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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA8/2000

JDG TRADING (PTY) LTD t/a BRADLOWS FURNISHERS Appellant
and

LAKA, AP NOMINE OFFICII First Respondent
PHUNGWAYO, CHRISTINE Second Respondent
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Third Respondent

J U D G M E N T

DAVIS AJA:

> **[1] First respondent handed down an arbitration award on 14 April 1997 ordering appellant to reinstate second respondent as an employee "with immediate effect without any loss of benefits".**

[2] Appellant failed to reinstate second respondent immediately and initially sought to set aside the award. It however withdrew its application and eventually reinstated second respondent on 14 November 1997 and paid her for the period between the date of her dismissal and reinstatement. Apart from the salary, she had earned commission at the time of her dismissal but nothing was paid in respect thereof for the period concerned.
[3] This led second respondent to apply to third respondent "to interpret the arbitration award whether or not the employer party complied therewith". She contended that she was entitled to be paid average commission as part of the benefits due to her calculated on the basis that she had been in the employ of appellant during the period when the latter had barred her and prevented her from so working.
[4] Second respondent subsequently made an order which read as follows:

> **"This is how the award should be interpreted. That applicant must be reinstated as she is, that she be paid her basic salary as she was, *further that*, she be paid commission for the period she was not paid same. That such commission shall be average commission to be worked on the basis of 52 week period prior to her dismissal in terms of respondent's policy". This award was served on appellant on 23 April 1998.**

[5] In an application of 2 June 1998 to the Labour Court, appellant sought to set aside both awards . Francis AJ dismissed the application and made no award as to costs. The learned judge decided that first respondent had become *functus officio* after he had made the

first award and that appellant had accordingly brought the application for the setting aside of such an award outside the period laid down in terms of section 145(1) of the Labour Relations Act 66 of 1995 (the "LRA").
[6] Mr Nel, who appeared on behalf of appellant, attacked the finding of the Court *a quo***,** that first respondent was *functus officio* after he made the first award , and submitted that he had only become *functus officio* after he had made the second award. He further submitted in respect of the merits of the application in terms of section 145 that second respondent was bound in terms of a collective agreement dated 22 January 1997 to have an alleged unfair dismissal which she brought before the first respondent determined by private arbitration.
[7] The enquiry as to whether first respondent was *functus officio* after he made the award is, in my view, an irrelevant one. An analysis of the two awards reveals that the second amends the first. Furthermore irrespective of whether first respondent was *functus officio* after making the first award, he made the second and it has effect until set aside by a court.
[8] In the first award the reinstatement was provided "without any loss of benefits" meaning that second respondent's reinstatement is to be accompanied by payment of her full salary and other remuneration. This other remuneration includes commission which she would have earned during the period in which she was unable to work. In the absence of the second award, second respondent would have been entitled to sue appellant for the amount which she would have earned in commission had she worked at the time. This would have necessitated an enquiry into a multitude of factors including the state of the market at the relevant time and second respondent's record in earning commission. In making the second award, first respondent simplified the enquiry as to the quantum of the commission by stating that it must be calculated on the basis of 52 weeks of earnings and commission during the period prior to second respondent'' dismissal. It follows that by providing a clear mechanism for the calculation of commission, first respondent amended the first award.

> [9] Appellant was thus bound by the first award as amended and therefore by one award which came into existence in its present form on the date of the second award. It follows that the date of the award for the purposes of section 145(1)(a) of the LRA was that of the second award.
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> [10] On the basis of this finding it is common cause that the application in terms of section 145 was brought in time. It follows thus that the court *a quo* erred in finding that the application was not brought timeously.

[11] On the basis of this finding, the question arises as to whether first respondent exceeded his powers in terms of section 145(2)(a)(iii) - an enquiry which **Francis AJ** was not required engage in the light of his finding that the application had been brought out of time. Appellant and second respondent were parties to a collective agreement signed on the 22 January 1997, in terms of which all disputes relating to unfair dismissals were to be determined by private arbitration. The dispute of the appellant and second respondent arose on 24 January 1997, being the date of her dismissal.

[12] The question as to whether first respondent had the necessary jurisdiction to hear the matter was raised before first respondent. In his award first respondent describes the point *in limine* raised by appellant thus: "The company representatives raised an issue of whether or not this matter is properly before the CCMA arbitrator, submitting that the Company and the relevant union have signed a document called Relationship Agreement. They submitted that this document regulates dispute resolution processes and the CCMA does not have jurisdiction over this matter. The Union in reply expressed surprise that company representatives raised this point. The Union submitted that, the company raises this point only to delay the resolution of this dispute. The company has not raised this point in the conciliation process, it did not raise this point in the conciliation process, it did not raise this point in the pre-arbitration conference which the two parties held. The Union further submitted that when the disciplinary process against their members starting the said Relationship Agreement was not signed, therefore that agreement should not affect this process."

> [13] First respondent overruled the objection without initially giving reasons. In the award of 29 April 1997, he provided the reasons for overruling the objection. He decided that the CCMA has an overriding jurisdiction over labour disputes which fall within the scope of the LRA. He further found that when the relationship agreement had been signed the process leading to applicant's dismissal had already begun and further that since the LRA encourages speedy resolution disputes and since the matter was before the CCMA, the arbitration should continue.

