

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case No: JR 1260/19

In the matter between:

**SELEPE BENSON LEKGAU**

**Applicant**

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**NAMISILE KHESWA N.O**

**Second Respondent**

**QUATRO SECURITY SERVICES**

**Third Respondent**

**ENROLLED: 20 May 2020, in view of the measures implemented as a result of the Covid-19 outbreak this matter was decided on papers.**

**DELIVERED: This judgment was handed down electronically by circulation to the parties representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 25 May 2020.**

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**JUDGMENT**

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**MABASO, AJ**

- [1] The Applicant seeks this court to review and set aside an arbitration award under case number GAJB 27035/18 and condone the late delivery of this application. The review application was delivered six weeks out of time, which

is not an inordinate period. Further taking into account the explanation thereof and prospects of success as set out below, the condonation application is granted.

### Grounds of review

[2] One of the grounds of review herein is that the arbitrator failed to reasonably determine and assess the material properly placed before her. Considering this ground, this Court has to take into account the totality of the material that was before the arbitrator.

[3] The role of an Arbitrator, in resolving a dispute before them, as put by the Constitutional Court in *CUSA v Tao Ying Metal Industries and others*<sup>1</sup> is this:

“Consistent with the objectives of the LRA, commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities.” This requires commissioners to deal with the substance of a dispute between the parties”

[4] At the commencement of the arbitration, it was in dispute that the Applicant was dismissed. Therefore, the Applicant had to present evidence to show a dismissal in order for the Commission for Conciliation, Mediation and Arbitration (CCMA) to have jurisdiction to hear the matter.

[5] It was common cause that the Applicant joined the employer in August 2018. Parties entered into a written employment contract which among other things

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<sup>1</sup> (2008) 29 ILJ 2461 (CC) at para 64. A commissioner must, as the LRA requires, “*deal with the substantial merits of the dispute*”. This can only be done by ascertaining the real dispute between the parties.<sup>39</sup> In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration, including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.

refers to commencement date being "31-08-18 -31-09-18". Paragraph 7.2 of the contract provides that *"the duration of this agreement is, subject to the provisions of clause 8 and 14 for an indefinite period."*<sup>2</sup>. Sub-clause 8.1 provides that *"the first six months of the employee's employment with the employer shall be a probation period"*.

- [6] During the opening statements, the Applicant stated that the employer permanently employed him.<sup>3</sup> In the examination in chief, he referred to a letter issued by the employer advising him that the contract of employment was "automatically" ending on 31 October 2018. I must indicate that the contract of employment does not state this date as the termination date. He averred that he had not committed misconduct at work.<sup>4</sup> He further referred to sub-clause 7.2 of the contract of employment.
- [7] The arbitrator concluded that the employment contract was for a fixed term, from 31 August to 30 September 2018, and that the Applicant worked beyond the latter date. The arbitrator says the issue before her was that of reasonable expectation, and she states that despite the clauses mentioned in paragraph 6 above indicating otherwise. The arbitrator held that sub-clause 7.2 refers to a probation period and according to her the probation did not apply to the Applicant. I conclude that the arbitrator was wrong in her conclusion therefore failed to apply her mind to the facts before her, taking into account that the contract of employment which was entered into by the parties contained the clauses and at no stage during the arbitration that parties disown these clauses. Further, during the arbitration the employer presented no evidence which supports the arbitrator's conclusion on this point.
- [8] Furthermore, the arbitrator failed to take into account that after concluding the 'fixed term' which ended in September the Applicant continued working beyond this period. Moreover, this was in terms of the same contract of

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<sup>2</sup> Even the 7.13 form, the Applicant under issues in dispute wrote that: employment was terminated without a reason, neither was a hearing held. Furthermore, the employer fails to comply with the contract, which states that it is for an indefinite period.

<sup>3</sup> Page 4

<sup>4</sup> Page 7

employment. On a reading of the contract, nowhere it says is fixed for one month as I have indicated that the commencement date is "31-08-18 -31-09-18". The arbitrator in concluding that there was a *"mix up with ending dates is not a good reason for any reasonable expectation whatsoever"* is not supported by the evidence presented before her. The arbitrator also failed to take into account that in the 7.11 form the Applicant indicated that the date of dismissal is 31 October 2018, which is a date after commencement date(s) as stated in the contract of employment.

[9] I, therefore, conclude that the arbitrator was wrong in concluding that the Applicant did not prove that he was dismissed.

[10] I find that the Applicant was dismissed, and the dismissal was both procedurally and substantively unfair. The Applicant, before the arbitrator, asked for compensation. I see no reason why he should not get compensation. Considering that he worked for two months and the dismissal was both procedurally and substantively unfair a compensation equivalent to six months will be appropriate.

[11] In the premises the following order is made:

Order:

1. The late delivery of the review application is condoned.
2. The arbitration award issued by the first Respondent under case number GAJB 27035-18 is reviewed and set aside and replaced with an order that,
  - "1. The CCMA has jurisdiction to hear the dispute as the Respondent dismissed the employee,
  2. The dismissal was both procedurally and substantively unfair.
  3. The Respondent must pay the employee compensation equivalent to 6 months of his salary calculated at the date of the dismissal."

3. There is no order as to costs.

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S. Mabaso

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicants: In chambers

Instructed by: MM Mitti inc Attorneys

For the Respondent: In person

Instructed by:

LABOUR COURT