REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 53/2012

HOUSE OF FLOWERS	**First Appellant**
KAREN JANE KELLY	**Second Appellant**
KELLY DAVID PETER	**Third Appellant**
and	
RADEBE MANGELE PRINCESS	**First Respondent**
RADEBE BETTY	**Second Respondent**
KHOADI PORTIA	**Third Respondent**
MOOS JOELENE	**Fourth Respondent**
MBEKWA PEARL NO	**Fifth Respondent**
CCMA	**Sixth Respondent**

Heard: **05 September 2013**

Delivered: **21 November 2013**

Summary: review of arbitration award- Labour Court misdirecting itself to the issue before it- enforcement of arbitration awards- principle restated.

Date of dismissal- probabilities favouring employees' versions of their dismissal. Practice and procedure- Labour Court cannot *mero motu* join

parties to proceeding- appeal upheld – review application dismissed with no order as to costs.

Coram: Waglay JP, Dlodlo AJA and Francis AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment handed down by the Labour Court. Although the application before the Labour Court was to review and set aside the arbitration award handed down by the fifth respondent (commissioner) in favour of the first to fourth respondents (employees) the Labour Court decided to replace the arbitration award with an order of its own (which was more favourable to the employees). This order of the Labour Court was made notwithstanding the absence of any counter-review by the employees.

Background

[2] The appellant is a duly registered close corporation conducting a business of a florist. It has two members Karen Jane and Davis Peter Kelly, who are married to each other. Karen Jane Kelly (Kelly) manages the business of the appellant and testified on behalf of the appellant at the arbitration.

[3] Her evidence was to the following effect: On 10 November 2009, the appellant claimed that it was suffering substantial losses as a result of pilferage. It thus decided that its employees take a lie detector test in an attempt to establish who the culprit(s) was/were. The test produced no result of any consequence. On 11 November 2009, Kelly, on behalf of the appellant decided to put in new rules at the workplace in order to stem the pilferage. As and from 11 November the employees; (i) were no longer allowed the use of their cell-phone while on duty, (ii) needed to obtain permission to leave the work premises, even to go to the bathroom; (iii) were subject to be searched when

arriving or leaving the work premises; (iv) were not allowed to empty the dustbins; and (vii) had to keep in their lockers, provided for that purpose, whatever they brought to work.

[4] According to Kelly, the employees were unhappy with the new rules and she noticed by their demeanour and the fact of how they cleared their lockers at the end of their working day on 11 November 2009 that they had no intention of returning to work. The next day they in fact did not return to work. She then sent them a message on their cell-phones telling them that they must return to work for the latest on the next day, 13 November 2009. The employees did return on 13 November 2009 but refused to enter work premises because the new rules remained in place. According to Kelly the employees then just left. She added that it took sometimes to train employees to be florist and she couldn't get someone off the street to do their work. Also there was a big order for the weekend and she needed the employees to execute that order. She added that since the employees left the appellant employment the stock position had improved. Finally she admitted that before the employees' left work on 11 November 2009 she made sure they had completed all the work that was required to be done for the next day.

[5] Because of their failure to return to work, the appellant decided to institute misconduct proceedings against them. The charge proffered against them was absconding from work. Notice for the misconduct hearing was sent to each of the employees none of whom attended the hearing. The hearing was held in their absence; they were found guilty and dismissed in December 2009.

[6] The appellant thus claimed that the employees were dismissed in December 2009 which dismissal was both substantively and procedurally fair.

[7] As against the above version, the evidence of the first respondent, who testified on behalf of all the employees, was that after complaining of the pilferage the appellant made the employees take a lie detector test, the results of which were not made known to the employees. The next day 11 November 2009, Kelly explained the new rules which would be implemented.

That notwithstanding, at the end of the working day on 11 November 2009 Kelly told them that they need not return to work. The next day, 12 November 2009, they went to the Department of Labour to complain about their dismissal, the Department of Labour directed them to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the CCMA, they completed the application for conciliation form and faxed it to the appellant. At some time, after faxing the form to the appellant, they received a message on their cell-phone from Kelly informing them that they should return to work the next day. When they returned to work the next day Kelly refused to open the gate for them to enter and after waiting a while they left. She said that Kelly's attitude towards them was as if she was dealing with thieves. According to her, Kelly also told them that they must not think that they cannot be replaced, and that she (Kelly) could replace them immediately.

[8] Many days later they received a letter constituting a notice to attend a disciplinary hearing, which said that they were being charged for absconding from work and must attend the hearing to answer the charge against them. They refused to attend the hearing because they were already dismissed on 11 November 2009 when they were told not to return to work.

