REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PA6/12

In the matter between:

SHANON NICHOLL **Appellant**

and

BOTHA DU PLESSIS N.O **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

MTN SERVICE PROVIDER **Third Respondent**

Heard: 26 November 2013

Delivered: 05 August 2014

Summary: Dismissal- Onus-- Employee bearing the onus of proving that dismissal occurred- Employee claiming to have been offered a contract of employment and then dismissed prior to commencing employment. Commissioner finding that there was no dismissal. The Labour Court upholding the arbitration award. Appeal: Employee failing to prove the existence of a contract of employment- Employee failing to discharge onus of proving dismissal- Appeal dismissed.

Coram: Tlaletsi ADJP, Musi et Mokgoatlheng AJJA

JUDGMENT

TLALETSI ADJP

Introduction

[1] In this matter, the appellant contends that she had been offered a contract of employment by one of the third respondent's managers and after accepting the said offer, she was dismissed before she could even assume her new employment. The third respondent (the respondent) disputes that the appellant was offered any employment by any of its managers. The respondent contends that she was only offered an opportunity to apply for a position at the respondent and that the said offer, for some reason, did not materialise.

[2] The appellant referred a dispute of unfair dismissal to the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA). Her dispute was arbitrated by the first respondent ("the commissioner") after it could not be successfully conciliated. The commissioner rejected the appellant's contention that she was employed and dismissed her claim of unfair dismissal. Aggrieved by the award of the commissioner, she instituted review proceedings in the Labour Court seeking to review and set aside the award. The Labour Court (per Bhoola J) dismissed the appellant's application for review and upheld the commissioner's finding that there was no dismissal. The appellant was further aggrieved by the order of the Labour Court and came to this Court with leave of the Court *a quo.*

Background facts

[3] The following brief background is necessary for a better understanding of the dispute. The appellant had previously been employed by the respondent for 12 years. She was charged with misconduct and left the employment of the respondent, in October 2008, pursuant to a separation settlement agreement between the parties.

[4] It is common cause that months after the settlement agreement, Rajen Ryan ("Ryan") who was the respondent's Regional Manager in the Eastern Cape arranged a meeting with the appellant on 9 March 2009 to discuss her potential employment. Ryan, together with Van der Merwe, represented the respondent at the meeting. The appellant was accompanied by her husband. There were various positions available at the time to which the appellant was qualified to be appointed. None of the positions had been advertised. Ryan discussed with the appellant the two available positions of bank administrator and the applicable salary band. The details of the discussions are crucial since the parties have divergent versions of what was discussed and on what note they parted. I will revert to this aspect in the cause of my judgment. It must be mentioned though that it was not uncommon at the respondent to earmark a person for a position. It is however common cause that there were certain processes that had to be followed by the Human Resource (HR) department of the respondent to finalise an appointment of an employee.

[5] It is further common cause that later in the day after the parties to the meeting had parted, the Human Resources Manager, Themba Nyathi, sent an email to Ryan stating that:

> *'Based on the discussion that we had in the morning, Shannon can be hired back only if she resigned voluntarily. However, it seems as if she was charged and as such settled with the organization. Based on that she cannot be hired back. All staffs charged with insubordination, gross dereliction of duty and bringing the organization into disrepute are incompatible with MTN culture. She can apply but will not be taken back due to serious nature of her charges. Upon advice I am told that we might as well consider all staffs dismissed for theft, fraud, poor performance etc.*

I know that you are compassionate however, we have to be fair to all other staffs who left under similar considerations.' (sic) [Emphasis provided.]

[6] Reacting to the email, Ryan called the appellant the same day and informed her that "*Johannesburg*" was not happy with employing her. By this, he meant that his head office did not want the appellant to be reemployed for the reasons stated in the above quoted email. It was this call that triggered the referral of a dispute of an alleged unfair dismissal to the second respondent, which was arbitrated on 28 July 2009 and 4 December 2009.

[7] At the arbitration, the respondent agreed to present its case first and led the evidence of one witness, namely, Ryan. For the purpose of this appeal, it is important to limit his testimony to issues necessary for the determination of this appeal. Ryan testified in respect of the meeting of 9 March 2009 that the appellant was invited to the meeting in which meeting various vacancies available within his department were discussed. He maintained, specifically, that the appellant was offered an opportunity to apply for the vacant position of banking administrator.

