



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

Not Reportable  
Case No: JR 1579/15

In the matter between:

**VICTOR DUNGELO**

**Applicant**

and

**ERGO MINING (PTY) LTD**

**First Respondent**

**COMMISSION FOR CONCILIATION MEDIATION  
AND ARBITRATION**

**Second Respondent**

**BENJAMIN POPPY WAUCHOPE N.O.**

**Third Respondent**

**MOHLALA N.O.**

**Fourth Respondent**

**L A CELLIERS N.O.**

**Fifth Respondent**

**Heard: 29 November 2017**

**Delivered: 3 May 2018**

**Summary: Application to set aside agreement to withdraw unfair dismissal dispute in CCMA. Commissioner wrongly took the view that he had no**

authority to postpone the arbitration before him because of a prior decision by a Senior Commissioner. Commissioner told applicant that if he was not prepared to proceed with the arbitration, he would have to withdraw his dispute. Parties accepted the Commissioner's stance in this regard and concluded agreement to withdraw the dispute. Agreement founded on a mistake common to the parties and set aside.

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## JUDGMENT

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**BARNES AJ,**

### Introduction

- [1] This is an application to set aside an agreement which was concluded between the applicant and the first respondent on 3 August 2015 in terms of which the applicant withdrew his unfair dismissal dispute in the Commission for Conciliation Mediation and Arbitration ("the CCMA"), the second respondent.
- [2] The application is opposed by the first respondent. The third and fifth respondents, both of whom signed the agreement, do not oppose the application but filed explanatory affidavits to assist the Court.

### The Agreement

- [3] The agreement is standard form CCMA issue. It is titled "Agreement to Withdraw the Dispute" and provides that "the parties agree that the applicant, Dungelo, Victor, hereby withdraws the application to the CCMA against the Respondent."
- [4] The agreement lists the following possible reasons for withdrawal:

"I have gone back to work";

"I have found new/alternative work";

"I do not want to take this case further";

"I have settled with my former employer";

"I only want to be paid statutory monies/UIF and I will claim through Department of Labour."

- [5] None of these are selected in this case. Instead, the following is inserted by hand as the applicant's reason for the withdrawal of his dispute:

"I cannot continue in the absence of the Union."

- [6] The agreement states as follows: "Confirmation by Applicant: I confirm that I signed this agreement to withdraw the dispute of my own free will. I understand that there will be no further process in this matter and that I am not able to re-refer or re-open this case."

- [7] The agreement was signed by the applicant and the first respondent. It was also signed by CCMA Commissioner Wauchope, the third respondent and Senior CCMA Commissioner, Celliers, the fifth respondent.

#### The Material Facts

- [8] The applicant was employed by the first respondent as a security guard. On 15 April 2015 the first respondent dismissed the applicant after finding him guilty of misconduct. Aggrieved, the applicant referred an unfair dismissal dispute to the CCMA on 17 April 2015.
- [9] On 18 May 2015, the dispute was unsuccessfully conciliated. On the same date, the applicant referred the dispute to arbitration. In July 2015, the CCMA notified the parties that the dispute had been set down for arbitration on 3 August 2015.

- [10] On 29 July 2015, Ms Adelaide Ngubeni, the first respondent's human resources manager made a written request to the CCMA for the postponement of the arbitration on the basis that one of the first respondent's key witnesses was unavailable on 3 August 2015. Ms Ngubeni copied the request for postponement to Mr Japhta Rabothata, a NUM official, and the applicant's representative.
- [11] On the morning of 30 July 2015, the CCMA, per Senior Commissioner Teladia, e-mailed a response to Ms Ngubeni stating that the first respondent's request for the postponement of the arbitration had been declined.
- [12] On the afternoon of 30 July 2015, Mr Rabothata sent an e-mail to Ms Ngubeni stating that he had consulted with the applicant and that they consented to the first respondent's request for the postponement of the arbitration.
- [13] On 31 July 2015, Ms Ngubeni forwarded Mr Rabothata's e-mail to the CCMA and asked whether, regard being had thereto, the arbitration could be postponed by agreement between the parties.
- [14] On 3 August 2015, the CCMA responded to Ms Ngubeni's e-mail stating that the request for postponement was declined and that, as per a directive from Senior Commissioner Mohlala, the arbitration would proceed at 1 pm that day as scheduled.
- [15] The applicant and Ms Ngubeni attended at the CCMA offices on 3 August 2015. Mr Rabothata did not. It appears that this may have been because Mr Rabothata was under the incorrect impression, based on the e-mail correspondence referred to above, that the arbitration had been postponed by agreement.
- [16] The Commissioner assigned to arbitrate the dispute was Benjamin Wauchope, the third respondent. The applicant and the first respondent are in agreement that upon arrival at the CCMA on 3 August 2015, Ms Ngubeni

again requested that the arbitration be postponed on the basis that one of its key witnesses was unavailable.

- [17] Ms Ngubeni, who deposed to the first respondent's answering affidavit, states as follows in this regard:

"At the arbitration hearing on 3 August 2015 I requested that the arbitration be postponed however the arbitrator, B P Wauchope (3rd Respondent) refused this request for a postponement on the basis that:

The prior application for a postponement had been refused by a Senior Commissioner, namely Mohlala and he was not in a position to overrule that refusal. Given the fact that the parties were present, the arbitration should proceed. The parties had been notified timeously of the date for the arbitration and that my application for a postponement had been refused."

- [18] The applicant and the first respondent are also in agreement that the applicant was extremely concerned that his representative, Mr Rabothata, was not present at the CCMA and made repeated attempts to contact him telephonically, but to no avail.

