

SOUTH AFRICA / JUDGMENT

Diedricks v Expert-Tech (PTY) Ltd and Others (PR 168/20) [2022] ZALCPE 31 (31 October 2022)

[2022] ZALCPE 31

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PR 168/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

Case

no: PR 168/20

In

the matter between:

RIKUS

DIEDRICKS

Applicant

And

EXPERT

-TECH(PTY)LTD

First Respondent

COMMISSION

FOR CONCILIATION

MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER

SIPHO SMITH N.O.

Third Respondent

Heard:

28 July 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h00 on 31 October 2022.

JUDGMENT

LALLIE, J

- [1] The Applicant brought this application in terms of section 145 of the Labour Relation Act 66 of 1995 as amended (The LRA) seeking an order reviewing and setting aside a ruling of the third respondent who will be referred to as the Commissioner in this judgment. The application is opposed by the first respondent.
- [2] The factual background relevant to the adjudication of this matter is that the applicant is an employee of the first respondent. He referred a dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration, hereinafter referred to as the CCMA. The referral was made in terms of Section 73A of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) and it constitutes the applicant's claim for outstanding money due to him by the first respondent. In an attempt to resolve the dispute, the CCMA scheduled a con/arb for 21 September 2020. The applicant appeared in person at the con/arb and the first respondent had a representative. The dispute remained unresolved at the conciliation stage and when the commissioner attempted to proceed to arbitration the applicant sought a postponement.
- [3] Although the record of the arbitration proceedings is incomplete, it paints a clear picture of the conflict between the applicant and the commissioner. The applicant expressed his unwillingness to participate in the arbitration process on the grounds that his attorney had objected to the con-arb. He was therefore of the view that the matter would be adjourned at the end of the conciliation stage to be arbitrated at a later date. The arbitrator explained the correct procedure that in terms of Section 73A(5) of the BCEA he was obliged to commence the arbitration immediately after certifying that the dispute remained unresolved at the conciliation state. The applicant accepted his attorneys' error and applied for the postponement of the arbitration.
- [4] The commissioner did not consider the application and proceeded with the arbitration. He afforded the Applicant an opportunity to make an opening statement which he declined based on his request for a postponement. The same opportunity was given to the first respondent whose representative seized it. A further material fact in this matter is that during the verbal

exchange between the applicant and the commissioner the former denied having received the con-arb notice. The commissioner informed him that he had proof that the notice was properly served on his attorney in terms of the applicant's election.

- [5] After the first respondent's opening statement was made the commissioner adjourned the proceedings. On 28 September 2020 he issued an award dismissing the applicant's case on the grounds that he was satisfied that the applicant had adequate notice of the date, time and place of the scheduled con/arb process. It is that ruling which the applicant seeks this court to review and set aside.
- [6] The applicant sought to rely on a number of grounds for review which were strenuously opposed on behalf of the first respondent. There is, however ground which Ms Songca, for the applicant relied mainly on, which Mr Unwin for the first respondent could not refute. The ground is that the commissioner committed gross misconduct in relation to his duties as an arbitrator and gross irregularities in the conduct of the of the arbitration proceedings. The irregularities, if was argued rendered the award defective making it susceptible to review. It was argued, on behalf of the applicant that the commissioner was remiss in his duties as an arbitrator in not dealing with the application for the postponement of the arbitration irrespective of its flaws. I have taken into account the arguments raised on behalf of the first respondent including the applicant's failure to comply with the CCMA rules in filing his postponement application.
- [7] Section 138 (1) of the LRA grants commissioners power to conduct arbitrations in a manner they consider appropriate in order to determine disputes fairly and to deal with the substantial merits of disputes. I accept the argument on behalf of the first respondent that the commissioner was enjoined by the provisions of Section 73A
- (5) of the BCEA to proceed with the arbitration process after issuing the certificate of the non-resolution of the dispute. The first respondent argued, correctly, that postponements are governed by Rule 23 of the Rules for the conduct of proceeding before the CCMA hereinafter referred to as the CCMA rules. Rule 23(3) enables a party to apply for a postponement in terms of Rule 31 of the CCMA rules. Rule 3(10) enables commissioners to determine an application in any manner he or she deems fit, provided that the commissioner informs the parties of how the process will be conducted and gives the parties an opportunity to be heard. In terms of Rule 23 read with Rule 31(10) of the CCMA rules, the commissioner had the necessary power to consider and determine the applicant's application to have the arbitration postponed. His failure to consider the application resulted in him dismissing the applicant's case for his failure to participate in the arbitration after being properly notified that it had been scheduled for hearing. The commissioner's omission to consider the postponement application constituted a defect as envisaged in section 145 (2) of the LRA. It is in breach of his duty in terms of Section 138(1) of the LRA to conduct the arbitration fairly.

- [8] In *Herholdt v Nedbank Ltd* (Congress of South African Trade Union as *amicus curiae*) [2013] BLCR 1074 (SCA) it was held that when a commissioner has misconceived the dispute, the resultant award may be reviewed and set aside. The commissioner misconceived the dispute before him in that he conducted the inquiry incorrectly by taking the decision to dismiss the applicant's case without considering the application to postpone the arbitration.
- [8] The first respondent did not act unreasonably in opposing this application in an attempt to protect its rights in terms of an arbitration award. Granting a cost order will, in the circumstances, not be appropriate.
- [9] In the premises, I the following order is made:

Order:

1. The dismissal ruling issued by the third respondent under case number ECPE4746-20 dated 28 September 2020 is reviewed and set aside;
2. The matter is remitted to the second respondent for the arbitration to be heard *de novo* by a commissioner other than the third respondent;
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Yolisa Songca

Instructed by

Claude Smith Attorneys

For the Respondent:

Chris Unwin

Instructed by

Kaplan Blumberg

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Prepared on 13 October 2026 · Esheria