REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR 3037/12

In the matter between:

MASTER BUSINESS SOLUTIONS	**APPLICANT**
and	
FRANCOIS VAN DER MERWE N.O. (cited in his capacity as Arbitrator of the Second Respondent)	**FIRST RESPONDENT**
DISPUTE RESOLUTION CENTRE FOR THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNSEL	**SECOND RESPONDENT**
ALFRED MAKOTI	**THIRD RESPONDENT**

Heard: **19 December 2014**

Delivered: **03 March 2015**

JUDGMENT

MALAN AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act and/or section 158(1)(g) of the Act to review and set aside an arbitration award made by the First Respondent under case number MEGA 36274 dated 20 November 2012.

[2] In terms of the arbitration award which is the subject of this application, it was held by the First Respondent that the Third Respondent was unfairly dismissed by the Applicant and the Applicant was ordered to reinstate the Third Respondent albeit that back payment of retrospective remuneration was not ordered.

Background Facts

[3] The main thrust of the review application is an attack on the finding of the First Respondent that the Third Respondent was dismissed at all with the argument on behalf of the Applicant being that the evidence as it emerges from the record does not establish a dismissal.

[4] It appears from the record of evidence that the Applicant operates as a labour brokerage in which capacity it had employed the Third Respondent and for a period of time provided his services to a client called Improfile.

[5] It is apparent from the record that the First Respondent clarified at the outset of proceedings that the Third Respondent claimed to have been dismissed by the Applicant when Improfile required that he be taken away from their premises on 5 March 2012. It furthermore appears from the record that it was common cause that after 5 March 2012, the Applicant did place the Third Respondent at other clients albeit that the Applicant alleged that it was not on a consistent basis as had been the case at Improfile for a period of time.

[6] The evidence from the Applicant's witness, which appears not to be challenged effectively in the proceedings was, however, to the effect that on occasions when he tried to place the Third Respondent, the Third Respondent was not available and furthermore that the Third Respondent was on occasion dissatisfied with some of the placements offered to him after his placement at Improfile terminated. It however, appears from the record that the Third Respondent conceded that he did leave at least one of the placements because of his dissatisfaction with the type of environment he was exposed to and the type of work that was available and that he was on another occasion unavailable to take up a placement offered to him.

[7] It appears that the Third Respondent at all times continued to rely on the his own assessment that he had been retrenched by Improfile, the client of the Applicant, on

5 March 2012 when Improfile without any prior consultation ceased to use his services.

Analysis of the Arbitration award

[8] It was held by the First Respondent in terms of the arbitration award that it is probable that the Third Respondent was retrenched by the Applicant. At the first bullet point under paragraph 11 of the award it is stated that clearly the relationship between the parties ended sometime after March 2012. The First Respondent records that the exact date of the termination of the relationship is unclear. It is stated by the First Respondent that the "Respondent" (the Applicant in this application) is relying neither on misconduct nor on incapacity in relation to termination of the relationship. The First Respondent further records that according to the Applicant's own version the contract with the customer ended in the beginning of March 2012 and he tried to place the Third Respondent elsewhere.

[9] The First Respondent then proceeds to reason that the Third Respondent, not having been placed elsewhere successfully, would in these circumstances most probably have been retrenched.

[10] It appears from the reasoning in this paragraph and the paragraphs that follow that the First Respondent fails to clearly distinguish between the termination of a placement of an employee by a labour broker and a dismissal of the same employee by the labour broker. The Third Respondent's case was clearly that he was dismissed on 5 March 2012. The First Respondent appears to recognise that the Third Respondent's case in regard to his supposed dismissal on 5 March 2012 is not sustainable insofar as he holds that the relationship between the Applicant and the Third Respondent terminated sometime *after* March 2012 only.

[11] The burden to prove the existence of a dismissal at all times resided with the Third Respondent. The First Respondent's finding that he cannot determine when a dismissal in fact occurred after March 2012 therefore sits somewhat uncomfortably with his ultimate conclusion that the Third Respondent had proven that a dismissal had in fact occurred at all.

[12] What is apparent is that the relationship most certainly could not have ended on 5 March 2012 insofar as the common cause facts demonstrated that the Applicant

proceeded to place the Third Respondent elsewhere with other clients after 5 March 2012 and clearly therefore did not proceed to terminate the relationship because of the termination of a specific placement on 5 March 2012. The efforts of the Third Respondent to prove a dismissal had taken place on 5 March 2012, therefore, in effect failed but was nonetheless rewarded to the extent that the First Respondent still found that he had been dismissed at some unknown point thereafter.

