IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J1526/99

In the matter between

Applicant

and

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

PILLAY AJ

1]This is a review of an award made by the Second Respondent, a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA). At the arbitration the Applicant contended that Mr Motsanana, the employee, had deserted his place of employment. The Third Respondent submitted that he had been dismissed.

2]The first ground of review was that the Second Respondent committed a gross irregularity by insisting that the evidence be completed within about two hours, the time allocated for the arbitration, and by further

directing that only relevant information be adduced. As a result, it was submitted, the Applicant's representative, Ms Nkosi, did not request a postponement or an adjournment to call a material witness, Mr Duiker, to testify for the Applicant.

Mr Landman, who appeared for the Applicant, submitted it behoved an arbitrator to consider an adjournment *mero motu* in certain circumstances. In this case, the Applicant was taken by surprise by Mr Motsanana's evidence which was inconsistent with the Third Respondent's opening statement. That warranted the arbitrator intervening *mero motu* to adjourn the proceedings. In support of this submission he referred to the case of *DIMBAZA FOUNDARIES LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (1999) 20 ILJ 1763 (LC)*

[2] The Third Respondent accepted that a commissioner should intervene if it appears that a party is so taken by surprise that it is unable to continue with its case, as in *DIMBAZA*. Ms Nkosi made no application for postponement. Nor did she give any indication whatsoever to the Second Respondent that she was not in a position to proceed. She also did not indicate to the Second Respondent whether Mr Duiker was willing and able to testify if the matter was postponed.

[3] Mr Bruinders submitted for the Third Respondent that the Applicant would have been made aware from the referral to arbitration that it was always the intention of Mr Motsanana to challenge the fairness of his dismissal.

[4] There is nothing irregular about the Second Respondent requesting the parties to confine themselves to the time allocated to the case. That is precisely what commissioners are enjoined to do. It can hardly be inferred from the Second Respondent's request that the parties adduce relevant facts within the time available that he was "insisting" on the matter being completed within

the allocated time. Nor do these requests amount to intimidation as suggested by Ms Nkosi. Commissioners are required by law to consider only relevant facts. It would serve no purpose therefore to have wasted time on irrelevant information. Furthermore, commissioners have to manage time and the process so that the CCMA operates efficiently.

[5] To expect the Second Respondent to have known that Ms Nkosi would need a postponement when she did not even hint as much, is placing too high a burden on him.

[6] I find therefore that the Second Respondent did not unduly insist on completing the proceedings expeditiously. Even if he had done so, it was open to Ms Nkosi to apply for a postponement. It was not incumbent on the Second Respondent to postpone the matter of his own accord in the absence of any indication that such a postponement was sought or that it would serve any purpose.

[7] The second ground of review was that the Second Respondent had failed to appreciate that the issue in dispute was whether Mr Motsanana had deserted or was dismissed. As a result, it was submitted, the Second Respondent failed to consider that Mr Motsanana bore the onus proving the dismissal.

[8] The arbitration recorded as the "*issues to be decided"* the question *"whether the respondent dismissed the applicant unfairly and what remedies to institute should it be found that the Applicant was indeed unfairly dismissed."* In amplification of the award the Second Respondent confirmed that he was convinced that there had been a dismissal *"on grounds where the employer made it impossible for the employee to fulfil his duties as no accommodation and food was made available to him..."*

[9] Mr Motsanana's evidence was that he had been told by Mr Duiker that his services were terminated. He left work because he no longer had company accommodation from 30 March 1998. He was also denied his rations that day. The Second Respondent inferred from the fact that Mr Motsanana had been denied accommodation and rations, that he had been constructively dismissed. It was not the only inference to draw. Another reasonable inference was that the accommodation and rations were terminated simultaneously with and as a consequence of the termination of his employment. The latter inference would be consistent with Mr Motsanana's version that he had been dismissed.

