

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**Reportable**

Case no: C595/18

In the matter between:

CT INTERNATIONAL FINANCIERS (PTY) LTD**Applicant**

and

MADELAINE VAN ROOYEN**First Respondent****COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION.****Second Respondent****VUSUMZI LANDU N.O.****Third Respondent****SHERIFF FOR THE LABOUR COURT
FOR THE DISTRICT OF GOODWOOD****Fourth Respondent**

Date heard: 30 October 2019

Delivered: 12 December 2019

Summary: Application in terms of section 142A – Condonation for late referral of a dispute to the CCMA not required in order to give the CCMA jurisdiction to make a settlement agreement an arbitration award.

JUDGMENT

CONRADIE, AJ

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (LRA) to review and set aside two rulings made under case number WECT4616-18.
- [2] In terms of the first ruling, the commissioner made a settlement agreement an arbitration award in terms of section 142A of the Labour Relations Act of 1995 (the LRA). In the subsequent ruling, the commissioner certified the award in terms of section 143 of the LRA.
- [3] The applicant (the employer) argues that the second respondent (the CCMA) lacked jurisdiction over the dispute as it had not determined the condonation application and as such the commissioner could not make the settlement agreement an arbitration award and subsequently certify the award.

Background facts

- [4] The first respondent (the employee) was employed at the employer as its HR Manager.
- [5] The employee tendered her resignation on 7 July 2017 and left the employer's employ on 4 August 2017.
- [6] On 13 March 2018 the employee referred an unfair dismissal dispute (constructive dismissal) to the CCMA alleging that the dispute arose on 1 September 2017.
- [7] Given that the employee's referral was approximately 150 days late, the employee brought an application for condonation for the late referral of the dispute, which was subsequently set down for hearing on 3 April 2018.
- [8] On 3 April 2018, Andrea Scholtz, the current HR Manager of the employer, and a representative from NEASA, an employer's organization, represented the employer at the CCMA.
- [9] Prior to the determination of the point *in limine*, the commissioner appointed to hear the matter, enquired whether there was any possibility of settlement. Following some negotiations between the parties, they agreed to settle the dispute on the basis, *inter alia*, that the employer would pay the employee a settlement amount of R200 000.00 by no later than 6 March 2018. The

agreement was reduced to writing using the CCMA's settlement agreement template.

[10] As it turned out, the employer did not pay the employee as agreed, and as a result, on 8 May 2018 the employee applied to have the settlement agreement made an arbitration award in terms of section 142A of the LRA.

[11] On 23 May 2018 the settlement agreement was made an arbitration award by the commissioner. Following on this, the employee applied to have the award certified in terms of section 143 of the LRA. The employer opposed the application for certification on the basis that *"the settlement agreement was entered into without the express mandate or approval of Mr Michael Russon who is the Managing Director of the respondent"*.

[12] The arbitrator found that:

"10. A settlement agreement entered into before the CCMA between the parties is legally binding and enforceable and means that the dispute that was referred to the CCMA has been resolved.

11. The effect of a settlement agreement is that the CCMA lacks jurisdiction to set it aside and only the labour court has such competency. The respondent in its opposing application seems to suggest that because its representative was not mandated to enter into such settlement agreement, the same must be set aside by the CCMA and the matter heard afresh.

12. I have difficulties with the respondent's submissions for the following reasons: Firstly the respondent's founding affidavit is not accompanied with any confirmatory affidavit of the representative to whom it alleges had no power or authority to enter into such an agreement, and on this basis alone this opposing application should fail. Secondly it could be an absurd situation if the CCMA were to set aside validly entered settlement agreements on the basis that the respondent's representative did not have the necessary authority, Commissioners cannot be expected to probe further the extent of the authority that the representative parties have before concluding settlement agreements.

13 *In the circumstances the respondent's opposing application stands to fail as there is no basis in law why this arbitration award should not be certified in terms of section 143 of the Labour Relations Act as amended".*

[13] The CCMA found in favour of the employee and the award was certified.

Grounds of review

[14] The employer seeks to review the award and certification thereof on the following grounds:

14.1 The CCMA lacked the necessary jurisdiction to make the settlement agreement an arbitration award under section 142A of the LRA and to certify the award under section 143 of the LRA because the arbitrator failed to make a ruling on condonation for the late referral. The CCMA was therefore unable to exercise its powers in terms of section 142A and section 143 of the LRA because it lacked jurisdiction to do so.

