

SOUTH AFRICA / JUDGMENT

Nxumalo v Commission for Conciliation, Mediation and Arbitration and Others (P69/13) [2016] ZALCPE 22 (17 November 2016)

[2016] ZALCPE 22**COURT**

Labour Court Port Elizabeth

BEFORE

E Tlhotlhemaje

CASE / FILE NUMBER

P69/13

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THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P69/13

NQOBILE MOFFAT NXUMALO Applicant And THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION First Respondent COMMISSIONER M NDUZULWANA Second Respondent COMMISSIONER ANTHONY MARE N. O Third Respondent COMMISSIONER PJ CLOETE N. O Fourth Respondent COMMISSIONER THEMBA CHOBOKOANE N. O Fifth Respondent COMMISSIONER EBM VAN ZUYDUM N. O Sixth Respondent BORDER CRICKET (NPC) Seventh Respondent

Heard: 26 October 2016

Delivered: 17 November 2016

TLHOTLHALEMAJE, J

Introduction:

[1] The Applicant seeks an order reviewing and setting aside a ruling issued under case number ECEL184/13 by the Second Respondent

(Commissioner Nduzulwana) dated 03 June 2013, in terms of which the Applicant's alleged unfair dismissal dispute was dismissed.

Background:

- [2] The Applicant held the position of Chief Financial Officer of the Seventh Respondent (Border Cricket) from 1 February 2010 until his dismissal on 24 December 2012. Having referred an alleged unfair dismissal dispute to the CCMA, the matter was initially set down for con/arb proceedings on 15 February 2013. Following unsuccessful conciliation, the Applicant had then referred the dispute for arbitration.
- [3] The dispute was set-down for arbitration before Commissioner Nduzulwana on 9 April 2013. The proceedings only went as far as a protracted process of narrowing down of issues, and were adjourned. Emanating from those proceedings, the Applicant thereafter wrote a letter of complaint to the Senior Commissioner (Eastern Cape CCMA) on 29 April 2013 in relation to the conduct of Commissioner Nduzulwana. The Applicant's contention was that he did not receive a response from the Senior Commissioner in regard to his concerns. As it however appears from the bundle of documents[1], Commissioner Nduzulwana was made aware of the complaint and had in fact responded to the Applicant's allegations in writing to the Senior Commissioner on 13 May 2013.
- [4] The arbitration proceedings were re-scheduled for 3 June 2013. The Applicant had attended the proceedings unrepresented, and had raised some 'preliminary' points related to the complaint he had lodged, and the fact that he was not properly notified of the proceedings. The Applicant's contention was that he had not received a proper notice of set-down, and was only informed by the CCMA via 'SMS' on 31 May 2013 of the proceedings. He had upon receipt of the 'SMS' made enquiries with the CCMA and was informed that the notice of set-down was despatched on 10 May
2013. He nevertheless contends that he did not receive the notice of set-down. The second issue was in respect of his complaint to the Senior Commissioner. His contention was that the arbitration could not proceed until his concerns were addressed.
- [5] The Applicant then requested an adjournment for ten minutes to 'consult', insisting nevertheless that he was unable to continue because of his initial complaint. At some point the Commissioner adjourned the proceedings as he also needed to investigate the circumstances the notice of set-down was not received as alleged by the Applicant. The Commissioner's investigations revealed that the notice of set-down was sent to Pick 'n Pay/ Beacon Bay Post Office on 10 May 2013 and was returned to the East London Post Office on 17 May 2013 from where it was initially sent. That notice was still however to be collected by the CCMA from the post office, as it remained unclaimed. The Commissioner had also established that the CCMA also sent an e-mail to the Applicant on 10 May 2013 and a reminder by 'SMS'.

- [6] The Applicant had nevertheless insisted that he was not prepared to proceed with the matter because his previous complaint against the Commissioner had not been attended to by the Senior Commissioner. The Commissioner informed the Applicant that there was no 'formal application for his recusal', and that there was no basis in law or authorities for the request to postpone the proceedings. The Commissioner then made a ruling that the matter would proceed as scheduled.
- [7] The Applicant informed the Commissioner that he was 'not going to be part of this', at which stage the Commissioner warned him that if he decided to leave, that was his choice, but that the arbitration would proceed in his absence. The Applicant then asked for a few minutes' adjournment at which the Commissioner refused. Again, the Applicant informed the Commissioner that he was going to see the Senior Commissioner, stating that he was unable to proceed. The Applicant then left the proceedings, and the Commissioner proceeded with the arbitration, at which stage the Border Cricket representative requested that the matter be dismissed. The Commissioner accordingly dismissed the matter.
- [8] In dismissing the matter, the Commissioner relied on the provisions of section 138 (5) of the LRA[2] and Rule 30 (1) of the CCMA Rules[3], and concluded that by walking out of the proceedings despite being warned of the consequences, the Applicant had abandoned his case.

