

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR1260/08

In the matter between:

POGISO KGOBOKOE

Applicant

and

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER PRINCE KEKANE

Second Respondent

COMMISSIONER THULANI AKIM

Third Respondent

STANDARD BANK OF SOUTH AFRICA

Fourth Respondent

Date of hearing : 22 March 2011

Date of judgment : 29 June 2011

JUDGMENT

SHAI AJ

[1] This is an application by the applicant that seeks to review and set aside the notice of withdrawal signed by applicant at the instance of the third respondent, and also to review and set aside the decision of the second respondent to refuse reinstatement of arbitration proceedings in case number GAJB25081-07, withdrawn by applicant at the insistence of the third respondent. Further more, the applicant seeks to have the above decision replaced by an order to reinstate the matter for arbitration.

[2] The first respondent is the Commission for Conciliation, Mediation and Arbitration (“the CCMA”), a juristic person established in terms of Section 112 of the Labour Relations Act of 1995 (LRA), with its principal place of business at CCMA House, 26 Loveday Street, Johannesburg.

[3] The second respondent is Prince Kekana (“the Senior Commissioner”), a Commissioner of the CCMA, duly appointed as such in terms of Section 117 of the Act and employed by the CCMA at CCMA House, 26 Loveday Street, Johannesburg.

[4] The third respondent is Thulani Akim (“the Commissioner”), a Commissioner of the CCMA, duly appointed as such in terms of Section 117 of the Act and employed by the CCMA at CCMA House, 26 Loveday Street, Johannesburg.

[5] The fourth respondent is Standard Bank of South Africa Limited, a duly registered company, incorporated in terms of the laws of the Republic of South Africa,

with its main place of business situated at Standard Bank Centre, 1st Floor, Simmonds Street, Johannesburg.

The facts

[6] On 12 June 2007, at about 19h36, the applicant received notification of a disciplinary hearing for the following day, 13 June 2007. The disciplinary hearing was held on the 13 June and applicant was dismissed thereafter. The charge against the applicant was framed as follows:

“1) Dishonesty in that you misrepresented facts to a client, namely BJ Vilakazi, when you provided her with three different financial products which she was made to believe was the single investment that she had requested in an attempt to enrich yourself to earn a higher commission on the products that you provided to the client in comparison to what she had requested.”

[7] The applicant was not satisfied with the said outcome and referred an unfair dismissal dispute to the first respondent on 25 July 2007. The dispute was scheduled for conciliation on 24 August 2007 and applicant also made an application for condonation of a ruling of which was issued on 7 September 2007. The dispute was subsequently scheduled for arbitration on 12 November 2007 under case no GAJB25081-07. At the arbitration hearing, the fourth respondent was represented by Mrs Linda Mcineka, its Industrial Relations Consultant.

[8] Mr. Endy Morrison, Director Financial Consultancy Division of the fourth respondent allegedly made a settlement proposal and requested that the commissioner,

adjourn the arbitration proceedings for purpose of entering into negotiations on the proposals. The commissioner agreed to the suggestion and adjourned the proceedings.

[9] The said proposal was as follows:

“9.1 the employer will offer re-employment, albeit for a different position that was held by the applicant prior to the suspension.

9.2 Monetary compensation.

9.3 There will be no black listing for dismissal.”

[10] As there were no details regarding the new offered position nor the quantum of the compensation the applicant requested the offer in writing.

[11] The commissioner returned to the hearing room and was informed of the offer and the request for postponement for purpose of having the offer reduced to writing. The commissioner was unwilling to postpone the matter and insisted the matter be either proceed or be withdrawn as he was busy with other cases. The commissioner allegedly left with fourth respondent’s representative, Mr. Mcineka.

[12] The applicant contends that when the commissioner returned he was with the fourth respondent’s representative and had a withdrawal notice in his hands. The commissioner then instructed him to sign the form which was already completed save where he had to sign. When he protested, the commissioner informed him that since there was a settlement offer, there was no need to further engage the CCMA.

[13] The applicant contends further that the fourth respondent's representative reiterated their desire to settle on terms referred to above, and backed by the commissioner, asserted that the best way to proceed is for him to withdraw the case. Further that, Mr. Endy Morrison confirmed the proposal and committed himself to obtain the necessary details from the bank.

[14] The applicant contends further that despite his protestations, the commissioner insisted that he should sign the withdrawal and based on these commitments and insistence by the commissioner he then signed the withdrawal. The parties then agreed that the applicant should go and see Mr. Mcineka the following Thursday.

