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Case Review: Gretev (Pty)Ltd v The Commission for Conciliation Mediation and Arbitration(Limpopo) and Others (2009) ZALC 79

Bhoola AJ

This is an application to **review** and set aside the arbitration award made by the arbitrator acting under the auspices of the CCMA in terms of which the employee's dismissal was found to have been both substantively and procedurally unfair.

Background:

The third respondent employee was employed by the applicant employer as Facility Manager at the University of Limpopo ("the client"). It is common cause that employee resigned, and his resignation was accepted by the applicant. All the parties were aware that the position of Facility Manager had been advertised and that a selection process was under way. As a result of a request from the client, the employee was persuaded to retract his resignation. He understood that this meant that he resumed his position. However, he was informed the next day that the position had been filled. He accordingly declared a dispute claiming that he had been unfairly dismissed.

The arbitrator concluded that the parties had entered into an agreement which renewed the employee's contract for a fixed period. He further found that as a result of the conclusion of the agreement, the employee was dismissed and that such dismissal was both substantively and procedurally unfair.

Grounds of review:

The applicant submits that the employee failed to establish all the requirements relating to **conclusion of a valid contract**, but the arbitrator found that a contract had been concluded between the parties. This conclusion was not justified and was in the light of the evidence, unreasonable in that the arbitrator, *inter alia*, confused the issue of "acceptance" which is a requirement for a valid contract to come into being, with the issue of "awareness" on the part of the applicant that the employee was willing to retract his resignation. It was clear from the evidence that there had been no acceptance of the employee's withdrawal of his resignation, nor was there a new agreement concluded between the parties. Unfortunately, as is common cause between the parties, the position had already been offered

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to another candidate who had accepted the offer. The applicant was therefore not in a position to offer that position to the employee. It was also common cause that the applicant, as promised at the meeting, reverted to the employee the following day and advised that the position had already been filled.

Furthermore, the applicant submitted that the arbitrator erred in awarding **compensation** to the employee (who did not seek reinstatement) for three months when the evidence was that he had been unemployed for one month after his dismissal. Accordingly, it was submitted, the award of the arbitrator stood to be reviewed and set aside.

Employee's submissions:

Employee submits that on a proper construction of the evidence, on a balance of probabilities, the arbitrator came to the correct conclusion that a contract of employment had in fact been concluded.

In calculating the compensation due to the employee as a result of his procedural and substantive unfair dismissal it was not disputed that the relationship between employer and employee had irretrievably broken down and that the employee no longer wished to be employed further by the applicant.

In calculating the compensation the arbitrator was required by the provisions of **section 194 (2)** to award compensation to a maximum of 12 months but subject to the minimum stipulated in **section 194 (1)** and accordingly the award of the employee in this regard should be confirmed.

The arbitration and award:

The arbitrator states in his award that it was common cause between the parties that the third respondent's contract (which had been a verbal contract renewable on a monthly basis), had been **renewed for a fixed term**. The applicant contends that this was not common cause. It was the nub of the dispute and was contrary to all the evidence presented.

Secondly, the arbitrator found on a balance of probabilities that applicant informed the client that the applicant had withdrawn his resignation. This in fact was common cause and there was accordingly no need to make a finding in this regard.

The issue was whether the **withdrawal of his resignation was accepted** by the applicant and there was a dispute of fact in this regard. The arbitrator should have enquired further into whether, on the evidence before him, the understanding by the employee that the withdrawal of his resignation had been accepted was a common understanding.

The arbitrator accordingly found that, on a balance of probabilities, the employee was dismissed and that his **dismissal** was both **procedurally and substantively unfair**.



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In considering the extent of the **compensation** to be awarded he states that the applicant was employed a month after he was dismissed and that “[H]e lost a month’s salary and some minor inconveniences. I will award three month’s compensation”.

Evaluation of award and submissions:

The court held that the Constitutional Court recently reaffirmed the requirements, considered at some length in **Sidumo & Another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)** that a commissioner is required to apply her mind to the issues properly before and that failure to do so would result in an arbitration award being set aside. This requires an assessment of the weight that the arbitrator placed on factors that must be taken into account, whether the decision is supported by adequate evidence and adequate reasons, and the existence of a sustainable, logical connection between the two.

This point was made furthermore in the unreported decision of my brother **Van Niekerk J** in **Maksal Tubes v MEIBC and others (Case number JR 2450/07)**, where the court also reaffirmed the distinction between a reasonableness enquiry and a process related enquiry on the grounds set out in **section 145 of the LRA**.

In the court’s view there was sufficient evidence for the arbitrator to conclude that a verbal contract had been concluded, even though he erred in finding it was common cause.

The court held that it was not persuaded that, having regard to the material before the arbitrator, it can be said that the arbitrator failed to apply his mind to the evidence as a result of which the award was based on a **misdirection or gross irregularity** in terms of **section 145**, nor can his conclusion be said to be one that a **reasonable decision maker** could not have reached.

In regard to the sanction, the court held that the **Sidumo judgment** makes it clear that where the award and conclusion of the arbitrator, which is essentially a value judgment, falls within a band of reasonable responses to the evidence before him, this should not be interfered with.

The application was therefore dismissed, with costs.

