

SOUTH AFRICA / JUDGMENT

Malema v Commission for Conciliation, Mediation and Arbitration and Others (JR652/22) [2024] ZALCJHB 534 (5 December 2024) [2024] ZALCJHB 534

COURT

Labour Court Johannesburg

BEFORE

ZM Navsa

CASE / FILE NUMBER

JR652/22

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 652/22

In

the matter between:

FRANS
SATHEKGE MALEMA
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
MATHABO
MAKWELA N.O.
Second Respondent
JD
GROUP (PTY) LTD t/a BRADLOWS
Third Respondent

Heard:

22 August 2024

Delivered: 5 December 2024
The judgment was handed down electronically by emailing a copy to the parties. The 5th of December 2024 is deemed to be the date of delivery of this judgment.

JUDGMENT

NAVSA, AJ

Introduction

- [1] The applicant (Mr Malema) seeks an order reviewing and setting aside an in limine ruling dated 18 February 2022, in which it was found that the doctrine of res judicata applied, and that the Commission for Conciliation, Mediation and Arbitration (CCMA) did not have jurisdiction to determine the dispute.
- [2] The application is opposed. The answering affidavit delivered by the third respondent (Bradlows) in opposition to the review application was delivered some six days late. Bradlows brought a condonation application for the late delivery of its answering affidavit, which was not opposed by Mr. Malema.
- [3] Bradlows has demonstrated good cause for condonation to be granted, and on the basis of the trite legal principles governing applications for condonation, condonation is granted for the late filing of Bradlow's answering affidavit in Mr. Malema's review application.

Background

- [4] Mr. Malema was appointed as a salesperson in August 2019. On or about 31 March 2021, Mr. Malema was charged with misconduct in the form of attempted assault.
- [5] A disciplinary hearing was convened, and it culminated in a determination that Mr. Malema was guilty of the alleged misconduct.

Mr. Malema was summarily dismissed by Bradlows on 15 April 2021.

- [6] On or about 9 June 2021, Mr. Malema referred an unfair dismissal dispute to the first respondent, the CCMA, together with an accompanying condonation application for the late referral of the dispute.
- [7] The CCMA appears to have allocated two different case numbers to the same unfair dismissal dispute between Mr. Malema and Bradlows, namely case numbers GAEK 5443-21 and GAEK 4556-21.
- [8] Mr. Malema contends that there was also a third case number allocated to the unfair dismissal dispute, being case number GAEK 4565-21.

- [9] On 5 July 2021, an in limine hearing under case number GAEK 4556-21 was scheduled, and Mr Malema's condonation application for the late referral of his unfair dismissal dispute was decided on paper.
- [10] On 19 July 2021, Commissioner Eugene Martin (Commissioner Martin) under case number GAEK 4556-21 found that Mr. Malema had not shown good cause to justify condonation being granted and ordered that Mr. Malema's condonation application be denied. The CCMA was further directed to close the file.
- [11] On 30 July 2021, the same unfair dismissal referral, now under case number GAEK 5443-21 was set down for an in limine hearing, and Mr. Malema's condonation application for the late referral of his unfair dismissal dispute was now, for a second time and before a different Commissioner, decided on paper.
- [12] On 4 August 2021, Commissioner Belinda Magakwe (Commissioner Magakwe) under case number GAEK 5443-21 granted Mr. Malema's condonation application and directed the CCMA case management to schedule the matter for a con-arb process.
- [13] On 27 August 2021, the unfair dismissal referral, under case number GAEK5443-21 was set down for con-arb, which Bradlows objected to.
- [14] On 9 February 2022, the unfair dismissal referral under case number GAEK5443-21 was set down for arbitration before Commissioner Makwela (Commissioner Makwela). Mr. Malema was present, and was represented by his attorney, Mr. Tshepo Rametse (Rametse). Bradlows was represented by Mr. Ernest Kamini (Kamini), its regional manager. Kamini raised a point in limine that the CCMA did not have jurisdiction to determine the dispute, as it had already been determined. Rametse, conversely, contended that the CCMA did have jurisdiction to determine the dispute.