[14] This conclusion is manifestly incorrect. The relationship agreement was signed on 22 January 1997 and was clearly applicable to a dispute which arose on 24 January 1997. Thus first respondent did not have the required jurisdiction to hear the matter. Appellant did not immediately apply to the Labour Court for a review of this decision but continued to put its case before first respondent. Only after the second award was handed down did appellant make application in terms of section 145 of the LRA for an order to review and set aside the two arbitration awards made by first respondent , namely the award dated 14 April 1997 and the later award of 23 April 1998. Significantly no application for review was made pursuant to the initial award of 14 April 1997.

> [15] The question therefore arises as to whether the facts of the present dispute fall within the framework of the judgment delivered by this court in **Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Two Others** (case No. DA 25/99). In that case appellant had launched an application in the Labour Court to have the Commissioner's award reviewed and set aside. The review application was based *inter alia* on an issue of jurisdiction, namely that the Commissioner who arbitrated the dispute had no jurisdiction. It was argued that the conciliation proceedings had been invalid in that the aggrieved employee had not made an application for condonation for the late referral of the dispute even though it had been referred to conciliation outside of the thirty days

statutory period and there had been no condonation of late referral by the Commissioner.

[16] In upholding the decision of the court *a quo* to dismiss the application for a review on the grounds of lack of jurisdiction, **Zondo JP** agreed with the reasoning of the court *a quo*, that if an administrative act of certification is invalid it must be challenged timeously. As the learned Judge President said at para 15, "a question which arises in a case such as this one is at what stage of the dispute resolution process contemplated by the Act should a party who objects on one or other ground to the processing of the dispute institute review proceedings? In the absence of a statutory provision to the contrary, I am of the opinion that it should be done within a reasonable time. The question which arises is whether that means before any further steps are taken after the event giving rise to the objection or that means within a reasonable time after the party has allowed the entire process to be concluded so that it can see whether its objection does not become academic for one or other reason in the process".

[17] Although the court in the **Fidelity Guards** case, *supra* did not lay down a fixed rule as to when a party should raise a jurisdictional objection before the appropriate court, the judgement placed the emphasis on the bringing of the challenge within a reasonable time.

> [18] In the present case, the objection was raised at the commencement of the proceedings on 11 April 1997 on which date, first respondent overruled the objection. After the arbitration award was handed down by first respondent on 14 April 1997, nothing occurred until second respondent brought an application in terms of section 158(1)(c) to make the award an order of court. Appellant then filed an application in terms of section 145 of the Act to review and set aside this award on the basis that the dispute was subject to a private arbitration agreement and that accordingly first respondent had no jurisdiction to hear the matter. This application was however withdrawn during July 1997 and second respondent was reinstated on 14 November 1997.

[19] On 26 February 1998 second respondent applied to first respondent for an interpretation of the award. The second award was then served on appellant on 23 April 1998. It was only after receiving the second award that appellant applied to set aside both awards and raised the question of jurisdiction as a ground of review. Appellant's approach to the question of first respondent's jurisdiction appears to have been determined by the content of the award .Appellant decided that it was prepared to abide the first award and thus withdrew its application for review. Only when the second award changed the implications of the first award, did the question of jurisdiction become of such importance that an issue raised more than a year previously had to be resuscitated.

> [20] In my view the length of time taken to apply for review and prosecute the case represents the kind of unreasonableness to which **Zondo JP** referred in the **Fidelity** case, *supra*. The application for review was launched more than a year after the initial award was issued. Further the appellant did not pursue its

right to launch review proceedings until it became dissatisfied about an aspect of the amended award, after apparently having been satisfied with the initial award. This conduct represents an unreasonable delay of a kind which runs counter to the purpose of the Act, namely to affect expeditious dispute resolution . The contrary conclusion would afford a party an opportunity to take its chances with the outcome and then apply for review more than a year later - a decision which would retard rather than promote the speedy resolution of the dispute.

[18] When this matter originally came before us on 9 November 2000, no heads of argument had been filed on behalf of the second respondent. Her attorney of record, Mr Kruger appeared, however, on her behalf and after some debate we postponed the matter until 4 December 2000. Mr Kruger was placed on terms to file heads of argument as well as an explanation on affidavit for the failure of his firm to have filed heads of argument timeously. Mr Kruger subsequently filed heads of argument on the second respondent's behalf together with an explanatory affidavit. However he failed to appear before us on 4 December 2000. In these circumstances the conduct of his firm ought to be investigated by the Law Society.

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

The appeal is dismissed.

The appellant is ordered to pay second respondent's costs of the appeal.

The Registrar is requested to furnish the Law Society of the Transvaal with a copy of this judgment and to draw its attention to paragraph 18 thereof, and with a copy of the affidavit and heads of argument of attorney H.W. Kruger, both dated 20 November 2000.

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DAVIS AJA

I agree.

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ZONDO JP

I agree.

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GOLDSTEIN AJA

For the Appellant: A.J. Nel

Instructed by Snyman, Van der Heever Heyns

For Second Respondent: Attorney Hilmer W. Kruger

(But no appearance on 4 December 2000)

Date of Hearing: 9 November and 4 December 2000.

Date of Judgment: 14 December 2000.