
SOUTH AFRICA / JUDGMENT

Temo v Van Niekerk and Others (JR1772/13) [2015] ZALCJHB 160 (21 May 2015) [2015] ZALCJHB 160

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

JR1772/13

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1772/13

In the matter between:

TEMO K.A

Applicant

and

VAN NIEKERK M

First Respondent

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

PHALANE, T N.O.

Third Respondent

Heard: 21 April 2015

Delivered: 21 May 2015

Summary: Review arbitration award. The Commissioner confirming the dismissal of a domestic worker who refused to sign an employment contract having concluded an oral contract and that having been in operation for three years. Section 29 of the BCEA does not require a written, neither does it impose on the employer the duty to have the employment contract in writing.

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number GATW 3900-13 in terms of which the third respondent (“the Commissioner”) found the dismissal of the applicant to have been both procedurally and substantively fair and, accordingly, dismissed his unfair dismissal claim. This application was not opposed.
- [2] The review application is accompanied by the application for condonation for its late filing, which was not opposed.
- [3] The review application is 80 days late. It is apparent from the reading of the applicant’s founding affidavit that the reason for the delay was due to lack of knowledge on the part of the applicant as to the process to follow after the Commissioner issued the arbitration award. The delay was also caused by the applicant moving between the department of labour and the CCMA seeking advice as to what to do. He finally came to the Labour Court where she was advised by the SASLAW–pro bono office to review the arbitration award.
- [4] In my view, considering the explanation tendered by the applicant, the delay of 80 days is not excessive. The applicant did not sit idle and suddenly plead ignorance of the law. From the time he received the arbitration award, she went about seeking advice as to what he needed to do. It would not serve the interest of justice if condonation for the late filing of the review application was to be refused.

Background facts

- [5] The applicant who was employed by the first respondent as a domestic worker was dismissed for refusing to sign an employment contract. At the time of refusing to sign the contract, the employment relationship between the parties had been in existence for about three

years. The employment relationship was based on the oral contract of employment concluded between the parties.

- [6] According to the applicant, the first respondent required her to sign the contract which had unfavourable terms and conditions to those of the existing contract. It was for this reason that she refused to sign it.

Grounds of review

- [7] The applicant contends that the arbitration award is reviewable because the Commissioner committed several gross irregularities in the conduct of the arbitration proceedings. The contention is based on the allegation in the founding affidavit that the Commissioner failed to take into account, inter alia, the fact that there was no obligation on her to sign the draft agreement. She also contended that the Commissioner adopted an incorrect approach in concluding that the Basic Conditions of Employment Act 75 of 1997 required a written contract to exist between an employee and an employer.

The arbitration award

- [8] In his arbitration award, the Commissioner found that the dismissal was both procedurally and substantively fair as stated earlier. He reasoned that the first respondent was justified in dismissing the applicant for refusing to sign the employment contract. He further found that the dismissal was not on the spur of the moment.

Evaluation/Analysis

- [9] In upholding the dismissal, the Commissioner reasoned that the first respondent, in requiring the applicant to sign the employment

contract, was doing so in compliance with the requirements of the section 29 of the BCEA.

- [10] It is apparent that all what is required in terms of section 29 of the BCEA is that an employer must present to an employee in writing, on the day he or she starts to work the particulars regarding the employment relationship. In practice, this is generally done in the form of a contract of employment. It would seem that it is from this practice that a perception has emerged that the BCEA requires a written and signed employment

contract and that if an employee refuses to sign such a contract even during the existence of an employment relationship the employer is entitled to dismiss for that reason alone. This is, clearly, a misconception of the law.

- [11] It should be pointed out that the absence of a signed agreement does not take the employment relationship outside the provisions of the Labour Relations Act. An oral employment contract provides an employee with no less rights than those rights envisaged in the Labour Relations Act as those employed in terms of a written contract. To this extent, an employee employed in terms of an oral agreement has the right not to be unfairly dismissed or subjected unfair labour practice in terms of section 185 of the LRA.[1] An oral employment contract can only be terminated if there exist substantive and valid reasons to do so.

- [12] The Commissioner, in the present instance, seems to have been influenced by the same misconception referred to earlier in concluding that the dismissal of the applicant was for a fair reason. There was no evidence before the Commissioner that the refusal to sign the employment constituted any of the grounds for dismissal as envisaged in section 188 of the LRA.[2]

[13] In light of the above, I find the decision of the Commissioner to have failed the standard of reasonableness envisaged by the Constitutional

Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*. [3] Accordingly, the arbitration award of the Commissioner stands to be reviewed. There is, however, insufficient material for this court to determine the matter. Thus the matter has to be remitted to the CCMA.

Order

[14] In the circumstances, the following order is made:

1. The arbitration award made under case number GATW 3900-13 is reviewed and set aside.
2. The matter is remitted to the second respondent before a Commissioner other than the third respondent.

Molahlehi, J

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant:

In Person

[1] Every employee has the right not to be- a) Unfairly dismissed; and b) Subjected to unfair labour practice.

[1] Every employee has the right not to be-

- a) Unfairly dismissed; and
- b) Subjected to unfair labour practice.

[2]

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove- a) That the reason for dismissal is for a fair reason- i. Related to the employee's conduct or capacity; or ii. Based on the employer's operational requirements; and b) That the dismissal was effected in accordance with a fair procedure. (2) Any person considering whether or not the reason for the dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

[2]

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- a) That the reason for dismissal is for a fair reason-
- i. Related to the employee's conduct or capacity; or
 - ii. Based on the employer's operational requirements; and
- b) That the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for the dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.
- [3] (2007) 28 ILJ 2405 (CC) at para 110.
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