14.2 The arbitrator acted *ultra vires* in granting the applications in terms of section 142A and section 143 of the LRA.

[15] The employer submits that since the dispute was in relation to an unfair dismissal, section 191 of the LRA requires compliance with two prerequisites before dispute resolution can take place at the CCMA, namely:

15.1 Disputes must be referred within 30 days of the date of dismissal. However, the CCMA may permit an employee to refer a dispute after the 30-day period has expired, if the employee shows good cause.

15.2 The employee must satisfy the CCMA that the referral has been served on the employer.

[16] It was further submitted that the CCMA's failure to address the *in limine* point and grant condonation for the late referral essentially nullified its jurisdiction to entertain the dispute.

- [17] The CCMA was therefore not competent to exercise its powers in terms of section 142A and section 143 of the LRA. Essentially, the failure to comply with section 191 (where condonation is not granted) would mean that the CCMA, by making the settlement agreement an arbitration award and certifying it, was in contravention of Rule 14 of the CCMA Rules which requires a referring party to prove that the CCMA has jurisdiction to conciliate a dispute.

Applicable sections of the LRA

- [18] It is useful to quote the following sections of the LRA which have a bearing on this judgment.

- [19] Section 142A of the LRA provides as follows-

“142A Making settlement agreement arbitration award

(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).

[S. 142A inserted by s. 31 of Act No. 12 of 2002.]”

- [20] Section 158 of the LRA provides as follows –

158 Powers of Labour Court

(1) The Labour Court may—

(c) make any arbitration award or any settlement agreement an order of the Court;

[Para. (c) substituted by s. 36 (a) of Act No. 12 of 2002.]

(1A) For the purposes of subsection (1) (c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer

to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22 (4), 74 (4) or 75 (7).

[Subs. (1A) inserted by s. 36 (c) of Act No. 12 of 2002.]

[21] Section 191 of the LRA provides as follows –

“191. Disputes about unfair dismissals and unfair labour practices —

(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—

- (i) a council, if the parties to the dispute fall within the registered scope of that council; or*
- (ii) the Commission, if no council has jurisdiction.*

(b) A referral in terms of paragraph (a) must be made within—

- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;*
- (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.*

[Subs. (1) substituted by s. 46 (b) of Act No. 12 of 2002.]

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

[Subs.(2) substituted by s. 46 (c) of Act No. 12 of 2002.]

Analysis

[22] Section 191(1)(a) gives an employee the right to refer an unfair dismissal dispute to the CCMA or a bargaining council. Subsection (1)(a) creates the right of referral. Subsection (1)(b) stipulates that the referral must be made

within 30 days of the date of dismissal. Subsection (2) allows for the CCMA or bargaining council to condone a late referral.

- [23] All that section 142A(1) requires is that the dispute has been referred to the CCMA or bargaining council. Whether or not it has been timeously referred or is indeed capable of determination is not relevant. Subsection (2) defines a settlement agreement as “a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court”. All that this subsection is concerned with is that the dispute is one which is capable of resolution by the CCMA or a bargaining council. In other words, that it is a labour dispute, and everything else being equal, it is a dispute in general that is capable of referral to arbitration or the Labour Court. This, as opposed to a specific dispute meeting all the requirements, in order for it to be capable of determination by the CCMA/bargaining council or the Labour Court.
- [24] It cannot be that when the CCMA, which was created to speedily resolve disputes, is alerted to a possible settlement of a dispute, it must first require the parties to apply for condonation, instead of finally settling the matter. If this were the case, the parties, instead of bringing the matter to finality, would have to delay immediate settlement in order for the CCMA to deal with the condonation issue. This is absurd. An employer who arrives at the CCMA ready to settle may change its mind if informed by a commissioner that the employee must first apply for and be granted condonation. This may encourage the employer to oppose the granting of condonation in the hope that the outcome may mean that no settlement is required. An employee would also be compelled to apply for condonation, failing which, any settlement agreement concluded with the assistance of the CCMA will not be capable of being made an arbitration award and certified by the CCMA.
- [25] In my view, the decision of the Labour Appeal Court (LAC) in *Greeff v Consol Glass (Pty) Ltd*¹ is fatal to the employer’s case.

