

SOUTH AFRICA / JUDGMENT

Durand & Bowden (Pty) Ltd v Kleinot N.O and Others (JR 728/01) [2002] ZALC 116 (7 February 2002) [2002] ZALC 116

COURT
Labour Court

BEFORE
AA Landman

CASE / FILE NUMBER
JR 728/01

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IN THE LABOUR COURT OF
SOUTH AFRICA
HELD AT JOHANNESBURG
Case number: JR 728/01

In the matter between: DURAND & BOWDEN
 (PTY) LTD First applicant
 and
 COMMISSIONER KLEINOT
 N.O. First respondent
 COMMISSION FOR
 CONCILIATION,
 MEDIATION AND
 ARBITRATION Second respondent
 STEVEN MARK
 RODWAY Third respondent

JUDGMENT

Landman J:

Steven Mark Rodway alleges that on 3 November 2000 he was constructively dismissed. On 29 January 2001 the dispute about his unfair dismissal was referred to the CCMA. As the referral was late an application for the condonation of his late referral was lodged. On 21 February Mr Rodway's employer, Durand and Bowden (Pty) Ltd, filed its notice opposing the application for condonation. An answering affidavit was attached. This notice was out of time.

-2-

In the meanwhile, on 12 February 2001, Mr Rodway received a notice setting the matter down for conciliation on 27 March 2001. When the notice was received the CCMA case manager was contacted. Rodway's attorney Ms N Koulountis was informed that condonation had been granted. This intimation was erroneous.

On 27 March 2001 the parties attended the CCMA for conciliation. However, before any hearing could take place, the commissioner handed down a condonation ruling, which (at that time) was undated and unsigned. The ruling makes it clear that it was decided on the basis of the founding and answering affidavits. The commissioner declined to condone the late application.

Ms Koulountis immediately requested that the ruling be rescinded in terms of s 144 (a) and (b) of the Labour Relations Act 66 of 1995.

The parties argued the application for rescission and condonation (should the rescission be granted). They supplemented this with written argument. The essence of Ms Koulountis' argument was that rule 19.7 of the Rules of the CCMA states that the: "Commission must allocate a date for the hearing of an application once a replying affidavit is delivered, or once the time limit for a replying affidavit has lapsed, which occurs first". The employer's opposing documents were out of time. Mr Rodway did not respond to them. But a hearing should have been convened. One was not held. This deprived Mr Rodway of an opportunity to reply, which was irregular and vitiated the ruling.

The commissioner issued a ruling rescinding the refusal to condone the late referral. She also condoned the late referral. The commissioner concluded that as a condonation ruling has the same effect as an award, both being final and binding, s 144, although it does not mention condonation rulings, impliedly included them.

A conciliation meeting took place on 12 June 2001. The dispute remained unresolved. But the commissioner refused to issue a certificate of outcome until the employer's application for review was decided.

The employer seeks to review the rescission of the ruling. The employer relies on two grounds. The first is that s 144 of the LRA,

-3-

on which the commissioner relied as her authority to rescind the ruling, is not applicable as it deals with the rescission of an award. The second is to the effect that, if the section applies, the ruling was not given in the absence of one of the parties and therefore s 144 does not apply.

Ms Koulountis submits that there is no substance in these grounds. Section 144, she submits, should be read with rules 19 and 24 of the Rules. These provisions empower a commissioner to rescind an arbitration award or ruling. Rule 24.3 allows for the variation or rescission of arbitration awards and rulings. Rule 24.1 requires applications for the variation or rescission of arbitration awards and rulings to comply with the provisions of rule 19. According to rule 19.9:

“any ruling made by a Commissioner in terms of Rules which has the effect of a final order will be regarded as an arbitration award”.

Ms Koulountis submits that various cases support this interpretation and so does the proposed amendment to s 114 of the LRA (Labour Relations Amendment Bill no 22642 of 2001). She contended that in *Mtshali v Commission for Conciliation, Mediation and Arbitration & Others* (1999) 20 ILJ 2400 (LC) specifically and unequivocally states that in terms of s 144 the CCMA is empowered to consider the question of condonation afresh in the light of evidence and arguments presented and to rescind a condonation ruling. It was held that it is not only entitled to do this, but is obliged to do so. See also *Balaram v Commission for Conciliation, Mediation and Arbitration & Others* (2000) 21 ILJ 1777 (LC).

It was also contended that the first ruling issued by the commissioner was made in error and in the absence of the parties. The condonation ruling states that “both parties submitted affidavits and

a ruling was made on this basis”.

I am in agreement that a ruling regarding condonation and an award

are both final and binding. Normally neither of these decisions would be capable of rescission by their author. The authors are *functus officio*. This is a substantive rule of law. Section 30 of the Arbitration Act 42 of 1965, which does not apply to the CCMA, permits an arbitrator to correct minor errors in the award. However, an award

-4-

made by an a CCMA commissioner may be rescinded in terms of s 144 on the grounds set out in that section. The legislature did not make s 144 applicable to rulings on condonation. Section 144 does not apply to condonation rulings. Rather the legislature, which may be taken to know the common law, was content that the *functus officio* rule should apply. A voidable ruling on condonation may only be set aside by the Labour Court on review. See *Ruijgrok v Foshini (Pty) Ltd* (1999) 20 ILJ 635 (LC) at paragraph 20.

Rulings on condonation are not awards. The court in *Mtshali v Commission for Conciliation, Mediation and Arbitration & Others* (1999) 20 ILJ 2400 (LC) proceeded on the basis that a ruling on condonation was an award. But it did so because the rescission ruling termed in the award a point in limine, took place immediately after the award was rescinded and was recovered in the same document. Marcus AJ at 2404 A referred to this as: “the rescission award”. A ruling on condonation, though it shares many of the attributes of arbitration, is not arbitration in the sense in which the concept is used in the LRA. Furthermore it makes no difference whether the condonation ruling is handed down at a conciliation session or during arbitration proceedings. Its fundamental nature remains the same.

Rule 19(9) which equates a ruling in terms of the rules with an award cannot amend or vary the LRA. The rules may only deal with procedural matters and not matters of substantive law. Section 115 (2)(cA) (iii) and (iv) of the LRA, which empowers the CCMA to make rules, does not permit the rules to amend the Act or the common law. The rules validly deal with the procedure regarding the rescission of arbitration awards as s 144 of the LRA caters for this. To the extent that the Rules purport to permit a commissioner to rescind a final condonation ruling they are ultra vires. The right to rescind the ruling

must exist before a procedure can be put in place Cf United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) at 463.

In the premises the application should be granted. I should add that

I am disturbed about the expense which the parties have incurred in connection with a ruling which is undoubtedly defective. But I have not been asked to review the first condonation ruling and it would be

-5-

improper for me to do so without Mr Rodway applying for it.

I make the following order:

It is declared that the first respondent's undated ruling headed "Point in Limine" purporting to rescind her previous ruling refusing the third respondent's application for condonation, is of no force or effect.

The ruling is set aside.

It is declared that it is incompetent for the second respondent validly to arbitrate upon the dispute referred to it by the third respondent on 29 January 2001 concerning his dismissal by applicant, until and if the ruling by first respondent handed to applicant and the third respondent on 27 March 2001 refusing condonation has been set aside by a competent court.

The third respondent is ordered to pay the costs of this application.

Signed and dated at PORT ELIZABETH this 7th Day of February 2002.

AA Landman

Judge of the Labour Court of South Africa

Counsel and attorneys for the Applicant instructed by SEESA.

Attorneys for the 3rd Respondent: Ms Koulountis of Jonker, Smith, Bergh Inc.

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