

SOUTH AFRICA / JUDGMENT

KLM Consulting (Pty) Ltd v Commission for Conciliation Mediation And Arbitration and Others (JR1256/2005) [2014] ZALCJHB 377 (3 October 2014)

[2014] ZALCJHB 377

COURT

Labour Court Johannesburg

BEFORE

O Mooki

CASE / FILE NUMBER

JR1256/2005

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 1256/2005

In the matter between:

KLM Consulting (pty) ltd

Applicant

and

COMMISSION FOR CONCILILATION

First Respondent

MEDIATION AND ARBITRATION

S.A. MAGWAZA N.O.

Second Respondent

HULME, YVONNE MYRLE

Third Respondent

Heard: 5 August 2014

Delivered: 3 October 2014

Summary: Review application by a party admitting committing fraud on the CCMA – attempt to oblige the CCMA to determine issues other than on the true facts

MOOKI AJ

- [1] The applicant seeks to review and to set aside an award stemming from a hearing on 18 April 2005. The third respondent set out various complaints in her referral to the first respondent, including that the referral was an “unfair labour practice”. She also complained that she was not paid her agreed retrenchment amount.
- [2] The application has somewhat of a tortured history. The applicant has filed various supplementary affidavits since launching the application. There is also an application to amend the notice of motion. The relief sought in the proposed amended notice of motion effectively renders this a substantially different application compared to when the application was first launched.
- [3] The applicant sought to rescind in proceedings before the CCMA. The CCMA issued a ruling dated 2 August 2005, in which the CCMA indicated that it lacked jurisdiction. The other curious feature to this application is that the third respondent has not filed an opposing affidavit to the review application. The third respondent had, instead, launched other proceedings including an application to dismiss the review application.
- [4] The applicant attacks the award on various grounds. The attack, in substance, is two-fold. First, that the third respondent was not retrenched but that she resigned. Second, that the first respondent lacked jurisdiction to determine the referral. The point on jurisdiction was not taken during the arbitration. It is taken for the first time in the review application.
- [5] The founding affidavit in support of the review application is a three-page statement that was deposed to on 24 June 2005. The applicant registered three complaints regarding the award in this affidavit; namely that there was no retrenchment, that the applicant had resigned, and that an award of 12 months compensation was not justified because the third respondent had been in service for five months.
- [6] The applicant filed a “final supplementary affidavit” deposed to on 14 March 2008. The applicant complained in that affidavit that the second respondent did not submit his handwritten notes of the arbitration and that the tapes received from the first respondent appeared to be incomplete. The applicant nonetheless stood by its founding affidavit despite these complaints.

- [7] There was then a hiatus in steps taken in application. This was interrupted when the applicant served a further supplementary affidavit on 5 August 2013. The applicant complained in this affidavit that it did not receive the record from the first and second respondents and that the first respondent had been ordered to comply on 15 November 2008.
- [8] The applicant raised six grounds of review in its latest affidavit. These are not all the same grounds raised in the affidavit on its behalf that was deposed to on 24 June 2005. The latest affidavit has a section styled “further issues”. This section includes allegations that the award has prescribed or that the third respondent had abandoned the award. None of these “further issues” appeared in the original supporting affidavit.
- [9] The affidavit of 5 August 2013 was followed by yet another affidavit that was served on 12 August 2013. This affidavit is also styled as a supplementary affidavit. Mr Goldberg, the applicant’s attorney, deposed to the affidavit. Mr Goldberg states in the affidavit that new information had come to the attention of the applicant; namely that the second respondent was no longer with the CCMA and that the second respondent’s notes could not be located.
- [10] Mr Goldberg filed the latest affidavit also because he had recently become aware of a particular authority that the initial referral to the first respondent was defective because the certificate of outcome recorded that the dispute was in relation to a dismissal consequent to section 189; whereas the third respondent referred an unfair labour practice. Mr Goldberg contended that the certificate was thus reviewable. This necessitated an amended notice of motion, in which the commissioner who issued the certificate is cited as a party. The applicant seeks an order that the certificate of conciliation itself be reviewed and set aside.
- [11] Mr Goldberg, in his affidavit, goes on to say that the first respondent lacked jurisdiction to hear the matter, should the court disallow the amendment; that there was no unfair dismissal and that the CCMA could not determine the claim for non-payment and that the third respondent should have referred the matter to the Labour Department or to the Labour Court in terms of section 77 (1) and (3) of the Basic Conditions of Employment Act.
- [12] Mr Goldberg then concluded his affidavit by stating that the applicant sought ‘...condonation to the extent necessary’.
- [13] Mr Goldberg appeared for the applicant when the matter came before the court.
- [14] The case for the applicant when the matter was argued was that there was no retrenchment. Reference to the third respondent being retrenched was an accommodation between the applicant and the third respondent to allow the third respondent to qualify for certain statutory benefits.
- [15] Mr Goldberg agreed that the first respondent, according to the record, conducted the arbitration on the bases the third respondent had been retrenched. Mr Goldberg also agreed that the available portion of the evidence from the arbitration shows that the third respondent’s case was premised on her being retrenched; that this was her evidence both in

