



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: D619/23

In the matter between:

PAILPAC (PTY) LTD

Applicant

and

NUMSA o.b.o. LWANDILE MTHWANE

First Respondent

**THE METAL AND ENGINEERING
INDUSTRIES BARGAINING COUNCIL**

Second Respondent

PERUMAL NAIDOO N.O.

Third Respondent

Heard: 12 March 2024

Delivered: 13 March 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 13 March 2024

JUDGMENT

MAKHURA, J

Introduction

- [1] On 4 May 2023, the first respondent referred an unfair dismissal dispute to the second respondent for conciliation. The dispute was unsuccessfully conciliated and was later enrolled for arbitration on 7 September 2023. The applicant applied for legal representation.
- [2] On 27 September 2023, the third respondent (commissioner) issued a ruling in terms of which he dismissed the application for legal representation. The applicant now seeks to review and set aside the ruling in terms of section 158 of the Labour Relations Act¹ (LRA). The application is unopposed.

Material facts

- [3] The employee was charged for allegedly slapping and kicking his colleague, and pulling a knife and swiping it on his colleague, resulting in the colleague sustaining injuries across his face and to his head and back. This was allegedly committed in full view of the colleagues and members of the public. This allegation is described by the applicant as assault with intent to do grievous bodily harm, assault, attempted assault, intimidation, fighting on the applicant's premises and many other alternative descriptions.
- [4] The commissioner dismissed the application primarily on two grounds - the matter is not complex and the only issue is the inconsistent application of the sanction of dismissal.
- [5] The applicant contends that *ex facie* the charge against the employee, the dispute raises complex legal issues that would require the legal expertise to deal with the evidence. Further, the applicant contends that legal expertise would be required to deal with the legal intricacies of each charge or sub-charge and the requirement both legally and factually to prove each element of the charge or

¹ Act 66 of 1995, as amended.

sub-charge. It is also argued that the employee raised a legal defence of “private defence” which would require legal expertise to deal with.

[6] Regarding the comparative ability of both parties, the applicant contends that its Human Resources Manager (HR manager) is inexperienced and that his skills and knowledge are limited as he has no legal background and never presented a case in arbitration proceedings before, compared to the union official who has experience in disputes relating to unfair dismissals and has represented the employee throughout his disciplinary hearing. The applicant contends further that there will be no prejudice if legal representation is permitted because the first respondent will also enjoy the same right.

[7] The applicant submitted that the commissioner’s decision overlooked the concerns raised by the Labour Appeal Court (LAC) in *Makuleni v Standard Bank of South Africa and others*,² (*Makuleni*) “where the arbitration became unruly and the evidence largely muddled and confused, as well as protractive, because of the absence of legal assistance”. The LAC said the following:

[7] A request by the appellant to allow legal representation was refused, a decision not challenged but one the commissioner might well have had reason to regret. Why it is so often glibly imagined that a matter involving only disputes of facts which will require credibility finding will be more appropriately adjudicated without the utility of legal expertise to adduce the cogent evidence coherently and conduct cogent cross-examination eludes me. The hearing took several days. There are 1,287 pages of evidence, much of it disorganised and sometimes waffling.

[8] The respondent’s case was presented by Mr Abie Phooko, an employment relations manager of the respondent, who cross-examined the appellant. It was apparent that the appellant and Mr Phooko already knew one another, and the evidence is occasionally peppered with asides evidencing this acquaintance. The leading of evidence and the cross-examination of the appellant by Mr Phooko was what is to be expected

² (2023) 44 ILJ 1005 (LAC); [2023] ZALAC 4.

from a layperson. The leading of evidence was reasonably coherent, being structured upon the reading of the statements mentioned into the record, but predictably the witnesses wandered off the point and often, but not always, offered no actual substantiation of the key grievance and were not brought back to the point in issue, leaving it to dangle. The cross-examination of the appellant was largely unhelpful in achieving the legitimate objectives of cross examination, often descending into arguments and the inappropriate soliciting of opinions.

Analysis

- [8] Section 158(1B) of the LRA provides that this court may not review any CCMA's or bargaining council's decision or ruling made during conciliation or arbitration proceedings in terms of the LRA before the issue in dispute has been finally determined, unless it is just and equitable to do so. The question therefore is whether it is just and equitable for this court to interfere with the commissioner's ruling?
- [9] Legal representation in this matter is regulated by Rule 17 of the Rules for Conciliating and Arbitrating Disputes in the Metal and Engineering Industries Bargaining Council (MEIBC Rules). This rule is the equivalent of Rule 25 of the Conduct of Proceedings before the CCMA³ (CCMA Rules). In terms of Rule 17(3)(b) of the MEIBC Rules, the commissioner has the discretion to determine whether a party should be permitted legal representation. The question before the commissioner with regard to determining an application for legal representation is whether it would be unreasonable to expect the applicant to deal with the dispute without legal representation. The commissioner found that it would not be unreasonable for the applicant to be expected to deal with the matter without legal representation.

³ GN 194 of 21 February 2020: Rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration.

[10] In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and others*,⁴ the LAC reaffirmed that the purpose of the LRA was to provide a speedy, cheap and informal dispute resolution system. Further, the LAC found that it would be untenable if the right to legal representation in conduct and incapacity disputes were to be absolute or a general right.

