



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case no: C 568/12

In the matter between:

Nazir CHAFEKER

Applicant

and

CCMA

First Respondent

D I K WILSON N.O.

Second Respondent

R & V BEARINGS SUPPLIES CC

Third Respondent

Heard: 6 May 2014

Delivered: 29 May 2014

Summary: Dismissal void – employment contract upheld.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Nazir Chafeker, was dismissed by the third respondent, R & V Bearings cc. He seeks a declaratory order that the dismissal is void.

The nature of the application

- [2] The applicant initially sought an order that an arbitration award by the second respondent, Commissioner D.I.K. Wilson, be reviewed and set aside. The Commissioner had found that Chafeker's dismissal was substantially fair but procedurally unfair. He ordered the cc to pay him compensation equivalent to two months' remuneration. Subsequently the applicant launched an application to amend his notice of motion. In the amended application, he seeks a declaratory order that his dismissal was null and void; and ancillary relief in the form of an order that the cc must be held to the contract of employment,
- [3] At the hearing of this matter on 6 May 2014 I dismissed the cc's application for condonation for the late filing of its supplementary answering affidavit with costs. I gave reasons for that order *ex tempore* and will not repeat them here.

The application to amend

- [4] In September 2013 the applicant brought an application to amend his notice of motion. That application was heard at the same time as the review application. It is not opposed. In terms of the amended notice, the application for review would be as an alternative to the following relief he seeks:

“1. Declaring the purported dismissal of the applicant on 22 August 2011 to be null and void and of no force and effect.

2. Directing the third respondent to comply with the applicant's employment contract by:

2.1 paying to him the total amount [of] salary he would have earned in the period from the date of his purported dismissal in 22 August 2011 to the date of this order;

2.2 permitting him to take up his former position as manager of the third respondent with all rights and privileges attached thereto;

2.3 continuing to pay his salary as before his purported dismissal.”

- [5] The applicant could have brought the application for a declaratory order as a separate application; but that would have led to an unnecessary duplication of costs. Most of the material relevant to the amended application was already before the Court in the review application.
- [6] The applicant delivered a short affidavit in support of the application for amendment, setting out why he seeks the amendment and setting out the circumstances of a meeting where the decision was taken to dismiss him. He delivered it almost eight months before the hearing. The cc had ample time to deliver an answering affidavit but it did not.
- [7] There is no prejudice to the cc in granting the amendment. It is so granted.

Background facts

- [8] At the time of Chafeker's dismissal in August 2011, the cc had four members. Apart from being an employee, Chafeker was also a member of the cc. They held membership in the following percentages:
 - 8.1 Nazir Chafeker 40%
 - 8.2 Godfrey Willie 40%
 - 8.3 Fuaad Willie 10%
 - 8.4 Faried Willie 10%.
- [9] Chafeker, an attorney, was appointed as a manager of the cc's business by Godfrey Willie in 2008, when Godfrey was the sole member of the cc. Fuaad and Faried Willie are Godfrey's sons.
- [10] Chafeker called a meeting of the cc for 22 August 2011. On the agenda were discussions of a number of business trips, dates for other meetings, and "Willie's offer for Chafeker's compensation". There was no mention of disciplinary steps to be taken against Chafeker – who had called the meeting – or his possible dismissal or removal as member.
- [11] Apart from the three Willies and Chafeker, a family friend, Logan Thavarajoo, attended the meeting. Logan is not a member of the cc. Chafeker's employment was terminated at the meeting.

Evaluation / Analysis

[12] I shall first deal with the application for a declaratory order. This Court has jurisdiction to do so in terms of s 77(3) of the Basic Conditions of Employment Act¹ and s 158(1)(a)(iii) and (iv) of the Labour Relations Act.²

[13] This leg of the applicant's argument does not rest on the fairness of his dismissal. He argues, instead, that it was unlawful and thus invalid and of no force and effect.

