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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT:

JOHANNESBURG

CASE NO: JA10/09

DATE: 2010-05-25

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In the matter between

KEVIN WELMAN

Appellant

And

FIRST RAND BANK LIMITED

(WESBANK DIVISION)

Respondent

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Coram: DAVIS JA, TLALETSI JA, MUSI AJA

J U D G M E N T

DAVIS JA: This an appeal against a judgment of the court *a quo*, in terms of which Molahlehi J, reviewed and set aside a condonation ruling issued by the first respondent (the CCMA commissioner) and referred the matter back to the CCMA for fresh consideration.

The facts of the case can be summarised thus:

Appellant was employed by the respondent (the bank), as the area manager of the Wesbank Medium Corporate Division in Bruma at the time of his dismissal. He was dismissed by the bank on 21 November 2006, having been found guilty of misconduct which related to a request for a receipt of R4 000 from one of his subordinates, which was apparently a part payment of an incentive which was due to her. Appellant lodged an appeal on 22 November 2006 and attached a handwritten manuscript to his appeal form, in terms of which he pleaded that respondent allow him
10 to resign instead of having his services terminated by way of a dismissal. This particular plea is illuminating insofar as the overall dispute is concerned. In that plea, the appellant sets out the facts of the case and then states:

“With all this in place, I acted prematurely and irresponsibly by suggesting to Michelle Karrim that we share part of her incentives. If I had approached her one month later, i.e.: 1/11/06, this agreement would have been seen as “sharing”, which is allowed amongst Marketers in Terms of
20 the Bank’s Rules of Engagement.

With no intentions to be dishonest in any way, my irresponsible behaviour has resulted in my dismissal.

I ask the Appeal Committee to please please grant me a Voluntary Resignation, based on the

following grounds:

No defrauding/stealing of the bank's fund, my unblemished 16 year track record with Wesbank, my first (and last) offence, my premature irresponsible behaviour, my demotion prior to receiving any funds ..."

He then proceeds to say the following:

10 "Please give me the opportunity to go and look for work, as hard as it will be, without being restricted, in terms of the consequence of a dismissal. As a true Wesbanker, who has always given my best, I ask you all to find it in your hearts and give me a second chance in life".

The plea which, as is evident from the passages that I have cited, was couched in desperate language. It appears to have been based on the notion that, were the appellant to secure a voluntary departure from respondent's employment as opposed to a dismissal and particularly a dismissal for dishonesty which was the case in the initial hearing, respondent would then be obliged to record on the register of employees
20 dismissed for dishonesty ("REDS"). This is a list held by the banking council, and an entry thereon would have hampered the appellant securing employment in the banking and financial sectors. It appears that in order to avoid this consequence, appellant was desperate to procure a result, whereby the dismissal would have been replaced by an agreed voluntary termination of his employment.

A settlement agreement was concluded. It does not form part of the papers but if one parses through the various affidavits, it is clear that an agreement was entered into, in terms of which the appeal which had been lodged by the appellant would not be conducted, that appellant would have been considered to have voluntarily resigned and, further, that the appellant would have been prohibited, not only from working for the bank but also for other banks, including ABSA Bank, Standard Bank, Nedbank and Investec for a period of 24 months from the date of the signing thereof.

10 Notwithstanding the conclusion of this agreement, appellant referred a dispute to the CCMA on 29 January 2007. The referral fell outside of the prescribed period of 30 days from the date of dismissal. Accordingly appellant brought an application for condonation for the late filing of the dispute, an application which was opposed by the bank.

In a ruling of 6 March 2007, the commissioner found some merit in the argument that the conclusion of the agreement had been a case of *justus error*, that the settlement agreement could not have been in full and final settlement and furthermore that were there to have been an agreement, it was one which could, arguably, be classified as *contra bonis mores*.

20 It was against this finding that the respondent launched a review application in the court *a quo*. That review application was successful. Molahlehi J, made the order against which the present appeal has been lodged, namely that the late filing of the review application condoned, the commissioner's ruling was reviewed and set aside, the matter was to be remitted back to the CCMA for consideration by a commissioner other than

the commissioner that heard the initial matter. No order was made as to costs.

In essence, Molahlehi J, found that a commissioner does not have the power to set aside agreements such as this settlement agreement and that powers of a commissioner are restricted to the interpretation, and application of agreements envisaged in section 24 of the Labour Relations Act, 66 of 1995 (“LRA”), that is agreements of a collective nature.

