

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2126/19

In the matter between:

ANSIES ENTERPRISES CC t/a BOSS ALU & STEEL

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER J. NKUNA

Second Respondent

G. N CHAUKE

Third Respondent

ENROLLED:19 May 2020, in view of the measures implemented as a result of the Covit-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 12h00 on 25 May 2020.

JUDGMENT

MABASO, AJ

Introduction

- [1] The Applicant brought an application to review and set aside the arbitration award issued in favour of the third Respondent, dated 21 August 2019, and replace it with an appropriate order which is either concluding that the termination of the employment was fair or remit the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for a hearing *de novo*.
- [2] In trawling the supporting affidavits herein, the only determinative grounds of review found is a contention that the arbitrator, in deciding the issue of reasonable expectation, committed a reviewable irregularity as he had been called to decide whether the employee was dismissed on 14 February 2019 following his alleged non-compliance with the instruction given to him by Mr Van Heerden.
- [3] On or about 7 September 2018, both parties entered into a written employment contract which provided that “*the employee shall commence his employment for an indefinite period...*”¹ It was common cause that when it expired, it was then renewed on a month-to-month basis. It was presented during the arbitration that this contract was to expire on 28 February 2019. On 14 February 2019, the employee and Mr Garth Van Heerden, co-owner of the Applicant had an altercation, the latter allegedly refused to comply with a lawful instruction.
- [4] It was common cause that following this deathly incident the employee left the Applicant’s premises. The latter then approached the CCMA claiming unfair dismissal. Conciliation was unsuccessful. The CCMA appointed the arbitrator to arbitrate the dispute. At the commencement of arbitration, the arbitrator proceeded to narrow down the issues. It transpired that it was not clear whether the employee was employed permanently or on fixed-term contract. As a result, the greater part of their respective testimonies dealt with this inconsequential aspect.

¹ Page 8 of the employment contract

[5] The Applicant disputed that the employee was dismissed and contended that the employee left the employment on his own accord. In contrast, the employee insisted that he was dismissed. The altercation happened on 14 February 2019 before 28 February 2019, the latter being the date the Applicant stated that the contract of employment was to end. The Applicant through the testimony of Mr Van Heerden stated that the contract of the employee was extended to 28 February 2019. During the altercation, he advised the Applicant that how could he expect his contract to be extended "*at the end of the month*" in light of his conduct. The employee then became angry, took his staff, and left.

[6] As a result, the onus was on the employee to establish the existence of the dismissal. Since it was stated even during the opening statements that dismissal was in dispute as the Applicant indicated that the employee "*just got angry and left the job*". Once this was established, then the onus would have shifted to the Applicant to prove that the dismissal was both procedurally and substantively fair.

[7] The arbitrator in his arbitration award concluded thus:

"The contract which ended on the 28 September 2018 comprised of 18 pages and had the signature which the employer testified that it was that of the employee. The second document which purports to be renewed was a 1 page which was not signed but as the name of the employer and the employee and the starting and the ending period of the contract. My analysis based on the evidence before me was that there was a meeting of minds between the parties and that there was a contract of employment. My finding is that the employee established the dismissal."

[8] A Commissioner called upon to decide a dismissal dispute. He is required to identify the issue before him and has to guide the parties relating to the issue before him. In preparing an arbitration award, such Commissioner has to prepare it by concentrating on the facts concerning the referral of the dispute and has to determine such issue. The award has to show this. I have

considered the arbitration records. In *casu* the arbitrator was called upon to decide, firstly, whether or not the employee was dismissed on 14 February 2019. The dispute had nothing do with whether the contract was terminated at the end of February 2019, taking into account the alleged termination of 14 February 2019.

- [9] Considering the facts and circumstances of this case, I conclude that the arbitrator failed to identify the issue that was before him. As a result, he misunderstood the dispute, therefore, he committed a reviewable irregularity.
- [10] Since the dispute between the parties before the arbitrator was misdiagnosed, the arbitrator had taken an incorrect approach in his questioning of the parties, as it concentrated mostly on the reasonable expectation aspect instead of the alleged misconduct and whether or not the employee was dismissed on 14 February 2019. The employee was either dismissed or not, and therefore the Court is not in the position to substitute the award. Therefore, I conclude that the best course of action is to remit the matter to the CCMA.
- [11] In the premises the following order is made:

Order:

1. The arbitration award issued by the first Respondent dated 21 August 2019 under case number LP 1883-19 is reviewed and set aside.
2. The unfair dismissal dispute between the Applicant and the third Respondent is referred back to the first Respondent for a hearing *de novo* before any commissioner other than the second Respondent.
3. There is no order as to costs.

S. Mabaso
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Cranko Karp Attorneys

For the Third Respondent: In person

LABOUR COURT