IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JR2360/06
J1805/06

In the matter between:

MICHAEL PETRUS BASSON Applican

and

SANTIE OOSTHUIZEN N.O. First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

VERONICA GRIFFIN Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the first respondent (the commissioner) on 30 September 2002 and for an order to declare that the third respondent was not an employee of the applicant in terms of section 213 of the Labour Relations Act 66 of 1995 (the Act). The applicant is also applying for condonation for the late filing of the review application. There is also the urgent application to stay the execution of the writ pending the outcome of the review application.

2. The application was opposed by the third respondent.

The background facts

3. The third respondent referred a constructive dismissal dispute to the second respondent (the CCMA). She contended that she was employed by the applicant and that the dispute arose on 1 August 2001 when the applicant allegedly told her that he did not have money to pay her salary for July 2001. She terminated her employment with the applicant with immediate effect and in her referral form indicated that she was seeking compensation of R96 000.00, being 12 months' salary, notice pay of R8 000.00 and her July 2001 salary of R8 000.00, totalling an amount of R112 000.00.

4. The applicant received the third respondent's referral dated 14 September 2001 accompanied with a letter dated 17 September 2001. The third respondent had also attached an application for condonation since her referral to the CCMA was 13 days late. Condonation was granted for the late referral. The dispute was later enrolled for arbitration on notice to both parties. There was no appearance by the applicant and a default award was issued on 30 September 2002. In terms of the award the applicant was ordered to pay the third respondent and amount of R168 000.00 being R14 000.00 per month x 12 months. The applicant also had to pay the third respondent two weeks notice pay and leave pay.

5. The applicant unsuccessfully applied to have the award rescinded. It is not the rescission ruling that is sought to be reviewed but the default award of 30 September 2002.

The condonation and review application

6. The applicant is applying for condonation of the late filing of his review application. There is an overlap in both applications since the applicant must deal with prospects of success in the condonation application that has a bearing on the merits of the review application. It is trite that four requirements must be satisfied in the condonation application. The first is the degree of lateness, the explanation for the lateness, the prospects of success and prejudice to the other party.

7. The first question that arises is how late the review application is. To answer this question, it must first be determined when the award was served on the applicant or his representative. The six weeks period referred to in section 145 of the Act starts running from the date when the award was served on the applicant and not from the date when the applicant had knowledge of the arbitration award. The applicant has given different dates about when the award was served on him. In the review and condonation application filed on 6 November 2006, the applicant has stated in paragraph 25 of the founding affidavit that he first became aware of the arbitration award issued against him during June 2005 when he was approached by Pitzer. He did not recall the exact date. In the third respondent's answering affidavit filed with this court on 5 March 2007 the third respondent disputes that the applicant has taken the court into his confidence and contended that he had not put all the facts truthfully to the court to enable this court to make a proper evaluation of the facts on a conspectus of all the facts. She has stated that in the applicant's section 145(3) application the applicant was initially very vague as to precisely when he had received the award. When she stated that the applicant received the award most probably on or about 20 May 2004, the applicant in his replying affidavit in the section 145(3)

conceded same. If this were accepted as a fact, then it follows that the six weeks as contemplated in terms of section 145(1) of the Act expired on 1 July 2004. The application was therefore filed 854 outside the prescribed period. The applicant states that the application was filed four years and two months out of time. He states that the reference to June 2005 was clearly a typographical error and that he must have received it in May/June 2004.

8. The applicant had also filed an urgent application on 3 October 2006 to stay the writ pending the outcome of the review application. At paragraph 8.7 of his founding affidavit he has stated that the only other time that he has received any documentation was when the award rendered against him by the second respondent dated 30 September 2002 was sent to him. In paragraph 9.7 he has stated that Pitzer objected on 7 June 2005 to an application to vary the award rendered by the second respondent on 30 September 2002. He has stated further in paragraph 9.13 that on 20 March 2004, almost two years after the award was rendered by the second respondent, Pitzer brought an application on his behalf. The third respondent in an answering affidavit filed on 16 October 2006 stated in paragraph 4.2.4 that the applicant was served with the award on or about April/May 2004. During February/March 2005 the section 143 application was served on him. In June 2005 he opposed the Variation Order. The applicant therefore was aware of the award at the earliest by April/May 2004 and at the latest by June 2005 and that the review application was filed outside the six weeks period as prescribed in section 145(1)(a) of the Act. The applicant in his replying affidavit refers to annexure A of his application to stay which sets out the time period referred to above.

