REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Not Reportable

CASE NO: JR1740/2010

In the matter between:

ADELE VINCENT **Applicant**

and

KAUSHILA GUNASE **First Respondent**

WORLDWIDE ENVIRONMENTAL

SOLUTIONS (PTY) LTD **Second Respondent**

Date heard: 15 May 2014

Date delivered: 15 May 2014

Date edited: 6 August 2014

EX-TEMPORE JUDGMENT

CELE J

[1] It is in terms of section 145(2) of the Labour Relations Act, 66 of 1995, hereafter referred to as "the Act," that the applicant seeks to review, correct and/or set aside the arbitration award dated 7 June 2010, issued in this

matter by the first respondent as a Commissioner of the Commission for Conciliation, Mediation and Arbitration, known as the CCMA. I may point out at this stage that the CCMA was not unfortunately cited as a party in these proceedings. I do not know why this was not done by the applicant. The application was opposed by the second respondent, in whose favour the award was issued.

The factual background:

[2] The applicant was employed by the second respondent in terms of a written contract of employment as an operations manager with effect from 1 July 2008. She earned a salary of R15 000 per month. She was on an indefinite term of employment. She was also a shareholder in the second respondent through a family trust that had purchased 10% of its shares. During June 2009, there were discussions between the second respondent's managing director, Mr B Rose, and the applicant concerning various issues, which included the matter of a share transaction of 2008, the issue around her status as an employee and whether she had to continue to earn a salary from July onwards or rather, to be remunerated on a commission only basis.

[3] The first such meeting was held on 26 June 2009, followed by another on 29 June 2009. Issues for discussion were not capable of any resolution and various further meetings were held by the parties. Some were held with Mr Rose's assistant, known as Mr Winston, in attendance. One of those meetings was, for instance, held on the 2 July 2009.

[4] According to the evidence of the applicant, the second respondent offered to transform the applicant's status of being an employee to that of being a commissioned agent with certain conditions. She was in the process of considering the terms of offer at various stages as the meetings progressed. According to the second respondent, there was time when she made up her mind. There are aspects in respect of which the parties were not able to reach consensus. At the end of the months July and August

2009, the second respondent withheld the salary of the applicant.

[5] The applicant's evidence was that she was concerned about a failure to be paid her monthly salary and she approached her attorney and gave instructions, as a result of which, her letter dated 15 September 2009 was issued to the second respondent. The letter deals with various issues but paragraphs 2 to 7 thereof read thus:

> "2. As you are aware, outlined in her personal capacity is your employee and the trust is a shareholder in your company.
>
> 3. We are instructed that over approximately two to three months, there have been various discussions initiated by yourselves and in particular by Mr Bernard Rose, in regard to the following issues."
>
> (See 3.1 up to 3.2 relates those issues.) It continues:
>
> 4. The buyback transaction has not been formally implemented to date by reason of the fact that no firm proposal has been forthcoming in regard to the date of the repayment to the trust of the monies invested by the trust as aforesaid.
>
> Furthermore, despite a resolution of directors to approve the buyback, there has been a failure to call any meetings of the shareholders for the purpose of passing the necessary special resolution to give effect to the buyback transaction in accordance with the provisions of the Companies Act. When such meeting is called and when outlined as furnished, full and precise detail as to:
>
> 4.1 How the buyback will operate;
>
> 4.2 Whether it will relate to both rights issues or any, or only the most recent ones;
>
> 4.3 When the monies invested in the company are to be paid to the trust; and
>
> 4.4 All of the remaining issues relating to the buyback mechanism.
>
> a decision may then be made as to the acceptability or otherwise of the buyback and whether our client agrees that this be linked in any way to a change in the terms and

conditions of her employment in her personal capacity.

5. We place on record that you are not entitled even if there be a proper sanctioning of the buyback transaction by means of a special resolution to unilaterally impose a change in the terms and conditions of our client's employment. Any such change will require our client's agreement and may not be imposed upon her as you appear intent on doing.

6. Our client has previously indicated to you that she is not opposed to reaching agreement in regard to her terms of employment being altered, such that she works on a commission structure, rather than on the current salary structure, which is applicable to her, but that this would have to be negotiated fully and agreement in respect thereof reached in writing in due course and once our client has been provided with all relevant details as to the financial position of the company, they need to place her on a commission structure and reasons thereof as well as the timeframes for the share buyback transaction.

   These timeframes, and most importantly, the date of payment of any sum due to the trust in respect of the share buyback are critical to our client's decision as to whether she is prepared to accept the commission structure as opposed to the fixed salary.

7. In the interim, we are instructed that our client's salary for the months of July and August has not been paid. Unless this issue is rectified immediately by means of the payment to our client of the requisite amount due and by means of the furnishing to our client of her normal payslip in respect of the month in question, legal proceedings will regrettably be instituted for the recovery of the full sum due to our client, without further notice or delay."

