



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1074/13
JR1155/13

In the matter between:

LEHLOHONOLO FORTUNE LETLATSA

Applicant

and

AIR CHEFS (PTY) LTD

Respondent

Delivered: 5 October 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] There are two applications before the Court. The first application (J1074/13) was brought by the Applicant in terms of section 158(1)(c) of the Labour Relations Act¹ (the LRA). He seeks an order that the arbitration award issued under GAEK 8301-12 dated 29 April 2012 under the auspices of the CCMA be made an order of court. The second application (JR11255/13) was

¹ Act 66 of 1995

brought by the Respondent, in terms of which an order is sought to review and set aside the said award.

Background:

- [2] For the sake of convenience, the parties shall be referred to as cited in the section 158 (1) (c) application. The Applicant commenced his employment with the Respondent in April 2003. At the time of his dismissal on 12 September 2012, he was employed as Employee Relations Manager. The allegations of misconduct that led to the dismissal were;
- a) "Gross negligence in that on the 29th June 2012 you attended a conciliation hearing at the CCMA and failed to implement legal advice given to you by the Labour Lawyer resulting in the company being put at a risk of losing a Labour Court case with the union;
 - b) Alternatively gross negligence in that on the 29th June 2011 you withdrew a conciliation referral at the CCMA without consultation with your Manager or a legal representative, putting the company at risk of losing a Labour Court dispute with the union;
 - c) Abdication of critical responsibility relating to a conciliation hearing to your subordinate, whom you had not properly briefed;
 - d) Failure to communicate the outcome of conciliation (withdrawal thereof) to our Manager and legal representative for over a week post-conciliation hearing"
- [3] Having referred an alleged unfair dismissal dispute to the CCMA, the matter came before Commissioner Nomusa Mbhele on 10 December 2012 and was finalised on 15 April 2013. An award was issued on 29 April 2013, in terms of which the Applicant's dismissal was found to be procedurally fair but substantively unfair. The Commissioner ordered that the Applicant be reinstated with arrear payment of his salary in the amount of R264 000.00.
- [4] On 23 May 2013, the Applicant launched an application in terms of section 158 (1) (c) of the LRA to make the award an order of court. The Respondent promptly opposed this application. This was followed by an application filed on

3 June 2013 to review and set aside the award. The Applicant also opposed this application.

[5] The issues that led to the dismissal of the Applicant are considered against the following background;

5.1 The Respondent entered into a substantive agreement with SATAWU on 11 June 2010 entitled '2010/2011 Substantive Agreement'. Clause 3.4 of that agreement provided that;

'SATAWU and management to conduct a benchmark exercise with the purpose of determining the extent and to arrive at a 'danger allowance' within 60 days of the signing of this agreement. Upon agreement between the signing parties, it shall be implemented with immediate effect'

5.2 The parties could however not reach an agreement on how the process of benchmarking should unfold or be implemented, and this resulted in a dispute pertaining to mutual interests being referred to the Bargaining Council for the Restaurant, Catering and Allied Trades on 12 January 2012. The dispute was in respect of non-payment of the danger allowance.

5.3 The dispute could not be resolved on 26 March 2012 and a certificate of outcome was issued. Attempts were made by the parties to resolve the issues but nothing came of it, and SATAWU issued a strike notice, indicating that its members would embark on strike action on 20 April 2012 in support of their demand for payment of danger allowance.

5.4 On 18 April 2012, the Respondent instituted an application to interdict the proposed strike action under Case Number J1002/12, contending that the strike was unlawful as the parties were bound by a collective agreement. On the same date, the Respondent also referred a dispute in terms of section 24 of the LRA to the Bargaining Council to seek a ruling that SATAWU should comply with the provisions of the agreement.

- 5.5 The Respondent obtained an interim order on 19 April 2012, with the return date being on 17 May 2012. The application was nevertheless dismissed on 18 June 2012. Immediately thereafter, the Respondent launched an application for leave to appeal against the judgment, as SATAWU indicated its intention to embark on strike action.
- 5.6 The Bargaining Council on the other hand had also declined to consider the dispute referred in terms of section 24 on the basis that it lacked jurisdiction to do so, and that the dispute should instead be referred to the CCMA. The Respondent accordingly referred the dispute to the CCMA, which matter was set down for a conciliation hearing on 29 June 2012.
- 5.7 The Applicant together with his colleague, Tebogo Moloto were supposed to attend to the conciliation meeting scheduled for 29 June 2012. In order to assist them at the conciliation meeting, the Respondent's attorneys of record had drafted a 'conciliation statement', and to also to ensure that a certificate of non-resolution was issued so that the dispute could be referred to arbitration. SATAWU nevertheless failed to attend the conciliation meeting.
- 5.8 The Applicant's contention is that on the advice of the conciliating Commissioner, the dispute was withdrawn. The dispute was withdrawn by Moloto in the presence of the Commissioner. At that time, the Applicant had excused himself from the proceedings, but had fully acquiesced to the withdrawal. The Respondent's contention is that the withdrawal took place in circumstances where the Applicant had abdicated his duties to Moloto, and also where he had failed to solicit further advice from its attorneys of record or its management prior to the withdrawal.