The Arbitration

[9] After the conciliation process failed to resolve the issue, the employees referred the matter to arbitration. The only issue before the commissioner was the date of dismissal. If the dismissal date was as alleged by the employees, 11 November 2009, then their dismissal was both substantively and procedurally unfair. If the employees were dismissed as alleged by the appellant, in December 2009, then there was no proper referral of the dispute to the CCMA and the dispute should be struck off or be dismissed.

[10] Based on the evidence which is recorded above the commissioner was satisfied that the employees were in fact dismissed as they had alleged on 11 November 2009 and found their dismissal to be substantively and procedurally unfair. The commissioner ordered the appellant to pay each of

the employees compensation equivalent to what each of the employees would have earned over a six month period.

The Labour Court

[11] The appellant was of the view that the commissioner committed misconduct in relation to her duties as an arbitrator and applied to have the award reviewed and set aside and replaced with an order that the employees were not dismissed on 11 November 2009 but in December 2009 and therefore the referral made by the employees should have been dismissed. There was no counter-review from the employees.

[12] One of the prayers in the application for review was that the enforcement of the arbitration award be stayed pending the outcome of the review application.

[13] After considering the review application, the Labour Court handed down a detailed judgment which contained the following order:

(i) That the prayer for the enforcement of the arbitration award to be stayed pending the outcome of the review was refused (this however did not find its way to the end of the judgment but remained in the body of the judgment);

(ii) Karen Jane Kelly and David Peter Kelly who were the members of the appellant were joined as parties in the matter and made co-debtors [appellants herein] .

(iii) The six month payment ordered by the arbitrator to each of the employee was set aside and the appellants were ordered to pay each of the employees the wages they would have earned over a period of 140 weeks in 36 instalments and pay interests at the rate of 15.5% per annum on the reduced balance.

(v) The employees were also reinstated on terms and conditions that are not less favourable than the terms that prevailed on the date of their

dismissal and without loss of any benefits that they were entitled to on the date of their dismissal.

(vi) The appellants were further ordered to pay costs of the application.

(vii) The respondents' attorney was also ordered to cause the publication of the court order in the *Daily Sun* newspaper, alternatively in the *Sowetan*; and the cost for such publication was to be deducted from moneys received on behalf of the third and fourth respondents and, finally that;

(viii) The appellant was to pay all the monies to the trust account of the first to the fourth respondents' attorneys.

[14] A reading of the judgment and order leaves one mystified as to how the order relates to the matter before the presiding acting judge. The order was not one which the Labour Court, on the application before it, was competent to make.

[15] In any event, to deal firstly with the merits of the appeal itself, that of the review application. In this respect, the first complaint raised by the appellants was that the commissioner committed an irregularity in that she failed to apply the test set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* (2003) 1 SA 11 which relates to how a commissioner may arrive at a decision relating to irreconcilable versions tendered by the parties as evidence.

[16] It appears that the appellants' complaint is premised on the failure of the commissioner to set out in sufficient detail, or at all, why she preferred the evidence of the employee who testified as opposed to Kelly, and this is extended by the appellants to mean that the commissioner failed to take into account material facts and issues. There is no basis for this argument. While it is correct that the commissioner's award lacks detail, there is no requirement that an award must be as detailed as a judgment. What is clear from the award is that the commissioner was of the view that the version tendered on behalf of the employees was more probable than that tendered by the appellant. The fact that the commissioner may have got wrong the evidence

as to which manager was present at a particular time had no impact on the overall decision. Furthermore, her view as to when the referral to the CCMA must have been received by Kelly is not one which is open to criticism. The fact that the attorney acting for the appellant in cross-examining the employee stated that their recall to work by Kelly was due to him advising the appellant to do so does not firstly make that statement evidence and secondly it does not detract from the fact that the recall of the employees could still have been made after the referral to conciliation was received by Kelly.

[17] The Commissioner had two mutually destructive versions before her and the only issue she was required to decide on was whether or not the employees discharged the *onus* to her satisfaction that they were dismissed on 11 November 2009. In deciding the issue the commissioner had to weigh up the evidence, apply the probability test and then if need be decide on the credibility of the witnesses. It is evident that the commissioner in fact did do this. Having regard to the evidence it cannot be said that the decision to accept one version over another is tainted with a failure to consider all the material evidence. Nor is her decision in this regard open to serious criticisms. I fail to see any irregularity let alone a gross irregularity committed by the commissioner.