[15] Upon his arrival at the Bank, Mr. Mcineka informed him that he did not have the details and that he should see Mr. Endy Morris. Mr. Morris then told him that he did not have anything to offer and does not see any reason why the bank should make an offer of settlement and that if he wants a job from the bank he must apply like anybody else.

[16] The applicant went back to the CCMA the same day to lodge a complaint. The Senior Commissioner, Moahloli Nyama responded and said that he had made an investigation and the results are that the commissioner denied that applicant had made any application for postponement. According to the commissioner, the applicant had wilfully and knowingly withdrew the dispute and that the implication of the withdrawal was explained to him. Mr Nyama then informed the applicant that the

case cannot be re-opened.

[17] Since applicant was aggrieved by the above response, he was requested to appeal to the Convening Senior Commissioner, Mr. Prince Kekana, (the second respondent). The second respondent ruled that “a dispute that has been withdrawn through an election of the applicant cannot be reinstated”. The second respondent then advised the applicant to approach this Court for a remedy.

[18] The applicant then launched an application with this Court seeking to set aside the said notice of withdrawal. It appears that the applicant did so on 9 July 2008. In the said application and in addition, the applicant sought condonation of the late filing of its papers.

[19] The matter was scheduled for 30 July 2009 at 10h00. On this day, my brother, Jammy AJ made an order condoning the late filing of the review application. Further, that he decided that the matter could not be decided on papers because of factual disputes. He referred the matter for oral evidence and reserved the costs of the day in question.

[20] As a matter of course, the parties held a pre-trial meeting and signed the minutes thereof. In terms of this pre-trial agreement the common cause issues were amongst others:

- The applicant requested the postponement which was refused by the third respondent who was apparently not satisfied with the merits of such a postponement.
- The third respondent gave the parties an opportunity to explore possibilities of settlement.

[21] The issues in dispute are recorded as follows:

[21.1] Whether the fourth respondent had proposed a settlement in the terms as they appear in paragraph 14 of the applicant's affidavit.

[21.2] Whether applicant, had indicated his unwillingness to proceed with the arbitration proceedings on account of not being ready to run with the matter and sought a postponement, which request was refused by the third respondent.

[21.3] Whether the applicant voluntarily withdrew the matter from the CCMA roll.

[21.4] Whether the third respondent coerced the applicant to sign a notice of withdrawal form.

[21.5] Whether the third respondent had read out the contents of the notice of withdrawal and explained the consequences thereof to the applicant.

[22] The issues which the Court is required to decide are recorded as follows in the said pre-trial minutes:

[22.1] Whether the applicant signed the notice of withdrawal voluntarily under case no GAJB25081-07.

[22.2] Whether the third respondent coerced the applicant into signing notice of withdrawal.

[22.3] Appropriate relief.

[23] The said application of review was re-scheduled for hearing of oral evidence and hence these proceedings.

Grounds of review

[24] The grounds for review raised by the applicant may be summarised as follows:

[24.1] The decision by the commissioner in casu, to refuse a postponement to allow me to consider the settlement proposal made by the employer before the start of the arbitration proceedings, his insistence to withdraw the matter, and subsequently refusal to reopen the matter after settlement negotiations fell through, is not rational but ultravires, and grossly irregular. The commissioner misconducted himself by acting in the manner he did during proceedings.

[24.2] It is my contention that the commissioner committed a gross irregularity by refusing the request to postpone the matter for the employer to provide the relevant details and reduce the settlement proposal to writing. It is my further contention that the commissioner committed a misconduct when he held side meetings with the employer's representatives in my absence during there proceedings. Further more, it is my submission that the commissioner exceeded the scope of his powers when he brought an already filled notice of withdrawal and instructed me to sign it, since I had expressed an intention to engage the employer's settlement proposal.

The test for review

[25] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ being: "whether the decision reached by the commissioner one that a reasonable decision maker could not reach".

