
SOUTH AFRICA / JUDGMENT

Uijs v Ferreira and Others (JR1921/13) [2016] ZALCJHB 514 (7 December 2016)

[2016] ZALCJHB 514

COURT

Labour Court Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

JR1921/13

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR1921/13

In the matter between:

SONJA UIJS

Applicant

and

COMMISSIONER W FERREIRA

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

NASHUA MOBILE

Third Respondent

Heard: 18 November 2015

Delivered: 7 December 2016

Summary: Application reviewed and set aside

BALOYI AJ

Introduction

- [1] The applicant seeks the review and setting aside of an arbitration award of the first respondent, (the “commissioner”), issued under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), case number GATW5475, dated 13 dated 10 July 2013. The commissioner found that the applicant was not constructively dismissed by the third respondent (“Nashua”) from her employment and accordingly dismissed her claim of unfair dismissal. In addition, the applicant seeks an order declaring and confirming that the applicant was reinstated without broken service to her position as Mobile Solutions Manager by Nashua on 5 June 2013.
- [2] Nashua opposes the application. As is often the case with review applications, the commissioner and the CCMA have elected not to

participate in the proceedings. This is regrettable as their participation would have been of assistance to the court as will become apparent in this judgment.

The relevant facts

- [3] The following is a summary of the relevant facts as they appear from the record.
- 3.1. The applicant was employed by Nashua as Mobile Solutions Manager until her resignation on 22 April 2013. The applicant claims that she resigned from her position as a result of unbearable work pressures and conditions unfairly imposed upon her by Nashua.
- 3.2. Following her resignation from employment, the applicant referred a dispute of unfair dismissal to the CCMA in which she claimed that she was constructively dismissed from employment. In the referral form LRA Form 7.11. The applicant did not object to a conciliation/arbitration process (“con-arb”). The matter was accordingly set down for con-arb on 3 June 2013 at the CCMA after which the matter remained unresolved. After conciliation and before the matter proceeded to arbitration on that date, the commissioner suggested to the parties that they discuss the possible settlement of the dispute. The parties proceeded to hold discussion as suggested by the commissioner and in the discussion Nashua offered to reinstate the applicant to her position without a break in service and gave her two days to consider the job description and to accept the offer of reinstatement by email.
- 3.3. On 5 June 2013, Nashua’s Candice De Goede (“De Goede”) enquired from the applicant by email as follows “...I am not sure if you misunderstood the commissioner on Monday but you needed to review the performance profile of the position you deserted and advise whether you want to be reinstated or proceed with arbitration. Kindly let us know whether you will be returning to work or proceeding with arbitration”. The applicant responded on the same day that

“... I accept the reinstatement of the Mobile Solutions Manager position. Please advice (sic) on the process/meeting of the above ...” From the affidavits filed in this application, it is common cause that on 6 June 2013, De Goede informed the applicant

that senior management had decided not to reinstate her due to her ill-health.

3.4. On 7 June 2013, the applicant received notice from the CCMA that the dispute was set down for arbitration on 1 July 2013. According to the applicant in her affidavit before me, she did not request the CCMA to set the matter down. Notwithstanding, the applicant attended the arbitration on 1 July 2013 where she informed the commissioner that the matter had become settled when she accepted Nashua’s offer to reinstate her and that in the result she did not wish to proceed with the arbitration. Nashua disputed that the matter had become settled on the basis that the offer and acceptance of the applicant’s reinstatement had not been approved by senior management. The first respondent ruled that in the absence of a written dispute settlement agreement, the arbitration would proceed.

3.5. Nashua alleges in its answering affidavit in this review application that the commissioner afforded the applicant the opportunity to consult with her legal representative on the phone about the ruling of the commissioner; that she in fact consulted with her legal representative; and she elected to proceed and participate in the arbitration after consulting with her legal representative. I point out that whilst it appears from the notice of set down and from the arbitration award that the matter was set down for arbitration on 1 July, the transcript of the arbitration indicates the date of arbitration as 10 July 2013. There is no explanation for what appears to be an obvious discrepancy.

Condonation

[4] In addition to opposing the application on the merits, Nashua has raised a point in limine that the review application was referred to this Court outside of the prescribed period and the applicant has not sought condonation of the late referral. The application, so Nashua contends, stands to be dismissed on the ground that the court lacks jurisdiction. It is so that the applicant has not applied for condonation.

