

SOUTH AFRICA / JUDGMENT

Media Information and Technologies Sector Education and Training Authority (MICTSETA) v Weedon and Others (JR718/16) [2018] ZALCJHB 79 (6 February 2018)

[2018] ZALCJHB 79

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JR718/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR

718/16

In

the matter between:

MEDIA
INFORMATION AND
TECHNOLOGIES
SECTOR EDUCATION
AND
TRAINING AUTHORITY
(MICTSETA)
Applicant
and
LYDIA
WEEDON
First Respondent
THE
COMMISSION FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
MR

ISAAC MILANZI N.
O
Third Respondent

Heard: 31 January 2018

Delivered: 6 February 2018

Summary: A party is entitled to representation by an employee and not a specific employee. Not all errors vitiate an arbitration award. If the outcome is reasonable then an award cannot be set aside and reviewed. Held: [1] The application for review is dismissed. Held: [2] The applicant to pay the third respondent's costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed review application. The applicant seeks to review and set aside an arbitration award made by the third respondent.

Background

facts

[2] The applicant employed the first respondent as a Human Resources Generalist. Around September 2015, it was alleged by the applicant that the first respondent committed acts of misconduct. Consequently, on or about 1 September 2015, the first respondent was charged with three acts of misconduct. One of the charges relating to misrepresentation was withdrawn. At the internal hearing, the first

respondent was found guilty of the remaining two charges and was dismissed on 07 October 2015.

[3] The first respondent was aggrieved and she approached the second respondent on allegations of unfair dismissal. The third respondent was appointed to resolve the dispute of the alleged unfair dismissal. After hearing evidence, the third respondent made certain rulings and an award in favour of the first respondent. The applicant was aggrieved thereby and approached this Court for a relief. The first respondent opposed the granting of the relief sought.

Grounds for Review

- [4] The first and the main ground relates to an alleged irregularity when the third respondent ruled that one Gama was not entitled to represent the applicant in the arbitration proceedings[1]. Allegedly, the error of refusing Gama representation led to unreasonable results, in that the whole case and evidence of the applicant was compromised. By dismissing the representatives (Advocate Motsiri, Mr Kgatla and Gama), the third respondent denied

the applicant a fair opportunity to present and prepare for its case.

- [5] The third respondent failed to apply mind by not mero motu postponing the arbitration, in the circumstances where postponement was inevitable. At the same time, he failed in his duties, thereby committing gross irregularity. He failed to enquire about the alleged third witness to have been called by the applicant at arbitration. Had the third respondent allowed Gama the opportunity to represent the applicant, it would have been shown through evidence that the transgression was serious enough to warrant a dismissal.

Evaluation

- [6] The issue of Gama is of no consequence when it comes to the reasonableness of the award. Even if I were to find that the third respondent erred, which finding I am not making, by not allowing Gama to represent the applicant, such a finding, does not affect the ultimate outcome. The outcome is reasonable nonetheless[2]. The provisions of Rule 25 of the Commission for Conciliation, Mediation and Arbitration (CCMA) Rules are clear. If a person seeking

to represent an employer is not an employee of that employer party, he or she is not entitled to represent. Before the third respondent,

the said Gama failed to prove that he was an employee of the applicant. Nonetheless the applicant was represented by another employee, Mr Peele.

- [7] In terms of the Rule, a party is not entitled to be represented by a specific employee or an employee of own choice. The argument that Gama was more prepared than Mr Peele is without merit. Even if that was the case, the applicant was represented within the contemplation of the Rule. The record reveals[3] that Mr Peele was actually prepared and was afforded an opportunity to prepare fully. It does seem that Mr Peele knew beforehand that he may have to represent the applicant, hence his partial preparation.
- [8] It cannot be correct that the applicant was denied a fair opportunity to present and prepare its case. The third respondent took time to explain the process to both parties before him[4]. To that explanation, Mr Peele responded thus:

JP: Yes, we are all clear, Commissioner.

IM: Are we ready to proceed?

LW: Yes, yes

JP: Ready for first witness.[5]

[9] Mr Peele led all the witnesses of the applicant and also cross-examined the first respondent and her witness. Therefore, the applicant had a fair opportunity to state its case.

[10] There was no reason for the third respondent to postpone the proceedings. Reliance on Dimbaza[6] is completely misplaced. The circumstances that obtained in that case do not obtain in casu. An argument that postponement was inevitable is without merit and thus rejected.

[11] In summary, the award issued by the third respondent is one that a reasonable commissioner can issue. It falls within the bounds of reasonableness. All the grounds persisted with are without merit. Thus the applicant is bound to fail. Regarding costs, I do not see any reason why costs should not follow the results.

[12] In the results, I make the following order:

Order

1. The application for review is hereby dismissed.
2. The applicant to pay the costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate K A Tema

Instructed by:

Kgatla Attorneys, Pretoria.

For the First Respondent: Advocate S J Hayward

Instructed by:

Deale Attorneys, Johannesburg.

[1] Paragraphs 7.1-7.11 of the FA.

[2] What matters is the materiality of the error. See Shoprite Checkers v CCMA [2015] 10 BLLR (LC), Herholdt v Nedbank Ltd [2013] 11 BLLR 1074 (SCA), Goldfields Mining SA v CCMA [2007] ZALC 66; [2014] 1 BLLR 20 (LAC) and HOD Education v Mofokeng

[2015] 1 BLLR 50 (LAC).

[3] SM: Yes, sir you said your name is Joseph Peele. So you need to proceed. JP: Commissioner as it stands now we will need about five to ten minutes just to make sure that I am well prepared, I had prepared partially but Mr Gama was meant to be fully presenting the case of the merits. But I have been asked to step in on his behalf and for that I will need a good five or ten minutes with him just to go through the case to make sure that I am well prepared if all parties are in agreement with that. I am well aware that we have just broken for the 30 minutes break but I am requesting that just to ensure that the representative of the employer is not prejudiced. SM: Yes, but I also stated that the issue concerning Mr Gama, we dealt with it, and then he said he was going to bring another person. So all right, I will give you the ten minutes that you have requested so that I don't prejudice you. SM: This is a continuation of case GATW128-15, the respondent requested ten minutes but I granted more than ten minutes for the respondent to prepare. Yes, Mr Peele. Are you prepared to proceed? JP: Yes, Commissioner, I think we have prepared as closely as possible, as we can, and we would want to proceed... [My underlining and emphasis] SM=The third respondent. JP=Joseph Peele. (the employee of the applicant)

[3] SM: Yes, sir you said your name is Joseph Peele. So you need to proceed.

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JP: Yes, Commissioner, I think we have prepared as closely as possible, as we can, and we would want to proceed... [My underlining and emphasis] SM=The third respondent. JP=Joseph Peele. (the employee of the applicant)

[4] See B63-B65.

[5] IM=Isaack Milanzi and LW=Lydia Weedon.

[6] Dimbaza Foundaries Ltd v CCMA and Others [1999] 20 ILJ 1763(LC)

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