



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA 60/23

In the matter between:

PHEGANYANE PRINCE PHAKOAGO

Appellant

and

**SANCA WITBANK ALCOHOL AND
DRUG HELP CENTRE**

First Respondent

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

Second Respondent

MAGAELE ALFRED MASHEGOANA N.O.

Third Respondent

Heard: 27 March 2024

Delivered: 18 September 2024

Summary: Appeal against the order of the Labour Court remitting the dispute back to the CMMA for a hearing before a different commissioner. Factors to be considered by the Labour Court when considering remitting a dispute back to the CCMA restated. The employee challenged his demotion after signing a new employment contract, appointing him at a level lower than that he occupied before the demotion.

Coram: Molahlehi AJP, Van Niekerk JA and Nkutha-Nkuntwana JA

JUDGMENT

MOLAHLEHI, AJ

Introduction

[1] This appeal, with the leave of this Court, is against the judgment of the Labour Court in terms of which it reviewed and set aside the arbitration award of the third respondent commissioner (commissioner) of the Commission for Conciliation, Mediation and Arbitration (CCMA) issued on 3 June 2019. The Labour Court further ordered that the matter be remitted back to the CCMA for consideration *de novo* by a commissioner other than the commissioner.

[2] Regarding the arbitration award, the commissioner ordered the first respondent, SANCA-Witbank (SANCA), to reinstate the appellant retrospectively as a manager, a position he occupied before his demotion. The reinstatement was made in terms of section 193(4) of the Labour Relations Act¹ (LRA), based on the finding that the appellant had been demoted and that the demotion was unfair.

[3] SANCA has also cross-appealed against the Labour Court's order that the dispute between the parties be remitted back to the CCMA to be heard *de novo* before a commissioner other than the third respondent. SANCA contended that the Labour Court ordered the remittal of the matter to the CCMA despite the record showing that it (SANC) followed a fair procedure in demoting the appellant.

¹ Act 66 of 1995, as amended.

[4] In light of the conclusion reached at the end of this judgment, the cross-appeal has, in a sense, become moot. I, therefore, do not deem it necessary to deal with the issue.

Background facts

[5] SANCA appointed the appellant to a senior social worker manager position in November 2017. It is common cause that the employment contract was subject to a six-month probationary period, which was initially extended for a further six months, resulting in the employment relationship lasting for a year.

[6] In March 2018, the parties concluded a performance management contract that provided a list of performance indicators, including the appellant's core duties.

[7] The parties signed a further supervisory contract in April 2018, which seems to have been informed by recognising the appellant's failure to meet the required performance standard.

[8] In April 2018, the respondent conducted a probationary assessment of the appellant's performance. It was found that the appellant had some performance challenges. In addition to the performance challenges, the appellant had problems reporting for duty on time, resulting in a written warning on 30 May 2018.

[9] The respondent conducted a further performance session in July 2018, during which the appellant is said to have conceded to the accusation of his poor performance.

[10] The respondent had scheduled several performance assessment sessions for the probationary period, but the appellant attended only one session.

[11] On 1 November 2018, at the end of the second probationary period, the respondent informed the appellant that he would not be offered permanent employment due to his poor performance.

[12] In a letter on 5 November 2018, the respondent informed the appellant that he had been demoted from his senior position as a social worker manager.

[13] Aggrieved by the decision to demote him, the appellant lodged an internal appeal on 13 November 2018. The internal appeal was unsuccessful, and the SANCA board upheld the demotion. The relevant part of the appeal ruling reads as follows:

- ‘1. That your demotion stands (if you accept the package of a Social Worker
2. That either you accept your new post of being a Social Worker or,
3. The organisation will have no other choice but to release you.’

[14] It is not disputed that the parties concluded another employment contract (the new employment contract) soon after the demotion of the appellant.

[15] Besides creating a new employment relationship, the new employment contract appointed the appellant at a level lower than that of social worker manager. The relevant part of the new employment contract provided:

‘1.1 Both parties voluntarily declare that they both wish to enter into this agreement on the conditions contained herein, that they are both fully aware of the contents of this agreement and that they understand it completely and that they both fully understand the full implications of entering into this agreement.

1.2 The Employee hereby declares that he/she shall not be entitled at any stage to declare that he/she did not agree with or did not understand the contents of this agreement at any given time and that he/she merely signed this agreement to be employed by the Employer.’

[16] The appellant remained aggrieved despite the new employment contract and thus referred an unfair labour practice dispute to the CCMA. He did not challenge the validity of the new employment contract.

