

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2274/17

In the matter between:

S A METAL (PTY) LTD

Applicant

and

DEBBIE LEE HOLROYD

First Respondent

VUSUMUZI EUGENE MOYO N. O

Second Respondent

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

Third Respondent

Heard: 29 January 2020

Delivered: 05 February 2020

Summary: An opposed review application – jurisdictional power – existence of employer – employee relationship – suspensive condition fulfilled or not. On the objective facts, employer and employee relationship came into existence and was terminated – dismissal within the meaning of section 186 of the LRA. The arbitrator was correct that an employer and employee relationship came into existence and that dismissal was effected – jurisdictional powers existed. The remedy of reinstatement was appropriate – the order of backpay cannot be interfered with – it being not compensation in terms of section 194 of the LRA – the just and equitable requirement finds no application. Held: (1) The application for review is dismissed ruling. Held: (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This application turns on a very narrow legal point. The real question is whether an employer employee relationship was born or not? The applicant contends that because the suspensive condition was not met, an employment contract did not come into being. Accordingly, the first respondent could not be dismissed and resultantly, the Commission for Conciliation, Mediation and Arbitration (CCMA) did not have jurisdiction to entertain the dispute. The first respondent on the other hand contends that an employer and employee relationship was born, and having been terminated, she was dismissed and the dismissal was unfair. The applicant in retort to the claim of unfair dismissal contends that the remedy was inappropriate and ought to be interfered with. The application is opposed by the first respondent.

Background facts

[2] During or about February 2017, the applicant required an HR Practitioner as a resource. Resultantly, an employment agency was instructed to source the required resource. The agency sourced the first respondent. On 27 February 2017, Mr Michael Jones (Mr Jones), the Human Resources Manager, as part of information sharing, indicated to the first respondent the details of the medical aid and the provident fund contributions. She was also informed that the information shared – medical and provident fund contributions – is subject to her passing all her tests. She was informed that the costs to company (CTC) would be outlined to her on the same day.

[3] It became common cause that the first respondent was invited to an interview session, wrote a skills test, underwent medical fitness tests and attended a handover meeting with the previous incumbent. She was informed by Mr Jones that she is the successful candidate. She later received a proposed CTC salary which she accepted. Resultantly, she tendered her resignation at her erstwhile employer. Subsequent thereto, on 1 March 2017, she received a letter of appointment, which she accepted on 2 March 2017. Later in the day, she received a call from the representative of the employment agency, one Morne, who advised her that she was struggling to find her referees, thus informed her that the offer of employment from the applicant would be withdrawn.

[4] On 3 March 2017, the applicant received a letter from one Mark Aaris, Head of Human Capital of the applicant, which, effectively sought to withdraw the employment offered to the first respondent. In the letter, it was suggested that the letter of appointment was a proposed employment contract, which was subject to her passing all pre-employment checks. The letter concluded thus: -

‘Subsequently we received results regarding the pre-employment checks which don’t meet the requirements and expectations for the position of HR Practitioner. These results unfortunately don’t allow us to continue with the employment offer.’

[5] Aggrieved thereby, (the withdrawal of the offer) the first respondent referred a dispute to the CCMA alleging unfair dismissal. At the arbitration proceedings, the applicant challenged the jurisdiction of the CCMA on the basis that there was never an employer and employee relationship between it and the first respondent. Having listened to the evidence from both parties, the arbitrator concluded that there was an employer and employee relationship and that the letter of 3 March 2017 serves as proof of dismissal of the first respondent. Having failed to prove the fairness of the dismissal, the arbitrator concluded that the

dismissal was both substantively and procedurally unfair. Resultantly, the arbitrator reinstated the first respondent with an order of backpay.

- [6] Aggrieved by the award, the applicant launched the present application. As pointed out above, the application is opposed by the first respondent only.

Grounds of review

- [7] The applicant raised five grounds of review. Those may be summarised as follows: (a) being prejudiced by not allowing legal representation in a seemingly complex dispute; (b) failure to allow postponement of the arbitration; (c) in concluding that there was employer employee relationship, the arbitrator failed in his duties by failing to properly analyze the evidence before him and came to an incorrect conclusion in respect of the suspensive conditions; (d) the relief of reinstatement was inappropriate and (e) the award is not one that a reasonable decision maker would arrive at. In the supplementary affidavit, the applicant did not add further grounds but simply amplified upon the aforementioned five grounds.

