IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 616/15

In the matter between

MATHOPO, MOSHIMANE AND MULANGAPHUMA

T/A DM5 INC **Applicants**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

LARRY SHEAR *N.O.* **Second Respondent**

SIMANGELE JULIA NHLAPO **Third Respondent**

Delivered: 5 February 2019

JUDGMENT

MAHOSI J

Introduction

[1] This is an application in terms of section 158(1)(g) read with section 145 of the Labour Relations Act (LRA)[1] to set aside the jurisdictional ruling (ruling) issued by the second respondent (the commissioner) under case number GAJB 105-15 on 12 March 2015. The applicant further seeks an order substituting the jurisdictional ruling, with the order that the (CCMA) lacks jurisdiction to determine the dispute between the parties. The commissioner ordered that the matter must be referred for arbitration.

[2] Prior to outlining the applicant's claims in detail and to considering the issues to which they give rise, it is necessary to summarise the facts that form the relevant background to the dispute between the parties.

Background

[3] The third respondent ("Ms Nhlapo") started working for the applicant on 2 June 2014 as a Human Resources Manager. The applicant and Ms Nhlapo concluded a contract of employment on 26 May 2014, which placed Ms Nhlapho on probation for the first six (6) months. On 3 December 2014, the applicant's representatives met together with Ms Nhlapho to discuss her performance during the probation period. Following the discussion, the contract between Ms Nhlapho and the applicant was terminated on the same date.

[4] On the same date, being 03 December 2014, the applicant addressed a letter to Ms Nhlapo confirming the discussion and further confirming that the termination was mutual. The letter did not record the payment of one monthly salary and leave pay due as agreed. As a result, Ms Nhlapo did not sign the letter and instead drafted a letter setting out her recordal of the discussions at the earlier meeting and specifically recorded the payment of the salary and leave pay due. The letter was signed by both parties.

[1] Act 66 of 1996, as amended.

[5] Subsequent to the termination of employment, Ms Nhlapo referred an unfair dismissal dispute to the First Respondent (CCMA). The referral was filed out of time and following a condonation application, the late referral was condoned by the CCMA. On the same day of the hearing of the condonation application, a certificate of outcome was issued and the matter was referred to arbitration. The applicant did not attend the conciliation nor did it oppose the condonation application. On the strength of the certificate of outcome, Ms Nhlapho referred the dispute to arbitration.

Arbitration

[6] The arbitration hearing was set down for 05 March 2015 and both parties were duly represented. At the commencement of the hearing, the applicant raised a jurisdictional point that the CCMA lacked the jurisdiction to determine the dispute as Ms Hlapo was not dismissed but rather the termination of employment was mutually agreed upon. It was common cause that the Third Respondent authored and signed the letter on 03 December 2014. Ms Nhlapo, while not disputing that she signed the letter, denied that there was a mutual termination this notwithstanding the terms of the letter recording that the termination was mutually agreed. Rather she submitted that she signed the letter in order to secure payment for her December salary.

[7] The arbitrator ruled that the CCMA does have jurisdiction to determine the referral and directed that the matter be set down for arbitration. The arbitrator further ruled that the applicant took a decision not to extend the probation period and that constitutes a dismissal. In support of this finding, the arbitrator stated that he was fortified by Ms Nhlapo's failure or refusal to sign the letter on the same date. The arbitrator further justified his ruling, by stating that if he were to find that the parties had mutually terminated Ms Nhlapho's services she would be without any remedy. He concluded that to an extent that the parties have not tendered any evidence, it was his belief that justice and fairness dictate that he

concludes that the CCMA has jurisdiction in order to enable both parties to present evidence.

Grounds of review

[8] The applicant submits that the Commissioner failed to properly apply his mind and, as such, committed gross irregularity or exceeded his powers, in finding that Ms Nhlapo was dismissed by the applicant when her probation period was not extended.

