

SOUTH AFRICA / JUDGMENT

Mwepu v Commission for Conciliation, Mediation and Arbitration and Others (JR924/18) [2020] ZALCJHB 51 (26 February 2020) [2020] ZALCJHB 51

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR924/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 924/18

In the matter between:

BAMBABU
OSCAR MWEPU
Applicant
and
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
COMMISSIONER ALLAN
KAYNE
Second
Respondent
EVANS
KGB PROPERTY MANAGEMENT
Third Respondent

Heard:

25 February 2020

Delivered: 26 February 2020

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act^[1] (LRA) to review and set aside the arbitration award issued by the second respondent (arbitrator) under the auspices of the first

respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), under case number GAJB7913/18, dated 08 May 2018

in terms of which the arbitrator found that the applicant was not dismissed by the respondent and dismissed his matter.

Background

- [2] The applicant was employed by the third respondent as a house-sitter on a fixed term contract from 28 September 2015. His duty was to reside in one of the third respondent's repossessed properties until the property is transferred to a new owner at which point the fixed term contract would automatically come to an end.
- [3] On the 5 April 2018, the applicant referred a dismissal dispute to the CCMA for conciliation. The dispute was unsuccessfully conciliated on 26 April 2018 and it proceeded to arbitration on the same date. The arbitrator then issued an arbitration award on 8 May 2018. In his award, the arbitrator found that the applicant failed to discharge the onus to prove that he was dismissed. Resultantly, the arbitrator dismissed the applicant's claim. It is this award that is the subject matter of this application.

Arbitration award

- [4] In his analysis of the evidence and argument, the arbitrator recorded that the applicant repeatedly testified that his dismissal related to his tablets (wireless touch screen personal computer) being stolen by thieves employed by the respondent and that he had instituted proceedings in the Small Claims Court. Whilst the arbitrator accepted the applicants evidence that his tablets may have been stolen, he found that there was no link between the said theft and his dismissal claim for dismissal.
- [5] The arbitrator referred to section 192(1) of the LRA which requires an employee in any dismissal proceedings to establish the existence of dismissal. With reference to section 186(1) of the LRA which defines the meaning of dismissal, the arbitrator found that the expiry of the fixed term contract does not constitute dismissal unless there was a reasonable

expectation of renewal of the fixed term contract or of infinite employment. The commissioner found that it was not the case in this matter and concluded that the applicant failed to discharge the onus of proving that he was dismissed. For

that reason he dismissed the applicants claim.

Applicant's grounds of review

- [6] The applicant's contention is that he was unfairly dismissed because the date on which he was dismissed was not the date on which the registration of the transfer of the property he was employed at was effected. According to the applicant, he was dismissed for complaining about his stolen tablets and salary increment.
- [7] It is the applicant's further contention that he was not able to prove before the arbitrator the existence of dismissal in terms of section 192(1) of the LRA because the employer did not provide him with the copy of his employment contract nor was he provided with any dismissal letter.

The third respondent's

submissions

- [8] The third respondent contends that the applicant's fixed term contract as a house-sitter that was entered into on 28 September 2015, came to an end on 21 June 2017 when the registration of the transfer took place. The applicant was allegedly then allowed to stay in a room at the third respondent's head premises at no

cost pending the opening of another house-sitter position. At the beginning of December 2017, the third respondent had its head premises painted and offered the applicant another fixed term contract of painting which has since been concluded.

Test for review

- [9] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] is a test for the substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry,[3] entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.[4]

- [10] In *Bestel v Astral Operations Ltd and Others*,[5] the Court stated as follows:

'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz*, supra, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[11] For the applicant to succeed with the review application, he must have established that the arbitrator's decision fell outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by the arbitrator.[7]

[12] The onus to establish that the award is reviewable rests on the shoulders of the applicant to the review application. Rule 7A of the Labour Court Rules provides that:

‘(1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.

(2) The notice must-

...

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.’

[13] To achieve this, the applicant must place such factual and legal grounds that will enable the Court to determine the matter. In this matter, the applicant has failed to do so. Instead, he argues that he could not have been able to establish that he was dismissed because the third respondent did not provide him with a dismissal letter. As aforementioned, the basis on which the applicant contends that he was dismissed is that 5 April 2018 was not the expiry date of the fixed term contract.

[14] The evidence before the arbitrator was that the applicant's fixed term contract as a house-sitter that was entered into on 28 September 2015 came to an end on 21 June 2017 when the registration of the transfer took place. This was not in dispute. In addition, the reading of the award and the record does not show that the fixed term contract to paint the third respondent's head premises did not come to an end. On the evidence before the arbitrator, it cannot be said that the arbitrator's conclusion that the applicant failed to discharge the onus to prove that he was dismissed was unreasonable.

[15] The applicant has not established any basis upon which the Court could find that the award is reviewable. As such, he failed to discharge the onus of establishing that the arbitrator either committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. It is the Court's view that the arbitrator's award is not only coherent, but it contains a detailed exposition of the evidence presented to him during the arbitration followed by fair analysis of the evidence and argument and a reasonable conclusion. There is, therefore, no reason for this Court to interfere with his award.

Costs

[16] In terms of section 162 of the LRA, this Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*,^[8] that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[17] In the circumstances, I make the following order.

Order

1. The application to review and set aside the arbitration award issued by the second respondent under the auspices of the first respondent under case number GAJB7913/18, dated 08 May 2018 is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Personal representation

For the third Respondent: No appearance

[1] Act 66 of 1995 as amended.

[2] [2007] 12 BLLR 1097 (CC).

[3] *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 2899 (LAC) at 2906H-I.

[4] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd* (Congress of South African Trade Unions as amicus curiae)

[2013] 11 BLLR 1074 (SCA) at para 13.

[5] [2011] 2 BLLR 129 (LAC) at para 18.

[6] *Id* fn 5 at para 18.

[7] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

[8] (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at para 24.

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