Evaluation

Legal representation

- [8] Two tests come into play in this matter. The first is the correctness test and the other is the reasonableness test. With regard to the legal representation issue, the gripe of the applicant is that the arbitrator having allowed legal representation for the first respondent, ought to have offered the applicant an opportunity to find one for itself. There is no merit in this ground. Having not offered an opportunity to find a legal representative is not a defect that renders the award reviewable. In any event, the transcript reveals the following:

‘COMMISSIONER: No, obviously you have to decide what you believe would be appropriate for the respondent. I need to understand what you are asking me, because obviously I cannot give legal advice. I can give you legal information, the approach.

MS AARIS: Okay, I do not think we will finish today. If there is a need for legal representation for the company, we can bring it next time.

COMMISSIONER: You want to bring to bring a legal representative?

MS AARIS: If we need to. We can proceed right now. We have one and half hour left. So most likely we will not finish this matter.’

- [9] It is patently clear that the applicant representative “*pinned her colours to the mast*” with regard to the issue of legal representation. Upon being asked if the applicant wishes to bring one, she categorically stated that “*if we need to*”. Clearly, it can never be said that the arbitrator failed in his duties, which failure taints the award. Accordingly, this ground must fail.

Postponement

- [10] At the CCMA, postponement is not there for the taking. Arbitrators cannot postpone arbitrations unless valid grounds to do so are presented to them. The transcript reveals that the representative of the applicant simply expressed her desire to leave at 11h30. The commissioner, pertinently asked her the following:

‘COMMISSIONER: So you do want to apply for postponement.

MS AARIS: No, let us just go ahead.

COMMISSIONER... Your flight bookings, I mean, those are your personal issues. I cannot entertain any of that, but what I can tell you is that there is a possibility of asking for postponement which is not automatic, but if that is something that you want to consider we can deal with that.

MS AARIS: Then I am going to ask you to postponement due to that.

...

MS AARIS: We can proceed. I have to hand over to my colleague if need be.'

- [11] It is absolutely clear that having been advised that the applicant could ask for postponement, its representative sought to apply for postponement but after the issue of costs was raised she decided to proceed with a rider that she would hand over to a colleague if need be. Accordingly, this ground is bound to fail too.

Was there an employment relationship?

- [12] With regard to the existence of an employer and employee relationship, I must state that for an employer and employee relationship to exist a written contract of employment is not a requirement. On the objective facts, an employment relationship commenced when the first respondent was offered the CTC which she accepted. This is after the first respondent was interviewed and attended the medical test. The letter of employment that followed on 1 March 2017 was not one to create an employer and employee relationship but was a recordal of the terms of the already created employer and employee relationship. The letter itself records thus: -

"The terms of agreement of your employment contract with the company are set out below."

- [13] The contentious issue, which I shall revert to later in this judgment is a term of the contract as opposed to a condition as argued by the applicant. As a term, it was recorded that "*Your appointment will be subjected to you passing all the pre-employment checks*". This is not a condition but a term, known as a modal clause. Thus the arbitrator was

right when he concluded that on the objective facts, an employer and employee relationship came into being.

Was the modal clause a suspensive condition?

[14] I now deal with the applicant's argument that the term outlined above is a suspensive condition and since the first respondent failed to pass the reference checks, the agreement did not come into existence. He placed heavy reliance on the judgment of the Labour Appeal Court in *Nogcantsi v Mnquma Local Municipality and others*¹, in particular where Coppel AJA, writing for the majority stated the law as follows:

'[36] A conditional contract of employment is a commercial reality. The LRA is not against such contracts. The appellant, seemingly, agrees that that is so, but confines the acceptability of such contracts to those where the condition is suspensive, rather than resolute, as in this case. The main argument being that with a suspensive condition there is no employment contract pending the fulfilment of the suspensive condition. But in the case of a resolute condition, a contract exists, but comes to an end upon fulfilment of the resolute condition and the contract is regarded as if it never existed.'

