



REPUBLIC OF SOUTH AFRICA

LABOUR OF SOUTH AFRICA COURT, JOHANNESBURG

JOHANNESBURG

Reportable

Case no: JR 2779/06

In the matter between:

CLENCOR (PTY) LTD

Applicant

and

COMMISSIONER KG MNGEZANA N.O

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

SABAWO obo NKOSI AND 32 OTHERS

Third Respondent

Date heard: 26 July 2013

Date delivered: 06 August 2013

Summary: Review application. Fixed term contract expiring. New contract offered- negotiated over a period of six months, and terminated when employees refused to sign new offer.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award under case number GAJB 16301/06 dated 12 September 2006 in terms of which the first respondent (the Commissioner) found the dismissals of the individual third respondents (the employees) to be both substantively and procedurally unfair.

Background facts

- [2] It is common cause that the applicant entered into fixed term contracts with the employees ranging from 1 July 2005 to 31 December 2005. It is common cause that at the end of those fixed term contracts, the applicant offered further employment contracts to the employees. The applicant says that the terms of the new contracts which were offered to the employees amended the previous terms of the contract in order to bring them within the provisions of legislation. The applicant entered into discussion with the union regarding terms of the new proposed employment contract. The discussion took place over a significant period which resulted in the applicant allowing the employees to continue with their employment despite the expiry of those contracts. According to the applicant, the employees refused to sign the new contracts even after three ultimatums were issued on them in this regard. The applicant says that it "had no choice but to terminate the services of the individual employees insofar as they had clearly rejected the new offer of employment with it."

- [3] It is common cause the employment contracts of the employees were terminated through the letters issued to each one of them dated 15 June 2006. The letters read as follows:

'This letter serves to inform you that according to our records you have not yet signed your new contract. Please note that your contract should be signed by Wednesday, 21 June 2006 at three o'clock. Should your contract not be signed, please see the letter as notice of

termination of your contract. Two weeks is then hereby given, your last working day being Wednesday, 05 July 2006.'

- [4] The employees referred an alleged unfair dismissal dispute to the CCMA subsequent to their dismissals. The matter was arbitrated by the first respondent subsequent to failure to reach consensus at the conciliation proceedings.

The arbitration award

- [5] As indicated earlier, the Commissioner found the dismissals of the employee to have been both substantively and procedurally unfair. In arriving at the conclusion that the dismissals were unfair, the Commissioner reasoned that the evidence before him revealed that it is probable that the employment contracts signed should not have been fixed term contracts. The Commissioner arrived at this conclusion on the basis that the contracts were not included in the bundle of documents submitted by the applicant during the arbitration proceedings.
- [6] The Commissioner also found that the applicant had the duty to prove that the contracts were for a fixed term period. In this respect, the Commissioner rejected the version of the applicant that the contracts of the employees were for a fixed period on the basis that it had failed to produce the contracts and also that if that was the case it would not have allowed the applicants to work until the June 2006.
- [7] In relation to the failure or refusal of the employees to sign the new contracts, the Commissioner found that the applicant had an ulterior motive. Having rejected the version of the applicant, the Commissioner found that the parties were still bound by the employment contracts which the applicant claimed had expired.
- [8] The applicant contended, at the arbitration hearing, that the employees were not dismissed but that their employment terminated because of the effluxion of the time. The Commissioner rejected the version of the

applicant and found that the contracts which the employees “signed should not have fixed term contracts or short term duration contracts.”

The grounds for review

- [9] The applicant contends that there was no basis for the Commissioner to make a finding that the dismissals of the employees were unfair. The applicant criticises the Commissioner for the finding that the employees were dismissed when the contracts terminated due to effluxion of time and also for refusing to accept the offer to submit the copies of the contracts which the applicant had failed to include in its bundle of documents. The other grounds upon which the applicant relies on in challenging the arbitration award is that there is no justification for the conclusion reached by the Commissioner when regard is had to the material which were before him and also that he failed to apply his mind to matter.
- [10] It is contended, in the heads of argument, on behalf of the applicant that the Commissioner committed misconduct and gross irregularity in refusing the offer made by the applicant to submit the copies of the employment contracts which should have been included in the bundle of documents.

Evaluation

- [11] The main issue in as far as the applicant is concerned centres around the refusal to accept the copies of the contract which the applicant failed to include in the bundle of documents. The applicant further complains that the Commissioner should have assisted its representative regarding the same. It appears from the reading of the record that the purpose of the contracts was to show that the contracts were fixed term contract which expired 25 November 2006.
- [12] It is common cause that the applicant did not produce the contracts referred to during the arbitration hearing. It is also apparent that the issue of producing the contracts did arise during the course of the hearing and at some point the union offered to submit the copies it had.

There is a dispute as to whether the Commissioner refused to accept the copies as offered by the representative of the employees. There is also an issue as to whether the Commissioner should have offered an “assisting hand” to the applicant’s representative with regard to the production of the contracts because he is a lay person.

