

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JR 3257/06

In the matter between-

EMERALD SAFARI RESORT AND CASINO

Applicant

And

COMMISSIONER E. HLONGWANE N.O.

First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

ISAAK BESSIE

Third Respondent

Date of hearing : 19 July 2011

Date of judgment : 22 July 2011

JUDGMENT

MOLETSANE AJ

Purpose of this application

1. The applicant in this matter seeks to review and correct and/or set aside the certificate of outcome of the conciliation proceedings under case number GAJB 906/06 dated 14 September 2006. The applicant also seeks an order that the third respondent's referral to the second respondent under the same case number be dismissed and set aside. Although the application was unopposed, Attorney J.

Roets appeared for the third respondent.

Factual background

2. The facts in this matter are relatively straightforward. The background is as follows:

- 2.1. The third respondent was employed by the applicant as a Table Dealer on 01 December 1998.
- 2.2. On 10 August 2005, the third respondent addressed a letter to Table Management complaining about an unfair labour practice.
- 2.3. The Applicant responded to the third respondent in a letter dated 11 August 2005, where it was brought to his attention that Management had already dealt with the issues raised by him in a meeting and if he had any further grievance, he should utilise the applicant's grievance procedure.
- 2.4. On 2 November 2005, the third respondent addressed a letter of resignation to the applicant, alleging that *"continued service has become intolerable and I have become a victim of loaded silence. Operating under such unresolved conditions is unbearable"*.
- 2.5. On 3 November 2006 the applicant's Human Resources Department received a notice of set down for arbitration from the second respondent. The arbitration was scheduled to take place on 17 November 2006.
- 2.6. On 17 November 2006, the applicant's attorney of record-Ms. M. Chenia attended the CCMA for the scheduled arbitration hearing on

behalf of the Applicant.

- 2.7. At the arbitration hearing Ms.Chenia requested from the Arbitrating Commissioner to peruse the CCMA file in order to establish whether there was proper service on the Applicant.
- 2.8. Ms. Chenia realized that proof of service attached to the referral for conciliation did not coincide with the date of signature of such referral. The registered slip attached to the 7.11 referral form indicated that the referral form was served on the applicant on 12 December 2005 but the referral form was only dated and signed on 15 December 2005. However, the CCMA stamp on the 7.11 form indicated that the referral form was only filed at the CCMA on 8 September 2006. The certificate of outcome was only issued on 14 September 2006, some nine months after the purported service of the referral for conciliation.

Applicant`s main dissatisfaction

3. The Applicant`s main gripe is that while the Applicant had resigned on 2 November 2005, the referral form claiming constructive dismissal was only referred to the Second Respondent (“the CCMA”) on 8 September 2006.
4. The applicant contends that the applicant has failed to refer the alleged constructive dismissal dispute to the CCMA within the 30 day period as prescribed in section 191(1) of the Labour Relations Act (“the LRA”). The applicant also contends that the third respondent’s late referral to conciliation was not

accompanied by the condonation application as required by Rule 9(1) of the CCMA Rules.

Arbitration proceedings postponed

5. As a result of Ms. Chenia raising the above points, the arbitrating commissioner postponed (rightly so in my view) the arbitration hearing in order to give the applicant an opportunity to review the certificate of outcome and the referral of the dispute to conciliation.

Evaluation

6. In my view, it is the commissioner's duty before s/he issues a certificate of outcome to satisfy herself/himself that the dispute was referred to the CCMA within the requisite period of 30 days.
7. In *casu* the certificate of outcome does not indicate when the dispute was referred to conciliation.
8. I agree with Ms. Chenia for the applicant that the referral was way out of time and the CCMA had a duty to direct the third respondent to apply for condonation before the certificate of resolution could be issued.
9. In my considered view, the decision of the first respondent in issuing the certificate of non-resolution before the condonation application had been considered is

reviewable in terms of Section 158(1)(g) of the LRA which is basically a common law ground of review.¹

10. It seems to me that the decision of the commissioner was arrived at arbitrarily.²

11. I however disagree with the submission by Ms. Chenia that I should also grant the applicant prayer 2 (i.e. setting aside the referral form to the CCMA).

12. It is my considered view that the applicant will have every right to raise the validity of the referral form to conciliation in its opposition to the condonation application, should the third respondent pursue the matter and apply for condonation. The Commissioner tasked with considering the condonation application will then have to deal with all issues raised including the validity of the referral form.

13. In the event the following order is made:

13.1. The certificate of outcome of the dispute referral for conciliation under case number GAJB 906/06 dated 14 September 2006 and issued by Commissioner E. Hlongwane is reviewed and set aside.

13.2. There is no order as to costs.

¹ See *Hira and Another v Booysen and Another* 1992 (4) SA 69 A

² For authority on arbitrariness, see *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

MOLETSANE AJ

APPEARANCES

For the Applicant : Attorney Chenia

Instructed by Glyn Marais Inc.

For the Third Respondent : Attorney J. Roets

Instructed by Roets Attorneys