

SOUTH AFRICA / JUDGMENT

Mncedane v Maziya General Service and Others (JR 1115/19) [2020] ZALCJHB 142; (2021) 42 ILJ 150 (LC) (17 August 2020)

[2020] ZALCJHB 142

COURT

Labour Court Johannesburg

BEFORE

N Coetzer

CASE / FILE NUMBER

JR 1115/19

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1115/19

In the matter between:

NKOSIFIKELELA G MNCEDANE

Applicant Applicant and MAZIYA GENERAL SERVICE

First Respondent ZIZI MQINGWANA N.Ob

Second Respondent THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Third Respondent Date of reasons: 17 August 2020 First Respondent Second Respondent

REASONS

COETZER, AJ

- [1] On 14 July 2020 I handed down an Order dismissing the application for review under the above case number. I set out below my reasons for doing so.
- [2] The applicant seeks, in terms of section 145 of the Labour Relations Act 66 of 1995, as amended ('the LRA'), to review and set aside the arbitration award issued by the second respondent ('the Commissioner') on 10 May 2019 under case number GAJB27196-18. In that award the Commissioner found that the applicant was not dismissed by the third respondent and as a consequence the Commission for Conciliation, Mediation and Arbitration ("the CCMA") lacked jurisdiction to arbitrate the dispute.

The review test

- [3] The review test applicable in the present circumstances is an objective one, requiring this Court to decide whether the Commissioner was right or wrong in arriving at his findings relating to the jurisdiction of the CCMA.[1]
- [4] In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[2] the Labour Appeal Court said the following:-

“[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

- [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties...
- [41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.”

The review application

- [5] The applicant contends as his grounds for review of the award that the Commissioner based his decision on wrong facts and failed to apply his mind to the provisions of section 198B of the LRA.[3] He has also alleges that he was prejudiced due to there being no Xhosa translator at the arbitration.

- [6] In his affidavits before this Court the applicant contends that he concluded a 'verbal permanent' contract of employment with the third respondent on 20 June 2013 to work as a Community Liaison Officer on a project, called RW00913/12 ("the Project").

This contract, he contends, commenced in May 2013.

- [7] The applicant also contends that he was employed by the third respondent to work on the Project until its completion, where after he would be transferred to another project. His contention is thus that his employment was indefinite in nature and not tied to the Project.
- [8] He contends further that some two years after allegedly commencing employment with the third respondent, he was required to sign a fixed-term contract 'under duress' with Rand Water on 13 July 2015. The applicant contends in his affidavit that this fixed-term contract was 'fictitious'.
- [9] It is necessary to mention at this juncture that the third respondent was a contractor performing work for Rand Water in respect of the Project, which came to an end on 30 November 2018. The applicant contends that it was on this date that he was dismissed by the third respondent.
- [10] As I understand it, the nub of the applicant's complaints is that he was employed by the third respondent on an indefinite basis on 20 June 2013 and that this remained so, notwithstanding the fixed-term contract which he subsequently concluded with Rand Water. Consequently, the termination of his employment on 30 November 2018 by the third respondent constituted a dismissal in terms of the LRA.
- [11] The application for review was initially opposed by the third respondent, but the opposition was withdrawn prior to any answering affidavit being filed. The applicant did not seek to argue the matter on the date that the matter was set down for hearing and requested that the review be determined based on the papers filed with this Court, in accordance with the Directive issued by the Judge President on 1 July 2020.

The record of proceedings

- [12] The record of proceedings reveals that a factual dispute arose as to when the applicant commenced employment with the third respondent. As indicated, he contends that he commenced employment on an indefinite basis on 20 June 2013 following the conclusion of a verbal contract of employment with the third respondent. The third respondent disputes this but concedes that it made UIF deductions on behalf of the applicant with effect from 1 November 2013.
- [13] It is common cause, however, that the applicant concluded a fixed-term contract with Rand Water on 13 July 2015. On this basis the third respondent's witness, Ms van Pletzen, at the arbitration seemed to disavow any notion that the applicant was employed by the third respondent.

[14] Ms van Pletzen however acknowledged that the third respondent continued to pay the applicant's salary each month until 30 November 2018 and effected and paid over the necessary statutory deductions from the applicant's salary. She also confirmed that the applicant also continued to report to the third respondent's project manager, Ms Nthangeni. Ms Nthangeni also informed the applicant that his fixed-term contract would terminate on 30 November 2018 in an email dated 27 November 2018.