evidence in chief and during her cross examination. Mr Goldberg also agreed that it was never suggested to the third respondent during her cross-examination that she resigned instead of being retrenched. It was never suggested to the third respondent during her cross-examination that her reference to being retrenched was a ruse.

- [16] Mr Goldberg submitted that the applicant agreed to present the “resignation” of the third respondent as a retrenchment during the arbitration. Mr Goldberg also agreed that the second respondent was misled into conducting the arbitration on the basis of a retrenchment when, according to the applicant, there was no retrenchment by a resignation. Mr Goldberg agreed that the applicant committed a fraud on the first respondent by allowing the second respondent to preside over an arbitration dealing with a retrenchment when, according to the applicant, there was no retrenchment.
- [17] I enquired from Mr Goldberg how his client could, in the light of its admitted fraud on the first respondent, approach the court for relief. He did not have an answer. The second respondent dealt with the dispute as a retrenchment-related matter. The applicant now seeks the court to review the award on the basis that there was no retrenchment but a resignation.
- [18] The court turns its face against any fraud, particularly fraud perpetrated in respect of the processes that bear on the administration of justice. The applicant knowingly got the first respondent to deal with the matter as if it were a retrenchment when, according to the applicant, there was no retrenchment but a resignation. The applicant now wishes the court to disturb the award because the arbitrator dealt with the dispute on the basis that the third respondent’s services were terminated on account of her being retrenched.
- [19] It is remarkable that the applicant has the temerity to seek recourse from a court of law in the light of its admitted fraud. The conduct of the applicant is a perversion of the administration of justice. It is also puzzling that an officer of this court would forge ahead and argue the cause for the applicant with full knowledge of the fraud by the applicant.
- [20] The application is also fatal for the following additional reasons. The jurisdictional challenge is belated. That challenge cannot be taken for the first time in review proceedings.
[1] The challenge should have been raised for the first time during proceedings before the first respondent.[2]
- [21] The complaint regarding the certificate of outcome is also devoid of substance. The categorisation of the dispute by a commissioner during conciliation proceedings does not raise a jurisdictional point. All that is required is for a commissioner to indicate whether or not the dispute was resolved.[3]
- [22] The “further issues” referred to in the applicant’s latest supplementary affidavit do not fall within the authority of this court when exercising its review powers.

[23] I am not satisfied that the award should be disturbed. The second respondent correctly identified the issue for determination, namely whether the termination of the services of the third respondent were for operational reasons or a resignation. He rejected the contention that the third respondent had resigned. The third respondent gave evidence that she was retrenched. She was cross-examined on the basis of her being retrenched. It was not suggested to the third respondent that there was never a retrenchment, but that she resigned.

[24] There is nothing to suggest that the decision by the second respondent was unreasonable. He was obviously alive to the applicant's contention that there was no retrenchment but a resignation. He rejected this contention on the evidence before him.

[25] I make the following order:

1.1. The application is dismissed.

O Mooki

Judge of the Labour Court (Acting)

APPEARANCES:

Applicant: Mr Goldberg, of Goldberg Attorneys)

(No appearance for the third respondent)

[1] See Fidelity Guards Holdings (Pty) Ltd v Epstein NO and & Others

(2000) 21 ILJ 2382 (LAC), where the court rejected a jurisdictional challenge taken for the first time during the review application; see also

Bombardier Transportation (Pty) Ltd v Mtiya and Others

[2010] 8 BLLR 840 (LC)

[2] Section 138 (1) of the LRA

[3] Bombardier Transportation (Pty) Ltd supra, at para 14

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