I will stop there on paragraph 7 and go to paragraph 8:

"8. It goes without saying that our client's salary and cellular telephone allowance in respect of the month of September 2009 must also in due course be paid as and when it becomes due at month-end."

[6] As already indicated in the letter just read, the applicant worked in July and August 2009 without receiving or being paid a salary at the end of those months. On 15 September 2009, the second respondent, upon receipt of this letter that I just read, coming from the applicant's attorneys, through its manager, Mr Rose, terminated the working relationship between it and the applicant. The applicant then referred an unfair dismissal dispute for conciliation and when it could not be resolved, she referred it for arbitration.

[7] During the arbitration hearing, it was the evidence of the applicant and her contention that she had been unfairly dismissed by the second respondent. To the contrary, but without leading any *viva voce* evidence, it was the second respondent's submission that the applicant's status had changed from employment to that of an independent contract or agent on a commission only basis some months prior to the termination of the relationship. This was due to the e-mail that had been sent by the second respondent to the applicant dated 3 September 2009.

[8] In particular, it was argued that the fact that the applicant had worked for the two months without a salary and without challenging that fact, demonstrated that her status had been changed through her conduct, that is, acceptance of that situation. The e-mail of the 3 September is important and therefore I need also to refer to a portion thereof. The e-mail comes from Bernard Rose, dated 3 September 2009 at 16:21 PM. It is addressed to the applicant, Adele Vincent and it is copied to Winston. Let me read what appears to be a second paragraph:

> "Allow me to record what we have discussed on numerous occasions over the last two months.
>
> 1. The directors of W-e-s, Wes and Efule were faced with a few options, given that we were running an insolvent company;
>
> - liquidated the company, in this case, the shareholders lost their investments. By doing this, no further costs would be incurred for rent, salaries and other overheads.
> - Share buyback of say, 2 cents per share, 40% of

value and give Adele three months' notice, R45 000, thus total to Adele of R145 000 (R100 000 plus R45 000;

- Share buyback of five cents per share and no further costs.

We adopted this third strategy, thus meaning, there are now no further employees in Wes, only commissioned agents."

It continues.

"We attempted to find a win-win in our decision making process and you have agreed with me that we have in fact achieved this by adopting option 3 above. You have received a copy of the resolution already and I confirm that you will receive R250 000 along with other shareholders on/or about 13 November 2009.

With regard to your involvement with the company, not employment as you phrase it, you are no longer a salaried employee but rather a commission agent as we have discussed on numerous discussions. You were not fired as you said on two separate occasions yesterday. Should you wish to discuss this matter in more detail, I am available to you at any time, except Friday afternoon.

Regards."

[9] The applicant did not issue any written response to this e-mail. Accordingly, the primary issue to be decided in the arbitration was whether the applicant was an employee and in that respect, she bore the onus of proof. Put differently and as stated by the Commissioner in her award, the question was whether the applicant was dismissed on 18 September, sorry on 15 September 2009 as contended by herself. In that regard, the Commissioner says she was recording that the respondent disputed that the applicant was an employee at the relevant time and thus that she was dismissed as alleged.

[10] The applicant gave *viva voce* evidence in her case and submitted documentary evidence. The second respondent elected not to lead any *viva voce* evidence and relied on documentary evidence for its case. Having evaluated the facts and evidence, the Commissioner said that she was drawn to the conclusion that the applicant failed to discharge the onus of proving that she was an employee at the

material time. She ultimately came to the conclusion that the applicant was accordingly not dismissed on 15 September 2009, as contended and the Commissioner dismissed the applicant's claim.

[11] Whilst there was no evidence by the second respondent and when the matter was argued before the Commissioner, Mr Campanella, who is appearing here for the second respondent, was able to succeed to persuade the Commissioner to admit into the record the e-mail of the 3 September 2009, to which reference has already been made. The Commissioner accepted it and relied on the Evidence Amendment Act and found an exception which she deemed was appropriate to admit that evidence.

[12] This is an application for review and therefore it is important for me to briefly visit the grounds for review. These are found as outlined in the founding affidavit on paragraph 10 onwards. I have taken note of what is contained there. For the sake of gravity, I am not going to read all of them but paragraph 10 of the founding affidavit contains such grounds. I will just pick up on a few:

> "10.1 The first respondent places no weight on the fact that the applicant confirmed the contents of the letter of appointment, her letter of appointment, which documented the terms of her employment and a copy of which is annexed hereto marked LM1.
>
> The applicant testified that the terms of her employment remain unchanged and that there were ongoing negotiations relating thereto but that same had not been concluded and no agreement had been entered into in this regard.
>
> 10.2 The applicant's version in this regard was supported by payslips evidencing the ongoing payment made to her and which accorded with the terms of her employment, as well as extracts from her electronic diary, which clearly showed that there were ongoing negotiations surrounding her future employment and the terms thereof.