[15] Notwithstanding this, the third respondent denied that it was the applicant's employer on the basis that the fixed-term contract was concluded with Rand Water. Ms van Pletzen summed up the third respondent's position as follows: -

"Uhm I put it to you Sir that we paid your salary every month, we contributed to the UIF, you were on our payroll, we did pay the UIF over because it was on record like that. There is nothing funny, nothing sinister, your contract of employment in writing was with Rand Water and we were paying your salary. But let me just put it to you this way. There is no more contract. This contract either with Maziya or with Rand Water doesn't exist anymore because the work is finished, so I don't understand."[4]

[16] It is not entirely clear from the record why the fixed-term contract was entered into with Rand Water in circumstances where the third respondent appeared to remain the applicant's de facto employer. Ms van Pletzen contended at the arbitration that the applicant had refused to sign a fixed-term contract with the third

respondent, but this was disputed by the applicant.

[17] The evidence led at the arbitration offers little to clarify the issue. I am only able to infer from the record that the arrangement was one of convenience, entered into in an attempt to resolve previous disputes raised by the applicant against the third respondent, including non-payment of his salary. It also appears that the third respondent had sought to institute disciplinary proceedings against the applicant on more than one occasion.

[18] The reasons for entering into such an arrangement are, however, not important. As indicated above, the applicant contended that the fixed-term contract concluded with Rand Water was fictitious and that he remained an employee of the third respondent up to and including 30 November

2018. He alleged during his evidence at the arbitration that the fixed-term contract was invalid, although this was denied by the third respondent and he tendered no further evidence to support this allegation.

[19] I mention also that Rand Water was initially a respondent in the arbitration proceedings but on the day of the hearing the applicant abandoned his claim against it and the Commissioner issued a Ruling to that effect.

Analysis

- [20] Taking account of the evidence presented at the arbitration there were, in my view, two issues which the Commissioner needed to determine in the arbitration. The first pertained to the identity of the applicant's employer. Once that had been established, the Commissioner was required to determine whether the applicant had in fact been dismissed.
- [21] It is not apparent from the award that the Commissioner dealt with any of the complexities pertaining to the nature of the relationship between the applicant, the third respondent and Rand Water. He appears, however, to have accepted that the third respondent was the applicant's employer simply because the applicant abandoned his claim against Rand Water. Be that as it may, the Commissioner's

conclusion

that the applicant was the employee of the third respondent cannot be faulted. I say so for the reasons set out in the paragraphs below.

- [22] As indicated above, it is common cause that the third respondent made UIF deductions from the applicant's monthly salary from 1 November
2013. It is, in my view, safe to assume that an employment relationship between the applicant and the third respondent commenced on or about this date.
- [23] Even after the fixed-term contract was concluded, the third respondent continued to pay the applicant his monthly salary, made statutory deductions from his salary, exercised control and direction over him and even instituted disciplinary action against him. Rand Water appears to have had little, if any, involvement in the employment of the applicant, other than signing the contract.
- [24] While the fixed-term contract was ostensibly concluded between the applicant and Rand Water, the evidence tendered at the arbitration strongly suggests that the applicant was, for all intents and purposes, still the employee of the third respondent after the conclusion of that contract. The arrangement involving Rand Water constituted an attempt to disguise the true identity of the employer.
- [25] Section 200A of the LRA provides specifically for situations of disguised employment by creating a rebuttable presumption as to whether a person is an employee for purposes of the LRA. It provides, *inter alia*, as follows:-
- “(1) Until the contrary is proved, for purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:*
- (a)” (Emphasis added).

[26] In *Universal Church of the Kingdom of God v Myeni & Others*[5] the Labour Appeal Court discussed the purpose behind the provisions of section 200A, inter alia, as follows:-

“[37] In my view, a better understanding of s 200A can only be informed by a clearer understanding of the circumstances surrounding the evolution of the section. There is no doubt that the introduction of this section was intended to safeguard and protect vulnerable workers who, in terms of the LRA, qualified to be treated as 'employees' and to enjoy the legal protection under the LRA, but who were somewhat manipulated by some unscrupulous employers and induced to conclude contracts in which they (the workers) were conveniently described either as independent contractors or something similar. In this way, employers escape their obligations under the LRA vis-à-vis the workers concerned. Therefore, in terms of s 200A, even B if a contract does not refer to 'employment', it is presumed to be an employment contract if the s 200A factors are present. This was doubtlessly the primary rationale behind the promulgation of s 200A. Simply put, s 200A advocates substance over form.” (Emphasis added).

