



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

**JUDGMENT**

Not Reportable

Case no: JR1663-13

In the matter between:

**NUDPW obo KGWELE, D**

**Applicant**

and

**CCMA**

**First Respondent**

**CARMEN WARD N.O**

**Second Respondent**

**SELLO NANISO N.O**

**Third Respondent**

**MIDDLEBULT EIEDOMME**

**Fourth Respondent**

**Heard: 26 January 2015**

**Delivered: 17 June 2015**

**Summary:** Application to review the rescission ruling made by the Commissioner. The Commissioner had refused to rescind the ruling dismissing the employee's claim of alleged unfair dismissal. The powers of the CCMA to determine the place where the matter will be heard in terms of s161 of the LRA and Rule 24 of the CCMA Rules. Applicant contending that he was entitled to have the matter heard at the region of his choice.

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## JUDGMENT

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MOLAHLEHI, J

### Introduction

- [1] This is an application to review and set aside the ruling of the second respondent ("the Commissioner") made under case number FS 2770-13 and dated 19 July 2013. In terms of that ruling, the Commissioner dismissed the applicant's application to rescind the ruling dismissing his alleged unfair dismissal claim due to his failure to attend the hearing on 14 February 2011 at Welkom.
- [2] The fourth respondent has opposed the application and has raised a preliminary point concerning the *locus standi* of SACWU to represent the individual applicant. .

### Background facts

- [3] It is common cause that the individual applicant was dismissed by the fourth respondent, apparently, for allegedly assaulting another employee.
- [4] Aggrieved by the dismissal, the individual applicant referred an alleged unfair dismissal dispute to the CCMA assisted by NUDPW. It is common cause that NUDPW has since been deregistered and accordingly could not represent the individual respondent. SACWU has subsequently taken over the representation of the individual respondent in these proceedings.
- [5] The CCMA set the matter down with notice to all the parties for a hearing at Kroonstad. The individual applicant was unhappy with the matter being set down at Welkom as he preferred to have had it heard at Welkom which is nearer to where he stays. He in this regard

addressed a letter dated 6 May 2013 to the CCMA requesting that his matter be consolidated with case number FS2699-12 and be scheduled for a hearing at Kroonstad.

- [6] The request to have the matter consolidated and rescheduled for a hearing at Kroonstad was refused by the Convening Senior Commissioner [CSC]. The decision of the CSC was communicated to the applicants in a letter dated 10 May 2013 which reads as follows:

'The above-mentioned matter and your letter dated 6 May 2013, has reference I have considered the request but cannot concede for the following reasons:

- The employer party in FS 2770-13 and FS 2769-13 is not the same employer and thus the two cases cannot be heard together.
- Rescheduling FS 2770-13 to be heard on 13 May 2013 does not comply with the required notice.

The Con/Arb hearings for FS 2770-23 on 14 May 2013 in Welkom and FS 2769-13 on 13 May 2013 in Kroonstad will still be heard as scheduled.'

- [7] It is common cause that the matter proceeded as scheduled on 14 May 2013 at Welkom. The individual applicant did not attend the hearing and it was for that the reason that his claim was dismissed.
- [8] As indicated earlier the individual applicant being unhappy with the decision and assisted by his erstwhile union filed the rescission application which was unsuccessful. It was for that reason that the present proceedings were instituted.

#### The point *in limine*

- [9] The fourth respondent as indicated above has raised a point concerning the *locus standi* of SACWU to represent the individual applicant. Its contention is that the union cannot represent the individual applicant because he is not a member.

[10] In the replying affidavit, Mr Mogase, the official of SACWU, states the following in relation to the preliminary point raised by the fourth respondent:

*'locus standi* issue

2.1 Previously the Applicant was the member National Union of Democratic Workers [NUDPW], and I was the Union Organizer for the same Union at the same Region.

2.2 On the 09 October 2013 NUDPW was deregistered and on the 06 January 2014 I was employed by SACWU and my first task was to recruit all the members of an NUDPW in my area into SACWU.

2.3 Applicant is one of those who I recruited into SACWU while Applicant was having this matter against the Respondents.

2.4 I represent the Applicant because he is a paid up member of SACWU...'

[11] Mr Mogase in contending that SACWU has the right to represent the individual applicant relies on the provisions of s 161 of the Labour Relations Act of 1995 (the LRA) and s 35(3) (f) of the Constitution.

[12] Section 35 of the Constitution deals broadly with the rights of arrested, detained and accused persons. Sub-section 35(3) (f) of the Constitution provides that an arrested, detained and accused persons have the right to choose and be represented by a legal representative.

[13] The broad principle governing employment rights in as far as the Constitution is concerned is found in section 23.<sup>1</sup> The full and specific expression of those rights is set out in the LRA. For the purposes of

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<sup>1</sup> The purpose of the LRA specific to the present matter is set out in section 1(a) of the LRA which provides: "To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution."

this judgment, the relevant section that applies is section 161 of the LRA which reads as follow:

**‘161. Representation before Labour Court**

In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by -

- (a) a *legal practitioner*;
- (b) a *director or employee* of the party;
- (c) any *office-bearer or official* of that party's registered *trade union* or registered *employers' organisation*;
- (d) a designated agent or official of a *council*; or
- (e) an *official* of the Department of Labour.’

