

SOUTH AFRICA / JUDGMENT

BWAWUSA obo Swartz v Phillips NO and Others (C691/18) [2021] ZALCCT 22 (23 February 2021) [2021] ZALCCT 22

COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C691/18

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IN THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN

Not Reportable

Case

no: C691/18

In

the matter between:

BWAWUSA
obo R.
SWARTZ
Applicant
and
JILL
PHILLIPS
N.O.
1st Respondent
CCMA
2nd Respondent
L.J.
PAINTING CONTRACTORS (PTY)
LTD
3rd Respondent
Date heard: 2 December
2020 on the papers
Delivered: 23
February 2021 by scanned email

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to set aside a jurisdictional ruling under case number WECT 1617/18. The first respondent (the Commissioner) found that the CCMA had no jurisdiction to hear the dispute.
- [2] The background to the dispute is somewhat complex. The applicant was suspended on the 31 July 2017 without pay, pending the institution of disciplinary proceedings. She was not paid her salary for three months i.e. August, September and October 2017. She referred a dispute pertaining to an unfair suspension under case number WECT17218 (the first dispute) on the 3 October 2017. The dispute was settled at the conciliation stage with the third respondent (the company) agreeing to pay the applicant her outstanding salary for the three month period.
- [3] The company were investigating possible fraud charges against the applicant but did not institute disciplinary charges. This led to a second referral (the second dispute) by her on the 19 October 2017, in which she sought, as submissions on her behalf state: “under the estoppel principle in terms of section 186 (2)(b) under case no: WECT 18697-17 on the 19th October 2017 to estop the Third Respondent from initiating disciplinary hearing against the Applicant as a result of excessive delays in doing so.”
- [4] Before the arbitration in the second dispute was held, the parties again entered into a written settlement agreement on the 6 April 2018, The agreement is recorded as being under case number 18697-17 in terms of which the company agreed to pay the applicant R32 000.
- [5] The ruling in casu concerns a third dispute referred by the applicant dated 26 January 2018 in respect of an ‘unfair suspension’. A certificate of non-resolution is dated 20 February 2018. The settlement agreement pertaining to WECT 18697-17, referred to in paragraph 4 above, was thus entered into after the third dispute was referred. According to the heads of argument on behalf of the applicant the third dispute was referred as a result of the company’s failure to pay the Applicant a salary for the month of December 2017 and January 2018.
- [6] The transcribed record of the jurisdictional hearing dated the 22 May 2018, reflects that the Company’s representative (Fisher) submitted that the settlement agreement entered into on 6 April 2018 settled everything between the parties. The transcript reads as follows:

“COMMISSIONER: Okay Alright. And you believe it settled everything. Why?”

MR FISCHER: Over and above this which is not included in this agreement, was the agreement – well upon Mr Africa’s what do I call it – he insisted that there be a UIF in UI19 form....

MR FISHER: We forwarded it was done to the office and was never collected. Upon discovery this was forwarded via email to Mr Africa.

Over and above that, we would not then further implement disciplinary procedures against the applicant.

COMMISSIONER: What was the code on the UI19? MR FISHER: I don't have that with me – it could be 506

COMMISSIONER: What was the wording? Or what was agreed? MR FISHER: End of contract.

COMMISSIONER: End of contract. And when was that issued, do you know? MR FISHER: I don't have that with me now.

[6] The version above regarding the UIF form was not disputed by Mr Africa (the applicant's union representative) at the hearing. Mr Fisher proceeded to explain why the company believed the second and third disputes referred by the applicant were one and the same:

"MR FISHER: As far as we are concerned you know, they both the same matters

– I know within the estoppel principle I fail to see how an employer can be prevented from implementing disciplinary measures. Each employer has the right to maintain discipline in the workplace. But it's all related to the unfair – alleged unfair suspension and the non-payment of monies during that period. As I said earlier, we were led to believe when we reached agreement under 18697, that the matter was settled in its entirety. Evidently that's not the case, according to Mr Africa. We feel that we have been led under the proverbial bush so to speak, deliberately..."

[7] The applicant's case at the jurisdictional hearing, as in this jurisdictional review was as stated by Mr Africa that:

"..it is correct...we reached a settlement agreement based on the estoppel principle that they will drop all disciplinary charges

against the applicant. We agreed specifically on that. They also compensated her in terms what they put her through unnecessary

through the disciplinary charges and threats and so forth..."

[8] However the union claimed on applicant's behalf that: "...that was a different dispute and that was the estoppel. The disciplinary charges is dropped now, we settled it and this is the unfair suspension that we just want to get the unfair suspension uplifted." Asked by the Commissioner for what period of unpaid suspension the matter before him related, Mr Africa said: "It was December, January, February, March, April, May."

- [9] On the union's own version then, the Applicant received payment for August, September and October 2017 after settlement of the first dispute. The so-called 'estoppel dispute' was settled in the first week of April 2018 with payment being made in settlement in an amount equivalent to 4 months of the applicant's salary. In applicant's heads of argument before me, two months' unpaid salary is mentioned. No doubt this is because that is what was recorded in the referral form dated January 2018 which was before the Commissioner.
- [10] It is trite that given this is a review of a jurisdictional hearing, the issue before me is whether the Commissioner's ruling that the CCMA did not have jurisdiction was correct and not the Sidumo reasonableness test.
- [11] The second settlement agreement took place in the first week of April 2018 after the referral to conciliation under WECT 1617/18 had taken place, and before the hearing before the Commissioner. The applicant's representative at the hearing did not dispute that the employer had issued a UIF certificate at his insistence with 'end of contract' recorded on it, after the settlement agreement of April 2018. In these factual circumstances, the referral before the Commissioner, was merely an attempt to have a further bite at a cherry that had already resulted in the applicant being paid out an amount equivalent to 7 months of her salary in two settlement agreements. It was not a separate dispute in law or in fact.
- [12] In these circumstances, the application to review the ruling stands to be dismissed.
- [13] The company has asked for costs in the event it is successful in this review. In the circumstances of this case, I regard this as appropriate in law and equity. I make the following order:

Order

1. The application to review the jurisdictional ruling under Case Number WECT 1617/18 is dismissed.
2. Applicant to pay the costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Applicant: KM Ramodike Attorneys

For the Third Respondent: Jafta Attorneys

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Prepared on 9 October 2026 · Esheria