REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OFSOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR3088/11

In the matter between:

THE WORKFORCE GROUP **Applicant**

and

COMMISION FOR CONCILATION

MEDITION AND ABITRATION **First Respondent**

COMMISIONER MS REFAEE *N.O* **Second Respondent**

MAKHOSAZANE KHAMBULE AND & 7 OTHERS **Third Respondent**

HEARD: **10 July 2014**

DELIVERED: **27 February 2015**

Summary: the commissioner ignoring key material facts; mentioning issues in passing without evaluating them; failure to provide reasons for the decision; the award reviewable.

JUDGEMENT

RALEFATANE, AJ

Introduction

[1] This is a review application in terms of section 145 of the LRA[1] to set aside the arbitration award issued by the Second Respondent under the auspices of the First Respondent, case number GAJB4729-11issued on 26 October 2011.

Background Details

[2] The Applicant conducts the business of a staffing solutions provider that, inter alia, includes the business of a temporary employment service as envisaged in section 198 of the Labour Relation Act, ("the LRA") and section 82 of the Basic Conditions of Employment Act.[2]

[3] The bulk of the Applicant's services are that of temporary employment service. The Applicant conducts such business in all sectors and industries and place employees (both permanent and temporary) in all disciplines within all industries and section of the market

[4] The Applicant employs in the region of 1600 employees who are placed at the sites of various clients countrywide

[5] The Applicant from time to time enters into agreements with these clients and provides them with their specific labour requirements as they may require.

[6] From 2004 to approximately 2005, the Applicant had an agreement with Johannesburg Water to supply them with their employment needs. This service was interrupted when another temporary employment service was contracted with and continued with in 2009.

[7] The Third and further Respondents were all employed by the Applicant in terms of contract specific contracts of Employment. The Contracts were signed on 17 May 2010 and were to endure until the completion of the project.

[1] Labour Relations Act 66 of 1995.
[2] Act 73 of 1997.

[8] The Third and further Respondent were placed at the premises of Johannesburg Water as meter readers earning R1000.00 per fortnight in terms of these specific contracts of employment.

[9] These employment contracts entered into between the Applicant and the Third and further Respondent specifically made provision for the contract to terminate automatically should the client terminate the underlying agreement between it and the Applicant.

[10] The Third and further Respondents all signed induction documents explaining the nature of the bossiness of the Applicant as well as the work that the Respondent would be conducting for the client, in this instance being Johannesburg Water.

[11] On or about 27 December 2010, Johannesburg Water advised the Applicant that it was terminating the contract with the Applicant and no longer required its services. The Applicant thereupon advised the Third and further Respondents that their contract of employment had automatically terminated as a result thereof.

[12] The termination dates (for purposes of the last payments) were on 6, 21 and 23 January 2011 and 11 March 2011.

[13] For instance, MW Khambule signed a specific contract of employment on 17 May 2010 which finished on the completion of the contract on 6 January 2011.

[14] On or about 23 February 2011 the Sixth, Seventh and Tenth Respondent referred a complaint of Unfair Dismissal to the first respondent.

[15] The remainder of the Applicant referred their matter to the First Respondent by way of making an appearance at the conciliation proceeding on 22 March 2011 and being joined as Applicant in the referral to the First Respondent.

[16] The matter thereupon was referred to arbitration.

[17] The matter comes before the Second Respondent on 12 October 2011. After hearing evidence, the Second Respondent made an arbitration award on 26 October 2011. A copy was sent to all of the parties on the same date.

Grounds for Review

[18] The Award, as given by the Second Respondent, is only three pages long and is severely lacking in a number of respect in as much as it is not a fair reflection of the evidence given.

[19] The Second Respondent misdirected himself with regards to the facts upon which he based certain conclusion and other respects misdirected himself with regard to the conclusions which he reached in as much as it was not supported by the evidence given.

[20] The Second Respondent failed to:

a. explain to the parties how the proceedings would be conducted,

b. afford the representative of the Applicant an opportunity to canvass the issue of the date of the alleged dismissal or the alleged employment dates, when it became clear that those dates were in dispute, which was crucial to a proper adjudication of the matter,

c. The Applicant themselves indicated that there had not been a dismissal. No page 24 of the transcribed record the representative of the Applicants, Mr. Sishuba acknowledges that there had not been a dismissal and that “we are still employed by Workforce”

[21] The Second Respondent gave an award which was not practical or possible for the Applicant to adhere or comply with in as much as it has no control over the premises of a client and has no authority to insist that it re-employs employees of the Applicant on it site.

