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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1588/19

In the matter between:

SERSHAN THEEYAAGARAJ NAIDOO

Applicant

and

NATIONAL LOTTERIES COMMISSION

First Respondent

COMMISSIONER LAWRENCE NOWOZENETZ

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION COMMISSIONER**

Third Respondent

Heard: 27 January 2021 (via Zoom)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 08 April 2021.

Summary: Review of award that CCMA lacks jurisdiction – *de novo* determination of a jurisdictional issue – dismissal is termination of employment in terms of section 186(1)(a) of the LRA – CCMA has jurisdiction to entertain dispute concerning alleged repudiation of a contract of employment.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] In this review application, the applicant, Mr Sershan Theeyaagaraj Naidoo (Mr Naidoo), impugns the arbitration award issued by the second respondent (Commissioner), under the auspices of the third respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) under case number GATW305-18, dated 13 June 2019. The Commissioner found that Mr Naidoo was not dismissed due to the fact that he refused to sign the contract of employment. The essence of the Commissioner's finding is that there was no employment relationship between the parties.
- [2] Mr Naidoo impugns the award mainly on the ground that the Commissioner misconstrued the nature of the enquiry and consequently rendered an incorrect outcome. The first respondent, the National Lotteries Commission (NLC) is the only respondent defending the award.

Pertinent facts

- [3] The facts in this matter are essentially common cause. Mr Naidoo was in the employ of the NLC since 1999 and held various permanent positions. In 2016, the NLC embarked on a restructuring process and, consequently, Mr Naidoo was placed into a newly created position of Senior Specialist: Publicity and Media but retained his remuneration package of R1 287 191.00 per annum.
- [4] Thereafter, Mr Naidoo successfully applied for a vacancy to be member of the Arts, Culture and Natural Heritage Distribution Agency (Agency) advertised by the Department of Trade and Industry (DTI). On 25 November 2016, Mr Naidoo received the appointment letter signed by the then Minister for the DTI, Mr Rob Davies, which he signed in acceptance of the offer employment on 5 December 2016. It is apparent from the letter of appointment that he was appointed for a non-renewable five year fixed term period. and that the terms and conditions of

his employment were subject to the policies, rules and regulations of the NLC. It was also expected that he would sign an employment contract with the NLC.

- [5] The NLC confirmed Mr Naidoo's appointment and presented him with a contract of employment dated 01 December 2016 duly signed by the Commissioner of the NLT, Mrs Thabang Mampane (Mrs Mampane), on 05 December 2016. The annual cost to company remuneration package was detailed as R1 022 249.00. Mr Naidoo took issue with the offered remuneration package because it was less than what he was earning in his previous position and contrary to what he contends was an assurance given to retain his remuneration package. Mr Naidoo was adamant that his move from the NLC to the Agency was informed by the discussions he had with Ms Modjadji Makoela (Ms Makoela), the NLC's erstwhile Executive: Corporate Services, during restructuring. As a result, he refused to sign the contract of employment until his previous remuneration is reinstated.
- [6] Mr Naidoo raised his discontentment with Mrs Mampane and Ms Makoela. He was informed that the remuneration and the benefits pertaining to the new position would be discussed later. Whilst the issue of the remuneration package was yet to be finalised, Mr Naidoo commenced his duties as the member of the Agency with effect from 01 December 2016.
- [7] Mr Naidoo was not the only member of the Agency that was disputing the remuneration package that had been offered by the NLC. Ms Marjorie Letoaba (Ms Letoaba) was appointed on the same terms and conditions as Mr Naidoo. They jointly raised their concerns with the Chairperson of the Board of the NLC, Professor Nevhutanda, in a memorandum dated 06 January 2017. Professor Nevhutanda met with the two complainants and he promised that a labour expert would be sourced to deal with their concerns.
- [8] In April 2017, Mr Naidoo received a salary adjustment which increased his salary to R1 312 567.00. However, it was of less comfort to Mr Naidoo as it was communicated to him as an inflation related increase that applied to all the members of the Agency. On 08 August 2017, the NLC informed him that there would be no further salary review at that time.