9. To summarise the applicant has initially stated in his application for condonation that he became aware of the award in June 2005. He proceeded to state that the date was a typographical error and that he must have received it in May/June 2004. The explanation given for the discrepancy is not convincing bearing in mind what was stated in the application to stay the review application. The impression that I am left with is that the applicant has attempted to mislead this court about the true position. This court takes a very dim view of the applicant. However I will accept for purposes of this judgment that the award was received in May 2004. As pointed out above the review application was filed on 6 November 2006 that is therefore filed some two years and four months late. The delay is excessive. The applicant has stated that it was irrelevant when he had received the award since the fact remains that when he received the award, Pitzer through his incompetence and unprofessional conduct, failed to file a proper application. I do not agree. The date when he received the award is important to determine the degree of lateness.

10. The next step is to enquire whether the applicant has explained the delay in filing the application timeously. It is not entirely clear from the applicant's founding affidavit what the explanation is which he tenders for the delay in launching the review application. The applicant stated that the only other time that he received any further documentation pertaining to the matter was when the arbitration award rendered against him in favour of the third respondent was handed to him. Upon receipt of the award he immediately consulted Pitzer who again assured him that he need not worry and that he would take care of the matter. He was again assured that he was in

capable and professional hands. To his total surprise and shock he received a visit from the Sheriff of Brakpan on 22 August 2006 when a writ of execution was served on him. He realised that something had gone terribly wrong. He decided to approach his present attorneys of record and immediately instructed them to investigate why this matter was allowed to go to a stage where not only an award was rendered against him in his absence, but also a writ of execution was served on him. Until that stage he was under the impression that Pitzer was handling all CCMA processes. He trusted Pitzer to handle his matter in an appropriate and professional fashion and was always assured that he should not worry about anything. Pitzer *inter alia* informed him that the third respondent had a stroke and that they would never hear from her again. On 20 March 2004, almost two years after the arbitration award was issued by the first respondent, Pitzer brought a rescission application on his behalf. He was not aware of the fact that such an application was launched nor was he ever requested by Pitzer to sign an affidavit and the third respondent opposed the application on the basis that it did not comply with the rules of the CCMA. On 7 November 2004 commissioner Margaret Smith of the CCMA issued her rescission ruling in which she concluded that the rescission application was defective for want of compliance with the Rules of the CCMA. Pitzer did not inform him that such an application, of which he was in any event not aware of, was dismissed. On 7 June 2005 Pitzer objected to an application to vary the award rendered by the commissioner on 30 September 2002. He did not see the variation application. The commissioner, despite the objection, issued a variation order in terms of section 144(b) of the Act on 2 June 2005 in terms of which the citation of the parties was corrected. This was done almost 33 months after the original award was issued. A further variation order was

issued by the commissioner on 11 May 2006 in terms of which the amount of leave pay was increased. Pitzer handled the matter in a very unprofessional manner and the manner in which he acted on his behalf display a shocking degree of incompetence and ignorance of the Rules and processes pertaining to the CCMA. Had he been aware that this was the case he would have terminated his mandate long time ago and would have sought proper legal advice. On 25 February 2006 a section 143 application was filed by the third respondent. He had never seen this application before nor was he informed that such an application was brought. It appears that from the documentation that the application was faxed to the fax number of Pitzer. Pitzer did not file any opposition to the application and the award was certified on 4 July 2006. A writ of execution was issued by the Registrar of this Court on 5 July 2006. He received a visit from the Sheriff of Brakpan on 22 August 2006 when the writ was served on him. This came as a total shock and surprise to him as he was brought under the impression that the matter was sorted out long ago. The last time he heard from Pitzer was when Pitzer approached him during June 2005 to depose to an affidavit in support of the opposition to the variation of the award. This was also the first time he became aware of the arbitration award issued against him. Upon receipt of the writ of execution on 22 August 2006, he immediately approached his present attorney of record and instructed them to investigate the matter. The CCMA filed was traced and an application for stay was filed on 3 October 2006.

11. The applicant blames the failure to bring the review application on Pitzer. The third respondent has in her answering affidavit pointed out contradictions and inconsistencies in the applicant's version. Even if there could be some explanation

given for this, the fact is that the applicant has not given an adequate explanation for his failure to bring the application timeously. He has failed to provide any explanation for the delay between May 2004 and June 2005 that is about 56 weeks and has blamed Pitzer for the remaining period. He adopted the attitude that because the third respondent had suffered a stroke that she would not persist with the matter. Well she certainly did. This is no basis for not having proceeded with the review application earlier. The impression that this court is left with is that once the applicant had entrusted the matter to Pitzer he adopted a lay back approach and was only prompted to do so after the Sheriff had called at his premises. The applicant states that the Sheriff came to his premises on 22 August 2006 yet he waited up to the 6 November 2006 to launch the review application. There is simply no explanation given for this further delay at all.

