



**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

JUDGMENT

Reportable

CASE NO: J1981/2010

In the matter between :

SOLOMON P MOHALE

Applicant

and

NET 1 APPLIED t/a CASH PAYMASTER SERVICES

NORTHERN (PTY) LIMITED

Respondent

Heard: 10 July 2012

Delivered: 8 August 2012

JUDGMENT

Dodson AJ:

- 1] A contractual relationship existed between the applicant and the respondent. The applicant says it was an employment relationship. The respondent

disputes this.

2] A dispute arose between the parties. That dispute was settled on 21 November 2008 by conclusion of a settlement agreement between the parties.

3] The settlement agreement provided in relevant part as follows:

‘I, the undersigned, Solomon Poroma Mohale confirm that I ... am prepared to accept, as I hereby do, the amount of R2 500 000 (two million five hundred thousand rands) in full and final settlement of the Settlement Claims.

...

I further confirm that any relationship, contractual or otherwise, between NET1 and myself ... are (sic) terminated with immediate effect.

...

The ‘Settlement Claims’ means any claim, of whatsoever nature, I may have against NET1, including any claims which may have resulted from the termination of the relationships (or otherwise in respect hereof) contemplated above.’

4] After this the parties entered into a further contractual relationship. A new dispute arose.

5] The applicant referred the new dispute as an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) in terms of section 191(1)(a) of the Labour Relations Act No. 66 of 1995 (“the LRA”). Conciliation failed. The matter was referred to arbitration in terms of section 191(5)(a) of the LRA.

6] The respondent raised two points *in limine*. The first was that the settlement agreement concluded on 21 November 2008 also settled the new dispute. The second was that the applicant was not an employee of the respondent,

but rather an independent contractor. The parties agreed that the Commission needed to give a ruling in respect of the first objection *in limine* before it arbitrated the dispute.

- 7] On 18 June 2010, the commissioner responsible for the arbitration handed down a ruling, the material part of which read as follows:

‘4.1 The applicant concluded a settlement agreement with the respondent during 2008 for a particular cause of action which was between the parties and the settlement agreement was in full and final between the parties.

4.2 It was apparent that the parties had further engaged one another which resulted in another cause of action.

4.3 The crucial issue is whether or not the settlement agreement that was concluded between the parties during 2008 did, or did not, cover the possible future claims or legal liability that the applicant may have against the respondent.

4.4 The cases cited by both parties are in congruent to one another in that they all indicate that if the issue in dispute is about the term of the agreement then the Labour Court and the High Court have concurrent jurisdiction in terms of section 77(3) of the BCEA.

4.5 Given the evidence before me, I conclude, that the CCMA has no jurisdiction to deal with the matter.’

- 8] Although the commissioner’s reasoning is somewhat opaque, it appears that he declined jurisdiction, not on the basis that the matter had been settled, but rather on the basis that only the High Court or the Labour Court had jurisdiction to resolve a dispute about the interpretation of a settlement agreement.

- 9] The applicant then referred by way of a statement of case in terms of Rule 6 of the rules of this court, the sole question of -

‘whether or not the settlement agreement concluded between the applicant and the respondent on 21 November 2008 settles any further claims and/or liability that might arise between the applicant and the respondent after 21 November 2008.’

- 10] The respondent pleaded as a point *in limine* that this court does not have jurisdiction. However, in a pre-trial minute, the parties agreed that -

‘4.3 The narrow question to be determined by the court is whether or not the settlement agreement concluded between the Applicant and the Respondent on 21 November 2008 settles any further claims and/or liability that arise between the Applicant and the Respondent after 21 November 2008.

4.4 If court answers aforesaid question in negative (sic), then the matter must be referred back to the CCMA for determination of two issues. Firstly, whether an employment relationship existed between the parties. Secondly, if the first question is answered in the affirmative, whether the Applicant had been unfairly dismissed by the Respondent.

4.5 The parties agree that costs should follow the result.’

- 11] The parties agreed further that the point was to be decided by this court without the leading of any evidence. It appears that the point *in limine* pleaded by the respondent was abandoned.

- 12] The respondent, however, in its heads of argument has taken up the attitude that in agreeing in the minute on the issue to be decided, both parties erroneously overlooked the fact that this court has no jurisdiction to entertain the dispute because –

12.1it is not for this court to determine academic issues; and

12.2the ruling of the commissioner should rather have been taken on review to have it set aside, if the applicant wished to take

issue with it.

