REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 613/2011

In the matter between:

UGU LIQUORS CC t/a RIPTIDE RESTAURANT **Applicant**

and

AYESHE BIBI SENEKE **First Respondent**

MANDLAKHE KHAWULA N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **1 August 2013**

Delivered: **05 December 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Review concerning issue of jurisdiction – Test of rationally and reasonableness does not apply – issue considered de novo**

CCMA arbitration proceedings – assessment and determination of evidence by commissioner – commissioner's assessment and determination of evidence not relevant because issue considered de novo – Court must assess and determine evidence of its own accord – principles stated

Dismissal – determination of existence of dismissal – finding that dismissal exists unsustainable based on proper consideration of the evidence – finding that dismissal exists reviewed and set aside

Practice and procedure – determination of dispute – as there is no dismissal CCMA not having jurisdiction – issue of jurisdiction finally determined by the Court – award substituted

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JUDGMENT

SNYMAN AJ:

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the third respondent). This application has been brought in terms of Section 145 of the Labour Relations Act [1] ("the LRA").

[2] The issue which came before the second respondent for determination concerned the very issue of whether the first respondent had been dismissed by the applicant or not. Part of this case also concerned whether the first respondent had in fact only been employed as a casual employee for a specific period. In an award dated 19 May 2011, the second respondent determined that the first respondent was a permanent employee, had indeed been dismissed, and that such dismissal was substantively and procedurally unfair. The second

[1] Act No. 66 of 1995.

respondent, consequently, directed that the applicant had to reinstate the first respondent with full retrospective effect and pay the first respondent back pay calculated from 10 January 2010 to date of the award. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

Background facts

[3] The applicant conducts the business of a restaurant. Of particular relevance to the current matter, the applicant's business is seasonal, with busy periods (especially over December/January) where it requires additional staff only for these periods.

[4] The applicant had always employed casual staff to work only over the December/January holiday season. This staff then leave once the season is over, having completed the work they were specifically employed for and are not dismissed.

[5] The case of the first respondent, however, has somewhat of a unique circumstance. The first respondent was actually formerly permanently employed by the applicant as a waitress. The first respondent, however, resigned, for her own personal reasons, from her employment with the applicant on 29 October 2009.

[6] After the first respondent had resigned, she, however, did not procure alternative employment as she thought she would do. Knowing the applicant's upcoming busy holiday season in December/January, having worked there, the first respondent then sought to approach the applicant for a casual position over the December/January holiday season. The applicant ultimately agreed to this.

[7] The first respondent then started work on 15 December 2009, being the start of the season, as a casual employee. The first respondent worked until 10 January

2010, with all the other casual employees. On 10 January 2010, the employment of all the casual employees came to an end, the season being over upon the completion of the holiday season. The first respondent's casual position came to an end along with it.

[8] The first respondent, however, contended that she had been permanently employed in December 2009. She did not dispute that she resigned earlier but stated that she had been taken back permanently. The applicant contended that she was only employed as a casual for the holiday season and was never permanently reemployed as she contended. The first respondent contended that she was dismissed on 10 January 2010 and the applicant contended that she was never dismissed and her employment simply came to an end at the end of the holiday season as agreed. The first respondent then pursued an unfair dismissal dispute to the CCMA.

[9] The matter then came before the second respondent for arbitration, who found that the first respondent had indeed been employed as a permanent employee and was dismissed on 10 January 2010. The second respondent concluded that such dismissal was substantively and procedurally unfair and he afforded the first respondent the relief as set out above. This determination of the second respondent then gave rise to these proceedings.

The relevant test for review

[10] I intend to first address the appropriate test for review in the current matter because the very issue before the second respondent actually was whether the first respondent had been dismissed. It was patently clear that if it was so that the first respondents was indeed dismissed, then such dismissal by logical and necessary consequence, in the circumstances of this matter, had to be unfair. Simply put, the applicant's entire case is based on the simple defense that the first respondent was employed as a casual for the December/January holiday

season and that this employment expired on 10 January 2010 and therefore she was not dismissed. It is an all or nothing issue.