[5] The review application was referred to this court on 5 September 2013. The arbitration award is dated 10 July 2013. On Nashua’s

contention, the application was referred about 10 to 15 days outside of the 6 (six) weeks period prescribed in section 145(1)(a) of the Labour Relations Act (LRA).[1] Section 145(1)(a) prescribes that an application to set aside an arbitration award must be made within six (6) weeks of the date that the award was served on the applicant unless the defect complained of is one which is described in subsections (a) and (b). The applicant’s complaint

is neither of the two.

- [6] According to the applicant, she became aware of the award on 12 August 2013 when she was called by a Mr Bester who informed her that her document had been sent to his office. It is not apparent who Mr Bester is and the applicant does not offer an explanation. According to Nashua, it received the arbitration award on 12 July 2013. It contends that the applicant received the award on the same date at the fax number that she indicated that the award should be sent to. Nashua points to the imprinted date 12 July 2013, at the top of the copy of the award attached to the applicant's founding affidavit as confirmation that the award was sent to the applicant on that date.
- [7] On the evidence before me, I am unable to find that the award was served on the applicant on 12 July 2013.

7.1 As I have stated, the commissioner and the CCMA have elected not to participate in these proceedings. As a result, I do not have any evidence from them that the award was served on the applicant as contended by Nashua. Their evidence of the commissioner and the CCMA would have put this issue beyond doubt. But for the contention of Nashua, there is no evidence that the imprint at the top of the applicant's copy of the award is the date when she was served with a copy of the award. It follows that there is no evidence that the applicant referred the dispute outside of the period prescribed in section 145(1)(a).

7.2 In the premises, I have no reason not to accept the applicant's account of when she received the award. If I err in my conclusion in this regard, I choose to err on the side of caution and fairness and not deny the applicant the opportunity to have her matter heard and decided on the merits. In the premises, I accept that the award was served on the applicant on 12 August 2013 and find that the application was referred within the period prescribed in section 145(1) of the LRA.

- [8] In any event, in the event that the award was received by the applicant as contended by the third respondent, for reasons that will become clear in this judgment, it is my view that this is not a bar to the determination of the application and that I have the jurisdiction to adjudicate the application notwithstanding.

Is the arbitration award liable to be set aside

- [9] The applicant relies on the following grounds for the review and setting aside of the award -
- 9.1. The arbitration award is incompetent for the reason that the first respondent acted ultra vires by insisting to proceed with the arbitration and making a (ruling) despite that the matter had become settled with the reinstatement of the applicant.
- 9.2. The first respondent committed a gross irregularity by proceeding with the arbitration when the matter had become settled.
- 9.3. The first respondent committed a gross irregularity by proceeding with the arbitration and arriving at an arbitration award when there was no factual basis upon which to do so.

9.4. The first respondent committed a gross irregularity in that he failed to analyse the evidence before him. He did not take into consideration

that the applicant had accepted the reinstatement offer made by the third respondent.

9.5. The first respondent committed a gross irregularity in that he misinterpreted the law applicable to the dispute.

[10] Succinctly characterised, the complaint of the applicant is that the commissioner lacked the jurisdiction to arbitrate the dispute. In the result, I must consider whether, objectively, the commissioner had the jurisdiction to determine the dispute.[2]

Was the arbitration of the dispute referred by the applicant competent?

[11] The powers of the commissioner to arbitrate a dispute derive from section 191(5) of the Labour Relations Act. Section 191(5) reads

“(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved (my underlining)-

(a)the council or the Commission must arbitrate the dispute at the request of the employee if-

(i)the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii)the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer

provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

... “.

[12] At the outset, section 191(5) requires the existence of an unresolved dispute before the commissioner can exercise any powers in terms thereof. In turn, section 191(5)(a) obliges the CCMA or a Bargaining Council to arbitrate an unresolved dispute if the employee so requests and the dispute is one which is described in subsection (a). Accordingly, absent an unresolved dispute and the request of an employee, the commissioner has no jurisdiction to arbitrate in terms of section 191(5)(a).

[13] I accept the applicant's allegation that she informed the commissioner that the dispute that she referred had become settled.

This is borne out in paragraph 2 of the commissioner's award and for its part Nashua does not deny this. On this account, the commissioner should not have proceeded to arbitrate the dispute and by doing, he exercised a power that he did not have. For purposes of section 191(5), there is no requirement that the resolution of a dispute must be recorded in writing for purposes of the

dispute to be considered to have been resolved and the commissioner's conclusion that a written settlement agreement was required in the circumstances cannot be said to be reasonable. The commissioner misdirected himself with the inquiry about the existence of a written settlement agreement. For completeness only, I point out that this was not a case where the commissioner was required or invited to act in terms of section 142A which empowers the commissioner to make a settlement agreement an arbitration award. Section 142A(2) prescribes that such a settlement agreement sought to be made an arbitration award must be in writing.

