

SOUTH AFRICA / JUDGMENT

# Derby Supermarket v CCMA and Others (D778/12) [2013] ZALCD 36 (10 December 2013)

[2013] ZALCD 36

## COURT

Labour Court Durban

## BEFORE

R Lagrange

## CASE / FILE NUMBER

D778/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

## JUDGMENT

.....Of interest to other judges

Case no: D778/12

In the matter between:

DERBY SUPERMARKET First Applicant and COMMISSION FOR CONCILIATION, MEDIATION AND  
ARBITRATION (CCMA) First Respondent COMMISSIONER E DU PREEZ (N.O.) Second Respondent  
VINESHREE RUBICHAND Third Respondent

Delivered: 10 December 2013

Summary: Review – gross procedural irregularity – legal representation permitted despite reason  
falling away – employer compelled to commence leading evidence when dismissal disputed –  
employee's opening statement treated as evidence despite not being corroborated

R LAGRANGE J

**Introduction**

- [1] The employer in this matter seeks to set aside and review an award by the second respondent, a CCMA Commissioner, in favour of the third respondent Ms V Rubichand ('Rubichand'), an employee with seven years' service with the applicant.

- [2] Contrary to the employer's claim that he had not dismissed the third respondent, the arbitrator found that he had and that the dismissal was substantively and procedurally unfair. The arbitrator awarded the third respondent eight month's remuneration as compensation.

#### Grounds of review

- [3] The grounds of review raised by the applicant mainly concerned the manner in which the arbitrator ran the arbitration hearing and in particular his handling of the matter of legal representation. The applicant claims that initially, the arbitrator permitted an attorney to represent the employee because the employer was represented by a Labour Consultant. The latter appears to have been allowed to represent the applicant on the basis that he was a bona fide member or official of a registered employer's organisation. The applicant claims that the Labour Consultant was asked to leave the meeting but the arbitrator did not revise his view on whether the employee should still be permitted legal representation in view of the consultant's departure from the hearing. Rubichand contends it was up to the employer to object to her continued representation by an attorney, and the applicant cannot raise this objection belatedly on review.
- [4] The applicant contends that nothing turns on whether the employer's representative was asked to leave the meeting or left on his own accord because it had already been established that he was not entitled to appear in the arbitration as he did not meet any of the criteria for representation set out in rule 25(1) (b) of the CCMA rules. That provides that an employer party to arbitration proceedings in the CCMA may only be represented by a legal practitioner, a director or employee or an official of an employer's organisation which the employer belongs to. In fact, there are further limitations on the use of legal representatives in

misconduct cases, which are set out in Rule 25(1)(c). This provides that legal representation is only permitted with the consent of all concerned or, if no consent is granted, subject to the commissioner's discretion after applying a multi-factor test.

- [5] Secondly, the applicant claims that the employee did not give evidence and the arbitrator was not entitled to consider her version that, after being arrested at Mr Moodley's instance, at the police station, she was informed by Mr Moodley that she was dismissed and that her salary was stopped thereafter. The third respondent contends that this is not an accurate account of what transpired as only one witness of the employer gave evidence under oath, and that witness had no knowledge of what transpired at the police station. That episode was dealt with in the form of statements made on her behalf by her attorney and by Mr Moodley for the firm, and that was the only 'evidence' before the arbitrator on the critical issue of what transpired there.
- [6] Thirdly, the applicant attacks the arbitrator for directing it to start leading evidence on the assumption that the employee had been dismissed, despite this being a contested issue. Moreover, as the only evidence adduced in the arbitration was produced by the employer, in

the absence of evidence to the contrary tendered by the employee, the arbitrator could not justify his conclusion that the employee was dismissed. Rubichand again submits that this is something of a mischaracterisation of what transpired as the arbitrator only made a provisional ruling after hearing statements from both parties.

#### Evaluation

[7] The transcript of the proceedings obviously commences a little bit after the arbitrator had already made a ruling on the question of representation. Nevertheless, it is clear from the Commissioner's introductory remarks what had transpired earlier. The Commissioner said:

"The employer arrived an hour after the start of the matter and the employer's representative, Mr Moodley -sorry, I'm just looking for my form. Here it is, sorry. Mr Moodley could not provide any proof that he is in fact a member of the employer's organisation- Mr Ismail, sorry, Mr Ismail, that he is a member of the employers organisation and was asked to leave the room. The employer, Mr Moodley has now indicated that he is prepared to continue with the matter. Mr Bhamjee in return, I'd already, the issue was not in dispute that he would appear if Mr Ismail was present, so we'll proceed with the matter on that basis."