[9] In October 2017, Mr Naidoo was once more presented with a copy of a fixed term contract but the remuneration package was still not adjusted to be in line with his previous remuneration package. His response was that he had no problem with signing the fixed term contract but the issues regarding his remuneration and benefits had to be rectified to be in line with the assurances that he had been given. Yet again he sought the intervention of Professor Nevhutanda, who in turn undertook to refer the issue to the HR Committee of the NLC Board.

[10] On 05 December 2017, Mr Naidoo was given an ultimatum to sign the fixed term contract by 08 December 2017. It would seem that Ms Letoaba was also put to the same terms and she ultimately signed her fixed term contract of employment on -8 December 2017. Mr Naidoo, on the other hand, refused to sign his fixed term contract of employment since he was still disputing the remuneration package. On 11 December 2017, he was handed a letter stating that:

'You have refused the terms that are crucial in regulating the employment relationship between you and the NLC;

In essence, you are declining the offer of employment made to you by the commission;

The commission therefore notes your refusal to sign an employment agreement on the terms as presented to you and therefore formally accepts your repudiation of the relationship with the commission.'¹

[11] Thereafter, Mr Naidoo was escorted out of the NLC's premises by security. He received his final remuneration on 15 December 2017.

[12] Displeased with the termination of his contract of employment, Mr Naidoo referred a dispute to the CCMA, challenging the fairness of his dismissal. The matter was duly arbitrated, following a failed conciliation, resulting in the impugned award.

¹ See Record page 115.

The arbitration

[13] The principal issue for determination as surmised by the Commissioner was whether Mr Naidoo was dismissed and if so, whether it was unfair. The Commissioner found as follows:²

[13] The employment status of the Applicant absent a formal employment agreement was ambiguous. He worked in his new position from December 2016 to December 2017 and was remunerated according to the new salary. In the absence of a written or verbal agreement, the salary and benefits in the employment relationship were not finalised nor agreed upon. Such a situation is antithetical to common law agreement of employment since an essential element is a fixed or readily ascertainable remuneration. *De Jar v Sisana* 1930 AD 71. During this period, he was paid the new rate remuneration which he accepted but certainly under protest as evidenced by his extensive effort to resolve this issue.

[14] The most that can be inferred from the conduct of the parties regarding his contractual status during the period in question is that they both contemplated that a written employment agreement was necessary. This was foreshadowed by the letter dated 1 December 2016. The period preceding the signing of the contract was thus a temporary employment arrangement. This does not fit neatly into our labour law. It can perhaps be seen as temporary or even a fixed term employment until the occurrence of the resolutive condition being the signing of a 5 year fixed term contract. The problem with this arrangement is that a resolutive condition or specified event should have an ascertainable timeline. In the absence of a stipulated period, in my view, it [is] for the arbitrator or judicial officer to evaluate what was a reasonable time under the circumstances. If no agreement is reached, then the legal consequence of that will be simply the same as the usual rule of contract law where there is no consensus ad idem. There is no employment contract at all.

[15] it is not necessary to speculate about a reasonable time to conclude the employment agreement in this case. It is not disputed that the

² See Arbitration award, pleadings bundle, page 25, paras 13-17.

parties frequently engaged each other to reach consensus on the Applicant's salary. Nor it is disputed that eventually Ms Moloko gave the Applicant an ultimatum to sign the fixed term contract by 8 December 2017. The Applicant failed to do so. Thus that was the resolute date.

[16] ...the letter dated 11 December 2017 which terminated the employment relationship relied on reputation by Applicant. The Respondent contended this was not a dismissal.