[8] Ryan further testified that the appellant was asked to apply for the position of banking administrator because she possessed the necessary expertise having previously worked in the said department. Asked whether they discussed the remuneration for the position, Ryan answered in the affirmative and mentioned that he did not disclose the exact salary payable because he is prohibited from doing so by the respondent's recruitment policy. He however did indicate the salary band and the level an employee in that position could possibly earn. He made no salary offer to her.

[9] Asked whether there was an offer of employment, Ryan testified that there was no offer of employment but an opportunity to apply for a position. He mentioned that the appellant was required to apply for vacant positions as required by the respondent's Human Resources policies. As regard the reasons why Ryan called the meeting of 9 March, he testified that he wanted

to resolve the animosity that existed between Manie van der Merwe and the appellant's husband by offering a job opportunity to the appellant. Apparently, the appellant's husband believed that his wife had been treated badly at the respondent in the past and he was prepared to fight for her "*until the bitter end*". Ryan insisted that the appointment would have had to follow the recruitment process but was prepared to make a positive recommendation for her employment. He insisted that the appellant knew the respondent's recruitment processes quite well. She knew that he could only recommend and not appoint an employee. He further testified that on 9 March 2009, after discussions with the HR Manager about the possibility of employing the appellant, he was given the go ahead with the proposal to allow the appellant to apply for a vacant position.

[10] Ryan testified that the four parted on the understanding that the appellant's husband was going to consult with his attorney on the possibility of him ending the legal process he had instituted against the respondent and for the appellant to formally apply for the position as discussed. However, later in the day he received an email from Mr Nyathi stating that the appellant could not be hired as she was charged for misconduct and she left as a result of a settlement agreement. This is the email quoted above. He concluded that he telephoned the appellant to convey the message and he, in return, received an SMS message from the appellant stating that she understood and thanked him for his efforts.

[11] Appellant's evidence before the arbitrator was that she previously had a fairly good working relationship at the respondent as an employee and she would enjoy if she could return to the establishment. She confirmed that she was phoned by Ryan on the 6th of March who wanted to resolve the animosity between her husband and Manie van der Merwe by offering her a job. Ryan told her that there was a vacancy which was created by a transfer of an employee. He wanted a meeting to discuss the offer and the legal issues

relating to her husband and wanted to know whether she was available to attend a meeting on the 9th. She testified that Ryan called again the same day and mentioned that he wanted to make it clear that it was a new contract and not a reinstatement. At 20h00 her husband sent an SMS message to Ryan confirming that they would attend the meeting as proposed.

[12] The appellant testified that Ryan opened the meeting by stating that "*there is this offer in exchange for her husband to withdraw the animosity*", that it was the position of banking administrator and the salary offer was R12 300.00 plus benefits. The working hours were discussed and she was to work on Saturdays only. The banking she was supposed to do was for 33 stores. Ryan asked her whether she was happy and she confirmed that she was. She was then told that she would be informed when to come for an interview to keep everything above board, but that the position was hers. She was further told that she would be informed when to start work which was to be either April or May and further that the "*paperwork*" could take some time. She mentioned further that Ryan told her that his seniors were happy to have her back and that they would deal with the "*gossip*" (skindernuus) that may arise as a result of her appointment. He further maintained that the HR Manager authorised their discussions and the meeting. They shook hands and parted. There was nothing that was reduced to writing.

[13] The appellant testified that a few hours later, Ryan called her husband stating that there was no offer of employment. No one spoke directly to her about the fact that there was no offer of employment. She confirmed that for her first employment she had to go through the normal recruitment process which included her being subjected to an interview. However, in this instance an interview process was merely intended to make her appointment "*legitimate*" as she was already assured that she was employed.

Arbitration award

[14] The thrust of the appellant's case was that she was offered a contract of employment which was later withdrawn and that such withdrawal constituted an unfair dismissal. In the award, the commissioner recorded that the issue to be decided was whether the appellant had been dismissed and if so, whether the dismissal was fair. He recognised that there were two conflicting versions in the case and he would *inter alia*, rely on the probabilities to decide the matter. He remarked that the appellant's husband was present at the meeting of 9 March 2009 but was never called as a witness to corroborate the appellant's evidence. The commissioner drew an adverse inference for such failure to call him as a witness. However, on the failure by the respondent to call Nyathi as a witness, he rejected the submission that an adverse inference should be drawn because it was the appellant who carried the *onus* to prove that the dismissal was fair. He further found that Ryan was an experienced manager and most of his evidence was not challenged. He referred to the fact that he was not challenged on his version that he received an SMS message from the appellant stating that she understood and accepted what Nyathi said and thanked Ryan for his efforts. He further held that the appellant's evidence was that they were still to consider abandoning the pursuance of any further case against the respondent should she be successful in her application for employment and that Ryan contacted her husband indicating that the arrangement could not be continued. By this time the appellant and her husband were still considering the proposal to cease any legal proceedings should the appellant's application for employment be successful. The commissioner found this aspect to be playing a significant role in determining the dispute.

