IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 250/07

In the matter between:

GRETEV (PTY) LTD	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION (LIMPOPO)	First Respondent
MANNDE, CHRISTOPHER N.O	Second Respondent
CURRAN, WILLIAM KAY	Third Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] This is an application to review and set aside the arbitration award made by the second respondent ("the arbitrator") acting under the auspices of the first respondent, on 26 December 2006 under case number LP3394/06 in terms of which the third respondent's dismissal was found to have been both substantively and procedurally unfair.

Background

[2] The third respondent was employed by the applicant as Facility Manager at the University of Limpopo ('the client"). It is common cause that third respondent resigned on 1 June 2006, and his resignation was accepted by the applicant on 12 June 2006.

[3] All the parties were aware that the position of Facility Manager had been advertised and that a selection process was under way.

[4] On 29 June 2006, as a result of a request from the client, the third respondent was persuaded to retract his resignation. He understood that this meant that he resumed his position. However, he was informed the next day that the position had been filled. He accordingly declared a dispute claiming that he had been unfairly dismissed.

[5] The arbitrator concluded that the parties had entered into an agreement which renewed the third respondent's contract for the period 1 July to 31 December 2006. He further found that as a result of the conclusion of the agreement, the third respondent was dismissed and that such dismissal was both substantively and procedurally unfair.

Grounds of review

[6] The applicant submits that as it was common cause between the parties that the third respondent resigned and that his resignation had been accepted by his employer, he bore the onus of proving that a new contract of employment had been concluded between the parties. Notwithstanding his failure to establish all the requirements relating to conclusion of a valid contract, the arbitrator found that a contract had been concluded between the parties. This conclusion was not justified and was in the light of the evidence, unreasonable in that the arbitrator, *inter alia,* confused the issue of "acceptance" which is a requirement for a valid contract to come into being, with the issue of "awareness" on the part of the applicant that the third respondent was willing to retract his resignation. It was clear from the evidence that there had been no acceptance of the third respondent's withdrawal of his resignation, nor was there a new agreement concluded between the parties. It was clear from the second meeting between the applicant and third respondent on 29 June 2006 that the applicant was informed that the third respondent was willing to withdraw his resignation. The second respondent understood this "awareness" to be acceptance by the applicant of his withdrawal of the resignation. This was clearly not the case as can be seen from the third respondent's own evidence when he confirmed that the applicant's Director would revert to him the following day.

[7] The third respondent testified that the reason why the applicant would revert to him the following day was, *"... make sure that everything was in place..."* for him to continue in his position.

[8] There was clearly no agreement concluded between the parties as there was no finality given that the applicant would revert to the third respondent the following day regarding whether or not the position was still available or whether it had been offered to another candidate.

[9] Unfortunately, as is common cause between the parties, the position had already been offered to another candidate who had accepted the offer. The applicant was therefore not in a position to offer that position to the third respondent.

[10] It was also common cause that the applicant, as promised at the meeting of 29 June 2006, reverted to the third respondent the following day and advised that the position had already been filled.

[11] It is clear from the evidence, the applicant submitted, that no contract of employment was subsequently concluded between the third respondent and the applicant after third respondent's resignation. Hence the third respondent failed in discharging the onus upon him and his dispute should have been dismissed. In coming to the finding that there was indeed a contract concluded between the applicant and the third respondent after the third respondent's resignation, the second respondent misdirected himself to such an extent, it was submitted by the applicant, that justice does not appear to have been done between the parties in that the arbitrator committed a gross irregularity.

[12] Furthermore, the applicant submitted that the arbitrator erred in awarding compensation to the third respondent (who did not seek reinstatement) for three months when the evidence was that he had been unemployed for one month after his dismissal. Accordingly, it was submitted, the award of the second respondent stood to be reviewed and set aside.

Third respondent's submissions

[13] The third respondent submitted that there was no basis to set aside the award of the second respondent either on the grounds of misconduct, gross irregularity or exceeding his powers as is required under section 145 of the Labour Relations Act 66 of 1995 ("the LRA"), or on the reasonableness test espoused in *Sidumo & Another v Rustenburg Platinum Mines Ltd* & others (2007) 28 ILJ 2405 (CC).

[14] The third respondent relies on a verbal contract of employment for the period 1 July 2006 to 31 December 2006, concluded on 29 June and which he contends was unilaterally terminated by the applicant on 30 June 2006. He submits that the evidence at the arbitration established that the third respondent's withdrawal of his resignation had been accepted by Mr Trevor Pierce Jones ("Pierce Jones") on behalf of the applicant and that the parties had agreed that third respondent's employment would continue on the same terms and conditions as before, until the end of December 2006.