[26] In *Sidumo* Ngobo J, as he then was, was of the opinion that although the

¹ 2008 (2) SA 24 (CC).

provisions of section 145 of the LRA have been suffused by the Constitutional standard, that of a reasonable decision maker.² The learned Judge further stated that when a litigant wishes to challenge the arbitration award under section 145(2), he or she must found his or her cause of action on one or more of these grounds of review and said the following:

“The general powers of review of the Labour Court under section 158(1)(g) are therefore subject to the provisions of section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioners may be reviewed by the Labour Court under section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under section 145(2) must found his or her cause of action on one or more of these grounds of review.”³

[27] In *Southern Sun Hotel Internationals (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁴ the Court acknowledged the test for review of Commissioner’s award as enunciated in the *Sidumo* decision (reasonable decision maker test) but added that:

² Id at para [162]

³ Id at para [189]

⁴ [2010] 31 ILJ 452(LC),

“Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner’s process related to conduct is found wanting. Of course, reasonableness is not irrelevant to this inquiry – the reasonableness requirement is relevant to both process and outcome.”⁵

[28] The issues that the Court has to decide on are outlined above in paragraph 22. Briefly stated, the Court has to decide whether the applicant signed the withdrawal notice voluntarily and or whether the commissioner, coerced him to sign same.

[29] I have indicated above that the matter was referred for oral evidence to specifically determine the two issues mentioned in the preceding paragraph.

[30] At the trial of this matter, the applicant led evidence that at the commencement of the arbitration proceedings the fourth respondent’s representative asked the commissioner to revert to conciliation as he did not attend the conciliation process. The commissioner agreed and allowed the parties to explore possible settlement on their own as he did want to be privy to the merits of the matter. He testified that the fourth respondent’s representatives made the following proposals:

[30.1] that he would be re-employed in another capacity

[30.2] monetary compensation\

⁵ Id at para [14]

[30.3] that the applicant would not be black listed.

[31] The applicant testified that he needed the said proposals in writing something that the fourth respondent were not in a position to do at that stage as they needed to consult the fourth respondent. He then asked the commissioner for postponement to enable him to receive the said proposal in writing. The commissioner refused this and this is confirmed by both parties in their common cause issues under the pre-trial minutes although the parties do not agree with regard to the reasons.

[32] The fourth respondent's main witness, Mr. Morris emphatically denied any proposal having been made at the arbitration hearing let alone proposals as mentioned at paragraph 23 above. He did so even when it was shown to him that he had confirmed such discussions in his affidavit. Furthermore, the commissioner in his evidence confirmed that such negotiations were entered into although he did not have details thereof. This was also confirmed by the respondent's other witness, Mr Mateo at page 62 paragraph 20 of the record. The commissioner's evidence is to the effect that he had given the parties time to discuss such proposals and after a long time it appeared to him that an arrangement had been arrived at by parties. The commissioner says the following at page 69 paragraph 20:

"....I was called, I only came in the office, I still remember they indicated. The applicant is actually withdrawing. Withdrawing the matter. Then I went. I went down stairs to collect the withdrawal notice."

[33] It appears that towards the end of time allocated, the commissioner asked the parties whether the matter was settled. It appears that he was informed of a possible settlement, because his evidence as I mentioned was to the effect that it seemed the parties had come to an arrangement. It is in dispute as to who of the parties and the commissioner suggested the withdrawal of the dispute. However, what is not in dispute is that once the issue of the withdrawal was mentioned the commissioner went away and brought with him a fully completed withdrawal form. What is further in dispute is whether the applicant was coerced to sign the withdrawal form.

[34] The applicant testified that when the commissioner came back with the withdrawal form, he instructed him to sign thereby withdrawing the case and as a result of this and the undertakings the respondent made he signed the withdrawal. He further said that the withdrawal was not explained to him before signing. However, the commissioner and Mr Mateo say that it was explained to him. Mr. Morris cannot remember but he is of the view that it must have been read to him. However, both the commissioner and Mr. Morris confirmed that they have forgotten most of what happened on that day. The commissioner other than to remember that there appeared to him to have been an arrangement between the parties stated that he had forgotten much including also that an application for postponement was made. What is striking; however is that the applicant appears to remember vividly what transpired at the arbitration hearing.

[35] It appears that once the fourth respondent had made certain undertakings,

which appeared enticing to the applicant, but were not in position to reduce them to writing the commissioner faced an administrative problem. The case had to be closed. The only way of closing it was by way of a settlement or by arbitration. How would he arbitrate when it appeared to him that the parties had come to an arrangement? How would the applicant want to proceed with arbitration when it appears that the matter is resolved in principle and there are undertakings to finalise it after consultations? The only convenient way was to rely on a withdrawal of the dispute. I say this because the commissioner states at page 77, paragraph 10:

“There is no way that I can actually allow parties, to give them days ,or to stand down the matter, maybe up until another date, for them to settle or to draft a settlement agreement outside.”

