IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

REPORTABLE

CASE NUMBER: C662/07

In the matter between:

ELSTON, INGRID — Applicant

and

McEWAN NO, GAIL — First Respondent

SHELL SA ENERGY (PTY) LTD — Second Respondent

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY — Third Respondent

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JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application primarily for the review, setting aside and correction of an arbitration award made by the first respondent on 23

October 2007 under case number WCCHEM3876 and under the auspices of the third respondent. In the alternative, the applicant seeks the review and setting aside of the first respondent's award and that the matter be remitted to the third respondent for *de novo* consideration.

[2] The application comes pursuant to the provisions of section 77(2) of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA") which confers on this court the jurisdiction to review "the performance or purported performance of any function provided for in this Act . . . on any grounds that are permissible in law". One of the functions for which the BCEA provides is the resolution – either by the CCMA or bargaining council and by way of arbitration – of disputes in relation to severance pay (section 41(9)). It is the award of the first respondent, sitting as arbitrator under the auspices of the third respondent, that this court is required to review in this case.

[3] The parties are agreed that this court has jurisdiction to do so pursuant to the provisions of the BCEA.

[4] The first respondent found that during the period 1 June 1997 to 31 May 2001 the applicant was not an employee of the second respondent and was therefore not entitled to additional severance pay of five years and eleven months.

[5] The applicant now seeks to have the award substituted with a finding that she was indeed an employee of the second respondent as defined in section 1 of the BCEA from 1 June 1995 to 30 April 2007 of which the period in dispute (1 June 1997 to 30 April 2001) forms part.

[6] Flowing from that finding, she seeks an order requiring the second respondent to pay her severance pay in the amount of R161 427.20 in terms of section 41(2) of the BCEA. She also seeks an order that the second respondent bears the costs of the arbitration proceedings.

[7] The second respondent opposes the application, maintaining that the applicant was not its employee during the period 1 June 1997 to 30 April 2001. It thus submits that she is not entitled to the severance pay she seeks in relation to that period.

[8] But what are the facts underpinning the first respondent's decision which the applicant seeks to have set aside?

The Undisputed Facts

[9] The following facts are not in dispute.

[10] The applicant rendered services to the third respondent as a computer trainer. She did so from 1 June 1995 until her retrenchment on 30 April 2007.

[11] Upon her retrenchment, the third respondent paid her severance pay for the period 1 May 2001 to 30 April 2007 ("the third period") calculated in terms of its retrenchment policy. She was not paid severance for the period 1 June 1995 to 31 May 1997 ("the first period") and for the period 1 June 1997 to 30 April 2001 ("the second period"). It appears that the first period was not included in the calculation of severance pay (even though the first respondent considered that the applicant was "for all intents and purposes" an employee during that period) because the second period was not considered "continuous service" for purposes of section 41(2) of the BCEA. The second period was in turn not considered for severance pay because the third respondent took the view that the applicant was not its employee during that period.

[12] During the second period the applicant rendered services to the third respondent through a close corporation of which she was one of three members. During that period she submitted invoices to the third respondent for work done; the invoices were rendered in the name of the close corporation of which she was a member; she received no paid

annual leave; she was not eligible to join the third respondent's pension fund.

[13] During that same period the applicant was required to render services to the third respondent personally and not delegate to other members of the close corporation; she received an annual bonus; she was required to comply with the third respondent's working conditions (including, presumably, working hours); she could not engage in activity that is in conflict with the third respondent's interests; she had a job title; and all intellectual property obtained in the course of rendering service to the third respondent would devolve upon the third respondent.

The Issue

[14] The issue that was in dispute between the parties at arbitration before the first respondent was whether the applicant was during the second period an employee of the third respondent. The first respondent found that she was not, and so was not entitled to severance pay including the first and second periods.

[15] The applicant disagrees and asks this court to review that decision and substitute its own decision for it to the effect that she was indeed an employee of the third respondent throughout.

Grounds of Review

[16] Before dealing with the merits of the case some preliminary observations are in order. In the heads of argument submitted on her behalf the applicant invokes the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") for her review application. Both the Constitutional Court (in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para [104] for the reasons given at paras [94] *et seq*) and the Labour Appeal Court (in *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) at para [92]) have held that PAJA does not apply in the review of awards made pursuant to statutorily compulsory arbitration processes.

[17] Nevertheless, that is in my view not fatal to the applicant's case because on a proper reading of her founding affidavit she does, albeit in higgledy-piggledy fashion, invoke a semblance of the grounds of review set out in section 145 of the Labour Relations Act, 66 of 1995 ("the LRA"). In essence, as I understand her grounds, she charges that the first respondent committed a gross irregularity. This is a ground of review in section 145(2)(a)(ii) of the LRA. The applicant then

elaborates by suggesting that the first respondent misconstrued the evidence presented to her. I disagree.

