

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

NOT REPORTABLE

Case no: JR 2212/16

In the matter between:

**BYTES MANAGED SOLUTIONS
(PTY) LTD**

First Applicant

and

**THE COMMISSION FOR
CONCILIATION, MEDIATION &
ARBITRATION**

First Respondent

MBONGENI MOTSOENENG (N.O.)

Second Respondent

JEFFREY MAPHAKELA

Third Respondent

Heard: 14 August 2019

Delivered: 19 August 2019

Summary: (Review – arbitrator failing to allow postponement for applicant to arrange legal representation – arbitrator failing to consider if appropriate cost award would have remedied prejudice to employee – (*obiter*) arbitrator permitting advocate to appear without anything to suggest counsel had been briefed by an attorney also irregular)

JUDGMENT

LAGRANGE J

Background

[1]

[2] This is a review application of an arbitration award in which the arbitrator found that the third respondent's retrenchment was both procedurally and substantively unfair. The applicant company retrenched the third respondent who was a storeman

[3] The arbitrator's reasoning in finding the retrenchment procedurally unfair was that:

3.1 The first consultation meeting with the employee was not proceeded by any notice along the lines expected in section 189 [3] of the LRA and in fact no forewarning of what the meeting was about was given to him.

3.2 The retrenchment was a fait accompli because the employer had already decided before the meeting on 8 June 2016 that he would be dismissed. Any suggestion that it was only a provisional decision was belied by the fact that the employee was not advised to come up with alternative proposals.

3.3 No genuine offers of alternative positions were made.

3.4 The employer knew as far back as January 2016 that it would have to shed staff but nonetheless renewed the employees contract for another 12 months in April 2016 only to spring the news of the retrenchment on him in June.

3.5 The fact that the employees contract contained a clause which envisaged the possibility of retrenchment taking place before the contract had run its full term could not shield the applicant from liability in terms of the contract of employment.

[4] In relation to the substantive unfairness, the arbitrator was persuaded that the retrenchment was substantively unfair on the basis that:

4.1 There was evidence that during the consultation one of the employer representatives argued that he should not be dismissed and even though it was the employee who testified to this, the arbitrator did not

regard it as hearsay because it was a statement made in his presence.

- 4.2 In any event, the arbitrator found that the employer had no right to retrenchment employee on a fixed term contract especially when it renewed the contract in circumstances where it must've known that it had sufficient resources to employ him for another 12 months.

Grounds of review:

- [5] While admitting that the failure to provide the third respondent with a notice in terms of section 189 [3] of the Labour Relations Act, 66 of 1995 ('the LRA') deprived him of an informed perspective and necessary information available to him prior to the meeting so that he could give it his consideration beforehand, the applicant argues that no prejudice was suffered by him as a result because it dealt with all aspects in section 189 [3] during the course of the consultation meeting on 8 June. Further, it claims it then gave him the opportunity to consider his position and if he deemed it necessary to request further consultations. The applicant submits this would have provided him with the time to consider his position take advice and make representations which he failed to do. Accordingly, the applicant takes the arbitrator to task for criticizing the respondent for not apprising the employee of the retrenchment consultation beforehand and then expecting him to engage meaningfully in consultation, whereas the applicant contends the first meeting was merely informative and it was never expected that the employee would have to respond in that meeting. This version that the first meeting was merely informative, is entirely at odds with the applicant's version in the arbitration proceedings where it maintained that the first meeting was very much a consultation meeting in keeping with the LRA's intention that there should be a meaningful consultation process.
- [6] Secondly, the applicant argues that the arbitrator's finding that the retrenchment was a *fait accompli*, the applicant entailed misconstruing Engelbrecht's testimony, which was simply to the effect that a decision was taken that it would be necessary to dispense with two of the three

store controller positions, but that did not mean that dismissal would necessarily follow.

