

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: PR 97/2018

In the matter between:

THSEPO TIMOTHY MOTAUNG

Applicant

and

BARLOWORLD EQUIPMENT (PTY) LTD

First Respondent

M VAN DER MERWE N.O

Second Respondent

CCMA

Third Respondent

Heard: 30 October 2019

Judgment: 31 October 2019

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks to review and set aside a jurisdictional ruling made by the

second respondent (the arbitrator) on 5 March 2018. In her ruling, the arbitrator held that the CCMA lacked jurisdiction to arbitrate an unfair dismissal dispute referred by the applicant. The basis of the ruling is that the applicant was employed by a legal entity registered in Lesotho, and that the CCMA accordingly lacked territorial jurisdiction.

- [2] The material facts are recorded on the ruling, and it is not necessary for me to repeat them here. The central issue that served before the arbitrator was whether at the time of his dismissal. The applicant was employment by Barloworld Equipment (Pty) Ltd, a company registered in South Africa, or whether he was employed by Barloworld Equipment Lesotho (Pty) Ltd, a discrete legal entity.
- [3] The arbitrator determined the matter by reference to documents submitted by the parties, and submissions made by them. As I have indicated, central to the determination of the jurisdictional dispute was the status of the letter of transfer. The letter reads:
- ‘Please note that you have been transferred from Bloemfontein to Lesotho as a Project Manager: MARC effective 1 November 2013. You will report for Christo Coetzee, the Service Manager.’
- [4] The arbitrator records that the applicant’s representative disputed the letter, and disputed that it was ever signed. The dispute notwithstanding, the arbitrator proceeded to make a finding that the applicant ‘knew’ of his transfer and that it entailed that he was subject to different laws. What this illustrates is the undesirability of arbitrators making factual findings without hearing evidence. In *South African Social Security Agency v NEHAWU obo Punzi and 13 others* (2015) 36 ILJ 2345 (LC), his court held that arbitrators ought not to condone an agreement between parties to decide a dispute, in the absence of a stated case, on the basis of documentary evidence and written submissions. In that case, the award was set aside and the matter remitted for rehearing. The court said the following:

[5] I fail to comprehend how dispute which hinges on the fairness of the conduct of an employer can be decided [in the absence of a stated case] without parties giving oral evidence...

[6] The process used in the arbitration proceeding simply does not allow for a due and proper arbitration of the dispute...

[8] In the absence of such a stated case, oral evidence should be lead on the material facts in disputed arbitrations in terms of the LRA. Commissioners and arbitrator should not condone an agreement between parties that no oral evidence be lead unless such a state case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument is a fast way of resolving a dispute on the day of arbitration, it in fact renders the award is sued susceptible to review. As the result, the principle of speedy resolution of disputes is ultimately sacrificed.

[5] I fail to appreciate why the same principle should not apply to a jurisdictional ruling, especially where that ruling is necessarily dependent on the factual matrix. It does not appear in the present instance that there was an agreed stated case, nor does it appear that evidence was led on what appear to be clear and material disputes of fact, particularly those regarding the status and effect of the applicant's transfer. On the face of it, the letter appears to give effect to a geographical transfer or perhaps a secondment, not any transfer from one corporate entity to another. As I have indicated, there is no record of any evidence before me, certainly none that would serve to clarify these issues. In the result, that award stands to be reviewed and set aside, and the matter remitted to the CCMA for rehearing before a different commissioner.

[6] In coming to this conclusion, I pass no judgment on the merits of the jurisdictional point raised by the first respondent. I also make no decision on the basis on which the review has been brought and in particular, whether it is open to the applicant to rely on a 'reasonableness review' in the present circumstances. My decision is predicated only on the procedure adopted by the commissioner in

making the ruling under review.

[7] Finally, in terms of s 162 of the LRA, the interests of the law and fairness are best satisfied by there being no order as to costs.

I make the following order:

1. The jurisdictional ruling issued by the second respondent on 5 March 2018 under case number FSBF 3778-17 is reviewed and set aside.
2. The matter is remitted to the third respondent for rehearing before a different commissioner.

André van Niekerk
Judge

APPEARANCES

For the applicant: Adv. Sander, instructed by JG Keyl Attorney

For the respondent: Ms V Reddy, Norton Rose Inc