[17] Repudiation is a principle in contract law where it usually arises as an anticipatory breach of as a breach going to root of the contract. It also applies in employment law. A requirement is that there must be an intention of a party allegedly repudiating to no longer be bound by the contract... There is no basis whatsoever for finding that Applicant no longer intended to be bound by the employment relationship. He merely challenged the contractual terms. However, the Respondents submission that there was no dismissal survives on different grounds. There was there was simply a failure to enter into a contract of employment by the stipulated date on 08 December 2017 and that triggered the termination of the temporary agreement or the effluxion of the fixed period of employment between the parties.' (Emphasis added)

Review test

[14] It is well accepted that in the arbitration proceedings concerning an unfair dismissal dispute, the employee must establish the existence of the dismissal if this is placed in dispute; an enquiry that pertains to the jurisdiction. In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Association Union & Another*,³ the LAC aptly made the following observation, albeit in relation to a dismissal in terms of s 186(1)(b) of the Labour Relations Act⁴ (LRA):

³ (2008) 29 ILJ 2218 (LAC) at paras 39-41; see also *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* (2014) 35 ILJ 3360 (LAC) at para 19; *Gold One Ltd v Madalani & Others* (2020) 41 ILJ 2832 (LC) at paras 21-23.

⁴ Act 66 of 1995, as amended.

- [39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
- [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. ...
- [41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.'
(Emphasis added)
- [15] Since the issue to be considered on review is about the jurisdiction of the CCMA, the test is not the reasonableness but correctness of the outcome. The enquiry on the jurisdictional an issue is undertaken on *de novo* basis by the Labour Court.⁵
- [16] In the present matter, it is obvious from the award that the Commissioner was alive to the fact the enquire he had to undertake was two pronged Firstly, whether there was a dismissal and the onus of proving same rested upon Mr Naidoo.⁶ Secondly, whether Mr Naidoo repudiated the contract of employment; and if so whether the circumstances justified a termination of employment, in this regard the onus rested upon the NLC to prove that the dismissal was fair.⁷

⁵ Ibid; see also *Madondo v Safety and Security Sectoral Bargaining Council and Others* [2015] JOL 32795 (LC) at para 48.

⁶ See section 192 (1) of the LRA.

⁷ See section 192 (2) of the LRA.

Whether Mr Naidoo was dismissed?

- [17] The answer to the question whether the CCMA has jurisdiction to conciliate and arbitrate the dispute depends on whether there was a dismissal. Section 186(1)(a) of the LRA defines a dismissal, inter alia, to mean 'an employer has terminated employment with or without notice'. Whilst section 191 of the LRA provides that if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute for conciliation and arbitration to the Commission, if no council has jurisdiction.
- [18] For the reason not apparent in the award and not supported by evidence, the Commissioner inferred that there was a resolutive condition between the parties. The Commissioner's conclusion stems not from him having found that Mr Naidoo failed to discharged the onus resting upon him of proving that he had been dismissed. Instead, he held that there was never an employment contract because of Mr Naidoo's non-compliance with resolutive condition. This finding is obviously incorrect for the following reasons:
- 18.1. Firstly, it is common cause that Mr Naidoo had signed the offer of employment and commenced in his new position despite the contestation over his remuneration.
 - 18.2. Secondly, rather surprisingly, the Commissioner approached the matter on the assumption that there was a resolutive condition agreed between the parties or that the NLC's had invoked a resolutive condition to terminated Mr Naidoo's contract employment.
- [19] Mr Naidoo correctly submitted that it was not for the Commissioner to second guess the intention of the parties and to create contractual terms that never existed in circumstances where the parties themselves were quite clear on the fact that Mr Naidoo had been employed as a member of the Agency. Obviously, the Commissioner's finding that the parties were bound by the purported resolutive condition is untenable as it is based on conjecture and not fact.
- [20] As far as I am concerned, the NLC is opportunistic in defending the Commissioner's finding that 'there was simply a failure to enter into a contract of employment by the stipulated date on 08 December 2017 and that triggered

the termination of the temporary agreement or the effluxion of the fixed period of employment between the parties'. It was never its case at arbitration that it had invoked the purported resolutive condition.

