IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C34/2003

DATE: 24-11-2004

In the matter between:

SACHAL & STEVENS (PTY) LTD Applicant

and

D J F CAROLUS First Respondent

MARIO WANZA Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

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J U D G M E N T

TODD, AJ:

1. This is an application for review of an arbitration award of the second respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration ("CCMA"). An award was made in favour of the first respondent, who was found to have been dismissed unfairly and was awarded certain compensation.

2. The application is plagued by a number of procedural irregularities and other technical points, which have bedeviled not only its conduct in this Court, but which ultimately lie at the heart of the applicant's contentions in the application before me. The case also demonstrates a regrettable lack of administrative precision on the part of the CCMA, to which I will refer in due course.

3. The first respondent was employed, he said, by an entity which he cited when he referred a dispute to the relevant Bargaining Council (I was not provided with a copy of that dispute referral in these papers, but can discern this by reference to a certificate of outcome which I am left to assume reflects the name of the employer as it was cited in the referral) as "Sachal & Stevens". There is no reference to whether that entity is a company, a firm or any other form of corporation, a situation which is all too common in matters of this nature, in particular where individuals prosecute employment-related claims in the CCMA and, indeed, in this Court.

4. The matter was not successfully conciliated and was referred to arbitration. At the commencement of the arbitration proceedings, a Mr Mark Stevens, who attended the arbitration proceedings on behalf of the applicant, indicated to the second respondent that the first respondent had in fact been employed by a company known as Sachal Polyships (Pty) Ltd. The

record shows that his actual words used were the following "it is actually Sachal Polyships is the name of the company who employs him." Mr Stevens, it is apparent from the papers before me, is the director both of Sachal & Stevens (Pty) Ltd (the applicant in these proceedings) and of Sachal Polyships (Pty) Ltd (the company which he advised the commissioner at the commencement of the arbitration proceedings was the employer of the first respondent). It is further apparent from the papers before me that those companies conduct business from the same premises and that they have common membership and may properly be described as forming part of a “group”.

5. In simple terms they appear to be sister companies closely related in terms of their commercial identity, but the precise nature of their relationship and the extent to which they conduct the same business has not been disclosed to me for reasons which are far from clear. I may say that it seems to me that the person most obviously in a position to articulate the inter-relationship between the companies' business so that a proper understanding could be gained of the significance of Mr Stevens' contention at the outset of the proceedings (that Sachal Polyships was the first respondent's employer) was Mr Stevens himself.

6. Nevertheless, at the outset of the arbitration proceedings, as I have indicated, Mr Stevens informed the arbitrator that the employer was Sachal Polyships. The first respondent did not at the time dispute that statement of Mr Stevens and the arbitration proceedings took place on that basis. Mr Stevens did not suggest to the arbitrator that he had no jurisdiction to arbitrate the dispute on the basis which Mr Rautenbach, who appeared for the applicant, submitted to me, namely that there had been no proper referral of a dispute as between the first respondent and Sachal Polyships, the relevant dispute referral forms having related to Sachal & Stevens. I make that point because it seems to me to be clear from a consideration of the transcript that Mr Stevens continued to participate in the arbitration on the basis that he was there as a representative of Sachal Polyships, of which it is apparent also from the papers before me, he is the sole director and which has the intimate commercial or ownership relationship with Sachal Stevens that I have described. The arbitration proceedings continued on the basis that the employer in the arbitration proceedings was Sachal Polyships (Pty) Ltd.

7. An arbitration award was issued on or about 10 April 2002 which cited the respondent as "Sachal & Sevens-The Manager". The arbitration award then went on to describe the respondent's representative as "Sachal Polyships (Pty) Ltd". Reference in the award to the respondent as "Sachal & Sevens- The Manager" appears to me - quite apart from the typographical error in relation to the name Stevens - to have been an obvious error and on a proper consideration of the award it seems clear to me that the arbitrator intended to make an award against Sachal Polyships (Pty) Ltd. To the extent that there is any doubt about that, the arbitration award filed with the record of proceedings clearly reflects Sachal Polyships in relation to the arbitration award, though this time with what perhaps is by now a not unexpected further typographical error in relation to the name. That award, as Mr Rautenbach pointed out, bears one difference to the award issued on or about 10 April 2002 and that is that the date by

which the applicant is to be paid the compensation he was awarded is stated as being 30 April 2002, as compared to the date of 25 May 2002 in the other copy of the award.

