



REPUBLIC OF SOUTH AFRICA

Not Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C256/2010

In the matter between:

NURSING SERVICES OF SOUTH AFRICA

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

TARIQ JAMODIEN

Second Respondent

ISABELLE PRETORIUS

Third Respondent

Heard: 21 / 05 / 2011

Delivered: 21 / 10 / 2011

JUDGMENT

VAN VOORE AJ

1. This is an application in terms of section 145 of the Labour Relations Act, 66

of 1995 (the LRA) to, *inter alia*, review and set aside an arbitration award (the award) of the second respondent (the commissioner) dated 12 February 2010. The application is opposed. Ms Isabelle Pretorius (Pretorius) was employed by the Nursing Services of South Africa (the applicant) until October 2009. Pretorius alleged that she was unfairly dismissed and referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). The applicant contended that Pretorius' employment had been terminated in terms of a voluntary retrenchment agreement.

2. Following arbitration proceedings under the auspices of the CCMA, the commissioner made an arbitration award in which he found that the dismissal of Pretorius was both substantively and procedurally unfair and awarded that the applicant must pay Pretorius 'compensation in the amount of R138 000 (calculated as R23 000 per month X 6 months). This amount shall be paid into her bank account by 15 March 2010.'¹

The review grounds

3. The applicant contends that the commissioner heard and did not properly consider the evidence before him in arriving at his conclusion that Pretorius resigned under duress. Further the applicant contends that the commissioner had prejudged the matter and that the arbitration award is not justifiable 'in terms of the factual matrix of the matter'. The applicant also contends that the commissioner was biased in favour of Pretorius. Further the applicant contends that the commissioner failed to exercise his discretion in a judicial manner in awarding compensation. Yet further, the applicant contends that the commissioner erred in the manner in which he conducted the arbitration proceeding. The applicant specifically alleges that the commissioner conducted the arbitration proceedings on the basis that it was agreed that Pretorius was dismissed for operational requirements. The applicant contends that Pretorius' employment was terminated by agreement between the parties. In this regard, the applicant also relies on pre-arbitration proceedings and a proposed pre-arbitration minute. The applicant contends that the commissioner's view of its responses to the propositions put to it in the pre-arbitration proceedings distorted his assessment of the parties' respective cases.

¹ arbitration award paragraph 21.

The Background

4. Pretorius was employed by the applicant at its Nelspruit branch during August 2008. Pretorius was transferred, with promotion, to the applicant's Cape Town office with effect from June 2009. On 9 October 2009, Pretorius was called to a meeting with the applicant's Mr J Zietsman (Zietsman). During this meeting, Zietsman on behalf of the applicant, and Pretorius discussed her employment with the applicant going forward, and if she were to remain in employment, what the terms and conditions of such employment would be. It is not disputed that one of the matters discussed between Zietsman and Pretorius in the meeting of 9 October 2009 was the possible retrenchment of Pretorius. It is further not disputed that it was also raised with Pretorius that she could accept a much reduced salary of R13 000 per month or face retrenchment. At that stage, Pretorius was earning a salary of R22 696 per month.

5. On 9 October 2009 and following the meeting with Zietsman, Pretorius sent Zietsman an email in which she wrote, *inter alia*, the following:

'[I] had decided to take retrenchment... I will be in the office on Monday to complete my documents if it is possible if my money can be paid out on the same day as I would prefer to go home.'

6. Mr Coetzee (Coetzee) on behalf of the applicant prepared a document styled 'Notice of Termination of Employment Following Retrenchment Consultation Process'.²

7. During the arbitration proceedings and in respect of the meeting with Zietsman, Pretorius testified that Zietsman informed her that:

'I have one of two options. I can move over to Ambition 24 hours as the sales manager, exactly the same position, obviously at a lower salary. He did not mention the salary amount. Or I can take retrenchment of which I started to ask him about the Ambition position.

MS PRETORIUS because I thought that if there is a R3000 salary gap, then obviously I can basically down size or cut something somewhere to survive. Then he said to me ...'³

² record of arbitration proceedings, page 68.

³ transcript pages 61, line 25 and page 62 line 1 – 10.

8. Pretorius also testified that Zietsman had alleged poor performance on her part and she disputed this.

9. Further, during her evidence at the arbitration proceedings, Pretorius testified as follows:

MS PRETORIUS: and Penny said that basically I can go over to the Ambition at the salary of R13 000 or take retrenchment. And he asked me, when I would be able to give him an answer. I said to him ...

MR KOEN: just stop there for a moment. So R13 000 at Ambition or retrenchment?

MS PRETORIUS: that's it, either one of the two.

MR KOEN: What was your state of mind at that stage how did you react?

MS PRETORIUS: I was totally emotional.

MS PRETORIUS: Then he asked me when I would be able to give him an answer.⁴

10. Ms Pretorius further testified that she then called a meeting with her staff and informed them of the two options that had been put to her.⁵ Ms Pretorius also testified that she informed her staff that the applicant had decided what would happen and that she had decided to accept it.⁶ Thereafter Ms Pretorius sent an electronic mail to Zietsman referring to their meeting of earlier that day and informed him that she had decided to take the retrenchment option.⁷

11 Ms Pretorius further testified that she did indeed make the decision and that she did not take legal advice at the time of making the decision. Ms Pretorius further testified that a few days after making the decision she telephoned a legal insurance company and sought advice.

12 Further, in her evidence and under cross-examination, Ms Pretorius confirmed that the two options, a 'drastic' salary cut or retrenchment were put to her in the meeting with Zietsman. Ms Pretorius further confirmed that following the meeting with Zietsman she was asked to sign a letter headed 'Notice of Termination' and that

⁴ transcript, page 63 lines 14 – 23.

