IN THE LABOUR COURT OF SOUTH AFRICA

Held at Port Elizabeth

Reportable

CASE NUMBER: P301/08

In the matter between:

FIDELITY SUPERCARE CLEANING (PTY) LTD	Applicant
and	
BUSAKWE B N.O	First Respondent
THE COMMISION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
SOLIDARITY obo HESTER CLAASSEN	Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application for the review in terms of section 145 and 158(1)(g) of the Labour Relations Act, 66 of 1995 ("the LRA"), of the arbitration award of the first respondent, made under the auspices of the second respondent.

Background facts

[2] The applicant supplies contract cleaning and related services to various clients. In terms of the applicable Sectoral Determination, employees generally were employed on a fixed term or fixed project basis, and the practice was to tender for cleaning contracts with various clients. The individual third respondent, Ms Claassen,

was employed by the applicant from 30 August 1990 as a Supervisor at Guestro Forging and Machining (”Guestro”) in the Eastern Cape, in terms of the applicant’s service contract with its client. During November 2007 the contract cleaning services were placed on general tender by Guestro, as a result of which the contract was awarded to another company, Zama Cleaning Services. Guestro gave notice to the applicant that its cleaning services contract would terminate on 31 December 2007. As a result, the applicant alleged that the fixed term contracts of all its employees based at Guestro terminated with effect from 31 December 2007 and they were notified accordingly. The first respondent found that the termination of the third respondent’s employment constituted a termination due to operational requirements and that she was accordingly entitled to severance pay in terms of section 41(2) of the Basic Conditions of Employment Act, 75 of 1997 (“the BCEA”) for her seventeen years of service with the applicant, in the sum of R18 642.99. The applicant’s Mr Bamford testified that prior to invoking the termination clause (“clause 22”) in the employment contract with its employees, it explored the possibility of alternative employment and in this regard engaged in consultations with Zama to take over some of the applicant’s staff. As a result of supplying Zama with a good reference on behalf of the third respondent, she was offered employment, which she accepted, with Zama.

Grounds of review

[3] The applicant submits that the first respondent had no jurisdiction to determine the dispute in that there was no dismissal for operational requirements, merely an automatic termination of the third respondent’s fixed term employment contract with the applicant. It is up to the Labour Court to determine whether the CCMA and the first respondent had the requisite jurisdiction, and in a jurisdictional

review this court is not limited by the reasonableness of the award. This court is entitled to consider the issue afresh and is not limited to the finding on arbitration. The applicant's legal representative Mr Snyman relied for authority on the following dictum of Zondo JP in *Fidelity Cash Management Service v CCMA & others*[1] :

> *"Nothing said in Sidumo means that the grounds of review in section 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds it powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise."*

[4] Mr Snyman referred this court, *inter alia,* to the principles applicable to jurisdictional reviews articulated in *Solid Doors (Pty) Ltd v Commissioner Theron & Others*[2] where the court held :

> *"[I]t is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that – even on review – must be established objectively. That is so because if there was no constructive dismissal – the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it*

1 [2008] 3 BLLR 197 (LAC) at para [101].

2 (2004) 25 ILJ 2337 (LAC) at para [29].

jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one – even on review – is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside".

[5] The second ground of attack is that the interpretive construction that the first respondent placed on the employment contract is not sustainable. It was submitted that the first respondent had correctly determined that the relevant provision of the employment contract, clause 22, could be divided into different components, but that he incorrectly interpreted it on the basis of three sections instead of two. The first section provides for the situation where the applicant loses the contract on which the employee was employed, and the second relates to where the applicant on its own accord restructures, rendering the employee redundant. A simple reading of the section, the applicant submitted, makes it clear that where a cleaning contract is cancelled the employees are simply "*laid off",* but where the employer restructures, it will seek alternative employment and where this is not successful they will then be retrenched in terms of the applicable retrenchment policy. In other words, where there is a cancellation of a service contract, the employment contract automatically terminates on the date of termination of the applicant's service agreement with the client. Notwithstanding this the applicant will seek alternatives even in a lay off situation. A termination for operational requirements as contemplated by law would accordingly only apply where the employer restructures, and its retrenchment policy

