

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 107/16

In the matter between:

COMMUNICATION WORKERS UNION

First Appellant

LULAMA MKALIPI

Second Appellant

SIBUSISO BANDA

Third Appellant

FIKELEPHI MTHEMBU

Fourth Appellant

NCEBA LONI

Fifth Appellant

JOHN SEEMELA

Sixth Appellant

FANYANA MKWANAZI

Seventh Appellant

XOLELWA MBAKAZI

Eight Appellant

SIFISO NOMBIKA

Ninth Appellant

ENOCH PHAALA

Tenth Appellant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER JOSEPH TSHABADI NO

Third Respondent

Heard: 05 November 2019

Delivered: 18 May 2020

Summary: Jurisdiction – Ruling that party submits proof of payment before matter set down is an administrative action – failure to comply with the ruling deprives CCMA of jurisdiction.

Coram: Waglay JP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

- [1] The first to the tenth appellants (“the appellants”) appeal against paragraph 50.2¹ of the order of the Labour Court (Bester AJ) reviewing and setting aside the arbitration award of Commissioner Joseph Tsabadi (“Commissioner Tsabadi”) made under the auspices of the Commission for Conciliation, Mediation and Arbitration (“CCMA”).

Reinstatement of the Appeal

- [2] The appeal lapsed as a result of the appellants’ failure to file the appeal record within the prescribed time limits. The appellants make application for reinstatement of the appeal. The Court is satisfied that the delay in filing the record was due to the wrong case number that was allocated to the appeal record by the transcription company. The first respondent has suffered no prejudice as a result of the delay and does not oppose the application for reinstatement of the appeal. The appeal is, therefore, reinstated.

Background

¹ Paragraph 50.2 of the order of the Labour Court reads: ‘The award is reviewed and set aside in as far as reinstatement or compensation was granted to the employees and the matter is remitted to the Second Respondent [CCMA] for set down before the Third Respondent [Commissioner Tsabadi] or, if he is unavailable, another Commissioner to determine an appropriate remedy in respect of all the employees after hearing relevant evidence hereto including evidence in respect of the possible retrenchment of the employees or their transfer to alternative positions on different terms and conditions, if not for their dismissal for misconduct.’

- [3] In September 2010, the second to tenth appellants (“the second to tenth appellants”) were dismissed by the first respondent, Mobile Telephone Networks (Pty) Ltd (“MTN”) for misconduct relating to their purported failure to disclose their membership of the first appellant, Communication Worker’s Union (“Union”), to MTN.
- [4] In mid-2009, MTN embarked upon a retrenchment process which would have resulted in the retrenchment of approximately four hundred of its employees. Pursuant to an urgent application brought by the Union, MTN and the Union entered into an agreement in terms of which MTN undertook to consult with the Union in relation to any retrenchments that were likely to affect its members.
- [5] The retrenchment process was to conclude by the end of March 2010. When this did not happen, MTN created a “special dispensation fund” for the payment of salaries and benefits to members of the Union who had not opted to take voluntary retrenchment packages. Since this fund was for Union members only, it was imperative that MTN established who the affected Union members were. MTN, therefore, requested the second to tenth appellants to verify their membership of the Union on numerous occasions. As a result of their failure to do so, MTN continued to pay them after the cut-off date by means of the “special dispensation”. They were consequently charged with gross dishonesty, misrepresentation and fraud. Following on a disciplinary hearing, they were found guilty of all the charges and dismissed on 14 September 2010.
- [6] The second to tenth appellants referred an unfair dismissal dispute to the CCMA. Conciliation failed and the dispute was referred to arbitration. After a series of postponements, and a ruling by Commissioner Braam Van Wyk that the Union lacked the necessary *locus standi* to act as the employees’ representative, the dispute came before Commissioner Lawrence Nowosenetz (“Commissioner Nowosenetz”) for determination. He advised the second to tenth appellants that the Union’s lack of *locus standi* could be cured, at that stage of the proceedings, by them “legitimately” joining the Union for purposes of it representing them in the

arbitration proceedings. The employees accepted Commissioner Nowosenetz's advice and the proceedings were postponed to 7 April 2011 (to run for two days on 7 and 8 April) to enable the second to tenth appellants to remedy their lack of membership of the Union.