[17] The dispute was referred to arbitration after failing to settle in conciliation. The relief sought in the arbitration proceedings was reinstatement into the previous managerial social worker position.

[18] The commissioner found that the appellant was unfairly demoted, ordered that he be reinstated into his previous position as social worker manager, and compensated him for the short payments resulting from the demotion.²

[19] SANCA disagreed with the commissioner's finding and thus instituted review proceedings before the Labour Court to have the award reviewed and set aside.

[20] At the arbitration hearing, the respondent raised a point in *limine* regarding the CCMA's jurisdiction to entertain the dispute in light of the new agreement. The commissioner dismissed this point and held that the CCMA had jurisdiction to consider the matter.

[21] Having concluded that the CCMA had jurisdiction, the commissioner proceeded to consider the merits of the dispute and concluded that SANCA committed an unfair labour practice by demoting the appellant to a position lower than that of a social worker manager.

The Labour Court

²The commissioner's award reads as follows:

'1. The respondent SANCA Witbank Alcohol and Drug Help Centre is ordered to put Mr Pheganyane Prince Phakoago back to his position he held prior (sic) his demotion as Social Worker Manager without any loss of benefits, in the same terms and conditions of employment that prevailed before demotion, with effect from the 1st of July 2019.

2. The respondent is further ordered to pay the Applicant Mr. Prince Phakoago R33 412.50 to be calculated as $R21\ 682.50 - R15\ 000.00 = R6\ 682.50 \times 5\ 20\ \text{Months} = R33\ 412.50$ being the short payment the Applicant would have earned had he not (sic) unfairly demoted.

3. The amount must be paid on or before the 31st of July 2019, failing which the amount shall earn interest from the date of 31st July till the date of payment, and the interest rate applicable to the judgement debt in terms of section 143(3) of the LRA 66 of 1995 as amended'.

[22] SANCA's central point amongst the grounds of the review was that the commissioner exceeded his powers by effectively setting aside the new agreement because he did not have the statutory powers to do so.

[23] As alluded to earlier, the Labour Court reviewed and set aside the arbitration award and ordered the matter be remitted back to the CCMA for a hearing *de novo* by a commissioner other than the third respondent. The order of the Labour Court reads as follows:

- ‘1. The arbitration award issued by the [commissioner] on 3 June 2019 under CCMA Case Ref MP174-19 is reviewed and set aside;
2. The dispute between the third respondent and the applicant is remitted to the first respondent for a *de novo* arbitration before a Commissioner other than the second respondent;
3. There is no order as to costs.’

[24] The reasons for the order made by the Labour Court appear in paragraph 17 of the judgment and provides as follows:

‘It seems to me that the third respondent, in referring an unfair labour dispute to the first respondent seeking reinstatement at once, adopted a process which ultimately did not assist him. What the third respondent ought to have done instead is approach this Court and seek to set aside the newly signed contract. Absent a legal challenge to the new agreement, this agreement stands. And while it has life, it was incompetent for the second respondent to order reinstatement of the third respondent regardless.’

On appeal

[25] The appellant's case before this Court is amongst others that the Labour Court erred in the following respect:

- a In reviewing and setting aside the arbitration award and remitting the matter to the CCMA to be determined *de novo* by a commissioner other than the third respondent.

b In not finding that the commissioner had the power, consequent the finding that SANCA had committed an unfair labour practice, to reinstate the appellant in terms of section 193 (4) of the LRA.

c In finding that the third respondent was incompetent to reinstate the appellant while the new agreement was still in existence.'

[26] It was submitted that the commissioner had the power to reinstate the appellant in terms of section 193 (4) of the LRA once he had found that the demotion was unfair.

[27] In relation to the new agreement, the appellant argued that the agreement was nothing but a confirmation that SANCA had committed the unfair labour practice. It was further submitted that "*the consequences of reinstatement are that the newly signed contract of employment as a social worker falls away*".

[28] In support of the contention that the new agreement confirmed that the appellant was demoted and that the implementation of such an agreement amounted to an unfair labour practice, the appellant relied on the case of *Builders Warehouse v Benade*³ (*Builders Warehouse*) where this Court held that:

'Employers and employees are encouraged to settle their differences by agreement. When they have done so, a binding contract comes into existence. Contracts are binding unless there is a valid reason to have them set aside. The commissioner correctly appreciated that she did not have any power to set aside the contract (which is what the third respondent wanted). But the commissioner erred in concluding that the agreement between the parties meant that the CCMA did not have jurisdiction to hear the dispute. The court a quo is correct that a dispute about an alleged unfair labour practice extends to "unfair conduct relating to demotion". The fact that the parties have agreed that the aggrieved employee accepts demotion is not a complete defence because the ambit of this unfair labour practice is wider than this. The implementation of an agreement to accept demotion, may constitute an unfair labour practice.'

