



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 78/18

In the matter between:

ZISTICS TRANSPORT CC

Applicant

and

DUSWO

First Respondent

SIMELANE SICELO & 10 OTHERS

Second Respondent

COMMISSIONER M P MNGOMEZULU

Third Respondent

NBCRFLI

Fourth Respondent

Heard: 5 May 2020

Delivered: 07 May 2020 (This judgment was handed down electronically by emailing a copy to the parties. The 7th May 2020 is deemed to be the date of delivery of this judgment).

Summary: Due to Covid19 lockdown, this application was decided without oral hearing and the parties agreed to this arrangement. Jurisdictional review – the finding that the Bargaining Council had jurisdiction was correct. The award is one that falls within the bounds of

reasonableness. Held: (1) The application for review is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application seeking to review and set aside an award issued by the third respondent, in terms of which the dismissal of Simelane Sicelo and 10 others was found to be unfair and ordered their reinstatement with backpay. The applicant is aggrieved by the outcome and has launched the present application. The application is opposed by the trade union on behalf of its members. The trade union only filed a notice to oppose and did not file answering papers. That notwithstanding, this matter was enrolled on the opposed roll. However due to the lockdown period and the directive issued by the Judge President, the matter could not be dealt with in an open court. The applicant agreed that this matter may be disposed of without a hearing of oral submissions in an open court.

Background facts

[2] Mr Simelane Sicelo and 10 others (dismissed employees) were employed by the applicant as truck drivers. The dismissed employees alleged that they were dismissed on or about 12 March 2017 for reasons unknown to them. Allegedly on the day in question the business owner demanded that they sign certain documents and upon refusal they were told to pack their stuff and leave. They were locked out of the premises and not paid any wages. Aggrieved by their alleged dismissals, their

trade union referred a dispute alleging unfair dismissal. An attempt was made to resolve the dispute through conciliation, which attempt drew blank.

[3] Ultimately, the dispute was transferred from the Commission for Conciliation, Mediation and Arbitration (CCMA) to the fourth respondent, the National Bargaining Council for the Road, Freight and Logistics Industry (the Bargaining Council) for resolution through arbitration for which the third respondent was appointed. At arbitration, the applicant challenged the jurisdiction of the fourth respondent on the basis that the reason for dismissal was alleged by the trade union to be one that required the attention of this Court and the conciliator has certified that the dispute ought to be referred to this Court for resolution.

[4] Further, the applicant alleged that the dismissed employees were not dismissed. The third respondent after hearing submission ruled that the bargaining council had the necessary jurisdiction notwithstanding a certificate by a conciliator that the dispute is justiciable in this Court. After the ruling, the applicant attempted to have the matter postponed. The application for postponement was refused. After hearing evidence, the third respondent concluded that the dismissed employees were indeed dismissed and since there was no evidence from the applicant to justify the dismissal, he found that the dismissal was both procedurally and substantively unfair. As pointed out above, the third respondent ordered reinstatement with payment of backpay. Aggrieved by the award, the present application was launched.

Grounds of review

[5] The applicant contends that the award is a nullity since it was issued without the necessary jurisdiction. Further, it is contended that the dismissed employees were not dismissed and a finding that they were

was wrong. Above all, it is contended that the award is not one that a reasonable arbitrator would arrive at.

Evaluation

- [6] At the core of this matter lies the question whether the award was issued with the necessary jurisdiction. The jurisdictional challenge manifests itself in twofold. Firstly, whether the bargaining council had jurisdiction to entertain the dispute owing to the allegation that the reason for dismissal was on an alleged exercise of constitutional rights. Secondly, whether factually the dismissed employees were dismissed.
- [7] Regarding the first challenge, this Court was not favoured with the referral forms. However, the transcript reveals that the dismissed employees alleged that they were dismissed for unknown reasons¹. In terms of the Labour Relations Act² (LRA), where an employee does not know the reason for his or her dismissal the dispute could be resolved through arbitration. Reliance on the characterisation of the dispute by the conciliator is of no assistance to the applicant. It became common cause during the testimony tendered at arbitration that at some point after 12 March 2017, the dismissed employees were summoned to a disciplinary hearing. Although the dismissed employees testified that the reason for their dismissal was unknown, it is clear that the applicant had issues with their conduct. In terms of the LRA, where the reason for dismissal is misconduct, the dispute could be resolved through arbitration. I therefore conclude that the third respondent was correct when he ruled that the bargaining council had the necessary jurisdiction to entertain the dispute.
- [8] With regard to the second challenge, according to section 192 of the LRA, an employee bears the *onus* to establish the existence of a

