

SOUTH AFRICA / JUDGMENT

Nkosi v Putco Limited (JS793/13) [2015] ZALCJHB 380 (22 October 2015)

[2015] ZALCJHB 380

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS793/13

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REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 793/13

In the matter between:

ABEL DOCTOR NKOSI

Applicant

and

PUTCO LIMITED

Respondent

Heard: 9 October 2015

Delivered: 22 October 2015

VAN NIEKERK J

- [1] This is an interlocutory application to determine a number of points in limine raised by the respondent in a dispute referred to this court concerning the fairness of the applicant's dismissal. The points in limine go to the court's jurisdiction to entertain the applicant's referral. For the sake of convenience, I will referred to the parties as they are referred to in the main action.

- [2] It is not disputed that the applicant was dismissed by the respondent in October 2012 after it was alleged that he instigated and participated in an unprotected strike. A dispute concerning the applicant's alleged unfair dismissal was referred by the trade union of which he was a member (TAWUSA) to the South African Road Passenger Bargaining Council. That dispute was dismissed by the bargaining council on 27 February 2013 when the applicant and his representative failed to appear before the bargaining council. The dismissal ruling was not challenged by the applicant or his trade union, nor was it sought to be rescinded.
- [3] The applicant then referred the same dispute to the CCMA. The respondent did not receive the application nor the application for condonation for late referral that accompanied it. A conciliation meeting was held on 21 June 2013 and once the applicant's late referral had been condoned, certificate of non-resolution of the dispute was issued. The respondent then applied to rescind the condonation ruling. On 8 August 2013, the CCMA granted the application and the condonation ruling was set aside. The commissioner concerned directed that the jurisdictional issues be dealt with at the arbitration hearing. That hearing commenced on 13 August 2013 and on 27 August 2013 the commissioner ruled that the CCMA had no jurisdiction to arbitrate the dispute. In the ruling, without any application for condonation for the late referral of the dispute having been made, and despite the fact that the prior order granting condonation had been rescinded, the commissioner granted the applicant condonation for the late referral of his dispute and ruled that the applicant should within a period of six weeks refer the dispute to this court. The dispute was referred on 3 October 2013, outside of the 90 day period prescribed by section 191 of the LRA, and without any application for condonation.
- [4] In these proceedings, the respondent contends that the applicant correctly referred his dispute to the bargaining council. (There is no dispute that the bargaining council had jurisdiction.) While s 147 provides that the CCMA may exercise jurisdiction in certain circumstances where the parties fall within the jurisdiction of the bargaining council, the respondent contends that it was not competent for the applicant to do so given that the dispute had already been dismissed by the bargaining council, and that he referred the dispute to the CCMA in the full knowledge that the council had jurisdiction.
- [5] In my view, there is merit in the submissions. Section 147 simply confers a discretion on the CCMA, if it becomes apparent that the parties to the dispute are parties to a bargaining council, either to refer the dispute to that council for resolution, or to appoint a commissioner to resolve the dispute. That section is not an invitation to parties who, having had their disputes dismissed by a bargaining council with jurisdiction, attempt a referral of the same dispute to the CCMA, certainly not in circumstances where the bargaining council's dismissal ruling remains in force. Indeed, the applicant's conduct is nothing less than disingenuous and an attempt to avoid the consequences of the bargaining council's ruling. To the extent that the applicant submits in these proceedings that the failure to attend the conciliation convened by the bargaining council was the fault of his then legal representative, the applicant ought to have made out a case for the review for rescission of

the dismissal ruling. The applicant was not entitled, as he did, simply to treat the ruling as a nullity. In the circumstances, and given particularly the existence of a valid ruling by a bargaining council with jurisdiction that a dispute referred to it ought to be dismissed, it was not open to the CCMA to assume jurisdiction or convene any conciliation meeting or issue any certificate of outcome. It follows to that the arbitrating commissioner's conduct in granting condonation where no application for condonation had been made and in the face of a prior ruling rescinding condonation previously granted, while grossly defective, is of no consequence in these proceedings. So too is the commissioner's ruling that the applicant referred his dispute to this court within six weeks, ruling that is irreconcilable with the provisions of s 191 (11)(a) of the Act.

- [6] Given these conclusions, it is not necessary for me to consider the respondent's submissions in relation to the failure by the applicant to comply with s 191 of the Act, and the respondent's

submissions

in relation to *National Union of Metalworkers & another v Driveline Technologies (Pty) Ltd & another* (2000) 21 ILJ 142 (LAC) and *National Union of Metalworkers & another v Intervale (Pty) Ltd* (2015) 36 ILJ 363 (CC). With regard to the latter, it seems to me that confirmed is the referral of a dispute to conciliation as a precondition to arbitration or adjudication by this court. In the present instance, it seems to me that there was a valid referral to the bargaining council. The jurisdictional obstacle in the present instance is the council's ruling on 27 February 2013 that the referral be dismissed.

- [7] Finally, the court is indebted to the applicant's counsel and attorneys who appeared pro bono.
- [8] For the above reasons, the respondent's point in limine is upheld and it is declared that this court has no jurisdiction to entertain the applicant's referral.

I make the following order:

1. The applicant's referral is dismissed.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. L Abrahams instructed by Webber Wentzel

For the Respondent: Adv. ZM Navsa instructed by Bowman Gilfilan Inc.

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