

SOUTH AFRICA / JUDGMENT

Morudu and Others v Commission for Conciliation, Mediation and Arbitration and Others (JR1735/2021) [2024] ZALCJHB 522 (25 October 2024)

[2024] ZALCJHB 522

COURT

Labour Court Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

JR1735/2021

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`THE

LABOUR COURT OF SOUTH AFRICA, JOHANESBURG

Not

Reportable

Case

No.: JR1735/2021

In

the matter between:

JACOB
MORUDU AND 309 OTHERS Applicant
and
COMMISSION
FOR CONCILIATION, First
Respondent
MEDIATION
AND ARBITRATION
COMMISSIONER
LEN DEKKER N.O. Second
Respondent
UNIVERSITY
OF SOUTH AFRICA Third
Respondent

Heard:

12 June 2024

Delivered:

25 October 2024

JUDGMENT

ADAMS, AJ

Introduction

- [1] This is an Opposed Application to review an in limine ruling by the Second Respondent (the Commissioner), in which he found that the Applicants are independent contractors and accordingly the Commission for Conciliation, Mediation and Arbitration (CCMA) lacks jurisdiction to attend to the dispute between the parties.
- [2] There is also an unopposed application for condonation for non-compliance with rule 7A(8) of the Rules of the Conduct of Proceedings in the Labour Court (1996 Rules). I deal with the Condonation Application at the outset.

Condonation

- [3] The ruling in this matter was handed down on 21 July 2021 and the Applicants received it on the same day.
- [4] The Rule 7A(8) Notice was twenty-nine days late. In explaining the lateness, the Applicant has stated that the record of proceedings was collected on 13 September 2021 by Advocate Du Plessis, and that the attorney received the records on the same day from the Advocate but that it took time to find a transcriber in the matter.
- [5] The record was subsequently handed to a transcriber on 20 September 2021, seven days after receipt of the record
- from the Registrar.
- [6] The transcription was completed on 10 October 2021 (twenty days after handing same to her and the attorney received it from the transcriber on 12 October 2021.
- [7] The Applicant's attorney remained with it in his possession at his office until 8 November 2021.
- [8] The Applicant's attorney has explained that in the time span from 13 October 2021 until 11 November 2021 he was hospitalised twice and both times were due to heart attacks. Proof of same has been annexed to the Founding Affidavit.
- [9] When one considers the degree of lateness and the explanation tendered, I find that same is reasonable and that no prejudice has been suffered by the Respondent in the event that Condonation is granted.
- [10] In all these circumstances I am prepared to grant condonation and entertain the merits of the review.

Analysis

[11] This is a jurisdictional ruling and as this Court summarised in *Moses v Commission for Conciliation, Mediation and Arbitration and Others*[1]:

“[11] ... In a review of the jurisdictional ruling, the applicable threshold is not that of reasonableness; the Review Court must determine whether or not the Commissioner’s decision is correct. In SA Rugby Players Association and Others v SA Rugby (Pty) Limited and Others the Labour Appeal Court (LAC) said the following:

“[39] The issue that was before the Commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of Statute and is not a Court of Law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.”

[12] More recently, in *Phaka and Others v Bracks N.O. and Others*, the LAC confirmed that when the jurisdiction of an arbitrator is in question (the case concerned a Bargaining Council but the same holds for the CCMA), the issue is whether he or she objectively had jurisdiction in law and fact – finding that the arbitrator had jurisdiction because he or she might reasonably have assumed as much “is wholly untenable in principle”. In other words, the question of the reasonableness of the Commissioner’s decision does not arise and in effect, the Commissioner’s decision is of no real consequence. The Court must decide the jurisdictional issue de novo on the basis of the record filed in the Review Proceedings.”

[12] The transcribed record reflects one of the facts that was in dispute between the parties was that the Applicants had entered into an independent contractor’s agreement with the Respondent for a period of three years.

[13] In addition to this, further disputes of fact included, inter alia, that the Applicants were independent contractors and that the Applicants were employed on fixed term contracts of employment, amongst others.

[14] It was agreed that the Applicant would begin as the onus rested on the Applicant to prove the employment relationship. It was further agreed that each party would seek and would be responsible for securing the attendance of their own witnesses. The Applicant indicated that it intended to call two witnesses, and the Respondents indicated that they would call three witnesses, save for the undertaking that each employment contract would be accepted as evidence.

