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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 790/22

LABOUR COURT

In the matter between:

AMINTO PRECAST AND CIVIL ENGINEERING CC **Applicant**

and

THE CCMA **First Respondent**

MAPUTLE MOHLALA N. O **Second Respondent**

CUKELO JOHNSON MQOKOLO **Third Respondent**

Heard: **16 March 2023**

Delivered: **17 March 2023**

Summary: Is a lay-off a suspension or not? When does a suspension happen and when does a layoff happen? An unfair labour practice is confined to conduct outlined and defined in section 186 (2) of the Labour Relations Act, 1995 (LRA). A lay-off is not considered to amount to an unfair labour practice. Section 191 (5) (a) (iv) of the LRA empowers the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate disputes concerning an unfair labour practice as defined. Where the conduct does not amount to an unfair labour practice as defined, the CCMA lacks jurisdiction to arbitrate such

conduct that may have arisen between an employer and an employee. An arbitration award issued without the necessary jurisdictional powers is a nullity and ought to be set aside as such. Held: (1) The arbitration award is reviewed and set aside. (2) It is replaced with an order that the applicant did not commit an unfair labour practice. (3) There is no order as to costs

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JUDGMENT

MOSHOANA, J

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Introduction

[1] This is an unopposed application seeking to review and set aside an arbitration award issued by Commissioner Maputle Mohlala (Mohlala) in terms of which he found that the applicant, Aminto Precast and Civil Engineering CC (Aminto) has committed an unfair labour practice against Mr. Cukelo Johnson Mqokolo (Mqokolo). He ordered Aminto to reinstate Mqokolo into his position on the same salary and benefits as they applied at the date of his “dismissal” [suspension] and backpay him some money. Aminto was displeased and launched the present application. The application stands unopposed. I must mention that on the set down date, Mqokolo made an appearance. He filed no opposing papers. Having openly in Court discussed the matter with counsel for Aminto, this Court took an approach that saw Mqokolo being allowed to say his say even if he had not filed any opposing papers. This approach was actuated by expediency. Had this Court postponed the review application to the opposed roll, no purpose would have been served, since in a review application what matters, in my view, is what served before a commissioner not what the parties may wish to say *ex post facto*.

[2] A further engrossing reason for this particular review application is that it turned largely on the law than facts. Had this Court removed the application to the opposed roll, the same application would return only dressed up with a

regurgitation of facts apparent from the transcript. The consequences of course are dire, because another judicial resource would be dispatched to re-read the transcript, in the circumstances where this Court was in a position to deliver justice expeditiously. In my view, what makes a review application is the grounds and the record of the proceedings to be reviewed and set aside. The rest are panoplies that serves no important purpose.

Background facts

[3] Mqokolo was employed by Aminto as a driver of heavy-duty vehicles. With the advent of Covid-19, Aminto like many other businesses faced a severe slump during the regulated lock-down period. As a result, Aminto had no work for Mqokolo during that period. Due to the prevailing situation, Mqokolo became a candidate for dismissal due to the operational requirements of Aminto. Mqokolo was engaged and it was decided that instead of dismissing him for operational requirements, he be laid-off for a short duration. Mqokolo disputes any discussion having been held with him. On his version, on 11 November 2021, he was still active with his driving functions. It is unnecessary in the present application to attempt any resolution of that dispute of facts.

[4] Resultantly Mqokolo was given a written notice of lay-off effective 12 November 2021. The lay-off was to be reviewed in January-February 2022. Aggrieved thereby, Mqokolo initially referred a dispute alleging an unfair dismissal. Later the dispute was changed to one of unfair labour practice relating to suspension. Ultimately, the alleged unfair labour practice was arbitrated by Mohlala, who concluded that the lay-off of Mqokolo amounted to his suspension within the contemplation of section 186 (2) (b) of the Labour Relations Act[1] (LRA). As indicated above, Mohlala afforded Mqokolo a relief outlined above. Aminto is aggrieved hence the present application.

Grounds of review

[1] No. 66 of 1995, as amended.

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[5] Aminto alleges that Mohlala committed a material error of law in that the suspension contemplated in section 186 (2) (b) of the LRA is one limited to disciplinary measures. Additionally, Aminto alleges that Mohlala lacked jurisdiction over the matter since there was no suspension within the contemplation of section 186 (2) (b) of the LRA.