[8] It is apparent from his comments that, the Commissioner had previously made a ruling that the employer's representative could not appear in the hearing because he was not a member of an employer's organisation. It is also clear that originally the applicant had been allowed legal representation on account of permitting Mr Ismail to appear. The arbitrator mentions that the employer was prepared to continue with the matter but in his next breath mentions that the applicant's lawyer's presence had been conditional on Mr Ismail's attendance.

[9] The most favourable interpretation of this for the applicant is that Mr Moodley had consented to the applicant still being represented by an attorney notwithstanding Mr Ismail's exclusion from the hearing. But there is no indication that when Mr Moodley was asked whether he was willing to continue with the hearing he was advised that the question of representation could be reconsidered if he was unhappy with the applicant being represented by a lawyer. I am not satisfied on the evidence that the employer understood that it was within his rights to still object to the applicant being represented by an attorney, when the original basis for permitting her legal representation appears to have been mainly, if not wholly, based on the employer being represented by Mr Ismail. In the circumstances, there was a duty on the arbitrator to reopen the question of legal representation. At the very least, he could have asked the employer if he nonetheless agreed to the employee still being represented by an attorney. The factual basis on which legal representation had been agreed to, had disappeared, and the arbitrator ought to have established whether the employer expressly agreed to Mr Bhamjee's continued presence as the employee's representative. Consequently, the arbitrator committed misconduct in relation to his duties.

[10] It was submitted in argument that the employer cannot raise this objection belatedly on review, but it is not obvious that he would have known of his right to object at that stage.

[11] The second issue concerns the manner in which evidence was heard. Mr Bhamjee and Mr Moodley both gave fairly extensive introductory accounts of the dispute. After hearing them both the arbitrator, addressing Mr Bhamjee, said:

"I'm going to, because of the very nature of this matter, if the Applicant has not been working for the months, not been paid for three months, I'm going to assume, without making a ruling, that she's been dismissed, which means that the onus is upon yourself, sir, to prove that the dismissal was fair or that you never dismissed, whatever you want to prove. It means in effect that you need to start by presenting your case and giving your, the evidence. So we will start with your case.

[12] Mrs V Ramduth ('Ramduth') was then sworn in as the employer's witness. After she had testified it appears Mr Moodley decided not to call anyone else and the Commissioner confirmed that he was closing his case. Mr Bhamjee then stated:

"If he is closing his case, he has not proved a thing. He hasn't necessarily (inaudible) the dismissal stands from 13 April, or rather 16 April. (Inaudible) therefore there was no procedure, there was no reason for her dismissal. There was no process followed to ensure that the applicant on her version went back to work except one phone call. The evidence of procedure needs to be treated with caution. She had no knowledge of whatever had gone on. She was merely a messenger. The duty still rested with the Respondent to take certain steps, which it failed to do. Its simply not good enough to say its within the hands of the police, or the CCMA."

[13] Mr Bhamjee proceeded to argue the employee's case, and later in his representations suggested that the situation was similar to one in which a party asks for absolution from the instance because the other party had failed to discharge the onus. He argued that even though such a procedure didn't exist at the CCMA "the Commissioner is also bound by the normal rules of evidence, and in the circumstances I am of the view that it does need that discretion." He then asked the Commissioner effectively to

make a ruling that the employer had failed to discharge the onus that the employee had been fairly dismissed after which he would consider whether or not to lead evidence. However the Commissioner refused this invitation and made it clear that, that was not his decision whether the employee should lead evidence. The arbitration proceedings then concluded, without Rubichand leading any evidence herself.

[14] In summary, what had happened was that the arbitrator had made a provisional finding on the employee's dismissal based simply on the representations of both parties, without those versions being supported by evidence under oath and without being tested under cross-examination. Having made that provisional ruling, which he never revisited, the arbitrator then burdened the employer with the duty of proving that the dismissal was fair. At the end of Ramduth's evidence, the arbitrator did not point out to the employer that, as things stood, the only evidence properly before him was Ramduth's, when he must have known from Moodley's and Bhamjee's opening statements that the answer to whether there was a dismissal and how it might have come about lay in a proper examination of those two versions.