[13] It is apparent from a perusal of the record of the arbitration proceedings that it is not at all clear whether the failure of the Applicant to place the Third Respondent consistently at clients after 5 March 2012 resulted from the Applicant's failure to identify positions or from the Third Respondent's dissatisfaction with some of the work which was available and, on occasion, the Third Respondent's unavailability to take up positions in which the Applicant wished to place him. The fact that the Third Respondent felt at liberty to refuse or not be available to take up placements in any event does not suggest that the relationship between the Third Respondent and the Applicant represented one where the Third Respondent was necessarily at the back and call of the Applicant or where the Applicant was obligated to utilise the Third Respondent's services by finding placements for him on an on-going basis. Even if the relationship between Applicant and the Third Respondent were to be construed as having the peculiar nature of creating non reciprocal duties in the sense that the Applicant was obligated to find the Third Respondent placements but the Third Respondent was not obligated to be available to take them up (which does not necessarily seem consistent with an employment relationship) then there is still no conclusive evidence on record that Applicant failed to execute its side of the bargain.

[14] It is in any even apparent that at the very least, the Third Respondent at no point discharged the onus of proof to prove that he was in fact dismissed by the Applicant. In the absence of factual clarity about how the status of the relationship between the Applicant and Third Respondent unwound, the First Respondent appeared to have committed the reasoning error of defaulting to an assumption that the termination of the relationship must have been at the behest of the Applicant without having any factual material that conclusively or even as a matter of probability demonstrated this to be the case. The evidence does not appear to

demonstrate anything more than a gradual deterioration of the relationship due to a mutual decline of interest on the part of the Third Respondent and the Applicant. The Applicant's efforts over time to place the Third Respondent apparently never entirely terminated but the Third Respondent appears not to find the placements satisfactory and did not always make himself available to be placed.

The Review test

[15] As a creature of statute, the CCMA is not able to as a general rule decide its own jurisdiction and the issue of whether it had jurisdiction to rule on a particular matter or not is a matter to be decided by the Labour Court. The review test which has been developed in our Courts and articulated in the judgment of the Supreme Court of Appeal in *Herhold v Nedbank* Ltd and by the Labour Appeal Court in the *Gold Fields Mining South Africa (Pty) Ltd v CCMA and Othersjudgment* therefore does not apply in instances where the review point raised relates to the jurisdiction of the CCMA. The crisp issue to be decided by the Court in instances where a jurisdictional ruling of the CCMA is at issue is very simply whether the CCMA in fact had jurisdiction to decide the matter or not.

[16] In the present matter the Applicant simply argues that no dismissal was ever proven by the Third Respondent and that therefore, the First Respondent did not have jurisdiction to decide the matter before him. The Applicant contends that the evidence before the First Respondent does not justify the conclusion that a dismissal had occurred.

Analysis and finding

[17] As is apparent from the assessment of the evidence reflected above, this Court is persuaded that the evidence before the First Respondent did not demonstrate that a dismissal had occurred in the circumstances. The Third Respondent had not discharged the burden to prove that he had been dismissed by the Applicant.

[18] The exact reasons and circumstances of the gradual deterioration of the relationship between the Third Respondent and the Applicant remains somewhat murky, but it is readily apparent that the Third Respondent's case to the effect that he was retrenched on 5 March 2012 was disproven by the evidence insofar as he continued to work for and receive remuneration from the Applicant after that date.

The First Respondent's assumption that a "retrenchment by default" must be assumed to have occurred is not consistent with the burden of proof and itself presupposes that any deterioration of the relationship and termination thereof (even if by mutual neglect) must constitute a conscious act on the part of the employer without consideration that it may equally have resulted from the actions of the employee. It therefore follows that the First Respondent should have dismissed the referral and should have ruled that he lacked jurisdiction to decide the matter.

[19] It is the view of this Court that it is in a position, with reference to availability of a comprehensive record of the proceedings to determine the issue at hand and that it is, in the interest of justice to substitute the First Respondent's finding.

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

1 The arbitration award issued by the First Respondent under case number MEGA 36274 dated 20 November 2012 is reviewed and set aside.

2 The award is substituted with the following:

2.1 Third Respondent's referral to the MEIBC is dismissed for want of jurisdiction.

3 There is no order as to costs.

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Malan AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Snyman Attorneys

For the Respondent: In person