

SOUTH AFRICA / JUDGMENT

Windoer (Pty) Ltd v Loveday and N.O and Others (J1521/98) [1998] ZALC 107 (11 November 1998)

[1998] ZALC 107

COURT

Labour Court

BEFORE

R M M Zondo

CASE / FILE NUMBER

J1521/98

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IN THE LABOUR COURT OF SOUTH AFRICA

[Held at Johannesburg]

CASE NO J 1521/98

In the matter between:

WINDOOR (PTY) LIMITED First Applicant

MAN BUILDING SUPPLIES CC Second Applicant

and

LOVEDAY, G. B. NO (Cited in her capacity

as a Commissioner for the Commission for Conciliation, First Respondent

THE COMMISSION FOR CONCILIATION,

ME Second Respondent

ALAN JASON FITTINGHOFF Third respondent

J U D G M E N T

ZONDO J:

- [1] Windoor (Pty) Ltd ("the first applicant") and Man Building Suppliers CC ("the second applicant") have brought an application to review and set aside an arbitration award which was handed down by G B Loveday, (the first respondent) a Commissioner of the CCMA, in a dispute relating to the dismissal of one Alan Jason Fittinghoff, the third respondent, in

which award the first respondent ruled that the first applicant was the third respondent's employer and ordered payment to him by the first applicant (alternatively the second applicant) of a certain amount of compensation for unfair dismissal.

- [2] This review application is said to be brought in terms of sec 158(1)(g) of the Labour Relations Act, 1995 ("the Act"). In terms of the as yet unreported judgement of the Labour Appeal Court in Carephone, the section under which applications to review CCMA awards may be brought is sec 145 of the Act and not sec 158(1)(g). Ordinarily the mere fact that the application is said to be brought in terms of sec 158(1)(g) instead of sec 145 of the Act would not be a sufficient ground to dismiss the application. This is so because the substance of the contents of the founding affidavit may well reveal that some of the grounds relied upon fall within the ambit of sec 145 of the Act in which case, in my view, at least in respect of those grounds of review the Court should then deal with the review application as if it has been brought in terms of sec 145 of the Act. I therefore proceed to examine the contents of the founding affidavit with this in mind.
- [4] Before examining the contents of the founding affidavit to see whether at least some of the grounds relied upon fall within the ambit of sec 145, it is appropriate to briefly set out the facts of the case as they emerge from the papers and the issue the Court is called upon to decide.

The facts:

- [5] Apparently one Mr Rom is the Managing director of the first applicant and the sole member of the second applicant. Further, the two entities share the same premises, the same telephone number and the same fax number. It would appear that the second applicant had no bank account and when payments had to be made, these were made through other companies which are alleged by Mr Rom to belong to the same group of companies.
- [6] The third respondent was interviewed by Mr Rom in May 1997 and was, as far as he is concerned, employed by the first applicant. The second applicant had been registered in 1992 but lay dormant until about August 1997 when Mr Rom instructed the third respondent to deal with certain clients through the second applicant. In October 1997 there was an argument between the third respondent and Mr Rom and Mr Rom fired the third respondent. The letter of dismissal addressed to the third respondent was on the letterheads of the first applicant. Subsequently the third respondent referred the dismissal dispute to the CCMA (the second respondent).

Conciliation and Arbitration:

- [7] At the CCMA conciliation failed and the dispute was referred to arbitration. At the arbitration the representative for the first and second applicants took the point that the first applicant was misjoined because it was not the third respondent's employer and that the third respondent's employer was the second applicant. The first respondent dismissed the point and proceeded to deal with the merits of the dispute. It is the first respondent's

dismissal of that point and the first respondent's ruling that the first applicant was the third respondent's employer that in effect this Court is asked to review and set aside.

The issues:

- [8] The sole question that I am called upon to decide is whether or not the ruling made by the first respondent in the arbitration proceedings between the two applicants in this review, on the one hand, and the third respondent, on the other, that the third respondent was employed by the first applicant is reviewable and should be set aside. The findings which the first respondent made

that the dismissal of the third respondent was both substantively and procedurally unfair is not being challenged nor is the order for the payment of compensation. But, obviously, if the ruling that the first applicant was the third respondent's employer is set aside, the rest of the findings fall away.

- [9] A reading of the first respondent's award in relation to this point reveals that the material which was before the first respondent was, inter alia, that:
- (a) the third respondent had been interviewed and hired by Mr Rom who is the managing director of the first applicant and sole member of the second applicant.
 - (b) the second applicant was dormant at the time when the applicant was hired.
 - (c) the applicant's salary was paid by the first applicant.
 - (d) the letter which was addressed to the applicant informing him of his dismissal was on the letterheads of the first applicant.
 - (e) the dismissal letter which Mr Rom had signed indicated that Mr Rom was signing for and on behalf of the first applicant.
- [10] In the light of the material that was before the first respondent, her decision that the first applicant was the third respondent's employer cannot, in my view, be said to be one which goes against the evidence that was before the first respondent nor can it be said that such evidence was such as to make it more likely that the second applicant was the third respondent's employer than that the third respondent's employer was the first applicant. In fact on the evidence that is before me I would myself have been more inclined to decide that the first applicant was the third respondent's employer if I had to decide that issue.

In the light of this no basis has been shown for this Court to interfere with the finding of the first respondent.

- [11] In the premises the applicants' application is dismissed. As to costs, all parties agreed that costs should follow the result. Accordingly the applicants are ordered to pay the respondent's costs jointly and severally the one paying the other to be absolved.

[12] With regard to the third respondent's application to have the award made an order of Court, it seems that, in the light of the dismissal of the review application, there is no longer any need for the Court not to make that award an order of this Court.

Accordingly the award issued by the first respondent under Case No GA 21399 at the CCMA on the 20th May 1998 is hereby made an order of this Court and the respondent in that matter is ordered to pay the costs of the application in that case.

R M M ZONDO

JUDGE - LABOUR COURT OF SOUTH AFRICA

Date of Argument : 30 September 1998

Date of Judgement : 11 November 1998

For the Applicant : Mr L. M. Malan

Instructed by : Snyman Van Der Heever Heyns Inc.

For the respondent : Mr W. Luyt

Instructed by : Warren Luyt Inc.

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Prepared on 11 October 2026 · Esheria