⁵ transcript, page 65 lines 1 – 9.

⁶ transcript, page 65 lines 13 – 17.

⁷ transcript, page 67 line 1.

she did indeed sign the letter.⁸ Further, and also under cross-examination Ms Pretorius testified that the two options were put to her and she had taken one of the two 'I had to sign the letter, stipulating that those were the two options, that's the one that I took.'⁹

13 Ms Pretorius further confirmed that following her signing of the letter she did indeed take steps, in accordance with the terms stipulated in the letter and requested payment of monies due to her.¹⁰ Under cross-examination Pretorius said that she felt that she was 'forced'.

14 On balance, it does appear that the termination of Ms Pretorius's employment with the applicant proceeded rather hastily. The applicant contends that it was terminated by agreement. Ms Pretorius contends that she was unfairly dismissed. The commissioner found that Ms Pretorius was unfairly dismissed.

15 At paragraph 2 of the arbitration award, the commissioner described the issue in dispute as follows:

'2 The issue to determine is whether Ms Pretorius had entered into a voluntarily retrenchment agreement. If so there would be no dismissal. If not, I would have to determine whether her dismissal was fair.'

16 The CCMA's records of the arbitration proceedings include a handwritten document;¹¹ being the commissioner's notes which refer to a proposed pre-arbitration minute. A copy of the proposed draft pre-arbitration minute forms part of the bundle of documents that served before the commissioner during the arbitration proceedings.¹² That document is unsigned. However, it is not in dispute that at some point during the arbitration proceedings and in the presence of the commissioner, the parties held a pre-arbitration meeting. The commissioner's handwritten notes record those aspects dealt with in the proposed pre-arbitration minute which the commissioner understood to be agreed and disputed. The commissioner's understanding, as confirmed by his handwritten note, of one of the outcomes of the pre-arbitration meeting includes the following:

⁸ transcript, pages 79, lines 12 – 25, page 80 lines 1 – 4; record of arbitration proceedings, page 38.

⁹ transcript, page 80 lines 1 & 2.

¹⁰ transcript, page 83.

¹¹ record of the arbitration proceedings, pages 13 and 14.

¹² record of the arbitration proceedings, pages 101–106.

- 10.1 Pretorius was employed by the applicant at its Nelspruit office from 25 August 2008.
- 10.2 The applicant proposed that Pretorius should relocate to the Cape Town office, with a promotion, which Pretorius accepted.
- 10.3 Pretorius relocated to Cape Town and accepted the position of sales manager at a salary of R23 000 per month plus benefits from 8 June 2009.
- 10.4 Pretorius was in charge of sales.
- 10.5 It is disputed that the applicant did not pay Pretorius's relocation costs.
- 10.6 It is disputed that on 9 October 2009 Pretorius was called to a meeting with Zietsman and given an option to either accept a lower salary of R13 000 per month or accept retrenchment.
- 10.6 It is disputed that Pretorius accepted retrenchment under duress.
- 10.7 It is agreed that the applicant terminated Pretorius's salary writing on 12 October 2009.
- 10.8 It is agreed that the applicant did not issue Pretorius with a notice in terms of section 189 (3) of the LRA (with reasons by the applicant).

17 In relation to that clause in the pre-arbitration minute that deals with termination of Pretorius's 'salary', Pretorius contends that the pre-arbitration minute was in the applicant's possession for at least four days prior to the commencement of the arbitration proceedings and that the term 'salary' was an error, that it should have read 'employment' and that this meaning was in fact clear to the applicant. On this basis Pretorius contended that the parties had, at the pre-arbitration meeting conducted in the presence of the commission, agreed that her employment had been terminated in writing on 12 October 2009.

18 The commissioner was clearly of the view that the parties had agreed that Pretorius' employment had been terminated in writing on 12 October 2009. However,

the record of the arbitration proceedings including that part of the proceedings dealing with the proposed pre-arbitration minute, does not support out this view or understanding. In particular, the transcript of the arbitration proceedings does not record that Coetzee, on behalf of the applicant, had agreed to this proposition.¹³ In the circumstances, the commissioner had incorrectly recorded the existence of an agreement in respect of one of the material issues in dispute. This no doubt influenced his assessment of the matter and the rest of the proceedings.

19. An instructive assessment of what section 145 of the LRA requires is to be found in the judgment of *Van Niekerk J in Pam Golding Properties (Pty) Ltd v Erasmus and Others*.¹⁴ In that matter, Van Niekerk J held that:

'8. In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness. The Court is also empowered to scrutinise the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that the result is nonetheless capable of justification.'

20 The commissioner understood that the parties had agreed that the applicant terminated Pretorius' 'salary' (employment) on 12 October 2009. However, as noted above, this was not in fact so. The commissioner misunderstood a material part of the dispute between the parties. On this ground alone the arbitration award falls to be reviewed and set aside.

21. In light of the basis on which I have determined that the award is reviewable, the commissioner's assessment of material issues in dispute and material issues in respect of which the parties have agreed, it is not appropriate that costs should follow the result.

22. Accordingly, I made the following order.

¹³ transcript, pages 138 to 140

¹⁴ (2010) 31 ILJ 1460 (LC) at para 8.

- 1 The arbitration award of the Second Respondent is reviewed and set aside and the matter is remitted back to the First Respondent for arbitration before an arbitrator other than the Second Respondent.
- 2 There is no order as to costs.

VAN VOORE AJ

APPEARANCES

APPLICANT: Adv A de Wet

THIRD RESPONDENT: Mr R Kuhn