would then apply. In this context it was submitted that the first respondent materially erred in his determination that clause 22 was not intended to create a fixed term contract of employment. This, it was submitted, could not be further from the truth as the clause has no other feasible purpose and moreover given the nature of the industry it is clear that service contracts with a client are inextricably tied to employment contracts with employees. The first respondent's conclusion that to accept the existence of a fixed term contract will led to clause 22 being superfluous is not sustainable and completely irrational having regard to the clear terms of the contract. The construction placed on clause 22 was irrational, unreasonable and unjustifiable in that the last part of the clause (which he refers to as 22 (c)) makes the issue even clearer – lay off is not retrenchment but a lay off from employment as a result of a contract lost. This clause would not be necessary if normal retrenchment would flow from a lay off, and the first respondent has failed to appreciate or determine this.

[6] In this context the applicant submits that given the fact that the Guestro contract (which was also known as the Dorbyl Uitenhage contract, reflecting where employee was based) and the concomitant employment relationship with the third respondent was subject to the Sectoral Determination for the Contract Cleaning Sector which recognised the fixed term or fixed project nature of cleaning contracts, the demise of a cleaning contract would be an automatic catalyst for the termination of the employment relationship. This it submits must have been understood by the applicants "*as a matter of sheer common sense*", and accordingly the intentions of the parties when entering into a contract in the cleaning industry is determinative of the interpretation of clause 22.

[7] In the end, the first respondent clearly does not comprehend what a fixed term contract means. The period of a fixed term contract can be defined by reference to an event. In this instance there was an event defined term in existence in that if the event happens, i.e. loss of a client service contract, the employment contract automatically terminates. This event could occur in one or ten years, but when it does the employment contract ends. As a result of the first respondent's clear misconception and improper application of the law, his award is tainted with irregularity. Accordingly, the applicant submitted that the finding that the third respondent was not employed on a fixed term contract and was dismissed by the applicant, is not a finding a reasonable decision maker could have arrived at in the circumstances, having regard to the facts, the clear terms of the contract and the relevant provisions of law. This finding is therefore a reviewable irregularity.

[8] The third ground of attack is the award of severance pay. Even if this court were to accept that the finding that the third respondent was dismissed for operational requirements is acceptable, the applicant submitted that she should not be entitled to severance pay. The reason for this is the consideration of the factors in section 41 (4) of the LRA, and the objective and rationale behind severance pay, will deprive the employee of severance pay. In this regard the applicant submitted as follows:

(a) From the outset the first respondent materially misconstrued the evidence. The fact is that on the evidence the applicant was instrumental in procuring alternative employment for the employee at Zama. That is all that is required in law. The applicant introduced the employee to Zama and gave her a favourable reference. She was then employed by Zama even before her employment with the applicant terminated;

(b) The first respondent finds that because it was not the applicant that made an *"offer"* of employment to the employee, the provisions of section 41(4) would not find application. This is, it was submitted, a gross misdirection. The applicant cannot offer alternative employment at another employer, and moreover the first respondent finds that it was an "undisputed fact" that the third respondent was employed by Zama on the basis of the reference given by the applicant. The first respondent failed to rationally, reasonably and justifiably determine this issue, thereby committing a reviewable irregularity;

(c) The first respondent also fails to appreciate the rationale behind severance pay. The fact that the employee procures alternative employment without any interruption in service in her same occupation just at a different employer, due to at the very least some effort on the part of the applicant , it was submitted, negates the very basis for the payment of severance pay. In this regard the applicant cited as authority *Irvin & Johnson v Commission for Conciliation, Mediation and Others*[3] where the principle of forfeiture of severance on the grounds of refusing a reasonable offer of alternative employment was reiterated by the Labour Appeal Court and the court referred to section 41(4) as having to do more with the *"incentive*" for the employer to *"try to get alternative employment for the employee…."*. Accordingly, it was submitted that the first respondent clearly exceeded his powers in determining the issue as he did. He was fixated on the fact that there were no discussions or consultations between the applicant and the employee herself about alternative employment at Zama notwithstanding that it was undisputed that the applicant provided her with a good reference and discussed her with

3 (2006) 27 ILJ 935 (LAC) at para [46].