[15] The commissioner held further that the thrust of the appellant's case was that in her mind a firm offer was made to her. That belief means that she possibly misconstrued the intention of the respondent during the discussions at the meeting. This, according to the commissioner, is an indication that there was no valid contract concluded. He mentioned further that there was no

commencement date agreed to by the parties in this case. The commissioner, in conclusion, preferred the evidence of the respondent over that of the appellant and held that the appellant was still to apply for the position and to attend an interview. The commissioner found that the appellant failed to prove that a contract of employment had been concluded between the parties and that the appellant was not entitled to any relief. He made no order as to costs.

The court *a quo*

[16] The appellant sought to review the commissioner's award on the grounds that the commissioner misconstrued the evidence; reached a conclusion that was unsupported by the evidence; failed to apply his mind to the evidence presented and disregarded relevant evidence.

[17] The nub of the reasons why the Labour Court dismissed the review application is to be found in the following extract from the judgment:

> *'the arbitrator' in clear and cogent reasoning, states that he is faced with two conflicting versions, and that he accepts the version of the third respondent on the probabilities. In my view he was justified in drawing a negative inference from the failure to call the [appellant's] husband as a witness to corroborate her version of the events. In these circumstances the [appellant's] submissions that the job offer must on the probabilities have been a quid pro quo for withdrawal of his dispute with the third respondent can be dismissed as pure speculation. There were no probabilities in this regard that the arbitrator failed to consider given the evidence was not before him.*
>
> *It is clear that at common law a contract of employment is concluded when the contracting parties reach consensus on the essential terms. He finds that no offer was made and there could therefore have been no acceptance, let alone a contract. This finding is reasonable based on his conclusion that Ryan did not concede that a firm offer of employment was made, although a number of issues were discussed.*

In my view the award must withstand scrutiny under the Sidumo test as being one that could have been made by a reasonable decision-maker on the evidence before him. There is no reason in law of fairness to depart from the general rule that costs follow the result.'

The appeal

[18] In this Court, the appellant raised the same grounds as in the court below as her grounds of appeal. The main contention of the appellant was that the arbitrator did not apply his mind to the evidence before him by misconstruing the evidence in circumstances where he was faced with two diametrically opposed versions of the event. It was submitted in this regard that the arbitrator failed to make credibility findings to the effect that the probabilities favoured the appellant's versions that her husband would abandon his dispute against the third respondent in return for the employment for his wife. Consequently, the appellant contended, the Labour Court erred in finding that the commissioner's acceptance of the respondent's version was clearly and cogently reasoned on the probabilities.

[19] The respondent opposes the appeal. It was contended that the appellant failed to establish a *prima facie* case that a valid contract of employment was entered into with the respondent. In this respect, it was submitted that Ryan had no authority to employ anyone as recruitment of personnel was the responsibility of the Human Resources department of the respondent. It was further contended that the commissioner was justified in drawing a negative inference from the appellant's failure to call her husband as a witness to corroborate her version of events.

[20] It is trite that the *onus* to prove the existence of the dismissal lies first on the employee. In *CWU v Johnson and Johnson (Pty) Ltd,*[1] the court held that the use of the word "must" indicates that the provisions of section 192(1) and (2) of the Labour Relations Act 66 of 1995 (LRA) are peremptory. The employee

[1] *CWU v Johnson and Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC).

must establish on a balance of probabilities that the dismissal took place. The employee must set out the facts and legal issues which substantiate that termination of employment occurred. Once the employee has proved that dismissal did take place, the *onus* is shifted to the employer to prove that the dismissal was for a fair reason. In order to prove that there is a dismissal, an employee should establish in the first place that an employment relationship existed.

[21] The question whether there was an employment relationship in existence between the parties is fundamental because it raises the question whether the commissioner had jurisdiction to arbitrate the appellant's alleged unfair dismissal dispute referral. In the absence of an employment relationship, the commissioner would not have had the jurisdiction to arbitrate the dispute as there would not have been a dismissal. The test is in essence not whether the decision by the commissioner to the effect that it did not have jurisdiction to arbitrate the dispute is justifiable, rational or reasonable. The question is whether objectively speaking, the facts which would give the CCMA jurisdiction existed. A finding by the commissioner that it did not have jurisdiction when in fact such facts existed would not divest the CCMA of its jurisdiction to determine the dispute.[2]

[22] In this matter, the arbitrator was faced with two conflicting versions. The appellant contended that she had been offered a contract of employment at the meeting of 9 March 2009 whilst the third respondent contended that no such offer was made but an opportunity to apply for vacant positions with the support of Ryan. It was further contended by the third respondent that the appointment of the appellant had to follow its long established recruitment process.