- [15] In his award, having noted that the employee had decided not to give evidence under oath because she felt that the respondent had not discharged its onus to prove her alleged dismissal was fair, he then proceeded to analyse her version, thus:

*"The applicant's version was that she was dismissed, by Mr Moodley personally at the police station. That apparently being the reason*

why she phoned in the afternoon to request a letter dismissal. Mr Moodley not challenge this allegation nor give evidence to deny the allegation. In my view an omission on the part of Mr Moodley. Mr Moodley further conceded that although the applicant was not an employee any longer, he could not advance any explanation how the employment contract was terminated or when it was terminated."

- [16] Consequently, despite being aware that the only testimony properly admitted in the enquiry was that of Ramduth, the arbitrator found against the employer at least to a significant extent because he had not led evidence to repudiate the opening statement of the employee's representative. In the arbitration hearing, he did not even ask the parties whether they would confirm their opening statements under oath and allow each of them to cross-examine the other thereon. Obviously, the arbitrator irregularly equated the employee's opening statement with evidence, but would not afford the same status to the employer's opening statements. Plainly, this was a gross irregularity in the conduct of the proceedings and amounted to misconduct on his part in relation to his duties as an arbitrator. Moreover, on Ramduth's evidence the employer's case was that Rubichand did not return to work as she said she would, so the evidentiary burden clearly was on her to explain her non-return, by challenging Ramduth's

version of events.

- [17] In argument, it was submitted by Rubichand that the arbitrator was entitled to require the applicant to start leading evidence despite there being a dispute over whether or not Rubichand had been dismissed in terms of the arbitrator's power to conduct the arbitration in a manner he or she considers appropriate to determine the dispute fairly and quickly. I agree. There may for example be merit in an employee giving evidence first even when the employer bears the onus for proving the fairness of the dismissal, if the nature of the employee's complaint has not been clarified in a pre-arbitration agreement. However, the arbitrator must not lose sight of what evidence has been led. The arbitrator cannot simply use the opening statement of the employee's

representative as a rough proxy of the evidence she would give, especially when she bears the onus on the issue under consideration.

[18] This is not a mere formality. According to the employer's only witness Mrs Ramduth, it was on a Sunday that she had first phoned Rubichand, who was not at work, to inform her that she had been seen on video footage paying out extra money to a customer, which Rubichand denied on the phone and terminated the call. On the following Monday, Rubichand phoned and said she wanted 'a dismissal letter'. However, Mr Moodley had said they could not issue a dismissal letter because she had not been

dismissed. Ramduth claims she told Rubichand she must return to work and Rubichand said she would come in the following day but never did. It was put to Ramduth, that when Rubichand testified, she would say that when she phoned Ramduth, she had told her she had been fired and was not returning to work. Because Rubichand never corroborated this version in testimony, it was effectively never tested under cross-examination, even though the two versions contradicted each other in material respects.

## Conclusion

[19] In conclusion, the arbitrator committed serious procedural irregularities in the way he conducted the hearing and in failing to properly distinguish between representations and evidence when he evaluated what had transpired at the hearing. In the circumstances, the award must be set aside. Since the issues of representation and the leading of evidence were not properly handled, this is not a case that can be decided on the existing record and must be remitted for a hearing de novo.

[20] In passing, I should mention that it is not necessary for the purposes of this judgment to make any finding on whether the applicant was entitled to be represented by Mr Ismail, or whether the requirements of CCMA Rule 25(1) (b)(3) were met.

## Order

[21] The second respondent's award dated 22 July 2012 issued under case number KNPM 1247-12 is reviewed and set aside.

[22] The matter is remitted back to the first respondent, which must set the matter down for a hearing de novo before a commissioner other than the second respondent.

[23] No order is made as to costs.

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R Lagrange

Judge of the Labour Court

Appearances:

For the Applicant:.....Mr S Khan

..... Instructed by A. Singh & Associates

For the Third Respondent: Mr P J Blomkamp

..... ..Instructed by Bhamjee Attorneys

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