

NOT REPORTABLE

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO. JR 944/07

In the matter between:

LUMKA AND ASSOCIATES (PTY) LTD

Applicant

and

MS NTOMBEKHAYA MANCOTYWA

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

L MAQOMA AND TWO OTHERS

Third to Fifth Respondents

JUDGMENT

—

A VAN NIEKERK, AJ

1. The Applicant seeks to review and set aside an arbitration award made by the First Respondent under case number GA 9316/04.

2. At the arbitration hearing, the First Respondent recorded that she was required to decide whether or not the Third to Fifth Respondents were dismissed, and if so, whether their dismissal was fair. It is not necessary for the purposes of this judgment to record the factual background to this dispute save to say that at the arbitration proceedings the Applicant in these

proceedings, a temporary employment service, denied having dismissed the Third to Fifth Respondents, who in turn contested that they had been dismissed, and that their dismissals were substantively and procedurally unfair.

3. The arbitrator found, on the evidence before her, that the Third to Fifth Respondents had indeed been dismissed, largely on the basis that they had been told by a member of the Applicant's management that there was no more work for them at the premises of the client to which they had been assigned and that their services had accordingly been terminated. Having found that the Third to Fifth Respondents had been dismissed by the Applicant, the First Respondent proceeded to find that the dismissal was both substantively and procedurally unfair. Although the Third to Fifth Respondents had sought reinstatement, the First Respondent considered that given the period that had elapsed since the date of dismissal (the events giving rise to the arbitration had occurred in 2003) and awarded each of them the equivalent of 12 months' remuneration as compensation.

4. When this matter was argued, the parties' submissions concerned the First Respondent's finding that the Third to Fifth Respondents were in effect engaged in atypical employment relationship, that they had been dismissed by the Applicant and that the circumstances of their dismissal were such that the First Respondent was correctly entitled to conclude that the dismissal was substantively and procedurally unfair. After the parties had presented their submissions, the Court reserved its judgment.

5. In the course of preparing a judgment, it became apparent from the record of the arbitration proceedings and the supporting documentation that the circumstances surrounding the dismissal of the Third to Fifth Respondents were such that the reason for the termination of their employment was, on the face of it, one based on the Applicant's operational requirements. Were that to be the reason for dismissal, the CCMA would of course lack jurisdiction

since section 191 (12) of the Labour Relations Act (“the Act”) provides that the CCMA has jurisdiction to determine the fairness of a dismissal effected by reason of an employer’s operational requirements only where the dismissal follows a consultation process conducted in terms of section 189 of the Act in respect of a single employee. The Court accordingly issued a directive that supplementary heads of argument be filed on the following issues:

“Assuming that the respondents were dismissed for the purposes of the definition of ‘dismissal’ in section 186 of the LRA, but given that in terms of the record of the arbitration hearing (and the First Respondent’s award) the individual respondents were dismissed for a reason that appears to relate to the Applicant’s operational requirements, did the First Respondent have jurisdiction:

- (a) to decide the point in limine (i.e. whether the individual respondents were dismissed); and*
- (b) to find that the dismissal of the individual respondents was substantively and procedurally unfair, and to award compensation?”*

6. The Third to Fifth Respondents, in the supplementary heads of argument filed on their behalf, record that the First Respondent was faced with a situation in which the Third to Fifth Respondents alleged that they had been unfairly dismissed, in the face of the Applicant’s denial of the existence of a dismissal. On that basis, it was contended that the First Respondent had the necessary jurisdiction to entertain the point *in limine*. In relation to the question whether the First Respondent had the necessary jurisdiction to find the dismissal substantively and procedurally unfair, and to award compensation, the Third to Fifth Respondents concede that the First Respondent did not have the necessary jurisdiction to make the award. They submit that this Court has the necessary jurisdiction to entertain a dispute of this nature, and that the Third and Fifth Respondents should be afforded the

opportunity to refer the dispute to this Court. The Applicant agrees that the First Respondent had no jurisdiction to make the award she did. In these circumstances, the whole of the First Respondent's award stands to be reviewed and set aside.

7. I do not intend to make any ruling in relation to any referral of their dispute to this Court by the Third to Fifth Respondents. The Act and the Rules of this Court prescribe the manner in which this ought to be done and the limitations that apply. The Third to Fifth Respondents are entitled, on that basis, to refer a dispute for adjudication should they so wish.

8. In relation to costs, the jurisdictional issue was not raised at any stage during the arbitration process nor, as I have stated above, in these proceedings, until after the point that judgment had been reserved. In these circumstances, it would in my view be unfair to burden either of the parties with an order to the effect that they should pay the costs of the other.

9. I accordingly make the following order:

1. The arbitration award made by the First Respondent under case number GA 9316/04 is reviewed and set aside;

2. There is no order as to costs.

ANDRE VAN NIEKERK,
Acting Judge of the Labour Court

Date of Hearing: 27 February 2008

Date of Judgment: 19 August 2008