- 13 The respondent relies on the trite point that the parties cannot by agreement confer upon the Court jurisdiction which it does not otherwise have.¹
- 14 The applicant argues that the commissioner correctly found that he lacked jurisdiction to interpret a settlement agreement and further that that was the only issue in respect of which the commissioner declined jurisdiction. The applicant argues further that if the issue in respect of which the commissioner declined jurisdiction is determined by this court, the way is then open for the commissioner to resume the arbitration in respect of the balance of the issues in dispute.
- 15 The respondent argues that it was within the power of the commissioner to decide whether or not the settlement agreement precluded the applicant's unfair dismissal claim and further that his declining of jurisdiction pertained to the entire matter and not just the question presented for determination by this court. Hence the need for a review of the commissioner's ruling, says the respondent, if the applicant wishes to compel the commissioner to resume the arbitration proceedings.
- 16 A preliminary difficulty which I raised with the applicant is the fact that neither the CCMA nor the commissioner are party to the proceedings. On that basis any relief which requires either the CCMA or the commissioner to be mandated to do anything, such as to resume the arbitration proceedings based on this court's ruling, is out of the question. Mr Orton, on behalf of the applicant, accepted that this was so, but argued that it was nonetheless open to this court to rule solely on the issue of whether or not the settlement agreement precluded the applicant's claim. If the ruling is in the applicant's favour, the applicant will take the necessary steps to have the matter set down for a resumed hearing before the commissioner.
- 17 I also asked Mr Orton on behalf of the applicant to identify which provision of

¹ *NUM obo 35 employees v Grogan NO* [2010] 8 BLLR 799 (LAC).

the LRA he relied on as providing the source of this court's jurisdiction. In response he placed reliance on section 158(1)(a)(iv) which gives this court the power to make a declaratory order.

18 In my view, there are two impediments to the relief sought by the applicant.

19 In the first place, the arbitrator's actual ruling on jurisdiction was not expressed in terms which confined it to the narrow issue which the applicant now asks this court to determine. Paragraph 1.1 of the commissioner's ruling introduces the matter by saying-

'This matter was set down for arbitration hearing on the 18th June 2010.'

20 Under paragraph 2 with the heading "*Issue to be Determined*", the commissioner defined the issue as being -

'to determine whether or not the CCMA has jurisdiction to hear the matter.'
(emphasis added)

21 He did not say "*to determine whether or not CCMA has jurisdiction to hear the first point in limine*".

22 In paragraph 5 he sets out his ruling as follows:

'I rule that the CCMA has no jurisdiction to deal with the matter.'
(emphasis added)

23 There is thus no attempt by the commissioner to confine his ruling merely to the narrow point which had been raised. As I read it, the commissioner decided that he had no jurisdiction to decide the matter at all.

24 I agree with the respondent that the only way of reigniting the arbitration proceedings before the commissioner in these circumstances was to take his ruling on review in terms of section 145 of the LRA, joining both him and the CCMA, as well as the respondent, as parties. A successful review would allow

this court to remit the matter and order a resumption of the arbitration proceedings.

- 25 Absent a review, the commissioner is in my view *functus officio* and the matter must be treated as having been finalised until his ruling is set aside.
- 26 In the second place, I do not agree that the commissioner had no jurisdiction to interpret the settlement agreement. The applicant based his case in this regard on certain decisions of this court and a decision of the High Court.
- 27 In *Premier, Limpopo Province v Makgoka & Others*² the applicant sought a stay of execution of a warrant enforcing a settlement agreement made an arbitration award in terms of section 143(3) of the LRA by the relevant bargaining council. A dispute had arisen subsequent to the award as to the correct interpretation of the settlement agreement.
- 28 The court remarked, *obiter*, that it, and not the bargaining council, was the appropriate body to have interpreted the settlement agreement and referred to the fact that “*the arbitral powers of CCMA commissioners and bargaining council arbitrators are limited when it comes to matters of interpreting agreements, to the interpretation and application of collective agreements.*”
- 29 It is not clear from the judgment why the provisions of section 24(8) of the LRA did not come into play in the circumstances. It provides that –

‘If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.’
- 30 Subsections (3) to (5) provide for the usual sequence of referral of a dispute, conciliation and, failing successful conciliation, arbitration by the council or the CCMA.

2 (2010) 31 ILJ 2974 (LC).

31 Section 142A(2) defines a settlement agreement as –

‘a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court...’

32 I will revert to this provision below. Leaving aside section 24(8), the comments in *Makgoka* must be understood in their context. In that matter, the referral of an unfair labour practice to the relevant bargaining council had been taken to its final conclusion in the form of the settlement agreement made an award of the arbitrator. The court was of the view that the bargaining council did not have jurisdiction to determine what was a fresh dispute which had arisen solely about the interpretation of the settlement agreement.