8. These discrepancies are unexplained, but it seems to me that the differences in date are not material for the purposes of my decision in this matter. I mention that both versions of the award appear to have been signed and it would, in my view, have been appropriate for the CCMA or the second respondent (the arbitrator) to have explained the discrepancies in the award and the manner in which they came about. Nevertheless, it seems to me clear that the employer party cited in the award is Sachal Polyships (Pty) Ltd and in the light of the portion of the record to which I have referred, there is no reason to doubt that this was the conclusion that the commissioner had reached on the basis of the evidence before him.

9. That has two material consequences in relation to the applications that have been brought before me. The first is that Sachal Polyships (Pty) Ltd is not a party in these proceedings, has not been joined as an applicant in this application, and is not seeking in these proceedings to challenge the arbitration award or have it set aside. Insofar as the applicant (Sachal & Stevens) seeks to review and set aside the award, it is not the employer party ordered in the award by the arbitrator to pay the compensation which the arbitrator awarded and it has, on the papers before me, no basis for seeking to review and set aside the award.

10. The applicant's primary concern arises from the fact that the first respondent has procured, in an endeavour to enforce the award, a writ of execution (preceded, I should say, by a certification of the award by the director of the CCMA), in which the applicant (Sachal & Stevens (Pty) Ltd) is cited as the respondent. It seems to me on the papers before me that the applicant is entitled to relief in relation to the writ of execution.

11. Before I turn to the orders that I propose to make in the matter, I make the following further observations in relation to the facts as they appear before me. Firstly, insofar as Sachal Polyships is concerned, efforts to resist compliance with the award on the basis that there was no proper referral of a dispute to the Bargaining Council for conciliation seem to me to be doomed to failure. I mention this only because it was suggested in these proceedings that in the event that Sachal Polyships is found to be the employer party in relation to the arbitration award, it would be necessary for the first respondent to start afresh with a referral of a dispute citing Sachal Polyships as the employer.

12. The kinds of arguments that were advanced in this regard before me have been dealt with in other judgments of this Court. I refer by way of example to Lambrecht v Pienaar Bros (Pty) Ltd [1998] 6 BLLR 608, a judgment of the Labour Court by Tipp, AJ. There, an employer resisted enforcement of an arbitration award on the grounds that it alleged that it had been mistaken for a similarly-named but separate legal entity. Tipp AJ stated at paragraph 6 of the judgment:

"In general, when it comes to the correction of parties, a distinction falls to be drawn between instances where a party has been incorrectly described and those where an entirely different party has been cited. On the face of it, two legal entities are involved in the present matter; the one is Pienaar Bros (Pty) Ltd and the other is Pienaar Bros (Pty) Ltd t/a Pienaar Bros North. However, the facts must be placed in context and the substance of the matter must be examined. When that is done, I am satisfied that the existence of two entities plays no material role in the present case.

All transactions relevant to this dispute have been directed to the personnel and the establishment which *de facto* employed the applicant. That establishment, particularly through the person of Mr Kobus Steyn, has been fully informed of the steps taken towards resolution of the dispute. Up to a point, there was active participation by it *qua* employer in those steps. At no time before the opposing papers in this application has there been any complaint about the identity of the persona which has been cited."

And further, after considering the powers of the Labour Court, which include, in terms of the provisions of section 158(1)(a)(iii), the power to make any appropriate order, including an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act, the learned Acting Judge concludes at paragraph 15:

"In my view, the effect of these various provisions is to vest this Court with sufficient power to bring about in relation to the CCMA arbitration award the same correction that it has effected in respect of the proceedings before the Court. If it were not so an absurd result would follow, being an unnecessary, time-consuming and costly remission to the CCMA in order to effect a correction that this Court had already determined is to be made."