Zama. Whether this was also conveyed to the employee, it was submitted, is irrelevant and the first respondent completely exceeded his powers by becoming embroiled in such irrelevant issues, which renders his award reviewable.

[9] In the light of the above, it was submitted that defects exist in the arbitration award of the first respondent, as contemplated by sections 145 and/or 158(1)(g) of the LRA in the following respects :

(a) The first respondent failed to comply with the provisions of the LRA pertaining to the conducting of fair and proper proceedings in terms of the Act;

(b) He exceeded his own powers in terms of the Act;

(c) He did not properly, rationally and justifiably apply his mind to the facts or law in this instance;

(d) He failed to properly apply the provisions of the Constitution of the Republic of South Africa in this instance;

(e) He failed to properly, lawfully and justifiably determine the issues of jurisdiction of the CCMA in this instance;

(f) His determination that the employee was not employed on a fixed term contract, and was dismissed and entitled to severance pay, is not justifiable in relation to the reasons given for such determination and is not rational or justifiable in its merit or outcome;

(g) The first respondent did not properly, rationally and lawfully discharge the duties imposed upon him by the Act.

Third respondent's submissions

[10] The economic rationale for the termination was common cause and the only issue for determination by the first respondent was whether the second applicant's contract was a fixed term contract which terminated automatically on expiry of the applicant's service contract with its client or whether she was dismissed for operational requirements, and if so, whether she was entitled to severance pay.

[11] In regard to the employment contract it was submitted that sufficient evidence exists to lay a basis for the third respondent's claim that she was permanently employed. She remained employed by the applicant for seventeen years despite various transfers of going concerns. The applicant's submission that the award falls to be set aside because the Commissioner fails to quote the provisions of the Sectoral Determination does not warrant a response, and in any event does not advance the applicant's case as it does not exclude a retrenchment policy or procedure where the parties have contracted to such a condition. It was in any event disputed that the third respondent's employment contract was linked to Guestro.

[12] No reasonable person reading the contract could possibly conclude that the applicant would not apply its retrenchment policy in the event that the contract came to an end. The construction urged by the applicant violates the employee's contractual rights to be treated in terms of a retrenchment policy, which in any event would not have formed a term and condition of her contract if it had not applied to her. The first respondent correctly accepted the contention on behalf of the third respondent that it would make no sense to read clause 22 in any other way than that it outlined a process that had to be followed when the employer's contract with a client ended and it had to lay off affected staff, attempt to relocate them, and if this

was unsuccessful, make them redundant. Moreover, the termination provision in the employment contract entitled the employee to notice of at least one week. This reinforces the argument that there is no automatic termination on cancellation of a client service agreement.

[13] The first respondent did not find that "*lay off*" in clause 22 refers to a retrenchment. He found that : "*neither clause 22(a) nor (b) suggests automatic termination of the applicant's contract when the client cancels or does not renew the respondent's contract. "Lay-off" does not mean termination of the contract of employment – it means that the employee will not do any work during the lay-off period. It thus cannot be said that if the client terminates the respondent's contract, the contract of the applicant also terminates*[4]*".*

[14] While the first respondent accepted that it was "*undisputed*" that the applicant provided the employee with a good reference on the basis of which she secured employment with Zama, nothing turns on this. The first respondent's decision to award severance pay did not flow from this finding, as he made it clear that a reference did not constitute an offer of alternative employment. Having determined that the contract did not automatically terminate, he was enjoined to find that the termination was due to operational requirements, and it was common cause that in such instance the employee would be entitled to severance pay.

[15] Insofar as the applicant relied upon *Irvin & Johnson (supra)*, the third respondent submitted that the Labour Appeal Court assumed, without deciding in favour of the union, that where employees were dismissed their entitlement to severance pay depended on the correct construction of section 41(2) and (4) of the LRA.

4 Award at page 21.

The arbitration award

[16] The arbitration was conducted in terms of section 41 of the BCEA and the first respondent identified the issue to be decided as follows:

> *"I am required to determine whether the applicant was dismissed and if so whether she is entitled to severance pay".*

[17] The first respondent sets out the evidence of the third respondent as being in summary that she was informed by way of written notice on 29 November 2007 that her employment contract with the applicant would expire on 31 December 2007. The applicant's Regional Manager, Mr Bamford, had promised to secure alternative employment for her but failed to do so. She obtained employment with Zama on the recommendation of a friend. She was a permanent employee of the applicant and did not consider herself to be on a fixed term contract. She had been employed for seventeen years, and clause 22 of her contract entitled her to receive severance pay. She was currently employed by Zama as a Contracts Manager, and conceded that she had been appointed without being interviewed.