Copies of the relevant payslips and the electronic diary are annexed hereto marked LM2 and LM3 respectively and which support the aforesaid contention of the applicant.

10.3 The first respondent place no weight on the fact that the second respondent via its duly appointed attorney of record, in fact, admitted its liability to pay the applicant the sum that the applicant contended was due and payable as a result of her unfair dismissal from the second respondent."

I will jump 10.4.

"10.5 On the strength of this admission alone, it is clear that the first respondent erred in coming to the finding that the applicant was not an employee of the second respondent and the failure to place any weight on the admissions of the second respondent in this regard clearly showed that the first respondent has acted unreasonably and that a reasonable person in a similar position to the first respondent should not have made this ruling of the first respondent.

I will jump the rest of those paragraphs, having considered them and go to 10.12:

"10.12 The first respondent erred in allowing and placing weight on the hearsay documentary evidence, being an e-mail from Rose dated 3 September 2009 and despite the fact that the entry of the aforesaid e-mail into evidence, was objected to on the basis that same constituted hearsay.

10.13 The first respondent erred and misdirected herself in finding that section 3 of the Law of Evidence of Amendment Act, 45 of 1998 allows for the entering of such evidence and for any weight to be placed thereon. Further legal argument will then be addressed in the above court at the hearing of the matter."

[13] And I stop here. Grounds opposing the review application, I have looked into

them. The second respondent submitted that it is apparent from the Commissioner's award itself and in particular the part of it under the heading 'Analysis of the evidence and argument,' that she was fully aware of the material issues in dispute and that she applied her mind fully to all relevant evidence presented. As a result, all her findings, including those concerning the applicant's credibility and conclusions were clearly the product of comprehensive reasoning based on the relevant evidence and therefore the award cannot be faulted.

[14] Further submission is that the award could not be faulted on the basis that the Commissioner ignored or incorrectly placed no weight on any material evidence as contended by the applicant, in particular the Commissioner specially elucidated her finding that correspondence between attorneys and, after the termination of the relationship and the fact that payment was made to the applicant as demanded, could not by itself conclusively prove that the applicant was an employee. In this regard, the Commissioner correctly stated that she needed rather to consider the evidence presented to her in the arbitration as tested by cross-examination to determine the issue or in the Commissioner's own words:

> "Reference was made to correspondence from the parties' respective attorneys. As a result, I note that payment of R39 957.22 on 15 October 2009, which the applicant terms, accrued salary, was made after letters of demand, and importantly, the parties' effort to resolve issues that were related to the trust as well.
>
> As a result, I am not persuaded that this payment *per se* proves categorically that the applicant was an employee as at 15 September 2009. To so conclude would be to ignore the pertinent evidence that I have commented on herein above and which clearly has a bearing on whether the applicant discharged the onus in the instance."

[15] The Commissioner admitted and relied upon hearsay evidence, that is an e-mail by the second respondent's managing director, dated 3 September 2009 and in doing so, as the second respondent says, that was not irregular. In this regard, the Commissioner was said to be correct in explaining on what basis she had the authority to admit hearsay evidence, why she admitted that evidence, for what

purpose and effectively what she made of it in respect of the parties respective various versions concerning the applicant's status. Based on all of the other submissions made, the submission further was that the applicant had failed to establish any proper ground upon which the award could be reviewed and set aside, more particularly the submission was that there was no basis to find that the Commissioner made or came to any conclusion which a reasonable decision maker in her position could not come, given all the evidence and arguments presented in the arbitration.

[16] I need to remind myself as Mr Campanella has pleaded that I should remember that this is a review application and therefore that a distinction needs to be drawn between a review and an appeal. Mr Campanella has already suggested that the submissions made in this case by Mr Bollo are more of an appeal approach, particularly those submissions that were not included in the heads of argument. I am looking at *Herholdt v Nedbank Ltd*, [2013] 11 BLLR 1074 (SCA) paragraph 25, of which the court having looked at the provision of section 145 and having considered the decision in Sidumo, had the following to say:

> "In summary, the position regarding the review of the similar awards is this. A review of a similar award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity, as contemplated by section 145(2)(a), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Arbitrator could not reach on all the material that was before the Arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts are not in and of themselves sufficient for an award to be set aside but are only of any consequence of their effect is to render the outcome unreasonable."

[17] One of the grounds cited by the applicant was the admission of the e-mail of the 3 September 2009. In my view, that ground is meritorious. The Commissioner, when one looks at the *viva voce* evidence of the applicant, the applicant clearly

indicated that she had spoken to the managers and had clearly indicated where she stood. She had indicated that, according to her, she was an employee. Now in the event anyone were to doubt that she had communicated her attitude after the date of the e-mail, that doubt should be dispelled by the e-mail itself because when one looks at it, it clearly indicates, as I have read it, that the writer says:

> "With regard to your involvement with the company, not employment as you phrase it, you are no longer a salaried employee but rather a commissioned agent as we have discussed on numerous occasions. You were not fired as you said on two separate occasions yesterday."

