

SOUTH AFRICA / JUDGMENT

Masilela v CCMA and Others (JR2350/11) [2016] ZALCJHB 132 (30 March 2016)

[2016] ZALCJHB 132

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

JR2350/11

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR2350/11

In

the matter between:

SAMUEL KHAYA

MASILELA

Applicant

and

CCMA

First Respondent

JOSEPH

NGOBENI N.O.

Second Respondent

MARK

HAWYES

N.O.

Third Respondent

ESKOM

HOLDINGS SOC

LIMITED

Fourth Respondent

Heard:

5 September 2015

Delivered:

30 March 2016

JUDGMENT**WHITCHER J**

[1] The Applicant was employed by Eskom as a Coal Manager. In July 2010 he was found guilty of misconduct and dismissed. He referred a dismissal dispute to the CCMA.

[2] The Applicant seeks to review and set aside the Third Respondent's refusal to grant him a postponement in the arbitration proceedings on 8 December 2010. He also seeks condonation for the late filing of the review application. He further seeks to review and set aside the Second Respondent's jurisdiction ruling on 15 August 2011.

[3] At the commencement of the arbitration proceedings before the Third Respondent on 21 October 2010, the Applicant brought an application

for the postponement of the proceedings on the basis that his legal representative was not adequately prepared for the hearing. After argument on the matter, the application was declined and the arbitration commenced. It was then adjourned part-heard to 8 December 2010.

[4] On 8 December 2010, the Applicant brought another application for postponement on the basis that his legal representative had withdrawn

from the matter the night before the proceedings. After argument on the matter, the application was declined, principally because the date of the hearing had been agreed between the parties at the last sitting.

[5] On the same day, at the CCMA, the parties entered into a written monetary settlement agreement in full and final settlement of all

disputes between the parties. The agreement was not made under the auspices of the CCMA, nor was it made an arbitration award.

[6] On 15 March 2011, the Applicant notified Eskom that he has "terminated" the agreement due to Eskom's "non-performance of its obligations in terms of the agreement". This was due to Eskom having failed to pay the money by then.

[7] In its response, written on 23 March 2011, Eskom was of the view that there still existed a binding settlement agreement between the parties. Eskom claimed that it had failed to timeously perform in terms of the agreement because it did not the Applicant's valid tax number on record to apply for a tax directive and the Applicant was refusing to furnish them said tax number. Eskom urged the Applicant to furnish them with his correct tax number.

[8] The Applicant did not do so. Instead in May 2011, the Applicant applied to have the arbitration proceedings on the dismissal dispute

re-enrolled on the following grounds.

[9] The Applicant submitted that when entering the settlement agreement, there was an unequal power relationship between the parties which favoured Eskom because he was not informed of his rights [he did not specify these rights], unlike Eskom, he was not represented by an attorney and he was not afforded an opportunity to submit the agreement to an attorney for consideration before he signed it. In any event, the agreement was no longer valid as Eskom had failed to perform in terms of the agreement.

[10] Prior to the hearing, the parties filed affidavits. In his replying affidavit, the Applicant added that Eskom through its legal

representatives, coerced him to accept and sign the agreement, threatening that if he does not accept the settlement agreement, he would walk away with nothing.

[11] On 15 August 2011, after hearing argument on the matter, the Second Respondent[1] ruled that the CCMA lacks jurisdiction to entertain the dismissal dispute between the parties on account of the settlement agreement.

[12] On 23 September 2011, the Applicant filed this review application.

[13] In its opposing affidavit, filed on 15 November 2011, Eskom alerted the Applicant to the fact that the postponement ruling was handed down on 8 December 2010. Accordingly the review was filed more than 7 months late and the Applicant had failed to file a condonation application.

[14] Notwithstanding this warning, the Applicant failed to file a condonation application.

[15] The review application was enrolled for hearing on 15 August 2013, but was postponed sine die to give the Applicant an opportunity to file the condonation application.

[16] The Applicant filed the condonation application, but only in June 2014. He cites a lack of funds and the unavailability of counsel for the delay.

[17] I can understand why the review application in relation to the commissioner's decision of 8 December 2010 was late. Certain

events overtook this decision, namely the settlement agreement and the dispute arising therefrom.

[18] However, it is pertinent that Eskom alerted the Applicant way back in November 2011 that it needed to file a condonation application, but the Applicant, for no good reason, ignored this warning. More pertinent is that, after being given an opportunity to file same in August/September 2013, the Applicant delayed another 10 months before filing the application. In my view, irrespective of the reason therefor, such an egregious delays cannot be condoned in review proceedings,[2] which are considered urgent applications.