[10] The Second Respondent's identification of the issues in dispute and his finding that dismissal was procedurally and substantively unfair do not *per se* manifest that he was alive to the onus being on the Third Respondent to prove the dismissal first before its fairness could be considered.

[11] The Second Respondent justified the reasons for concluding that the dismissal was procedurally and substantively unfair. However, having made the incorrect inference about the termination of accommodation and rations, he was forced to hedge his bets on dismissal at the instance of the Applicant and constructive dismissal at the instance of Mr Motsanana.

[12] However, the Second Respondent appears to have accepted Ms Nkosi's submission that the onus rested on Mr Motsanana to prove the dismissal as he allowed the latter to begin leading evidence. Furthermore, it must follow from his finding that Mr Motsanana did not absent himself from the workplace, that he accepted that he had been dismissed at the instance of the Applicant. The Second Respondent must therefore have been alive to the fact that the dismissal had to be established first.

[13] The Second Respondent appears to have considered all the evidence and concluded, correctly in my view, that there had been a dismissal.

[14] The second ground of review is not sustained.

[15] The third ground of review was that the Second Respondent exceeded his powers by hearing the dispute as it fell to be determined by this Court in terms of section 191 (5) (b).

[16] It does not follow necessarily from Motsanana's evidence that being told that there was "no more work" for him meant that he was being retrenched. It is not the Applicant's case that there was a retrenchment. There could have been no work for him for any number of valid and invalid reasons. When he was asked during cross-examination why the Applicant dismissed him, his response suggested that he did not know himself what the reason was. The Second Respondent was obliged to hear the matter particularly in the absence of any objection about jurisdiction.

[17] The fourth ground of review was that the Second Respondent's analysis and reasoning in concluding that Mr Motsanana was dismissed was fatally flawed and objectively unjustifiable in the light of the material before him.

[18] Not all the "material" presented on behalf of the Applicant qualified as evidence. The status of the documents is not evident from the transcript. Except for the "blue card" none of the other documents were put to any of the witnesses. Assuming that they were admitted to be what they purported to be then pitted against the oral evidence of Mr Motsanana, the Second Respondent correctly preferred the latter's version. The evidence of the Applicant's only witness was hearsay

on the material issues, such as Motsanana's last day of work and whether Mr Duiker had terminated his services.

[19] The Second Respondent appears to have rejected the Applicant's "material" correctly in my view. He ought nevertheless to have given brief reasons therefor. However, his failure to do so does not amount to a ground of review in terms of section 145 of the Act. One of the reasons the Second Respondent found in favour of Mr Motsanana was because the Applicant could not refute that Mr Duiker had told him that there was no more work for him. That was the crux of his reason for rejecting the Applicant's version.

[20] That Mr Duiker did not have the authority to dismiss him - unchallenged as it might be - did not prove that Mr Duiker did not in fact dismiss Mr Motsanana.

[21] The fifth ground of review was that the Second Respondent did not apply his mind properly to the remedy of reinstatement. As a result, the Second Respondent, it was submitted, created a contract of indefinite duration contrary to the terms of the original contract.

[22] Despite Ms Nkosi's promise during the opening statement to lead evidence to prove that Mr Motsanana was employed on a one year fixed term contract which commenced on 15 April 1997, the Applicant's witness was unable to say when the contract expired. Mr Motsanana was not cross-examined about being on a fixed term contract.

[23] In the absence of evidence as to when the contract expired the Second Respondent was entitled to treat it as a fixed term contract the expiry date of which was unknown. The onus was on the Applicant to prove that the contract was for a fixed term and when that term commenced and

expired. It would have been a gross irregularity in the circumstances if the Second Respondent came to the aid of one party and called for evidence about the date on which the contract expired, as suggested by Mr Landman. It is not a case of Ms Nkosi not knowing that the Applicant had to lead this evidence.

Order:-

The application is dismissed with costs.

D PILLAY A J

Acting Judge of the Labour Court

G: 24 February 2000

NT: 29 February 2000

Adv T. Bruinders

: Adv A.P. Landman