

SOUTH AFRICA / JUDGMENT

De Beer v Tupa 2012 (Pty) Ltd and Another (J 1547/14) [2014] ZALCJHB 247 (9 July 2014)

[2014] ZALCJHB 247

COURT

Labour Court Johannesburg

BEFORE

Lallie

CASE / FILE NUMBER

J1547/14

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J1547/14

In the matter between:

REYNO DAWID DE BEER.....Applicant

and

TUPA 2012 (PTY) LTD.....First Respondent

MR. JOSEPH TSABADI..... Second Respondent

Heard: 3 July 2014

Delivered: 9 July 2014

Summary: The first respondent may not unilaterally resign from or act in breach of a pre-dismissal arbitration agreement as contemplated in section 188A of the LRA.

Acting in breach of section 188A pre-dismissal arbitration agreement.

LALLIE, J

[1] The applicant approached this Court on the basis of urgency for an order in the following terms:

‘1.1 That the first respondent’s dismissal of applicant:

- a. Is in breach of an agreement concluded between first respondent and applicant in terms of which it was agreed that the parties would approach the Commission for Conciliation, Mediation and Arbitration to appoint a capable commissioner whom can preside over the pre-disciplinary / pre-dismissal procedure as contemplated in section 188A of the Labour Relation Act. Act 66 of 1995 (as amended);
- b. Is in contravention of the requirements of referral to the Commission for Conciliation, Mediation and Arbitration as contemplated by section 188A; and
- c. The dismissal ruling by second respondent is unlawful.

1.2 The dismissal is set aside.

1.3 The applicant is reinstated retrospectively from date of unlawful dismissal and in the event that first respondent elects to pursue an inquiry into alleged misconduct by the applicant it is directed to conduct a pre-dismissal arbitration as contemplated in section 188A.

1.4 The first and second respondent is ordered to pay the costs of this application de bonis propriis, the one paying the other to be absolved.

2. Further and/or alternative relief’.

[2] Although the applicant initially sought an interim order, all the relevant factual and legal issue were canvassed, including the question of costs. The application was effectively for a final order. Counsel for the first respondent sought the issue of urgency to be determined first, however, the establishment of urgency was inextricably linked to the merits and in her efforts to argue urgency, she argued her entire case

[3] The facts of this matter are that the applicant was employed by the first respondent as its operations manager. On 27 March 2014, the applicant was suspended from duty and on 9 April 2014 he was served with a disciplinary notice in which he was accused of serious acts of misconduct. On 11 April 2011, a meeting which was attended by the applicant, Mr Birkenstock (Birkenstock) the first respondent’s CEO and Ms Pelsaer (Pelsaer) the Industrial Relations Consultant of the second respondent was held. The following agreement (agreement) which was signed by all three people in attendance was concluded:

‘POINTS AGREED AT MEETING ON 11 APRIL 2014

- 1) Ms l Pelsaer will not be the chairperson of the disciplinary hearing.
- 2) the parties will approach the CCMA to appoint a capable commissioner who can do the pre-disciplinary/pre-dismissal procedure, to chair the hearing at tupa, time to be confirmed.

- 3) the commissioner will be requested to write a detailed ruling, which will be final and binding on both parties’.
- [4] The applicant submitted that the agreement was a pre-dismissal arbitration agreement in terms of section 188A of the Labour

Relations Act 66 of 1995 (the LRA). The first respondent denied and submitted that it was an agreement to deal with the matter in terms of the Arbitration Act of 1965. As the agreement is central to this matter it is essential to determine the legislation in terms of which it was concluded.

- [5] It is common cause that before the agreement was signed, the applicant deleted the words “pre-dismissal” and substituted them with “pre-disciplinary/pre-dismissal”. The applicant and the first respondent therefore agreed to follow ‘the pre disciplinary/ pre- dismissal procedure’ in dealing with the allegations of misconduct which had been preferred against the applicant. It is common cause that the applicant and the first respondent agreed to approach the Commission for Conciliation

Mediation and Arbitration (“the CCMA”) to appoint a capable commissioner to conduct the procedure.

- [6] The agreement makes reference to neither a section 188A pre-dismissal arbitration nor private arbitration. The facts which support the applicant’s version are that the parties agreed to approach the CCMA for a commissioner to conduct the procedure. Section 188A requires that the CCMA be approached before the pre-dismissal arbitration is held. When parties wish their dispute to be resolved

through private arbitration approaching the CCMA is not necessary. In a letter addressed by the applicant to the first respondent on 15 May 2014, his attorneys stated that the first respondent ‘elected to follow the procedures as set out in section 188A of the Labour Relations Act 1995’. The first respondent did not correct the applicant regarding the process the parties had agreed to when replying to the letter although it referred to it as a disciplinary enquiry. In the front page of the arbitration award the second respondent referred to the procedure as the “SECTION 188A DISCIPLINARY ARBITRATION”. His opening sentence of the award reads as follows:

‘The pre-dismissal arbitration proceedings were conducted on 23 & 29 May 2014 respectively in the offices of TUPA Ltd in Johannesburg. The matter was dealt with in terms of section 188A of the Labour Relations Act 66 of 1995’.