The learned judge found:

10 “The commissioner committed a gross irregularity
and exceeded his powers in finding that the
agreement was invalid or the termination of the
employment relationship was not by mutual
agreement between the parties.

The ruling stands to be reviewed for this reason
alone”.

20 The learned judge went on to find that the commissioner had also
committed a gross irregularity in that he had speculated about the validity
of an agreement which was placed before him and furthermore that the
commissioner would have been empowered to have called for the
agreement and considered it *in camera* under a seal of confidence.

The appeal, which has now been brought, is predicated on two grounds, namely that the appellant contends that the court *a quo* erred and that the CCMA did have jurisdiction to interpret the settlement agreement and secondly, that the court *a quo* erred in finding that the commissioner had committed a gross irregularity in the proceedings by failing to call for

the settlement agreement and consider it *in camera*.

When the matter was argued this morning, Ms Hardy who appeared on behalf of the appellant, submitted that the only approach which could logically be pursued in this matter was for the case to be referred back as had been ordered to a commissioner, for the commissioner then to determine whether a condonation application should be successful and if so, to determine further, whether the appellant had been unfairly dismissed.

10 The problem with the present case is that, were this matter to be referred back to a commissioner, the implication would inexorably flow from such a judgment, that this court would have sanctioned an argument that a commissioner would have jurisdiction, not only to examine a settlement agreement but to set it aside. Ms Hardy was correctly constrained to accept that, absent the setting aside of the settlement agreement, there could not have been a dismissal because the settlement agreement provides for a voluntary resignation. That point is fortified by the further notion that, even though the initial disciplinary body had decided that appellant should be dismissed for dishonesty, the appeal body had not decided the matter because the settlement agreement was
20 concluded in circumstances whereby it was agreed that the appeal body would not dispose of the case. The settlement agreement had done the work of the appeal body and hence the disposition of the dispute.

The question therefore arises as to whether a commissioner, faced with a case of this kind, has jurisdiction to examine the settlement agreement, find whether because of *justus error*, or because the

agreement is *contra bonis mores* therefore the CCMA could consider the possibility of an unfair dismissal. I leave aside the difficulty with such an argument, being that due to the settlement agreement, the domestic disciplinary procedures were never exhausted for the reasons already set out.

It is clear that the CCMA and its commissioners require the existence of a dismissal as a jurisdictional prerequisite for its proceedings. See Section 186 of the LRA and the definition of dismissal as contained therein. In terms of section 192, an onus lies on a party, alleging a
10 dismissal, to prove such in the event of a dispute about whether or not a dismissal took place. Until there is a dismissal and the existence thereof is shown, the jurisdictional fact which would allow the CCMA to be clothed with jurisdiction does not apply.

In this case, until such time as the settlement agreement is set aside, there can be no question of a dismissal. Accordingly, in terms of the LRA, the CCMA is not clothed with jurisdiction. It would be anomalous for the CCMA to have jurisdiction to set aside settlement agreements which have to be set aside in order to attain jurisdiction in circumstances where there is no express provision which gives it jurisdiction and where the
20 CCMA is a creature of the statute.

For these reasons therefore, to remit the matter back to a body that does not have jurisdiction is an exercise in legal futility. What needs to happen, were the appellant to prosecute his case further, is for the appellant to approach the appropriate court with an application to set aside the agreement on a cause properly shown, being either the High Court or

the Labour Court.

In the circumstances, the learned judge in the court *a quo* was correct to find that the commissioner did not have the necessary jurisdiction. But there is no point sending it back to another commissioner when that finding had been made. That finding ended the possibility of the CCMA hearing the matter, absent a setting aside of the agreement. On this leg, the court *a quo* appeared to have overlooked the implications, with respect to the learned judge, of its own finding regarding jurisdiction.

For these reasons therefore, I make the following order:

- 10 1. The appeal is dismissed with costs;
2. The order of Molahlehi J, is set aside and replaced with the order:
1. The late filing of the review application is condoned;
2. The commissioner's ruling is reviewed and set aside;
3. There is no order as to costs.

TLALETSI JA and MUSI AJA Agreed

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DAVIS JA

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APPEARANCES:

For the appellant: Adv. G.B. Hardy

Instructed by: Allerdyce & Partners (Mr K. Allerdyce)

For the Respondent: Adv. G.A. Fourie

Instructed by: Edward Nathan Sonnenbergs

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Date of Hearing: 25 May 2010

Date of Judgement: 25 May 2010