- [14] Where a referring party elects not to persist with a dispute referred, as the applicant elected to do, there is no dispute for the second respondent, and therefore the first respondent to arbitrate on account of absence of an arbitrable dispute. As dominus litis, the applicant indicated that there was no dispute to arbitrate as the matter had become settled. It was not open to the first respondent to insist, as he did, that in the absence of a written settlement agreement, he would proceed to arbitrate the dispute originally referred. There is no legal requirement that a settlement agreement must be in writing to have legal effect.
- [15] In the result, a necessary jurisdictional fact, the existence of an unresolved dispute, was absent for the commissioner to exercise the powers in section 191(5)(a). It follows that the award is invalid for want of jurisdiction.
- [16] The applicant's allegation about a settlement agreement in terms of which the applicant was offered and accepted reinstatement raised a new dispute between the parties. The applicant will be required, at the right forum and time, to show that such an agreement existed and that the third respondent was not absolved from the agreement by the decision to retract the offer that was already accepted by the applicant. Clearly from the opposing positions adopted by the parties, there exists a dispute between them whether there is a binding agreement to reinstate the applicant. However, this was not an issue that the commissioner was required or empowered to resolve, which he did with his finding that in the absence of a written settlement agreement, the matter is unresolved. The significance of the absence of a written settlement agreement was a matter to be resolved by a different forum in the face of the applicant's contention that the matter had become resolved. However, this dispute was not before the commissioner and it was not competent of the commissioner to make any determination about that issue. It is also not competent for this Court to make any determination concerning this issue.
- [17] With respect to the requirement that the commission must arbitrate an unresolved dispute at the request of the employee, it is my view that whilst it is so that by consenting to a "con-arb" the applicant requested arbitration, it would be highly artificial to disregard her contention before the arbitrator that the dispute had become resolved and that there was no longer a dispute to be arbitrated and to hold her to that original consent. She clearly did not request or wish that the dispute she referred should be arbitrated and the disregard of this position of the applicant cannot be said to be reasonable.

[18] With respect to the applicant's participation in the arbitration, suffice it to say that I consider such to be of no significant

consequence in the circumstances, if objectively there was no dispute for the commissioner to arbitrate, as I have found it to be the case. I accordingly place no stock on this.

[19] In the premises and for the aforementioned reasons, I find that the arbitration award issued by the first respondent is invalid. In *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*,^[3] the court said the following with respect to administrative action that is declared invalid and set aside: "After a judgment setting this administrative decision aside has been given, the administrative decision is certainly regarded as having been void ab initio".^[4] It is settled law that a commissioner arbitrating a dispute in terms of the LRA performs an administrative act.^[5] Accordingly, the same consequence of invalid administrative action or decision befalls an award of a commissioner acting under the auspices of the CCMA. I accordingly find that the award is void ab initio.

[20] With respect to the applicant's prayer that I make a declaratory order that she was reinstated without broken service to her position as Mobile Solutions Manager by the 3rd respondent on 5 June 2013, I agree with Nashua that the relief claimed is not competent in the present application. In any event, in the light of Nashua's denial that there exists a settlement agreement between the parties in terms of which the applicant was reinstated to her previous position, an order as prayed for would be inappropriate and that dispute must be determined in the appropriate forum.

Costs

[21] The applicant was represented by an official of the union UASA. Accordingly, I do not consider that a costs order will be appropriate

in the circumstances.

Conclusion

[22] In the result I make the following order:

22.1. The arbitration award issued by the first respondent under CCMA case number GATW5475/13 dated 10 July 2013 is reviewed and set aside.

22.2. No order as to costs.

Baloyi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: MJ Van As

INSTRUCTED BY: Cliffe Dekker Hofmeyer

FOR THE THIRD AND FOURTH RESPONDENT: L Pretorius, UASA

[1] 66 of 1995.

[2] See Zeuna-Starker BOP (Pty) Ltd v NUMSA

[1998] 11 BLLR 1110 (LAC) para [6]; SA Rugby Players Association (SARPA) & others v SA Rugby (Pty) Ltd & others , SA Rugby (Pty) Ltd v SARPA & another

[2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) paras [40] and [41]

[3] 2008 (6) BCLR 571 (CC).

[4] At para 45. Also Kruger v President of the Republic of South Africa 2009 (3) BCLR 268 (CC) at para 52.

[5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] ZACC 22; 2008 (2) BCLR 158 (CC).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2016/514.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/uijs-v-ferreira-and-others-unknown-topic-alcjhb-2016>

Prepared on 12 October 2026 · Esheria