- [13] It appears that the contracts were needed to prove that they were fixed term contracts and more importantly that they had expired. In my view, the contracts were irrelevant for determining the issues which the Commissioner had to deal with.
- [14] There are two key issues which the Commissioner in this matter had to deal with. The first issue, in light of applicant having contended that the employees were not dismissed, was whether the CCMA had jurisdiction to entertain the dispute. In this respect, the Commissioner had to determine whether the employees were dismissed. The second issue relates to the fairness or otherwise of the dismissal.
- [15] In dealing with the first issue, the Commissioner found that the employees were dismissed for refusing to sign the offer for the new employment contract. It was argued, on behalf of the applicant during the hearing of this matter, that the applicant never waived the right to terminate the contracts of employment with the employees and further it was never put to the applicant that its “kindness of trying to negotiate for new contracts beyond the expiry date of the contracts led to a new contract”.
- [16] In my view, the Commissioner cannot be faulted in finding that the employees were dismissed. The finding is supported by even the applicant’s own version. In this respect, the applicant states its founding affidavit that:

‘7.11 Insofar as no agreement could be reached between SABAWO and the Applicant in relation to the offer of employment made to the individual employees and the individual employees’ consistent refusal to sign the contracts of employment, the

Applicant had no choice but to terminate the services of the individual employees in so far as they had clearly rejected the new offer of employment with it.

7.12 Due notice in this regard was given to employees on 15 June 2006, 23 June 2006 and 10 July 2006 respectively.’

[17] It common cause that the employees were employed by the applicant and the termination of their employment was in accordance with the above notices issued on the dates as indicated. In this regard, the Commissioner’s finding that there was a dismissal cannot be criticised. In other words, the Commissioner correctly found that there was a dismissal and further correctly entertained the unfair dismissal dispute as was alleged by the employees.

[18] The issue that remained for determination was whether the dismissal was fair or otherwise. In my view, the Commissioner can be criticised for basing his finding on the basis of failure to produce the contracts by the applicant.

[19] The second issue which the Commissioner had to determine concerned the fairness or otherwise of the dismissal of the employees. The Commissioner, as indicated earlier, found the dismissal to be unfair because the applicant dismissed the employees for refusing to sign the new offer of employment and that the dismissal did not relate to permissible grounds set out in the law, namely misconduct, incapacity or operational reasons.

[20] The authorities are in agreement that an arbitration award is reviewable if there is no justification for the conclusion reached in the award and where the Commissioner has failed to apply his or her mind to the issue/s he or she had to determine.¹ In *Cater v CCMA and Others*,² the Court found that failure to apply her mind to the material issues prevented the Commissioner from determining the matter fairly and thus committed a misconduct. This approach was followed in *Herholdt*

¹ See *Group Six Security (Pty) Ltd v CCMA and Another* unreported case number JA 77/05.
²(2010) 31 ILJ 2876 (LC) at para 38.

v Nedbank Limited,³ where the Labour Appeal Court held that it is gross irregularity or misconduct if the Commissioner fails to take into account material evidence or has regard to irrelevant evidence.⁴

- [21] In *Edcon Ltd v Pillemer NO and Others*,⁵ the Court in applying the review test of the reasonable decision maker as formulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁶ held that in order to arrive at a reasonable decision, the Commissioner has a duty 'weigh up all relevant factors and circumstances of each case in order to come up with a reasonable decision'.
- [22] In the present case, the Commissioner failed to apply his mind because he considered irrelevant facts relating to the production of the contracts of employment of the employees. In my view, those contracts were irrelevant because it was never disputed that fixed term contracts were concluded with the employees and that they expired during November 2006.
- [23] The issue which the Commissioner ought to have applied his mind to was whether the termination of the contracts of the employees was fair in circumstances where after the termination of the contracts, the applicant offered new contracts to the employees which the employees refused to sign. In the context of assessing the fairness of the dismissal, the refusal to sign which, clearly was the reason for the termination of the contracts, needed to be considered in the context where the facts indicate that from the time of the expiry of the contracts to the last moment the applicant engaged with the union in negotiations regarding the signing of the new employment offer. It has not been disputed that the applicant did engage with the union regarding the negotiations for the renewal of the contracts neither has it been disputed that the applicant issued the employees a number ultimatum

³ [2012] 9 BLLR 857 (LAC) at para 33.

⁴ See also *CUSA v Tao Ying Metal Industries and Others* (2009) 1 BLLR 1 (CC).

⁵ (2008) 29 ILJ 614 (LAC).

⁶ (2007) 28 ILJ 2405 (CC).

regarding the signing of the new contract before the notices of termination was issued.

[24] In the circumstances, I am of the view that the applicant's application to have the Commissioner's arbitration award reviewed stands to succeed. Having regard to the period it has taken to bring this matter to finality, I should ordinarily be determining it without having to refer it back to the CCMA. However, I am concerned that in doing so the parties could be deprived of the opportunity to deal in full with the issues relevant to the determination of the substantive fairness or otherwise of the dismissal.

[25] I do not believe that it would be appropriate to allow costs to follow the results.

[26] The premises, the following order is made:

1. The arbitration award under case number GAJB 16301/06 dated 12 September 2006, is reviewed and set aside.
2. The matter is remitted back to the CCMA for consideration by a Commissioner other than the first respondent.
3. There is no order as to costs.

Molahlehi, J

Judge of the Labour Court

Appearances:

For the Applicant: Advocate Halgryn SC instructed by Routledge Modise INC

For the Respondent: Advocate Lennox instructed by Waldeck Attorneys

LABOUR COURT