

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR603/03

In the matter between:

**KUNGWINI RESIDENTIAL ESTATE AND
ADVENTURE SPORT CENTRE LIMITED**

Applicant

and

MR LUCKY MHLONGO N.O.

First Respondent

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

Second Respondent

CAROL DUTTON

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (“the Act”), to review and set aside a rescission ruling made on 3 March 2003 under case number GA39954-02 by the first respondent (“the commissioner”).

2. The application was opposed by the third respondent.

The background facts

3. The third respondent was employed by the applicant. She resigned on 10 March 2002 and contended that she was constructively dismissed. On 27 November 2002 she referred a dispute of constructive dismissal to the second respondent ("the CCMA"). On 3 December 2002 the third respondent served an application for condonation for the late referral of her dispute.

4. The applicant handed the third respondent's application for condonation to its attorneys of record who on 4 December addressed a letter to the third respondent's representative stating that the application for condonation did not comply with Rule 31(3) and 31(3)(e) of the CCMA Rules. It stated that the non compliance with the said rule prevented the applicant from opposing the application for condonation. The complaint were that since the CCMA has assigned no case number, the applicant was prevented from opposing the condonation application. A copy of the letter was also faxed to the CCMA.

5. Unbeknown to the parties, on 10 January 2003 commissioner S Alli Dadabhai issued a condonation ruling in terms of which the third respondent's late referral was condoned.

6. On 16 January 2003 the third respondent's representatives advised the applicant's attorneys in a letter that the case number had been allocated. It advised further that the applicant had fourteen (14) calendar days to lodge a notice of opposition and supporting affidavit.

7. On 22 January 2003 the applicant received per registered post the condonation ruling referred to in paragraph 5 above.

8. On 24 January 2003 the applicant delivered its intention to oppose the third respondent's application for condonation and an application to have the condonation ruling rescinded.

9. On 30 January 2003 the applicant received a notification letter from the CCMA that the matter had been set down for conciliation on 24 February 2003.

10. On 24 February 2003 the applicant attended the conciliation meeting at the CCMA. The commissioner presided. The applicant raised the following issues with the commissioner:

10.1 The CCMA did not have jurisdiction to conciliate, since the application to rescind the condonation ruling had not been set down for hearing;

10.2 The commissioner is not permitted to address the rescission application since the application was not before him.

11. The commissioner after being provided with all the relevant documents pertaining to the rescission application, requested the parties to address him on the rescission application.

12. On 25 March 2003, the commissioner issued the ruling that the applicant is seeking to review.

The rescission ruling

13. The commissioner found in his ruling that:

13.1 That the third respondent has complied with the provisions of CCMA rules 10(1)(2) and (3). Rule 10 might be in conflict with Rule 31(3)(b) since it is impractical to have a case number assigned without having served the other party to the dispute as specifically required by Rule 10(2)(b) to have written prove that the other parties to the dispute were served.

13.2 If the applicant's representative was aware of Rule 10, placing an obligation on the third respondent to get the case number assigned is unfair instead of requiring same from the Commission as stated in Rule 31(3)(b). At this stage having in mind Rule 10, the applicant's representative should have known that it was impossible that the case number was already assigned but decided to use this as an excuse not to oppose the application to go on holiday which was done the day after receipt of the application. The commissioner found that in the light of Rule 10, the applicant had no bona fide defence not to oppose the application for condonation.

13.3 The commissioner found that it was inappropriate for the applicant to simply have concluded that the application was defective and therefore decided not to oppose the matter. The applicant's contention that the third respondent's application for condonation was defective raised a question about who is empowered to decide defective referrals. The applicant was not empowered to decide whether the third respondent's application was defective. The applicant should have in terms of rule 31(5)(a) requested that the third respondent's referral be dismissed on a technical basis. The reason for not opposing the third respondent's application for condonation was because the applicant's representative's office was closed. The failure to file a notice of opposition and answering affidavits constituted a waiver of the applicant's rights and could therefore not be entertained.

The grounds of review

14. The applicant relies on the following grounds of review:

14.1 The commissioner did not consider the relevant facts of law, misunderstood his powers and consequently arrived at a ruling that is not in accordance with the law of natural justice.