33 The present matter is distinguishable. The need to interpret the settlement agreement arose in the course of (not following after the final settlement of) the arbitration of a valid referral of an unfair dismissal dispute to the CCMA. The interpretation of the settlement agreement was incidental to and part of the issues to be decided by the commissioner in arbitrating the alleged unfair dismissal. In the circumstances, he had both the power and duty to interpret the agreement as part of the arbitration process which he was seized of. Commissioners do that all the time, particularly in the form of interpretation of employment contracts in the course of deciding unfair dismissal disputes. It would be absurd if, on every occasion that a CCMA commissioner was required to interpret an employment contract or other agreement in the course of the arbitration of a valid unfair dismissal dispute, the matter had to be stayed pending an interpretation by the Labour Court.

34 The second case relied on was *First National Bank Limited (Wesbank Division) v Mooi NO & Others*.³ In that case, the third respondent employee entered into a settlement agreement with the applicant employer at the stage when an internal appeal was pending. Notwithstanding the settlement agreement, the third respondent subsequently purported to refer an unfair dismissal dispute to the CCMA, along with an application for condonation of

3 (2009) 30 ILJ 336 (LC).

the late referral. When the dispute was referred for arbitration before a commissioner of the CCMA, the third respondent argued that the settlement agreement had been entered into as a result of a *justus* error. The commissioner essentially agreed with this submission, ignored the settlement agreement and granted condonation.

35 In a review of the commissioner's order of condonation, the Court held as follows:

[16] The powers of commissioners of the CCMA to rule on the interpretation and application of agreements is, in my view, confined to collective agreements in terms of s 24 of the Labour Relations Act ... In order to have the agreement set aside the third respondent ought to have approached either the civil courts or this court in terms of s 77 of the BCEA.

[17] In my view the commissioner committed a gross irregularity and exceeded his powers in finding that the agreement was invalid or the termination of the employment relationship was not by mutual agreement between the parties. The ruling stands to be reviewed for this reason alone.

[18] The Commissioner further committed a gross irregularity in ruling on the validity of an agreement which was never placed before him. Whilst it is clear the agreement was confidential between the parties, the commissioner could have called for the agreement and considered it in camera under the seal of confidence.'

36 In my view, the comments were made in a similar context as that outlined above in relation to the *Makgoka* decision. What the Court was conveying was that a commissioner of the CCMA would not have a distinct jurisdiction to receive and arbitrate a dispute aimed at the setting aside of a settlement agreement. This does not mean to say that a commissioner would not be able to interpret a settlement agreement in the course of adjudicating an unfair dismissal dispute which was validly referred to him or her.

- 37 In fact if one takes into account that the Court in the *Mooi* matter reviewed and set aside the condonation ruling and then remitted the matter to the CCMA for consideration by another commissioner, it becomes clear that the Court was of the view that a CCMA commissioner could indeed deal with the matter, including the employer party's reliance on the settlement agreement as requiring a determination of the arbitration in its favour. The commissioner's decision was also patently reviewable on the other grounds referred to in the judgment.
- 38 The third decision relied on was *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others*.⁴ In this matter it was held that a High Court did not enjoy concurrent jurisdiction with the institutions established in terms of the LRA to adjudicate upon disputes about the interpretation or application of a collective agreement. The judgment does not say that the CCMA or a bargaining council cannot interpret or apply an agreement other than a collective agreement in the course of the adjudication of a dispute validly referred to it.
- 39 I am also supported in my view that the commissioner had the requisite jurisdiction, by section 24(8) of the LRA. If a commissioner of the CCMA has the express power to determine disputes pertaining specifically to the interpretation or application of a settlement agreement, it is difficult to conceive how he or she would not have jurisdiction to interpret or apply a settlement agreement where that duty arises as an incident of the adjudication of an unfair dismissal dispute properly referred to him or her.
- 40 In the circumstances, I am in agreement with the contentions advanced by the respondent that this court does not in these circumstances have jurisdiction to determine the issue purportedly presented to it by agreement in the parties' minute. I do not express any view on whether or not the court would have jurisdiction in circumstances where the matter had not arisen as an incident of separate proceedings in the CCMA.

4 (1999) 20 ILJ 1018 (T)

- 41 The respondent contends that the wasted costs of the day when the matter was argued should be awarded against the applicant, as he ought to have withdrawn the referral upon receiving the respondent's heads of argument.
- 42 In my view, the following of the incorrect procedure emanated from errors on the part of both parties and on the part of the arbitrator. The matter was not that clear cut that withdrawal was the obvious response to the belated raising of the point by the respondent. I am accordingly of the view that each party should bear its own costs.
- 43 I accordingly make the following order:

43.1The referral is dismissed.

43.2No order is made as to costs.

DODSON AJ

Acting Judge of the Labour Cour

Appearances:

For the applicant: RJC Orton of Snyman Attorneys

For the respondent: Adv W Hutchinson instructed by Fluxmans Inc