account the totality of such evidence which will include the evidence presented during examination in chief, cross-examination and re-examination. It is further important to consider the documents that the witnesses, for both the applicant and employee, led evidence on.
- [13] Without hesitation, the arbitrator solely relied on the notice concluding that the employee was dismissed. It is submitted that the arbitrator did not apply his mind to what transpired during the cross-examination of the employee and to what the applicant properly presented before him. Highlighted below is some of the evidence that was properly placed before the arbitrator.
- [14] In a letter dated 24 October 2015, which was sent to the employee, Mr Lycos, who was part of the meeting *in casu*, summarised partly thus:

‘...As a step towards that possible decision, I decided that to discuss possibility with [the employee] on ...19 October 2015. I discussed with him if you would conceptually agree to a retrenchment which would offer him payment in full for all amounts owed to him for his service, notice pay, and leave pay. In exchange [the employee] would waive any and all claims against [the Applicant]. **It was during this discussion that [the employee] revealed that he could not agree to such terms as he was already planning to resign and was preparing to file legal action against the company**

⁹ See *Cooper and Another v Merchant Trade Finance Ltd* [1999] ZASCA 97 where the SCA held that “If the facts permit of more than one inference, the court must select the most “plausible” or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof”

immediately thereafter. In an effort to preserve his right to file such action he said he could not agree to a retrenchment on such terms.¹⁰

And this letter further reads as follows

“It was at this point that [the employee] and I **had a broader conversation about his consent and we agreed that since he found the terms of the possible retrenchment unacceptable, we would not pursue that path.**

However, we were agreed that the since he no longer wanted to work for [the applicant], that 19 October would be his last day and that he would have you send me his settlement terms in the coming days. I considered this his verbal resignation as the retrenchment document provided was a discussion point, and unsigned by myself and [the employee] and not executed nor [the applicant's] official position”.¹¹

[15] In examination-in-chief, the employee's representative asked him about the contents of this letter and the employee did not distance himself from it. The contents of the letter corroborated what Mr Lycos presented during the applicant's evidence in chief.

[16] The employee, during cross-examination, conceded that when he was approached on 19 October 2015 by Mr Lycos, he saw an opportunity to extract financial benefit from the applicant. His cross-examination partly was as follows:

‘ADV THOMSON: And so when Mr Lycos presented you with the **discussion document** it presented you with the perfect opportunity now get a settlement of the money that you want... to pay for the training which you needed?

[THE EMPLOYEE]: Correct, about three weeks later, no more than a month later.”¹²

¹⁰ Court emphasis.

¹¹ Court emphasis.

¹² Court emphasis.

ADV THOMSON: Let me ask you this question. At that meeting and after the discussion and the point that we're at now, you had no intention of carrying on with the employment relationship?'

[THE EMPLOYEE]: No.

[17] Therefore, based on the above I hereby conclude that the arbitrator did not apply his mind to evidence that was presented in support of the applicant's version that indeed the employee was not dismissed, but instead he wanted to resign. Hence it was agreed between him and Mr Lycos that *"he would have ... send [Mr Lycos] his settlement terms in the coming days"*. My conclusion is also supported by the fact that another letter was sent to the employee's attorneys advising him to return to work as he was still regarded as the applicant's employee. Therefore, had the arbitrator taken all evidence into account, he could have concluded that the employee was not dismissed. Thus, the CCMA had no jurisdiction to arbitrate the dispute.

[18] In light of my conclusion , I am of the view that further grounds of review are not relevant as they relate to the procedural and substantive fairness of the alleged dismissal.

[19] In respect of costs both parties passionately asked for the costs to follow the results, fully aware of the provisions of section 162 of the Labour Relations Act¹³ (LRA) and in *casu*, I am of the view that indeed the costs should follow the results.

[20] Thus I made the order as in paragraph one [1] above.

S Mabaso

Acting Judge of the Labour Court of South Africa

¹³ Act 66 of 1995 as amended.

Appearances

For the Applicant: Adv S Swartz

Instructed by: Christodolou & Mavrikis Inc.

For the Respondent: Mr Scott

Instructed by: . TKI Scott Attorneys