THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 26/18

In the matter between:

DANIEL PETER MOROBANE **Applicant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER JOHAN D STAPELBBERG **Second Respondent**

FILM AND PUBLICATION BOARD **Third Respondent**

Heard: **13 November 2019**

Delivered: **19 November 2019**

Summary: An opposed review application – where a commissioner issues a ruling when the CCMA is *functus officio* – such a ruling is a nullity since it was issued without the necessary jurisdictional power. Held: (1) The ruling issued by the second respondent is hereby reviewed and set aside. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

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[1] This opposed review application raises the question whether the Commission for Conciliation, Mediation and Arbitration (CCMA) has the necessary jurisdiction to exercise statutory powers twice. The review application before me seeks to review and set aside a condonation ruling, in terms of which the second respondent refused to condone a late referral of a dismissal dispute for conciliation. The application is opposed by the third respondent.

Background facts

[2] Given the *fulcrum* upon which this review application must rotate, it is unnecessary for the purposes of this judgment to punctiliously set out the facts of this case. Briefly, the relevant facts are that on or about 16 July 2015, the applicant, Daniel Peter Marobane was dismissed by the third respondent. Aggrieved by his dismissal, the applicant referred a dispute alleging unfair dismissal within the time period prescribed in the Labour Relations Act[1] (LRA). On 9 September 2015, after performing the statutory function of conciliation and mediation, the Commission for Conciliation, Mediation and Arbitration (CCMA) issued a certificate certifying that the dispute of alleged unfair dismissal remains unresolved. The next statutory course open for the applicant was to request resolution of the dispute through arbitration or refer for adjudication.

[3] The applicant took neither of the courses open to him. He was subsequently wrongly advised by Jansen and Jansen Attorneys to instead re-refer the same dispute to the CCMA for conciliation. This re-referral was made in August 2017, which was obviously done outside the prescribed time period. Owing to that, the applicant was again wrongly advised to seek condonation for the late referral. The application for condonation was considered by the second respondent, who in turn issued the impugned ruling refusing to condone the late re-referral. The applicant was aggrieved by the ruling and approached this Court for a relief. Initially, the application was enrolled before my sister Lallie J, but

[1] No. 66 of 1995, as amended.

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could not be heard due to power failure as occasioned by load shedding. Mercifully, the application was enrolled before me within a short space of time.

The issue raised *mero motu*

[4] The applicant challenged the award on a number of grounds. However, at the commencement of the hearing of the application, this Court *mero motu* raised the legal question whether the CCMA was not *functus officio* when it entertained the second referral, the consequence of which being that the CCMA lacked the necessary jurisdictional power and accordingly the ruling is a nullity and ought to be set aside on that basis alone. The Court debated the issue with Advocate Bekker, appearing for the third respondent owing to the fact that the applicant was appearing in person and is not legally trained to have understood the legal point.

Submissions by Mr Bekker

[5] On the point, Mr Bekker submitted that since the ground is not foreshadowed in the applicant's papers it should not be entertained. Further, he submitted that since the applicant has abandoned the first referral, he should stand or fall by the second referral. Since the condonation application was rightly refused, the application for review must fail, so went the submission.

Evaluation

[6] Perhaps the best place to start is to consider the question whether a Court of law is entitled to *mero motu* raise a question of law even if not specifically raised in either of the parties' papers. The general rule is that a Court of law should not decide issues irrelevant to the outcome of a

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case[2]. In *Minister of Justice and Correctional Services v Walus*[3] President Maya, writing for the majority had this to say:

> '[23] …However, where a point of law is apparent on the papers (even where it has been expressly abandoned) but the common approach of the parties proceeds on a wrong perception of the law…the court is not only entitled, but it is also obliged, *mero motu*, to raise the point of law and require the parties to deal with it. Otherwise it would be bound to make a decision that is premised on an incorrect application of the law, despite the accepted facts, merely because a party failed to raise the legal point, as a result of an error of law on his part. That would infringe the principle of legality.'

[7] This Court was thus obliged to raise the issue of *functus officio* as it was blatantly apparent that the applicant referred a dispute and the dispute was entertained by the CCMA. Accordingly, the argument by Mr Bekker that this Court should not entertain the point is rejected.

Was the CCMA *functus officio*?

[8] It does seem that Mr Bekker, reluctantly though, accepted that the doctrine of *functus officio* does apply to CCMA rulings. The Labour Appeal Court (LAC) in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*[4] confirmed that the doctrine does apply to CCMA commissioners. The doctrine has been explained to mean that a person who is vested with adjudicative or decision making powers may as a general rule exercise those powers only once in relation to the same matter. With regard to the matter before me, section 135 (1) of the LRA provides that when a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it

[2] See: *Four Wheel Drive CC v Leshni Rattam N.*O (1048/17) [2018] ZASCA (26 September 2018).
[3] [2017] 4 All SA 1 (SCA).
[4] [2013] 3 BLLR 225 (LAC).

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through conciliation. Section 135 (2) states that the appointed commissioner must attempt to resolve the dispute through conciliation.

[9] It is thus crystal clear that the statutory power of the commission, in relation to a referred dispute is to attempt resolution through conciliation. There can be no doubt that the dispute of the applicant was and remained that of an alleged unfair dismissal. It may well be so that the applicant and or the conciliating commissioner at one stage labelled it an automatically unfair dismissal. However, it remains so that the dispute was with regard to the dismissal of the applicant. It is undisputed that on 05 August 2015, the applicant referred to the CCMA a dispute challenging the fairness of his dismissal occasioned on 16 July 2015. Such a referral ignited the powers bestowed on the CCMA in section 135. It is evident that the CCMA did exercise those powers on 9 September 2015.

