



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGEMENT

Not Reportable

Case no: JR 2634/13

In the matter between:

SUNDUZA DORAH BALOYI

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

KUTSO ELIAS MPAI N.O

Second Respondent

EDCON (PTY) LTD

Third Respondent

Heard: 17 December 2014

Delivered: 03 February 2015

JUDGMENT

VAN DER MERWE, AJ

Background

- [1] The Applicant was employed by the Third Respondent from 28 September 1992 and her dismissal took place on 28 August 2013 following a disciplinary enquiry. The Applicant then referred an unfair dismissal dispute to the CCMA in Polokwane, Limpopo, on 18 September 2013. A Con-Arb was scheduled for 22 October 2013 but the Third Respondent objected to arbitration taking place after conciliation. The matter was consequently conciliated on 22 October 2013.
- [2] During conciliation, the Applicant signed a notice of withdrawal and it is this notice of withdrawal that is the subject of the current review application before this court. It is alleged by the Applicant that the Second Respondent was harsh to her and did not allow the Applicant an opportunity to explain what her case was and that the Second Respondent then started shouting at her saying that the Applicant should not waste his time but should rather withdraw the dispute because the Applicant clearly did not have a case against the Third Respondent.
- [3] According to the Applicant, she felt that she had no other choice but to sign a notice of withdrawal of the dispute. In that sense, the Applicant submitted that she was coerced into withdrawing her case on 22 October 2013.
- [4] A review application was brought to this Court in December 2013 requesting an order as follows:
- “1. **REVIEWING AND CORRECTING OR SETTING ASIDE** the proceedings conducted by the Second Respondent acting under the auspices of the First Respondent under case number LP6410-13 (“the withdrawal”);
 2. **SUBSTITUTING** the finding of the in the Second Respondent that the Applicant does not withdrawal the referral as stated in the notice of withdrawal signed by the Applicant, but that the matter proceed to Arbitration accordingly

3. **ALTERNATIVE TO 2 ABOVE**, determining the dispute between the Applicant and the Third Respondent in any manner the court deems appropriate;
4. **FURTHER AND ALTERNATIVELY TO PRAYER 3 ABOVE:**
 - 4.1 **Referring** the matter back to the first Respondent and ordering a complete re-hearing of the matter to be conducted under the auspices of the First Respondent by the Commissioner other than the Second Respondent
 - 4.2 For the purposes of any subsequent Ruling that the time periods between the withdrawal of the Dispute and any subsequent Award be disregarded
5. **DIRECTING** those of the Respondents who opposes the Application to pay the costs jointly and severally on Attorney Client scale, the one paying the other to be absolved;
6. **GRANTING** further and/or alternative relief.”

Jurisdiction

- [5] I raised the issue of whether the Labour Court has the necessary jurisdiction to entertain this review application and referred the Applicant’s representative to the judgment by Steenkamp J in *SAMWU et al v the CCMA and Zenzeleni Cleaning and Transport Services CC*.¹
- [6] Upon reflection, the Applicant persisted with the review application submitting the facts of the *SAMWU*-case differ from the facts of this case.
- [7] I am of the view that the same principles as are stipulated in the *SAMWU* decision apply to the case before me.

¹ (J 2448/13) [2013] ZALCJHB 303 (21 November 2013)

Evaluation/Analysis

[8] The starting point is to consider the effect of a withdrawal of a dispute at the CCMA. This was diligently considered by Lagrange J in *Ncaphayi v CCMA and Others*.² He held that:

“[25] The essential issue is whether the commissioner was correct in concluding that he could not entertain the applicant's unfair dismissal claim unless the notice of withdrawal in respect of the first referral was not set aside by this court.

[26] Implicit in the commissioner's reasoning is an assumption that the 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 his conclusion that he had no jurisdiction to entertain the matter.

[27] The second reason relates to the effect of a withdrawal of a referral to conciliation. 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 the Labour Court Rules merely deals with the procedure to be followed if a party wishes to withdraw proceedings. It is instructive to note how the 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 reinstituting proceedings and the defendant absolved in the first proceedings will not be able to raise the *exception rei judicatae* if sued again on the same cause of action.

[28] If the withdrawal of a matter in the High Court at a stage when it is ripe for hearing does not necessarily prevent the institution of fresh proceedings, it would be anomalous if the withdrawal of a matter at

²(2011) 32 ILJ 402 (LC) paras [25] – [28].

the conciliation stage of dispute resolution under the LRA - when no decision on the merits of the dispute is even possible - precluded a party from making a fresh referral. Obviously, if the withdrawal under consideration is part and parcel of a final settlement of the dispute the situation would be quite different. However, in this case, the withdrawal was at the applicant's own instance and not an intrinsic part of a settlement agreement. It should also be mentioned that the commissioner presiding at the first conciliation did not issue a certificate of outcome so the question of whether or not that would have to be set aside before the matter could be reconsidered does not arise in this case.”

[9] The withdrawal of the dispute by the Applicant during conciliation is akin to an order of absolution from the instance. That does not deprive the CCMA of jurisdiction to receive and deal with a fresh referral.

[10] Whether that referral has any prospects of success and whether the Applicant will succeed in her application for condonation, is for the arbitrator to decide.

[11] As stated in the *SAMWU*-case,³ it is always open to a claimant to institute a new action or application (or file a fresh referral), subject to specific defences that may be raised by the defendant or respondent.

[12] Also, a notice of withdrawal in the CCMA may itself be withdrawn as stated by Shai AJ in *Kgobokoe v CCMA and Others*:⁴

‘[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....’

[13] For these reasons, I find that it is not for this Court to set aside the Applicant’s notice of withdrawal. The Applicant can herself withdraw her withdrawal and refer a fresh referral to the CCMA. Such referral will

³ *Supra* n1 at para 16.

⁴ (2012) 33 ILJ 235 (LC) at paras 54–58, relying on *RouPELL v Metal Art (Pty) Ltd* 1972 (4) SA 300 (W).

obviously be subject to condonation and any specific defences that may be raised by the respondent – including the defence of election.

Order

[14] In the result, I make the following order:

14.1 The Applicant's Review Application is dismissed.

14.2 There is no order as to costs.

G van der Merwe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms T Mangena – Mangena & Associates Attorneys

For the Third Respondent: Unopposed