



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No JR2083/12

In the matter between:

SOLLY MOHALE

Applicant

and

HLATSWAYO, T N.O.

First Respondent

COMMISSION FOR CONCILIATION,

Second Respondent

MEDIATION AND ARBITRATION

CASHPAY MASTER SERVICES NORTHERN

Third Respondent

(PTY) LIMITED

Heard: 15 January 2014

Delivered: 18 February 2014

Summary: Review of jurisdictional ruling - section 158 (1)(g) of the LRA, 1995 - delay in filing of review application condoned - reasons for delay satisfactory – Commissioner committed gross irregularity in finding that CCMA had no jurisdiction to interpret settlement agreements - ruling set aside.

JUDGMENT

CHAVOOS AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended (**the “LRA”**) and/or section 158(1)(g) of the LRA to review and set aside a jurisdictional ruling of the first respondent under the auspices of the second respondent. In terms of the ruling, the first respondent found that the second respondent did not have jurisdiction to arbitrate the applicant’s unfair dismissal dispute on the basis that the issue in dispute was about a term of the settlement agreement in which case the labour court and the high court had concurrent jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act to preside over the dispute.

Background

- [2] A dispute arose between the applicant and the third respondent which culminated in a settlement agreement being concluded on 21 November 2008.
- [3] In terms of the settlement agreement, any relationship, contractual or otherwise, that existed between the applicant and the third respondent terminated on 21 November 2008 by mutual agreement.

- [4] The agreement was in full and final settlement of the “settlement claims” defined as any claim of whatsoever nature, the applicant may have against the third respondent including any claims which may have resulted from the termination of the relationships contemplated in the settlement agreement.
- [5] Subsequent to the conclusion of the settlement agreement, the parties entered into a further contractual relationship. Sometime thereafter, a new dispute arose and the applicant referred an alleged unfair dismissal dispute to the CCMA for arbitration.
- [6] At the commencement of the arbitration, the third 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 an independent contractor. The parties agreed that the commissioner was only required to give a ruling in respect of the first objection in *limine* before it arbitrated the dispute.
- [7] On 18 June 2010, the commissioner handed down his jurisdictional ruling, the salient portion of which is as follows:

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

It was apparent that the parties had further engaged one another which resulted in another course of action;

The crucial issue is whether or not a 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;

The cases cited by both parties are incongruent 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;

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

- [8] It is apparent from the commissioner's reasoning that he declined jurisdiction on the basis that the high court or labour court had jurisdiction to resolve a dispute about the interpretation of a settlement agreement;
- [9] The applicant then referred the matter by way of a statement of case to this Court which matter was heard by Acting Judge Dodson on 10 July 2012, with judgment being delivered on 8 August 2012.
- [10] In a pre-trial minute, the parties agreed that:

10.1 the narrow question to be determined by the court is whether or not a settlement agreement concluded between the applicant and the respondent on 21 November 2008 settles any further claims

and/or liability that arose between the applicant and the respondent after 21 November 2008;

10.2 if the court answered the aforesaid question in the negative, 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.

[11] Mr Hutchinson who was the counsel for the third respondent, at the trial before Dodson AJ argued that both parties had erroneously overlooked the fact that this court had no jurisdiction to entertain the dispute because it was not for the court to determine academic issues and that the 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.

[12] The change in approach was for the first time recorded in the third Respondent's heads of argument.

[13] For reasons set out in his judgment, Dodson AJ agreed that this court did not have the jurisdiction to determine the issues purportedly presented to it by agreement in the parties' pre-trial minutes and accordingly dismissed the referral. He also agreed that this matter ought to have been referred to this court for a review. He also articulated in his judgment the reasons for him disagreeing that the commissioner had no jurisdiction to interpret the settlement agreement and drew a distinction

between the cases referred to by the third respondent from the matter at hand in coming to his conclusion.

Evaluation

[14] I am in agreement with Dodson AJ that the cases as referred to by the third respondent are distinguishable from the matter at hand. In my view, the defence that was raised by the third respondent at the CCMA before the commissioner in response to the applicant's alleged unfair dismissal claim was that the alleged unfair dismissal dispute could not be adjudicated by the CCMA on the basis that a settlement agreement had been concluded between the parties which settled all current and future disputes is simply a plea of compromise and collateral to the real nature of the dispute referred to by the applicant, namely an alleged unfair dismissal dispute. The interpretation of the settlement agreement was part of what the commissioner was required to determine in adjudicating the alleged unfair dismissal dispute and he had the requisite power to interpret and hear evidence on the defence raised by the third respondent as part of the adjudication of the alleged unfair dismissal claim.

[15] Ironically, Mr Hutchinson in his heads of argument before Dodson AJ, records the following as to the commissioner's findings:

"The commissioner's findings are set out above in paragraph 1 above. It is apparent from the commissioner's findings that he committed a gross irregularity in the conduct of the

proceedings by failing to determine the issue that was argued before him. In fact, he side-stepped the issue and made an incomprehensible reference to the labour court having jurisdiction over disputes concerning the terms and conditions of an agreement as contemplated in section 77(3) of the BCEA.