- [7] It is after the applicant had raised concerns about the process conducted by the second respondent and he had been approached by Pelser that the second respondent issued a revised award in which he referred to the process as a disciplinary arbitration held in terms of the Arbitration Act of 1965. In his answering affidavit, the second respondent submitted that he made a mistake by issuing his original award in terms of section 188A and on a Tokiso letterhead. The factors which support the first respondent’s version are that the agreement makes no reference to section 188A of the LRA. The parties did not sign the

CCMA standard form for requesting a section 188A arbitration and they did not pay the CCMA the required fee.

- [8] When the factors which support the applicant's version that the agreement is a section 188A pre-dismissal arbitration agreement are compared with the first respondent's version, the most plausible inference that can be drawn is that the agreement the parties concluded is a section 188A pre-dismissal agreement. In view of the dispute of fact the following dictum in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1], is apposite:

'...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order... In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...'

- [9] The applicant's version must be preferred because the first respondent's version is not only far-fetched, it is untenable. It is not possible that the applicant and the second respondent would be of the incorrect view that the agreement was a section 188A one. The agreement makes no reference either to private arbitration or the Arbitration Act. It instead refers to a pre-dismissal procedure. It cannot be by coincidence that both the agreement and section 188A refer to a pre-dismissal procedure. Nothing turns on the additional by the applicant of the term "pre-disciplinary" in the agreement as no such process exists in our labour legislation. The agreement the applicant and the first respondent entered into on 11 April 2014 is therefore a pre-dismissal arbitration agreement as contemplated in section 188A of the LRA.

- [10] It is common cause that the process conducted by the second respondent was not the agreed process. As the applicant and the first respondent had concluded a section 188A agreement the applicant could not unilaterally resile from the agreement. The second respondent's obligation in terms of the agreement was to conduct the section 188A agreement, he had no authority to conduct another process. It is common cause that the first respondent communicated with the second

respondent in the applicant's absence. Part of the communication included the procedure to be followed. The inescapable conclusion which can be drawn from the applicant's inability to enjoy his rights in terms of the section 188A agreement is that the first respondent resile from the agreement and communicated its decision to the second respondent who had to alter his original award to reflect the first applicant's change of heart. As the section 188A agreement is valid, the applicant is entitled to have the acts of misconduct he is accused of determined in terms of a section 188A pre-dismissal arbitration. As the decision to dismiss the applicant was taken in a process other than the one he agreed to and in the absence of an agreement to arbitration in

terms of the Arbitration Act, the applicant's dismissal was unlawful.

[11] The first respondent argued that this application was launched pre-maturely as it was launched on 27 June 2014 after he was informed that the second respondent would replace the original award which was eventually received by the applicant on 30 June

2014. The first respondent further argued that this application constitutes an abuse of the court process in an attempt to compel it to settle the dispute between the parties. I am not convinced that the first respondent's argument is valid. The applicant established urgency. At the time the application was launched, the applicant had the necessary evidence to prove his case. He was under no obligation to wait for the second respondent to effect amendments to the original award to be consistent with the first respondent's defence. I am satisfied that the applicant established urgency as he seeks to enforce his right to a pre-dismissal arbitration in terms of an agreement with the first respondent. I could find no reason for delaying the enforcement of the right.

[12] The applicant sought a costs order *de bonis propriis*. He however, failed to forward reasons for the grant of the said order. Section 162 of the LRA provides that a costs order may be made according to requirements of the law and fairness. The applicant is the successful party. Fairness requires that he does not find himself out of pocket as a result of the first respondent's conduct. Had the first respondent not renege on the section 188A agreement, the applicant would not have approached this Court to assert his right. Both the law and fairness require that a costs order be made against the first respondents.

[13] I accordingly make the following order:

13.1 The applicant's dismissal is in breach of the pre-dismissal arbitration agreement concluded by the applicant and the first respondent on 11 April 2014 and unlawful.

13.2 The dismissal is set aside.

13.3 The applicant is reinstated with effect from the date of his unlawful dismissal.

13.4 In the event that the first respondent elects to pursue an inquiry into the alleged misconduct by the applicant, the applicant is directed to conduct a pre-dismissal arbitration as contemplated in section 188A of the LRA.

13.5 The first respondent is ordered to pay the costs of this application.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate E Van As

Instructed by: Len Dekeer & Associates

For the Respondents: Advocate T Colyn

Instructed by: Cynthia Van Dyk Attorneys

[1]

[1984] ZASCA 51; [1984] 2 ALL SA 366 (also 1984(3) SALR 623 (A)).

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Prepared on 11 October 2026 · Esheria