[18] The e-mail itself discloses what the writer believe was in the mind of the applicant. The e-mail discloses that according to the applicant, she thought she was an employee, she thought she had been fired. That was the evidence that she tendered at the arbitration. Clearly this e-mail ought never to have been admitted when the witness, the writer thereof, Mr Rose, was there to testify. What the Commissioner did was a misdirection, to allow this practice and let a door open for evidence, which the second respondent had ample opportunity to lead through *viva voce* evidence but chose not to. In admitting this e-mail, the Commissioner acted prejudicially to the applicant. It clearly was hearsay evidence, there was no opportunity to test the truthfulness of the assertion therein contained and the e-mail, as I have indicated, discloses the state of mind of the applicant, contrary to that of the respondent, even as at the time of the writing of this e-mail. Clearly therefore, the Commissioner should have realised that admitting it had highly prejudicial consequences. If the Commissioner had applied her mind appropriately to the prejudice there would be, she would have had to deny the admission of the document, in preference to viva voce evidence which the respondent could at the time lead.

[19] If she had denied the admission of the document, she could never have come to the conclusion that she eventually reached. In my view, that is where there is a serious fatality to the arbitration award, but secondly, the applicant testified, she was cross-examined, she conceded that she applied her mind to the proposed

change of her employment status from one meeting to another. There really was no evidence led to negate what she said. Clearly, her version should have stood.

[20] There may have been some weak aspects of her evidence but the fact that she believed that there was never an agreement throughout the discussions and this suggests that she never at any stage acquiesced or agreed by conduct or by any means to the change of the status to her employment. There could never have been any legitimate change to her employee status unless and until she agreed to it. Obviously, by her attitude, the second respondent was left, among others, with an option to consider retrenching her. In the manner that the second respondent went about it, calling her to an office and terminating the relationship, the evidence clearly indicated that the second respondent dismissed her, evincing as it did that she had been an employee. In my view, there was all the evidence on this record to support the finding by the Commissioner that the applicant was an employee and had been unfairly dismissed.

[21] I accordingly find that the first respondent, the Commissioner, misdirected herself in the manner that she conducted the arbitration proceedings to the point that she issued an award which a reasonable decision maker could never have issued.

[22] There is further support of what I am saying and this is to be found, among others, in the very letter that was written by the applicant's attorney, dated 15 September 2009 and the one written on 16 September 2009 and the response thereto by the second respondent. Submissions have been made at large on this and I uphold them. In my view, the Commissioner should have favourably considered those. To say that the Commissioner was not entitled to look at the communication between the attorneys subsequent to her dismissal, was baseless because the one dated 15 September 2009 was preceding the breakdown of the relationship. She should have considered that document. It clearly says a lot and I have read it into the record. I therefore find that in light of the record that is before me, the applicant ought to have been found to have been successful in proving that she had been an employee at the material time and that she had been unfairly dismissed.

[23] That takes me to the second part of the inquiry. I have been asking the parties, and in particular Mr Bollo for the applicant, as to what the way forward would be because all I was asked to do was to review the award and set it aside. A practice directive was file in which I was asked to make the finding which I have done, nothing more. The parties approached the Commission with the aim of determining whether the applicant was an employee or not and secondly, whether she was unfairly dismissed.

[24] There was some kind of a concession to the effect that if she was an employee, it would follow that she was dismissed and probably unfairly dismissed because there was no procedure put in place, but the parties in their considered opinion, decided not to take that matter further. In my view, I may not take the matter beyond what the parties contemplated in their minds. I have arrive at what I consider a reasonable finding to have been, that the applicant was an employee and was unfairly dismissed.

[25] I will accordingly therefore remit this matter to the CCMA for a consideration of the second leg of the inquiry. I do not think it would be appropriate that the CCMA should put the matter to the same Commissioner who handled this matter, that is the first respondent. I think it will be appropriate for the next leg of the inquiry to be handled by a senior Commissioner, other than the first respondent. In my view, there shall be no costs order. I will then proceed to write the order. I now read the order, as I have written it here:

Order

1. The arbitration award dated 1 June 2010 issued in this matter by the first respondent is reviewed and set aside.
2. It is found that the applicant was an employee of the second respondent and was dismissed unfairly (procedurally and substantively) by it.
3. The matter is remitted to the CCMA to be placed before a senior

Commissioner, other than the first respondent, to hear any evidence or further evidence on the relief or compensation that the applicant may be entitled to.

4. No costs order is then made.

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Cele J

Judge of the Labour Court of South Africa