[15] The third respondent contends furthermore that Pierce Jones communicated the withdrawal of his resignation to the client, Mr Masoga ("Masoga"), and confirmed the continued employment of the third respondent until end December 2006. He submits that the acceptance of the withdrawal of his resignation was unconditional.

[16] Third respondent submits that on a proper construction of the evidence, on a balance of probabilities, the second respondent came to the correct conclusion that a contract of employment had in fact been concluded on 29 June 2006. The evidence to this effect was substantiated by Masoga, who was an independent witness, as well as Ms Brayden, who was at that stage an employee of the applicant.

[17] Third respondent submits that the evidence of Pierce Jones was improbable in that it was inconceivable that he would not be aware of whether

a key position had been offered to another individual or had been accepted by such person on 29 June 2006 but became aware of it the next day. Furthermore, his evidence that the offer of continued employment to the third respondent was conditional upon the availability of the position was contrary to the evidence of the third respondent and Masoga. Furthermore, the applicant did not tender proof from the Human Resources Department to the effect that the position had been offered to someone else and had been accepted.

[18] In calculating the compensation due to the third respondent as a result of his procedural and substantive unfair dismissal it was not disputed that the relationship between employer and employee had irretrievably broken down and that the third respondent no longer wished to be employed further by the applicant. The dispute was finalised on 26 December 2006 and the third respondent's employment would in any event have terminated by the effluxion of time on 31 December 2006. In calculating the compensation the second respondent was required by the provisions of section 194 (2) to award compensation to a maximum of 12 months but subject to the minimum stipulated in section 194 (1) and accordingly the award of the second respondent in this regard should be confirmed.

The arbitration and award

[19] The second respondent summarises the evidence of Masoga that he was concerned about the third respondent's resignation and expressed his view to the applicant that the that third respondent should remain and continue the projects he had been involved in. On 29 June 2006 Pierce Jones met with him and informed him that he would ask the third respondent to withdraw his resignation. Later that day he was telephonically informed by Pierce Jones that he had succeeded in getting the third respondent to retract his resignation, and he understood that this meant that the third respondent would stay on in his current role until the contract between the university and the applicant ended on 31 December 2006. The following day he was informed by Pierce Jones that the third respondent would no longer be employed by the applicant. He confirmed in cross examination that he was aware that the applicant had taken steps to seek a replacement for the third respondent. Furthermore he confirmed "*that Mr Pierce Jones phoned him and said that the Applicant withdrew his resignation and that no condition was attached to his withdrawal"* (award, para 4.2.10).

[20] The second respondent summarised the evidence of Ms Ilona Brayden ("Brayden") as follows: she was aware that the third respondent had tendered his resignation and he informed her and other staff members of this in a meeting on 30 December 2006 (this is incorrect – the arbitrator must have intended to refer to June). She testified furthermore that the contracts of all staff members of the applicant had been extended until 31 December 2006.

[21] The second respondent summarised the evidence of Pierce Jones as being that the resignation of the third respondent was accepted and it was agreed that his last working day would be 30 June 2006. His post was

advertised in the local press and Pierce Jones confirmed in an e-mail to the client that efforts were being made to obtain a replacement. He met with the third respondent on 29 June 2006 and the latter indicated his willingness to agree to continue working on the campus should an offer being made to him. Pierce Jones informed him that he would consult with the Human Resources Department to establish how far the recruitment process had gone and would revert to him in this regard the following day. The next morning he became aware that the offer that had been made to another candidate had been accepted and he contacted the third respondent and advised him accordingly. He also testified in cross examination that the third respondent did not have a written contract because he had refused to sign contracts of employment. He confirmed that he had consulted with his Managing Director with a view to persuading the third respondent to remain in the applicant's employ because he was respected by the client.

[22] The third respondent's confirmed in his evidence that on 29 June 2006 he informed Pierce Jones that he would withdraw his resignation, and the latter said he would inform Masoga. He had agreed to continue working until the end of the year as the contracts of all staff members of the applicant had been renewed until then. He informed his staff the following day that he would remain in the applicant's employ until its contract with the client came to an end in December. However, later the same day he received a telephone call from Pierce Jones informing him that the applicant was not going to renew his contract and that the position had been filled. In cross examination he stated that he had understood that the withdrawal of his resignation had been confirmed by Pierce Jones and also by the client.

