

SOUTH AFRICA / JUDGMENT

Moraba and Others v Ngwenya NO and Others (JR1893/20) [2021] ZALCJHB 427 (5 November 2021) [2021] ZALCJHB 427

COURT

Labour Court Johannesburg

BEFORE

M I Mangena

CASE / FILE NUMBER

JR1893/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

CASE

NO: JR 1893/20

In

the matter between:

LESLEY
LESEBA
MORABA First
Applicant
JOSLATE
MISIMA
MAHOSI Second
Applicant
MACDONALD
MONOGE Third
Applicant
MUSA
MABUNDA Fourth
Applicant
THANDI
MICHEL
NKWINIKA Fifth
Applicant
DONALD
MAKGARE Sixth

Applicant
MORUFE
GIVEN
MAROTA Seventh
Applicant
THABO
SINA
MOLEFE Eighth
Applicant
SHAPHU
ANGELA
MADISHA Ninth
Applicant
JOHANNES
SHIBURI Tenth
Applicant
SEISHANE
CORNEY
MOKWANA Eleventh
Applicant
PUSELETSO
EMMARENCIA LEBYANA Twelfth
Applicant
NAKEDI
KOBE Thirteenth
Applicant
MOKGADI
HENLY
HLAKO Fourteenth
Applicant
CEDRIC
KHOZA Fifteenth
Applicant
WENDY
MQOBOLI Sixteenth
Applicant
BUSISIWE
KHOZA Seventeenth
Applicant
NICO
SEEMA Eighteenth
Applicant
and
DUMISANI
NGWENYA
N.O First
Respondent
COMMISSION
FOR CONCILIATION MEDIATION
AND
ARBITRATION Second

Respondent
PIONEER
FOODS
GROCERIES Third
Respondent
Considered
in chambers
Date
delivered: 05 November 2021

JUDGMENT

MANGENA AJ

- [1] The applicants were all employed by Pioneer Foods Groceries (Pioneer) at various times on fixed term contracts. The last contract was for a period of one month from 01 February to 28 February 2019 except in case of one, Mr Seema whose contract ended on a different date.
- [2] Prior to the termination of contract, the applicants referred a deeming dispute to the CCMA where they sought to be regarded as permanently employed in terms of section 198 B (5) of the Labour Relations Act.[1] The dispute was conciliated on 19 March 2019 where it remained unresolved and was referred to arbitration.
- [3] In the intervening period, Pioneer notified the applicants of its decision not to renew the contracts and that their services will no longer be required. This necessitated another referral to the CCMA for an unfair dismissal dispute. This dispute was conciliated on 11 April 2019 without resolution and was also referred to arbitration.
- [4] On 24 April 2019, applicants applied for consolidation for the two disputes. In the written statement submitted in support of the application for consolidation, Khongelani Hlungwani explained the basis for the application as follows: -

“[8] I have since been advised that the facts and legal issues which the applicants would be required to prove in both the deeming referral (this referral) and the dismissal referral (conciliated recently) are the same: that they are the deemed employees under section 198 B and that the fixing of contract terms for them is not justified”

- [9] I draw the commission’s attention to Rule 28 (2) (a) of the Rules, which recommends consolidation when there are two cases, involving the same questions of law and fact.”

The statement concluded by stating that it would be most convenient to hear the matters together.