The grounds of review:

- [6] It was submitted on behalf of the Respondent that two central issues were before the Commissioner, viz, whether the withdrawal of the section 24 dispute resulted in the company being put at risk of losing the appeal before

the Labour Appeal Court, and secondly, whether if the withdrawal placed the company at risk of losing the appeal, the Applicant was grossly negligent.

- [7] The Commissioner had found that the Applicant was not grossly negligent because the withdrawal of the section 24 referral did not result in the company being put at risk of losing the appeal. Her reasoning was that the withdrawal was not part of a final settlement of the dispute and therefore the company was at liberty to re-refer the dispute which it could have done once it became aware of the withdrawal. The Commissioner had further reasoned that the employees had in any event, not embarked on the strike as at the date of the arbitration. As I understand the essence of the award, the Commissioner's ultimate view is that the Respondent had not been prejudiced by the withdrawal of the dispute.
- [8] The Respondent's contention was that the Commissioner's finding is wrong, and one that a reasonable decision maker could not have come to. In this regard, it was submitted that the appeal in respect of the urgent application was conditional on the continuation of the section 24 dispute, as an interdict was sought pending the finalization of that dispute. It was contended that once the dispute was withdrawn there was no dispute pending upon which the interdict could be sought, and accordingly, the interdict was discharged as the basis of the appeal fell away.
- [9] It was further submitted that whether the section 24 dispute could be re-referred to the CCMA was moot as the re-referral could not revive the appeal, and to this end, it was contended that the Commissioner committed an error of law or fact when she concluded that the withdrawal of the dispute did not place the company at risk in respect of the appeal, and that the company could have remedied the situation by a simple re-referral. The Respondent further attacked the award in regard to the remedy ordered, contending that the Commissioner failed to properly exercise her discretion in terms of section 193 of the LRA.
- [10] Submissions made on behalf of the Applicant were vastly based on a legal opinion sought from Adv. Bruinders SC, and whose view was that by

withdrawing the danger allowance dispute from the CCMA on the suggestion of the conciliating commissioner, the Applicant was not guilty of gross misconduct. It was also submitted that the Applicant could not be found guilty of a failure to obey an instruction as there was no such an instruction; that at most, the Applicant should have been found guilty of a lesser charge, and that the Respondent should have applied progressive discipline. Furthermore, it was contended that the Commissioner relied on a variety of factors in coming to her conclusions including the fact that no consequences arose from the withdrawal of the matter.

Evaluation:

- [11] Where it is alleged that a Commissioner misapplied the law to the facts before him or her, the effect of the allegation is that the Commissioner committed gross irregularity as contemplated in section 145(2) (a) (ii) of the LRA. Gross irregularity occurs “where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner and produced an unreasonable award². The SCA in *Herholdt* further held that;

“... an error of fact or law by the arbitrator would not justify the setting-aside of the award, unless it had the result that the arbitrator was diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination in the arbitration.”³

- [12] The complaint in this case was that the Commissioner had misapplied the law in relying on what was in fact *obiter dictum* in *Kgobokoe v CCMA & Others*⁴, rather than following the *ratio* in *Public Servants Association of South Africa on behalf of Strydom v SARS*⁵, where it was held that once a party withdraws an application, he or she would be barred from changing the choice by the doctrine of election which provides that once a choice is made, a party should stay with that choice. In *Kgobokoe*, Shai AJ having considered that the issue before *Strydom* pertained to peremption in respect of an appeal, had concluded that the facts were distinguishable, and that in line with the

² *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* (2013) 34 ILJ 2795 (SCA) at para [21]

³ At para [19]

⁴ (2012) 33 ILJ 236 (LC)

⁵ (2007) 28 ILJ 2037 (LC)

principles enunciated in *Roupell v Metal Art (Pty) Ltd and Another*⁶, the approach that a withdrawal of a dispute could be withdrawn should be followed.

