



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA90/2013

Not Reportable

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Appellant

TAOLE ELIAS MOHLALISI

Second Appellant

and

COMMISSION FOR CONCILIATION

First Respondent

MEDIATION AND ARBITRATION

DIALE SIMON NTSOANE N.O

Second Respondent

TWO RIVERS PLATINUM MINE

Third Respondent

Heard: 26 August 2014

Delivered: 01 October 2014

Summary: Legal representation at the CCMA- Employee requesting legal representation two working days prior to arbitration proceedings- commissioner refusing legal representation taking into account comparative ability of the parties and their representatives to deal with the dispute- Commissioner not mentioning complexity of the dispute and interest of justice - such omission does not lead to inference that these factors were not considered where Commissioner alive to factors listed in Rule 25(1)(c) - dispute of sexual harassment neither

complex to warrant legal representation nor of public interest. Labour Court upholding commissioner's ruling. Refusal of Legal representation not unconstitutional. Appeal dismissed.

Coram: Tlaetsi DJP, Musi JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA:

- [1] This is an appeal against the judgment of the Labour Court (per Boqwana J) in a review application in which it upheld the Commissioner's ruling in the arbitration proceedings refusing to allow the second appellant legal representation in terms of Rule 25(1)(c) of the CCMA Rules.
- [2] The second appellant was an employee of the Two Rivers Platinum Mine ("the third respondent") until his dismissal on four charges of sexual harassment on 2 April 2007. The second appellant referred an unfair dismissal dispute in terms of s 185 of the Labour Relations Act 66 of 1995 ("the LRA") to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation and arbitration. The Commissioner in the arbitration proceedings dismissed the dispute on the basis that it concerned victimisation, and an automatically unfair dismissal, which the CCMA had no jurisdiction to arbitrate. Dissatisfied, the appellants referred the matter to the Labour Court on review, where Francis J set aside the arbitration award, and referred the dispute back to the CCMA for arbitration by a different commissioner.
- [3] After receiving notice of set down of the arbitration hearing for 29 June 2010, the appellants made application to the CCMA on 24 June 2010, for the second appellant to be permitted legal representation at the arbitration proceedings. On 29 June 2010, the second appellant attended the hearing with his legal representative. The third respondent opposed the application for legal representation but did not file opposing papers. The sum total of the

Commissioner's reasons for dismissing the application for legal representation is this:

'The applicant was charged and dismissed for sexual harassment. The rules on representation are clear: the commissioner has to exercise his discretion whether or not to allow legal representation. The applicant is a member of the trade union which represented him at the disciplinary hearing and again at the conciliation. If legal representation is denied the applicant will not suffer any prejudice because the union will step in. If legal representation is allowed the playing field will not be level and that will prejudice the respondent.

If the union wanted to apply for legal representation they could have done so in time to give the respondent time to brief their attorney. One does not launch an application on Thursday for the hearing sitting on Tuesday.'

[4] Having disallowed the second appellant legal representation at the arbitration proceedings, the Commissioner advised him to call the union (cited as the first appellant in this appeal) to represent him at the arbitration proceedings. Mr Moeketsi Mokoena ("Mr Mokoena"), an official of the union informed the Commissioner that the second appellant intended to take the ruling on review. He also requested a postponement of the arbitration proceedings on the basis that he was unable to represent the second appellant as he was not *au fait* with the matter, and that Mr Mampuru, the union official who was familiar with the matter, was not available to represent the second appellant at the hearing due to ill-health. The Commissioner dismissed the application for a postponement on the basis that the second appellant ought to have prepared for the eventuality of the application being refused, and made arrangements for his union representative to be available for the hearing. Mr Mokoena then excused himself and left the hearing, and so too did the second appellant. The Commissioner then dismissed the matter.

[5] The second appellant took the matter on review to the Labour Court. The Labour Court reviewed and set aside the postponement and dismissal rulings of the Commissioner, and remitted the matter to the CCMA for hearing *de novo* before

another commissioner on the grounds that the refusal by the Commissioner to grant a postponement amounted to a gross irregularity. The Labour Court, however, found that “the decision of the Commissioner on legal representation stands and cannot be entertained by the new commissioner”.

- [6] The Labour Court found that the second appellant’s application for legal representation was without merit for the following principal reasons: Since the appellants had filed the application for legal representation only a few days before the hearing of the matter, the third respondent did not have sufficient time to file opposing papers, and was therefore entitled to make submissions on the facts and law at the hearing of the matter. To the extent that the appellants claimed prejudice, for the failure of the third respondent to file opposing papers, the Labour Court found that the prejudice was self-created as the appellants were well aware of the date of set down but chose to launch the application for legal representation on the Thursday preceding the Tuesday on which the matter was set down for arbitration before the Commissioner. The Labour Court furthermore confirmed the decision of the Commissioner not to allow the second appellant legal representation at the arbitration proceedings on the basis that the Commissioner had applied his mind to the relevant factors on whether legal representation should have been granted, and correctly came to the conclusion that it should not as the union, which had represented the second appellant at both the disciplinary hearing and the conciliation proceedings, would step in if legal representation was denied. The Labour Court furthermore found that the Commissioner had looked at the comparative ability of the representatives and correctly found that “if legal representation is allowed the playing field will not be level and that would prejudice the third respondent”. In relation to the discretion afforded to the Commissioner in terms Rule 25(1)(c) of the CCMA Rules to allow or disallow legal representation, the Labour Court found:

‘Glancing through the application papers submitted at the CCMA by the applicants, I am not convinced that they demonstrated that the matter was so complex that it required legal representation, that the question of law needed a

lawyer to deal with and raised issues of public interest that required legal representation. The case that the second applicant had to allegedly meet was that of misconduct relating to an alleged sexual harassment. The applicants' application for legal representation does not state why the facts of the case required consideration of legal representation. The grounds of review do not demonstrate that either. In that regard the grounds relating to legal representation must fail.'

[7] The appellants now seek to appeal the decision of the Labour Court on the grounds that the Labour Court erred in confirming the Commissioner's application of Rule 25(1)(c) of the CCMA Rules, which they contend is unconstitutional as it denies a party in a CCMA arbitration the right to be represented by a qualified and competent legal representative to protect his or her constitutional right to fair labour practices. In addition, the appellants contend that the Commissioner committed a gross irregularity by failing to consider the factors relevant to the determination of an application to be allowed legal representation at CCMA proceedings.

[8] Rule 25(1)(c) of the CCMA Rules provides:

'If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule (1)(b) are not entitled to be represented by a legal practitioner in the proceedings unless-

- (1) the commissioner and all the other parties consent;
- (2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-
 - (a) the nature of the questions of law raised by the dispute;
 - (b) the complexity of the dispute;
 - (c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.'

In *Commission for Conciliation, Mediation & Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*,¹ the Supreme Court of Appeal observed as follows in relation to Rule 25(1)(c):

'The subrule indeed allows the commissioner considerable latitude in allowing legal representation. It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors. The listed factors are: the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute. The subrule does not disallow other forms of representation. Nor does it exclude the consideration of other relevant considerations. These factors may well, in a given case, include the seriousness of the individual consequences of a dismissal, assuming that this is not already encompassed by the subrule, which I doubt.' [Footnote omitted]

[9] The appellants had made application to the Commissioner in terms of Rule 25(1)(c) of the CCMA Rules to be allowed legal representation. In exercising his discretion in terms of Rule 25(1)(c) on whether to allow the second appellant legal representation in the arbitration proceedings before him, the Commissioner was required to take into account the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest and the comparative ability of the parties or their representatives to deal with the dispute. The only factor referred to by the Commissioner in his ruling, in the application for legal representation, is the comparative ability of the opposing parties or their representatives to deal with the dispute. The appellant contends that this gives rise to an inference that the Commissioner failed to give consideration to the

¹ (2013) 34 ILJ 2779 (SCA) para 21.

other factors in Rule 25(1)(c) of the CCMA Rules. In dealing with a discretionary decision such as is provided for in Rule 25(1) (c) of the CCMA Rules, the court must consider whether the arbitrator properly took into account all the factors listed in the Rule in coming to its decision, and whether the decision arrived at is justified.² It is clear from the ruling that the Commissioner was alive to the factors listed in Rule 25(1)(c) as he made specific mention of the Rule in his ruling. Surely, no other inference but that the Commissioner did in fact consider the other factors listed in Rule 25(1)(c) can be drawn from this.

- [11] To my mind, the decision arrived at by the Commissioner in his ruling was completely justified for the following reason. As indicated, the third respondent dismissed the second appellant after he was found guilty of four charges of sexual harassment. The primary question for determination at the arbitration would therefore turn on whether the second appellant's conduct constituted sexual harassment as defined in the Labour Relations Act. In my view, no difficult questions of law or fact arise requiring "a lawyer with advanced skills in litigation" as contended for by the appellants. The dispute is furthermore neither complex nor does it involve issues of public interest. As demonstrated in the Commissioner's ruling, the comparative abilities of the parties and their representatives clearly weighed against allowing the second appellant legal representation, as it would have upset the level playing field, causing prejudice to the third respondent whose representative was not legally trained. At the hearing of the appeal, counsel for the appellants contended that the union representative who had represented the second appellant at the conciliation proceedings, and thereafter at the first arbitration hearing, does not possess the requisite skills to represent him at the arbitration. This contention is manifestly unfounded, as no such allegation is made in the appellants' founding affidavit. In the circumstances, I find that it was not unreasonable for the Commissioner to have expected the second appellant to deal with the dispute without legal representation. The appeal against the judgment of the Labour Court confirming

² Cf: *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC).

the Commissioner's ruling on the question of legal representation must, for this reason, fail.

- [12] In relation to the further ground of appeal that Rule 25 of the CCMA Rules is unconstitutional, as it denies the second appellant the right to legal representation, this Court held in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others*³ that the now repealed s 140(1) of the LRA, which was the predecessor to Rule 25 of the CCMA Rules was not unconstitutional. More recently, in *Commission for Conciliation Mediation and Arbitration and Others v Law Society of Northern Provinces*,⁴ the Supreme Court of Appeal found Rule 25 to be constitutional. It stated thus in relation to the right to legal representation in *fora* other than courts of law:

'The courts have consistently denied entitlement to legal representation as of right in *fora* other than courts of law. As Innes CJ said:

"No Roman-Dutch authority was quoted as establishing the right to legal representation before tribunals other than courts of law, and I know of none."

The common law, however, recognises a right to a procedurally fair hearing in civil and administrative matters which may, in circumstances of the case, require recognition of the right to legal representation. The Bill of Rights expressly refers to the right "to choose, and to consult with, a legal practitioner" (section 35(3)(f)), but this is said in the context of an arrest for allegedly committing an offence (section 35(1)) and the right to a fair criminal trial (section 35(3)). Section 33 dealing with just administrative action contains no reference to such a right. Nor does PAJA, which was enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to be given reasons where rights have been adversely affected, refer to such an absolute right. Instead it confirms the common law. In *Hamata*, Marais JA concluded:

³ [2009] 4 BLLR 299 (LAC).

⁴ *Commission for Conciliation Mediation and Arbitration and Others v Law Society of Northern Provinces* at para 19.

“In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, only in cases where it is truly required in order to attain procedural fairness.”

He further said that, although there was no common law imperative to allow legal representation, the common law nevertheless required disciplinary proceedings to be fair and if:

“In order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion.” [Footnote omitted]

The SCA in *Law Society of Northern Provinces* accordingly found that Rule 25(1)(c) did not contravene the right to access to court in s 34 of the Constitution as there was no unqualified constitutional right to legal representation before administrative tribunals. The Constitutional Court subsequently dismissed the application for leave to appeal against the judgment of the SCA on the basis that the application bore no prospects of success. These are authoritative findings to which this court is bound, and I find no reason to differ with them. Accordingly, the appellants’ appeal on this ground must fail as well.

- [13] The last ground of appeal raised by the appellants is that the Labour Court erred in not finding that the Commissioner acted unreasonably by proceeding with the hearing of the application for legal representation when the pleadings were not closed, and the appellants had not had sufficient opportunity to reply to the third respondent’s opposition to the application. I consider this ground of appeal to be equally without merit for the following reasons. The appellants’ application for legal representation was launched two court days prior to the date of set down of the arbitration hearing. The third respondent was therefore not given an opportunity to oppose the application as contemplated in Rule 31 of the CMMA Rules in terms of which any party who wishes to oppose an application may

deliver a notice of opposition and an answering affidavit within 14 days from the day on which the application was served on that party. It is, therefore, required of a party who intends to bring an application to afford the opposing party sufficient time in which to serve its opposing papers prior to the commencement of the hearing. The third respondent was, however, only presented with the application for legal representation two working days before the date of hearing, and could not have reasonably been expected to comply and enter its opposing papers within such a short time frame.

[14] To the extent that the appellants wished to have the application for legal representation dealt with on an urgent basis, with truncated dates for filing of opposing papers, then they were required under Rule 31(4)(e) of the CCMA Rules to explain in their founding affidavit why they were unable to comply with the time frames prescribed under the Rules. No such explanation appears from the appellants' founding affidavit in the application for legal representation. However, appellants are seemingly of the view that the application for legal representation was brought in compliance with the CCMA Rules, meriting a postponement for the third respondent to oppose the application and file answering papers, if it so wished.

[15] Despite the appellants' non-compliance with the Rule 31(5) of the CCMA Rules, for failure to provide the third respondent with a clear 14 days prior to the date of hearing of the application for legal representation to file its opposing affidavit, the Commissioner proceeded to hear argument from the parties concerning the question of whether the second appellant should be allowed representation. There is, in my view, nothing irregular with the approach adopted by the Commissioner. Both parties were given ample opportunity to make their submissions, where after the Commissioner gave his ruling. In circumstances where the party facing potential prejudice for not being given sufficient time to file opposing papers, elects nonetheless not to file an opposing affidavit, but rather to argue the matter on the applicant's founding papers and the law, the adjudicator cannot be faulted for allowing the proceedings to continue, provided the other

party too, is given the opportunity to reply. It was certainly not required of the Commissioner, in circumstances such as those that prevailed at the hearing of the application for legal representation, to have postponed the matter to give the appellants a further opportunity to respond, in writing, to the third respondent's opposing argument. The second appellant was in any event required to make out his case for legal representation in his founding affidavit, which he clearly failed to do. Accordingly, the Labour Court correctly dismissed the review application on this ground as well.

[16] In the result, the appeal is dismissed, with no order as to costs.

F Kathree-Setiloane

Acting Judge of the Labour Appeal Court

Tlaetsi DJP and Musi JA concurring

APPEARANCES:

FOR THE APPELLANT: MES Makinta

Instructed by ES Makinta Attorneys