[14] This Court issued a declaratory order to that effect in *NEHAWU v University of Transkei*.³ Landman J explained the circumstances as follows:

“At the outset of the hearing it was agreed that the application would be argued in two stages as the first stage might dispose of the matter. The first stage relates to the validity of the dismissal or, more accurately, whether in law there has been a dismissal. The second relates to the fairness of such a dismissal, if there has been one.

The jurisdiction of this court to consider a question whether employees have been dismissed by their employer arises from the Labour Relations Act of 1995, especially by virtue of the provisions of s189 which confers jurisdiction on this court to adjudicate on dismissals for operational requirements. The power to grant a declaratory order stems from s158(1)(a)(iv) of the Act. Where a dispute about a dismissal for operational requirements can be decided at an early stage then it is clearly within the objects of the Act and in the interests of all concerned for the court to pursue this avenue. “

[15] That decision was quoted with approval by the LAC in *Revan Civils v NUM*⁴ where the prior question was if the employees had been validly – as opposed to fairly -- dismissed in terms of s 189A of the LRA. Relying on *De Beers Group Services (Pty) Ltd v NUM*⁵ the Court held:⁶

¹ Act 75 of 1997 (BCEA).

² Act 66 of 1995 (LRA).

³ [1999] 3 BLLR 244 (LC) paras [5] – [6] and [19].

⁴ (2012) 33 ILJ 1846 (LAC).

⁵ (2011) 32 ILJ 1293 (LAC).

“Unless there has been a valid dismissal the court may not consider or grant any relief on the basis that the dismissal was unfair.”

- [16] This Court considered the validity of the dismissal of an employee who was also a director of a company in *Nibo (Edms) Bpk v Cupido*⁷. The Court held that the employee’s dismissal was invalid and noted:⁸

“Dit volg uit die reg soos neergelê ... dat NIBO se submissie dat Cupido, waar hy hom bekla oor die regsgeldigheid al dan nie van sy ontslag, hom tot die KVBA moet wend ingevolge die onbillike ontslag prosedures van die WAV, nie relevant is t.o.v. die regsgeldigheid in teenstelling met die billikheid van sy ontslag nie.”

- [17] The question whether the Commissioner in this case had the jurisdiction to decide on the fairness of Chafeker’s dismissal depends on the prior question whether his dismissal was valid in law.

- [18] At the time of this judgment, the provisions of the Close Corporations Act⁹ still apply, despite the enactment of the new Companies Act.¹⁰ Section 48 of the CC Act deals with meetings of members:

“48. Meetings of members

(1) Any member of a corporation may by notice to every other member and every other person entitled to attend a meeting of members, call a meeting of members for any purpose disclosed in the notice.

(2) Unless an association agreement provides otherwise --

(a) a notice referred to in subsection (1) shall, as regards the date, time and venue of the meeting, fix a reasonable date and time, and a venue which is reasonably suitable for all persons entitled to attend the particular meeting;

(b) three-fourths of the members present in person at the meeting, shall constitute a quorum; and

⁶ *Revan Civils (supra)* para [7].

⁷ C 954/12 [2013] ZALCCT 54 (11 Feb 2013).

⁸ *NIBO (supra)* para [12].

⁹ Act 69 of 1984 (CCA).

¹⁰ Act 71 of 2008, that was promulgated on 1 May 2011.

(c) only members present in person at the meeting may vote at that meeting.”

And s 46 deals with voting:

“(c) differences between members as to matters connected with a corporation's business shall be decided by majority vote at a meeting of members of the corporation;

(d) at any meeting of members of a corporation each member shall have the number of votes that corresponds with the percentage of his interest in the corporation;”.

[19] The effect of these provisions is that, where there is a dispute about the management of a business of a close corporation, any decision about it must be put to the vote of members in a properly constituted meeting.

[20] The full transcript of the meeting of 22 August 2011 served before the Court. It is clear that no vote was taken or called for. The notice to terminate his employment was conveyed to Chafeker in the following manner by Logan:

“So the last thing that the family wants and if you do not have a letter of appointment the last undertaking the family has made is that the offer [of employment] that was made to you, that of administrator, was on a temporary basis.