Subsequent applications:

- [9] A ruling by a Commissioner dismissing a matter in terms of the provisions of section 138 (5) (a) and Rule 30 of the CCMA Rules would ordinarily be a matter for considerations under the provisions of section 144 of the LRA read together with Rules 31 and 32 of the CCMA Rules. However, in this case, this matter ended up being before this Court in terms of section 145 of the LRA because of the following events;
- [10] The Applicant had lodged an application in terms of section 144 of the LRA to have the ruling rescinded. That application was opposed and heard on 13 November 2013. It was dismissed on 29 November 2013 by the Fourth Respondent (Commissioner Cloete), who had concluded that the Applicant was not 'absent from the proceedings but had abandoned them' for the purposes of the application of the provisions of Rule 30 of the CCMA Rules. To that end, Commissioner Cloete concluded that the matter had to be dealt with in terms of the provisions of section 145 of the LRA.
- [11] To the extent that it was contended that Commissioner Cloete's ruling sustained a plea of res judicata, this in my view cannot be so, in that the application before Commissioner Cloete was brought in terms of section 144 of the LRA, whilst the one before this Court is in terms of section 145 read with section 158 of the LRA. Accordingly, and as correctly pointed out on behalf of the Applicant, both applications were not founded on the same cause of action. In any event, I did not understand this point to be seriously pursued by Border Cricket.

[12] There was a further application to amend the Notice of Motion in the initial review application to include the Third to Sixth Respondents after they had issued a variety of rulings related to several applications/referrals brought before the CCMA by the Applicant after review proceedings were launched. The Applicant has however since abandoned those amendments or attempts to consolidate those disputes.

The review test and evaluation:

[13] Section 145 (1) of the LRA provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Under section 145 (2) of the LRA, a defect referred to in subsection (1), means that the commissioner (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers.

[14] Misconduct in relation to the duties of a commissioner ordinarily denotes wrongful or improper conduct on the part of the Commissioner, which has the effect of rendering not only the outcome but also the arbitration process unfair[4]. A failure to have regard to the circumstances of the case prevents a party from having its case fully and fairly determined, and would constitute gross irregularity. Excess of powers ordinarily implies exceeding powers as conferred by the provisions of the LRA, including discretionary powers. In an explication of the review test as enunciated in Sidumo[5], the Labour Appeal Court in Goldfields held that;

'Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused"

in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable

decision-maker could come on the available material.[6]

[15] In this case, the issue for determination is whether the ruling is reviewable to the extent that the Commissioner had considered the provisions of section 138 (5) of the LRA read together with Rule 30 of the CCMA Rules, and secondly, whether the Commissioner in dismissing the dispute, had acted procedurally fairly. To this end, it is not always so that the test of reasonableness would find application in each instance.

[16] It is accepted that in terms of section 138(1) of the LRA, a commissioner may conduct arbitration proceedings in any manner that

he/she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities[7]. The basic premise of such proceedings is that of natural justice and a fair unbiased hearing. In this regard, it has been held that arbitrators therefore need to exercise their entitlement to conduct the proceedings in the manner they deem appropriate, with the necessary circumspection and good sense[8]. The main objective of review proceedings is to determine whether a Commissioner has afforded parties before him or her a fair hearing, and this is determined from the manner in which the hearing was conducted, from the manner in which the Commissioner approached the issues before him or her, or from the conclusions reached.

[17] Commissioners during arbitration proceedings may be confronted with instances where parties to a dispute walk out because of a variety of reasons, some of which might be misguided. Parties may walk out of proceedings when a postponement is refused, or where a commissioner refuses to recuse himself or herself, or when a commissioner makes an adverse ruling in the course of proceedings, or where a party is generally of the view that it is not being afforded a fair hearing.

[18] The provisions of section 138 (5) (a) of the LRA and Rule 30 of the CCMA Rules are however clear. Thus, if a party fails to appear in person or to be represented at the arbitration proceedings, and the party had referred the dispute to the Commission, the commissioner may dismiss the matter. By virtue of the word, 'may', it implies that the Commissioner has a discretion whether or not to dismiss, taking into account the provisions of Rule 30 (2), which requires the Commissioner to be satisfied that a party (defaulting party), had been properly notified of the date, time and venue of the proceedings.