[9] Further that the commissioner ignored the fact that the decision not to extend the probation period was preceded by an agreement between the parties to mutually terminate the employment relationship. The applicant argued that once parties agreed to terminate the employment relationship, the issue of whether to extend the probation period did not arise.

[10] The applicant submitted that the commissioner failed to properly apply his mind to the evidence before him indicating that after the meeting, the applicant addressed a letter to Ms Nhlapho setting the terms of the discussion and confirming the mutual termination and that Ms Nhlapho authored and signed the letter.

[11] According to the applicant, there was no evidence before the Commissioner indicating that Ms Nhlapho denies that her employment was mutually terminated, if there was no mutual termination why would a seasoned Human Resources Manager in the third respondent's position not have said so. More so that she drafted and signed the letter.

Applicable law and analysis

[12] The test for review applications based on jurisdictional error is well established and has been stated in numerous cases of this Court and the Labour Appeal Court as the correctness test. In *SA Rugby Players' Association v SA Rugby*

(Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU,[2] the Labour Appeal Court (LAC) held as follows:

> '…The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.'

[13] The applicant has to establish that the arbitrator's decision was objectively wrong. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others,*[3] the court held as follows:

> 'In my view where the power to be exercised is statutory, the answer to the question of what the jurisdictional fact(s) is (are) which must exist before such power can be exercised lies within the four corners of the statute providing for such power. Accordingly the provisions of such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are). In the light of this I consider it necessary to have regard to the provisions of the Act to determine what the necessary jurisdictional fact(s) is (are) which must exist in a case such as this one before it can be arbitrated or adjudicated in terms of the Act.'

[14] It is trite that in a case where a dispute that was referred to the CCMA was settled there is no jurisdiction to arbitrate. However, in this case, the commissioner was confronted with a jurisdictional point, as raised by the applicant on whether the dispute had become settled. In order to determine this issue, the commissioner had to consider whether the agreement constituted a compromise of the dispute before him. To decide this, the commissioner had to interpret the agreement. Issues in relation to the effect of settlement agreements on the commissioner's jurisdiction have been considered by the courts. In *Cook4Life CC v Commission for Conciliation Mediation and Arbitration and Others,*[4] this Court stated as follow*:*

[2] [2008] 9 BLLR 845 (LAC) at para 41.
[3] [2000] 12 BLLR 1389 (LAC) at para 7.
[4] (2013) 34 ILJ 2018 (LC).

'[14] In my view, the refusal by commissioners to enter into any consideration of the validity of an agreement confuses the concepts of jurisdiction and power. The CCMA has jurisdiction to determine unfair dismissal disputes and it is specifically enjoined, in terms of s 115 (1)(b), to arbitrate disputes referred to it after a failed conciliation. Section 191 contemplates that the CCMA must make a ruling when the existence of a dismissal is placed in issue, by determining whether or not an employee referring an unfair dismissal claim was dismissed within the meaning accorded to that term by section 186 (1) of the Act. That being so, I fail to appreciate why, in matters such as the present, when it is contended that an agreement is voidable on account of it having been induced by duress, the CCMA is not empowered to make that determination in the exercise of its jurisdiction to determine the existence or otherwise of a dismissal. To require an applicant in those circumstances to refer a contractual dispute to this court as a precondition to arbitration on an unfair dismissal claim would defeat the statutory purpose of informal and expeditious dispute resolution, and would import a requirement that finds no reflection in the Act.'

[15] In determining whether the CCMA had jurisdiction, the commissioner had to establish whether the employment relationship was mutually terminated. In so doing, he had to interpret the settlement agreement. In *CTP Ltd T/A Caxton Newspapers Division v Mphaphuli NO and Others,*[5] this Court restated the principles relating to the interpretation of statutes and other documents as mentioned in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.*[6] In the latter judgment, it was stated as follows:

'[10] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the current state of our law in regard to the interpretation of documents was summarised as follows:

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of

[5] (2015) 36 ILJ 1042 (LC).
[6] [2014] 1 All SA 517 (SCA); 2014 (2) SA 494(SCA) .

annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself[1], read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] That statement reflected developments in regard to contractual interpretation in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd; KPMG Chartered Accountants (SA) v Securefin Ltd & another* and *Ekurhuleni Municipality v Germiston Municipal Retirement Fund*. I return to it and to those cases only because we had cited to us the well- known and much cited summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Lybrand & others v Bryant*, that:

'The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is,

broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ... ;

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted. . ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise. Accordingly it is no longer helpful to refer to the earlier approach.'

