DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

22/3/23
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1262/2022

In the matter between:

BLUE HAWK TACTICAL (PTY) LTD **Applicant**

and

COMMISSIONER RICHARD BYRNE N.O **First Respondent**

THE CCMA **Second Respondent**

INNOCENT SITHOLE **Third Respondent**

Heard: 16 March 2023

Delivered: 22 March 2023

Summary: Unopposed review application. Where it becomes apparent that the CCMA lacks jurisdiction, it is the duty of a commissioner to call upon the referring party to establish jurisdiction. On the objective facts, the employee was not dismissed instead his fixed term contract of employment came to an end. Since the employee was not dismissed, the CCMA lacked the necessary jurisdiction and the arbitration award is a nullity.

Where a Commissioner interprets and invoke the provisions of section 198B of the LRA absent a referral in terms of section 198D, such a commissioner acts

ultra vires **and his award is reviewable in law. Held: (1) The arbitration award is reviewed and set aside. (2) The employee was not dismissed and the CCMA lacked jurisdiction over the dispute. (3) There is no order as to costs.**

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application seeking to review and set aside an arbitration award issued by Commissioner Richard Byrne (Byrne) in terms of which it was found that the dismissal of Innocent Sithole (Sithole) was substantively unfair. He ordered the applicant, Blue Hawk Tactical (Pty) Ltd (Tactical) to compensate Sithole.

Background facts

[2] Sithole was employed on fixed term contracts, which were renewed on three occasions. Prior to the expiry of the third fixed term contract, Sithole was subjected to a disciplinary process on allegations of misconduct. Owing to the fact that his fixed term contract was due to expire, on 9 March 2022, Sithole was notified that his contract would not be renewed. At the end of March 2022, his fixed term contract expired. On 14 March 2022, Sithole referred a dispute to the CCMA and alleged an unfair dismissal on allegations of misconduct – failed a polygraph test.

[3] Conciliation failed to resolve the referred dispute. At the request of Sithole, the referred dispute was referred to arbitration for resolution. The CCMA appointed

Byrne to resolve the referred dispute through arbitration. As indicated above, he resolved the dispute in favour of Sithole. Tactical was aggrieved thereby and launched the present application. The application remained unopposed and was enrolled on the unopposed roll. On the set down date, Sithole made an appearance. Although he did not file any opposing papers, this Court for practical reasons allowed Sithole to make whatever submissions in support of the impugned arbitration award. This the Court did in order to avoid postponing the application to the opposed roll, in the circumstances where the same grounds and the same record will feature before one of my colleagues or myself two years later, in the circumstances where this labour dispute may be put to bed effectively, swiftly and without much further ado.

Grounds of review

[4] Although Tactical was unnecessarily expansive in the founding papers, in essence it impugns the arbitration award on two fronts; namely (a) Sithole was not dismissed, thus the CCMA lacked jurisdiction; and (b) the dispute referred did not fall under section 198B of the LRA, thus the Commissioner acted *ultra vires.*

Evaluation

[5] Section 191 (5) (a) of the LRA provides that if it is certified that the dispute remains unresolved, the Commission, in this case, must arbitrate the dispute at the request of the employee. It must follow that the CCMA is obligated to arbitrate the dispute referred by the employee. In *casu*, Sithole referred a dispute and alleged an unfair dismissal in terms of section 191 (5) (a) (i) of the LRA. In the referral forms Sithole alleged that he was dismissed on 9 March 2022. The termination notice which was availed to Byrne expressly read as follows:

> "Furthermore, this letter serves to confirm that your fixed term contract expires on the 31 March 2022.

In view of the above, the company has decided to not renew your contract."

[6] Section 186 (1) of the LRA defines what a dismissal means. Amongst the forms of a dismissal there exists one where an employee employed in terms of a fixed term contract of employment reasonably expects renewal or retention in employment and his or her expectations are quashed. This form of a dismissal was not alleged by Sithole. At arbitration Tactical made it abundantly clear that although Sithole was disciplined for alleged misconduct, he was not dismissed for that, but his expiring contract was simply not renewed. Under such circumstances, there can be no dismissal in terms of section 186, unless an employee alleges and proves a reasonable expectation of renewal or retention in an indefinite employment.

[7] Absent dismissal, the CCMA lacks jurisdiction. Rule 22 of the CCMA Rules provides that if during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has jurisdiction to arbitrate. Despite a clear indication that Sithole was not dismissed – a jurisdictional issue – Byrne failed to request Sithole to prove that the CCMA has jurisdiction to arbitrate. This rule is consistent with section 192 (1) of the LRA. In terms thereof in any proceedings concerning any dismissal the employee is obligated to establish the existence of a dismissal.

[8] Faced with a situation, that called for the invocation of rule 22 read with section 192, Byrne opted to take what appears to be a short shrift approach and invoked the provisions of section 198B (5) of the LRA, in the circumstances where Tactical was not warned that such an approach was in the offing. He unfairly and inappropriately concluded that the employment of Sithole was for an indefinite duration. Whereafter, he wrongly concluded that Sithole was dismissed on 9 March 2022. One aspect that Byrne was oblivious of is that section 198B (5) is a deeming provision and requires no decision from him. In order for the deeming provisions to kick into gear, there must be a contravention

of section 198B (3). The section provides that an employer may employ an employee on a fixed term or successive fixed term contracts for longer than three months of employment if – (a) the nature of the work for which the employee is employed is of a limited duration; or (b) the employer can demonstrate any other justifiable reason for fixing the term of contract.