[19] There is therefore no provision in either the LRA or the CCMA for instances where the referring party walks out of the arbitration

proceedings for whatever reason. Be that as it may, the provisions of section 138 (5) (a) of the LRA and Rule 30 of the CCMA Rules could not have been applicable in this case as concluded by Commissioner Nduzulwana, due to the reason that the Applicant was present in those proceedings. The only issue is that the Applicant had walked out of those proceedings, and a party that walks out of the proceedings cannot be deemed to 'have failed to appear in person or to be represented at the arbitration proceedings' within the meaning of section 138 (5) (a) of the LRA. At most, that party failed to remain in attendance until the conclusion of the proceedings. Thus as correctly pointed out on behalf of the Applicant, to have dismissed the matter on the

basis of the provisions of section 138 (5) (a) of the LRA and Rule 30 of the CCMA Rules was indeed a misapplication of those provisions.

[20] Where a Commissioner has in the course of proceedings issued a ruling in regards to any interlocutory application or any other matter in the course of those proceedings, which ruling does not have the effect of finally disposing of the main dispute before him or her, the aggrieved party is precluded from approaching this court for a review of that ruling by virtue of the provisions of section 158 (1B) of the LRA. Effectively, then a party aggrieved by an adverse ruling during the course of arbitration proceedings is ordinarily expected to go through that process, irrespective of his or her misgivings, until finalised, and to thereafter review the entire award if still aggrieved. The rationale behind this approach, which I fully align myself with, is to avoid piece-meal litigation.

[21] A referring party that walks out of arbitration proceedings for whatever reason, and despite being forewarned of the consequences

thereof, risks its case being dismissed on account of either having abandoned those proceedings, or alternatively, having waived its right to present its case. Even then, when matters are dismissed under these circumstances, it is still expected of the Commissioner

to act fairly. Thus, it does not follow in each instance when a party walks out of proceedings that it should be deemed that a matter has been abandoned, or that a party had waived its rights to have its matter determined. The primary consideration in all instances is whether ultimately, the Commissioner exercised his or her duties fairly in the conduct of proceedings, including arriving at the decision that a matter is either abandoned or that a party had waived its rights to have its matter heard.

[22] To the extent that a party that walks out of proceedings may be deemed to have abandoned those proceedings or waived its rights to have its matter determined, a further consideration is that there must be a basis for a conclusion to be reached that proceedings have indeed been abandoned or that a party had waived its rights. Accordingly, the question of whether a party has waived its right is a question of fact, as a waiver of a right cannot be presumed[9]. It has further been held in that it must be shown that a party that is said to have waived its right had full knowledge of its rights and that its conduct was irreconcilable with continued existence of such rights or with the intention of enforcing them[10].

[23] The circumstances of this case are peculiar for several reasons. Upon the Applicant having complained about not being properly served with a notice of set down, Commissioner Nduzulwana went out of his way to establish the circumstances the notice might not have been received as alleged by the Applicant. To sum up, the Commissioner had established that the notice of set-down as sent to the Applicant remained unclaimed from the post office. Although the Commissioner was also informed that the Applicant was further notified by email on 10 May 2013, proof in that regard had not been made available to him at a point when he decided to dismiss the matter.

[24] In the light of these factors, and to the extent that there was nothing before the Commissioner to demonstrate that the Applicant was indeed timeously and properly notified of the arbitration proceedings, there was no cause to insist on the matter proceedings,

as clearly the Applicant had not been properly notified.

[25] Even if the Commissioner may have cause to believe that the Applicant was properly and timeously notified of the proceedings, the second issue raised by the Applicant was even more serious. In his letter[11] to the Senior Commissioner, the Applicant complained of irregularities, and incompetence or bias on the part of Commissioner Nduzulwana during the proceedings of 9 April 2013. Effectively, he had requested that the Commissioner should not arbitrate his dispute. As already indicated, Commissioner Nduzulwana had responded to the complaint on 13 May 2013, and was fully aware of its contents and concerns raised about his partiality.

[26] Notwithstanding the above, Commissioner Nduzulwana's contention however was that there was no law or authority upon which the Applicant could rely upon in not proceeding with the matter until his complaint was addressed. The Commissioner went on to state that he did not have the complaint in his file, and that if ever such a complaint was directed for the attention of the proceedings, it should have been served on the employer in terms of Rule 31 of the CCMA Rules[12]. The Commissioner further stated that there was no application before him in terms of Rule 31, and could therefore not comment on the complaint forwarded to the Senior Commissioner.

[27] The complaint to the Senior Commissioner pertained to Commissioner Nduzulwana's impartiality and manner with which he had conducted the proceedings. It is trite that where there is a reasonable apprehension that a Commissioner is biased or has conducted proceedings in a manner that give rise to a reasonable perception of bias, this may give rise to a reviewable irregularity.

Ordinarily, the aggrieved party may ask the Commissioner to recuse him/herself by way of an application in terms of Rule 31 of the CCMA Rules.

