



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR852/13

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Applicant

QIQIMANE AND 42 OTHERS

Second Applicant

And

**ZENZELENI CLEANING AND TRANSPORT
SERVICES CC**

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

BOYCE T N.O

Third Respondent

Heard: 04 September 2014

Delivered: 23 February 2015

Summary: Review of the ruling that the CCMA does not have jurisdiction to re-enroll the dispute after the same had been withdrawn by the applicants. A party entitled to withdraw a withdrawal of a dispute unless withdrawal entailed a compromise.

Judgment

Molahlehi, J

Introduction

- [1] This is an opposed application to review and set aside the jurisdictional ruling made by the third respondent (the Commissioner), under case number GAJB 11054-11 on 25 March 2013 in terms of which it was found that the second respondent (“the CCMA”) did not have jurisdiction to re-enroll a dispute that had been withdrawn before it could have been finalized.

Background facts

- [2] The detailed background facts in this matter are set out in the parties’ papers, and therefore there is no need to repeat the same in this judgment. For the purpose of this judgment the relevant facts are those relating to the issue for determination on review and they are the following: The applicants withdrew their referral to arbitration after apparently being advised that the best cause of action to take in challenging their dismissal was contractual. This entailed instituting their claim in the High Court.
- [3] The applicants realized in due course that the prospects of success in the High Court were not good and therefore applied to the CCMA to have their arbitration proceedings re-enrolled. The application to re-enroll the arbitration proceedings was refused by the Commissioner on the basis that the CCMA lacked jurisdiction.

The ruling on jurisdiction

- [4] In arriving at the conclusion that the CCMA lacked jurisdiction to allow the applicants to re-enroll their dismissal dispute which the applicants had withdrawn, the Commissioner reasoned as follows:

“4.1 At the outset it must be noted that neither the Labour Relations Act, 1995 (the LRA), nor the CCMA Rules, provides for the CCMA to determine an application to “enroll” an unfair dismissal dispute after such a dispute has been withdrawn by an applicant. The real enquiry, therefore, is not whether there were plausible reasons why the applicants withdrew their disputes, but whether the CCMA has any powers to even entertain such an application.”

- [5] In relying on the authority of *Ncaphayi v CCMA and Others*,¹ the Commissioner, found that the effect of the withdrawal of a dispute by a party is akin to absolution from the instance which means that, unless the withdrawal is “part and parcel of a final settlement of the dispute”, the party concerned may reinstitute proceedings on the same cause of action.

The grounds for review

- [6] The applicant contends that the Commissioner was incorrect in finding that the CCMA had no jurisdiction to consider the application for re-enrolment for the following reasons:

“12.1 In terms of section 191(5) of the LRA the CCMA must arbitrate a dispute at the request of the employee party if it has been referred to conciliation and 30 days have passed or a certificate has been issued;

12.2 It is common cause that in this matter those conditions had been fulfilled;

12.3 The withdrawal of the dispute was not for reasons that it had been settled. The dispute between the parties as to the alleged unfair dismissals of the individual applicants was still in existence, notwithstanding its withdrawal;

12.4 There is no provision in the CCMA rules which provides that the effect of a withdrawal is such that the dispute is removed from the jurisdiction of the CCMA;

¹ [2011] 32 ILJ 402 (LC), at para 27.

12.5 There is no provision in the LRA which provides that the effect of a withdrawal is such that the dispute is removed from the jurisdiction of the CCMA;

12.6 In seeking arbitration in respect of their alleged unfair dismissal the individual applicants seek to enforce their constitutional right to fair labour practices. The effect of the arbitrator's ruling is to limit that right. Such a limitation would have been contained expressly in the statute."

[7] The applicants contend further that, the Commissioner's conclusion that the CCMA does not have the jurisdiction to deal with an application of this nature is incorrect.

[8] The applicants in their heads of argument contend that at common law, the withdrawal of an action does not mean that the claim has been extinguished or abandoned² and that a party to litigation may apply to have its matter re-enrolled on good cause shown³. If the legislature had intended different consequences in a labour dispute there would have been explicit provision to that effect.

The effect of withdrawal of a dispute at the CCMA

[9] The issue of withdrawal from proceeding with a dispute at the CCMA received detailed and careful attention by Lagrange J in *Ncapahyi v CCMA & Others*,⁴ where it was held that:

"[26] 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.