[11] The issue as to whether a dismissal exists is a jurisdictional fact. If there is no dismissal, then the CCMA will have no jurisdiction to determine the matter. Because of this, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] does not apply. The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3] specifically interpreted the review test as determined in *Sidumo* and held as follows:

> 'Nothing said in *Sidumo*, supra, means that the grounds of review in section 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.' (emphasis added)

[12] In *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd*,[4] it was held that:

> 'Generally speaking a superior court always has the power to determine whether the preconditions for the exercise of a statutory power to act have been met 'even in the absence of any statutorily provided remedy by way of an appeal or review' (per Marais JA in *Minister of Public Works v Haffejee* NO 1996 (3) SA 745 (A) at 751G). Where the precondition is an objective fact or a question of law, its existence is objectively justiciable in a court of law and if the public

[2] (2007) 28 ILJ 2405 (CC).
[3] (2008) 29 ILJ 964 (LAC) at para 101.
[4] (1998) 19 ILJ 557 (LAC) at para 24.

> authority made a wrong decision in this regard the decision may be set aside on review (*Minister of Public Works v Haffejee NO* at 751F-G; *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93A-B).' (emphasis added)

The Court concluded that:[5]

> 'Generally speaking, a public authority is obliged to determine the scope of its own powers before it can act (cf Baxter Administrative Law at 452). In doing so it cannot finally determine its competence, because if it wrongly decided that it had jurisdiction, its decision may be reviewed on objectively justiciable grounds. This kind of jurisdictional review does not depend on any statutorily provided remedy by way of appeal or review (*Minister of Public Works v Haffejee NO* at 751G-H). But, as noted above (para [23]), the determination of the existence of a jurisdictional precondition may be left to the public authority itself to determine and the nature and extent of judicial review of its decision will then depend on whether the determination was left to its subjective discretion in terms of the empowering statute, or whether the determination had to be made on objective grounds.'

[13] In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* it was said:[6]

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[14] The Court, in *Solid Doors (Pty) Ltd v Commissioner Theron and Others,*[7] dealt with a jurisdictional review in the case of constructive dismissal and held that:

> '.... A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of

[5] Id at para 28.
[6] (1999) 20 ILJ 108 (LAC) at para 6.
[7] (2004) 25 ILJ 2337 (LAC) at para 29.

affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.' (emphasis added)

[15] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*,[8] the Court stated the enquiry as follows:

'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.

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….'

[16] As to how the Labour Court has recently dealt with this issue, I refer to the judgment of *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[9] where the Court said:

'The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to

[8] (2008) 29 ILJ 2218 (LAC) at paras 39 – 40
[9] (2012) 33 ILJ 363 (LC) at para 23.

> the same conclusion, as set out in *Sidumo*, but whether the commissioner correctly found that Van Rooyen had been dismissed.'

The same approach was followed in *Hickman v Tsatsimpe NO and Others,*[10] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[11] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[12] *Workforce Group (Pty) Ltd v CCMA and Others*[13] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[14] I conclude with the following reference to what I said in *Trio Glass t/a The Glass Group v Molapo NO and Others.*[15]

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[17] All of the above simply means that in determining the question whether the first respondents was dismissed, I must decide the issue on the basis of whether the second respondent was right or wrong in making his determination and, in essence, consider the issue *de novo*. I will now proceed to determine this matter on this basis.

<u>The reasoning of the second respondent</u>

[18] The second respondent accepted that the first respondent has previously resigned and was re-employed on 15 December 2009 and, in my view, correctly defined the issue that he had to determine as being whether, on the probabilities,

[10] (2012) 33 ILJ 1179 (LC) at para 10.
[11] (2013) 34 ILJ 392 (LC) at paras 5 – 6.
[12] (2012) 33 ILJ 1171 (LC) at para 14.
[13] (2012) 33 ILJ 738 (LC) at para 2.
[14] (2013) 34 ILJ 1272 (LC) at para 21.
[15] (2013) 34 ILJ 2662 (LC) at para 22.

this employment was permanent and thus the first respondent was dismissed on 10 January 2010.