³ (PA 1/14) ZALAC 77 (5 May 2015) at para 14.

[29] Mr Tebeile, for the appellant, conceded during the hearing before this court that the facts and the circumstances in *Builders Warehouse* are distinguishable from those in the present matter. In any case, the principle enunciated in that case does not support the proposition suggesting that the new agreement was of no force and effect.

[30] The appellant further criticised the Labour Court for remitting the matter to the CCMA for *de novo* arbitration hearing.

The issues

[31] The pivotal issue in this appeal is whether the Labour Court's decision to remit the matter for a re-hearing was proper or whether it should have substituted its decision for that of the commissioner by reviewing and setting aside the award. Put in another way the question is whether the Labour Court exercised its discretion judicially when it ordered the matter be remitted for a rehearing before the CCMA.

[32] Having found that the commissioner's award was reviewable, the Labour Court had to exercise its discretion in determining whether to substitute the award by dismissing the review or remitting it to the CCMA for a rehearing.

[33] The issue on review, which is the focus of this appeal, was whether the commissioner had the power or authority to determine the relief sought by the appellant in light of the new agreement to employ him at a lower level than that of a social worker manager. The relief sought by the appellant and granted by the commissioner during the arbitration proceedings was reinstatement into the previous position of social worker manager.

[34] In seeking the reinstatement relief, the appellant based his cause of action on the unfair labour practice dispute arising from an alleged demotion by SANCA. Therefore, it cannot be said that the matter was not properly before the commissioner. The fundamental question relates to the commissioner's exercise of the discretion of reinstatement in terms of section 193 (4) of the LRA. The Labour

Court answered this question when it found that the arbitration award was reviewable.

[35] As alluded to earlier, the Labour Court reviewed the arbitration award because the commissioner did not have the power to reinstate the appellant while the new agreement existed. In *S v S*⁴, the court, in dealing with an agreement which was concluded in the context of a divorce under the heading “*Caveat subscripto*”, held that:

‘It is trite that a person who signs a contractual document thereby signifies his assent to the contents of the document. He is bound by the ordinary meaning and effect of the words which appear above his signature.’

[36] Similar to an order of court, a contract or agreement stands and is enforceable until resiled from by any of the parties, cancelled or set aside by a court. A contract can, for instance, be cancelled based on the grounds of undue influence, duress or misrepresentation.

[37] While a court order derives its force from the power of the court, an agreement derives its legal force from the contractual arrangement between the parties and is governed by the principles of the law of contract.⁵

[38] In *Gbenga-Oluwantoye v Reckitt Benckiser South Africa (Pty) Ltd and Another*⁶, the Constitutional Court reaffirmed the principle that employment agreements are lawful even if they waive an employee’s right to seek judicial redress through the CCMA and the courts.

[39] The procedure to be followed by the Labour Court in review applications is set out in section 145 (1) of the LRA. In this section, any party complaining about a defect in any arbitration proceedings may apply to the Labour Court to have such an

⁴ (11/5810) [2013] ZAGPJHC 312 (5 November 2013) at para 39.

⁵ See: *Malebo v Commission for Conciliation, Mediation and Arbitration and Others* [2010] ZALC 97 (15 April 2010) and *Hadio v Commission for Conciliation, Mediation and Arbitration and others* [2015] 12 BLLR 1207 (LC).

⁶ [2016] ZACC 33; (2016) 37 ILJ 2723 (CC).

award reviewed and set aside. In this regard, the applicant must set out the grounds upon which he or she alleges their arbitration award is defective. In addition, an award may be attacked for excess power wherein the commissioner may have exercised powers that he or she did not have.⁷ This should be contrasted with the commissioner exercising the power they have but doing so erroneously.⁸

[40] In terms of section 145 (4) (a) of the LRA, the Labour Court has the broadest powers to determine a dispute in whatever manner it considers appropriate.⁹ In exercising this power, the Labour Court may, after reviewing the proceedings, and if it finds in favour of the applicant by upholding the review, either substitute its decision for that of the commissioner or remit the matter to the CCMA.