<u>Evaluation</u>

[6] Like a dismissal, the existence of a suspension within the contemplation of the LRA agitates the question of jurisdiction. In the absence of a suspension contemplated in the LRA, the Commission for Conciliation, Mediation and Arbitration (CCMA) lacks the necessary jurisdictional power. The test for jurisdictional review is one of correctness as opposed to reasonableness. Similarly, a party alleging an error of law may attack the arbitration award on correctness or reasonableness grounds. The LRA does not define the word suspension, an unfortunate situation in my view. It only defines what a dismissal is. Therefore, the word suspension must be given its ordinary grammatical meaning. Grammatically suspension means a temporary cessation or prevention. In an employment context, a suspension must mean temporary cessation of work or prevention from performing work. When an employee is placed on a suspension, such an employee would be without work for the duration of the suspension.

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[7] The term lay-off grammatically means discontinue; discharge (an employee) permanently or temporarily, especially owing to shortage of work. Indeed, there are some similarities between a suspension and a lay-off. In both, an employee becomes without work for a duration. However, what sets a lay-off apart is that it only happens in situations where there is a shortage of work. A suspension happens even in instances where there is no shortage of work.

[8] In an employment context, shortage of work serves as a basis to dismiss an employee due to operational reasons. Differently put, an employee faced with work shortage has a fair reason to dismiss an employee affected by the work

shortage (section 188 (1) (a) (ii) read with section 213 of the LRA defining operational requirements). Section 189 of the LRA compels an employer to consider alternatives before a dismissal for operational reasons is proposed. There are a number of alternatives that an employer may consider. One of the alternatives is that of a lay-off. In *casu*, the notice given to Mqokolo dated 8 November 2021 read as follows:

"**NOTICE OF UNPAID LAY_OFF DUE TO NO WORK BEING AVAILABLE**

With reference to my earlier discussion with you, please take note of the following developments:

1. As discussed with you, the demand for the service and products of the company has declined quite severely. This situation has already resulted in you not being gainfully employed for a considerable period of time. The situation cannot continue.
2. Based on the aforegoing, coupled to the difficult economic situation that prevails in the country, we have no option but to lay you off without pay with effect from 12 November 2021. It is envisaged that this will be at least until January 2022.
3. To assist you financially, you will be allowed to take whatever paid holiday leave is due to you so that you do have at least some income for the period of lay-off.
4. You will be required to provide contact details where you can be reached at short notice in the event your services are needed.
5. The position shall be reviewed in January 2022 and we trust that the situation would have improved by then.

Management regrets that this situation has arisen through no fault of its own."

[9] Regard being had to the above notice it is perspicuous that Mqokolo was not suspended but was laid off. Section 186 (2) (b) makes reference to the unfair suspension. As already expressed, it is unfortunate, in my view, that the legislature found it imperative not to define the term suspension, let alone an unfair one. This unfortunate situation led to authors[2] arguing that a suspension

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may be of two kinds. They say an employee may be suspended as a holding operation pending a disciplinary hearing or may be suspended as a disciplinary sanction[3]. To my mind this two forms punted for by the authors is not contemplated by the legislature, in particular the second form.

[10] In the same subsection the legislature refers to "*or any other unfair disciplinary action short of dismissal in respect of an employee*". A suspension imposed as a disciplinary action is a disciplinary action short of dismissal. That being the case, it shall be tautologous, in my view, for the legislature to use the phrase "*unfair suspension*" together with "*any other unfair disciplinary action*". Particularly where the word "*or*" is employed. The word 'or' is used to link alternatives and it can be used to introduce a synonym or explanation of a preceding word or phrase. It cannot be correct, in my view, to suggest that the phrase *any other unfair disciplinary action* seeks to explain the phrase *unfair suspension*. Amongst disciplinary actions short of dismissal lay, to my mind, demotion, transfer, warnings, lay-off, docking of a salary, depriving one of increment, bonuses, denial of breaks and many other work benefits. As long as those are effected in the stead of being dismissed.

[11] Nevertheless, this Court takes a view that even if the two forms as suggested by the authors are justified, it is clear that what happened to Mqokolo, although a holding operation, by character and nature, was not pending a disciplinary hearing or was effected as a disciplinary sanction. Based on what the authors say is a suspension contemplated in section 186 (2) (b), it must be so that a suspension has not happened to Mqokolo.