- [13] The consequences of a withdrawal of a dispute at the CCMA received detailed attention by this Court in *Ncaphayi v CCMA & Others*⁷. Having held that the withdrawal of a dispute referral to the CCMA was not an act of any functionary, but the action of an employee party to a dispute, and further that the commissioner played no role in that decision⁸, La Grange J further concluded that⁹;

“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 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.” (Authorities omitted)

And,

“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 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

⁶ 1972 (4) 300 (W)

⁷ (2011) 32 ILJ 402 (LC)

⁸ At para [26]

⁹ At paras [27] to [28]

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.”
(Authorities omitted)

[14] *Ncaphayi* has been followed in a number of decisions by this Court. In *SAMWU and Others v Commission for Conciliation Mediation and Arbitration and Another*¹⁰, Steenkamp J, agreed with that decision, 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 held that;

“...Whether the notice of withdrawal can be seen to be akin to a settlement agreement, is a different question that I will address under the heading of “election”. But it seems to me that, as was the case in *Ncaphayi*, the withdrawal of the first referral was akin to an order of absolution from the instance. That does not deprive the CCMA of jurisdiction to enrol the second referral for arbitration. Whether that referral has any prospects of success, and whether the applicants will succeed in their application for condonation, is for the arbitrator to decide. So is the defence of election or waiver.”¹¹

[15] In also confirming the approach in *Ncaphayi*, Molahlehi J in *South African Municipal Workers Union and Others v Zenzeleni Cleaning and Transport Services CC and Others*¹², held that;

“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....”

[16] In the light of the consistent approach of this court, which I have no reason to divert from, a withdrawal of a dispute at the CCMA can be withdrawn, and it is

¹⁰ (2014) 35 ILJ 2011 (LC). See also *Sunduza Dorah Baloyi v CCMA & Others* Case no: JR 2634/13 (unreported)

¹¹ At para 15

¹² (JR852/13) [2015] ZALCJHB 47 (23 February 2015) at para [15]

always open to a party to file a fresh referral, subject to specific defences that may be raised by respondent party, including election, a waiver, a final determination of a dispute and/or questions of prejudice. Prejudice may have to be addressed within the context of an application for condonation where so required.

- [17] It therefore follows that any contention that the Commissioner had misread or misapplied *Kgobokoe*, and that the correct approach to follow is that in *PSA of SA obo Strydom* is clearly misplaced. The matter having been withdrawn at conciliation, in circumstances where the Applicant had acted on the *bona fide* advice of the conciliating commissioner, and further in circumstances where the dispute had not been resolved or finalised, the Respondent was still at liberty to re-refer the dispute at any stage. There is therefore no merit in the contention that the withdrawal impacted on the application for leave to appeal, and even if there was any impact, this could have been circumvented with a re-referral of the dispute.
- [18] The contention that the continuation of the appeal hearing was dependent on the section 24 referral is thus without merit in that what the Respondent sought with the urgent interdict was an order declaring the intended strike action at the time to be unprotected or unlawful, whilst the section 24 referral pertained to the interpretation and/or application of the substantive agreement. It was common cause that SATAWU did not at any time after the withdrawal of the dispute embarked on any strike action, and it can only be assumed that no strike action was taken in the light of the application for leave to appeal. It can therefore not be correct that the withdrawal of the dispute at the CCMA rendered the application for leave to appeal moot, as the dispute before the LAC and the one under section 24 of the LRA followed different jurisdictions, *albeit* the principal cause of the dispute was common to both processes.
- [19] In view of the conclusions reached that the dispute could have been referred at any stage after its withdrawal, any connection between the disputes before the Labour Appeal Court and the one that was withdrawn from the CCMA is clearly overplayed. I did not understand from the Respondent's arguments as

to whether its fears in regards to the alleged detrimental effect of the withdrawal of the dispute on the Labour Appeal Court were proven to be correct. As at the hearing of these applications, it is not known what the effects of the withdrawal were on the leave to appeal application.

[20] In the light of the above conclusions, there is no merit in the Respondent's contention that the Commissioner committed a reviewable irregularity to the extent that it was argued that she had misapplied the law in relying on *Kgobokoe*. The conclusions reached by the Commissioner that the withdrawal of the dispute was not part and parcel of a final settlement of the dispute, and that the dispute could be re-referred was a reasonable one and in accordance with legal principles followed in this court.

[21] Once it was established that the Applicant had not placed the Respondent's application for leave to appeal at risk with the withdrawal of the dispute, it can therefore not be said that he was grossly negligent. At most, and if ever there is anything to be held against the Applicant, it is that he had not conferred with the Respondent's attorneys of record or its management when deciding to withdraw the dispute. The first issue in this regard is that I did not understand the Respondent's case to be that the conciliating commissioner's advice was not made and accepted in good faith. It is accepted that the Applicant was not bound to heed the advice of the conciliating Commissioner. It is also accepted that the dispute is or was important to the Respondent as it wished to avert any strike action, and to hold SATAWU to the process of implementing benchmarking in regards to the issue of danger allowance.