Evaluation of the point in *limine*

Point in limine

[22] The Applicant in this matter raised a preliminary point to say that the Third Respondent deposed of the affidavit to oppose the review and setting aside of the award but further Respondent did not file confirmatory affidavits to show that they also oppose the application. The Applicant prays that this court should take that only the Third Respondent is opposing the application.

[23] Any party that has interests in the matter and wish to take part must declare expressly declare that intention, the same applies to any person who present himself or herself as representative of the principal must have the powers as conferred by the principal or the person purported to be represented.

[24] The Third Respondent, in casu, should have had proof that further Respondents have declared their interest to be part of the process, so because should the costs be ordered, it must be clear who is entitled to the costs or to bear the costs. The mere submission by the Third Respondent that further Respondents are part of the process is not sufficient further so because the outcome of the matter will be binding and having effect to them whether positively or negatively. Whoever invokes the legal actions is also prepared for any outcome. In the premise, unless there is proof that other Respondents have declared their interest to participate in this process, it cannot be relied upon the Third Respondent's word for it. There is a list of names attached in the bundle of documents filed with the Court but there is no date or explanation to the effect that it was for this particular action, therefore, it cannot be assumed that it was meant to declare the interest to participate in this action. The Third Respondent will be regarded as the only party opposing the application.

<u>Evaluation of the submissions</u>

[25] Section 145 of the LRA:

> '1. Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)

(2) A defect referred to in subsection (1), means-

(a) That the commissioner-

(i) Committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) Committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) Exceeded the commissioner's powers; or

(b) That an award has been improperly obtained.'

[26] As a principle established in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[3]*the* review Court must ascertain whether the arbitrator considered the principal issue before him or her; evaluated the facts presented at the hearing, and came to a conclusion which was reasonable to justify the decisions he or she arrived at.

[27] The fact that the award is short, in this case is about three pages, does not always mean that the commissioner omitted to deal with the facts. The commissioner will be guided by the material facts presented before him or her, and what is crucial is whether all the important submissions or evidence have being taken into account. The opposite also holds true that in some instances it can happen that the award is short because indeed it does not contain all the relevant information. The reviewing Court will have to assess the material facts that were presented before the decision-maker in order to determine whether the important facts were left out or that the commissioner

[3][2014] 1 BLLR 20 (LAC); [2014] 35 *ILJ* 943 (LAC) at para 16.

has considered all the necessary material facts. It is not necessary for the commissioner to state every irrelevant issue in his or her award but at the same token he or she must not omit to consider key issues that will lead to her or she reaching unjust and unreasonable decision. If a commissioner fails to take into consideration a fact that he is bound to consider his or her decision invariably will be unreasonable.

While an award may not necessarily manifest all the factors taken into account by a commissioner it was held in *Corrobrik (Pty) Ltd v TLA Brick and Tile v CCMA and Others*[4]it was stated that:

> 'Some factors may be of such importance that failure may lead to a reasonable inference that they were not considered at all.'

It is also true that the fact that the commissioner has mentioned facts in the award it does not mean that he or she has evaluated and applied the mind to such facts as that will be clear from the award itself including the reasoning for the decision he or she has arrived at.

[28] In Gaga v Anglo Platinum Ltd and Others,[5]it was indicated that:

> 'Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determines the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness.'

[29] The Applicant avers that the Second Respondent erred in conceiving that the Respondents' commencement date with the Applicant is 2004 whereas in actual fact the commencement date should have been recorded as the 17 May 2010. The date of termination is crucial to determine especial when compensation is be ordered.

[30] The Applicant contents that it had a contract with Johannesburg water between 2004 and 2005 which expired upon which another contractor won the tender in 2005. The Applicant won the tender again in 2009 which will

[4] 2000) 8 BUB 738 (LC) at paragraph 7
[5][2012] 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC) at para 44.

remain without say that between part of 2005 and 2009 there was no contract in existence. There is no evidence that the employees were placed at other assignments after the contract with Johannesburg water was terminated. It is the Applicant's submission that there was interruption of service after Johannesburg Water has terminated the contract. If they were placed to other assignments, then there was no interruption of service but if they were not then there was interruption of service which will mean that during the return of the Applicant to Johannesburg water in 2010, was a new assignment for those employees. It is not always the case that when the contract between the labour broker and it client terminates automatically the contracts between the said labour broker and the employees will terminate unless there is a provision in the contract specifying the position upon termination. In the present matter, the employment relationship between the Applicant and the Respondent was a crisp issue to deal with. The commissioner is found having failed to interrogate this issue therefore committed irregularity.