14.2 The first and second respondents' failure to take cognizance of the relevant Act and Rules for the Conduct of Proceedings before the CCMA, constitutes an abuse of their powers. The commissioner determined a dispute where the dispute had not been the subject of conciliation.

14.3 The commissioner conducted him in a manner that was partial and biased and gave a ruling that was inconsistent with the right to fair labour practices.

14.4 The commissioner acted outside the limits of the Rules of the CCMA by which he is bound to.

14.5 The commissioner failed to make a ruling in terms of the material properly available to him and the conclusion he eventually arrived at.

14.6 The condonation ruling and the rescission ruling are found to be fatally defective and be reviewed and set aside.

Analysis of the facts and arguments raised

15. There is no substance in the grounds raised by the applicant in his application. It is clear from the ruling that the commissioner considered the relevant facts of law, understood the powers and arrived at a decision that was in accordance with the law of natural justice. The matter had been initially enrolled for conciliation. At the conciliation hearing the applicant raised a point in limine to the effect that the CCMA did not have jurisdiction to conciliate the dispute pending the rescission application. The point in limine was upheld and the commissioner permitted the parties to address him on the application for rescission. The applicant did not object to the route that the commissioner had followed. The commissioner did not abuse his powers and did not determine a dispute which was not the subject of conciliation. The commissioner did not go to conciliate the dispute and it is clear from the ruling that he went on to hear the rescission application. It is also clear from the ruling that conciliation is still pending.

21. There is no evidence that shows that the commissioner conducted himself in a manner that was partial and biased and that he gave a ruling that was inconsistent with the right to fair labour practices. The commissioner had considered all the material placed before him and arrived at a conclusion that was based on the material that was before him.

22. It is clear from the facts that the third respondent's referral was made in terms of Rule 10(1) and (2) and that in terms of Rule 10(3) the CCMA accepted the referral. The said Rule reads as follows:

"(1) A party must refer a dispute to the commission for conciliation by delivering a completed Labour Relations Act form 7.11 ("the referral form").

(2) The referring party must:-

(a) sign a referral document in accordance with Rule 4;

(b) attach to the referral document written proof, in accordance with Rule 6 that the referral document was served on the other parties to the dispute;

(c) if the referral document is filed out of time, attached on application for condonation in accordance with Rule 9.

(3) The Commission must refuse to accept a referral document until sub rule (2) has been complied with.”

23. The applicant on its own version received the third respondent’s referral on 3 December 2001. The referral did not contain a case number. The referral was referred to the applicant’s attorney’s on 4 December 2001 whose firm was closing for the December holidays. Instead of filing the necessary notice to oppose or answering affidavits, the applicant requested the third respondent to file a case number. Nothing as pointed out by the commissioner prevented the applicant from opposing the late referral. Except the letter that the applicant wrote it did nothing. The third respondent could not condone the applicant’s non compliance. The applicant could not on its own decide that there was non compliance with rule 31 and decide not to oppose the application. It was the author of its own misfortune.

24. The commissioner has dealt with the submissions made by the applicant about the provisions of rule 31. It cannot be said that the commissioner either committed an irregularity or did not apply his mind to the facts or submissions made. The award is well reasoned and no irregularity was committed by the commissioner.

25. The applicant has in its written heads of arguments raised new grounds of review that was not raised in the review application. I do not deem it necessary to deal with those new grounds of review.

26. The applicant’s application to review the condonation ruling of 10 January 2001 should fail on the basis that the ruling was received by the applicant on 22 January 2003 and the review application was only filed with this Court on 15 April 2003. This was well after the six-week period. There is no application for condonation. The commissioner who made the ruling was also not cited at a party to the proceedings.

27. The review application stands to be dismissed.

28. There is no reason why costs should not follow the result.

29. In the circumstances the following order is made:

29.1 The review application is dismissed with costs.

29.2 The CCMA is to enrol the dispute for conciliation under case number GA39954-02 on notice to both parties.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : ATTORNEY G J DE VILLIERS - MOHR

FOR THIRD RESPONDENT : M A HAWYER INSTRUCTED BY BARRY KOTZE INCORPORATED
ATTORNEYS

DATE OF JUDGMENT : 2 DECEMBER 2003