[19] The second respondent found that the employment contract concluded between the applicant and the first respondent was verbal. As to deciding what the terms of this verbal contract were, the second respondent proceeded to evaluate and determine the evidence of the respective witnesses and concluded that the case of Mr Kruger who testified for the applicant that the first respondent was employed as a casual was a fabrication. The second respondent accepted that the first respondent was actually offered her previous position that she had resigned from back, thus as a permanent employee.

[20] The second respondent concluded that on a balance of probabilities, the first respondent was not employed as a casual employee and, consequently, she was dismissed.

Merits of the review: The issue of dismissal

[21] As stated above, the issue as to whether the first respondent was dismissed is an issue of jurisdiction and, therefore, the onus was on the first respondent to prove that she had been dismissed, as the issue of dismissal was placed in dispute by the applicant.[16] I shall have regard to the entire record of evidence, as it stands, including the documentary evidence and determine the issue of the existence of a dismissal *de novo*. I shall, accordingly, not consider the reasoning of the second respondent in his award and shall only refer to the same where it is in the interest of a complete and proper determination of this matter and shall decide the issue for myself.

[22] Central to the determination of this matter is a simple issue in dispute. That issue is on what basis was the first respondent employed on 15 December 2009. It was

[16] Section 192(1) of the LRA.

never in dispute on the evidence that the applicant does employ casuals during the December/January holiday season and that when this season comes to an end, such employees are not dismissed but their employment automatically ends. It was also never in dispute that the first respondent was previously permanently employed, then resigned, and came back. I must decide, as the second respondent was also tasked to do, on what basis the first respondent came back. If she came back as a casual, she was not dismissed on 10 January 2010 but her employment automatically ended. If she came back in her former permanent position, then she was dismissed on 10 January 2010 and it would follow that such dismissal was unfair.

[23] In resolving this issue in dispute, the approach to be followed was aptly set out in *SFW Group Ltd and Another v Martell et Cie and Others*[17] where the Court said the following:

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

[24] I will first deal with the issue of the credibility of witnesses. Now it is immediately true that these witnesses did not testify before me. In assessing the credibility and reliability of a witness, the Court said in *SFW Group:*[18]

> '…. the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of

[17] 2003 (1) SA 11 (SCA) at para 5.
[18] Id at para 5.

particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof….'

Because the witnesses did not testify before me, it would be very difficult to determine reliability and/or credibility based on points (i), (ii) and (vi) as set out above. In fact, if the arbitrator made conclusions of credibility on these three principles, one would still, even in a determination *de novo* in jurisdictional review proceedings such as the current matter, have to defer to such findings of the arbitrator, and accept the same as correct. In this regard, the following extract from what was said in *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[19] would still hold true:

'…. Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:

'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies....'

I also said the following in the judgment of *National Union of Mineworkers and*

[19] (2012) 33 ILJ 485 (LC) at para 18.

Another v Commission for Conciliation, Mediation and Arbitration and Others[20] which would equally still hold true:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings….'

[25] Fortunately, and where it comes to the points as set out in (iii), (iv) and (v) in *SFW Group* above, it is possible to determine this issue with reference to the transcript and documentary of the proceedings on a de novo basis. Internal contradictions would clearly appear from the transcript, external contradictions would be apparent from a comparison to the testimony in the transcript and the documentary evidence and any relevant pleading documents (such as the referrals and any pre-arbitration minute) and, similarly, a complete consideration of the record will enable the Court to assess and determine probabilities. Therefore, it is possible for me to determine these issues *de novo* in these proceedings, as I have a complete transcript of the evidence in the arbitration as well as all the documentary evidence.

[20] (2013) 34 ILJ 945 (LC) at para 31

[26] On what basis the second respondent determined credibility can only be gathered from the actual reasons provided by the second respondent in his award. If the second respondent did not give a reason in this respect, I accept that he did not consider it. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another,*[21] it was said that:

> '…. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

When assessing issues of credibility, it is important that a commissioner sets out why he or she considers the evidence of a witness not to be credible. The determination of credibility of a witness is central to the duties of a commissioner and of great significance and using the words of the Court in *Maepe*, if such a reason does not appear in the award, it must be accepted that it was not considered. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni No and Others:*[22]

> '.... What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner.'