25.1 In *Greeff* the LAC had to consider whether to uphold a retrenchment agreement made an arbitration award, which had not been referred for adjudication to the Labour Court. *Greeff*

¹ (2013) 34 ILJ 2835 (LAC).

was employed as an account manager with Consol Glass in 2010. Subsequently, Consol Glass embarked on a section 189 retrenchment process which led to the parties concluding a severance agreement (the settlement agreement).

- 25.2 According to the settlement agreement, Greef's effective date of termination was 30 November 2010, but she was only required to work until 31 October 2010, if there was a timeous handover of duties. Greef secured new employment and told Consol Glass she would be leaving on 18 October 2010. Consol Glass responded by stating that Greef had effectively overridden the settlement agreement by resigning with immediate effect, notwithstanding that she was required to work till 31 October 2010. As a result, the settlement agreement would no longer apply.
- 25.3 Greef requested the CCMA to make the settlement agreement an arbitration award in terms of section 142A, which it did. Consol Glass took the matter on review to the Labour Court which set aside the award on the basis, *inter alia*, that as a dispute was not referred to the CCMA that body was not empowered to make the agreement an arbitration award in terms of s142A.
- 25.4 Greef then approached the Labour Court and asked it to make the settlement agreement an order of court in terms of section 158(1)(c). The Labour Court opted to follow the approach in *Molaba and & others v Emfuleni Local Municipality*², where s158(1)(c) of the LRA was narrowly interpreted to the effect that settlement agreements referred to in that section were limited to agreements that were concluded after a dispute had been referred to the Labour Court for adjudication. As Greef's dispute had not been referred to the court for adjudication, her application was dismissed.

² [2009] 7 BLLR 679 (LC).

25.5 On appeal, Greef argued that there was no requirement for a dispute to be referred to the CCMA before it could be made an order of the Labour Court and that since Consol Glass had not applied to 'any appropriate forum' to set aside the agreement, the Labour Court had the power to make the agreement an order of court.

25.6 The main thrust of Consol Glass's argument was that Greef had repudiated the agreement by not complying with the obligations imposed on her and it would similarly not comply. Greef through her actions had cancelled the agreement. Consol Glass further argued that since the employee already referred the matter to the CCMA it could not also be ventilated in the Labour Court.

25.7 The LAC found in favour of Greef and held as follows:

"[19] It is thus clear from a reading of s158(1A) that s158 (1)(c) must be read with and subject to s158(1A). Even though s158(1)(c) refers to 'any settlement agreement' this cannot be taken to mean, literally, 'any' settlement agreement. Section 158(1A) describes what settlement agreements are being referred to in s158(1)(c). So properly interpreted, in terms of s158(1)(c), read with s158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in s158(1A), orders of court. A settlement agreement that may be made an order of court by the Labour Court in terms of s158(1)(c), must (i) be in writing, (ii) be in settlement of a dispute (i.e. it must have as its genesis a dispute); (iii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration in terms of s22(4), or s74(4) or s75(7). Those kinds of dispute are excluded.

[20] ...

[21] ...

[22] Conciliation is a jurisdictional pre-requisite before a dispute, of the kind referred to in s191 of the LRA, may be referred to a council or the CCMA for arbitration, or to the Labour Court for adjudication. The question that prominently arises in this regard is whether an employee can be said to have 'a right to refer' the matter to arbitration by the CCMA or council, or to the Labour Court for adjudication, in terms of s191, where there has been no referral of the dispute to the CCMA, or the council (as the case may be), or 30 days have not elapsed since the dispute was referred to the council or CCMA and those bodies have not certified that the dispute remains unresolved? The majority in NUMSA v Driveline Technologies (Pty) Ltd and another³ held that the employee did not have a right of referral in those circumstances. However the court there was not interpreting the word 'right' or the phrase 'right to refer' in s158(1A) and was clearly referring to an employee's entitlement to refer the dispute, as contemplated in s191(5) of the LRA and construed that entitlement in the strictest sense as 'a legal right' open to immediate exercise. Does the word 'right' as it is used in s158(1A) have the same strict meaning?