This was in response to the question whether it was permissible to postpone the matter for purpose of allowing parties to finalise the agreement outside the CCMA. This fits well into the evidence of the applicant that he was refused postponement for this purpose. I can safely take judicial notice that it is practice in the CCMA that when there is strong possibility for parties to settle a dispute, postponement is usually granted for that purpose.

[36] This falls into place as the applicant testified that after signing the said withdrawal an appointment was made that he should visit the fourth respondent on the following Thursday for purpose of finalising the settlement negotiations. Mr. Morris testified that there was no such arrangement. However, fourth respondent's other

witness Mr Mateo confirms that indeed the applicant did present himself at the fourth respondent to see him and Mr Morris and he spoke to them. Applicant testified that he first spoke to Mcineka who told him that he does not have the said necessary details and that he should see Mr. Morris which he did. The applicant states that Mr. Morris told him that there is no reason why the fourth respondent should make any settlement. Mr Mateo confirmed further at page 62 paragraph 20 that the issues discussed were re-employment and the moneys owed to him.

[37] Once Mr. Morris said what he said to him the applicant returned to the CCMA to report that the negotiations have broken down and that the matter should be reinstated which request was refused by a Senior Commissioner and subsequently by the Convening Senior Commissioner. This is a further indication that the applicant laboured under a belief that the matter would be resolved which was in fact not the case.

[38] The applicant, although a single witness and his evidence needed to be treated with caution, appeared to me to be a credible witness. He remembered vividly what transpired on that day and some of his evidence is corroborated by both the commissioner and the fourth respondent witnesses in certain cases as I have shown above. Mr. Morris appears to have forgotten much of what transpired on that day and contradicted himself and persisted to do so when he was shown such contradiction. For that reason he is an unreliable witness. Mr Morris furthermore is contradicted by Mr Mateo and this calls into question the credibility of his evidence. What is also

striking is that the person who led the fourth respondent's delegation, Mr. Mcikane was not called to counter what the applicant said which was clear from the papers. It was not indicated why he was not called to counter the applicant as he was the best person better placed to know what happened as he was representing the fourth respondent and is the one who according to the applicant's evidence called for reversion to conciliation. He would have resolved this issue, "why revert to conciliation if there was no proposal to make" for example. The correct course of action the commissioner should have followed was to adjourn the matter and give parties time to explore further consensus on the settlement. It was not correct for him to insist on withdrawal while on the other hand directs the applicant to visit the respondent the following Thursday to discuss the matter further.

[39] On this basis, I find that the commissioner unreasonably refused postponement when it was clear that it was necessary in the circumstances. It is my further finding that both the commissioner and the applicant laboured under the mistaken believe that the matter was resolved in principle and thereby causing the commissioner to inadvertently making undue pressure to bear on the applicant to sign. It is therefore my finding that the applicant did not sign the said notice of withdrawal voluntarily. Secondly, it is also clear to me that the parties have not agreed and it appears to me that the applicant laboured under the mistaken belief that the matter will be resolved which is not the case. I take into account that the applicant is a lay person in this matter. That being the case, I see no reason why the applicant cannot revert to his former claims.

[40] Having arrived at the conclusion that I reached, I am of the opinion that I need to deal with the issue of withdrawal in general. I must say without hesitation that the remedy that I will grant at the end would be the same even if I had not reached the conclusion I reached above, that is, even if the applicant voluntarily withdrew the dispute. The following are my reasons.

[41] Withdrawal of a dispute is a unilateral act by an applicant and no act by a functionary and therefore not reviewable. See in this regard – *Ncaphayi v Commission for Conciliation, Mediation and Arbitration and Others*.⁶

[42] In the *Public Servants Association of South Africa obo Strydom v SARS*,⁷ the question was whether a party can be permitted to withdraw a withdrawal, and whether the Labour Court has discretion to grant that permission. Moshoana AJ held that the answer to the first question lay in the doctrine of election, which is part of our law. He held that where a man has two courses open to him and unequivocally takes one, he cannot thereafter turn back and take the other. There was no reason why this principle should not be applied to the withdrawal of a withdrawal, he said. On the second question he said that the Court has no discretion to exercise. He further said that even if the Court was wrong in holding this view, the discretion would have to be exercised judiciously and that case the exercise of this discretion was not called for.

