REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA 8/14

In the matter between:

THANDA ROYAL ZULU FOOTBALL CLUB **Appellant**

and

LESTER, S N.O. **First Respondent**

COMMISSION FOR CONCILATION

MEDIATION AND ARBITRATION **Second Respondent**

DOE, BONIFACE **Third Respondent**

Heard: **12 March 2015**

Delivered: **21 April 2015**

Summary: Review of arbitration award – employee contending that he entered into a one year contract with employer – employee dismissed - employer not rebutting employee's version of dismissal _ commissioner finding dismissal unfair and awarding compensation for the remainder of the contract - Employer disputing jurisdiction of the CCMA – employer contending the existence of a tacit term in the contract and giving jurisdiction to the Dispute Resolution Centre of the National Football League– no evidence adduced to prove the existence of the tacit term – reliance on vague indiciae suggestive of contradictory terms unhelpful in absence of a rebuttal of employee's version of conclusion of the contract- Labour Court's judgment upheld and Appeal dismissed with costs.

Coram: Ndlovu, Landman and Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is against a decision of the Labour Court (Whitcher AJ) dismissing a review application of an award by the first respondent, a commissioner of the second respondent, the CCMA. The third respondent, Doe, alleged that he was employed as a football coach on a year's fixed term contract by the appellant. He claimed to have been unfairly dismissed. He succeeded before the CCMA and was awarded compensation equivalent to the salary he would have earned over the balance of the term of the contract.

[2] The appellant challenged the claim on two bases. First, the CCMA had no jurisdiction to hear the matter and secondly, Doe was not an employee, but rather an independent contractor (though in argument the appellant equivocated on the latter point). Also, it was disputed that the term of his "relationship" with the appellant was for 12 months. In the review application, the commissioner is alleged to have committed irregularities. The notice of motion does not reveal what the irregularities might be. In the founding affidavit, a rambling critique of the preliminary award and the final award is given, the first on the jurisdiction issue and the second on the merits of the unfair dismissal claim and the compensation granted. From this critique it may be gleaned that the grounds of review are essentially a failure to render an award that a reasonable arbitrator would have given.

[3] The appeal is, as was the review, utterly without merit.

[4] The discomfort of the appellant is derived wholly from its own sublime bungling of the case it claims to have had. An elementary fact about litigation is that if you need to rely on facts you need to adduce evidence of those facts. The appellant tried to do without adducing evidence in advancing its case. The evidential deficiencies seem not to be really in dispute, but instead the arbitrator is alleged to have acted

irregularly by not being proactive to shepherd the appellant's representative from the shadows of his forensic ineptitude onto the bright uplands of cogency. The critique is unwarranted. The record reveals that the arbitrator offered the usual hints and prompts and cautions appropriate to steering a litigant towards the basic requirements of an effective presentation of evidence. To demand more of an arbitrator would imperil the impartiality of the arbitrator. The critical omission of evidence to substantiate the contentions sought to be advanced by the appellant was expressly addressed but the appellant's representative obdurately ignored the guidance.

[5] The two aspects of the controversy are addressed in turn.

Was Doe an employee?

[6] The referral of the dispute to the CCMA by Doe had to be supported by evidence that he was an employee of the appellant. He gave evidence that Ngubane, acting for the appellant, employed him on a 12 month contract, from 30 August 2009. The pay was said to be R20,000 per month. The agreement was oral. On 13 November 2009, he was invited to sign a "voluntary release". He refused. The result was that his employment was terminated anyway. Doe's attorney, on 26 November 2009, recorded the unlawful termination and demanded specific performance. None was forthcoming and he referred a dispute to the CCMA.

[7] No evidence to contradict this evidence was offered. Instead, certain documents were adduced.

[8] First, a letter of 3 November by the appellant to the SA Reserve Bank (SARB) confirming a 'one year' employment contract at R20,000 pm from 30 August 2009 until 30 June 2010, ie 10 months. Doe said the latter date was an error. That allegation was not rebutted by the author of the letter, Ngubane, who was not called. No explanation was offered for not calling him. The upshot is that the letter corroborates the claim of employment and the unexplained failure to rebut it, leaves the only version of Doe before the arbitrator that the term was 12 months.

[9] The second species of documents are invoices purportedly submitted by Doe which, self-evidently, even if not conclusively, would point strongly to an

independent contractor relationship. The documents were put to Doe. He denied knowledge thereof, and indeed, the documents appear to have been prepared by Ngubane, not by Doe. Again, Ngubane's evidence to explain why the invoices were prepared and the ostensible contradiction with the representations made to the SARB, was crucial to the appellant's case and such evidence was not adduced.

[10] The relationship of employment contended for by Doe, and upon whom an *onus* of proof rested, was therefore held to be proven.

<u>If Doe is an employee, on what basis did the CCMA not have jurisdiction?</u>

[11] On the evidence addressed above, Doe had established the jurisdiction of the CCMA. If the CCMA's jurisdiction was trumped, as alleged by the appellant, by the Dispute Resolution Chamber (DRC) of the National Soccer League (NSL), it was incumbent on the appellant to adduce evidence of a basis to prove that trumping. This was an evidential burden and, also, properly speaking, an *onus* of proof on that issue. The onus to prove a fair dismissal was also on the appellant.

[12] The appellant's contention is that Doe's contract of employment contains a stipulation that any employment dispute must be resolved in terms of the private arbitration process in the rules of the NSL. How was this sought to be proven?

[13] Significantly, no evidence was adduced that Doe concluded an agreement incorporating such a stipulation, and Doe denied that the oral agreement he concluded with Ngubane included such a stipulation.