[31] The Applicant state that the commissioner failed to comprehensively deal with the nature of the employment relationship and ignored to pay attention to the contract specific contract of employment.

[32] The commissioner did not bother himself to deal with nature of the employment relationship which was very crucial. This kind of employment relationship is different from other employment relationship because employees in this case of labour broker are the employees of that labour broker not of its clients. It can happen through that a labour broker hires employees on behalf of its clients in which event those employees become employees of client. In casu, the Respondents remained employees of the Applicant but assigned to render services to Johannesburg water, the Applicant's client.

[33] It is cardinally important that the employment contract is taken into account in order to determine whether the employee was dismissed. If the employee was terminated before the expiry of the fixed term contract, that employee can argue dismissal in the context of labour brokerage but if the employee was

terminated because the fixed term contract of employment expired, then the employer may argue that the contract terminated.

[34] In this case, there is no such information that can suggest that the commissioner considered this issue. The commissioner does not even discuss his findings in regard to whether the Respondents were dismissed. The Applicant avers that the Respondents were not dismissed but its client, Johannesburg water, did not require the services any longer. This statement alone is sufficient to tell that the dismissal was contested. The commissioner erred in that he failed to consider very crucial point which if not considered may lead to unreasonable conclusion.

[35] The Applicant further avers that the automatic termination of a contractual relationship in terms of that agreement cannot be equated with a summary dismissal without notice because the Second Respondent in this case had a notice.

[36] This is a common cause issue that the Respondents were given two weeks' notice. The commissioner took into cognizance that the Respondents were given two weeks' notice. The Court satisfied that the commissioner dealt with this issue in his award. Whether the notice was sufficient in terms of section 37 read with 38 of the BCEA is another issue which this Court is not satisfied that the commissioner has considered that. It was not an issue that was submitted before the commissioner but any decision-maker will be inquisitive where the law is violated. No employer may offer less favourable conditions than those provided in the BCEA and in this case, it seems that the Applicant offered Respondents two weeks' notice after they have worked for more than a year. Section 37 of the BCEA provides that:

> 'Notice of termination of employment
>
> (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than-
>
> *(a)* One week, if the employee has been employed for more than a month or less;

(b) Two weeks, if the employee has been employed for more than six months but not more than a year;

(c) Four week, if the employee-

(i) Has been employed for one year or more; or

(ii) Is a farm worker or domestic worker who has been employed for more than six months.

[Sub-s. (1) submitted by s. 8 of act 11 of 2002.]

(2) *(a)* A collective agreement may not permit a notice period shorter than that required by subsection (1)

(b) Despite paragraph *(a*), a collective agreement may permit the notice period of four weeks require by subsection (1) *(c)* (I) to be reduced to not less than two weeks.

(3) No agreement may require or permit an employee to give a period of notice longer than that required of the employer.

(4) *(a)* Notice of termination of contract of employment must be given in writing, except when it is given by illiterate employee.

(b) If an employee who receives notice of termination is not able to understand it, the notice must be explained orally by, or on behalf of, the employer to the employee in an official language the employee reasonably understands.

(5) Notice of termination of contract of employment given by an employer must-

(a) Not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and

(b) Not run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three, except sick leave.

(6) Nothing in this section affects the right-

(a) of dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VII of the Labour Relation Act,1995, or any other law; and

(b) Of an employer or an employee to terminate a contract of employment without notice for any cause recognized by law.'

[37] The commissioner's award at paragraph 8, mentioned that the Respondent contended that they were not given any notice pay. This point, having being mentioned, required attention where the commissioner should have specifically dealt with it and made determination or directed the Respondents to relevant forum which include Department of Labour to lodge a claim. The commissioner failed to apply his mind on this issue.

[38] The Applicant states that the Second Respondent misconstrued the nature of the relationship between the parties especially when he holds that:

> 'The Respondent has a workforce of 16000 employees at over 60 branches nationwide. They cannot willy-nilly dismiss employees and pretend that: "a contract specific contract of employment" can override the fact that all the Applicants were employed long before the 17 May 2010 with the Respondent.'

[39] There is no evidence before the commissioner that the Respondent had not interrupted employment relationship with the Applicant. He does not provide reasons for his conclusion. The Applicant (Respondent at Arbitration) submitted that it had a contract with Johannesburg water in 2004 which terminated in 2005 after which another contractor won the contract. The Applicant won the contract again in 2010, which the submissions were that the Applicant entered into specific contract of employment with the Respondent on the 17 May 2010. This piece of evidence was not discussed in the commissioner's award there committed gross irregularity.

