

SOUTH AFRICA / JUDGMENT

Ngwethana Madumetja Security Services CC v CCMA and Others (JR2240/19) [2022] ZALCJHB 116 (13 May 2022) [2022] ZALCJHB 116

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR2240/19

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: JR

2240/19

In

the matter between:

NGWETJANA MADUMETJA
SECURITY SERVICES CC Applicant
and
THE
CCMA
First Respondent
COMMISSIONER
J F NKUNA N.O.
Second Respondent
PITSI
EKSTEEN NONG & 2 OTHERS
Third Respondent

Heard:

11 May 2022

Delivered:

13 May 2022

Summary:

Opposed application to review and set aside an arbitration award and a variation ruling. Variation correcting an error made after the Commissioner substituted the cited party with the correct employer party. The power to correct citation of parties emanates from rule 27 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration (CCMA Rules). The power lies with the Commission as opposed to a Commissioner. The Commission may effect it mero motu; with the consent of the parties or on application and on notice to the parties concerned. The power to substitute a party or join a party arises from rule 26 of CCMA Rules. The power to vary an obvious error to an arbitration award arises from section 144 of the Labour Relations Act (LRA). Once there is an obvious error, the commissioner who issued the arbitration award is entitled to mero motu vary the arbitration award only to the extent of the obvious error. Where the substitution of a party is improperly made, varying an arbitration award to reflect the improper substitution is impermissible in law. Held: (1) The variation ruling is reviewed and set aside. (2) The arbitration award is reviewed and set aside. (3) The dispute is remitted back to the CCMA for a hearing de novo before another commissioner. (4) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This application presents an unusual and a strange situation indeed. It involves a dispute that alleged an unfair dismissal. In referring the dispute, Mr Pitsi Eksteen Nong, Mr Matlou Manakana and Thabo Sasa (hereafter collectively referred to as the dismissed employees); cited Kands Investments (Kands) as the employer party in the referral forms. At the arbitration proceedings, one Mr Samuel Khumalo (Khumalo) appeared and requested the arbitrating commissioner to substitute Kands with presumably the correct employer party being Ngwetjana Madumetja Security Services CC (Ngwetjana). The appointed commissioner, Commissioner Jeffery Nkuna (Nkuna) duly substituted Kands without notifying Ngwetjana. Whereafter, Nkuna proceeded with the arbitration proceedings. At the

end, Nkuna issued an arbitration award on 5 February 2019 reflecting Kands as the respondent. Upon noticing the error, which is of course inconsistent with the substitution ruling, on 29 July 2019, Nkuna, mero motu varied the arbitration award by reflecting Ngwetjana as the respondent party.

Background facts

[2] The dismissed employees were employed as security officers since 27 August 2018. On 7 January 2019, the dismissed employees alleged that they were dismissed from such employment. As a result, they referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal and a claim for an amount of R7278.00 per person being in respect of salary owed for a period of six months. As indicated above, they cited Kands as their employer. Conciliation failed to resolve the dispute. They requested that the dispute be resolved through arbitration. At the arbitration proceedings, Khumalo appeared who alleged that the correct employer was Ngwetjana. He alleged that the dismissed employees had a misunderstanding because at the time they were hired, they were given business cards of Kands, referred to in the arbitration transcript as K & S Investments. Due to the misunderstanding the dismissed employees referred a dispute (opened the case[1]) citing (used[2]) Kands instead of Ngwetjana.

[3] After hearing that allegation, Nkuna proceeded to make the following ruling:

“COMMISSIONER: Okay, as a Presiding Officer I will therefore make the necessary substitution and I will substitute K & S Investment here with Ngwetjana Madumetja Security Services. Thank you very much. Since we have explained that, now we are starting the process here[3].”

[4] As indicated earlier, arbitration proceeded and culminated in the impugned arbitration award and variation ruling. Around September 2019, Ngwetjana became aware of the arbitration award and the variation ruling through the deputy sheriff. Aggrieved thereby, Ngwetjana launched the present application, which is duly opposed by the dismissed employees.