[27] Fortunately perhaps and considering the *de novo* determination that I have to make, the second respondent in this matter did not determine credibility based on any issue relating to demeanor, cogency or bias of the witnesses or his observations as to the actual caliber, conduct and performance of the witnesses

[21] (2008) 29 ILJ 2189 (LAC) at para 8.
[22] (2011) 32 ILJ 723 (LC) at para 7.

whilst giving evidence. The second respondent only determined credibility on the basis of contradictions in the evidence of the applicant, and specifically only referred to contradictions in the evidence of Mr Kruger (Bennie) himself and also contradictions between the evidence of Mr Kruger and other witnesses. The second respondent made no reference to the documentary evidence in deciding the issue of contradictions. Therefore, I will accept that nothing turns in this matter in respect of credibility findings based on demeanor, cogency or bias of the witnesses, or their caliber, conduct and performance whilst giving evidence. The issue of credibility can be determined based solely on contradictions, which I can competently and properly determine on the basis of the record and I will deal with this hereunder. I will also consider relevant principles of law when determining the value of evidence and apply the same to the record, which I will also deal with hereunder. I am however compelled to mention one exchange at the very start of the arbitration, where the second respondent in fact says the following to the first respondent, and which in my view must count against her when credibility is assessed:[23]

> 'And, I must warn you, Applicant, you seem to be so disturbing, so you must try and behave yourself and you do have a representative you can just sit there calm and you'll be asked whenever your representative wants you to talk. I'm not going to warn you once again this is the first and last.' (sic)

[28] The second respondent also appeared to consider probabilities. This is evident from the fact that the second respondent simply states in his award that he finds on a 'balance of probabilities' that the first respondent was not employed as a casual employee. Unfortunately, save for this bald statement, the second respondent does not provide any cogent reasons why he so finds but, in my view, this is not important because I will consider the issue of probabilities for myself and I am not, for the reasons already set out above, bound to what the

[23] Record page 42 line 20 – 24.

second respondent may have considered, reasoned or determined. In deciding the issue of probabilities, what must be considered is, as said in *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[24] whether the inference drawn from the evidence is 'the most natural or acceptable inference', and not the only inference. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co,*[25] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

[29] Similarly, in *Govan v Skidmore,* [26] the Court said: '.... in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt' so that one may 'by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.[27]

[30] Having said all of the above, what does the record of the proceedings in this matter then reveal? The first issue to consider is the employment terms and conditions of the first respondent prior to her resignation on 29 October 2009. In this regard, as a permanent employee, the first respondent had a signed employment contract, specifying notice periods in the case of terminations of employment. When the first respondent became employed on 15 December 2009, she signed no such contract as before.

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[24] (2000) 21 ILJ 2585 (SCA) at para 9.
[25] 1985 (3) SA 916 (A) at 939J-940A.
[26] 1952 (1) SA 732 (N) at 734A-D.
[27] See also *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC).

[31] In her letter of resignation, the first respondent in fact asked to be released earlier before the expiry of her notice. The reason given for the resignation is that the first respondent considered her work surroundings to be harsh and stressful and due to what the first respondent described as 'limited relations' with other employees of the applicant. Under such circumstances, the question that must immediately be asked is why would the first respondent just simply return two weeks after the expiry of her one months' notice (which she was required to work) and just resume her former position.

[32] Documentary evidence was also provided as to the first respondent's work status as from 15 December 2009. Firstly, in terms of the work roster actually prepared at the time and before any dispute arose, the first respondent was recorded and rostered for work as a casual and was only rostered from 15 December 2009 to 10 January 2010. Secondly, the extracts from the applicant's wage records for the same period were also provided. These documents were never disputed. These documents showed the clear distinction between the permanent employees and the casual employees of the applicant. The first respondent was recorded as a casual employee. Thirdly, the first respondent's pay slips for this same period were provided, which also reflected that she was a casual waiter. The documentary evidence in this respect, in my view, certainly supports the probability that the first respondent was employed as a casual employee.