[23] In Bramley, Faber AJ dealt with this issue, although obiter, and came to following conclusion:

'In short I am of a persuasion that the words "the right to refer" in section 158(1A) are not to be construed in a narrow, literal sense so as to equate to a right which is open to immediate exercise. In my judgment, it connotes a far wider concept, such as an entitlement which may only fall to be exercised once the prerequisites for doing so have been satisfied. Thus, provided only that the dispute is of a kind which is amenable to adjudication by the Commission or the court in terms of the structure of the Act, albeit not as a matter of immediacy, but once the prerequisites for such adjudication have been satisfied, a

³ [2000] 1 BLLR 20 (LAC).

settlement in relation thereto maybe made an order in terms of section 158(1)(c), irrespective of the date of its conclusion. This construction does no violence to the wording of section 158(1A). As previously indicated, it has been recognised that the word "right" in the language of the law may be used in a wider and laxer sense and not in the sense that it is synonymous with the concept of a "legal right", correlating to a duty or obligation. It is in this wider sense that the word "right" is in my judgment used in section 158(1A) of the Act. It follows, in my view, that the character of the right referred to in section 158(1A) is such that it need not be open to immediate exercise, but may be invoked at sometime in the future when the pre-requisites therefore have been fulfilled. It nonetheless is something which is extant in the sense that, bar a subsequent resolution of the matter, the machinery of referral may be resorted to.'

[24] Making settlement agreements orders of court may be regarded as important for the protection of the rights of the parties to the settlement. It not only facilitates and enables execution through court processes, but would enable an aggrieved party to institute contempt proceedings if the order of court is not complied with. If the word 'right' in s 158(1A) were to be given a strict meaning, consequences would ensue that cannot be said to be consistent with the aims and objects of the LRA. With regard to the kinds of dispute envisaged in s 191 of the LRA — the power of the Labour Court to make settlements orders of court would be limited to those settlements entered into after failed conciliation and a certificate has been issued to that effect, or in respect of which 30 days elapsed from the date the dispute was referred to the council or CCMA, but which remained unresolved. Parties would be reluctant to enter into settlement agreements before the aforementioned events have occurred, because they would not be able to make their agreements orders of court. Since the identical phrase, 'right to refer', is also found in s 142A(2), the same would apply in respect of settlements which parties wish to make awards in terms of s 142A of the LRA. The only settlement agreements that the CCMA

would be empowered to make awards would be those concluded after failed conciliation and a certificate had been issued to that effect, or 30 days had elapsed since the dispute had been referred to the CCMA and the dispute remains unresolved [my emphasis]. Giving a strict meaning to the word 'right' in s 158(1A) would have the effect of differentiating between those settlements concluded before and those concluded after the statutory events pertaining to conciliation had occurred. Other than purporting to limit the potential number of applications to make settlements orders of court, there appears to be no rational basis for such differentiation. Moreover, any retardation, or discouragement of the early settlement of disputes is not consistent with the objects of the LRA, namely, the resolution of disputes as speedily as possible, in an efficient and cost effective manner. Lingering, unsettled disputes are not conducive to stability in the workplace and militate against the principle aims of the LRA in that respect [my emphasis].

[25] Accordingly, I am in agreement with the conclusion of the court in Bramley regarding the meaning of the phrase 'right to refer' in s 158(1A). It needs only to be established, for the purposes of compliance with that section, that the dispute is of a kind, if unresolved and once all the procedural requirements have been met, which may be referred to arbitration, or to the Labour Court for adjudication. It does not have to be established that there is a 'right of referral', in the strict sense of a legal right capable of immediate exercise" [my emphasis].

- [26] Even though it was overturned by the LAC, Mr Bosch, on behalf of the employer, sought to rely on the Labour Court's decision in *Greef*⁴ to the effect that the CCMA lacked jurisdiction to make a settlement agreement an arbitration award in terms of section 142A because the dispute which had

⁴ Consol Glass (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others [2012] 1 BLLR 42 (LC).