[16] The commissioner's finding that the CCMA had the jurisdiction to arbitrate the dispute was premised on the conclusion that the applicant took a decision not to extend the employee's probation period. In coming to the aforesaid conclusion, he interpreted the settlement agreement and rejected the applicant's reliance on the part of the agreement where it was stated that "this termination has been agreed based on the following terms…" Instead, he took the view that the phrase

should be read in the context of the whole letter. The letter in question records as follows:

> '03 December 2014
>
> 6 Months' Probation: HR Manager
>
> The firm has taken a decision not to offer Simangele Nhlapho the abovementioned position after the probation period. This decision was taken on Wednesday, 03 December 2014
>
> This is the first formal and final probation the firm has conducted with Simangele Nhlapho. The end of contract is based on cultural fit as per the meeting with Vele Malungaphuma and Lerato Mathopo
>
> The contract of Simangele Nhlapho is terminated with immediate effect; this termination has been agreed based on the following terms:
>
> Leave balance of 6.75
>
> December salary to be paid on my account on 19 December 2014.'

[17] The commissioner's interpretation of the abovementioned agreement is in line with the test laid out in *Bothma-Batho.* In interpreting the agreement, he considered both the context and the language of the agreement. The applicant relied on the perceived literal meaning of the words "this termination has been agreed based on the following terms". The commissioner did not stop at the said words, he considered them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The subject matter of the letter was Nhlapho's six months' probation. It further records that the meeting the applicant had with Ms Nhlapho constituted a first and final probation period. It was in this meeting that the applicant took the decision not to offer Nhlapho the HR Manager position after the probation period which decision was "based on cultural fit."

[18] Ms Nhlapho relied on section 158(1B) of the LRA and Clause 11.2.5 of the Labour Court Practice Manual of the Labour Court in submitting that there would be no basis for the ruling to be reviewed before the issue in dispute has been finalised. Her contention was that it would result in a grave miscarriage of justice if this Court was to delve into the merits of the dispute without having allowed the CCMA to deal with the same as a forum of first instance and without having the benefit of evidence led by the parties on the matter. Section 158(1B) of the LRA provide thus:

> 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

[19] Clause 11.2.5 of the Labour Court Practice Manual provides that applications under sections 145 and 158(1) (g) of the LRA should not ordinarily be brought in respect of proceedings that are incomplete. Therefore, the issue is whether it is just and equitable for this Court to review the decision or ruling made by the commissioner during the arbitration proceedings before the issue in dispute has been finally determined. This Court has a discretion on whether to proceed with the review on the merits.

[20] From the reading of the ruling, it is apparent that the commissioner, having considered the language and the context of the agreement, concluded that justice and fairness dictate that the merits and demerits of the unfair dismissal dispute be ventilated in evidence to be led in the arbitration. The applicant has not made out a case for this Court to permit its application on a piecemeal basis. As such, I am of the view that the commissioner correctly found, in his first ruling, that the CCMA has jurisdiction to arbitrate the matter.

[21] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[22] In the circumstances, I make the following order:

1. The application to review and set aside the jurisdictional ruling issued by the second respondent under case number GAJB 105-15 on 12 March 2015 is dismissed.

2. There is no order as to costs.

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D Mahosi

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANTS:	Advocate Van As
	Instructed by Mathopo Attorneys
FOR THE RESPONDENT	Advocate D.Z Kela
	Instructed by Ndumiso Voyi Inc