

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: DA 6/2000

In the matter between:

M G MEYER

Appellant

and

W C BUTLER t/a WACK-EM

Respondent

JUDGMENT

MOGOENG JA

[1] The Appellant was dismissed by the Respondent for operational reasons. As a result, a dispute arose. It was arbitrated under the auspices of the Commission for Conciliation, Mediation and Arbitration (“CCMA”). On 23 October 1997 a CCMA Commissioner made an award in favour of the Appellant in the following terms:

- “(1) The dismissal of the Applicant by the Respondent without consultation was unfair;
- (2) Respondent is ordered to pay Applicant an amount of R80 500,00 being compensation;
- (3) Respondent to pay Applicant’s costs of this matter.”

[2] The Respondent failed to comply with this award. Consequently the Appellant brought an application in the Labour Court to make the award an order of the Labour Court in terms of s 158(1)(c) of the Labour Relations Act No. 66 of 1995 (“the LRA”). That

order was granted by Landman J on 16 April 1999 in the absence of the Respondent.

[3] Pursuant to the award being made an order of the Labour Court, a warrant of execution was issued against the Respondent's property. The Respondent's property was attached and removed by the sheriff.

[4] The Respondent then brought an application before Waglay J to suspend the attachment. It was set down for hearing on 30 November 1998. It was opposed. On the date of the hearing the Respondent effectively withdrew his application and tendered costs.

[5] After Waglay J had perused the file, he formed the view that the order granted by Landman J in terms of s 158(1)(c) was clearly wrong. He informed the parties that he would be rescinding that order *mero motu* in terms of s 165 of the LRA. Counsel for the Appellant requested and was afforded an opportunity to present argument as to why the order should not be set aside. On 02 December 1999 Waglay J set aside the order.

[6] All dismissal disputes must first be referred for conciliation. In the event of those disputes not being settled through conciliation, they may either be arbitrated under the auspices of the CCMA or be adjudicated by the Labour Court. As to whether the CCMA or the Labour Court has jurisdiction over a dismissal dispute would depend on the nature of the dismissal dispute. The dispute in this matter arose from a dismissal based on operational reasons. Such a dispute must, in terms of s 191(5)(b)(ii) of the LRA, be referred to the Labour Court to adjudicate upon. It may only be arbitrated under the auspices of the CCMA if all the parties to the dispute agree to refer it to the CCMA in terms of s 141(1). Section 141(1) reads thus:

“(1) If a *dispute* remains unresolved after conciliation, the Commission must arbitrate the *dispute* if a party to the *dispute* would otherwise be entitled to refer the *dispute* to the Labour Court for adjudication and, instead, all the parties agree to arbitration under the auspices of the Commission.”

Waglay J held that the word ‘agree’ as used in s 141(1) means an express agreement and does not include a tacit or implied agreement. As there was no such express agreement in respect of arbitration under the auspices of the CCMA, Waglay J found

that the CCMA did not have jurisdiction to arbitrate the matter and set Landman J's order aside.

[7] The Appellant appeals against the setting aside of Landman J's order. One of the grounds on which the Appellant relies to challenge Waglay J's order is that the word 'agree' in s 141(1) of the LRA does not only mean to agree expressly, as found by Waglay J, but has a wider meaning which encompasses a tacit or implied agreement.

[8] The Labour Court's power to set aside its order derives from s 165 which provides as follows:

“The Labour Court, acting of its own accord or on application of any affected party may vary or rescind a decision, judgment or order -

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (b) in which there is 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.”

Although Waglay J did not specify the subsection in s 165 on which he relied for setting aside the order, it is clear that it is subsection (a). It must be so because he says in paragraph 13 of his judgment that the order made by Landman J was erroneously granted. This is the language employed in s 165(a).

[9] For the purpose of determining this appeal I am prepared to assume, without deciding, that it was competent for Waglay J to set aside the order of Landman J. However, even if it was competent to do so *mero motu*, such a step should not be taken save in exceptional circumstances.

[10] A statute must be interpreted in the light of and in conformity with the common law unless that statute provides otherwise. Our Courts have expressed themselves in the following terms on this issue:

“It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the

common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.” (Wessels J in CASSERLEY v STUBBS 1916 TPD 310 at 312)

“It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law.” (Tindall JA in DHANABAKIUM v SUBRAMANIAN & ANOTHER 1943 AD 160 at 167)

[11] It is trite that, in terms of the common law, an agreement may be concluded expressly, tacitly or impliedly. Therefore a construction of s 141(1) which is in conformity with the common law is that the word ‘agreement’ means any lawful agreement - express, tacit or implied. Section 141(1) does not explicitly say that the agreement must be express. Furthermore, there is nothing in s 141, or even the LRA itself, to justify the conclusion that the legislature plainly intended to alter the common law with regard to forms of agreements so as to exclude tacit and implied agreements. All that s 141(1) requires of the parties to the dispute to do in order to clothe the CCMA with jurisdiction, is to agree to its (i.e. the CCMA’s) jurisdiction. This section does not prescribe the form of that agreement.

[12] It is clear that from the correspondence exchanged between the parties’ legal representatives that they tacitly or impliedly agreed to the jurisdiction of the CCMA.

[13] Because of the view I take of this matter it will not be necessary to deal with the other grounds relied on by the Appellant. As the appeal was unopposed the issue of costs does not arise.

[14] In the result, I make the following order:

- “(a) The appeal is upheld;
- (b) The order of Waglay J dated 02 December 1999 is set aside;
- (c) There will be no order as to costs.”

M.T.R. MOGOENG

JUDGE OF APPEAL

I agree

R.M.M. ZONDO
JUDGE PRESIDENT

I agree

M.M. JOFFE
ACTING JUDGE OF APPEAL

Appearances

Appearing for the Appellant : Adv M. Daley *instructed by* Bakers

Appearing for the Respondent : No appearance

Date of hearing : 22 August 2000

Date of judgment : 15 February 2001