[18] Mr Bamford's testimony on behalf of the applicant was that in July 2007, Guestro had put its cleaning services out to tender to seek a new service provider and had terminated its contract with the applicant with effect from 31 December 2007. When he learnt that the Zama was the successful service provider he engaged in discussions with them to take over some of the applicant's staff, which was common practice in the industry. He provided Zama with a good telephonic reference on behalf of the third respondent.

[19] Mr Bamford testified that he understood the third respondent to be employed

on a fixed term contract, which he explained as follows:

> *"…..- Its effective for the duration of the contract. So if you have a contract with Guestro and you have that contract for seventeen years, your employment is fixed with that company until the contract is terminated.*
>
> *So you are saying that if an employee works for you for seventeen years, they can still work on a fixed term contract? – Absolutely. Fixed to the contract that you have with the company"*[5].

[20] He testified further that the third respondent's employment was contingent on the applicant's service contract with the client. The practice was to find alternative positions for staff when service contracts are lost, and employees on fixed contracts are not retrenched. This is what was successfully done on behalf of the second applicant. He disputed that clause 22 entitled the applicant to severance pay or a retrenchment package, and said there was no retrenchment policy applicable to the employee. He conceded that he had been unable to find alternative employment for her with the applicant.

[21] The first respondent concluded, setting out his reasons, that the third respondent was not employed on a fixed term contract. In his reasons he explains that he understood clause 22 to form three separate sub-sections, as set out below:

> "*a)The nature of the company's business is contractual, each employee is therefore, linked to the contract where he or she is employed on a contract renewal basis.*
>
> *b)In the event that the company is not re-awarded the contract where the*

5 Record at page 50 line 10 – 15.

employee has been employed to work, or where the contract is cancelled, the company will be impelled to lay off its employees at that contract. In this event the company undertakes to make every attempt to re-locate the employee at another contract. Where this is not possible, the employee will be made redundant after the normal notice period.

c)In the normal course of business, restructuring of staff at contracts is unavoidable. In which case the company's retrenchment policy will apply, the company acknowledges to give preferential employment opportunities to retrenched employees when new contracts are awarded."

[22] The first respondents reasoning for his interpretation of clause 22 was as follows:

"21. ……One subsection cannot be read in isolation from the other. I do not believe that clause 22(a) must be construed to mean that the applicant was employed on a fixed term contract. In my view clause 22 (a) outlines the reality that the nature of the respondent's business is such that a loss of contract by the respondent might affect her conditions of employment. The employee is being made aware that it might happen that the respondent's contract with the client is lost and that the consequences are that clause 22 (b) will be followed.

22. If I were to accept the respondent's argument that the applicant's contract is fixed-term, it would mean that once the respondent's client cancels a contract or terminates it, the employees' contracts should or would automatically terminate "by operation of law". This would render clause 22 (b) superfluous. I do not believe that the intention of clause 22 (b) was to merely

put words that do not mean anything. I am of the view that the aim was to outline a process that must be followed when the respondent has lost a contract with a client. Clause 22 (b) provides that in instances wherein the client cancels or does not renew the respondent's contract, the respondent will be impelled to lay off the affected staff, attempt to re-locate the affected staff to other contracts and where relocation is not possible affected staff will be made redundant after notice has been given.

23. It must be noted that neither clause 22(a) nor clause 22 (b) suggests automatic termination of the applicant's contract when the client cancels or does not renew the respondent's contract. "Lay-off" does not mean termination of the contract of employment – it means that the employee will not do any work during the lay-off period. It thus cannot be said that if the client terminates the respondent's contract, the contract of the applicant also terminates.