The 18 February 2022 ruling

- [15] On 18 February 2022, Commissioner Makwela identified that the issue she was required to determine was whether the CCMA had jurisdiction to determine Mr. Malema's unfair dismissal dispute.
- [16] Commissioner Makwela, in her analysis, found that it was clear that the CCMA had allocated two case numbers in error for the same parties, in respect of the same dispute, arising from a single act of dismissal.
- [17] Commissioner Makwela, in examining the relevant legal authorities, found that it was clear that the matter had already been decided when the first ruling was issued. Commissioner Makwela further found the doctrine of res judicata found application in this matter, in that, the matter cannot be decided twice.
- [18] Commissioner Makwela ultimately ruled that the CCMA did not have jurisdiction to determine the dispute.

Malema's review grounds

[19] Mr. Malema seeks a review of the in limine ruling dated 18 February 2021, in terms of section 145 of the Labour Relations Act[1] (the LRA) on the basis of the Sidumo and another v Rustenburg Platinum Mines Ltd and others[2] test.

[20] Mr. Malema contends that Commissioner Makwela failed to apply her mind to the submissions that he had made. Mr. Malema specifically submitted that Commissioner Makwela attached too much weight to the submissions and evidence of Bradlows and failed to attach sufficient weight to his submissions and evidence during the hearing.

20.1 Mr. Malema took issue with a failure to establish how, by whom and when the case number GAEK4556-21 was registered.

20.2 Commissioner Makwela's failure to consult with her colleague, Commissioner Martin in respect of the condonation ruling dated 19 July 2021.

20.3 Commissioner Makwela's failure to approach the administrative staff of the CCMA to verify aspects concerning case number GAEK4556-21.

[21] Mr. Malema also submitted that Commissioner Makwela misconstrued and misapplied the principle of res judicata and that this resulted in her not properly applying her mind.

Relevant legal principles

Jurisdiction ruling reviews

[22] Francis J stated in *Global Outdoors Systems Ltd v Du Toit and Others*[3]:

"...The question is not whether the finding of the Commissioner that the CCMA had jurisdiction was justifiable, rational or reasonable. The issue is simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed..."

[23] Mr. Malema seeks to have a jurisdictional ruling reviewed and set aside. The test in reviewing a jurisdictional ruling is simply whether the arbitrator was right or wrong, and not whether his or her conclusion was reasonable as set out in Sidumo. [4]

[24] A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds. The test is whether, objectively

speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. [5]

[25] The Labour Court has stated that the Commissioner's decision is of no real consequence, as the Labour Court must decide the jurisdictional issue de novo based on the record filed in the review proceedings. [6]

[26] The dispute to be resolved determines the appropriate test to be applied. The dispute between the parties is whether the condonation ruling issued by Commissioner Martin dated 19 July 2021, and, which preceded the condonation ruling by Commissioner Magakwe

on 4 August 2021, invoked the principle of res judicata. If it did, the CCMA would not have jurisdiction as the unfair dismissal dispute, including on the merits, would have been finally determined. If it did not, the CCMA would have jurisdiction, with the unfair dismissal dispute then being required to be enrolled for arbitration.

- [27] The application of the principle of res judicata on the issue of condonation for the unfair dismissal dispute of Mr. Malema, is therefore a jurisdictional issue, with the correctness standard and not the reasonableness standard being required to be applied.

Res judicata

- [28] Nugent JA in *Nestle (SA) Pty Ltd v Mars Inc*[7] said the following in respect of the defence of lis pendens and res judicata:

“The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before the tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the parties should be brought once and finally.”

(Own emphasis)

Evaluation

- [29] Mr. Malema has unfortunately relied on the incorrect reasonableness standard review test under Sidumo when it is the correctness standard that finds application in respect of the review of the jurisdictional ruling dated 18 February 2022.
- [30] The review grounds relied upon by Mr. Malema would, in any event, be wholly inappropriate given the doctrine of functus officio which provides that once a Judge has given a final order the Judge is functus officio. The doctrine acknowledges that once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The doctrine also acknowledges that there is a further equally important consideration, namely the public interest in bringing litigation to a finality. [8]
- [31] The CCMA as a creature of statute, and not being a court of law would be required to strictly apply the principle of res judicata. Unlike a court of law, the CCMA does not have the inherent powers to relax, where appropriate, the principle of res judicata.
- [32] The objective facts, from a reading of the pleadings and the review record, point to Mr. Malema having referred only one unfair dismissal dispute to the CCMA together with an accompanying condonation application for its late referral.