[21] Underpinning the Commissioner's finding is evidently a misconception of the applicable legal principles. There is no requirement in law that the dismissal of an employee must be preceded by a formal contract of employment. Conversely, section 186(1)(a) defines dismissal as a 'termination of employment' with or without notice. This definition is obviously wide enough to cover an instance where the employer had accepted the repudiation of a contract of employment by the employee and terminated the contract, as exemplified in this present instance.⁸

[22] I, accordingly, find that Mr Naidoo was dismissed and as such the Commissioner wrongly disrobed the CCMA of the jurisdiction to deal with the matter. On this ground alone, the award stands to be reviewed and set aside.

Whether Mr Naidoo repudiated of contract?

[23] The Commissioner rejected the NLC's defence that Mr Naidoo repudiated the contract of employment. He conclusively found that there was no basis at all for finding that Mr Naidoo no longer intended to be bound by the employment relationship as he merely challenged the terms of his fixed term contract of employment.

[24] Ms Khau Moloko (Ms Moloko), the NLC's Senior Manager HR, conceded that she could not dispute Mr Naidoo's evidence that Ms Makoela had assured him that his remuneration would not be affected by his appointment as a member of the Agency. In addition, it is apparent from the record that even at the time of Mr Naidoo's dismissal, his complaint had been given attention by Professor Nevhutanda who duly referred it to the HR Committee of the board of the NLC.

⁸ See the minority decision of the LAC in *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* [2013] 4 BLLR 362 (LAC) (*Solidarity I*) at paras 40-41. This decision was upheld at appeal, see *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* [2014] 8 BLLR 727 (SCA); 2014 (5) SA 59 (SCA) (*Solidarity II*). See also *NUM v CCMA* [2009] 8 BLLR 777 (LC) at para 11.

- [25] The finding of the Commissioner in this regard cannot be faulted and, in the absence of a cross review, must stand.
- [26] What follows from the finding that there was no repudiation of the contract of employment is that, in dismissing Mr Naidoo, the NLC was ill-advised and wrongly deduced that it was entitled to dispense with the requirements for a fair dismissal enacted by the LRA.⁹ It did so despite being advised by Ms Moloko to follow an option of a disciplinary route as, in her view, Mr Naidoo was insubordinate.
- [27] After a careful perusal of the record and in the light of the findings I have arrived at above, I am convinced that the dismissal of Mr Naidoo was substantively and procedurally unfair.
- [28] That takes me to the issue of the relief. There is no reason why Mr Naidoo should not be afforded the primary remedy of reinstatement in the circumstances. Ms Moloko's evidence that reinstatement would be difficult because Mr Naidoo had abused administrative staff during the course of challenging his remuneration falls to be rejected as this version was never put to Mr Naidoo. Given the egregious conduct of the NLC towards Mr Naidoo, I am satisfied that reinstatement with full back pay is just and equitable.

Costs

- [29] As a rule, costs do not follow the result in this Court in line with the requirements of the law and fairness. However, in this present instance, the NLC's opposition is flagrantly disingenuous as well as cynical.
- [30] I, accordingly, make the following order:

Order

1. The arbitration award under case number GATW305-18, dated 13 June 2019 is reviewed and set aside and substituted with the following order:

⁹ See *Solidarity I supra* at para 41.

- 1.1 It is declared that the CCMA has jurisdiction to determine the unfair dismissal dispute referred to it by Mr Naidoo.
 - 1.2 The dismissal Mr Naidoo is procedurally and substantively unfair.
 - 1.3 The NLC shall reinstate Mr Naidoo in his position as the Member of the Agency retrospectively with full back pay effective immediately.
2. The NLC shall pay Mr Naidoo's costs.



P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

LABOUR COURT