- [5] On the 15 May 2019, the CCMA in a short ruling granted the consolidation application based on the principle of convenience, expediency and lack of prejudice. Indeed, section 135 (3) A read with Rule 28 regulates the consolidation of disputes in cases where they relate to the same parties and/or relates to the same set of facts. The lodestar on a consolidation application is prejudice.
- [6] On the 04 March 2020 applicants withdrew their deemed referral dispute and provided the reasons therefor as follows: the legal issues will be covered by an unfair dismissal dispute that was referred timeously. It is this withdrawal that gave rise to this litigation.
- [7] Subsequent to the withdrawal, the parties concluded a pre- arbitration minutes where it was once again confirmed that the applicants withdrew the deemed dispute and that arbitration will proceed only in respect of section 186 (1) (a) referral made on 11 March 2019. With regards to the facts in dispute, the minute state the following (a) whether the nature of the work for which the applicants were employed was of a limited or definite duration or whether there was any other justifiable reason for fixing the applicant's contracts, (b) whether the terms reflected in the written fixed term contracts were agreed and
- (c) whether the applicants were dismissed in terms of section 186 (1) (a) of the Labour Relations Act 66 of 1995.
- [8] The matter was set down for arbitration and as part of the opening statement the respondent raised a point that the applicants would not be able to lead evidence on the deemed dismissal dispute by virtue of the fact that it has been withdrawn and therefore not a matter for adjudication before the commissioner. The applicants contended otherwise.
- [9] The first respondent adjudicated on the point raised and described it under the issues to be decided as follows:
- Whether the applicants are entitled to lead evidence traversing section 198 B ("deeming provision") in support of the dismissal dispute. Relying on NUMSA v Driveline Technologies (Pty) Ltd and Another[2] he ruled that applicant's application to lead evidence relating to section 198 B of the Act is declined. The ruling was based on the fact that the pre-minutes made it clear that the referral had been withdrawn.
- [10] The applicants approached this court to have the ruling reviewed and set aside on the basis that the arbitrator committed an error of law by barring them from leading evidence relating to the determination whether they were dismissed or not. The applicants further argued that the end-results of this determination is that they are eventually deprived of an opportunity to present their case and this violate the principle of natural justice.

- [11] At the outset, it needs to be mentioned that section 158 (1) B read with clause 11.2.5 of the Practical Manual discouraged piecemeal litigation except in exceptional circumstances where the court is of the view that it is just and equitable to do so. In Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Other,[3]the court explained the rationale for the position as follows:-

“[4] There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy-related reason – for this court to routinely intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.”

- [12] To obviate this difficulty the applicants contended that it would be just and equitable to review the ruling prior to the commencement of the arbitration proceedings in order to avoid a situation where the parties expend time, energy and resources on a hearing in which the evidence relevant to the determination of the issues in dispute is not heard. They argue that the outcome of such an arbitration would be an award that would be reviewable due to failure to determine what they call a “critical component of the dispute.” The matter would inevitably be remitted and this would cause further delay in finalising the dispute between the parties. Adopting such an approach would be contrary to the spirit and tenor of the Labour Relations Act which requires an expeditious resolution of labour disputes. I agree with these submissions.
- [13] Having determined that the applicants have made their case for the court to intervene in the uncompleted arbitration proceedings, are the applicants entitled to lead evidence in respect of a dispute they have withdrawn and confirmed it in the pre-arbitration minutes.?
- [14] The legal position with regard to the status of the pre-arbitration minutes was recently restated by Prinsloo J in Kunene v Sithole N.O and Others[4], as follows: -

“[12] It is trite law that a court or tribunal and the parties are bound by a pre-trial agreement and the issues they agreed to in the pre-trial minute. The court or tribunal cannot and should not go beyond the issues it is required to determine, with reference only to the pleadings and the pre-trial minute.

- [13] The court or a tribunal such as the CCMA does not provide its own terms of reference or conduct its own enquiry into the merits of the case, but instead accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings and a pre-trial minute. In the adversary system of litigation, it is the parties themselves who set the agenda for the trial and neither party can complain if the agenda is strictly adhered to....”

[15] In *South African Breweries (Pty) Ltd v Louw*[5] the court said a party cannot unilaterally resilie from the minute. Necessarily, the strategic choices made in a pre-arbitration

conference need to be carefully thought through, seriously made and scrupulously adhered to. It is not open to the court to undo the laces of the strait-jacket into which the litigants have confirmed themselves.