[23] The arbitrator states in his award that it was common cause between the parties that the third respondent's contract (which had been a verbal contract renewable on a monthly basis), had been renewed on 1 July 2006 until 31 December 2006. The applicant contends that this was not common cause. It was the nub of the dispute and was contrary to all the evidence presented.

[24] Secondly, the arbitrator found on a balance of probabilities that Pierce Jones informed Masoga that the applicant had withdrawn his resignation. This in fact was common cause and there was accordingly no need to make a finding in this regard. The issue was whether the withdrawal of his resignation was accepted by the applicant and there was a dispute of fact in this regard. The arbitrator should have enquired further into whether, on the evidence before him, the understanding by the third respondent that the withdrawal of his resignation had been accepted was a common understanding. The arbitrator also indicates that the applicant's representative in closing argument stated that the applicant did not enter into a verbal contract with the applicant. He states: "*I was not expecting this argument from the respondent. All the contracts except one, the applicant entered with the respondent were verbal contracts."* The applicant submits that this is simply nonsensical.

[25] Pierce Jones testified that there was no verbal contract concluded on the afternoon of 29 June 2006, and confirmed that he gave the applicant *" an*

undertaking to explore the human resources process that was underway regarding the making of an offer and the acceptance thereof by the alternate candidate for the position of facilities manager on the university campus". He stated further that he did not have the authority to accept the withdrawal of the third respondent's resignation and conclude a new contract with him.

[26] The arbitrator accordingly found that, on a balance of probabilities, the third respondent was dismissed and that his dismissal was both procedurally and substantively unfair. In considering the extent of the compensation to be awarded he states that the applicant was employed a month after he was dismissed and that "*"[H]e lost a month's salary and some minor inconveniences. I will award three month's compensation".*

Evaluation of award and submissions

[27] The applicant submits that the arbitrator made a gross error concerning what was common cause between the parties and his finding flowed from that. Accordingly, his finding is inexplicable. There was no evidence on which he could have found that on a balance of probabilities there was a meeting of minds between the parties in respect of the renewal of the contract. He therefore he failed to apply his mind to the evidence before him and to interpret the evidence, which led to an incorrect finding. It was quite clear that the second respondent did not have regard to the evidence that acceptance of the third respondent's withdrawal of his resignation was conditional on confirming whether an offer had been made to someone else. This is apparent from his expression of surprise in his award that the applicant would argue that there had not been a contract. He accordingly committed a gross irregularity and could not by any stretch of the imagination have reached the finding he did.

[28] The Constitutional Court recently reaffirmed the requirements, considered at some length in *Sidumo & Another v Rustenburg Platinum Mines Ltd* & others (2007) 28 ILJ 2405 (CC) that a commissioner is required to apply her mind to the issues properly before and that failure to do so would result in an arbitration award being set aside. This requires *inter alia* an assessment of the weight that the arbitrator placed on factors that must be taken into account, whether the decision is supported by adequate evidence and adequate reasons, and the existence of a sustainable, logical connection between the two. This point was made furthermore in the unreported decision of my brother Van Niekerk J in *Maksal Tubes v MEIBC and others* (Case number JR 2450/07), where the court also reaffirmed the distinction between a reasonableness enquiry and a process related enquiry on the grounds set out in section 145 of the LRA.

[29] Mr Van As, the third respondent's counsel, submitted that this court should adopt a holistic attitude to determining the reasonableness of the award, alternatively whether any procedural irregularity in terms of section 145 had been committed. If neither was present there was no basis to set aside the award. He submitted furthermore that the probabilities were

overwhelming that the purpose of the meeting on 29 June would have been to get the third respondent to retract his resignation as has been confirmed by Pierce Jones when he stated *".. there was a desire from my client to have Mr Curran continue on site and by and large our relationship was good in my opinion except for one or two matters that Mr Curran and I disagreed on".* This is an admission made under cross-examination. The evidence clearly was that the withdrawal of his resignation was done at the instance of the employer, and it is clear furthermore on a balance of probabilities, that it was an unconditional withdrawal and was not subject to the employer having found a suitable candidate. Furthermore, it was in keeping with Masoga's evidence that the purpose of retracting his resignation on 29 June in circumstances where his contract ended the following day i.e. 30 June, was the continuation of the contract of employment until December. This is clearly what the second respondent refers to in when he expresses surprise about the submission that there had been no verbal agreement. Clearly the parties had anticipated, and this was clear from the evidence on a balance of probabilities, that a verbal agreement would be entered into and that a letter and contracts would eventually be sorted out. In other words, the contract was extended with a view to the parties concluding a formal further contract. This was not improbable given that the third respondent was employed on the basis of a verbal contract that was renewed monthly, according to his undisputed evidence. Mr Van As submitted that no aspect of the reasoning of the arbitrator constitutes a reviewable irregularity in terms of the *Sidumo* test. The second respondent clearly made a credibility finding against Pierce Jones, supported by the balance of probabilities, and when viewed together concluded that there was an agreement to extend the contract of employment. It was submitted furthermore that the present matter was on all fours with the Labour Appeal Court decision in *Wyeth SA (Pty) Ltd v Manqele and others* [2005] 6 BLLR 523 (LAC) and it would accordingly have been unfair of the employer to terminate in this instance. I agree with these submissions.