24. When a contract is concluded the other most important aspect is that parties to the contract must, for all intense (sic) and purposes, have been aware of, understood and contemplated that employment was of limited duration. I do not believe that in this instance that was the case. The applicant's contract has no stipulated duration of work or no determined or determinable period of termination {See also SACCAWU & others v Primserv ABC Recruitment (Pty) Ltd (2007) BLLR 78 (LC)}. Accordingly, I am thus of the view that that applicant was not employed on a fixed-term contract."

[23] The first respondent noted the argument of the applicant that clause 22(a), which outlines the nature of the business and that the employment contract is linked

to the contract with the client, and the submission by the applicant that this clause should be interpreted to mean that the employee was employed on a fixed term contract. He noted further that *"[t]he respondent in support of this assertion also drew my attention to the provision of the Sectoral Determination for the Cleaning Industry".* He then proceeded to find that the second applicant's employment was terminated on notice for operational reasons, and that she was entitled to severance pay of 17 weeks' for her period of 17 years continuous service. At most what the applicant did, the first respondent found, was to provide a good reference to Zama in respect of the second applicant. This, he found, did not constitute an offer of alternative employment.

Merits of the review

[24] The proper test to determine whether an arbitration award can be sustained on review is stated in *Sidumo & others v Rustenburg Platinum Mines Ltd & Others Ltd* [6]as follows:

> **"***[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker*

6 (2007) 28 ILJ 2405 (CC).

could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

[25] Ngcobo J held as follows[7] in applying this test:

"It is plain..that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial….Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason…

It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In doing so, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA".

[26] Applying the above principles to the award of the first respondent, it is evident that the award was comprehensive and detailed, and that the first respondent has an understanding of the legal issues involved and applied his mind properly to a determination of the issues in the light of the evidence led. The test is not whether

7 Ibid at para 267 and 268.

this court might come to a different conclusion or whether his interpretation of clause 22 was the correct one – it is whether he made a decision that a reasonable decision maker could not have reached in the circumstances. In my view, the grounds of review raised by the applicant are without merit. I cannot find that the first respondent committed a gross irregularity in finding that the third respondent was not employed on a fixed term contract or that his decision was not one a reasonable decision maker could have reached. I cannot agree, moreover, that he did not apply his mind to the evidence, in particular of the Sectoral Determination and the context applicable to the contract cleaning sector. He was made aware of the Sectoral Determination and the prevailing practice in the industry, and it did not assist him in his interpretation and application of clause 22. I cannot find that he failed to appreciate, alternatively ignored evidence relating to the relevant terms of the sectoral determination. He makes no further reference to it, which is in itself not unreasonable in the light of its lack of relevance. On the relevance of the Sectoral Determination in fact Mr Snyman, appearing for the applicant, conceded in argument that the specific employment contract to an extent incorporated the provisions of the Sectoral Determination but could have been more clearly formulated. Even if I were to accept the alternative construction contended for by the applicant of the third respondent's employment contract, this would not imply that the review should succeed. As long as the construction placed on clause 22 is not so unreasonable that it is vitiated by gross irregularity or misconduct on the part of the first respondent, I am not inclined to set it aside.

[27] Furthermore, in as much as the applicant sought to rely on *Irvin & Johnson*, it is clearly distinguishable on the facts in that *in casu* it was common cause that the applicant did not "*arrange"* alternative employment but simply facilitated it by way of

providing a reference. Furthermore, even if I were to find that the commissioner's finding in regard to the construction of the employment contract was an error of law, it is not material: *Irvin & Johnson*[8].

[28] In my view, the first and second respondent had the requisite jurisdiction to determine the matter and the first respondent has provided an award that is not unreasonable in the light of the material before him. In other words, in the light of the *Sidumo* test, the decision he reached cannot be said to be one that a reasonable decision maker, faced with the issue of the client service contract, the employment contract and the right to severance pay, could not have made. Neither the outcome nor the process of the arbitration can be faulted on any basis. Not all the grounds of review are pertinent to my determination and I do not consider it necessary to deal with them.

[29] In the circumstances, I make the following order:

The application is dismissed, with costs.

Bhoola J

Date of hearing: 10 November 2009

Date of judgment: 4 December 2009

Appearances:

8 Above n 3 at para [48].

For the Applicant: Snyman Attorneys

For the Third Respondent: Solidarity Official E P Van Niekerk