



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1877/2022

In the matter between:

DDP VERVOER CC

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER VELLOEN NO

Second Respondent

MADISHA AND OTHERS

Third Respondent

Heard: 13 November 2024

Delivered: 13 November 2024

Summary: Review dismissed, no costs.

JUDGMENT

DANIELS JIntroduction

- [1] This is an application brought to review and set aside the arbitration award issued by the second respondent (the “commissioner”) under case reference GATW2274-22, on 15 July 2022, in which the commissioner found that the individual respondents were dismissed by the applicant, and their dismissals were substantively and procedurally unfair.
- [2] The second respondent ordered the applicant (the “employer”) to reinstate each of the individual respondents (save for Mr C Kabu – who failed to attend the proceedings) with effect from the date of their dismissal. The individual respondents (the “employees”) were directed to tender their services on 11 August 2022.

Material facts

- [3] The employer’s business is that of furniture transportation. The applicant contends that the employees were employed by it on a casual basis and their services were used as and when required. They were paid for each day they worked. The individual respondents contend that they worked on a regular basis and worked more than twenty-four hours per month.
- [4] On 30 December 2021, the employees arrived at the workplace but refused to work until the employer addressed their grievances. On 4 January 2022, the employees again demanded that the applicant address their grievances including their desire to be engaged as ‘permanent’ employees, payment of a 13th cheque, and their job descriptions to be recorded in writing.
- [5] On or about 10 January 2022 the employees referred a dispute to the CCMA alleging that they had been dismissed at the end of December

2021. The employer disputed that they had been dismissed. The parties concluded a settlement agreement as follows:

- 1. The respondent maintains that the applicants were not dismissed nor were their employment terminated*
- 2. The parties agree that the applicants may return to work on Wednesday 2 February 2022*
- 3. The respondent shall communicate with the applicants to inform them of their respective work assignments*
- 4. If the applicants do not get any work assignments from the respondent by 11 February 2022, then the applicants may refer a new dismissal dispute with the CCMA.*

[6] It was common cause that the employer did not allocate any new work assignments to the employees by 11 February 2022.

[7] After the settlement agreement was concluded at the CCMA, the applicant contacted the employees and arranged a meeting with them for 11 February. At the meeting, the employer advised the employees that he had secured work for them on 12 February. The employees demanded written employment contracts. The employer produced a blank employment contract for their consideration. The employees advised that they would like to read the employment contracts before agreeing to it. When they refused to sign the employment contracts, so the respondents allege, the employer told them to “go home and starve and he will get cheap labour from the streets”.

[8] On 12 February, the employees failed to arrive to tender their services and the employer was forced to seek replacement labour on an urgent basis.

- [9] The employer states that it subsequently contacted the employees and asked them to return to work with their signed employment contracts. This was disputed.
- [10] On 14 February, the employees referred a further dispute to the CCMA alleging that they had been dismissed. After conciliation, the dispute was enrolled for arbitration. Both parties were represented, with the applicant being legally represented. This process resulted in the arbitration award, which is the subject of the review application.

Review grounds

- [11] The applicant alleges, in the main, that the arbitration award should be reviewed and set aside because: (a) there was no dismissal, (b) the employees abused the letter and spirit of the settlement agreement, (c) the commissioner's award was one no reasonable decision maker could reach, and (d) the amount of backpay was unreasonable.
- [12] The review grounds set out in (b), (c) and (d) are completely devoid of merit and, with respect, to the extent that they are understandable, are not properly motivated. I do not intend to consider them. The principal ground of review is that the commissioner was incorrect in finding that the individual respondents were dismissed (the "jurisdictional ruling").

Legal principles

- [13] It is trite that the CCMA is not a court of law. Instead it is an administrative tribunal charged with the execution of statutory functions. As a creature of statute, the jurisdiction of the CCMA is governed by the statute (or statutes) which empowers it.

[14] In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*¹ (“SA Rugby”) the court set out the position as follows:

[40] 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. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. (Own emphasis)

[15] In *Bombardier Transportation (Pty) Ltd v Mtiya NO & others*² Van Niekerk J (as he was then) stated as follows:

“13] The first step in this approach is to recognize that many ‘jurisdictional issues’ raised by parties in conciliation proceedings are not jurisdictional questions in the true sense. The only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time-limit prescribed by s191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment related matter at all. The distinction to be drawn is one between facts that the legislature has decided must

¹ (2008) 29 ILJ 2218 (LAC) at para 40

² (2010) 31 ILJ 2065 (LC) at para 13

necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers. The power given to the CCMA to determine the fairness of a dismissal includes the power to determine whether or not an applicant was an employee, and whether she was dismissed. These questions ordinarily fall to be determined in the course of the CCMA's adjudication functions. It follows that a conciliating commissioner is under no obligation to determine them at the conciliation phase." (Own emphasis)

- [16] To summarise, the existence of a dismissal (in an unfair dismissal dispute) is a jurisdictional prerequisite. An administrative tribunal, such as the CCMA, cannot finally determine its own jurisdiction. Its findings on jurisdictional facts are provisional, and are made solely for the sake of convenience. The test on review, in relation to jurisdictional findings, is one of correctness, not reasonableness.

Analysis

- [17] The key to the commissioner's jurisdictional ruling is the following:

"[30] I do not accept the respondent's witnesses version that the applicants were told to go over the contracts and that it was the first step in meeting their demands as per their letter of 4 January 2022. The applicants witnesses testimony was compelling, when they indicated that they were not going to sign the agreements they were told to go home and starve and the employer will get cheap labour from the streets."

[18] The applicant has not provided any basis, compelling or otherwise, to overturn the finding of the commissioner that the applicant told the employees to “go home and starve” while it would source cheap labour. The applicant does not state that this evidence was not presented by the employees to the commissioner. On review, findings of this nature cannot be overturned simply because a party wishes to do so. Something more is required. The finding was based on oral testimony, presented under oath, directly to the commissioner. In my view, no proper basis has been laid to set aside the finding that the respondents were dismissed.

[19] Dismissal is broadly defined in section 186 of the LRA to cover instances where ‘an employer has terminated a contract of employment with or without notice’. The definition requires conduct on the part of the employer. It does not, however, require a formal written employment contract.

[20] The applicant argues that the employees deserted or absconded. However, that cannot be accepted at face value, and it is not the end of the enquiry. The applicant accepted that the employees had deserted simply because they failed to tender their services on 12 February. On its own, their failure to arrive for work on a single date, can never be considered incontrovertible proof that an employee has deserted or absconded. The learned author Professor John Grogan stated in Workplace Law: *“the correct position in law is that, when an employee deserts, it is the employer who brings the contract to an end by accepting the employee’s repudiation.”*

[21] In the circumstances, the application falls to be dismissed.

Conclusion

[22] The application is dismissed, with no order as to costs.

RN Daniels
Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Adv JL Basson

For the Respondent:

LP Ngoepe Attorneys Inc

LABOUR COURT