[33] This now brings me to the *viva voce* evidence in the arbitration. Now, from the outset and before I make specific reference to the evidence, I need to state that a number of material and critical issues raised by the first respondent in her evidence was never put to the applicant's witnesses in cross examination. The specific instances I will refer to hereunder but as a principle of law, where such issues are not put by the first respondent to the applicant's witnesses in cross examination, these contentions must be rejected and the applicant's evidence be

accepted as true and reference is made to *ABSA Brokers (Pty) Ltd v G N Moshoana N.O. and Others,*[28] where it was held as follows:

> 'It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that he evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is alleged that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19(A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony….'

[34] Having carefully considered the transcript of the evidence in the arbitration, I must confess that I have difficulty in comprehending how the second respondent could come to the credibility findings in respect of the purported contradictions in the evidence of the applicant that he did. Whilst I do not need to consider the reasons provided by the second respondent, I must nonetheless state that these reasons are simply not substantiated by the evidence as contained in the transcript. I will now proceed to assess and determine the evidence presented in the arbitration in order to decide for myself whether the first respondent was dismissed.

[35] The first witness for the applicant was Barend Hendrik Kruger, who is the proprietor of the applicant and is commonly known as 'Bennie', and is referred to by that name throughout the arbitration proceedings. I will for ease of reference in this judgment continue with this reference to 'Bennie'. Pertinent aspects of the evidence of Bennie was the following: (1) the first respondent had in fact

[28] (2005) 26 ILJ 1652 (LAC) at para 39; See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) (*supra*); *Masilela v Leonard Dingler (Pty) Ltd* (2004) 25 ILJ 544 (LC).

resigned and after she had resigned, her position had actually been filled by someone else; (2) the applicant had an agreement with the trade union that the applicant would only employ 10 permanent employees and the rest would be casual employees; (3) Bennie stated that after she had resigned, he never spoke to the first respondent again but he was informed by his wife Elza Marie Kruger and his manager Godfrey Ndlovu that they were contacted by the first respondent to ask for a casual job in December; (4) Bennie also said that the union official, Regina Mbili, also called him about work for the first respondent and that he actually went to see her at the restaurant she was working at and following discussion with her agreed to give the first respondent a casual job for December; (5) the first respondent in fact came the restaurant on 14 December 2009 and he informed her with Godfrey present that she would start working the next day in the restaurant as a casual and that Godfrey also told her she would be working as a casual; (6) Bennie consistently disputed that he ever re-employed the first respondent back into her former position; (7) Bennie stated that he never contacted the first respondent and it was her that contacted the restaurant; (8) Bennie stated that the first respondent was never dismissed.

[36] A consideration of the evidence of Bennie as a whole reveals no material contradictions. His evidence under cross examination remained the same. I simply cannot share the second respondent's assessment of his evidence. A proper consideration of the record in my view illustrates that there was simply no reason not to accept the entire evidence of Bennie as truthful.

[37] The next witness for the applicant was Elza Marie Kruger ("Elza'). She was Bennie's wife and also worked in the restaurant. The pertinent testimony of Elza was the following: (1) Elza stated that she received calls from first respondent between 1 and 10 December 2009 requesting a casual job in December; (2) the first respondent was then told to come back which she did on 14 December 2009 and she was specifically informed by Elza and Godfrey that she would work as a

casual for the holiday season; (3) Elza confirmed that the first respondent actually started working on 15 December 2009 as a casual; (4) Elza was not aware of any communication between first respondent and Bennie directly before the first respondent came back on 14 December 2009; and (5) Elza was aware that Mbili contacted Bennie to ask him to help the first respondent with a casual job for the first respondent.