[14] Two attempts were made to put up a case to try to support the idea that an inference could be drawn that such a stipulation was included.

[15] First, the appellant produced a copy of a CCMA award involving a footballer, Dylan Kerr who was in dispute with his club. In that matter, the disputants agreed several facts, including that a written agreement existed including a clause stipulating that disputes were to be heard in the DRC. The case put up on behalf of Kerr did not challenge that agreement, but rather argued that the CCMA and the football dispute resolution agency had concurrent jurisdiction. That argument was rejected by that

arbitrator who ruled the private arbitration agreement excluded the CCMA's jurisdiction. The appellant in brandishing this award, pointed to a partial citation of the NSL rule 18 which provides for that process.

[16] This is fascinating information but plainly contributes absolutely nothing to establishing whether Doe's oral agreement included such a stipulation. Moreover, no evidence was adduced that could have established a custom in the "football industry" that bound Doe and the clubs to such a stipulation.

[17] The second attempt was a contention advanced, for the first time in the review application. The appellant sought to introduce the whole Constitution of the NSL (which had not been put before the arbitrator) upon which an argument was to be proffered that the private arbitration stipulation was an "implied" (I assume what was meant was to allege a "tacit") term. Counsel for the respondent drew attention to the basic deficiencies in the attempt to show the arbitrator rule 18 of the NSL rules; ie the citation was partial, it was from a version of the rules not stated, and as *Kerr's* case was conducted in April 2011, ie about a year and a half after Doe had contracted, the notion that the rule existed or was applicable to Doe in August 2009 could not cogently be advanced. Plainly, the appellant's argument is flawed on its own terms for want of a connection to Doe, but even were it to enjoy a smidgen of merit, it is of no assistance if it was not put before the arbitrator.

[18] On appeal, Counsel for the appellant endeavoured to found an argument relying upon several induciae which tended to suggest that Doe was bound by the rules of the NSL and consequently he must therefore have been bound to subject his case to the NSL's DRC. The submission resurrected the idea of, somehow, a tacit term being found. Apart from the absence of a platform upon which to build that contention, a case for a tacit term had not been made to the arbitrator. First, it was common cause that Doe had to be registered and get an identification card to be recognised as a member of the coaching staff. This fact is unhelpful because the inference that all the rules apply cannot be derived from it. Additional evidence about the registration system would have been essential to carry the idea forward. Secondly, a handbook setting out the regime of the NSL was said by the club owner Delvoix to be given "to everyone". Ergo, it was submitted, Doe must have got one too and was thus fully aware of his subjection to the DRC. This is a non-

sequitur, but moreover, Delvoix's relationship with the club post-dated the Doe contract, and obviously what Delvoix could say about general practice was inapplicable to the earlier era. Thirdly, it was contended that Doe's evidence contains an acknowledgement of being bound to the NSL rules and to the DRC stipulation. In the passage relied on, Doe says that he went to the CCMA, because in the absence of a written contract, which was outstanding, he was unsure what the attitude of the NSL would be. [Record 250-251]. That passage needs to be read with what follows. Doe says that the NSL prescribes terms of contracts for footballers but not for coaches; that the clubs and coaches make their own arrangements, and the NSL has no interest in a coach unless there is a dispute. These passages indeed do hint at the prospect of some support for the appellant's contentions but remain no more than hints because the circumstances under which, if at all, the NSL would exercise a jurisdiction are unknown. Plainly, the only way that the NSL could compel the subjection of coaches to its DRC is a contract which includes such a stipulation. The absence of evidence to establish that fact is the persistent barb in the flesh of the appellant's failed case.

[19] Accordingly, the case to establish a competing jurisdiction by the DRC that might have triggered the need for the arbitrator to exercise a discretion to defer to the DRC must fail.

Was there an unfair dismissal?

[20] The only evidence adduced was that of Doe. The letter of his attorney was not rebutted.

[21] What could the arbitrator have found other than that Doe was summarily dismissed for no valid reason? No reason was offered on 13 November when he was dismissed and again at the CCMA hearing no reason was offered.

The relief awarded

[22] Doe waived a claim to reinstatement.

[23] The compensation awarded was calculated to result in the appellant paying Doe the balance of the fixed term contract, ie about nine months of a 12 month term, a sum of R180,000. The Arbitrator reasoned that a lesser sum would in effect grant

employer a licence to breach fixed term contracts. Moreover, it is the very sum that the appellant would be liable for under the Common Law. The argument for appellant was that a lesser sum was appropriate. However, nothing cogent has been presented to suggest why the award was unreasonable. In balancing the interests of contending parties, requiring the defaulting party to pay what was contractually owed, is not unreasonable.

Is the Arbitrator to be criticised?

[24] In our view, the reasons offered for the decision by the arbitrator manifestly demonstrate compliance with the test set out in the *Sidumo* test, most recently affirmed by the SCA in *Heroldt v Nedbank* [2013] 11 BLLR 1514 (SCA) at [25], ie "…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".

[25] Moreover, the judgment of the Labour Court was wholly appropriate in dismissing the application with costs, having regard to the expense to which an individual litigant, unassisted by a union, has been put to twice defend challenges to an award in his favour.

The Order

[26] The appeal is dismissed with costs, including the costs of the review and of the appeal.

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Sutherland JA

I agree.

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Ndlovu JA

I agree.

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Landman JA

APPEARANCES:

FOR THE APPELLANT:	Adv C. Goosen
	Instructed by Van Gaalen Attorneys
FOR THE RESPONDENTS:	Adv M Pillemer SC
	Instructed by Jafta Inc