[11] In *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and others*⁵, the Labour Court, per Van Niekerk J (as he then was), held that:

'The limitation on the right to legal representation is an integral element of a system of expeditious and informal dispute resolution. The default position established by rule 25 of the CCMA Rules is that in cases of dismissal for misconduct and incapacity, a party to arbitration proceedings is not entitled to be represented by a legal practitioner unless the commissioner and the parties consent, or the commissioner concludes, after considering specified factors, that it is unreasonable to expect a party to deal with the dispute without legal representation.'⁶

[12] The court held that the fact that the dispute may raise intricate legal questions concerning the law are all issues that may be addressed in due course should the applicant seek later to review the award and to subject the commissioner's decisions and the reasons underlying them to scrutiny by this court.⁷ This matter was decided in the context of an urgent application to stay the continuation of arbitration proceedings pending a review of the legal representation ruling.

[13] The application lacks merit and falls to be dismissed. It is common cause that the issue in dispute, the unfair dismissal dispute, has been finally determined. This court must be slow to interfere in incomplete arbitration proceedings.⁸ No case has been made out why this court should interfere with the ruling at this stage of

⁴[2008] ZALAC 13; [2009] 4 BLLR 299 (LAC) at paras 44 – 46.

⁵ [2009] ZALC 35; (2009) 30 ILJ 2513 (LC).

⁶ Ibid at para 5.

⁷ Ibid at para 6.

⁸ See *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and others* (*supra*).

the arbitration proceedings. On this basis alone, the application must be dismissed.

- [14] Regardless, the application remains without merit. There is no question of law that this dispute raises which cannot be dealt with by an HR manager. There is only one charge against the employee, which is that he slapped, kicked and swiped a knife on his colleague in full view of the other employees and members of the public. The applicant submitted that the victim, who is its employee, sustained physical injuries which have been recorded in the form of, amongst others, photographs.
- [15] During arguments, Mr Van Niekerk, appearing on behalf of the applicant, submitted that another important aspect of the case is the place where the incident took place. He submitted that the incident took place outside the applicant's premises and that this raises another legal complexity. The charge sheet states that the incident took place "just outside" the applicant's premises at approximately 18h05. However, the employee is also accused of fighting on the applicant's premises. Other than these two references, no case has been pleaded to demonstrate why this is a legal complexity that its HR manager cannot deal with, and why this court should interfere with the ruling at this stage.
- [16] The matter turns on whether there was assault or not and sanction. There is nothing complex about this that the HR manager cannot deal with. The application for legal representation is, in my view, based on the applicant's desire and/or preference to be legally represented.
- [17] The applicant has profoundly misconceived the remarks made by the LAC in *Makuleni*. If the applicant's argument is followed to its logical conclusion, all applications for legal representations will succeed, thereby changing the default position that legal representation is not permitted in arbitration proceedings relating misconduct and incapacity dispute, against the clear intention of the Legislature. In *Makuleni*, the issue in dispute was finally determined. The LAC did not have to speculate how the parties would present their respective cases and

how the commissioner would handle and direct the proceedings, which is what the applicant is calling for in this matter. Further, the proceedings were not tainted to warrant referring the matter back to arbitration in order for both parties to have a fair hearing. Both parties were given a fair hearing. That the LAC suggested that the arbitrator may have regretted refusing legal representation or that the presentation of evidence was disorganised and the parties were waffling cannot be a basis for granting an application for legal representation.

[18] The applicant has an HR manager. To suggest, as the applicant seems to, that its HR manager is inexperienced and not capable of representing it at arbitration proceedings dealing with misconduct disputes is a vote of no confidence in its manager. It is again a matter of preference. The fact that he has no legal background is irrelevant. Further, that he never presented a case in arbitration proceedings is not, on its own, determinative of the issue, particularly considering that the employee is represented by a union official who equally has no legal background. The HR manager may be prepared and guided by the applicant's legal practitioner on how to present the case during arbitration proceedings. No case has been made out as to why it could not exercise this option and why its HR manager would still not be capable of presenting the case after the preparation and guidance. Accordingly, this inexperience argument must be rejected.

[19] The applicant argued, speculatively that:

'The time and expenses of both parties would be wasted through a lengthy process that the Applicant submits would properly be reviewed and set aside in any event based on the grounds in this application.'

[20] Ironically, it is now more than 6 months since the sitting of the arbitration proceedings. The employee was dismissed on 14 April 2023. It is therefore 11 months since his dismissal and the arbitration dispute is yet to commence.

[21] The application is misguided, based on speculation and conjecture, and a waste of time. It has only frustrated and undermined the informal dispute resolution mechanisms and the overall object of the LRA. The applicant has succeeded in that the second respondent has not enrolled the matter again, despite there being no order interdicting it from continuing with arbitration. This application does not suspend the commissioner's ruling to refuse legal representation and there is no valid reason for the second respondent not to proceed to enrol the dispute for arbitration.

Conclusion

[22] Accordingly, the application is dismissed on the basis that it is not just and equitable for this court to interfere with the commissioner's ruling.

[23] In the premises, the following order is made:

Order

1. The application is dismissed.
2. The second respondent is ordered to enrol the unfair dismissal dispute for arbitration.
3. The Registrar is directed to serve a copy of this judgment on the second respondent.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. G van Niekerk SC

Instructed by: Barkers Attorneys

LABOUR COURT