[16] In casu, the applicants had successfully applied for the consolidation of all two referrals on the basis that the facts and the legal issues to be traversed are the same. The legal effect of granting consolidation in the context of this matter was that there will in effect be one referral, namely, unfair dismissal dispute in terms of section 186 of the Labour Relations Act. The CCMA had by granting a consolidation ruling agreed that the facts and legal issues to be traversed are the same and therefore convenience

required that they be heard as one matter instead of two separate referrals. The legal effect of the ruling was that the deemed

referral dispute was subsumed into unfair dismissal dispute. Put differently the deemed referral dispute collapsed into the unfair

dismissal dispute. This is so because the ordinary grammatical meaning of consolidate is to bring together separate units into one. Its synonym is combine, unite and merge.

[17] If I am correct in my interpretation of legal effect of consolidation of the referrals, it then follows axiomatically that the applicants were not in a position to withdraw the deemed referral dispute as it had seized to exist by operation of law. The consolidation ruling had destined it to extinction. In this regard the purported withdrawal of the referral was of no legal moment. I am fortified in my views by the reason advanced by the applicants in their withdrawal notice where they stated that the legal issues will be covered by an unfair dismissal dispute that was referred timeously/previously. The consolidation was the scrambling of an egg which could not be unscrambled by a withdrawal.

[18] The above notwithstanding, there is no dispute that the two referrals arose out of the same set of facts and therefore so inextricably linked and interrelated that it cannot be possible to advance one case without making reference to the other. The applicant's case for deemed permanent employment was overtaken by the events in that their contracts "expired" before the matter could be conciliated. However, this does not take away the fact that there is an unfair dismissal dispute before the commissioner to adjudicate. In the determination of the issue whether there was a dismissal, the applicants will be required to adduce evidence regarding the circumstances surrounding their employment.

[19] In *IMATU v SALGA and Others*[6], *Snyman AJ* analysed the inter-relationship between section 198 B and 186 (1) (a) or (b) of the Labour Relations Act and concluded that whilst section 198 A and 198 C have their own dispute resolution procedures, section 198 B can be applied as part and parcel of an employee's case in an unfair dismissal dispute as contemplated by either section 186 (1) (a) or 186 (1) (b) of the LRA. The pre-requisites for

this is that the unfair dismissal dispute must have been properly referred to the CCMA or Bargaining Council and conciliated upon. The applicants meet this requirement.

[20] The IMATU judgment supports, in my view the contention by the applicants that though the two cases have been conciliated for purpose of hearing to determine whether they were dismissed by Pioneer and if so, whether that dismissal was fair, there is no legal impediment to the arbitrator admitting into the record evidence relevant to the “deemed dismissal” for as long as such evidence satisfy the requirements for admissibility. As a general rule, a commissioner adjudicating a case should allow parties to adduce any evidence relevant and necessary for the advancement of their case. The key words are relevant and necessary, which means evidence which is irrelevant and unnecessary can be rejected and a party leading such evidence may be refused permission to do so. This is not the case in this matter nor has there been any suggestion that admitting such evidence will evince any prejudice (perceived or real) to the respondent.

[21] Based on the foregoing, it is my finding that the applicants have made out their case for the reviewing and setting aside of the commissioner’s ruling and that it be substituted. I grant the orders as prayed for in the notice of motion with a further directive that it be re-instated on an expedited basis.

[22] It is ordered that: -

Order

1. The ruling of commissioner Ngwenya dated 24 September 2020, issued under the auspices of the CCMA in case number GAEK 3707-19 is reviewed and set aside.
2. The above ruling is substituted with an order that: -
 - 2.1. The point in limine is dismissed; and
 - 2.2. The CCMA is directed to set the matter down for arbitration on an expedited basis.
3. No order as to costs.

M. I. Mangena

Acting Judge of Labour Court of South Africa

Appearances:

For the Applicant: Casual

Workers Advice Office (Law Centre)

For the First Respondent: Pioneer Foods Groceries

[1] Act 66 of 1995

[2] (J 324/97) [1999] ZALAC 157 (11 October 1999)

[3]

(2009) 30 ILJ 2513 (LC)

[4] (JR 879/18) [2021] ZALCJHB 196 (27 July 2021)

[5]

(2018) 39 ILJ 189 (LAC)

[6] Case C391/17 para 36

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Prepared on 12 October 2026 · Esheria