IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JR 2038/02

In the matter between:

T D MKHWANAZI **APPLICANT**

AND

T MOODLEY N.O **FIRST RESPONDENT**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **SECOND RESPONDENT**

INDEPENDENT ELECTORAL COMMISSION **THIRD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the Applicant seeks to review

and set aside the arbitration award issued under case number PMD070404 dated 19 August 2005. In terms of this award the First Respondent found the dismissal of the Applicant, Mr. Mkhwanazi for operational reason to be both substantively and procedurally fair and confirmed the dismissal by the Third Respondent (the IEC).

Background

[2] The IEC is a Chapter 9 institution established in 1997 in terms of the Electoral Commission Act, No 51 of 1996 for the purpose of conducting fair democratic elections in South Africa.

[3] It is common cause that the IEC‘s budget allocation for the financial year 2002/2003 was reduced from R900 million to R100 million. As a result of this reduction in the budget the IEC embarked on a restructuring and rationalization process. The outcome of this process was the dismissal of the Applicant and several other employees. The Applicant challenged his dismissal on the basis that it was unfair.

[4] During February 2001, the IEC convened a meeting of all staff members.

At this meeting according to Mr Lambani (Lambani), the Chief Director Legal Services, staff members were issued with a document detailing the restructuring process. The purpose of the meeting as set out in the notice was to table proposals and time scales for the rationalization and restructuring of the IEC.

[5] There was no representative trade union at the workplace at the time and accordingly employees were required to elect a staff representative body to represent them at various levels during the consultation with the IEC. The consultation process was facilitated by two external facilitators.

[6] Lambani further testified that because of the restructuring the Recruitment and Training division was merged with the human resources division. This resulted in 6 (six) employees having to compete for the same position.

[7] The second witness of the IEC, Ms During (During), testified that during the consultation Mr Mokoena and Taukobong represented employees who fell under the amalgamated human resources division. She further testified that an agreement was concluded between the employees' representative forum and the

IEC regarding all aspects of the restructuring.

[8] Mr Sithole, the candidate who successfully competed for the position of assistant director party training, confirmed the evidence of Mr Lambani and Ms During.

[9] It is common cause that on 7th March 2001, the Applicant signed a retrenchment agreement with the IEC. The agreement reads as follows:

"I TD Mkhwanazi, understand and accept the offer of retrenchment and the terms of such an offer as a full and final settlement between ITC (sic) and myself."

[10] The agreement was signed on the same day that the Applicant received his notice of retrenchment being 7th March 2001. In addition to the notification of the termination of his employment the Applicant was informed that he would receive the following; (a) one month's worth of his salary, (b) 15 (fifteen) days of each year completed at the IEC, (c) two weeks of every year worked at the IEC and (d) the cash value of all leave due and not taken since joining the IEC.

The grounds for review and the award

[11] The essence of the Applicant's case can be found from what was said by his representative during the opening remarks at the arbitration hearing (at page 35 line 15) when he said:

"Subsequent to his dismissal the Applicant learnt that another person, one Sithole, was occupying his position. It then became apparent to the Applicant that what the employer attempted to do was to disguise his dismissal as one of retrenchment that in fact the employer had intended dismissing the Applicant. So I am mindful of the fact that when the matter was brought before the CCMA on conciliation it seems as though the dispute was one of retrenchment and whether the retrenchment was fair. But when the information came to my attention it became clear that we were not dealing a retrenchment but rather a with an unfair dismissal."

[12] The Applicant contended that; (a) there was no basis for the conclusion by the commissioner that his dismissal was fair, (b) no consultation in terms of section 189 of the Labour Relations Act 66 of 1995 took place, and (d) the IEC misrepresented to him the true state of affairs in as far as the redundancy of his position was concerned. The Applicant contended that his position was never redundant but was given to Sithole who was less qualified than him.

[13] The Commissioner was called upon to determine whether or not the dismissal of the Applicant for operational requirement by the IEC was fair. In his award the Commissioner found that the dismissal to have been fair and that the Applicant was present at the meeting where the representative forum was elected to represent the employees during the consultation process.

[14] In rejecting the Applicant's contention that the staff representative forum did not have the mandate to represent him the Commissioner found that the Applicant was consulted in terms of section 189 of the LRA and that the agreement which the Applicant signed was the result of a consultation process.

[15] The test to be applied in reviews of decisions or the rulings of CCMA Commissioner's is whether the decision reached by the Commissioner is a decision that a reasonable decision-maker could not reach. This test was formulated by the Constitutional Court in the case of *Sidumo v Rustenburg Platinum Mines Limited* (2007) 28 ILJ 2405 (CC), and was subsequently followed by the Labour Appeal Court in the recent unreported case of *Fidelity Cash Management Services v Commission for Conciliation and Arbitration &*

Others, case number DA10/05.

[16] In the *Fidelity Cash Management Services*, the Labour Appeal Court, per Zondo JP (at paragraph [97]) held that:

"If it is an award or decision that a reasonable decision-maker could not reach, then the decision or the award of the CCMA is unreasonable and, therefore reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach."

[17] The Court further held that the test enunciated in *Sidumo* for determining whether a decision or an award is reasonable:

"… is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached."

[18] In my view the decision of the Commissioner in this case cannot be faulted for unreasonableness. The Applicant did not dispute the existence of the agreement but however contended that the IEC misrepresented the issue of his position being redundant. This however does not seem to be the case that the Applicant presented during the arbitration hearing. I have not been able to find evidence in the record showing whether or not the issue of misrepresentation was raised during the arbitration hearing. However, what can be discerned from the arbitration award, the opening remarks by the Applicant's representative and the heads of argument of both parties during the arbitration proceedings is that the Applicant did not challenge the validity of the agreement.

[19] It would seem to me that the issue of misrepresentation is raised for the first time during the review proceedings. This agreement which the Commissioner took into account in arriving at his decision was never set aside nor was it ever rescinded by any of the parties. It is therefore a binding agreement which the Commissioner correctly took into account in arriving at his decision. There is no evidence that the Applicant was unduly influenced or forced to sign the agreement. The situation of the Applicant would not have changed even if the issue of misrepresentation was raised during the arbitration proceedings because the CCMA would not have had jurisdiction to entertain such an issue.

[20] In my view, regard being had to the evidence which was presented before the Commissioner and the circumstances of this case, it cannot be said that the award of the Commissioner is one which a reasonable decision-maker could not have reached. In fact it would seem to me that the attack of the Commissioner's award by the Applicant is based more on its correctness rather than its reasonableness. In *Fidelity Cash Management case* the Court at para 99 held:

"Sidumo does not allow that a CCMA arbitration award or decision be set aside simply because the Court would not have arrived at a different decision to that of the commissioner…"

[21] It would not be fair in the circumstances of this case to allow cost to follow the result.

[22] In the premises the application is dismissed and no order as to costs is made.

MOLAHLEHI J

DATE OF HEARING : 20 SEPTEMBER 2007

DATE OF THE ORDER : 11 JANUARY 2008

DATE OF JUDGMENT: 23 JANUARY 2008

APPEARANCES

For the Applicant : Rikki Anderson of Rikki Attorneys

For the Respondent: J G Van Der Riet SC

Instructed By: Bowman Gilfillan Attorneys