[23] In deciding which of the two versions was more plausible, one must first consider the common cause facts found on the two versions. It is common cause that the meeting was held at the instance of Ryan in order to resolve

[2] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) para [41].

the tension that existed between the appellant's husband and Manie van der Merwe. At this stage, no agreement for her employment had been reached. What Ryan had in mind was to propose an employment or job to the appellant in order to resolve the tensions. Ryan had at this stage obtained authorisation from Nyathi to have discussions for appellant's employment.

[24] In my view, it is reasonable to find that the parties had agreed that the pending litigation between the appellant's husband and the respondent could only be discontinued once the appellant had been employed. It would not make sense to agree to withdraw the litigation whilst the appellant was still to undergo an interview process and without first having consulted their legal advisor who was handling the matter on their behalf. Similarly, I find it difficult to believe that despite making an offer of employment to the appellant her husband was going to continue litigating against the third respondent when it is common cause that the main reason for the employment of the appellant was to end the animosity between her husband and the respondent. On a balance of probabilities, it is reasonable to find that the offer was made in exchange for the appellant's husband's abandonment of the legal proceedings against the respondent and when they parted the appellant and her husband were still to consider the proposal.

[25] The question that remains is whether a clear employment contract was entered into on that day. The commissioner's conclusion that there was no valid contract of employment concluded has merit. The conclusion is supported by the evidence on record. The email from Nyathi supports the view that it had not been agreed with the respondent that she must be employed. That explains why Nyathi indicated in his email to Ryan that she may go through the process but she would not be employed because of the circumstances in which she previously left her employment with the respondent. It would also not make sense for Ryan to tell the appellant that her interview would be merely to go through the motions when it was a process to be conducted by the HR department and not him. It is also not

unusual for the parties to discuss the details relating to salary and working conditions pertaining to the prospective position before a prospective candidate is formally interviewed for the position. Such a discussion would assist the prospective candidate to decide whether it is worth applying for the position or not. Such discussions do not necessarily mean that there is agreement on the salary payable when there is still to be a formal interview to be conducted.

[26] The evidence of Ryan that the appellant had prior knowledge of the respondent's recruitment process was not disputed. His evidence about the normal processes followed on recruitment of staff was also not disputed. His evidence accords with what according to Ryan happened and was still to happen. The respondent's policy required that all recruitment and selection practices must be equitable and transparent; that prior to any employment offer for all positions pre-employment reference checks and qualification verifications had to be conducted and that any re-employment must be authorised and approved by the Managing Director. It is common cause that Ryan did not have any authority by the Managing Director to re-employ the appellant. He could therefore not conclude a valid contract of employment with the appellant without such authorisation.

[27] On the evidence on record, I am unable to find that the appellant has shown that she was an employee of the respondent for her to be a candidate for dismissal. On the contrary, Ryan out of his good heart, wanted to resolve the animosity that was in existence by facilitating a process of the appellant's employment. However, because of the historical reasons, the employment could not materialise. It makes good sense why the appellant sent him a message that she understood and appreciated his efforts. He was not to be blamed for the ultimate failure to employ her. The Labour Courts' preference of the respondent's version under the circumstances cannot be faulted. Furthermore, no reasonable explanation was offered why the appellant's

husband who was present at all material times and whose role relating to the cessation of further legal action in exchange of employment was not called to testify. His evidence would not only have served to corroborate the evidence of the appellant but would also have provided some other independent and objective facts relating to the circumstances that led to the meeting and thereafter.

[28] For the above reasons, the appeal must fail. It would be in accordance with the requirements of the law and fairness that there be no order as to costs.

[29] In the result, the following order is made

The appeal is dismissed with no order as to costs.

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Tlaletsi ADJP

Musi et Mokgoatlheng AJJA concur in the judgment of Tlaletsi ADJP

APPEARANCES:

FOR THE APPELLANT:	Adv Dyke
	Instructed by Brown Braude & Vlok Inc.
FOR THE RESPONDENT:	Adv AM Mthembu
	Instructed by Mashiane, Moodley & Monama Inc.