¹¹ Page 51-55 of the transcript reveals an objection raised by the dismissed employees' representative with reference to the referral document which reflected that reason for dismissal was not told to the dismissed employees.

² No 66 of 1995, as amended.

dismissal. Section 186 defines what a dismissal is. It states that a dismissal does occur when an employer terminates a contract of employment with or without notice. The question whether a dismissal has or has not occurred is a factual one. The witnesses testified that the dismissed employees were dismissed. On the one hand the one witness testified that the owner told them to pack their stuff and leave the employer's premises. On the other hand the other witness testified that they were locked out of the premises and were not paid. During cross examination of these witnesses, technical propositions were put to them with no version being put as to what exactly the applicant's case was. Nonetheless, other than asserting that the employees were not dismissed no evidence was led by the applicant to support the assertion put to the dismissed employees. Versions put during cross-examination of a witness do not constitute evidence.

- [9] Accordingly, the evidence that the dismissed employees were told to take their stuff and leave; that they were locked out of the premises; that they offered their services by being at the gate until late afternoons and that they were not paid remained uncontroverted. In the light of such objective evidence, a finding that there was a dismissal is correct. There is no merit in an argument that the third respondent ought to have first dealt with the issue whether there was a dismissal or not. Section 138 of the LRA allows the arbitrator to take any approach in resolving a dispute. The transcript reveals that he called upon the dismissed employees to prove that they were dismissed³. Indeed the dismissed employees tendered evidence to prove that they were dismissed. There was no countervailing evidence against such evidence. Accordingly, the finding that the dismissed employees were dismissed factually is correct. Thus the challenge of lack of jurisdiction must fail. The technical defence that since the disciplinary enquiry was scheduled for 17 March 2017 is not helpful to the applicant in light of the uncontested evidence of the

³ Page 33 the commissioner stated that "you have to prove there was dismissal and all and then we will proceed with the case."

dismissed employees. It is not unusual for an employer to hold a disciplinary hearing after a dismissal of an employee⁴. Thus, it is no answer that since a hearing was still to happen then *ex hypothesi* there was no dismissal factually.

[10] The refusal of postponement was justified. A postponement of an arbitration is not there for the taking. In the absence of good grounds, an arbitrator is entitled to exercise his or her discretion against the granting of a postponement. Unless malice and caprice are shown to exist, a Court of review is not entitled to interfere with an exercise of discretion. Accordingly, a challenge on the postponement ruling is misplaced and ought to fail.

[11] With regard to the finding that the dismissal is both procedurally and substantively unfair, it cannot be said that the finding is not one that a reasonable commissioner may arrive at. Once dismissal is established, which was the case in this matter, the applicant was duty bound to prove the fairness of such an established dismissal. The short shrift approach taken by the applicant in this matter by not leading any evidence is and was unhelpful to the applicant given its statutory *onus*. Where dismissal is not proven to be fair through evidence, any finding that it is unfair is one a reasonable commissioner may arrive at. An allegation that the arbitrator committed a gross irregularity in not allowing oral arguments is rejected. At the conclusion of arbitration, parties agreed to deliver written submissions. Those submissions were taken into account when the award was issued.

[12] In light of all the above reasons, the application is bound to fail. The arbitration award is free of any defects. All the grounds put forward are therefore rejected.

⁴ *Semenya v CCMA and others* (2006) 27 ILJ 1627 (LAC)

[13] In the result the following order is made:

Order

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

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

Appearances:

No appearances.