THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 2055/19

In the matter between:

SOUTH AFRICAN BROADCASTING

CORPORATION (SOC) LIMITED **Applicant**

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER DANIEL DU PLESSIS **Second Respondent**

AYANDA MKHIZE **Third Respondent**

Heard: 17 October 2019

Judgment delivered: 18 October 2019

Edited: 21 October 2019

JUDGMENT

VAN NIEKERK J

[1] The third respondent (the employee) was dismissed by the applicant (the SABC) on 17 October 2018, exactly a year ago. The employee contested the fairness of her dismissal, and referred a dispute to the CCMA. The matter was ultimately referred to an arbitration hearing before commissioner Zazi Mqingwana. The SABC's representative challenged the CCMA's jurisdiction to hear the case. In essence, the SABC argued that when an employee misconducts him or herself, the employer may treat the case as one of misconduct, or as a breach of the employment contract. In this case, so the argument went, the SABC had decided to treat the case as a breach of contract. That being so, the employee's dismissal could only be challenged for its lawfulness, and not its fairness. Since the CCMA's statutory jurisdiction was limited to the determination of the fairness of any termination of an employment contract, it lacked jurisdiction to hear the case.

[2] Commissioner Mqingwana held that the CCMA had jurisdiction to arbitrate the dispute, but that if the evidence led in due course revealed that the true nature of the dispute was one over which the CCMA did not have jurisdiction, the dispute would not be arbitrated but referred to an appropriate forum.

[3] The SABC avers that it understood this ruling to mean that the CCMA had provisional jurisdiction to hear evidence to determine whether the CCMA had jurisdiction to hear the merits of the case.

[4] The matter was ultimately set down before commissioner Soman, who asked to hear evidence on the point in *limine*. For reasons that are not relevant to these proceedings, commissioner Soman recused herself, and the arbitration was reconvened before the second respondent, commissioner Du Plessis. The SABC avers that when commissioner Du Plessis's attention was drawn to the ruling made by commissioner Soman, he refused to hear evidence in relation to the jurisdictional point, and 'stated that in his understanding the in limine ruling was clear in that the CCMA had jurisdiction to hear the merits of the matter'. The employee understands commissioner Du Plessis's ruling to mean that he could not interfere with the prior ruling made by commissioner Mqingwana, i.e. that the CCMA had jurisdiction (at least on a provisional basis) to entertain the applicant's claim and that the ruling remained binding in the absence of any review by this court.

[5] Be that as it may, on 7 October 2019, the SABC filed an application (under case number JR 2243/19) seeking to review and set aside the ruling rendered by commissioner Mqingwana on 16 April 2019, and to substitute it with a ruling that the CCMA lacks jurisdiction to arbitrate the employee's dispute.

[6] On 11 October 2019, the SABC filed the present application, in which it seeks to stay the arbitration proceedings pending the finalisation of the review application. The SABC contends that if the dispute is arbitrated by the CCMA its right of review will be negated and that it will expend time, effort and resources to arbitrate the dispute, which will all be in vain if the review is upheld. If the proceedings are stayed, and it subsequently transpires that the CCMA has jurisdiction, no resources would have been wasted and the matter may simply be remitted to the CCMA for determination.

[7] Since the SABC seeks an interim order, it is obliged in these proceedings to establish a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted, that the balance of convenience favours the granting of an interim interdict, and that there is no other satisfactory remedy.

[8] I deal first with the existence of any *prima facie* right. The starting point is s 158(1B) of the LRA. That section was introduced into the LRA in terms of the 2014 amendments to the Act, and reads as follows:

> The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.

[9] The SABC must establish therefore, on a *prima facie* basis at least, that it is 'just and equitable' for the court to intervene by entertaining the application to review and set aside the jurisdictional ruling made on 16 April 2019.