- [33] The objective facts further point to the CCMA, unfortunately, assigning two different case numbers namely GAEK 5443-21 and GAEK 4556-21 to the very same unfair dismissal dispute between Mr. Malema and Bradlows, and of having deliberated twice on the issue of condonation for the late referral of Mr. Malema's unfair dismissal dispute.
- [34] When the unfair dismissal dispute was set down for arbitration, Bradlows raised a preliminary point that the unfair dismissal dispute was res judicata.
- [35] Commissioner Martin's ruling on 19 July 2021, found that Mr. Malema had not shown good cause to justify the granting of condonation for the late referral of his unfair dismissal dispute. Commissioner Martin denied Mr. Malema's condonation application and directed the CCMA to close the file. This effectively brought finality to Mr. Malema's unfair dismissal dispute, including on the merits, as condonation had been refused. This ruling has never been challenged in any subsequent proceedings, and therefore remains valid and binding.
- [36] Commissioner Magakwe's ruling on 4 August 2021, post dates that of Commissioner Martin's. Commissioner Magakwe's

ruling

concerned the very same parties, the same cause of action (condonation for the late referral of Mr. Malema's unfair

dismissal dispute) and the same relief. It is self-evident from Commissioner Magakwe's ruling that the very same condonation

application, on the papers, that served before Commissioner Martin similarly served before her.

- [37] On 18 February 2022, Commissioner Makwela specifically recorded in her ruling that Mr. Malema was aware of the different case numbers, and that in his submissions he had indicated that the error of case numbers should not prejudice him.
- [38] Commissioner Makwela was right in finding that the CCMA had allocated two case numbers in error for the same parties, in respect of the same dispute, arising from a single act of dismissal.
- [39] Commissioner Makwela was also right in finding that the matter had already been decided when the first ruling by Commissioner Martin on 19 July 2021 was issued, in which condonation had been refused. The refusal of the condonation application finally disposed of the unfair dismissal dispute, including on the merits.
- [40] Commissioner Makwela was correct in finding that the doctrine of res judicata applied in this matter, and that the matter cannot be decided twice. Commissioner Makwela rightly found that the CCMA did not have jurisdiction to determine the dispute.

[41] Objectively speaking, the principle of res judicata clearly applied and the unfair dismissal dispute had finally been disposed of through the refusal of Mr. Malema's condonation application by Commissioner Martin on 19 July 2021. The CCMA, on the facts, simply did not have jurisdiction to entertain Mr. Malema's unfair dismissal dispute.

Costs

[42] With reference to the issue of costs, this Court has a broad discretion to make costs orders in accordance with the requirements

of law and fairness.

[43] Mr. Snyman, who appeared on behalf of Bradlows, did not seek costs and rightly accepted that the two case numbers at the CCMA was not Mr. Malema's fault.

[44] In my view, the interests of justice will best be served by making no order as to costs.

[45] In the result, the following order is made:

Order

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

ZM Navsa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Self-represented.

For the Third Respondent: Mr. Sean Snyman of Snyman Attorneys.

[1] No. 66 of 1995, as amended.

[2] (2007) 28 ILJ 2405 (CC).

[3] (2011) 32 ILJ 1100 (LC) at paragraph 18; See also SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others (2008) 29 ILJ 2218 (LAC).

[4] See: CTP Ltd t/a Caxton Newspapers Division v Mphaphuli NO and others (2015) 36 ILJ 1042 (LC) at para 16.

[5] De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others (2013) 34 ILJ 1427 (LAC) at paragraph 24; Phaka and others v Bracks NO and others (2015) 36 ILJ 1541 (LAC); [2015] 5 BLLR 514 (LAC).

[6] Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers and others (2018) 39 ILJ 903 (LC) at paragraphs 63 – 64; See also: University of South Africa v Stapelberg NO and others (2019) 40 ILJ 2610 at paragraph 27.

[7] 2001 (4) SA 542 (SCA) at paragraph 16.

[8] Zondi v MEC Traditional and Local Government Affairs and Others 2006

(3) SA 1 (CC) at paragraphs 28 – 29.

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