[18] The second complaint is linked to the first. It deals with the material error committed by the commissioner in finding Kelly's evidence incoherent. Again, a reading of her award makes it clear that the commissioner was simply of the view that the employee's version was more probable than that of the appellant and again based on the evidence before her this is a reasonable view to hold. There is no explanation as to why Kelly required them to complete the work for 12 November on 11 November nor was it challenged that she did not tell them that all of them could be easily replaced. Furthermore, by her own admission the work she had to execute in the weekend could be done (at an inconvenience) without the employees

[19] The third complaint is that the decision arrived at by the commissioner does not meet the test set out in *Sidumo*[1] which requires the court to consider the decision arrived at by the commissioner to be that which a reasonable commissioner would arrive at. This test does not apply in this matter. The issue before the commissioner was not strictly whether or not the dismissal was fair, but what was the date of the dismissal. In this respect, the question of the *Sidumo* test does not apply. What the Labour Court was required to establish was whether the commissioner got the date of the dismissal right because that would determine the issue whether or not the employees were fairly dismissed. As stated earlier, the commissioner got that right, this being so, it is clear that the dismissal was both substantively and procedurally unfair as the appellant simply stuck to its version that the employees were not dismissed until about a month after the employees claimed they were dismissed.

[20] Turning to the other terms of the order made by the Labour Court, the appellant in its notice of motion firstly sought for the stay of the execution of the arbitration award pending the finalisation of the review application. When the Court *a quo* was entertaining the review the prayer for the stay of execution was not being proceeded with by the appellant as the matter had become moot. The court *a quo* nevertheless felt obliged to consider the matter and refused the prayer. However, in refusing the prayers, the Labour Court *mero motu* raised the difficulties that execution of an arbitration award may have in general, especially where an application for review is pending (this was based on the acting judge's understanding of the situation and not any argument presented or allegation contained in the application). The Labour Court decided that *"an award of compensation or back pay is not enforceable against an employer who has filed an application for the review and setting aside of the award of compensation or back pay"*. The Labour Court felt it went against the prescripts of the Constitution of the Republic of South Africa to hold an award enforceable pending a review. This decision by the court is totally erroneous. See *Olivier v University of Venda* [2003] 5 BLLR

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

471 (LC) which correctly states that an application to review an award does not automatically stay the execution of an arbitration award.

[21] The Labour Court in dealing with the evidence led at the arbitration correctly found that decision of the commissioner with regard to the dismissal being substantively and procedurally unfair was correct. However, it made a number of statements and allegation that cannot be supported by the record. In any event having done so, it decided that the relief granted by the commissioner was wrong. The fact that the employees did not seek to review the award *vis-à-vis* the relief did not deter the court *a quo* from interfering with the award. The Labour Court decided that since the employees had sought reinstatement at the arbitration that should be the relief that the commissioner should have granted, and so it decided that it would change the award to grant the relief of reinstatement with full back pay. This Labour Court could not do this as there was no counter review.

[22] Furthermore because the Kellys were members of the CC the court decided to join them as co-debtors. The fact that the CC was a legal *persona* on its own was of little consequence: that the Kellys were not before the court only the CC as a separate legal persona was, mattered not. The Labour Court *mero motu* invoked Rule 22(2)(a)[2] of the Labour Court Rules governing conduct of proceedings in the Labour Court and decided that the Kellys were now joined as co-debtors. According to the Acting Judge, if the court *mero motu* decides to join a party in the proceedings there is no need for the party the Court seeks to join to be given notice. Clearly there was no basis for the joinder and in any event it was incompetent for the court to make the order in the absence of the Kellys being notified and given an opportunity to oppose such an application.

[23] Also, at the hearing at the Labour Court, the representative of the employees stated that he had no instructions from two of the employees. In this respect, the court *a quo* simply asked the representative to act for all four employees

[2] Rule 22(2)(a) reads that: "The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

and then having realised that no instructions were forthcoming to the legal representative made the order that the court order be published in the “Daily Sun”. Again there was no basis for this.

[24] I need go no further in respect of the orders granted save to state, lest some reliance is placed on the judgment of the court *a quo,* that the Labour Court simply got it terribly wrong. The whole of the judgment is hereby set aside. The tragedy is that this acting judge has regularly in the past and continues to appear in the Labour Court. He has argued and continues to argue reviews and does so satisfactorily. It seems that he just carried awaywhen sitting as an acting judge and presiding in this matter.

[25] With regard to costs as the matter was not opposed there is no order as to costs.

[25] In the result, I make the following order:

1. The appeal is upheld.

2. The order of the Labour Court is set aside and replaced with the following:

“The application for review is dismissed with no order as to costs”.

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Waglay JP

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Dlodlo AJA

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Francis AJA

APPERANCES

FOR THE FIRST TO THIRD APPELLANTS: Adv M A Kruger

Instructed by Goldberg Attorneys

FOR THE FIRST TO FOURTH RESPONDENTS: No appearance