What the commissioner should have determined is whether there was any connection between the settlement agreement and a subsequent contract of employment that was allegedly entered into between the parties and allegedly resulted in the dismissal of the applicant. If the commissioner found that the settlement agreement, covered a subsequent dismissal the CCMA would not have jurisdiction to entertain the matter. If however, he determined that a subsequent event culminating in the dismissal of the applicant was not covered by the settlement agreement, then he had jurisdiction to deal with the matter.”

[16] This is precisely what the commissioner ought to have done in adjudicating the dispute at the CCMA instead of side-stepping the issue.

[17] It is not necessary for me to provide substantive reasons motivating why the CCMA does indeed have jurisdiction to deal with unfair dismissal disputes in light of the concessions made by Mr Hutchinson. The reasons are in any event well articulated in the judgment of Dodson AJ in

respect of which I am in agreement. If the CCMA has the power to decide on whether a settlement agreement is enforceable in appropriate circumstances, it may determine the issue in dispute for this reason as well.

- [18] The Commissioner's findings are grossly irregular and falls to be reviewed and set aside.

Condonation

- [19] The Third Respondent sought to contest the review application on the basis that the condonation for the late service and filing of the review application should not be granted as a result of the delay in bringing the review application. It was not contended that the Applicant had no prospects of success in reviewing and setting aside the decision of the Commissioner. In fact it would have been absurd for Mr Hutchinson to argue this given his argument before Dobson AJ during trial.
- [20] Insofar as the issue of delay is concerned, Mr Hutchinson contended that the Applicant was legally represented at the CCMA and that his attorneys ought to have known that the Commissioner's ruling should have been taken on review as opposed to filing a statement of case and seeking the wrong remedy. In the circumstances he contended that as a consequence of such negligence on the part of the Applicants' attorneys, the condonation sought by the Applicant insofar as the delay in bringing the review application is concerned should not be condoned.

- [21] He also contended that the third respondent would suffer substantial prejudice if condonation were to be granted without any real substantiation in respect thereof.
- [22] Mr Orton for the Applicant argued that the advice given by the Applicant's attorneys at the time of the jurisdiction ruling being issued was far from negligent and bona fide. It was not wrong at the time as the CCMA had at such stage adopted the view in respect of many similar cases that it did not have jurisdiction to deal with the matter and that such an issue ought to be adjudicated by the Labour Court. The judgment of Molahlehi J, which was an orbiter ruling on the issue was also taken into account and it was not until Dobson AJ pronounced on the issue that certainty was created.
- [23] He further contended that it was the third respondent who had been mala fide throughout the litigation in that it had first raised a jurisdictional objection to the CCMA hearing the matter which was a very frivolous argument. It then agreed with the Applicant that the Labour Court had jurisdiction to adjudicate the dispute in terms of section 77(3) of the BCEA. In fact, both parties had agreed on the narrow question to be determined before Dobson AJ in terms of a pre-trial minute before the third respondent belatedly in its heads of argument before trial argued that the matter ought to be heard on review in the Labour.
- [24] Moreover, he contended that the third respondent's attorneys had taken eight months to agree on a pre-trial date which protracted this matter

unnecessarily and that it was the third respondent who was responsible for a large portion of the delay.

[25] The incorrect procedure followed by the applicant which resulted in the matter coming before Dodson AJ were errors on the part of both parties. If the third Respondent knew from the outset that the Commissioner had jurisdiction to hear the matter and/or his ruling should have been reviewed then it has been mala fide. The third respondent in fact in the pre-arbitration agreement agreed to the issues that were to be argued before Dodson AJ and in the circumstances it can hardly contend that the Applicant was negligent for following the incorrect procedure. It is clear that the review application was pursued by the applicant within 20 days of Dodson AJ's judgment being delivered and the only delay in bringing the review application was as a result of the incorrect legal procedure being followed. I do not find that the attorneys for the Applicant were negligent in the handling of this matter and find that the Applicant has provided a more than satisfactory explanation for the delay.

[26] The prejudice that the Applicant will suffer should he not be given an opportunity to have the merits of the dispute heard is immense. He is entitled to have a fair hearing on the merits before the CCMA which has thus far been denied to him.

[27] Insofar as the issue of costs is concerned, the third respondent was alive to the fact that the first respondent had committed a gross irregularity in the proceedings which was in as much set out in the third respondent's

heads of argument before Dodson AJ. The argument that condonation should not be granted based on an unsatisfactory explanation for the delay is without any merit. I see no reason why costs should not follow the result in this matter.

[28] In the premise, I make the following order:

28.1 The ruling issued by the first respondent, under the auspices of the second respondent, under case number GAJB43451-09 dated 18 June 2010, in the arbitration proceedings between the applicant and the third respondent, is reviewed and set aside;

28.2 The dispute is remitted back to the CCMA for arbitration;

28.3 The third respondent is ordered to pay the costs of this application.

Chavoos AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

T J C ORTON (Snyman's Attorneys)

For the Third Respondent:

Advocate W Hutchinson instructed by
Fluxmans