[12] Even if this Court were to adopt the grammatical meanings of the words suspension and lay-off, what will emerge is that what happened to Mqokolo happened because there was a shortage of work. As indicated earlier, a suspension may occur even in an instance where there is enough work.

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[2] Du toit *et al*: *Labour Relations law, A Comprehensive Guide* 6th edition at 565.

[3] This approach received an imprimatur from the LAC in its judgment of *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) para 44.

Ordinarily, suspensions are used in a situation of discipline[4], whilst lay-offs are used in a situation of operational requirements[5]. In this matter, it is apparent that Mohlala confused the distinction between suspension and lay-off. To his mind, a lay-off amounts to a suspension as contemplated in section 186 (2) (b) of the LRA. This is a clear error of law because that is a wrong reading of the section. This error of law is material enough to distort the outcome of the arbitration award. An error of law can be impugned by a correctness test as well as a reasonableness test. A decision based on an error of law is not one that a reasonable decision maker may reach. Equally a decision predicated on an error of law cannot be correct nor lawful. For this reason, the arbitration award of Mohlala cannot pass the constitutional muster and is reviewable in law.

[13] A further string to the bow is that where there is no suspension within the contemplation of section 186 (2) (b) of the LRA, the CCMA lacks statutory powers to arbitrate. On the objective facts, Mqokolo was not suspended within the contemplation of section 186 (2) of the LRA. The phrase unfair labour practice has been afforded a statutory meaning. In this regard, it means any unfair act or omission that arises between an employer and an employee involving the following (a) promotion; (b) demotion; (c) probation; (d) training; (e) provision of benefits; (f) unfair suspension; (g) unfair disciplinary action short of dismissal; (h) failure to reinstate or re-employ in terms of any agreement; and (i) occupational detriment other than dismissal. Accordingly, the above constitutes a closed list of what the section considers to be acts or conducts amounting to an unfair labour practice.

[14] A number of actions or omissions that may arise between an employer and an employee did not make the guest list. What immediately comes to mind is an internal transfer and a lay-off that does not occur as a form of sanction. The LRA is predicated on the primacy of collective bargaining. The rest of the

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[4] Often referred to as precautionary suspension.

[5] As alternatives to proposing dismissal based on operational requirements.

actions may be regulated through the process of collective bargaining. In countries like Canada, lay-offs are statutorily regulated[6]. Although there may be a justifiable and arguable case to include lay-offs in the guest list, as the law stands now, lay-offs in general terms did not make the guest list. It may be argued, successfully so, in my view, that a lay-off fits a definition of an occupational detriment in terms of section 1 of the Protected Disclosures Act (PDA)[7]. In terms of section 1 (e) of the PDA, being subjected to a term or condition of employment or retirement which is altered or kept altered to an employee's disadvantage amounts to an occupational detriment. A lay-off ordinarily leads to an alteration of a term and condition of employment. However, in that context, for it to amount to an unfair labour practice as defined, it must have been effected on account of an employee having made a protected disclosure. That situation does not arise in this matter.

[15] The power to arbitrate disputes arise in section 191 of the LRA. In terms of section 191 (5) (a) (iv) of the LRA, an unresolved dispute concerning an unfair labour practice may be referred to arbitration for resolution. Accordingly, if the dispute does not concern an unfair labour practice as defined; the power in section 191 cannot be invoked. Where a commissioner invokes section 191 powers on a dispute that does not concern an unfair labour practice, a decision that may arise is a *brutum fulmen*. It is a nullity and unenforceable in law. Applying the principle of legality, such a decision may be reviewed and set aside on that basis alone. The fact that Mohlala assumed jurisdiction where one does not exist, such is a decision of convenience and it is not binding on this Court. On the objective facts, particularly the notice dated 8 November 2021, it cannot be said that Mqokolo was suspended within the meaning and contemplation of section 186 (2) (b) of the LRA. Therefore, the conclusion that the CCMA had the necessary jurisdiction to arbitrate the dispute presented by Mqokolo is wrong and it is reviewable in law.

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[6] See: section 54 of the *Labour Relations Code* as well as *Tolko Industries Ltd v USPFRMEAISWIUL (Union)* (*Tolko*) 2020 BCLRB 57 (CanLII).

[7] Act 26 of 2000 as amended.