13. I refer to that judgment not so much because it is material to my decision, but because it is apparent that the sentiments there expressed would be equally apposite here. Mr Stevens has been the recipient of all relevant dispute referrals and documents relating to this dispute. An argument that the referral had not been directed to Sachal Polyships (Pty) Ltd and that on that basis the arbitration award in relation to that entity should be set aside would, in my view, apart from being excessively late, be spurious, the true dispute between the parties having, in my view, properly been referred to the CCMA and conciliated in the manner contemplated by the Act. As to what that entails I refer also to the decision of the Labour Appeal Court in the matter of Numsa v Driveline Technologies (Pty) Ltd [2000] 1 BLLR 20 (LAC). Although that case concerned a different question, that is whether a particular ground of the dispute in issue had been dealt with at conciliation, it nevertheless seems clear to me from the judgment that the Court was concerned primarily with the question whether as a matter of substance the parties had properly been brought together in a process of conciliation at the CCMA and that that is the jurisdictional prerequisite. Similar considerations are evident in the judgments of the Labour Appeal Court in Fidelity Guards Holdings (Pty) Ltd v Epstein & Others [2000] 12 BLLR 1389 (LAC); in the decision of the Labour Court in that matter reported at [2000] 3 BLLR 27, which was upheld on appeal; and in the decision of the Labour Court on similar questions in BHT Water Treatment v CCMA &

Others [2002] 2 BLLR 173. Those decisions show, in my view, that this Court and the Labour Appeal Court will be concerned primarily with questions whether as a matter of substance jurisdictional prerequisites have been met. Quite apart from that, it seems to me that a challenge by Sachal Polyships (Pty) Ltd on the basis of the alleged non-referral of a dispute in relation to that entity to the relevant bargaining council, will fail on the grounds that it was brought too late and on the grounds that the point was not taken at arbitration. Although at arbitration Mr Stevens identified the correct employer, there was no suggestion that the dismissal dispute then being arbitrated had not been referred to conciliation and the principle that then becomes applicable is that expressed in the maxim *omnia praesummuntur rite esse acta*.

14. The time for Sachal Polyships to take the point, it seems to me, has long past. I make a further observation in that regard. Not only was the point not taken in the arbitration, but there is no reference to it in the letter dated 30 May 2002 addressed by Mr Stevens to the CCMA following his initial receipt of the CCMA award. His letter is addressed to the CCMA on a letterhead of Sachal Polyships (Pty) Ltd, and raises a number of complaints about the arbitration award which are articulated in the form of an appeal.

15. These comments are, of course, not directly material to the present application. I have not been asked to deal with any such application by Sachal Polyships and they are therefore, needless to say, *obiter*.

16. On the question of costs, before I turn to the award that I make, it seems to me that the applicant will have been successful in this matter insofar as it will have succeeded in relation to the writ of execution that has been issued, but in relation to the remainder of the application the effect of my order is that the application was misconceived - I refer to the rview application brought by the applicant to review and set aside the arbitration award to which the applicant on its own contentions was not a party. Appropriate declaratory relief may have been sought but the applicant need, in my view, only have sought relief in relation to execution.

17. I am mindful of the fact that the CCMA commissioner (second respondent) might and perhaps should have been more articulate in describing the nature of the entity in respect of which the arbitration was conducted. This inaccuracy may have contributed to what, in my view, is a course of litigation that is not warranted when one has regard to the essence of the award that is ultimately at the heart of this matter; in fact, I have a very real fear that the parties' respective legal costs will by now far have exceeded the compensation ordered in the award, a situation which, in the light of the purpose of the Labour Relations Act, is entirely regrettable. Nevertheless, in the light of the view I take of this matter, I think it appropriate that costs should lie where they fall at the moment and that each party should bear its own costs.

18. In those circumstances I make the following order:

1. Sachal Polyships (Pty) Ltd is declared to be the respondent in respect of the arbitration award

made by the second respondent under case number WE8176/01. To the extent that two separate dates are referred to in the two copies of the awards before me, the applicable date is declared to be 25 May 2002.

2. The certification of the award in relation to the applicant is set aside.

3. The writ of execution in relation to the applicant and any attachments in terms thereof, are reviewed and set aside.

4. There is no order as to costs.

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TODD, AJ