12. The applicant has therefore failed to give an adequate explanation for the delay in filing the review application timeously. Strictly speaking it becomes unnecessary to consider the issue of prospects of success since. There is merit in the third respondent's contention that the applicant has attempted to mislead this court. However, for completeness sake I will consider the question of prospects of success. In deciding the question of prospects of success in the review application, the commissioner's award needs to be determined to decide whether the respondent has committed any reviewable irregularities. It is not a question about whether the third respondent was an employee of the applicant but whether the commissioner's award is unreasonable. The applicant must prove that the commissioner's award is not reasonable. In doing so facts must be placed before me that supports that contention.

13. The applicant has raised the following grounds of review:

13.1 The jurisdictional fact that the applicant was indeed the employer of the third respondent had to exist objectively before the CCMA could have resolved the matter and exercise its powers. The third respondent was never employed by the applicant and no employment relationship existed between them in the objective sense. The CCMA thus lacked jurisdiction to arbitrate the third respondent's dispute. The commissioner, however, assumed that the third respondent was in fact employed by the applicant and based her award on such an erroneous assumption. In doing so she exceeded her powers as a commissioner of the CCMA that constitutes a valid ground for review of her award. The award was also improperly obtained by the third respondent through the presentation of fabricated evidence to the effect that she was employed by him.

13.2 The first respondent based the compensation she awarded on an approximate figure and did not have proper regard to the evidence placed before her in the form of the LRA7.11 form and the *viva voce* evidence of the third respondent to the effect that her salary before deductions was approximately R14 000,00. In doing so she committed a reviewable irregularity and her award also fails the test of rationality.

13.3 The first respondent awarded maximum compensation to the third respondent although she was apparently employed by him for a short period of only seven months. She obtained alternative employment after a mere five months. There was apparently no evidential material before the commissioner to

indicate what she earned in such alternative employment and it was thus not possible to establish whether she had in fact suffered a financial loss as a result of the alleged unfair constructive dismissal. As such the maximum award of compensation cannot be justifiable as there was no evidential basis on which the first respondent could have exercised her discretion in a proper manner. As such she has failed to exercise her discretion properly or at all and this also constitutes a reviewable irregularity.

14. It is now trite according to *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* CCT85/06 that when a commissioner of the CCMA conducts an arbitration in terms of the compulsory provision of the Act, he or she is conducting an administrative action. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) does not apply to such administrative action. The justifiability of administrative action in relation to the reasons given for it as propounded in *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) as a ground of review of CCMA arbitration awards under section 145 of the Act, does not apply any more. The grounds of review set out in section 145 of the Act are suffused by the criterion of reasonableness as dealt with in *Bato Spar Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (7) BCLR 687 (CC) and the constitutional requirement that CCMA arbitration awards must meet is that they must be lawful, reasonable and procedurally fair.

15. An arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside. See *Fidelity Cash Management Service vs CCMA and others* DA10/05 (LAC). To decide whether an arbitration award is reasonable or unreasonable, the question that must be asked is whether the decision or finding reached by the commissioner is one that a reasonable decision maker

could not reach. If it is an award or decision that a reasonable decision-maker could not reach, then the decision or arbitration award is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or arbitration award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach. In deciding the reasonableness or otherwise of a decision, a judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

16. The LAC has cautioned in *Fidelity Cash Management Service* at paragraphs 98 to 100 as follows:

> *"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.*

In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike the aforesaid balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set aside said simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA's commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review - it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances.

The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached".

17. In the review application, the applicant is not seeking to review the rescission application dismissed by a commissioner of the CCMA but is seeking to review the commissioner's default arbitration award. I will therefore proceed on the basis that the applicant and his representative were correctly informed of the date of the arbitration hearing and had failed to attend the arbitration hearing.