[14] The two key requirements for representation by a trade union in the Labour Court in terms of s 161 of the LRA is that the employee must be a member of the trade union and the trade union must be registered. There is no restriction imposed on that right except for these two requirements. The fact that the union seeking to represent an employee, does not organise in the industry or sector where the employee is employed is irrelevant as concerning the right to representation before the court. The issue of membership of the union is an internal affair of the union and, therefore, no third party, including the employer, has the right to interfere in that regard.

[15] In *NUM obo Mabote v Kalahari Country Club*,<sup>2</sup> Steenkamp J in dealing with facts very similar to those of the present case observed:

‘It is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature to unduly restrict the right to representation by a trade

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<sup>2</sup> [2013] 10 BLLR 1020 (LC); (2013) 34 ILJ 3296 (LC) at paras 27 and 28.

union to the extent that it is up to a third party... to deny a worker that right, based on the trade union's constitution.

The NUM constitution makes it clear that eligibility for membership is "subject to the approval of the branch committee which has jurisdiction." It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.'

[16] It is common cause that SACWU is a registered trade union. The version of Mr Mogase that he recruited the individual applicant from NUDPW has not been disputed by the fourth respondent. I am also satisfied from the submissions made by Mr Mogase that the individual applicant is a member of SACWU and thus SACWU has the right to represent him before this Court.

[17] In light of the above, the preliminary point raised by the fourth respondent stands to fail.

#### The late filing of the answering affidavit

[18] The applicants have in their heads of argument raised the point concerning the late filing of the fourth respondent's answering papers. In this respect, the applicants served and filed their founding affidavit on 13 September 2013. The fourth respondent filed its answering affidavit on 25 November 2014 without any application for condonation. The delay in filing the answering affidavit is excessive. In the absence of an application for condonation and the granting of the same by this court, the fourth respondent's answering affidavit has to be treated as not being properly before this court. Accordingly, the matter has to be treated as being unopposed.

[19] The fact that the matter is treated as unopposed does not mean that the ruling of the Commissioner stands to be automatically reviewed. There is a general perception in the public, in fact even amongst some lawyers, that once a review is unopposed the Court is obliged to grant

the relief sought by the applicant. In law, the Court is enjoined to consider the review application even when it is unopposed. The Court applies the same test as it would apply when considering an opposed review application. I will revert to the test which the court has to apply later in this judgment.

#### The grounds of review

[20] It is not clear as to what the grounds of review are upon which the applicant relies on in seeking to review the ruling of the Commissioner. The deponent to the founding affidavit, Mr Mogase says the issues which this court is required to determine are:

- '3.1 Whether the CSC acted unlawfully, unreasonable and procedurally unfair when she refused to concede to our lawful, reasonable and procedurally fair request...
- 3.2 Whether Commissioner Sello Naniso has exercised his sense of fairness when he decided on the Rescission ruling when he blindly followed his CSC which is the subject of tis application.
- 3.3 Whether the CCMA is at liberty to schedule at random as it deems fit.'

[21] Mr Mogase further states under the heading "REASONS FOR THE REVIEW" that:

- '4.1 First of all it is insensitive of the CSC, Carmen Ward, to dismiss our fair request like that without a second thought. There were many remedies at her disposal, and this would apply to the Third Respondent.'

[22] At paragraph 4.3, Mr Mogase says that the reason for the failure to attend the hearing as directed by the notice of set down was that the individual applicant had requested that the matter should be heard in Kroonstad and not Welkom. He seems to also suggest that the decision of the Commissioner is based on his fear to contradict the decision of the CSC not to reschedule the matter to Kroonstad.

- [23] The other point made by Mr Mogase is that the CCMA is inconsistent in the manner in which it allocates matters in terms of geographic spread. He gives examples of two cases where they had pointed out to the CSC that the matters were incorrectly set down in terms of their geographic relations to the applicants. According to him, the CSC did acknowledge that to have been a mistake and apologised for it.
- [24] The applicants' application stands to be dismissed for the above reasons alone. As will appear later in this judgment the review application stands to be dismissed even when a liberal interpretation is adopted to what is stated in the applicants' papers. The liberal interpretation entails reading into the applicants' papers the grounds as envisaged in s 145 of the LRA. The essence of the question to be answered in this regard is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach.

#### The ruling

- [25] In dismissing the applicants' application for rescission, the Commissioner reasoned that the individual applicant failed to furnish a reasonable explanation for his failure to attend the hearing. He further found that the individual applicant received the letter from the CSC advising him that his request to have the matter set down at Kroonstad was refused and that he wilfully stayed away from the hearing. It was for these reasons that the Commissioner found that the individual's application to rescind the dismissal ruling did not comply with the requirements of section 144 of the Labour Relations Act of 1995 (LRA).