[18] It must be borne in mind that this court is required to consider whether the decision of the first respondent is one that a reasonable decision-maker could not reach (*Sidumo* at para [110]). It is not the reviewing court's task to consider whether or not the decision is correct in law. That is the function of an appeal court (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[19] Counsel for the applicant sought to urge me that the reasonableness test in *Sidumo* "and the test for reviews of commissioners' findings on unfair dismissal" cannot be relied on in this matter because this matter is not concerned with the unfairness of a dismissal but rather with a finding on a jurisdictional fact. This argument has little to commend itself. There is nothing either in section 145(2) of the LRA or in the *Sidumo* judgment that confines application of the review standard that each posits only to unfair dismissal cases. The standard in *Sidumo* is in my view clearly the overarching standard of general application to all review cases outside those falling within the purview of PAJA.

[20] Section 77(2) of the BCEA confers on this court the jurisdiction to review arbitration awards made under the third respondent's auspices

"on any grounds that are permissible in law". In my reading of the Constitutional Court's decision in *Sidumo* and that of the Labour Appeal Court in *Fidelity Cash Management Service*, the grounds permissible in law for purposes of section 77(2) of the BCEA do not include those in PAJA for the reasons given by the Constitutional Court in *Sidumo* at para [94]-[104]. The applicable grounds are thus those in section 145(2) of the LRA as "suffused by" the reasonableness standard.

[21] The Labour Appeal Court's take on the meaning of this has been articulated in *Fidelity Cash Management Service* (at para [101] thus:

> "Nothing said in *Sidumo* means that the grounds of review in s 145 of the [LRA] are obliterated. The Constitutional Court said that they are suffused by reasonableness."

and again (at para [102], 997 *in principe*):

> "*Sidumo* seeks to construe s 145 so as to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair."

[22] Thus, the section 145(2) review grounds have not, with the advent of *Sidumo*, become obsolete. The BCEA provides no review grounds of its own.

[23] I am satisfied that the first respondent's award is unassailable on the grounds in section 145(2) of the LRA as "suffused by" the *Sidumo* constitutional standard.

[24] For purposes of this judgment and on the facts of this case it is not even necessary to go as far as the Labour Appeal Court went in *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) when it said at para [102]:

> "It seems to me that, even if there may have been a debate under *Carephone* and prior to *Sidumo* on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or

her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

[25] The reasons given by the first respondent are in themselves compelling for the conclusion at which she arrived. It is thus not necessary to trawl the record for other "better" reasons on which she might have relied but did not. Clearly, when the applicant interposed the close corporation between herself and the third respondent for purposes of rendering the service that she did, she could not possibly thenceforth have been an employee within the meaning of the BCEA. Therein, too, lies the distinction between her circumstances on the one hand, and those of Ms Hendricks on the other (who, having initially been a contract worker and later a permanent employee, was paid severance that covered her entire stay at the third respondent, including that during which she had been a contract worker). It matters not, in my view, that the applicant effectively became a member of the Shell community by reason, among other things, of the working conditions that apply to other employees being applicable to her.

[26] In my view, on whatever test (whether "reality" test or "dominant impression" test) the applicant was not an employee on the evidence advanced before the first respondent.

[27] The applicant also charges that the first respondent exceeded her powers. Again, this is a ground in section 145(2)(a)(iii) of the LRA. But the applicant does not explain in what respects the first respondent has "exceeded her powers".

[28] She says "there is no rational objective basis justifying the connection made by the first respondent between the material properly available to her and the conclusion he or she eventually arrived at". This is really no more than a regurgitation of the "rationality test" as formulated by the labour courts in numerous cases. I could find nothing irrational about the first respondent's conclusion on the evidence presented to her. Even if I disagreed with the first respondent on certain aspects of her decision as regards considerations of law (and I express no view in that regard as it is not my place to do so on review) it cannot reasonably be said in my view that her conclusion is (as the applicant charges) not rationally connected to the material properly made available to her or (on the constitutional standard ushered in by *Sidumo*) unreasonable.

[29] The Labour Appeal Court is with respect correct when it says (in *Fidelity Cash Management Service* at para [100]):

> "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner 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 objectives of the [LRA] 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."

[30] On this standard, and with the primary objective of the LRA's effective dispute resolution scheme, I can find no basis on which to interfere with the first respondent's award.

Finding

[31] In the result, the application is dismissed with costs.

[32] In argument, counsel for the applicant sought costs both of this application and in the arbitration. The application has been unsuccessful and so the applicant cannot be awarded costs of the arbitration. Neither party argued that the costs of the arbitration had, by agreement, stood over for determination in this court, or that they would be costs in this application. In any event, it is in my view undesirable to award costs of arbitration in the circumstances of this case as that may tend to send the wrong message to individuals who may be minded to refer disputes to

their council or the CCMA for arbitration. In the circumstances, I cannot make an order in relation to the arbitration.

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Ngalwana AJ

Appearances

For the applicant:	*Mr P Kantor*
Instructed by:	*Craig Schneider Associates*
For the 2nd respondent:	*Mr G Elliott*
Instructed by:	*Maserumule Inc*
Date of hearing:	*29 October 2008*
Date of judgment:	*09 January 2009*