been settled had not been referred to the CCMA as required by section 142A. He sought to distinguish the LAC's decision on the basis that it was dealing with making a settlement agreement an order of court in light of the wording of section 158(1A) as opposed to dealing with section 142A. This argument does not hold water. The same considerations and reasoning which the LAC applied in respect of section 158(1)(c) applies equally in respect of section 142A, if not more so, given that the CCMA, and bargaining councils, are at the coal face of the resolution of disputes. In fact, at paragraph 24 of its judgment, the LAC refers to the similarities between the two sections. According to the LAC *"Since the identical phrase, 'right to refer', is also found in s 142A(2), the same would apply in respect of settlements which parties wish to make awards in terms of s 142A of the LRA. The only settlement agreements that the CCMA would be empowered to make awards would be those concluded after failed conciliation and a certificate had been issued to that effect, or 30 days had elapsed since the dispute had been referred to the CCMA and the dispute remains unresolved".*⁵

[27] While I agree with the applicant that there are certain criteria *"that allows one to unlock the door to the CCMA"*, one should not lose sight of one of the main purposes of the CCMA, and the LRA for that matter, namely, speedy dispute resolution. To require every litigant to argue points *in limine* prior to concluding a settlement agreement would go against this very purpose, quite simply it is a specious argument.

[28] The enforcement of arbitration awards is also a major challenge for employees. This has resulted in amendments to the LRA which are aimed at making the enforcement of awards easier. If accepted, the arguments advanced by the employer in this case will ultimately frustrate the speedy resolution of disputes because even though the parties have settled their dispute, employees would not have access to the enforcement mechanisms in the LRA. It is telling that in this case the settlement agreement was already concluded as far back as 3 April 2018.

⁵ At para 24.

[29] In the circumstances, I am of the view that there is no basis on which to interfere with the rulings made by the commissioner and the review application must fail.

Costs

[30] The clear impression that one gets is that the employer, after signing the settlement agreement, did not wish to honour it. I say this for the following reasons –

29.1 Prior to approaching this court, the employer never challenged the CCMA's lack of jurisdiction as a result of its failure to condone the late referral of the employee's dispute. The opposition to the certification of the award was solely on the basis that Scholtz lacked the authority to conclude the settlement agreement at the CCMA.

29.2 Although the employer blames Scholtz, it does not tell this court what position she holds in the company. This is revealed by the employee in her answering affidavit. The reason for this may be that it is difficult to argue that the Human Resources Manager lacked authority to settle the dispute.

29.3 The employer also does not mention that Scholtz was accompanied by a representative of NEASA, an employers' organisation. The reason for this may be that it becomes even more difficult to argue lack of authority when Scholtz was accompanied by a representative of the employers' organisation.

29.4 No mention is made of what action, if any, was taken against Scholtz for, on the employer's version, exposing the company to a R200 000 settlement payment, and of course, there is no confirmatory affidavit from Scholtz.

29.5 The employer has not, at least as far as this Court is aware of, sought to set the settlement agreement aside. In fact, during argument, it was emphasised that the agreement would not be affected if the rulings are reviewed and set aside. Of course, the

end result would be to leave the employee with an agreement which is not capable of enforcement through the speedy and cost effective mechanisms in the LRA. The employee would have to institute civil action against the employer to try and recover the money owing to her. The response to such civil action may be in the form of the employer disputing that it is bound by the agreement because its representatives lacked the necessary authority to enter into the agreement. Such a response will mean a long and costly road for the employee in order to resolve what is an employment law dispute. This is exactly the position which employees are not supposed to find themselves in, post the introduction of the LRA.

- [31] While my decision to dismiss the review application is not dependant on the above factors I do believe that it has a bearing on costs. The employer asks for costs to follow the result. The employee asks for costs on a punitive scale in order to give effect to the principle of dissuading litigants from bringing frivolous and vexatious matters before the courts. In *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* ⁶ the Constitutional Court referred to the decision of *Zondo JP in Dorkin* where he stated the following:

“The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to

⁶ [2018] ZACC 1.

bring to the Labour Court and this Court frivolous cases that should not be brought to Court.”⁷

[32] I am of the view that this case should not have been brought to this court, particularly in light of the clear authority of the LAC in *Greef*. I believe that the requirements of law and fairness dictate that, in this case, costs should follow the result.

[33] In the circumstances, the following order is made-

Order

1. The review application is dismissed with costs.

BN. Conradie

Acting Judge of the Labour Court

Appearances:

Applicant: Advocate CS Bosch

Instructed by: Fairbridges Wertheim Becker Attorneys

First Respondent: S Khoza

Instructed by: Ruach Attorneys

⁷ At para 24.