[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 merely deals with the procedure to be followed if a

² *Franco Vignazia Enterprises (Pty) Ltd v Berry* [1983] 4 ALL SA 17, *Kruger v Sekretaris van Binnelandse Inkomste* 1970 (4) SA 687 (A)

³ *Roupell v Metal Art Ltd* 1972 (4) SA 300 (W)

⁴ *Supra*

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 *exceptio rei judicatae* if sued again on the same cause of action.”

[10] In the subsequent unreported case of *Bennet Shibogde v Minister of Safety and Security and Others*,⁵ the Learned Judge in the above matter held that:

“[26] Yet the fact that a matter is withdrawn is not necessarily a bar to reinstituting proceedings. It seems that the prevailing view is that a claim is not determined by the withdrawal did not bar of the claim, but the withdrawal is equivalent to a grant of absolution from the instance. It therefore remains open for the applicant to reinstitute proceedings as the merits of the claim have not been adjudged.

[27] . . . The withdrawal of the matter by the applicant, did not bar him from referring the matter afresh.”

[20] For these reasons, the pending review application does not constitute an adequate alternative remedy either. Whatever the outcome of that application, the CCMA has to consider the second referral.”

[11] The same approach was adopted by Shai AJ in *Kgobokowe v Commission for Conciliation, Mediation and Arbitration & Others*⁶. In that case the Court rejected the approach which was adopted in the *Public Servants Association of SA obo Strydom v SA Revenue Services*⁷, where it was held that a withdrawal of an action cannot be withdrawn. The decision that a party would not be entitled to withdraw a withdrawal of a claim was based on the doctrine of an election. In rejecting that approach the Court in Kgobokoe held that “a withdrawal of a matter may be withdrawn.”

⁵ Unreported Case number JR3307/09.

⁶ (2012) 33 ILJ 235 (LC).

⁷ (2007) 28 ILJ

- [12] In *SAMWU Cleaning & Transport*, unreported case number J2448/13, Steenkamp J, agreed with the decision in *Ncapahyi* and drew a distinction between a withdrawal at the applicant's own instance and where the withdrawal is an intrinsic part of a settlement agreement. The Court in further agreeing with *Ncapahyi* held that a withdrawal of a dispute in labour matters is akin to an order of absolution from the instances in civil litigation. The fact that the applicant had withdrawn the referral did not according to the Court deprive the CCMA of the power to enroll the arbitration of the second referral.
- [13] In the present matter, the issue which the Commissioner ought to have concerned himself with to ensure that he arrives at a correct decision is whether there had been compliance with the provisions of Section 191 (5) of the Labour Relations Act of 1995, in terms of which it is explicitly provided that the CCMA must arbitrate a dispute at the request of an employee, if the dispute has been referred to conciliation and or 30 days have lapsed or a certificate of outcome has been issued confirming that the dispute remains unresolved. It is common cause that the applicant acquired the right to refer the matter to arbitration once it was confirmed that the dispute remained unresolved.
- [14] The Commissioner was incorrect in assuming that the withdrawal automatically meant that the applicants were no longer intended on pursuing their claim by virtue of the withdrawal.
- [15] There is no automatic legal consequence that a withdrawal of a dispute means that the withdrawal cannot be withdrawn and the dispute be re-enrolled. Once the applicants' application to have the matter re-enrolled was made it was incumbent on the Commissioner to enquire as to whether the withdrawal precluded the applicants from proceeding further with the dispute. It is only where the withdrawal is consequent to the compromise of the dispute, that it cannot be withdrawn. It appears from the papers, that had the Commissioner enquired into the nature of the withdrawal, he would have found that the withdrawal did not compromise the applicant's claim.

[16] In light of the above I am of the view that applicants' application stands to succeed. I however do not believe that it would be appropriate to allow costs to follow the results.

Order

[16] In the premises the following order is made:

1. The ruling of the Third Respondent, that the Second Respondent did not have jurisdiction to entertain the applicant's dispute is reviewed and set aside.
2. The Second Respondent is ordered to re-enroll the arbitration proceedings and allocate a date for the hearing of the matter before a Commissioner other than the Third Respondent.
3. There is no order as to costs.

E MOLAHLEHI

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Mr R Daniels from Cheadle Thompson & Haysom

For the Respondent: D Venter from Webber Wentzel Attorneys