⁶ (2011) 32 ILJ 402 (LC)

⁷ (2007) JOL 20040 LC (JS591/04)

[43] However, in the case of *Ncaphayi*, Lagrange AJ said the following at paragraph:

“Implicit in the commissioner’s reasoning is an assumption that the applicant’s submission of a notice of withdrawal by a referring party constitutes action which this Court can review. However, the withdrawal of a dispute referral to the CCMA is not an act of any functionary, but the action of an employee party to a dispute. The commissioner plays no role in that decision. This is the first difficulty with the commissioner’s reasoning in arriving at this conclusion that he had no jurisdiction to entertain the matter.”⁸

[44] The Court went further and stated that:

“...The LRA does not deal with the withdrawal of matters referred to the CCMA and neither do the rules of the CCMA. Rule 13 of Labour Court merely deals with the procedure to be followed if a party wishes to withdraw proceedings. It is instructive to note how High Court has considered the effect of a withdrawal of a matter. It has been held that the withdrawal of a matter by a party is akin to an order of absolution from the instance. Ordinarily an order of absolution from the instance does not prevent a party from reinstating proceedings and the defendant absolved in the first proceedings will not be able to raise exception rei judicatae if sued again on the same cause of action.”⁹

⁸ Above n 6 at para [26]

⁹ Id at para [27]

[45] The court on the strength of *Kaplan v Dunell, Ebden and Co*,¹⁰ *Wildlife and Environmental Society v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others*,¹¹ and *MV Wisdom C United Enterprises Corporation v STX Pan Ocean Co Ltd*¹² decided that withdrawal of a dispute at the level of conciliation does not preclude a party from making a fresh referral. The court said further that however, if the withdrawal is part and parcel of a final settlement of a dispute the situation will be different.

[46] As it now turns, we have two opposing decisions on the issue of withdrawal of a notice of withdrawal.

[47] I must say at the onset that I am respectively unable to agree with my brother, Moshwana AJ and inclined to agree with the latter decision for reasons that I will state here under.

[48] In the case of *Public Servants Association of South African obo Strydom v SARS*, the court relied on a number of cases and rejected the case of *Roupell v Metal Art (Pty) Ltd and Another*,¹³ as an authority to the proposition that a party can be allowed and the Court has a discretion to allow such a withdrawal of a dispute. The Court did so on the basis that *Roupell* did not deal with all legal arguments and

¹⁰ 1924 EDL 91

¹¹ 2005 (6) SA 123 (E)

¹² 2008 (3) SA 585 (SCA)

¹³ 1972 (4) 300 (W)

therefore should not be regarded as an authority to the proposition.

[49] In that case, Counsel for the applicant argued that the doctrine of election should be confined to instances of not prosecuting an appeal.

[50] Indeed almost all the cases that the court cited related to an appeal against a judgment. In the case of *Cohen v Cohen*,¹⁴ Fieldsend CJ summarised the differing approaches as follows:

“To summarise the differing approaches:

- a) Wessels J in *Bongers v Ekstein* (Supra at 913) said that if a party litigant does an act by which he communicates to the other party that he acquiesces in the judgment he is deprived of the right to appeal;
- b) Mason and Britowe JJ in the same case merely decided that to satisfy a judgment without any reservation of rights was inconsistent with an intention to appeal from it;
- c) De Villiers JP in *Clarke v Bethal Co-operative Society* (Supra at 1158) indicated that the authorities required either an express or as implied agreement between the parties;

Bristowe J in the same case at 1161 appeared to require either an expression of intention made under circumstances amounting to a contract, although he also referred to the doctrine of election. Election he said, require unequivocal choice of one of two alternative courses.

Solomon J in *Hlatshayo v Mare and Deas* (Supra at 253) appeared to go very much further in that he rejected the idea that any agreement was necessary or that the conduct need to amount to an estoppel. He considered that only one party's act need be looked at, and if that led one to the conclusion that he did not intend to appeal that was sufficient.”¹⁵

¹⁴ 1980 (4) SA 435 (ZA) at page 439

¹⁵ Id at 439A - E

[51] The issue that all these cases dealt with was prosecution of an appeal and in the circumstances that the applicant acquiesced to the judgment either by payment of the judgment debt, costs of suite, wrote a letter indicating that he want to submit a bill for taxation etc. In other words by making such payment or offers it is taken that he has waived his rights to appeal.