- [7] Thirdly, the applicant contends that the arbitrator's finding that at no stage was the employee invited to provide alternatives and that he was simply asked to show an interest in a position that was also open to other employees, is illogical. The applicant's reasoning is that where the employee expressed no interest in the possible alternatives mentioned by the applicant there was no point in pursuing the discussion of alternatives.
- [8] Fourthly, the arbitrator misconstrued the evidence in concluding that the applicant knew as far back as January that retrenchments were envisaged whereas the evidence showed that it did not envisage at that point that there would be no work for the storemen or even when it renewed the employee's contract in April 2016.
- [9] Fifthly, the applicant maintains the arbitrator erred in law in believing that it was unlawful to terminate a fixed term contract in circumstances where the parties had expressly provided for the possibility of early termination through retrenchment.
- [10] Lastly, in awarding the employee 10 months' remuneration as compensation the arbitrator made a grossly inappropriate award bearing in mind the circumstances and the fact that the award of compensation exceeded the outstanding portion of the applicants fixed contract and was more than the employee was asking for.
- [11] In the applicant's suppliant supplementary affidavit, it focused on the conduct of the arbitration. The additional points of review raised were that:
 - 11.1 In the applicant's evidence at the arbitration extensive evidence was given of the alternative position at the CIW warehouse and that an alternative position for a stores person would be available in Cape Town and at that stage no meaningful engagement was expected of him.
 - 11.2 The applicant further attempted to bolster its explanation that the decision to retrench the employee was not a *fait accompli* and the employee was only told in the meeting of 8 June 2016 that his

contract would end at the end of June because he had declined the two other positions that were available. The only issue with the applicant concedes was predetermined was that there was not enough work for three individuals in the store function, but alternatives were available and were canvassed.

11.3 The finding that no alternatives were canvassed with the employee was entirely unreasonable in the light of testimony that there were positions open and the employee was invited to express an interest in the position. Further, the applicant indicated to the employee that it was willing to consider alternatives he might wish canvass with them. The arbitrator also misconstrued the employer's obligation namely that he believed the employer was obliged to actually offer a position to an employee.

11.4 In concluding that the consultation process was inadequate, the arbitrator ignored the fact that the employee himself refused to entertain further proposals and indicated that any communications would be undertaken through legal representatives, which undermined any process of effective and meaningful consultation.

[12] If it was necessary to consider the substantive merits of the arbitration award, I would be inclined to agree that the arbitrator appeared to have misdirected himself in equating the compensation due to the employee as being necessarily equivalent to the unexpired portion of his fixed term contract, which in any event he appears to have slightly overestimated. I would be less inclined to accept that the arbitrator was grossly unreasonable in concluding that the retrenchment was procedurally unfair.

[13] Be that as it may the applicant belatedly raised an important procedural irregularity which cannot be brushed aside. The applicant contends that the arbitrator should not have allowed the arbitration proceedings to proceed when it withdrew its jurisdictional objection at the hearing convened for the purpose of considering the jurisdictional point it had previously wished to raise. In proceeding with the arbitration, it argues the arbitrator deprived the applicant of the opportunity to properly consult with witnesses for the purposes of leading evidence and without giving the

applicant an opportunity to use legal representation. The arbitrator unreasonably rejected the applicant's application for a postponement. It was not unreasonable in my view of the arbitrator to have expected the applicant in those parties to have been ready to proceed as there would have been absolutely no reason for postponement in the matter and the applicant or to have foreseen the possibility that the matter might then proceed in the absence of anything else in delaying its commencement. However, the arbitrator's conduct in proceeding when the applicant had pertinently raised the issue of wanting legal representation was more cavalier.

[14] Rule 25(1)(b) and (c) of the CCMA Rules state:

“(b) Subject to paragraph (c), in any arbitration proceedings a party to the *dispute* may appear in person or be represented only by-

(i) a *legal practitioner*; or

(ii) an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1)(a).

(c) If the dispute being arbitrated is referred in terms of section 69(5), 73 or 73A of the BCEA or is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner or a candidate attorney in the proceedings unless-

(i) the commissioner and all the other parties consent;

(ii) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.”