Grounds for review

[5] Ngwetjana contends that it was never cited as a party to the dispute nor was it served with the referral forms as well as the notice of set down. It also never received the arbitration award as well as the variation ruling. Therefore, it contends that the award and the ruling were improperly obtained and reviewable in law. Further, it contends that in issuing the variation ruling without being afforded an opportunity to be heard, Nkuna committed misconduct, which renders the variation ruling reviewable.

Evaluation

- [6] The fundamental error in this dispute lies in the substitution ruling made by Nkuna. It is apparent from that ruling that Nkuna did not correct the citation but he substituted a party. The power to correct a citation lies with the Commission as opposed to a commissioner as provided for in rule 27 of the CCMA Rules. The Commission is entitled to do so *mero motu*, by consent of the parties or on application by any party.

The power to substitute a party

- [7] Rule 26 of the CCMA Rules deals with how to substitute parties to proceedings. Sub-rules 26 (6) and (7) specifically provides as follows:

“(6) If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the Commission for an order substituting that party for an existing party, and a commissioner may make such an order or give appropriate directions as to the further procedure in the proceedings.”

- (7) An application to join any person as a party to proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person’s representative is already in possession of the documents. The application may be made at any stage prior to the conclusion of an arbitration hearing.”
- [8] The technicality around this dispute is that Khumalo did not identify himself as a director and or representative of Ngwetjana. In the attendance register, he signed on behalf of the respondent/employer as “HRM[4]”. This happened before the substitution ruling. At that time, the cited employer was Kands. Therefore, Khumalo identified himself as the HRM of Kands. Nowhere in the transcript does Khumalo positively state that he is the Director of Ngwetjana. He only stated that Kands and Ngwetjana are “sister companies”. Nkuna records in his arbitration award that Khumalo testified that he is the director of the “Respondent Company”. *Ex facie*, the arbitration award, the respondent company is mentioned as Kands.
- [9] Nonetheless, the transcript reveals that when Khumalo introduced himself, he stated as follows:

“SAMUEL KHUMALO: My name is Samuel Khumalo Manager at [indistinct].”

- [10] Consistent with the attendance register, he refers to himself as a manager as opposed to a director. Although the transcript is indistinct, when Khumalo testified under oath, he never identified himself as the director of any company. Of course, the question is where does Nkuna get the fact that Khumalo was a director? Regard being had to the material before this Court; such appears to be a self-generated testimony. Nevertheless, the key question is what then empowers Khumalo, a stranger to Ngwetjana, on the strength of the material properly placed before Nkuna; to apply to have Kands substituted by Ngwetjana. Clearly, Khumalo lacks the

necessary powers to bind Ngwetjana in any form or manner. In the papers before Court, Madumetja Elias Ngwetjana testified that he is the sole member of Ngwetjana. This allegation is undisputed.

[11] Rule of law, popularly known as legality principle, commands that a functionary cannot perform powers that he or she did not have. Nkuna did not have the power to substitute a party, particularly in the absence of the substituted party. On the facts of this matter, there was no application to the Commission for an order to substitute a party for an existing party within the contemplation of sub rule (6) mentioned above. Rule 31 of the CCMA Rules deal with how to bring an application. Kands or Ngwetjana did not follow such a process as outlined in the rule. Section 139 of the LRA obligates the Commission to appoint a commissioner to arbitrate.

A commissioner appointed to arbitrate is also appointed to deal with interlocutory applications that may arise during the arbitration

proceedings. Rule 31 is there to deal with interlocutory applications. An application to substitute, properly made, is an interlocutory application. Nkuna did not have a proper substitution application before him. There is no indication that the peremptory provisions of sub rule (7) were complied with. The sub rule obligates that an application to join or substitute must be accompanied by all

documents previously delivered. In other words, the referral documents ought to have been provided to Ngwetjana. No evidence of

such was exposed. In the present proceedings, it is admitted that Ngwetjana was never served with the referral forms.