[38] An assessment of the evidence of Elza as a whole and as appears on the record once again leaves me perturbed as to how the second respondent could have found as he did. A proper assessment of the evidence of Elza in fact shows that her evidence was consistently the same with no material contradiction. Her evidence in fact supported that of Bennie about him not having contacted the first respondent, that it was the first respondent who in fact contacted Elza and that Mbili contacted Bennie to help the first respondent. Elza certainly confirmed that the first respondent was employed as a casual and her evidence was not impeached by cross examination.

[39] The applicant then called the union official, Regina Mbili ("Mbili') to testify. The pertinent testimony by Mbili was as follows: (1) the first respondent had resigned because of a fight (argument) between the first respondent and her sister who was also working in the restaurant, as well as an argument with another employee called Clive; (2) Mbili stated that she was actually contacted by the first respondent who asked her to contact Bennie on her behalf and for her (Mbili) to ask Bennie 'to take me because its December time'; (3) Mbili then telephoned Bennie to ask him for a job for the first respondent and Bennie said that if he has space it was going to be a temporary job; (4) Mbili confirmed that Bennie actually came to see her and that the job he proposed was a casual job; (5) Mbili stated that she never told the first respondent she would get her permanent position back, despite this being suggested to her under cross examination; (6) Mbili stated that she and the first respondent were friends and she wanted to help her.

[40] I will now turn to the general assessment of the evidence of Mbili. There is little doubt that she fully corroborated the evidence of Bennie. There is also simply no reason not to have accepted as her evidence, as it was simply not materially challenged under cross examination. There was also no reason for Mbili to have fabricated any evidence and she was not even employed by the applicant. I may refer to one contradiction between the evidence of Mbili and Bennie where Mbili was asked whether Bennie phoned the first respondent and she stated that she thought Bennie did telephone the first respondent because the first respondent called her and said she was going back to work at the restaurant. Mbili, however, did say that she was not sure about this and this was an assumption. This contradiction is not material as Mbili simply could not know what happened between the applicant and the first respondent after the discussion between Mbili and Bennie and she really only made assumptions, and this therefore cannot detract from the credibility of Mbili or the evidence of Bennie.

[41] The final witness for the applicant was the manager, Godfrey Ndlovu ('Godfrey'). The pertinent evidence of Godfrey was the following: (1) Godfrey confirmed that the first respondent only worked for the December season and that she was only employed as a casual; (2) Godfrey said that he specifically told the first respondent she was a casual; (3) the first respondent in fact called him to ask for casual employment in December; (4) Godfrey confirmed that casual employment meant that the casual employees only work for the busy holiday period and all the casual employees know this; (5) the first respondent's position she had resigned from had been filled by someone else; (6) Godfrey only ever spoke to the first respondent about the seasonal work; (7) Godfrey told the first respondent together with all the other casuals on 8 January 2010 that their last shift was on 10 January 2010 as being the end of the season; (8) Godfrey stated that the first respondent was never dismissed.

[42] In assessing the evidence of Godfrey, it is apparent that there is a contradiction between his evidence and that of Bennie, relating to the events of 14 December 2009. Bennie had stated that the first respondent was with him, Elza and Godfrey in a meeting on 14 December 2009 in which it was stated to the first respondent that she would be employed as a casual, whilst Godfrey testified that he was in no such meeting. Godfrey was, however, adamant that he specifically said to the first respondent when she started work on 15 December 2009 that she was a casual for the holiday season. I, however, in the context of the corroborated evidence as a whole, do not believe this contradiction to be sufficient so as to negatively affect the credibility of the evidence presented by the applicant's witnesses Bennie and Godfrey. Furthermore, a reading of the evidence of Godfrey as contained in the transcript shows his evidence was consistently the same, even under cross examination. Godfrey was the one who directly managed the first respondent and he was always consistent in saying she was employed as a casual, her former position she resigned from had been filled by someone else and she was not dismissed. The evidence of Godfrey should be accepted.