- [19] The applicant pleads that when he could not reach Mr Rabothata, he requested the postponement of the arbitration. He does so in the following terms:

"I then asked for a postponement, to a later date, even the next day of 4 August 2015, to get a representative, as I could not proceed without a representative and was not so prepared but the arbitrator refused to consider my postponement application, saying that the senior commissioner Mohlala had already declined postponement, and he did not have power to re-consider my application."

- [20] The applicant pleads that Commissioner Wauchope then told him that if he was not prepared to proceed with the arbitration, he would have to withdraw his dispute.

- [21] In its answering affidavit the first respondent denies that the applicant requested the postponement of the arbitration on 3 August 2015. The first respondent, however, pleads as follows:

“The Applicant informed the arbitrator that he cannot continue without his representative. The arbitrator then enquired of the Applicant whether he was withdrawing his application.”

- [22] As stated above, Commissioner Wauchope filed an explanatory affidavit. In it he states that “No application for postponement was made or requested by either the respondent party or the applicant party, on the day.” Notably, this conflicts with the first respondent’s version that Ms Ngubeni requested Commissioner Wauchope to postpone the arbitration on 3 August 2015.

- [23] Commissioner Wauchope goes on to say the following:

“The applicant, Mr Dungelo, stated to me that he cannot proceed to partake in the arbitration without the presence of his union, after his repeated attempts to contact the NUM office, and the official proved fruitless.

The respondent’s representative informed me that it had made a request for a postponement of the hearing and its application was declined. She further stated that consequent to the application being declined, the respondent was ready to proceed with its case. I then enquired from the applicant regarding his intentions; whether or not he was ready to proceed with the hearing, and he reiterated that he cannot proceed under the circumstances. I explained to him that as the application for postponement was declined by the CCMA the matter must proceed as set down.

The applicant could not explain the absence of his union representative, and neither could he make contact with him telephonically on the day of the hearing. It was explained to the applicant that the request for postponement was received, considered and had been declined, and the matter had to proceed as set down or be dismissed. He chose to withdraw the dispute.”  
(Emphasis added)

### Analysis

- [24] There are disputes on the papers pertaining to what the applicant was told in relation to the agreement, with the first respondent (as well as Commissioner Wauchope) contending that the nature and consequences of the agreement were fully explained to him and the applicant contending that this was not done. In the view I take of the matter, it is not necessary to decide these disputes.
- [25] As is apparent from the above, there is also a dispute on the papers as to whether the applicant requested the postponement of the arbitration when he could not reach Mr Rabothata. This too does not matter. What is clear is that the applicant stated that he was not able to proceed with the arbitration in the absence of his representative. This is common cause on the pleadings and is confirmed by Commissioner Wauchope in his explanatory affidavit.
- [26] In the face of this Commissioner Wauchope committed a fundamental error of law, which is, in my view, determinative of the matter. Commissioner Wauchope wrongly believed that by reason of the CCMA's prior decision to refuse the first respondent's postponement application, he had no power to postpone the arbitration notwithstanding the changed factual situation before him, that is, the unexpected absence of the applicant's representative.
- [27] Commissioner Waucope clearly had the authority to postpone the arbitration by virtue of these new facts. He would have been entitled to either re-visit the first respondent's postponement application or to have treated the applicant's statement that he was unable to proceed without his representative as a fresh postponement application. He wrongly took the view that he had no authority to postpone the matter, solely because of a prior decision by a Senior Commissioner. This was unfortunate, the more so because both parties

before him sought the postponement of the arbitration for what appear to be legitimate reasons.

[28] Counsel for the first respondent conceded in argument before me that Commissioner Wauchope's stance in this regard constituted an error of law.

[29] What was the consequence of this error? It is common cause on the pleadings that Commissioner Wauchope effectively told the applicant that if he was not prepared to proceed with the arbitration in the absence of his representative, he would have to withdraw his dispute.

[30] The first respondent put it as follows in Ms Ngubeni's answering affidavit:

"The Applicant informed the arbitrator that he cannot continue without his representative. The arbitrator then enquired of the Applicant whether he was withdrawing the application."

[31] The conclusion of the agreement to withdraw the dispute was therefore triggered by Commissioner Wauchope's erroneous belief that he had no authority to postpone the arbitration and his stance that if the applicant was not prepared to continue, he would have to withdraw the dispute. The parties accepted the Commissioner's stance in this regard and it was in these circumstances that the agreement was concluded.

[32] Having regard to the above, the agreement was founded upon a mistake common to the parties. In *Dickenson Motors (Pty) Ltd v Oberholzer*<sup>1</sup>, it was held that:

"An agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation can be set aside, formally if necessary or treated as set aside and as invalid without any process or proceedings to do so."<sup>2</sup>

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<sup>1</sup> 1952 (1) SA 443 (AD) at 450 C –E.

<sup>2</sup> See also *Concor Projects (Pty) Ltd T/A Concor Opencast v Commission for Conciliation Mediation and Arbitration and Others* (2013) 34 ILJ 2217 (LC) at paras 26 and 27 and *Concor Projects (Pty) Ltd*



[33] This is such a case and the agreement accordingly falls to be set aside. The parties were in agreement that costs should follow the result.

[34] I accordingly make the following order:

Order

1. The agreement to withdraw the dispute concluded on 3 August 2015 under case number GAEK 2996/15 is set aside;
2. The second respondent is ordered to set this matter down for arbitration before a commissioner other than the third, fourth or fifth respondents;
3. The first respondent is ordered to pay the applicants' costs.

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Heidi Barnes  
Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr Makinta of Makinta Attorneys

For the First Respondent: Mr Rudolph

Instructed by: Mendelow-Jacobs Attorneys