[12] Section 145 (2) (a) (iii) of the LRA provides that it is a defect in the arbitration proceedings if a commissioner exceeds the commissioner's

powers. As indicated above by substituting a party, Nkuna exceeded his powers. Once faced with such an application to substitute, he ought to have halted the proceedings and duly notify Ngwetjana about the arbitration proceedings. As held in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[5], the grounds set out in section 145 of the Labour Relations Act[6] (LRA) are suffused into the ground of reasonableness. In other words, a commissioner who exceeds his or her powers acts outside the bands of reasonableness. Thus, his or her award is not constitutionally compliant.

The variation ruling

[13] Since the arbitration award is one that does not comply with the constitutional standard, it follows axiomatically that a variation in terms of section 144 of the LRA only happens to a valid and enforceable award. Therefore, even if the variation as a power was exercised correctly, it was exercised on a nullity. Axiomatically, the variation ruling is a nullity and ought to be set aside as such. Given how the substitution happened, Ngwetjana was entitled

to be afforded an audi alteram partem, before the arbitration award binds it. In terms of section 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution), Ngwetjana has a right to a procedurally fair administrative decision. For all these reasons, the variation ruling is reviewable in law in terms of section 158 (1) (g) of the LRA.

Conclusions

[14] As outlined above, the arbitration award and the variation ruling are susceptible to review. However, before I conclude, I must state that Ngwetjana has admitted before this Court that the dismissed employees are its employees. To the extent that it is true that for the period of six months, the dismissed employees were not paid remuneration, then the actions of Ngwetjana are unlawful when regard is had to the provisions of section 32 of the Basic Conditions of Employment Act[7] (BCEA). In terms of section 32 (1) an employer must pay to an employee any remuneration that is paid in money. Section 73A of the

BCEA empowers the CCMA to resolve disputes over claims for failure to pay any amount. Regard been had to the amounts involved the dismissed employees must be covered by section 73A (1) of the BCEA.

[15] It is unclear from the papers before this Court as to whether; Ngwetjana did not pay or owed the dismissed employees any remuneration. Had it been clear, this Court exercising its powers emanating from section 145 (4) (a) read with section 158

(1) (j) of the LRA, would have been minded to determine that Ngwetjana must pay the dismissed employees any money owed to them. However, as a Court I am also constrained by section 34 of the Constitution to, in the interests of justice, make such an order. I however believe that since Ngwetjana is ably legally represented, it shall seriously consider the issue of the outstanding salary if there is any in line with the sectoral determination as found by Nkuna.

[16] In the circumstances, and in line with section 145 (4) (b) of the LRA, this Court is constrained to remit the dispute back to the CCMA for a proper exercise of power and resolution of the dispute, particularly the salary dispute.

[17] In the results the following order is made:

Order

1. The arbitration award issued by Commissioner J F Nkuna under case number LP37-19 dated 5 February 2019 is hereby reviewed and set aside;
2. The variation ruling issued by Commissioner J F Nkuna under case number LP37-19 dated 26 July 2019 is hereby reviewed and set aside;
3. The dispute is remitted back to the CCMA to be determined afresh by a Commissioner other than Commissioner J F Nkuna.

4. There is no order as to costs.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M E Phooko of Moloko Phooko Attorneys, Mokopane.

For the Respondents: Ms N Kamanga

Instructed by:

Legal Aid South Africa, Pretoria.

[1] Exact phrase used by Khumalo as it appears in the arbitration transcript.

[2] Exact word used by Khumalo as it appears in the arbitration transcript.

[3] Arbitration Transcript page 5 line 9-16.

[4] Presumably Human Resources Manager.

[5]

(2007) 28 ILJ 2405 (CC).

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

[7] No. 75 of 1997.

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