[9] Regard being had to the text of the section it is not prohibited for an employer to employ on a fixed term or successive fixed terms for longer than three months. However, if an employer fails to justify that action then the deeming provision kicks in. In order to justify, an employer must provide evidence to establish such justification. Given the principle of legality and section 34 of the Constitution of the Republic of South Africa, 1996, an employer cannot be ambushed in different proceedings to establish a justification contemplated in section 198B (3). Alive to a situation where an employer and employee may quibble over the existence and non-existence of the jurisdictional facts for the deemed indefinite employment duration to arise, the legislature enacted section 198D. In terms of section 198D (1) any dispute arising from the interpretation or application of sections 198A-C may be referred to conciliation first and thereafter to arbitration.

[10] It is beyond any doubt that Sithole did not refer a dispute arising from the interpretation or application of section 198B. Accordingly, Byrne was not authorised by the LRA to arbitrate or make any findings on the application of section 198B (3) and (5). In terms of section 145 (2) (a) (iii) of the LRA, a defect, which renders the arbitration proceedings reviewable, exists, if the commissioner exceeded the commissioner's powers. A commissioner is a creature of the LRA and sources his or her powers from the four corners of the LRA. By the following conclusion, Byrne exceeded his powers:

> "[13] ... I am therefore deeming the contract to be of an indefinite nature. The Respondent has failed to demonstrate that these contracts comply with section 198B (1) and (3) of the LRA."

[11] Sithole did not refer any dispute that arise from the application of section 198B. To deem an employee employed on a fixed term to be employed indefinitely has far reaching and adverse effects on an employer. That being the case, an employer require full protection of *audi alteram partem*. It is improper and unfair to ambush a party with a case that party did not come to meet. It is equally unfair to condemn a party that it failed to demonstrate a compliance issue, which issue, it was not prepared to meet or warned of its budding. At the opening parts of the body of the arbitration award, Byrne outlined, perfectly so his task in the arbitration proceedings. He stated:

> "[5] I must decide whether or not the termination of service of the Applicant amounted to a dismissal. If I find that there was a dismissal, I must decide on whether such dismissal was fair. If I find that the dismissal was unfair, I must decide on an appropriate remedy."

[12] Conspicuously absent is the requirement to decide whether the provisions of section 198B (5) applies or not. A gross irregularity in the proceedings exists where a party is not afforded a fair opportunity to be heard. Tactical was ambushed, sadly not by Sithole but by the commissioner. The case it came to meet at arbitration is one of alleged unfair dismissal and not one contemplated in section 198D of the LRA.

[13] The decision whether the CCMA had jurisdiction is one made for convenience and it is not binding on this Court. The conclusion reached by Byrne that the termination on 9 March 2022 constitutes a dismissal was made conveniently since it agitated the question of jurisdiction. It is unclear from the findings of Byrne as to when exactly did the deeming provisions kick in. Based on his conclusion that on 9 March 2022, Sithole was dismissed, it is safe to assume that the deeming provisions kicked in before 9 March 2022. It has already been held by the LAC that an employee cannot be employed on a fixed term and on an indefinite duration in tandem. It is either one or another but not both. The termination letter made it clear that the last fixed term expired on its terms at

the end of March 2022. If this fact is accepted, which objectively, it must be, it means that the dismissal was pre-mature. In any event section 190 (2) (a) of the LRA, in the context of a dismissal contemplated in section 186 (1) (b) (i), the date of dismissal beckons on the date of notification of the intention not to renew. Sadly, this is not a case where Sithole alleged a reasonable expectation for renewal or retention on an indefinite duration.

[14] Accordingly, on the objective facts, Sithole was not dismissed but his fixed term contract expired. It was open for Sithole to allege and prove that he had a reasonable expectation for renewal or retention or to refer a dispute arising from an interpretation and application of section 198B of the LRA. Sithole did not refer such disputes and the CCMA and or Byrne was not authorised to arbitrate such disputes.

[15] A party faced with an award issued without the necessary jurisdictional power must impugn such on the correctness test. Therefore, on the correctness test the arbitration award is reviewable. Nevertheless, arbitrating a dispute outside the four corners of the enabling statute amounts to an irregularity and excess of power which are grounds suffused into the standard of reasonableness. On application of the reasonableness test the arbitration award of Byrne fails to meet the constitutional standard too.

Conclusions

[16] For reasons set out above, this Court arrives at a conclusion that the arbitration award issued by Byrne is a nullity and or unsustainable in law. Sithole was on the objective facts not dismissed. He did not refer a dispute within the contemplation of section 198B. Thus, findings made in line with the provisions of that section are *pro non scripto*. Accordingly, the application is bound to succeed.

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

Order

1. The arbitration award issued by Commissioner Richard Byrne under case number GAEK2621-22 dated 30 May 2022 is hereby reviewed and set aside.
2. It is replaced with an order that Innocent Sithole was not dismissed and that the CCMA lacked jurisdiction to arbitrate his referred dispute.
3. There is no order as to costs.

G. N. Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms C Bensch of Higgs Attorneys, Johannesburg

The Third Respondent: In Person.