



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1043/15

In the matter between:

IDEAL SECURITY SERVICES CC

Applicant

and

CCMA AND OTHERS

Respondents

Heard : 10 October 2018

Delivered : 10 October 2018

Edited : 08 November 2018

EX TEMPORE JUDGMENT

MOSHOANA, J

- [1] This is an application seeking to review and set aside an arbitration award issued by the second respondent in terms of which a finding was made that the third respondent, Mr Armond Wolfaardt was dismissed on 9 January 2015, and such a dismissal was found to be procedurally and substantively unfair. And as a result, an order of compensation was made.
- [2] Briefly, the facts relevant to this matter are as follows:
- [3] The third respondent was employed as a senior technician by the applicant. Around 20 January 2014 - he was injured on his hand and received medical treatment for a period. Almost a year later, on 9 January 2015, the third respondent, was called to a meeting. It is the third respondent's contention that out of that meeting he was dismissed. On 19 January 2015 he then approached the first respondent, being the Commission for Conciliation, Mediation and Arbitration, seeking assistance with regard to the dispute of an alleged unfair dismissal.
- [4] The second respondent was appointed by the first respondent to resolve the dispute through an arbitration process. After hearing all the evidence, the second respondent issued an award in favour of the third respondent. One of the issues that was raised before the second respondent, was that the third respondent was not dismissed. In other words, the jurisdiction of the CCMA was challenged by the applicant before me. The second respondent came to a conclusion that the CCMA had jurisdiction and issued an award, as I pointed out, in favour of the third respondent.
- [5] The applicant was aggrieved thereby, and on 9 July 2015 it then launched a review application. Around 24 November 2016 a Rule 11 application was launched, which Rule 11 application, was not enrolled before me today. And earlier, I had dealt with the issue regarding the Rule 11 application, and the third respondent's representative, correctly so, decided not to proceed with the Rule 11 application. So, for that matter, it is unnecessary to even say anything further with regard to the Rule 11 application.

- [6] The main ground for review is simply that the second respondent came to a wrong conclusion that there was a dismissal. To put it differently, the commissioner was wrong when he concluded that he has jurisdiction to entertain the dispute.
- [7] It is by now trite that the test for determining whether a ruling is reviewable, where jurisdiction does not exist, is that of whether on the objective facts, was the arbitrator correct in coming to the conclusion that a jurisdictional fact exists? In this case, whether the dismissal did exist as a fact.
- [8] It is common cause before me that the third respondent was injured, and was unfit to do his work. It is also common cause that on 9 January 2015 there was a meeting between the third respondent and the owner of the applicant, together with other parties. In that meeting, words to the following effect were mentioned or uttered by the owner. They were said in Afrikaans:
- “Nul op ‘n kontrak”.*
- [9] It appears to be common cause between the parties that loosely translated, the words mean that *you are a zero on a contract*.
- [10] The third respondent interpreted those words to mean that he was dismissed. In addition, the third respondent indicated that because he was laid off and not allowed to return to work, therefore he had been dismissed and accordingly, on the facts, there was a dismissal.
- [11] Fortunately for this court, the Labour Relations Act defines what a dismissal is. Section 186(1)(a) of the Labour Relations Act provides as follows:
- “Dismissal means that an employer has terminated employment with or without notice.”
- [12] Clearly, that requires an action on the part of the employer to terminate the contract. It does not require any interpretation, as it was in this case.

- [13] The issue received legal attention by the Labour Appeal Court in the matter of *The South African Post Office Ltd v Mampuele*¹. Therein, the court made it very clear that there must be an overt statement by the employer terminating an employment contract.
- [14] Now, in this instance, on the facts, one fact that stands out like a sore thumb, is that on 12 January 2015 the third respondent's wife sent the sick notes to the applicant. The question that immediately arises is, if indeed the third respondent was dismissed on 9 January 2015, why sick notes are sent to the applicant?
- [15] As if that is not enough, the owner of the applicant made it clear in no uncertain terms that the third respondent was not dismissed. But with all that, the third respondent decided to lodge a dispute of an alleged unfair dismissal on 19 January 2015.
- [16] Section 192 of the Labour Relations Act is very clear that the onus is on an employee to establish the existence of a dismissal. In other words, the fact that a dismissal had happened must be established. In the absence of establishing the existence of the dismissal, there is no obligation on the part of the employer to prove that a dismissal – which has not occurred – is one that is fair.
- [17] Returning to the test in jurisdictional reviews, the facts that were presented before the second respondent clearly points, objectively viewed, to the fact that dismissal did not occur, and the interpretation by the third respondent of the words that were mentioned earlier in this judgment, is not consistent with the evidence of the owner and the steps that were taken by the third respondent and his wife.
- [18] Therefore, on the objective facts, the conclusion that the third respondent was dismissed is wrong. Since dismissal was not proven, the CCMA lacked jurisdiction. The award issued is a nullity as there was no jurisdiction.

¹ [2010] 10 BLLR 1052 (LAC)

[19] In the results I make the following order:

Order

1. The award issued by the second respondent is hereby reviewed and set aside.
2. It is replaced with an order that the CCMA lacked jurisdiction, since the third respondent not dismissed.
3. I make no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa.