



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 25/15

In the matter between:

RAMADIBA MOTLATSO ANGELINA

Appellant

and

LIMPOPO LEGISLATURE

First Respondent

MAAKE JOSIAS SELLO N.O

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

NGOBENI EVA N.O

Fourth Respondent

Heard: 23 March 2017

Delivered: 01 August 2017

Summary: Appeal- against the order of the Labour Court refusing to grant the appellant certain declaratory orders- whether the Labour Court made an incompetent order when reviewing the arbitration award in circumstances where at the time of the hearing of the review application the review application which had been the reason the main consideration whether the Labour Court had jurisdiction to entertain a referral of an alleged unfair dismissal – Held that the review court is to consider the record as it was before the commissioner when the award was made although another court may have decided not to grant the review order but to refer the matter back to

the CCMA for the arbitration of the unfair dismissal dispute, failure to do so does not render the order granting the review incompetent.

Application in terms of section 175 of the LRA for the Labour Appeal Court to sit as a court of first instance and determine an application for the rescission of an order which would be an impediment to the success of the appeal- such an application conditional and to be considered only when the Labour Appeal Court decides not to grant the appeal- the applicant/ appellant failing to make out a case for such an order – the application refused.

Coram: Tlaletsi DJP, Davis and Landman JJA

JUDGMENT

TLALETISI DJP,

Introduction

- [1] The appellant appeals against the whole judgment and order of the Labour Court (per Lagrange J) granted on 12 December 2014 in which her application for declaratory relief was dismissed with no order as to costs. She is in this Court with leave of the Labour Court. The dispute dates back 14 years ago. For a better understanding of the issues, a brief history of the matter is apposite.

Historical background and chronology of events

- [2] The appellant was employed by the Limpopo Provincial Legislature, the respondent. She was suspended on 25 August 2004 pending investigation of allegations of misconduct by a chairperson of a disciplinary enquiry. On 13 December 2004, the chairperson, after finding her guilty of certain allegations misconduct, recommended a sanction of demotion to be accepted by the appellant within five days, failing which she be summarily dismissed.
- [3] On 22 December 2004, the appellant instituted review proceedings against the decision of the chairperson in the Labour Court under Case No: JR 3166/04. On 5 January 2005, the respondent imposed a sanction of dismissal on the appellant. Two days thereafter, on 7 January 2005, the appellant

lodged an urgent application in the Labour Court seeking relief pending the final determination of the review application under case No: JR 3166/04.

- [4] The urgent application was heard by Ngcamu AJ on 11 January 2005. Ngcamu AJ dismissed the urgent application on the basis that, among others, the appellant had first to exhaust internal processes available at the respondent. On the same date, the appellant lodged an internal appeal against the decision and sanction of the chairperson of the disciplinary enquiry. The internal appeal was heard and dismissed on 4 March 2005.
- [5] On 10 March 2005, the appellant referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). Case No: LP 1170/05 was allocated to the referral.
- [6] Commissioner Ramotshela conciliated the dispute. On 20 May 2005, the respondent raised a point in *limine* challenging the jurisdiction of the CCMA conciliating the dispute on the basis that there was already a pending referral under Case No: JR 3166/04 in the Labour Court. The commissioner held that the CCMA had jurisdiction to entertain the dispute and dismissed the point in *limine*.
- [7] On 4 July 2005, the appellant filed a notice of withdrawal of her referral under Case No: JR 3166/04 in the Labour Court. On 23 June 2005, the respondent lodged a review application under Case No: 8/05 to review Commissioner Ramotshela's ruling that the CCMA had jurisdiction to entertain the dispute referred by the appellant.
- [8] The review application served before Broster AJ on 8 November 2005 on the unopposed roll. Broster AJ postponed the application in order to give the appellant an opportunity to present written reasons for not opposing the application. Appellant filed her reasons on 30 November 2005 in which she stated in the main that she had already withdrawn her review application under Case No: 3166/04.
- [9] On 7 November 2006, Broster AJ issued an order under Case No: JR 1398/05, reviewing and setting aside the ruling of Commissioner Ramotshela

of 20 May 2005 to the effect that the CCMA had jurisdiction to entertain the dispute referred by the appellant under Case No: LP 1170/05. According to the appellant, she sent a letter on the same day of the order requesting reasons for the order. However, the letter which is marked annexure "D6" is addressed to the Judge President and the date on the Court's date stamp is not legible. It is however significant that in the letter she alleged that "*I have tried for over a year to access the file to get a full understanding of this order to no avail. I therefore humbly request reasons behind this order that will empower myself to set... appropriate cause of action with full understanding of issues.*" The impression created herein is that she has been aware of the order for some time, and that she could not gain access to the court file for over a year.

- [10] On 7 December 2007, appellant's then attorneys of record addressed a letter to the CCMA for the attention of the senior case management officer setting out the history of the matter relating, *inter alia*, to the ruling of Commissioner Ramotshela and the subsequent order of Broster AJ reviewing and setting aside that award. They further advised that the proceedings in the Labour Court which formed the basis of the objection raised by the respondent had been withdrawn and requested the CCMA to refer the dispute under Case No: LP 1170/05 to arbitration.
- [11] The Senior Case Management Officer, (Eva Ngobeni) replied to the request by stating that they are unable to process the matter because they are in receipt of an order from the Labour Court which set aside the ruling made by Commissioner Ramotshela and, as such, the "*CCMA lacks jurisdiction to determine the dispute further and you are therefore advised to re-refer the matter*". For unexplained reasons, this letter is dated 4 December 2000.
- [12] On 10 October 2008, the appellant heeded the advice of the senior case management officer of the CCMA and made a second referral of her dispute to the CCMA and was allocated Case No: LP6471/08. This referral was accompanied by a condonation application for the late referral of the dispute.

- [13] The condonation application for the second referral of the dispute was heard by Commissioner S Maake on 2 December 2008. He reserved the ruling and subsequently dismissed the condonation application on 15 December 2008.
- [14] Aggrieved by this decision, the appellant instituted review proceedings in the Labour Court. On 21 July 2010, the Labour Court (per Van Niekerk J) dismissed the appellant's review application. The appellant sought leave to appeal the decision of Van Niekerk J which leave to appeal was refused. On 4 May 2011, the appellant's petition for leave to the Labour Appeal Court under Case No: JA 90/10 was dismissed. It is common cause that the refusal to grant the appellant leave to appeal by the Labour Appeal Court was not pursued further.
- [15] In the meantime, the appellant had not withdrawn her first referral to the CCMA under Case No: LP 1170/05. To recap on this referral, the last formal decision was Broster AJ's order setting aside Commissioner Ramotshela's jurisdiction decision and the subsequent refusal by the senior case management officer refusing to refer the dispute to arbitration. On 20 December 2010, the appellant launched Motion proceedings on urgent basis, to be heard on 18 January 2011 in which she sought declaratory relief on the following terms:
1. Declaring that the Fourth Respondent was not competent nor empowered to make the decision or directive or advise as contained in her fax message of 4 December 2007 (sic), being Annexure "D5".
 2. Declaring that the appellant is entitled to prosecute the referral of the dispute of unfair dismissal to the Third Respondent under case number: LP1170/05.
 3. Declaring that the decision or directive by the Third Respondent represented by the Fourth Respondent refusing to refer the dispute under CCMA case number LP1170/05 to arbitration on 10 December 2007 on the grounds that the CCMA lacks jurisdiction to determine the dispute further and then that the Applicant should re-refer the matter, was not legally competently sanctioned by the Court Order of Broster AJ of 7 November 2006 and is *ultra vires*. Section 191, read with Sections 135

and 136 of the Labour Relations Act, No, 66 of 1995, as amended ("the LRA") and Rule 10 of the Rules of the CCMA, and therefore invalid and/or null and void *ab initio*.

4. Declaring that the order of Broster AJ did not set aside the referral of dispute by the Applicant on 10 March 2005 under case: LP1170/05 and that the said referral is still extant and pending before the Third Respondent.
5. Declaring that the defence of *lis pendens* as raised by First Respondent on 20 May 2005 was merely to stay the conciliation process and did not dispose of the dispute as referred by the Applicant to the Third Respondent on 10 March 2005 under case number: LP1170/05.
6. Declaring that the withdrawal of the review application under case number: JR3166/04 in the Labour Court by the Applicant on 5 June 2005 effectively lifted the stay of the conciliation process and disposed of the First Respondent's defence of *lis pendens*.
7. Declaring that the dispute under case number: LP1170/05 was conciliated upon by Commissioner Mathews Ramotshela on 20 May 2005, and that the relevant certificate of non-conciliation is still extant and binding on the parties.
8. Declaring that the referral process on 10 October 2008 following on the Fourth Respondent's decision or directive or advise under CCMA case number: LP6471/08 was not competent nor sanctioned by the Court Order of Broster AJ and *ultra vires* the provisions of Sec 191, read with Sections 135 and 136 of the LRA and Rule 10 of the CCMA rules and thus invalid and/or null and void *ab initio*.
9. Granting the Applicant further and/or alternative relief.'

[16] On 18 January 2011, Molahlehi J dismissed the application. On 21 January 2011, the matter came before Molahlehi J under case no: J2568/10. He handed down his judgment on 2 February 2011 in which he stated that on 18 January 2011 the application was dismissed essentially because the appellant did not appear when the matter was heard and further that the court accepted the argument of the respondent that the appellant did not make out a case on

the papers. The application was dismissed with costs on an attorney and own client scale. On this occasion, Molahlehi J granted leave to appeal to the Labour Appeal Court against the whole of the judgment and order handed down by him on 2 February 2011.

- [17] On 22 March 2012, the very application that had been dismissed by Molahlehi J in which he had granted leave to appeal, was set down before Rabkin-Naicker J. She was concerned about the way the matter had been conducted and the service provided to the appellant by her legal team. She made an order striking the matter of the roll and directed *inter alia*, that the contents of the file be referred to the Judge President and/or Deputy Judge President for perusal and to consider whether the conduct of the appellant's legal representatives should be referred to the Law Society and the bar Council. The appellant's attorneys were ordered to pay costs of the application *de bonis propriis*.
- [18] The appellant proceeded to prosecute her appeal to this Court. This Court set aside the order and judgment of Molahlehi J, but did not deal with the merits of the application which were referred to the Labour Court.¹
- [19] The application was ultimately heard by Lagrange J who handed down his judgment on 12 December 2014. This judgment is the subject of this appeal.

Judgment of the Court a quo

- [20] The Labour Court recorded the merits of the dispute as the appellant seeking a number of declaratory orders requiring the court to make determinations concerning the previous judgment of Broster AJ. The central issue underlying the appellant's claim was identified as whether it would be competent for the CCMA to resume processing the original referral, which was halted when Commissioner Ramotshela's ruling of 20 May 2005 was reviewed and set aside by Broster AJ's order. The issue is whether the jurisdictional ruling of Commissioner Ramotshela that the CCMA had jurisdiction to entertain the dispute had been nullified.

¹ The reference to the judgment of this Court is *Ramadiba v Limpopo Legislature and Others* JA 37.2011 dated 01 June 2012 (Unreported).

- [21] In the court *a quo*, the appellant presented the following contentions: Firstly, that the setting aside of the jurisdictional ruling of Commissioner Ramotshela only affected the power of the CCMA to conciliate the dispute and did not set aside the referral as such. Secondly, that since the objection raised by the respondent before Commissioner Ramotshela was based on a plea of *lis pendens*, namely that there were pending proceedings between the same parties on the same dispute in the Labour Court, Broster AJ's order could only nullify the jurisdictional ruling of the CCMA only for as long as the review application was still pending. However, since at the time the order of Broster AJ was made, the appellant had already withdrawn the proceedings in the Labour Court, with the result that the temporary impediment to the CCMA's jurisdiction vanished and the matter could proceed.
- [22] The third contention on behalf of the appellant was that, notwithstanding the fresh or second referral of the dispute under case no: LP647/08, the appellant had never withdrawn the original referral under case no: LP1170/05 and as such was still alive. Fourthly, the senior case management officer (Eva Ngobeni) had no authority to make a finding on the CCMA's jurisdiction to determine whether the first referral of the dispute should continue to be processed. Regarding the refusal to grant condonation for the late referral of the second referral of the dispute, the appellant contended that the refusal had no bearing on the first referral of the dispute. Further by making a second referral of the dispute, the appellant did not abandon the first referral.
- [23] The respondent contended that the order of Broster AJ setting aside Commissioner Ramotshela's award stands as an insuperable obstacle in the way of reviving the first referral. In the absence of it being set aside, the court is *functus officio* in respect of the first referral and cannot revisit or interpret that decision by way of making declaratory orders; that the appellant could not keep the first referral alive once she filed the second referral; when she filed the second referral she made an election which is binding upon her; that the refusal of the senior case management officer to entertain the original referral was merely a reflection of and an adherence to the effect of the court order;

that for other prayers in the notice of motion the appellant is seeking legal advice from court.

- [24] The appeal was initially set down on 22 March 2016. On that day, during the exchanges with counsel for the appellant, a view was expressed that the existence of Broster AJ's judgment could be an impediment to having the real dispute adjudicated at the CCMA. An appeal or any appropriate process to have that order set aside would open the way to the real dismissal dispute being dealt with. The appellant was thereafter granted an opportunity to reconsider her position in that regard. The appeal was postponed *sine die* and the parties were granted an opportunity to file a note on who should be responsible for the costs of the appeal. This was on the understanding that the appellant would withdraw the current appeal and embark on a process of having the order of Broster AJ being set aside.
- [25] Subsequently, the appellant has not withdrawn the appeal and has since filed an application for the variation and or rescission of Broster AJ order in the Labour Court on 5 April 2016. The appellant also sought a directive by the Judge President in terms of s175 of the Labour Relations Act 66 of 1995 (LRA) that the rescission application be determined by this Court sitting as a court of first instance. However, the application for rescission should only be determined by this Court in the event this Court finds that Broster AJ's order is a bar to the arbitration of the appellant's unfair dismissal dispute at the CCMA. In other words, the appellant would pursue the appeal against the judgment of LaGrange J. However, should the appeal fail, then this Court should sit as a court of first instance and determine the rescission application against the order of Broster AJ. For now, the directive in terms of s175 of the LRA has not been granted by the Judge President.
- [26] In this Court, Mr Ntsebeza SC, who appeared on behalf of the appellant, made two main submissions. Firstly, Broster AJ made an incompetent order when he reviewed the ruling of Commissioner Ramotshela because at the time the review application that had been instituted to review the decision of the chairperson of the disciplinary inquiry that the appellant should either accept a demotion within five days or be dismissed, the application had

already been withdrawn by the appellant. He submitted that Broster AJ knew about the withdrawal because he was informed by the appellant in response to the unusual request for reasons from the appellant as to why she was not opposing the review application. The objection that was raised by the respondent based on *lis pendens* had already fallen away. This point was referred to as “the nullity point.”

- [27] Secondly, Mr Ntsebeza submitted that the fact that the review application was opposed and Broster AJ heard it on the unopposed basis amounts to a judgment given in the absence of a party and should therefore be rescinded. Counsel relied on the decision in *The Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others*² as authority for his submission.
- [28] The answer to the first question is simply that Broster AJ dealt with the review application based on the facts, circumstances and the record as it was before Commissioner Ramotshela. At the time the latter presided over the conciliation proceedings, the review application directed at reviewing the decision of the chairperson of the disciplinary inquiry was not yet withdrawn.
- [29] Another Judge hearing that the review application had been withdrawn would have been loath to review the decision of the commissioner, and would have referred the parties back to the CCMA to deal with the merits of the dispute. However, it cannot be said that Broster AJ should be faulted in his approach. The decision of the Supreme Court of Appeal in *The Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* (supra) is distinguishable from the facts of this case. In that decision, it was held that only the Master of the High Court was empowered by s429 of the Companies Act to appoint a judicial manager. The order of a Judge of the High Court appointing other persons as judicial managers who were not appointed by the Master of the High Court was regarded a nullity and of no force and effect. The Supreme Court of Appeal held further that a pronouncement of a nullity was not even necessary, so was a need to have it set aside by a court of equal standing. The main reason was that it was only the Master of the High

² 2012 (3) SA 325 (SCA).

Court who was empowered to appoint a judicial manager. However, in this case, the order made by Broster AJ was competent because he was entitled to consider the review on the record as it was before the commissioner. At the time the application to review the decision of the chairperson of the disciplinary inquiry was still pending in the Labour Court.

[30] One is sympathetic with the fact that the appellant had to involve herself in such a long and protracted litigation without her actual unfair dismissal dispute being determined. She has been failed by the system and the advices received along her way. The situation is regrettable that it is almost 13 years that the dispute has been dragging.

[31] I am not satisfied that this is a case where this Court should sit as a court of first instance in terms of s 175 of the LRA and entertain an application for rescission. It is not insignificant that the second referral has been unsuccessfully pursued by the appellant up to appeal stage. Those proceedings cannot be ignored or wished away because they concerned the very unfair dismissal dispute between the appellant and the respondent.

[32] In conclusion, the Labour Court committed no misdirection in dismissing the application. The appeal falls to be dismissed with costs.

[33] In the result, the following order is made.

“The Appeal is dismissed with costs such costs to include the employment of two counsel.”

Tlaletsi DJP

Davis JA and Landman AJA concurred

APPEARANCES:

For the Appellant: Advocates D Ntsebeza SC; G Shakoane SC; M Ramoshaba

Instructed by Ndekwe Attorneys

For the Respondent: Advocates N Cassim SC; S Tilly

Instructed by: Lokwe Attorneys

LABOUR APPEAL COURT