[Chafeker]: Is that so?

[Logan]: Yes. They have now requested that we terminate it.

[Chafeker]: You can't just terminate it.

[Logan]: Ja. Yes.

[Chafeker]: I'm not going way here.

[Logan]: Yes. They've already changed the banking code so you won't have access to that.

[Chafeker]: Are you willing to do that, Mr Willie?

[Godfrey Willie]: I'm willing to do that. To terminate your employment here because the staff is fed up with you...”

- [21] No vote was taken. It appears from the transcript that Faried may have been sympathetic to Chafeker; had a vote been called for, and had Faried voted against Chafeker's dismissal, the resultant deadlock would have had to be referred to a referee.
- [22] The cc has not taken a valid decision to terminate Chafeker's employment. It follows that his dismissal is invalid.
- [23] It also follows that the commissioner did not have jurisdiction to decide on the fairness of Chafeker's dismissal. His dismissal was void *ab initio*; the commissioner or the CCMA could not clothe itself with jurisdiction to decide whether it was fair.¹¹
- [24] At the meeting of 22 August 2011 Chafeker made it clear that he would "like to stay on at R&V". It is clear that he meant to continue tendering his services. The effect of his dismissal being void *ab initio* and his continued tender is that his employment contract remains of full force and effect. He is therefore entitled to his accrued salary.
- [25] Ms *Golden* argued that this application is premature because there is a pending dispute between the parties before the Western Cape High Court disputing the validity of the cc's association agreement. But on the evidence before me, Chafeker was validly appointed as a member of the cc by Godfrey Willie. He held a 40% member's interest. He called the meeting of the cc on 22 August 2011. None of the other members contested his authority to do so or his member's interest. Neither did they contest the validity of the association agreement which all four of them signed. Clause 4 of that agreement reads as follows:
- "A member of the corporation may by notice to other members and every person entitled to attend a meeting of the members , call a meeting of members for any purpose disclosed in the notice."
- [26] The question of voting is not dealt with in the association agreement. Therefore, the provisions of s 46 of the CC Act, quoted above, prevail. No vote was taken to validly dismiss Chafeker.

¹¹ Cf *Benicon Earthworks and Mining Services (Pty) Ltd v Jacobs NO & ors* (1994) 15 ILJ 801 (LAC) 803-4; *SARPA v SA Rugby (Pty) Ltd & ors* [2008] 9 BLLR 845 (LAC) 856 E-G; *Santam Insurance Ltd v CCMA & ors* (2009) 30 ILJ 2903 (LAC) 2908.

Conclusion

[27] Chafeker's dismissal was invalid and thus void *ab initio*. The CCMA had no jurisdiction to deal with its unfairness. The award must be reviewed and set aside. Chafeker is entitled to the declaratory order and the consequential relief that he seeks.

[28] Both parties asked that costs should follow the result. I see no reason in law or fairness to interfere with that request.

Order

[29] I therefore make the following order:

29.1 The arbitration award of the second respondent under case number WECT 13554/11, dated 30 May 2012, is reviewed and set aside.

29.2 It is declared that the purported dismissal of the applicant on 22 August 2011 is invalid and of no force and effect.

29.3 The third respondent is ordered to comply with the applicant's employment contract by:

29.3.1 paying his salary from 22 August 2011 to today;

29.3.2 permitting him to take up his former position as manager of the third respondent, with all rights and privileges attached thereto, from 1 June 2014;

29.3.3 continuing to pay his salary.

29.4 The third respondent is ordered to pay the applicant's costs, including the costs of counsel.

Steenkamp J

APPEARANCES

APPLICANT: N F Rautenbach
Instructed by Chafeker & Shabodien Inc.

THIRD RESPONDENT: T J Golden
Instructed by André Bester attorneys.

LABOUR COURT