[30] In my view there was sufficient evidence furthermore for the arbitrator to conclude that a verbal contract had been concluded, even though he erred in finding it was common cause . This clear from the following exchanges:

(a) *Mr Scholtemeyer: Sorry, what specifically did Mr Trevor Pierce Jones communicate to you? Did he accept your resignation?*
Mr Curran : Yes, he did. He accepted my withdrawal of my resignation, yes.... he said he would speak to me tomorrow – sorry, the next day... with regard to make sure that everything was in place, that they were to be continued as the facility manager, that I would continue as a facility manager"....

Mr Scholtemeyer: What have you agreed to?
Mr Curran: I agreed to continue working for Gretev until the end of the year."
(Transcript, page 23 - 24).

(b) Further, in cross examination the third respondent confirms that his discussion with Pierce Jones was that: "[Masoga had said] *That they*

did not want me to go, they wanted me to withdraw my resignation if it was withdrawn it would be – the contract would just extend to the end of the year, month by month and I agreed to that and I agreed to withdraw my resignation for that period of time". (Transcript, page 62)

(c) Masoga's evidence was that he received a call from Pierce Jones indicating that he had been successful in getting the third respondent to retract his resignation, and he was satisfied because this meant that the third respondent would continue to be employed by the University for a further six months. He confirmed that after his discussion with Pierce Jones: *"It was my understanding that an agreement was reached and that he will stay and therefore he would be back on Monday".* (Transcript, page 64). Furthermore, Pierce Jones did not specify that there were any conditions attached to the third respondent's return, and that the *"....message was that discussion seems fruitful that WILLIAM must come back on board and indeed it was agreed..INAUDIBLE....there would not be interruption of service, there would be continuity..."*(Transcript, p99). He stated in cross examination that the purpose of the meeting on the campus on 29 June was for Pierce Jones to get the third respondent to agree to withdraw his resignation. Masoga's evidence in this regard was that :

"Mr Da Costa : Because MR TREVOR PIERCE JONES will give evidence that he could not have accepted that verbal resignation if that position had been offered to someone else .
Mr Masoga: ...yes that is probably the case but I am just...INAUDIBLE...that my understanding was if there was somebody that has been taken I would not have said in that meeting...I had a meeting with MR PIERCE JONES in the morning that he must pursue...."[a reference to his instruction to the applicant to seek retraction of third's respondent's resignation] *(Transcript, page 102).*

[31] The *dictum* in *Sidumo* that the grounds of review set out in section 145 of the Act are suffused by reasonableness requires an evaluation both of the process by which the arbitrator reached his conclusions as well as the content of those conclusions. The *Sidumo* test of unreasonableness has been applied in a number of judgments of this court and has been aptly described by Zondo JP in *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) at para 96 as requiring that an award "*must be reasonable and if it is not reasonable, it can be reviewed and set aside".* I am not persuaded that, having regard to the material before the arbitrator, it can be said that the arbitrator failed to apply his mind to the evidence as a result of which the award was based on a misdirection or gross irregularity in terms of section 145, nor can his conclusion be said to be one that a reasonable decision maker could not have reached. In regard to the sanction, the *Sidumo* judgment makes it clear that where the award and conclusion of the arbitrator, which is essentially a value judgment, falls within a band of reasonable responses to the evidence before him, this should not be interfered with.

[32] In the premises, I make the following order:

The application is dismissed, with costs.

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Date of hearing: 05.06.09
Date of judgment: 10.07.09

Appearance:
For the Applicant: Advocate M B G Da Costa instructed by Grant Rae Attorneys
For the Third Respondent: Advocate M Van As instructed by Jan Scholtemeyer Attorney