- [7] At the resumption of the arbitration proceedings on 7 April 2011, Commissioner Nowosenetz ruled that the Union, acting on behalf of the second to tenth appellants, be allowed legal representation during the arbitration proceedings. At that point, the Union applied for a postponement in order to enable it to appoint an attorney. After noting that only one of the nine appellants had attended the proceedings on that day, and that the matter had been set down for two consecutive days, Commissioner Nowosenetz postponed the matter *sine die* awarding wasted costs (for 7-8 April 2011) to be jointly and severally paid by the Union and the employees. He directed that the costs be paid before the matter could be set down for hearing. Paragraph 6 of Commissioner Nowosenetz's ruling reads:

‘The case is postponed *sine die* and may only be rescheduled for hearing upon proof of payment by the applicants.’ (“the cost’s ruling”).²

- [8] The appellants instituted review proceedings against the costs’ ruling. Curiously, they enrolled the dispute for hearing on 14 October 2011 in the CCMA. This was before finalisation of the review application, and before payment of the wasted costs as stipulated in the costs’ ruling. The dispute came before Commissioner Tsabadi for determination.
- [9] On 1 October 2012, Commissioner Tsabadi found the second to tenth appellants’ dismissals to be procedurally fair but substantively unfair. The second and fourth appellants were awarded 12 months’ compensation, and the third and fifth to tenth appellants were reinstated with back pay (limited to 12 months).³
- [10] On 22 October 2012, MTN instituted review proceedings in the Labour Court. One of the review grounds raised by MTN was that Commissioner Tsabadi committed an

² The term “applicants” refers to the Union and the employees.

³ The third and fifth to tenth appellants were directed to report for duty on 1 November 2012.

act of gross misconduct by ignoring the costs' ruling of Commissioner Nowosenetz that the matter could only be enrolled upon proof of payment of the wasted costs having been furnished by the appellants.

- [11] MTN contended in the review application that Commissioner Tsabadi erred in stating that no preliminary issues were raised before him, when on the first day of the hearing MTN's legal representative argued that the matter had been enrolled for hearing in direct breach of the costs' ruling, and that Commissioner Tsabadi undertook to address the issue in the award. However, Commissioner Tsabadi failed to do so and, instead, stated in his award that no preliminary issues were raised by the parties. MTN, accordingly, contends that in arriving at this conclusion, Commissioner Tsabadi committed a gross irregularity as he was not entitled to disregard the costs' ruling.

In the Labour Court

- [12] The Labour Court concluded in relation to this ground of review that Commissioner Tsabadi's conduct was not irregular nor unreasonable as he did not exceed his powers as provided for in s 138⁴ of the Labour Relations Act ("the LRA").⁵ The Labour Court reasoned as follows in arriving at this conclusion:

'Although the Commissioner [Tsabadi] did not deal with this issue in his award, he dealt with it during the proceedings. He did, upon request for a ruling in writing, refuse to postpone the arbitration for purposes of issuing a written ruling and instead stated that the ruling will be availed as part of the award. I am, however, of the view that the Commissioner's failure to then deal with the ruling in the award, does not, per se, render the award reviewable.

An arbitrator is tasked to conduct arbitration proceedings in a manner that the commissioner deems appropriate in order to determine a dispute quickly and fairly (section 138 of the LRA). It would have been inappropriate for the Commissioner in

⁴ Section 138(1) of the LRA provides: 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'

⁵ 66 of 1995.

the circumstances to have postponed the arbitration and accordingly not to have determined the substantial merits of the case pending the outcome of a review application relating to a cost order.'

[13] MTN's cross-appeals this finding of the Labour Court.

[14] At the hearing, this Court requested the parties to address it on this issue first, because it concerned the question of the CCMA's jurisdiction to determine the dispute. Thus, the preliminary question for determination is whether, in view of the appellants' failure to comply with the costs' ruling, the CCMA (Commissioner Tsabadi) had jurisdiction to continue with the arbitration proceedings on 1 October 2012.