[15] Unfortunately, this case is not of assistance to the applicant. The condition therein was different as in that contract a term couched in the following terms was inserted: "*Clause 1.1 the appointment was subject to a vetting and screening process which should it reveal negative outcomes the contract would be automatically terminated.*" In the matter before me, there is no automatic termination contemplated. In fact this case is more about automatic termination, which is not a dismissal in terms of the Labour Relations Act² (LRA) and not about suspensive and/or resolute conditions³.

¹ (2017) 38 ILJ 595 (LAC).

² No. 66 of 1995, as amended.

³ See: Id fn 1 at para 42: "...The termination was not triggered by an act of which the aim and object ... was to end the employment relationship..."

[16] Returning to the contentious issue, the clause in question is not a suspensive condition. Where the party conferring a benefit intends the contract to be operative at once, but requires the party benefitting to give something, or to do or not do something in consideration of the benefit bestowed, then we are dealing with a *modus* or modal clause.⁴ In *Benoni Town Council v Minister of Agricultural Credit and Land Tenure*⁵, Acting Justice Page stated that it is best to treat a *modus* as a term of the contract, from breach of which the ordinary consequences of breach of contract follow. I fully agree.

[17] In *casu*, failure to pass the pre-employment checks amounts to a breach. A party faced with a breach has an election to seek specific performance or cancel and sue for damages. In an employment context cancellation of an employment contract is nothing but a dismissal. Thus the conclusion I reach is that the findings of the arbitrator are correct and cannot be disturbed.

[18] With regard to the question whether the first respondent was dismissed, the arbitrator was spot on when he concluded that the letter of 3 March 2017 is proof of dismissal. The author of the letter was ostensibly at pains to hide the purpose of the letter. He used the phrase '*not being allowed to continue with employment offer*'. This phrase does not make meaningful sense. If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. The letter is nothing but a dismissal letter. Section 186 (a) defines dismissal to mean that an employer has terminated employment with or without notice. On this score, the applicant must fail.

Relief

[19] Turning to the issue of the relief. Reinstatement is a primary remedy unless an employee does not wish to be reinstated. In *Equity Aviation*

⁴ See: RH Christie GB Bradfield *Christie's: The law of contract in South Africa* 6th Edition (Lexis Nexis, Cape Town, 2011) at p. 139.

⁵⁵ 1978 (1) SA 978 (T) at 991C.

*Services (Pty) Ltd*⁶, the Constitutional Court made it clear that the question whether the award of reinstatement should be retrospective is a question to be answered by the arbitrator. The arbitrator in this matter made reinstatement retrospective. A retrospective reinstatement comes with it the so-called back pay. In other words, the first respondent is treated as if she was never dismissed. Effectively backpay is nothing but arrear wages. The first respondent has tendered services and the applicant refused to accept the services. Accordingly, she was entitled to be paid her salary. Having not being paid her salary, she was entitled to her backpay as ordered by the arbitrator.

[20] A contention that the backpay ought to be just and equitable cannot be correct. As a point of departure, backpay is not compensation within the contemplation of the LRA. Section 194 of the LRA only applies to compensation, which was viewed as a *solatium* in a number of judgments of the Labour Appeal Court.⁷ Therefore, the concept of just and equitable does not apply to backpay. Accordingly, this Court, in my view, is not sceptered to interfere with the issue of backpay on the basis that same is not just and equitable. Thus, this ground must fail.

[21] With regard to the reasonableness of the award, the test is whether the award is one that a reasonable commissioner may arrive at. An unsubstantiated assertion was made that the reasoning in the award is totality divested from the evidence presented and the true nature of the dispute. There is no merit in this assertion. The evidence revealed that the first respondent was dismissed. The applicant bore the onus to prove that the dismissal was fair. Instead, the applicant chose to lead the evidence of the employment agency and failed to justify the dismissal. Where an employer fails to justify a dismissal on any of the three recognised grounds, then the dismissal is unfair. Accordingly, the award of the arbitrator falls within the bounds of reasonableness and this Court is not empowered to interfere with it. This ground must fail too.

⁶ [2015] 2 BLLR 174 (CC).

⁷ See: *Arb Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) and *SA Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 ILJ 2274 (LAC).

[22] In the results the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

G. N. Moshwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate I Posthumus

Instructed by: Whalley & Van Der Lith Inc, Johannesburg.

For the First Respondent: Ms N N Zulu of Ismail & Dhaya Attorneys,
Johannesburg.