18. The commissioner issued a default arbitration award that means that the commissioner was faced with the third respondent's version about her dismissal. The nature of the dispute that the commissioner was called upon to adjudicate is one of an unfair dismissal that clearly falls within the jurisdiction of the CCMA. The third respondent must in terms of section 192 of the Act establish the existence of the dismissal. If the dismissal was established, the applicant must prove that the dismissal was fair. It is clear from a perusal of the award that the commissioner correctly proceeded on the basis that she had to decide whether the third respondent was constructively dismissed on 1 August 2001. If this were found to be the case, she then had to decide the appropriate relief. The evidence led by the third respondent was recorded by the commissioner and it is of interest to note that the proceedings were mechanically recorded. The applicant has referred to what was or was not

placed before the commissioner yet failed to give this court a transcript of the arbitration proceedings before the commissioner. The commissioner then recorded that there was no appearance by or on behalf of the applicant. The commissioner concluded that the third respondent had discharged the onus to prove that she was constructively dismissed. The commissioner then proceeded to award her twelve months compensation with leave pay and two weeks notice pay.

19. An applicant in a review application when dealing with the prospects of success should place facts before this Court that shows that he or she has prospects of overturning the commissioner's review application. The applicant will have to show that the award given by the commissioner was unreasonable. It has in my view nothing to do with whether or not the third respondent was or was not an employee of the applicant.

20. I do not know what reviewable irregularity the commissioner has committed when she was faced only with the applicant's version of her dismissal. It would have been different if it were clear on the face of the referral form that the CCMA did not have jurisdiction to adjudicate the matter. A reading of the award reveals that the third respondent stated that she was employed by the applicant and then dealt with how she was dismissed.

21. There is no substance in the applicant's grounds of review. It is a decision that a reasonable decision-maker could reach. The arbitration award is therefore reasonable and must stand. The condonation and review application stands to be dismissed.

The declarator application

22. The applicant is seeking a declarator order to the effect that the third respondent was not an employee of the applicant. I had raised with both parties from the onset whether it is permissible for a party who had lost a matter at the CCMA to bring a review application with a declarator application. Both parties informed me that it was permissible to do so. The applicant referred me to the decision of *Flexware (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (1998) 19 ILJ 1149 (LC). I have some grave doubts about the correctness of this decision and do not believe that it helps the applicant all. I do not consider myself bound to follow the said decision which facts are also distinguishable from the facts this case.

23. It is clear from the provisions of section 158(1) of the Act that this court has a discretion to may make a declarator order. This in my view should be limited to disputes over which this Court has jurisdiction. This Court should not usurp the jurisdiction of other forums like the bargaining councils or the CCMA established to deal with certain type of disputes. This Court should refrain from dealing with disputes that resorts under the jurisdiction of those forums. The third respondent had referred an unfair dismissal dispute to the CCMA for adjudication. Had the matter proceeded before the CCMA, the CCMA would have dealt with the issue about whether the third respondent was an employee or not. This Court would have no jurisdiction to entertain the dispute save where an application for a review was filed flowing from the arbitration award.

24. The applicant with the declarator order is seeking an order that he has failed to achieve in the first place at the CCMA. This Court should therefore not entertain this part of the application since it ultimately does not have jurisdiction over the dispute that the third respondent had referred in the first place. The applicant had received a referral. It should have raised the issue about whether the third respondent was an employee or not at the CCMA. To do so now in the guise of a declarator goes totally in my view against why forums like the CCMA were established to hear such disputes. Ridiculous situations will arise if this is allowed to happen. A party who appoints a representative who blatantly ignores the provisions of the Act and loses a case may than approach this Court on review and seek a declarator. This cannot be the case and should not be allowed to happen. The review application was filed excessively late. If the declarator is granted it will have the effect that it sets aside the decision of the commissioner although the review application was out of time. A party who shows complete disregard for the provisions of the Act and rules cannot be allowed to obtain relief through the back door. One of the objects of the Act is that disputes should be resolved speedily. There are also certain time limits that are applicable for referrals and applications to this Court. Where no specific time period is stipulated, such application must in my view be brought within a reasonable period of time. The declarator application should also have been brought within a reasonable period that clearly is not so here.

25. For all of the afore going reasons I decline to issue a declaratory order.

26. It becomes unnecessary to deal with the preliminary issues raised by the applicant.

27. It follows that the order granted in the urgent application which was interim in nature,

lapses and falls away once there is a decision in the review application.

28. There is no reason why costs should not follow the result. This includes the costs of the urgent application.

29. In the circumstances I make the following order:

29.1 The application for condonation, review and declarator order is dismissed with costs.

29.3 The applicant is to pay the costs of the urgent application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : MUNNIK BASSON DAGAMA INC

FOR THIRD RESPONDENT : ALAN C KNIGHT ATTORNEY

DATE OF JUDGMENT : 14 FEBRUARY 2008