

SOUTH AFRICA / JUDGMENT

Freshmark (PTY) LTD v Commissioner Mothibe N.O (JR2063/18) [2020] ZALCJHB 265 (8 July 2020)

[2020] ZALCJHB 265

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JR2063/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR2063/18

In

the matter between:

FRESHMARK
(PTY) LTD
Applicant
and
COMMISSIONER
ISAAC TEKE MOTHIBE N.O First
Respondent
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION Second
Respondent
NATIONAL
TRANSPORT MOVEMENT (NTM) Third
Respondent

Enrolled:

27 May 2020
Decided
on the papers

Delivered:	In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 08 July 2020.
Summary:	Review application of jurisdictional ruling is moot – no just and equitable reason in terms of section 158(1B) of the LRA.

JUDGMENT

NKUTHA – NKONTWANA, J

Introduction

- [1] This is one of the unmeritorious review applications that are beginning to flood this Court's roll in recent months. The third respondent's members, the fourth to further respondents (respondent employees) were in the employ of the applicant. They participated in a secondary strike in support of a primary strike against Shoprite Checkers (Pty) Ltd, the applicant's shareholder, and various temporary employment services that provided workers to them consequent to a secondary strike notice served by the third respondent on 24 May 2018.
- [2] The applicant asserts that the secondary strike was unprotected because it was in support of the demands that were different to the demand in the primary strike. As a result, on 14 July 2018, the applicant dismissed the respondent employees. The applicant further asserts that at some stage it agreed with the first respondent to settle the strike on the basis that the dismissal of the respondent employees would be suspended and that they be subjected to a disciplinary hearing.
- [3] On 20 July 2018, the respondent employees reported at the applicant's premises and were issued with letters of suspension with full pay pending the outcome of their respective disciplinary enquiries. The respondent employees were also informed to return to the applicant's premises on 23 July 2018.
- [4] The respondent employees insisted that they be issued with the dismissal letters that the applicant had referred to when it communicated their dismissal to them on 14 July 2018. They were accordingly given their dismissal letters, subject to the agreed suspension of the dismissals. On 23 July 2018, the respondent employees returned to the premises of the applicant and were issued with notices to attend a disciplinary enquiry that was set down for 1 August 2018 and a confirmation that they were on paid suspension pending the outcome of the disciplinary enquiry.

- [5] Notwithstanding, on 24 July 2018, the third respondent on behalf of the respondent employees referred an unfair dismissal dispute to the second respondent, Commission for Conciliation Mediation and Arbitration (CCMA). At the conciliation hearing held on 21 August 2018, the applicant raised a jurisdictional challenge to the effect that the referral of the dispute was premature because the respondent employees were at that time, still in the employ of the applicant but suspended on full pay pending the outcome of the disciplinary hearing.
- [6] The commissioner issued the jurisdictional ruling under case number GAEK7382-18, dated 30 August 2018, wherein he found that, since the applicant suspended the dismissal of the respondent employees as opposed to a withdrawal, they were indeed dismissed and the CCMA had jurisdiction to conciliate the matter. The commissioner accordingly issued the certificate of non-resolution which allowed the third respondent to refer the matter to this Court since it pertains to the

dismissal of the respondent employees as a result of their participation in an unprotected strike.

- [7] Disgruntled with the jurisdictional ruling, the applicant launched this review application. It is disconcerting that, despite the fact that the respondent employees have since been dismissed, the applicant persists with this application. The litigation over the dismissal of the respondent employees is pending before this Court.
- [8] Clearly, in launching this application, the applicant had no regard to section 158(1B) of the Labour Relations Act[1] (LRA) which provides that

‘the Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices

of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally

determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined’.

- [9] It is inconceivable that the applicant would pursue this review contrary to the intent of section 158(1B) of the LRA which is to allow matters to be dealt with on merits without being bogged down by technicalities which can be dealt with in due course; and thus avoid a piecemeal approach. As things stand, there are two matters before this Court that emanate from the same issues and parties against the dictates of the LRA to have disputes resolved expeditiously. In my view, if this trend is permitted, it would essentially trump this statutory dispute resolution scheme.

[10] To make matters worse, the impugned jurisdictional ruling is not dispositive of the matter. Also, it is trite that the jurisdictional issue pertaining to the jurisdiction of the CCMA can be raised de novo before this Court.[2] In my view, there is no justification for this Court to excise its discretion in terms of section 158(1B) of the LRA.

[11] The applicant has not been able to put up a case to justify interference with the impugned ruling, in any event. The dismissal of the respondent employees was ultimately confirmed. It is illogical, therefore, to expect this matter to be remitted to the CCMA only to satisfy the applicant's technical claim which is patently moot and contrary to the approach spelt out by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*,[3] where the following was stated:

‘Consistent with the objectives of the LRA, commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities.” This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to “conduct the arbitration in a manner that the commissioner considers appropriate”. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

A commissioner must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.’ (Footnotes omitted and emphasis added)

Conclusion

[12] In the circumstances, the impugned jurisdictional ruling is beyond reproach. As such, this application is ill-conceived and must fail.

Costs

[13] It is trite that costs do not follow the result in this Court. In the circumstances of the present case, I am disinclined to award costs.

[14] In the premises, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended.

[2] See: SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others (2008) 29 ILJ 2218 (LAC) at paras 39 – 40; Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others

(2012) 33 ILJ 363 (LC) at para 23; Hickman v Tsatsimpe NO and Others

(2012) 33 ILJ 1179 (LC) at para 10; Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others

(2013) 34 ILJ 392 (LC) at paras 5–6; Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others

(2012) 33 ILJ 1171 (LC) at para 14; Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others

(2013) 34 ILJ 1272 (LC) at para 21.

[3]

[2008] ZACC 15; [2009] (2) SA 204 (CC) at paras 62 – 65.

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Prepared on 11 October 2026 · Esheria