[43] This then leaves only the evidence of the first respondent. Her pertinent evidence was the following: (1) in early December 2009, she was telephoned by Bennie who told her that he (Bennie) was going to reinstate the first respondent in her former position; (2) Bennie specifically told the first respondent that the reason why he was doing this was because he was unhappy with Fatima (being one of the persons with whom the first respondent had an altercation leading to her resignation) and bringing the first respondent back to work would, using the first respondent's words, 'piss off' Fatima; (3) Bennie told her that he was going to put the first respondent on the duty roster on Sunday and that he was going to leave this duty roster with Godfrey who will inform her when to work; (4) the first respondent then telephoned Godfrey in order to ask him because of what Bennie had told her, when she would be starting her first shift and Godfrey then said to

her she would start working at 10h00 the following day and must report for work; (5) the first respondent stated that she then worked as normal and as before as a permanent employee in her old position; (6) on 10 January 2010 and at the end of her shift, she had said to Godfrey basically in passing that she would see him on her next shift on the Wednesday and it was only then that Godfrey said to her that he would first have to clear this with Bennie because Bennie had said to him (Godfrey) that one Anna was going to come and work in the first respondent's place in January and February 2010; (7) the first respondent then specifically told Godfrey that this was not her agreement with Bennie because Bennie said to her she was coming back to her previous position; (8) the first respondent stated that she was thereafter not contacted again by the applicant and was not called back to work, and she thus accepted she was dismissed; (9) the first respondent denied asking Mbili for assistance to procure work at the applicant because the first respondent never communicated with Mbili and had actually resigned from the union in July 2009 and after that had nothing to do with Mbili again; (10) the first respondent denied that there was ever a meeting with Godfrey in which he told her she was a casual; (11) according to the first respondent, she was brought back by Bennie because he wanted to bring back Fatima's enemy so that he could teach Fatima a lesson and the first respondent was Fatima's enemy; (12) the first respondent stated that she never telephoned Elza or in any way contacted her to ask if she could come back to work for the applicant.

[44] The assessment of the evidence of the first respondent immediately brings forth a material difficulty. This difficulty is the fact that the vast majority of her evidence and case was never put to any of the applicant's witnesses under cross examination. In particular, the most critical parts of her case, being that it was Bennie that called her back, why Bennie had called her back, that she never asked Mbili for assistance and her version of the events on 10 January 2010, was never put to any of the applicant's witnesses. I refer to the legal principles as set out above as to the consequences of this failure and I am compelled to

conclude that based on these legal principles the evidence of the applicant's witnesses that is contrary to the case of the first respondent must be accepted, and these versions of the first respondent be rejected. As I said in *Trio Glass*:[29]

> '…. This evidence was however never put to the third respondent under cross-examination. The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….'

[45] There are further difficulties with the evidence of the first respondent. Under cross examination, the first respondent conceded that Godfrey had told her on 10 January 2010 that it was her last shift. Then realising the difficulty this caused to her version, the first respondent then recanted and sought to reiterate her version under evidence in chief. When confronted, under cross examination, with the pay slips that she had received which records she was a casual waitress, the first respondent then for the first time disputed the authenticity of these pay slips and contended Bennie fabricated them despite never having disputed these documents before, never having put such a contention to Bennie and not even having so testified in giving evidence in chief. The first respondent also contended that she did have the proper pay slips but she could not find them. The record also reveals that the first respondent was quite argumentative when being cross examined. The end of result is that I would have little hesitation in preferring the evidence of the applicant's witnesses over the evidence of the first respondent where it comes to the issue of credibility.

[46] Accordingly, on the issue of the consideration of credibility when resolving the issue in dispute in this matter, the evidence of the applicant's witnesses is to be preferred over the evidence of the first respondent. Therefore, on the basis of credibility, it must be accepted that the first respondent pleaded for a casual position in the holiday season, she was employed on such basis and her

[29] *Trio Glass* (supra) at para 41.

employment came to an end when the season ended along with all the other casuals.