#### Evaluation/Analysis

- [26] The test to apply in considering a review application is now well established. The test is that of a reasonable decision maker set out in



*Sidumo and Another v Rustenburg Platinum Mines and Others*.<sup>3</sup> The enquiry to apply in implementing the test is to determine whether the decision reached by the Commissioner is one which a reasonable decision maker could not reach.

[27] The reasonableness or otherwise of the ruling of the Commissioner in the present matter has to be determined in the context of the principles governing rescission of a ruling. It has to be considered specifically within the meaning of s 144 of the LRA.

[28] Section 144 of the LRA reads as follows:

‘144. Variation and rescission of arbitration awards and rulings.

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the *director* for that purpose, may on that commissioner’s own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.’

[29] In the present matter, the issue of the ruling having been made erroneously in the absence of the individual applicant does not apply as it is common cause that he was properly served with the notice of set down and that he did receive the same. In other words, the individual applicant was aware of the time, date and venue where the matter would be heard. He objected to the venue and insisted that the matter should be heard at Kroonstad and not Welkom. He in other words wilfully stayed away from attending the hearing.

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<sup>3</sup> [2007] 12 BLLR 1097(CC) at para 110.

- [30] It is common cause that the request to have the matter rescheduled to Kroonstad was rejected by the CSC who also in writing informed the individual applicant that the matter would proceed as scheduled at Kroonstad. On these facts it can therefore not be said that the ruling was erroneously made in the absence of the individual applicant.
- [31] The issue that then arose is whether the individual applicant has shown good cause for his non-attendance of the hearing.
- [32] Although s 144 is silent on the need to show good cause in the event of a party defaulting in attending proceedings, the Labour Appeal Court interpreted the section to included “good cause” to be shown in the event failure to attend a hearing. The test to apply in determining good cause is set out by the LAC in *Shoprite Checkers (Pty) Limited v Commission For Conciliation, Mediation and Arbitration and Others*,<sup>4</sup> per Jappie AJA in the following terms:

[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and secondly whether the applicant has a *prima facie* defence. In *Northern Province Local Government Association v CCMA and Other* [2001] 5 BLLR 539 (LC) at para 16 it was stated:

“An application for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bone fide defence to the plaintiff’s claims.”

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<sup>4</sup> (2007) 28 ILJ 2246 (LAC) at para 35.

- [33] The LAC further quoted with approval what was said in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*,<sup>5</sup> where the court held that:

‘These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence. . .’

- [34] It is apparent from the reading of the papers that the reason for not attending the hearing by the individual applicant was because he was opposed to the matter being heard at Welkom. He did not, in this regard, assert that he had a right to have his matter heard at Kroonstad. He accepted that scheduling the matter to Kroonstad was an indulgence which he requested from the CCMA. Once the indulgence was refused he had a duty to attend the hearing. He, as the Commissioner indicates in the ruling, had the opportunity to appear at the hearing and raise his concerns including the issue of joinder.
- [35] The law is very clear as to the powers and the authority of the CCMA for setting down matters such as the present one. Firstly, in terms of s 114 of the LRA, the CCMA has a national jurisdiction to determine matters that fall under its jurisdiction. Secondly, CCMA Rules provide that unless Senior Commissioner directs otherwise a dispute must be heard in the province in which it arose.<sup>6</sup> This means that matters in the CCMA could even be heard outside the province which they occurred. The rules also give the power to the Senior Commissioner to determine the venue where the proceedings will take place. In the present matter,

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<sup>5</sup> (1994) 15 *ILJ* 1310 (LAC) at 1311J-1312A.

<sup>6</sup> Rule 24 provides: ‘(1) Where a conciliation or arbitration will take place.—(1) A dispute must be conciliated or arbitrated in the province in which the cause of action arose, unless a senior commissioner in the head office of the Commission directs otherwise. (2) The Commission within a province determines the venue for conciliation or arbitration proceedings. This reinforced also by the CCMA Practice Manual which provides: 2.4.3 A party to a dispute does not have a choice as to where conciliations and arbitrations should take place. A dispute must be conciliated or arbitrated in the region in which the cause of action arose (usually where the workplace was), unless a senior commissioner in the head office of the CCMA directs otherwise.’

as indicated earlier, the CSC, in exercising her powers in terms of the rules, directed that the proceedings be conducted in Welkom.

- [36] In light of the above, the only conclusion reach is that the ruling of the Commissioner cannot be said to have been made in error because the individual applicant was aware of the date of the hearing. He wilfully failed to attend the hearing and has not been able to show good cause for his non-attendance of the hearing. I do not however believe that costs should in the circumstances of this case be allowed to follow the result.

Order

- [37] In the circumstances, the applicants' application to review the ruling made by the Second Respondent under case number FS 2770-13 and dated 19 July 2013 is dismissed with no order as to costs.

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Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Union Official Mr Mogase

For the Respondent: Adv. Obelholzer