[15] The thrust of the submission advanced on behalf of the appellants is this: there is a distinction between (i) the substantive part of a ruling, and (ii) a procedural directive contained within a ruling. The former is final and can only be overturned on rescission or review. The latter can be revisited in the absence of a formal review or rescission application. The costs' ruling is a procedural directive alternatively, an interlocutory step in the arbitration proceedings which can be rescinded or varied by a Commissioner of the CCMA.

[16] Accordingly, the appellants argue that the costs' ruling is either a procedural directive or a simple interlocutory ruling which had no bearing on the main issues between the parties to the arbitration. Nor did it anticipate any of the relief sought. It merely directed that the matter should not be set down for hearing before the Union and the employees paid the wasted costs occasioned by the postponement. Hence, it was permissible for Commissioner Tsabadi to proceed with the arbitration hearing despite the failure of the Union and the employees to provide him with proof that the costs order had been complied with as stipulated in the costs' ruling. /

[17] I consider the appellants' contentions to be completely unfounded. What they fail to recognise is that an award or ruling of a Commissioner of the CCMA is an administrative decision. It is important, in this regard, to remain mindful that the

CCMA is not a branch of the judiciary and it does not exercise judicial power. It is a creature of statute. The exercise of its powers of arbitration is of an administrative nature.⁶ Consequently, its awards or rulings constitute administrative action.

[18] Our courts have repeatedly held that administrative decisions remain binding until set aside by a court order.⁷ They, therefore, have legal consequences until set aside.

[19] Commissioner Nowosenetz's costs' ruling is an administrative decision. It remains binding until set aside by a court of law. Arbitration awards and rulings may, however, be varied and rescinded in the limited circumstances provided for in section 144 of the LRA which provides:

'Any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the *director* for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.
- (d) made in the absence of any party, on good cause shown.'

[20] There was no application before Commissioner Tsabadi to vary or rescind the costs' ruling of Commissioner Nowosenetz on the limited grounds set out in section 144 of the LRA. Nor did he seek to do so on his own accord. Accordingly, Commissioner Tsabadi was bound by the costs ruling of Commissioner Nowosenetz and could not simply ignore it, and proceed with the arbitration proceedings in breach of that

⁶ *Sidumo and Another v Rustenberg Platinum Mines (Pty) Ltd and Others* [2007] 12 BLLR 1097 (CC) paras 84, 84, 85 and 87.

⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (2004) 6 SA 222 para 26.

ruling.

- [21] The costs ruling had an important legal consequence. In the absence of compliance by the Union and employees with the cost's ruling, the CCMA had no jurisdiction to determine the dispute. As a result, Commissioner Tsabadi committed a gross irregularity by proceeding to determine the dispute between the parties.
- [22] It follows that the Labour Court erred in failing to set aside the arbitration award of Commissioner Tsabadi on the basis that the CCMA had no jurisdiction to determine the dispute in the absence of proof from the appellants that they had complied with the costs' ruling of Commissioner Nowosenetz.
- [23] For these reasons, the appeal falls to be dismissed and the cross-appeal upheld.

Costs

- [24] I consider it fair and just that each party pays its own costs in both the appeal and cross-appeal.

Order

- [25] In the result, I make the following order:

1. The appeal is dismissed.
2. The cross-appeal is upheld.
3. The order of the Labour Court is set aside and replaced with the following order:
 - "1. The CCMA has no jurisdiction to arbitrate the dispute in the absence of compliance by the first to tenth respondents with the ruling of Commissioner Lawrence Nowosenetz dated 7 April 2011.
 2. The arbitration award is set aside on review.
 3. There is no order as to costs.'

F Kathree-Setiloane AJA

Waglay JP and Sutherland JA concur.

APPEARANCES:

FOR THE APPELLANTS:

Mr M Sibanda

Instructed by Eversheds Sutherland (SA) Inc

FOR THE FIRST RESPONDENT:

Mr AM Mthembu

Instructed by Mashiane Moodley & Monama Inc