[15] In dealing with this point in limine the Applicant then called two witnesses, namely Mr Dominique Molokwane (Molokwane) and Zibuze Lenny Kunene (Kunene).

- [16] After the Applicant finished with its first witness, and prior to closing its case, the Commissioner then informed the parties that they could agree that they would make written submissions on the issue of whether the Respondents were independent contractors. At that point, the Respondent's representative then notified the Commissioner that he intended to call two witnesses and needed to call the next witness. He then called the second witness.
- [17] When the Respondent closed its case, the Commissioner immediately indicated that he would send an email to the parties to confirm that they would be able to make written submissions to him by email by 13 July, and that he would thereafter make a written ruling as to whether he was of the opinion that the Applicants were either employees or independent contractors. He then informed the parties that that was the end of the day's hearing.
- [18] The Applicants were not given the opportunity to call their witnesses when one considers the transcribed record.
- [19] It is common cause when one considers the papers filed in the review application, as well as the transcribed record, that the representative for the Applicant put the Applicant's version to the Respondent's witnesses during cross-examination, as well as in closing arguments.
- [20] The Respondent has indicated that the Commissioner evaluated the written submissions, the Third Respondent's evidence and the Applicant's version during cross-examination and in closing argument.
- [21] When one considers the arbitration award, it is clear that the Commissioner evaluated the evidence by Molokwane and Kunene, as well as the argument put forward. When one considers the arbitration award, it is clear that the Commissioner relied on factual submissions made in the submissions put forward by the Applicants, which was not put forward in evidence by witnesses called by the Applicants.
- [22] Importantly at paragraph 12.4 of the award, the Commissioner made a finding that no evidence was led on behalf of the Applicants to prove that they were economically dependant on being invigilators for the University of South Africa (UNISA) or that it was their sole and principal source of income.
- [23] When one considers the Commissioner's award in totality, it is clear that the Commissioner relied on "evidence", made in written submissions and not that provided by the parties.
- [24] The Commissioner did not hear evidence from the Applicants in terms of their version in light of the fact that it was agreed between the parties that there was a factual dispute pertaining to whether the Applicants were employees or independent contractors, and instead relied on evidence only from the Respondent and written submissions from the Applicant.

- [25] It was on the basis of evidence provided by only one party, and written submissions, that he came to his decision that the Applicants were independent contractors, and that the CCMA lacked jurisdiction to attend to the dispute between the parties. In other words, the Commissioner did not hear evidence relating to this aspect whatsoever from the Applicants themselves.
- [26] It is clear from the transcribed records that this was a factual dispute between the parties.
- [27] In the Court's view, the Commissioner committed a gross irregularity in failing to hear evidence from the Applicants in respect of whether the Applicants were indeed independent contractors or not. Without evidence, from both parties, he was unable to determine whether he had jurisdiction or not, thus also committing a mistake of law in coming to a conclusion in the matter.
- [28] Because there is insufficient evidence before this Court to determine whether the jurisdiction or ruling is correct or not, the matter must be remitted for hearing.

Costs

- [29] This Court has a wide discretion in respect of costs.
- [30] This is a matter where ultimately the Commissioner got it wrong. The Respondent was entitled to defend an award issued in its favour by opposing the Application and should not be punished for doing so. In my view, the interest of justice will be best served by making no order as to costs.
- [31] In the premise the following order is made:

Order:

1. Condonation for non-compliance with Labour Court Rule 7A(8), is granted;
2. The ruling made by the Second Respondent on 21 July 2021 under case number CCMA GATW16355/20, is reviewed and set aside;
3. The jurisdictional point in limine is to be remitted to the First Respondent for re-hearing before a Commissioner other than the Second Respondent;
4. there is no Order as to costs.

Adams

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Instructed by: Advocate JA Du Plessis Schumann vd Heever and Slabbert Inc

For the Respondent: Instructed by: Advocate Molapo Edwin S Nkwana Inc.

[1]

(2019) 40 ILJ 2371 (LC) at paras 11 and 12.

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Prepared on 12 October 2026 · Esheria