[41] In *National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰, the Constitutional Court, after noting the wide discretion the Labour Court has in determining a dispute, cautioned against the Labour Court readily substituting its decision for that of the commissioner. The underlying consideration of the caution relates to the risk of the hasty use of discretion undermining the doctrine of separation of powers. The doctrine of separation of powers is critical in this regard because otherwise, the Labour Court could usurp the powers assigned to commissioners of the CCMA. It was for this reason that the Constitutional Court held that the Labour Court should exercise a measure of judicial deference and only substitute decisions in exceptional circumstances.” It went further and stated that “*judicial deference should not be interpreted to mean that the Labour Court does not have the power to substitute... arbitration awards*”.¹¹

⁷ Section 145 (2) (a) (iii) of the LRA.

⁸ See: *Telcordia Technologies Inc v Telkom SA Ltd* [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA) at para 52.

⁹ *National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [2021] ZACC 47; (2022) 43 ILJ 530 (CC) (NUMSA).

¹⁰ *Ibid.*

¹¹ *NUMSA supra* at para 67.

[42] In *Trencon Construction (Pty) Ltd v Industrial Development Cooperation of South Africa Ltd and Another*¹², the Constitutional Court held that the factors to take into account in considering whether to exercise the discretion to substitute the decision of an administrator are the following:

‘To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.’

[43] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹³, the court set out the circumstances in which the Labour Court would rather correct the decision than refer it back to the CCMA as being:

- ‘(i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;
- (ii) where a further delay would cause unjustified prejudice to the parties;
- (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or
- (iv) where the court is in as good a position as the CCMA to make the decision itself.’

¹² [2015] ZACC 22; 2015 (5) SA 245 (CC) at para 47.

¹³ [2009] ZALC 68; (2010) 31 ILJ 452 (LC) at para 33.

[44] In *Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴, the Court held that:

‘A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing.’

[45] The crux of the matter before the commissioner in the present case was whether the commissioner had the power or authority to award the relief of reinstatement whilst the new agreement was still operative.

[46] This matter turns on the status of the new employment contract, the essence of which was the appellant's acceptance of the demotion and his appointment at a lower level than that which he had occupied previously. It is apparent that, in a way, the appellant accepted the demotion to avoid losing his employment.

[47] The Labour Court, in the present matter, correctly found that “*absent a legal challenge to the new agreement, this agreement stands*”. However, the court misdirected itself by remitting the matter back to the CCMA for a fresh determination by a different commissioner from the one whose arbitration award was challenged. This means the remittal of the matter to the CCMA would serve no purpose as long as the new employment agreement is neither resiled from nor set aside on the grounds recognised by the law.

[48] It is trite that the CCMA has no legal power or authority to set aside an agreement between parties. Only a court can set aside an agreement on recognised legal grounds. One ground upon which a court may set aside an agreement is where it is shown that one of the parties was forced to agree to the terms of the agreement. It is important to note that in the present matter, there is no evidence that the appellant was forced to accept the demotion. It is also important to note that the Labour Court provided no reason for remitting the matter to the CCMA.

[49] It is evidently clear, even from the Labour Court's own reasoning, that remitting the matter to the CCMA would serve no purpose, as the new commissioner

¹⁴ [2018] ZALCPE 41; (2019) 40 ILJ 550 (LC) at para 60.

would be faced with the same legal hurdle concerning the force and effect of the new employment contract. In other words, the new agreement is effective and binding on the parties until set aside.

[50] The Labour Court misdirected itself by remitting the matter to the CCMA for a re-hearing. To this extent, the appeal against the Labour Court's decision stands to succeed.

Costs

[51] In my view, there is no support for the proposition that costs in this matter should follow the results.

[52] In the circumstances, the following order is made:

Order

1. The appeal against the Labour Court's order remitting the matter back to the CCMA for a *de novo* hearing is upheld with no order regarding costs.
2. The cross-appeal is dismissed with no order as to costs.
3. The decision of the Labour Court is set aside and substituted with the following order:

‘1. The commissioner's arbitration award issued on 19 June 2019 is reviewed and set aside.

2. There is no order as to costs.”

E Molahlehi AJP

Van Niekerk JA *et* Nkutha-Nkuntwana JA agreed.

APPEARANCES:

FOR THE APPELLANT: Adv S.S Tebeile with T. A. Makola and M.A Sekhukhuni

Instructed by: R.J Phakoago Attorneys

FOR THE RESPONDENT: Mr Gert Jordaan

Instructed by: Employers' Organisation of Mzansi