- [15] When the applicant withdrew the jurisdictional point, its representative, Ms D Morris ('Morris') asked for a postponement owing to its witnesses being unavailable and because she was unable to consult an attorney before the arbitration. She claimed to have only discovered a week before the arbitration that she was entitled to be represented by a lawyer because the dismissal was for operational reasons and was travelling around the country on work related commitments during the previous week. The employee was represented by an advocate and she also asked if there was any distinction between an advocate and attorney. The arbitrator explained the difference and mentioned *inter alia* that advocates were "litigation specialists". He also incorrectly intimated that an advocate who belonged to the independent bar was entitled to "get clients from the street". Morris expressed concern she would be more disadvantaged facing an advocate and that "the playing fields are not equal."
- [16] If the employee had an attorney who had briefed the advocate, there was no record of anyone from the attorney's office being present, nor was there any evidence that the advocate had been briefed by an attorney. From the arbitrator's remarks about the position of advocates at the independent bar he clearly did not feel it was necessary, despite the absence of any other indications that the advocate had been briefed, to confirm if that was the case. In fact, his remarks strongly suggest that he believed Adv Maphekela was not a member of a bar society and that there was no need to enquire if he was on brief because of the arbitrator's mistaken conception of the right of independent advocates to appear after receiving instructions from the client. It is noteworthy that Adv. Maphekela said nothing to confirm his status or to confirm if he was on brief.
- [17] The arbitrator decided to dismiss the application for postponement as 'frivolous' on the basis that on the previous occasion the applicant had not been ready to proceed because a key witness was not available and the hearing was adjourned for the purpose of allowing the parties to try and settle the dispute or for the applicant to pursue the jurisdictional point if there was no settlement. The arbitrator found that the applicant had 21 days to prepare of the hearing and did not act with reasonable dispatch to protect its rights. However, he had no basis before him of knowing that

Morris had known at that early stage that the applicant was entitled to legal representation. The only evidence before him was Morris's statement that she only learnt a week ago and that she was criss-crossing the country for the rest of the week making it difficult to consult an attorney beforehand. In any event, the arbitrator ought to have been sure that the applicant was aware of its rights in that regard and not simply assumed that to be the case. It ought to have been manifestly evident that the issue of legal representation for the applicant had only come to light as an issue in the week before the postponed hearing and that the circumstances had made it difficult for Morris to arrange a consultation. Had the arbitrator pointed the issue of legal representation out to the applicant when the arbitration first convened when the employee was already represented by Adv. Maphakela the situation might be different.

- [18] Adv. Maphela rightly complained that the issue of a postponement and legal representation could have been raised with the employee in the week before the date of the postponed hearing and Morris ought to have considered the possibility of a continuance if the applicant did not proceed with the jurisdictional point. However, that inconvenience could have been cured with an appropriate cost award which the arbitrator did not even consider in his forthright dismissal of the application for postponement.
- [19] In the circumstances, though it cannot be said with any certainty that the outcome of the arbitration would have been different, it can be said that the applicant was denied a fair hearing in the sense that it was unreasonably refused a postponement to obtain legal representation which it was entitled to. I am satisfied that this gross irregularity warrants setting aside the award, despite my doubts about whether the applicant's case can be improved.
- [20] Initially I was under the impression this issue had been raised only in the week preceding the review application hearing, but it was set out in the supplementary affidavit. I fully understand why the employee would have been inclined to oppose the review in light of the award in his favour and some manifest shortcomings in the applicant's case on the record. In the circumstances it is not appropriate to make a cost award.

Order

- [1] The arbitration award issued under CCMA case number GAJB 13753-16 dated 10 October 2016 is reviewed and set aside and the dismissal dispute is remitted to the first respondent to be set down for a hearing before a commissioner other than the second respondent.
- [2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

W Hutchinson instructed by
Fluxmans Inc.

RESPONDENT:

A Goldberg of Goldberg
Attorneys