[10] There are at least two reasons why the SABC has failed to meet this threshold. First, commissioner Mqingwana's ruling amounts to no more than a decision to provisionally assume jurisdiction, to hear evidence and to decide whether it had jurisdiction to determine the dispute (if necessary) on the basis of that evidence. This much is clear from the written ruling, in which the commissioner explicitly states that jurisdiction was assumed on the basis that if it later transpired, after the leading of evidence, that the CCMA lacked jurisdiction, a ruling to that effect would be made. In other words, there is no equivocal ruling on jurisdiction either way, certainly not one that is susceptible to review.

[11] To the extent that Mr. van As, who represented the SABC, urged me at least to issue a directive in any ruling that I make that commissioner Du Plessis hear evidence on the jurisdictional point, something that the SABC says that he has refused to do. I fail to appreciate how such an order can be made in the context of what amounts to an application to stay an arbitration hearing pending a review of a jurisdictional ruling made by another commissioner. Control over arbitration proceedings (and the basis on which evidence is led) is best left to the presiding commissioner. It is not the function of this court to micro-manage arbitration

hearings and issue directions to commissioners as to how they should conduct a hearing. In any event, as I have observed, some jurisdictional points (particularly those concerned with whether the referring party is an 'employee' as defined in the LRA or whether any termination of employment constituted a 'dismissal') are best determined once all the evidence is in – they need not be the subject of a discrete enquiry.

[12] Thirdly, and more fundamentally, there is manifestly no merit in the basis of the SABC's point in *limine*, and thus no merit in the review application. The point in *limine* amounts to an assertion that an employer is entitled to elect to treat an act of alleged misconduct by an employee either as a breach of contract, or a breach of a disciplinary rule. In the former case, the employee may not claim to have been dismissed in the sense that 'dismissal' is defined in s 186 of the LRA, and may certainly not claim to have been unfairly dismissed. Any recourse by the employee, so the argument goes, is thus confined to a contractual remedy, a remedy that the CCMA is not empowered to grant. This proposition only has to be stated in those terms to illustrate how profoundly unsound it is. The definition of 'dismissal' in s 186 of the LRA expressly includes circumstances where the employer 'has terminated employment with or without notice.' Whether the employer casts the termination in the contractual language of acceptance of the repudiation of a contract of employment and an election to cancel the contract, this is no more or no less than a termination of employment, with or without notice (i.e. a summary termination), which in turn, by definition, constitutes a dismissal for the purposes of s 186. This is a matter over which the CCMA exercises jurisdiction, at least where the reason for dismissal is misconduct, a reason that is not in dispute in the present instance (see s 191(5)). I find it disconcerting to have to record such a trite principle - to any labour lawyer, this is a statement of the manifestly obvious. Were the SABC's point in *limine* to be upheld, it would be open to employers to avoid the statutory consequences of an unfair dismissal simply by casting a termination of employment in common law contractual terms. The inadequacies of the law of contract to protect employees against a termination of employment without a fair reason and without following a fair procedure is the *raison d'etre* of the statutory protection against unfair dismissal. This protection has its roots in the power imbalance inherent in the employment relationship and the remedial

constitutional right to fair labour practices, a fact acknowledged many times over by this court, the LAC and the Constitutional Court.

[13] In short – the SABC has failed to establish a *prima facie* right to the relief that it seeks. To the extent that the SABC contends that it will suffer irreparable harm should the relief not be granted, this is simply not the case. The SABC has invested significant energy and effort (and no doubt substantial legal fees) in delaying the determination of this dispute. Any irreparable harm that there may be is that suffered by the employee, who will face yet delay in the determination of her dispute. Given the current backlog in the opposed motion court roll, it is unlikely that the review will be heard within the next 12 months. For the same reason, the balance of convenience favours the continuation and conclusion of the arbitration hearing. With a commitment by both parties to address the real issue in dispute and avoid unnecessary technicalities and obstructions to an expeditious hearing, the arbitration hearing ought to be expeditiously concluded. Commissioners are specifically enjoined and empowered by s 138 to avoid legal formalities and deal firmly and fairly with the merits of a dispute. The SABC has failed to establish any of the requirements for interim relief and the application thus stands to be dismissed.