[22] The issue nevertheless is whether the failure to consult with attorneys and the Respondent's management prior to withdrawing the dispute constituted such gross misconduct to the extent that a dismissal was appropriate. The Respondent's contention was that the negligence of the Applicant was so gross that it goes to the very heart of the employment relationship and the company's ability to trust him. This contention was based on the grounds that the Applicant was unrepentant and recalcitrant in insisting that he had done nothing wrong and had acted properly.

[23] From the award, it does not appear that the Commissioner dealt decisively with the other charges pertaining to abdication of responsibilities and failure to communicate with the Respondent after the matter was withdrawn. Even if the Applicant was found guilty on these charges, it is my view that the conclusions reached by the Commissioner in regards to the appropriateness of the sanction of dismissal are unassailable.

[24] It is trite that a sanction of dismissal is reserved for the most forms of gross misconduct. A dismissal would have been appropriate in circumstances where the negligence complained of was so gross, as would have been evident from potential or actual prejudice or harm to the Respondent. A Commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances established by the factual matrix confronting him or her¹³. The gravity of the misconduct is an important factor in determining the appropriateness of dismissal as a sanction, and factors such as long service, a clean record have to be weighed against the risks posed to the employer's operations and the likelihood of the misconduct being repeated. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴, it was held that;

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[25] The argument that the sanction of dismissal was appropriate on account of the Applicant not having shown contrition has merit. However, a lack of remorse on its own is not a decisive factor, and must be balanced against all other factors. Inasmuch as the Applicant may have failed to consult with the Respondent's management or its attorneys of record prior to and after withdrawing the dispute, the Commissioner had properly concluded that the

¹³ *South African Breweries Limited v CCMA & others* ZALAC CA 13/2012 30 May 2014

¹⁴ (2000) 21 ILJ 1051 (LAC) at para [2]

Respondent had not suffered any prejudice, and further that no evidence was placed before her that the employment relationship had broken down. Effectively, the misconduct in question was not considered to be gross.

- [26] Furthermore, the Commissioner had pointed out that no evidence was led as to whether the Applicant's conduct would not have been corrected by progressive discipline in respect of those charges against him. It is not sufficient for an employer to simply allege that the employee's conduct has broken a trust relationship in the absence of evidence in that regard¹⁵. In my view, and having evaluated the merits of this case and the reasoning of the Commissioner, there is no basis for a conclusion to be reached that the decision arrived at was one that another reasonable decision maker could not have arrived at in the light of the material before her.
- [27] It is accepted that the Respondent may have been incensed by the decision to withdraw the dispute in the light of the sole purpose of that referral being to avert a strike. However, the Applicant's conduct at the end did not result in strike action being embarked upon, and as already indicated the outcome of the application for leave to appeal remains unknown. In my view, the dismissal was not in response to any real or potential risk posed to the Respondent's operations. The Respondent's incorrect interpretation of principles regarding a withdrawal of disputes cannot be held against the Applicant, and any other allegations of misconduct did not warrant a dismissal. If ever there was any inconvenience caused to the Respondent as a result of the need to re-refer the dispute, the sanction of dismissal was clearly disproportionate to the inconvenience caused. As correctly pointed out by the Commissioner, corrective action short of a dismissal would have sufficed in regards to the need by the Applicant to seek a full mandate whenever dealing with matters at the CCMA in future.
- [28] To the extent that it has been established that the award of the Commissioner falls within a range of reasonableness, it follows that there is no basis to interfere with it, and there is further no basis to interfere with the relief granted to the Applicant. Accordingly, the application in terms of section 158 (1) (c) of

¹⁵ See *Edcon Limited v Pillemer N.O* [2010] 1 BLLR 1 (SCA) at para 20

the LRA should also be successful. Further having had regard to considerations of law and fairness, it is concluded that the Respondent should be burdened with the costs of the review application.

Order:

- i. The application to review and set aside the arbitration award issued on 29 April 2013 under case number GAEK8301-12 is dismissed.
- ii. The above mentioned award is made an order of court in terms of the provisions of section 158 (1) (c) of the Labour Relations Act.
- iii. The Respondent (Air Chefs (Pty) Ltd) is ordered to pay the costs of the review application.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr. Andrew Goldberg of Goldberg Attorneys

On behalf of the First Respondent: Mr. L Frahm-Arp of Fasken Martineau
(Incorporated as Bell Dewar Inc)

LABOUR COURT