[16] As I conclude, the arbitration award of Mohlala is reviewable on two fronts. Firstly, he committed a material error of law by incorporating a lay-off in section 186 (2) (b) of the LRA. Such an undue expansion of the section was not warranted[8]. Such an error of law has the effect of distorting the outcome he reached. Secondly, not faced with a dispute concerning an unfair labour practice, Mohlala did not have jurisdictional powers to arbitrate the dispute. Having done so nevertheless, when on the objective facts, he was devoid of such jurisdictional powers, his decision is a nullity in law.

[17] Having said that, this Court do wish to, *en passant* state that, there may be a need for the legislature to expand the meaning of an unfair labour practice to include a lay-off that is not disciplinary in nature. In my view, had the legislature not included the word *involving* in section 186 (2), a room may exist to plug-in a non-disciplinary lay-off. A lay-off may be an unfair act that arise between an employer and an employee. The word *involving* grammatically means have or include something as a necessary or integral part or result. Regard being had to the usage of the word; it follows axiomatically that lay-offs are not a necessary or integral part of the unfair labour practice regime[9].

[18] This Court does accept that employers and employees may conclude a collective agreement that regulates lay-offs and the implementation thereof. However, the satisfactory position which may give full protection to the right to fair labour practices within the contemplation of section 23 of the Constitution, is where the meaning in section 186 (2) is expanded. Otherwise, a provision similar to section 54 of the Canadian *Labour Relations Code* may be useful. The section establishes a distinct duty to give notice and consult in three instances; namely (i) it applies when an employer introduces or intends to

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[8] See *Department of Internal Relations and Cooperation v Laubscher* [2023] 1 BLLR 1 (LAC).

[9] See comments by Commissioner Grogan in an arbitration matter of *Sonka v Johnny Bags (Pty) Ltd* [2001] 10 BALR (CCMA), where he opined that a lay-off may amount to a consensual termination or dismissal. This Court expresses no view with regard to the opinion held by Grogan. It suffices to mention that a dismissal is defined in the LRA and a lay-off, as grammatically defined, is devoid of the hallmarks of a dismissal as defined in the LRA.

introduce a change that affects the terms, conditions or security of employment; (ii) it requires an employer to give a trade union at least 60 days before it implements the change; and (iii) once notice is given, an employer and trade union must meet, in *good faith*, and endeavor to develop an adjustment plan to mitigate the effects of the change[10].

[19] I have no doubt in my mind that a lay-off does introduce a change that affects terms and conditions of employment as well as employment security. An employee who is laid off loses remuneration and or emoluments during the tenure of a lay-off. In our law, as it presently stands, an employer may not change the terms and conditions of employment unilaterally[11]. However, a unilateral change of terms and conditions of employment does not amount to an unfair labour practice. It is regulated differently in the LRA (section 64 (4) of the LRA). It is a matter that effectively falls under power play (strikes and lockouts). Although the lay-off in *casu* happened for what appears to be justifiable reasons – it was aimed at avoiding a dismissal for operational requirements, it does seem that the consultation and the proper selection was either not done or was done unfairly.

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[20] It is by now rested law that an employer is entitled to dismiss an employee for operational reasons if an employee refuses to accept a change of the terms and conditions of employment aimed at avoiding a retrenchment[12].

Conclusions

[21] For all the reasons set out above, this Court arrives at a conclusion that the award issued by Mohlala is unjustifiable in law and a nullity. It is wrong and incapable of justification when regard is had to the objective facts that obtain in the present dispute. Accordingly, the arbitration award falls to be reviewed and set aside. At the end of argument, this Court enquired as to the state of play between Mqokolo and Aminto, at this point in time. Aminto's counsel

[10] See: *Tolko* (Ibid) at para 30-33.
[11] See: *SAMRI v Toyota of South Africa Motors (Pty) Ltd* (1997) 18 ILJ 374 (LC).
[12] See: *NUMSA and Others v Aveng Trident Steel and Another* (2021) 42 ILJ 67 (CC).

advised the Court that parties are in search of a lasting solution. Parties are encouraged to do so, because another dispute is capable of mushrooming in the no distance future.

[22] In the result the following order is made:

Order

1. The arbitration award issued by Commissioner Maputle Mohlala dated 15 March 2022, issued under case number GATW14433-21 under the auspices of the CCMA is hereby reviewed and set aside.
2. It is replaced with an order that Aminto Precast and Civil Engineering CC has not committed an unfair labour practice against Cukelo Johnson Mqokolo.
3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. D J Groenewald

Instructed by: Serfontein, Viljoen and Swart, Pretoria

For the 3rd Respondent: In Person.