[14] The employee's counsel submitted that costs should be awarded *de bonis propriis*, since the present application is nothing less than an abuse of the process of this court. Section 162 affords the court a discretion to make orders for costs according to the requirements of the law and fairness, after taking into account all of the relevant facts and circumstances. In the present instance, the application has been brought in circumstances where the clear legislative policy, reflected in the introduction of s 158 (1B) in 2014, is that reviews of rulings made by commissioners ought not to be brought piece-meal. A case must be truly exceptional to warrant a departure from the norm that a review is appropriate only once the dispute has been finally determined in a completed arbitration hearing. This is consistent with the statutory purpose of expeditious dispute resolution which the LRA seeks to achieve. The conduct of the SABC and its representatives throughout the course of this dispute has been directed at frustrating this purpose.

[15] Section 158(1B) aside, I cannot lose sight of the context in which the present application has been filed. As I have noted, the employee was dismissed on 17 October 2018. Despite the dispute having been referred to the CCMA within the required 30-day period, and after four urgent applications brought by the SABC to this court, the arbitration hearing has yet to commence in any meaningful sense. The employee has been unemployed for more than a year. She has been obliged to incur legal costs in her opposition to the various applications filed by the SABC, and to bear the financial burden consequent on the proceedings having become unnecessarily protracted.

[16] I must also necessary take into account the fact the common knowledge that the SABC is in dire financial straits and it survives on the basis of bailouts from Treasury. I fail to understand how it can be said that taxpayers' money is being prudently spent by filing urgent application after urgent application and seeking to avoid or delay an arbitration hearing on the merits by the taking of technical points so obviously lacking in merit. I would have thought that tough financial times would dictate that the SABC's disputes with its employees be determined as expeditiously and inexpensively as possible. Considerations of good corporate governance and the moral obligations owed by a corporation to employees (even those who have been dismissed) demand that respect be accorded to employees and that the strategy of denying an employee effective access to justice by the application of corporate muscle must be avoided. This is not to say that an employer ought not to discipline its employees where this is warranted, or that it is not entitled robustly to defend any disciplinary action that is taken. But there is a difference between the robust defence or advancement of one's interests, and a conscious strategy to deny an employee access to justice by resorting to the superior resources and funds that an employer inevitably has at its disposal. Indeed, the employee avers that the present application is an element of a broader tactic to deprive her of the right to have the matter expeditiously finalised. There is no replying affidavit denying that averment and on the face of it, the employee's summation of the SABC's motives is correct.

[17] Finally, this court has warned practitioners against pursuing the hopeless case. In *Mashishi v Mdladla NO and Others* (2018) 39 *ILJ* 1607 (LC), the court said the following:

> Section 162, which regulates orders for costs in this court, confers a discretion to make orders for costs, based on the requirements of the law and fairness. Those requirements, as I have stated above, compel practitioners and other representatives to refrain from referring hopeless cases to this court and to place the interests of justice and of the court before the parochial interests of their clients and what might be seen to be a principle of partisanship that requires representatives to advance the client's partisan interests with the maximum zeal permitted by law; and the principle of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends.

[18] Regrettably and inevitably, the taxpayer will bear the bulk of the costs of the SABC's overbearing legal strategy. But there is no reason why the employee should be deprived of the costs that she has occurred in opposing this application. In my view, the interests of the law and fairness are best satisfied by the SABC's attorneys being held liable for those costs. To hold the SABC liable would unfairly prejudice the taxpayers who keep the SABC afloat. I intend therefore to make an order for costs, on a punitive scale, *de bonis propriiis*. Since the SABC's attorneys were not given notice of my intention to make such an order (on account of the urgency of the application), I intend to afford them seven days within which to make submissions as to why an order in those terms should not be confirmed.

I make the following order:

1. The application is dismissed, with costs, such costs to be paid *de bonis propiis*, on the scale as between attorney and client.
2. The order for costs in paragraph 1 is provisional. The applicant's attorneys are afforded seven days to make submissions as to why the order should not be confirmed.

André van Niekerk

Judge

APPEARANCES

For the applicant: Adv. M van As, instructed by Werksmans Inc.

For the third respondent: Adv. M Kufa, instructed by Motlatsi Seleke Attorneys