[52] Even the *Cohen* case itself involved an appeal. This is evident from page 436E of that judgment where the court held as follows:

“... when the appeal was noted on 20 November the respondent’s attorneys wrote that, in view of the unequivocal acceptance of the judgment of the Court aquo as appeared from the letters, they considered that the right to appeal had been perempted, and this is now the respondent’s contention.”

[53] After analysing comments by various judges and authorities the Court in *Cohen* said the following:

“The proper approach is to consider whether, applying the ordinary and well-recognised law governing agreement, express or implied, waiver or estoppel, a person is to be debarred from his right of appeal.”¹⁶

[54] In my view the authorities dealt with in the case of *Public Service Association*

¹⁶ Id at 440D

of South Africa obo Strydom v SARS dealt with peremption of appeal and nothing else and should be confined thereon. On the other hand *Roupell* dealt directly with the withdrawal of a notice of withdrawal and it should serve as authority that such a withdrawal can be withdrawn. The Court dealt with the question of whether an order to withdraw a notice of withdrawal can be made and proceeded to hold as follows at page 303C - D:

“The real enquiry is whether the version of the settlement asserted by the defendants differs in a material respect from that alleged by the plaintiff, and whether the plaintiff is properly entitled to claim that the parties were not ad idem, or that the defendant has repudiated the true settlement. If the plaintiff could establish such basis, then he would be entitled to revert to his original claims.”

[55] The Court went further and held that:

“The situation upon this analysis is that the plaintiff contended that the settlement was unconditional and that this defendant contended that the settlement was subject to the terms or condition referred to above. In that situation I think that the plaintiff was entitled to take up the attitude that there was not settlement and was entitled to revert to his original claim.”¹⁷

The Court went further and held that:

“.....in substance the case amounts to this, that the plaintiff says that the two attorneys thought they had arrived at a

¹⁷ *Roupell* n13 above at 304D

settlement, but that the defendant's attorney now thinks that the terms were otherwise than plaintiff's attorney thinks they were and, that being so, the plaintiff is prepared to accept that there was no settlement and wishes to revert to his original rights. It follows, in my view that the plaintiff must succeed on the merits of this application. In arriving at that conclusion I have not found it necessary to deal with any of the submission on the interpretation of the fourth schedule to the Income Tax Act.”¹⁸

[56] On the basis of the above I am of the view that a firm principle is established in this case and I see no reason why it should not be authority for the proposition that a withdrawal can be withdrawn. The submissions not attended to as mentioned above would in my opinion only help to the extent of arriving at the conclusion of whether the Income Tax Act should be read into that particular agreement or not. It will not answer the question whether a notice of withdrawal can be withdrawn. This I think could be the reason why the court found the submissions not relevant for deciding the issue.

[57] The fact that the applicant has the right to reinstate the matter back on the roll does not mean that he or she is guaranteed success in every such case. I'm of the view that were the respondent may be prejudiced by the reinstatement, for example, where a long time had elapsed before such case is reinstated and all evidence is lost, e.g. witness can no longer be traced, have died, etc. An applicant should not succeed. This will be in line with the comments made by Van Der Riet J in *Kaplan v Dunell*,

¹⁸ Id at 304G - H

*Ebden and Co.*¹⁹ where the learned judge said the following:

“If, moreover, they are prejudiced by the action of the plaintiff in withdrawing the case before it has been adjudicated upon and there is any real cause to fear that the plaintiff will recommence the action against them they may avail themselves at common law right given to them to apply for a decree of perpetual silence.”

It is my view that such an order may also be sought at the beginning of the proceedings in which a party seeks to reinstate such a withdrawal.

¹⁹ 1924 EDL 91, at page 94

[58] In the premise, my order is as follows:

- (1) The notice of withdrawal signed by the applicant is set aside.
 - 2) The decision by the second respondent to refuse reinstatement of the arbitration proceedings in case number GAJB25081-07 withdrawn by the applicant is reviewed and set aside.
 - 3) The first respondent is ordered to reinstate the matter on the roll within 30 days of receipt of this order to be heard by a commissioner other than the third respondent.
- Fourth respondent to pay the costs.

SHAI AJ

APPEARANCES

FOR THE APPLICANT : ADVOCATE MPHO MAKGATO

INSTRUCTED BY : RASEGOETE ATTORNEYS

FOR THE RESPONDENT : MR X MATYOLO

INSTRUCTED BY : PERROTT, VAN NIEKER, WOODHOUSE,
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