

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR558/16

In the matter between:

KREAN NAIDOO

Applicant

And

LIBERTY HOLDINGS

Respondent

Heard: 5 February 2019

Delivered: 19 March 2019

Summary: Review of CCMA ruling on jurisdiction. Application to have CCMA ruling on jurisdiction reviewed and set aside.

JUDGMENT

RAPHULU, AJBackground

- [1] The applicant is a former employee of the respondent. He was employed by the respondent as a Senior Manager – Group Tax, until his dismissal for misconduct. The applicant is of the view that his dismissal was unfair, and wants to have the fairness of his dismissal interrogated. In terms of his employment contract with the respondent, the applicant agreed to be bound by the respondent's terms of employment, which contract of employment incorporates the respondent's Employee Relations Handbook by referring to same. Said Employee Relations Handbook provides that dismissal disputes are to be dealt with via private arbitration. The applicant does not want to go the route of private arbitration, and instead claims his right to refer his dispute to the CCMA. The CCMA has ruled that it does not have jurisdiction to hear the matter, and that the applicant may elect to instead refer it to private arbitration. This is a review of the CCMA's jurisdiction ruling.
- [2] The applicant contends that he was never given a copy of the Employee Relations Handbook on commencement of employment with the respondent; that he never agreed to dealing with disputes via private arbitration; and that never gave up his right to refer the matter to the CCMA. He claims that private arbitration would mean automatic legal representation, arbitration costs after the first R30 000 that would be solely covered by the respondent, leeway for the arbitrator to order other costs, and the possibility of the chairperson of his disciplinary hearing to be the arbitrator as he appears on the list of possible arbitrators.

[3] The applicant argues that the arbitrator erred in finding in favour of the respondent, and that had he in particular considered that the applicant would incur arbitration costs after the first R30 000, the arbitrator would have found that the circumstances warrant the CCMA hearing the matter, and not referring it to private arbitration.

[4] The applicant contends that the fact that the Employee Relations Handbook states at 12.1.1 that:

“If the disciplinary enquiry outcome leads to a dismissal, and the dismissed Employee is not satisfied with this outcome, the dismissed Employee may refer the matter to Compulsory Private Arbitration within 30 days from date of termination”

[emphasis added] means that he may refer the dispute to private arbitration or to the CCMA.

[5] The applicant contends that in terms of section 147 (6) of the Labour Relations Act, the arbitrator erred in not directing that the matter goes to private arbitration, but in instead saying the applicant may refer the matter to private arbitration if he so wishes.

[6] The respondent argues that the applicant was a senior employee who agreed to the terms of his employment; that he had access to the Employee Relations Handbook for the full term of his employment with the respondent; that private arbitration is consistently used at the

respondent; and that as it is the practice - the respondent would cover the full costs of the arbitration and not only the first R30 000.

- [7] The respondent submitted that although the Employee Relations Handbook states that only the first R30 000 is borne by the respondent, its submissions before the CCMA clarified that the respondent would in fact cover the full costs of the arbitration. The respondent submitted that the chairperson of the disciplinary hearing was one of a possible 9 arbitrators for the parties to elect from, and the fact that his name was on the list did not mean that he would be the appointed arbitrator.
- [8] The respondent submitted that the rules of natural justice would still need to apply even at private arbitration, and to the extent that they were not, the applicant still had at his disposal normal recourse such as review by this Court.
- [9] The respondent submitted that the decision to refer the matter to private arbitration or not to refer a dispute at all as set out in section 147(6) of the LRA, lies solely with the applicant, and is not with the arbitrator.

Analysis of evidence

- [10] The applicant was a senior employee of the respondent and ought to have understood that signing a contract of employment that refers to conditions of employment contained in an Employee Relations Handbook means that he was agreeing to be bound by the terms in the Employee Relations Handbook.

[11] The arbitrator's ruling relied on the agreement between the parties to deal with disputes via private arbitration; the respondent's evidence that it would cover the full costs of the arbitration thus there would be no financial prejudice to the applicant in this regard; that the arbitrator would have the same powers as a CCMA commissioner in that the rules of natural justice would apply, and held that the evidence was overwhelmingly in favour of the respondent.

[12] Section 147(6) of the LRA states that:

(6) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been resolved through private dispute resolution in terms of a private agreement between the parties to the dispute, the Commission may -

(a) refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures: or

(b) appoint a commissioner to resolve the dispute in terms of this Act

[13] The arbitrator correctly adhered to that the decision to actually refer the matter to private arbitration (or not to refer a dispute at all), lies with the applicant. Once the appropriate route is determined to be that of private arbitration, the CCMA steps aside and the aggrieved party has the recourse of private arbitration, if he so wishes to proceed with his dispute.

[14] Having considered the evidence before the arbitrator, and his reasoning, I find that the arbitrator arrived at the correct ruling on the jurisdiction point – that the CCMA has no jurisdiction to hear the matter, and that if the applicant wishes to pursue an unfair dismissal dispute, such dispute must be dealt with by way of private arbitration as per the contract of employment read together with the Employee Relations Handbook.

[15] In the circumstances, I make the following order:

Order:

1. The review application is dismissed.
2. There is no order as to costs.

Raphulu L

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Self represented.

For the Respondent: D.L. Thereu, instructed by Salijee Govender van der Merwe Attorneys