[40] Further ground of review is that the second Respondent gave no reasons for concluding on respective reinstatement of the third and further Respondent. It is not clear whether the Second Respondent refers to reinstatement to Johannesburg water.

[41] The Applicant avers that its contract with Johannesburg water has been terminated owing to its nature as a type of employment contract that was dependent on the completion of the project. It is important that the Second Respondent provides his reasons in the award as to how he bothered to analyze the nature of employment relationship between the parties not excluding the Applicant's client, Johannesburg water because there are two different contracts depending on each other. That is the contract between the Applicant and Johannesburg Water and the contract between the Applicant and the Respondents. If the commissioner discussed this issue and reach a conclusion that is linked to his reasons, then it would not be said that he misdirected himself. In the award, there is nothing to show that the commissioner has considered the important issue pertaining to the relationship of the parties. In this Court's view, it would be prudent for a decision-maker to provide reasons for any conclusion reached and that such reasons are based on the evidence presented further that there is rational linkage thereof. The commissioner does not even furnish reasons for him reaching a conclusion that the Respondents were unfairly dismissed, failure of which supports the Applicant's submissions is that the commissioner has misdirected himself. Failure by the commissioner to consider the principal issues, to misconceive the facts as presented, the commissioner basing his or her decision on irrelevant facts or on issues that were never canvassed before him or her, is to deny the parties just and fair process with the likelihood that the conclusion will be unreasonable and prejudicial to the parties. In casu, the commissioner ordered reinstatement coupled with financial implications. This issue required the commissioner to carefully analyze it before arriving at the decision. He ignored the evidence by the Respondents to the effect that they were not dismissed nevertheless, the commissioner without giving reasons for his decision decided to order reinstatement.

[42] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,[6]the Appellate Division held as thus:

[6][1996] SA 577 (A); [1996] 17 ILJ 455 (A) at 476D-F.

> 'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act…'

[43] Finally, the Applicant contents that the Second Respondent awarded to the Third and further Respondent back pay without taking into consideration that they had never been permanently employed by the Applicant. There are no reasons in the award relating to the establishment of the dismissal and how did he arrive at the conclusion that there was unfair dismissal. The reasons of this Court on this issue, applies mutatis mutandis to the above discussion dealing with reinstatement. The review criterion is whether the decision is rationally connected with the information before the commissioner and the reasons for it.

[44] In Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)[7] the Court stated as follows:

> 'In summary, section 145 requires that the outcome of CCMA arbitration proceeding (as represent by the commissioner's decision) must fall within a band of reasonableness… 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 and party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside…'

[45] In addition to the contention of the Court in Herholdt case, if the commissioner misconceives the material facts before him or her, which will invariably result in unreasonable decision, then it can be hardly said that a reasonable decision-maker would have reached such a decision.

[46] The idea is not to match the decision of the commissioner with the decision that the Court would have reached had it been in the commissioner's position but rather whether the commissioner considered all the key issues before him

[7][2012] 33 *ILJ* 1789 (LAC) at para 25.

or her and reached the conclusion that is supported by the material facts before him or her. The reasons or findings that direct the commissioner's conclusion is unconceivable and if the commissioner is found to have committed irregularity in that regard his or her award will be open for review.

[47] In *Care Phone (Pty) Ltd v Marcus No and Others*[8]held that:

> 'It seems to me that one will never be able to formulate a more specific test other than, in one way or another asking the question: is there a rational objective basic justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrive at? In time only judicial precedent will be able to give more specific content to the broad concept of justiability in the context of the review provisions in the LRA.'

[48] In order to determine whether the decision is unreasonable, the Sidumo *and* Another v Rustenburg Platinum Mines Ltd and Others[9]requires the review Court to ask the question:

> 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[49] Having regard to the reasoning of the commissioner, based on the material facts before him, it cannot be said that his conclusion is one that a reasonable decision-maker could arrive at. Considering all the information and the circumstances, this Court is unable to find that the commissioner's award resists review. Therefore, it is hereby set aside.

Conclusion

[50] In the circumstances, the following order is made:

a) The Award under case reference No.GAJB4729-11issued by the third Respondent is hereby set aside

[8][1998] 11 BLLR 1093 (LAC);(1998) 19 *ILJ* 1425 (LAC) at para 37.
[9] [2007] 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC) at para 110.

b) The matter to be referred back to the First Respondent to be heard by a different commissioner other than the one who heard it matter.

c) No costs order.

Ralefatane,AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B Hauser of Hunts Attorneys

For the Third Respondent: No appearance