[10] Section 135 (5) provides that when conciliation has failed, the appointed commissioner must issue a certificate stating whether or not the dispute has been resolved. There is no dispute that on 9 September 2015, a certificate of non-resolution was issued. The legal effect of this administrative function of issuing a certificate is that it proves that conciliation was attempted and it failed. Put differently, it is proof that the CCMA has exercised its statutory powers over the dispute. Once that happened, on application of the doctrine of *functus officio*, the CCMA is not empowered to again attempt resolution of the same dispute.

[11] Despite that, Jansen and Jansen Attorneys, incorrectly advised the applicant to on 22 August 2017 re-refer the same dispute for conciliation. This advice was blatantly wrong. It is patently clear that the applicant as advised by Jansen and Jansen was at sea with regard to the correct legal position, when regard is had to annexure D to the re-referral form. In there, the second referral was labelled as a reinstatement of an existing matter. This labelling is wrong and demonstrative of lack of understanding of the legal position. However, this lack of understanding

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of the legal position did not license the CCMA to entertain the second referral. The second referral was a futile exercise. The second referral did not occur in a situation where the applicant had withdrawn the first referral[5]. The first referral was processed and the statutory power was exercised upon it. This point, the second respondent was alive to. In his unnecessarily detailed ruling, he said the following:

> [12] …It was not necessary to re-refer the same dispute for conciliation, as he had even.

[12] The above statement is correct in law. Surprisingly, the second respondent proceeded to attempt to exercise statutory powers over this unnecessary referral. All the second respondent was required to do was to decline jurisdiction over the matter. Section 191(1) obliges a party to refer a dispute about the fairness of a dismissal within 30 days of the dismissal. Should an employee fail to do so timeously, the commission may permit him or her to do so outside the prescribed period if good cause is shown.

[13] The exercise that the second respondent was engrossed with, which gave birth to the impugned ruling, is one that is permitted in section 191 (2) only in respect of one referral. Since the second respondent was considering whether or not to allow the re-referral, that exercise is not one sanctioned by the Act[6], thus *brutum fulmen*. The applicant was not entitled to refer the same dispute again. Any attempt to allow him to do what he is not entitled to do was and is a futile exercise. On application of the doctrine of *functus officio*, the second respondent had no powers to do what he did. A decision taken without jurisdictional powers is a

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[5] See *Ncaphayi v CCMA* [2011] 32 ILJ 402 (LC)

[6] See *Premier Gauteng and Another v Ramabulana N.O* [2008] 29 ILJ 1099 (LAC) at paragraph [24] The effect of the above is that in this case the employee party did not need to make a second referral of the dispute… The conciliator granted that condonation. He should have held that the second referral was incompetent as a dispute that has already been competently referred to conciliation cannot be referred to the same process for the second time. [25] Although the conciliator had no jurisdiction to deal with such a referral and such condonation

nullity and can be set aside on that ground alone. In *Eskom v Marshall and others*[7], the Labour Court held thus:

> 'The authorities are trite that a court of law or tribunal that issues an order where it has no jurisdiction to do so acts *ultra vires.* The result is that the order is a nullity. See *Immelman v Keller* 1903 20 SC 3 and *Visser v Van Der Heever* 1934 CPD 315.'[8]

Did the applicant abandon the first referral?

[14] Mr Bekker was insistent in his submission and repeatedly stated that the applicant abandoned the first referral. I fail to comprehend this submission. The scheme of the LRA is such that a dismissal dispute could be resolved employing three different processes. The first of which is conciliation. This is a distinct process. Only once it fails to resolve a dispute, would a party move to either of the two that follows, namely arbitration or adjudication. It is common cause that the applicant had exhausted the first process in relation to the dispute. The fact that he did not progress to the second available stages cannot suggest that he has abandoned the referral. The referral was made and processed at the first stage. That being the case how can the applicant abandon something that is already processed? In order to progress to the arbitration stage, a request[9] to that effect must be made. In order to progress to the adjudication stage, an employee must refer the dispute to the Labour Court.[10]

[15] It is fact that the applicant did not request arbitration nor refer the unresolved unfair dismissal dispute for adjudication. That does not imply that the applicant has lost the right to request arbitration nor refer for adjudication. That right remains intact. The question whether he shall be

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[7] [2003] 1 BLLR 12 (LC).

[8] See also: *Botha v Department of Education (Limpopo Province) and Others* (2008) 29 ILJ 624 (LC) at para 55 and 56.

[9] Section 191 (5) (a) the council or Commission must arbitrate the dispute at the request of the employee

[10] Section 191 (5) (b) the employee may refer…

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allowed to request arbitration or refer for adjudication outside the prescribed time periods is a question to be decided by the appointed arbitrator, if a request is made, or the appointed judge if a referral is made. It is not a matter to be decided by this Court. In my view, there is no evidence that the applicant has abandoned the unfair dismissal dispute, if that is what Mr Bekker meant to submit.

Conclusion

[16] In summary, by application of the doctrine of *functus officio*, the ruling of the second respondent was issued without the necessary jurisdictional powers, thus a nullity and susceptible to being set aside as such. The condonation application ought not to have been entertained. Accordingly, even though this Court sets aside the ruling, it cannot condone the late re-referral as same was not authorised in law. Accordingly, it is my considered view that the first referral has not been abandoned by the applicant. It is, in my view, incapable of abandonment, in so far as conciliation is concerned. Conciliation on the referral has happened.

[17] In the results I make the following order:

Order

1. The condonation ruling issued by the second respondent on 28 November 2017 under case number GATW 12420-17 is a nullity and thus reviewed and set aside.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

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For the Applicant:	In Person.
For the Respondents:	Advocate W P Bekker.
Instructed by:	Gildenhuys Malatji Inc, Pretoria.

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