[19] In any event, for the reasons set out below, the Applicant has no prospects of success.

[20] Firstly, the issue of the postponement became academic when the Applicant concluded a settlement agreement with Eskom. Or, as put by Eskom, this matter was subsequently compromised by a settlement agreement.

[21] Secondly, the Applicant's suggestion in the review application that the Third Respondent directly unduly influenced him to settle this matter is incredible. As described earlier on, the Applicant submitted a letter and two affidavits to the CCMA motivating for the arbitration to be enrolled. In every instance, he claimed that Eskom coerced him to accept and sign the settlement agreement and never placed the Third Respondent as a participant in the settlement

negotiations.

[22] The suggestion by the Applicant in supplementary heads of argument that the Third Respondent was biased against him is rejected outright on the basis that this issue was never canvassed in the application for the re-enrolment, nor in his supporting affidavits to the review application.

[23] Thirdly, there is an abundance of case law which holds that even settlement agreements which have been made an arbitration award (the settlement agreement in casu was not made an arbitration award) cannot be reviewed because the commissioner in facilitating a settlement agreement has no decision-making powers. The applicant's relief, if any, lies within the realm of contract law.[3] In *Hadico v CCMA and others*,[4] the Labour Court held as follows:

"It may well be that during the facilitation process the Commissioner improperly influences one of the parties in arriving at a settlement

agreement. In that case the settlement agreement would be invalid because it would have been improperly concluded. However, whatever

the role and influence the commissioner may have had in the conclusion of the agreement, the outcome remains the decision of the

parties and not that of the commissioner. In my view the....remedy in challenging the agreement that came into existence due to the alleged undue influence by the Commissioner lies in the common law principles of contract".

[24] In the above assessment, I have concentrated on the conduct of the Third Respondent - not that of Eskom - because this is a review application.

[25] In the result the condonation application and consequently the application to review the postponement decision made on 8 December 2010 is dismissed.

[26] I turn now to the application to review and set aside the ruling made by the Second Respondent on 15 August 2011. This application is devoid of any merit.

- [27] The Applicant essentially required the Second Respondent to declare the settlement agreement null and void, alternatively set aside the settlement agreement on the grounds of duress and/or undue influence. Commissioners do not have such powers. The CCMA does not have jurisdiction over such disputes.
- [28] Incredibly, the Applicant purported to invoke the provisions of s142A of the LRA as the basis for setting aside the settlement at the CCMA. It is plain that the section had no application in the dispute.
- [29] In order to have the settlement agreement set aside, the applicant ought to have approached either the Labour Court in terms of s 77 of the BCEA or the civil courts.[5] As submitted by the Respondent, the review applications were designed to permit the Applicant to resile from the settlement agreement.
- [30] In my view, both review applications were completely misconceived and, in the ordinary course of matters, would have attracted an adverse cost order. However, Eskom does not approach this court with clean hands. It could have prevented disputes arising from the settlement agreement if it had timeously complied with the agreement. Their excuse for failing to do so is weak.

Order

- [31] The review application is dismissed with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv H Van Zyl

Instructed by:

Ehlers Fakude Inc

For the Fourth Respondent: Adv P G Seleka

Instructed by:

Mabuza Attorneys

[1] 2nd Respondent.

[2] CUSA v Tao Ying Metal Industries & others

- [2009] 1 BLLR 1 (CC); Queenstown Fuel Distributors CC v Labuschagne N.O & others [2000] 1 BLLR 45 (LAC), Lentsane & others v Human Sciences Research Council (2002) 23 ILJ 1433 (LC); Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)
- [2007] ZACC 24; 2008 (2) SA 472 (CC); Shoprite Checkers (Pty) Ltd v CCMA & others
- [2009] 7 BLLR 619 (SCA); Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others
- [2010] 5 BLLR 465 (CC); the unreported judgment of Makuse v CCMA & others JR2795/11, dated 18 August 2015 by Myburgh AJ.
- [3] Hadio v CCMA [2015] 12 BLLR 1207 (LC); Malebo v CCMA and Others
- (2010) ZALC 97 (15 April 2010); Shortridge v MEIBC and others [2007]; Mavundla & others v Vulpine Investments Ltd t/a Keg & Thistle & others (2000) 2 ILJ 22 80 (LC).
- [4] Hadio v CCMA [2015] 12 BLLR 1207 (LC).
- [5] First National Bank v Mooi N.O & others [2009] 30 ILJ 336 (LC).

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