[47] The fact, however, is that issues in dispute are not just resolved on the basis of credibility but also on a consideration of probabilities. Considering the evidence to be preferred, as well as the evidence as a whole which includes the documentary evidence, it is my view that the most natural, plausible and logical inference to be drawn from the evidence is that the first respondent was never re-appointed back into her old position, that she was only employed as a casual for the holiday season because she pleaded to be so accommodated, that it was always clear to her that she was indeed employed as a casual, that her employment simply came to an end at the conclusion of the holiday season together with all the other casuals and consequently she was never dismissed. The following are the individual probabilities that I rely on in drawing this inference:

47.1 The first respondent resigned because of a dispute with fellow employees which appeared to have been never resolved despite efforts by Bennie to have it resolved. It is unlikely that the applicant would simply permanently re-employ her under such circumstances;

47.2 The suggestion that Bennie would permanently re-employ the applicant to simply aggravate Fatima is in my view preposterous. It is untenable that an employer would cause such further work conflict when entering into the busy holiday season just to spite another employee. It must also be considered that Fatima is still employed at the applicant, making this contention even more unlikely;

47.3 The evidence was that the applicant had actually replaced the first respondent after her resignation. With this evidence, it must be considered that the applicant had an agreement with the union not to have more than

10 permanent employees and this quota was thus filled. For the first time, under cross examination, the first respondent tried to dispute this agreement and for the same reasons as set out above, this contention must be rejected. The simple point is that there was no vacant position into which the first respondent could be permanently re-employed;

47.4 The other permanent employees have written contracts. The first respondent was never asked to sign a written contract, which is the position with all the casuals. The first respondent tried to explain this by contending that it was 'busy' in the restaurant and she would get to sign a contract in January, which explanation is unacceptable and clearly an afterthought;

47.5 All the wage records for this period, which in my view are actually uncontested, show that the first respondent was a casual;

47.6 The termination of the employment of the first respondent actually coincided with all the other casuals at the end of the season;

47.7 Despite the first respondent contending that she had an agreement with Bennie to be re-employed permanently, she in fact makes no effort to contact him when she told her that work would end on 10 January 2010. This must mean that it was unlikely that there was such an agreement;

47.8 There was never any evidence of an actual act on the part of the applicant terminating the employment of the first respondent. The first respondent herself in essence stated that she "assumed" she was dismissed when she was not called back to work;

47.8 Finally, as a matter of context, this all actually took place in the holiday season when the applicant extensively uses casuals.

[48] Based on all of the above, I conclude that as a matter of credibility and probability, the first respondent was never dismissed by the applicant. Her employment came to an end on 10 January 2010 when the holiday season ended, as she was employed as a casual specifically for that purpose. In *Mahlamu v CCMA and Others,*[30] the Court concluded as follows:[31]

> 'This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of *Sindane* to be - that ordinarily, there is no dismissal when the agreed and anticipated event materializes (to use the example in *Sindane*, the completion of a project or building project), subject to the employee's right in terms of s 186(1)*(b)* to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed-term contract and an employee reasonably expected the employer to renew the contract….'

[49] The second respondent thus erred in concluding that the first respondent was dismissed, and as such, he erred in determining this matter in favour of the first respondent as the CCMA simply had no jurisdiction to entertain the dispute in the absence of a dismissal. As this is an issue of jurisdiction, it is up to this Court to finally determine such jurisdictional issue and I thus determine that the CCMA had no jurisdiction to entertain this matter because the first respondent did not discharge the onus that rested on her to prove that she had been dismissed by the applicant. This means that the entire award of the second respondent simply cannot be sustained and falls to be reviewed and set aside and I so determine.

[50] Neither the applicant nor the first respondent really pressed the issue of costs before me. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion when it comes to the issue of costs. I exercise this discretion in

[30] (2011) 32 ILJ 1122 (LC).
[31] Id at para 23.

favour of making no order as to costs, as I am of the view that this would be fair and appropriate in this instance.

Order

[51] In the premises, I make the following order:

51.1 The review application of the applicant is upheld;

51.2 The arbitration award of the second respondent is reviewed and set aside in its entirety;

51.3 The arbitration award of the second respondent is replaced with a determination that the first respondent was not dismissed by the applicant and consequently the CCMA had no jurisdiction to entertain the dispute;

51.4 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr J Forster of Forster Attorneys

For the First Respondent: Mr B Purdon of Brett Purdon Attorneys