[27] The endorsement of a substance-over-form approach by the LAC is precisely what is advocated by the Code of Good Practice: Who is an employee, which provides as follows:-

“The presumption applies regardless of the form of the contract. Accordingly, a person applying the presumption must evaluate evidence

concerning the actual nature of the employment relationship. The issue of the applicant's employment status cannot be determined merely by reference to either the applicant's obligations as

stipulated in the contract or a "label" attached to the relationship in a contract. Therefore a statement in a contract that the applicant is not an employee or is an independent contractor must not be taken as

conclusive proof of the status of the applicant.”[6] (Emphasis added).

[28] To my mind, the evidence presented at the arbitration creates a rebuttable presumption, in terms of section 200A, that the applicant was an employee of the third respondent. It follows that the fixed-term contract concluded on 13 July 2015 served, in reality, to regulate the relationship between the applicant and the third respondent.

[29] Having established that the applicant was an employee of the third respondent and that the provisions of the fixed-term contract applied to their relationship, it is necessary to determine whether the applicant was dismissed.

[30] It is clear from the record that the arrangement entered into between the applicant, the third respondent and Rand Water entailed that the applicant would be employed for purposes of the Project, with effect from 1 October 2014 until its completion. This much is confirmed by the terms of the fixed-term contract. It is also not in dispute that the Project terminated on 30 November 2018.

- [31] In those circumstances it cannot be said that the applicant was dismissed by the third respondent. The fixed-term contract clearly expired automatically through the effluxion of time on 30 November 2018.
- [32] To the extent that the applicant has suggested that his employment with the third respondent is of an indefinite nature, this is not correct. Having failed to establish that the fixed-term contract was invalid, the applicant's terms and conditions of employment were regulated by the terms and conditions of the fixed-term contract from the moment that it was concluded.
- [33] While it may be that prior to the conclusion of the fixed-term contract his employment with the third respondent was of an indefinite nature, once the fixed-term contract was concluded he ceased to be employed on that basis.[7]
- [34] In summary, it is implicit from the Commissioner's award that he considered the third respondent to be the applicant's employer and that the fixed-term contract had overtaken any notion of indefinite employment. The terms of the fixed-term contract resulted in the applicant's employment terminating automatically at the end of the project i.e. 30 November 2018.
- [35] Consequently, the Commissioner's finding that the applicant had not been dismissed is therefore, in my view, correct and the application for review must fail.
- [36] The applicant's reliance on section 198B is of no assistance to him. The applicant was clearly employed on a fixed-term contract for purposes of project-based work, which constitutes a justifiable reason for fixing the term of the contract (see section 198B(4)(d) of the LRA). The applicant did not raise this issue at the arbitration and the averments contained in the founding affidavit take the case no further.
- [37] Finally, the applicant contends that he was prejudiced because he was required to speak English throughout the proceedings since no Xhosa interpreter was available. It is not clear from the record whether the applicant asked for an interpreter. However, at no stage during the proceedings did he indicate that he did not understand any of the questions put to him or the answers given to him by the third respondent's witness. He conducted the proceedings on his own and did not request the Commissioner to assist him at any point. I accordingly do not consider the lack of an interpreter to have negatively impacted upon his ability to present his case and consequently his right to a fair trial of issues was not impeded.
- [38] For these reasons, I dismissed the application for review.

N. Coetzer

Acting Judge of the Labour Court of South Africa

[1] See Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others (2012) 33 ILJ 1171 (LC); Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others (2012) 33 ILJ 363 (LC) and University of Pretoria v Commission for Conciliation, Mediation and Arbitration and Others (2012) 33 ILJ 183 (LAC).

[2]

(2008) 29 ILJ 2218 (LAC).

[3] Pleadings bundle, FA, p9, para 7.

[4] Record, p89, line 11.

[5] (2015) 36 ILJ 2832 (LAC).

[6] Item 16.

[7] This Court has recently held, in Campher v CCMA & Others [2020] JOL 47526 (LC) (unreported, 18 May 2020, JR2187/17) that an employee who chooses to conclude a fixed-term contract whilst employed on an

indefinite basis cannot still claim to be indefinitely employed after the fixed-term contract has expired.

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