

SOUTH AFRICA / JUDGMENT

Moyo v Commission for Conciliation, Mediation and Arbitration and Others (JR2778/05) [2016] ZALCJHB 96 (7 March 2016) [2016] ZALCJHB 96

COURT

Labour Court Johannesburg

BEFORE

Potgieter

CASE / FILE NUMBER

JR2778/05

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable / Not Reportable

Case No: JR2778/05

In the matter between:

THABANI MOYO

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

KERRY DRISCOLL N.O.

Second Respondent

EXECUJET

Third

Respondent

MARIANA MULLER

Fourth

Respondent

CINDY ROBERTSON

Fifth Respondent

Heard: 1 February 2016

Delivered: 7 March 2016

POTGIETER AJ

[1] In this application the applicant seeks to rescind an order made by Cele J on 30 October 2013.

Background

information:

- [2] Prior to this application and during January 2005 the Applicant referred a dispute concerning an alleged unfair discrimination claim in terms of section 10 of the Employment Equity Act to the CCMA. He also at the same time referred an ordinary unfair dismissal claim.
- [3] The parties to the above disputes agreed in writing to confer jurisdiction upon the CCMA to arbitrate the unfair discrimination claim.
- [4] Despite the agreement, the applicant amended his pleadings at the arbitration to allege an automatically unfair dismissal. The arbitrator thereafter ruled that the CCMA lacked jurisdiction to entertain the dispute. The applicant proceeded to make application to review and set aside this ruling. His review application was dismissed in the Labour Court on 13 December 2006.
- [5] After the dismissal of his review application, the applicant endeavoured to refer an unfair discrimination claim afresh to the Labour Court. His referral in this regard was dismissed for inter alia a failure to file a statement of claim and a default appearance.
- [6] The applicant thereafter sought to rescind and appeal these decisions. On 30 August 2011 the Labour Court (through La Grange J) however directed that the Applicant's case be referred to the CCMA for arbitration on the basis of the earlier signed arbitration agreement. The applicant sought to rescind this order, but also proceeded with the arbitration in terms of the agreement before the Second Respondent.
- [7] The arbitration was held over four days during the period 6 and 7 February 2012 and 13 March 2012. The Second Respondent handed down an award as a result.

- [8] On 24 May 2012 the applicant filed a review application against the award and simultaneously proceeded with an application to rescind the order made by La Grange J, referred to above. On 26 March 2015 Whitcher J dismissed the applicant's review application in relation to the Second Respondent's Award.
- [9] On 23 April 2013 Cele J granted the applicant's application to rescind the earlier order of La Grange J of 30 August 2011. This application had been launched during November 2012 almost a year after the order had been made. The application was not opposed and the applicant appeared before Cele J on 23 April 2013. Cele J granted a default order in terms of section 165 of the LRA, rescinding the order of La Grange J dated 30 August 2011.
- [10] When the rescission order came to the attention of the Third Respondent, it launched an application for leave to appeal to the LAC against the order. The application was delivered on 7 May 2013 and became opposed by the applicant on 10 June 2013.
- [11] On 30 October 2013 Cele J rescinded his own order of 23 April 2013 ("the October Order"). It is the October Order, which forms the subject matter of this application. The applicant now applies to rescind the October Order.
- [12] The effect of Cele J's order of 23 April 2013 was to have the dispute heard in the Labour Court afresh[1]. The court accordingly pointed out in terms of the October Order that certain important facts had not been brought to its attention. The Court was for example not made aware that the matter had already been heard by the CCMA and that an arbitration award had been rendered dismissing the applicant's case. The applicant also had not brought to the court's attention that he had participated in the arbitration proceedings in the CCMA and that he had reviewed the outcome thereof. By participating in the arbitration proceedings, Cele J held in terms of the October Order that the applicant had acquiesced to the judgment of La Grange J.
- [13] Cele J held in terms of the October Order that if the above important facts had been disclosed to him, he would not have granted the applicant's rescission application in relation to the order of La Grange J. The court concluded that the order of 23 April 2013 had been granted erroneously in the absence of the Third Respondent[2]. Cele J went on to find in terms of the October Order that the order handed down by La Grange J was procedural in nature and not final and definitive. It could accordingly not be appealed against, but could be rescinded if wrong. Cele J thereafter rescinded his own order of 23 April 2013 *mero moto* and by implication refused to grant the applicant's earlier application to have the La Grange Order rescinded. The order of La Grange J was furthermore confirmed to stand together with the arbitration proceedings carried out thereafter (in furtherance of the La Grange J order). It followed that the Third Respondent's application for leave to appeal to the LAC did not arise for consideration.

Relief Sought:

[14] In this application the applicant seeks the following specific relief:

- a. Recusal of Justice Cele from adjudicating this application; and
- b. Rescission of the orders that were granted by Justice Cele on or about 30 October 2013.

Assessment:

- [15] I can find no evidence to the effect that Cele J did not have the applicant's answering affidavit before him when he dealt with the matter in chambers. In the absence of any evidence to this effect, I am obliged to assume that on a balance of probabilities that the applicant's answering affidavit had in fact been placed on the court file prior to Cele J adjudicating the application and handing down the October Order.
- [16] The application was dealt with in chambers as is customary in relation to applications for leave to appeal. The parties would accordingly not ordinarily have been granted an opportunity to present argument in court or in chambers. It was the Third Respondent's application for leave to appeal which resulted in Cele J revisiting the relevant issues and in particular his earlier order of 23 April 2013. As expected, the parties were not invited to argue the matter in court and furthermore, under the circumstances the application did not proceed by way of default as contemplated in section 165.
- [17] I agree with Mr. Hutchinson that in the circumstances of the Judge having *mero motu* rescinded his order, there is no basis for the applicant to bring a rescission application. The October Order is moreover not final and accordingly not appealable. The applicant was free to continue to prosecute his review application and in fact did so.
- [18] It is common cause that the applicant participated in the arbitration proceedings and that he thereafter sought to have the award reviewed and set aside. The applicant accordingly cannot validly challenge the fact that he acquiesced in the order of La Grange J. It follows that the relevant facts set out in the October Order were not disputed by the applicant.
- [19] In light hereof I can find no fault with Cele J's decision to rescind his own order *mero motu*. It had clearly been erroneously granted in the absence of the Third Respondent.
- [20] In view of the applicant's review application having been dismissed on 26 March 2015, the Second Respondent's award is final and binding. Mr. Hutchinson pointed out to me that in the event that this application were allowed, that the applicant would most absurdly be granted an opportunity to have the matter adjudicated afresh in the Labour Court and be enabled to flout the effect of the Second Respondent's award. Inter alia in view hereof, Cele J was correct in rescinding his own order of 23 April 2013 in terms of the October Order. To enforce such an order would constitute an abuse of the court's process.

[21] Consequent upon the above I make the following order:

21.1 The application is dismissed;

21.2 There is no order as to costs.

Potgieter AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

In Person

For the Third Respondent: Adv. WA Hutchinson

Instructed by:

Norton Rose South Africa

[1] Para 1 of judgment.

[2] Para 4 of the judgment.

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Prepared on 10 October 2026 · Esheria