[28] The circumstances of this case are however not ordinary. The Commissioner having been made aware of the complaint against him

ought not to have dismissed the matter in the manner he had, let alone continue with the proceedings. It is acknowledged from the

record of proceedings that the Commissioner was clearly dealing with an uncooperative and obstreperous litigant as correctly pointed on on behalf of Border Cricket. Commissioners are nevertheless expected to deal with such situations, control their processes and ensure that they act fairly but firmly. Thus Commissioners cannot take shortcuts, and gratuitously dismiss matters when confronted with 'difficult' litigants simply because it is convenient to do so. It is still expected of Commissioners irrespective how trying the circumstances of their proceedings may

be, to conduct those processes fairly and in an unbiased manner. Thus Commissioners cannot let their frustrations with obstreperous litigants prevail over the need to conduct themselves and their processes in a fair and unbiased manner.

- [29] In the light of the above, and bearing in mind that the Commissioner was aware of concerns surrounding his impartiality, at the very least, it was expected of him to advise the Applicant, who was not familiar with the CCMA Rules and procedures, to bring a formal application for his recusal, instead of merely reading the provisions of Rule 31 to him as he had done, and proceedings with the matter. In the alternative, to the extent that the Applicant either sought a postponement on account of not having received a proper notice of set-down, or where the Applicant sought the recusal of the Commissioner, nothing prevented the Commissioner from considering any such request without a formal application in that regard, as the provisions of Rule 31 (10) of the CCMA Rules allowed him to do so.
- [30] The Commissioner in my view took an overly technical approach to the dilemma he was faced with and chose a convenient but unfair path in getting out of that dilemma. The fact that the letter of complaint was not in the file or was not brought to the attention of the other party was of no consequence. In any event, the complaint was addressed to the Senior Commissioner for his/her intervention, and sadly, there is nothing to suggest that there was a formal response to the complaint.
- [31] A further important consideration in this matter is that it cannot be said on the facts that the Applicant had abandoned the proceedings or waived his rights to have his dispute heard. There is no basis for a conclusion to be reached that the Applicant's conduct was plainly inconsistent with an intention to enforce his right to a procedurally fair hearing. This conclusion is premised on the fact that as can be gleaned from the record, after requesting an adjournment on several occasions, the Applicant walked out of the proceedings as his intention was to go and see the Senior Commissioner about his complaint which remained unattended to. Commissioner Nduzulwana other than downplaying the importance of the Applicant's complaint, incorrectly presumed that the Applicant had abandoned the proceedings or waived his rights to a procedurally fair hearing when this was not the case. The Applicant's intention was clearly to seek the intervention of the Senior Commissioner in respect of his previous complaint, even if the latter would not have been in a position to dictate to Commissioner Nduzulwana as to how to conduct his own proceedings.
- [32] In the light of the above, and having considered the circumstances and facts of this case as they were before the Commissioner, the conclusions to be reached is that in dismissing the matter in the manner he had, the Commissioner committed a gross irregularity in the conduct of proceedings, and also committed misconduct in relation to his duties as a commissioner within the meaning of section 145 (2)

(i) and (ii) of the LRA. Such conduct had the effect of rendering not only the outcome but also the entire process unfair. In the light of these conclusions, it follows that the ruling ought to be reviewed and set aside.

[33] I have further had regard to the requirements of law and fairness insofar as the issue of costs is concerned, and I am of the view that the facts and circumstances of this case do not call for any cost order to be made.

Order:

- i. The ruling issued by the Second Respondent under case number ECEL184/14 dated 03 June 2013 is reviewed and set aside.
- ii. The First Respondent is ordered to allocate a set-down date for the hearing of the dispute between the parties de novo before a Senior Commissioner other than the Second Respondent.
- iii. There is no order as to costs.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv. B. Dyke with Adv. L Ah Shene

Instructed by:

Brown Braude & Vlok INC

On behalf of the Seventh Respondent: Adv. JG Grogan

Instructed by:

Wesley Pretorius & Associates

[1] Page 304 of the Record

[2] Which provide that; '(5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party - (a) had referred the dispute to the Commission, the commissioner may

dismiss the matter; or (b) had not referred the dispute to the Commission, the commissioner may - (i) continue with the arbitration proceedings in the absence of that party; or (ii) adjourn the arbitration proceedings to a later date.'

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‘(5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party -

- (a) had referred the dispute to the Commission, the commissioner may dismiss the matter; or
- (b) had not referred the dispute to the Commission, the commissioner may -
 - (i) continue with the arbitration proceedings in the absence of that party; or
 - (ii) adjourn the arbitration proceedings to a later date.’

[3] Its provisions are a replica of those of section 138 (5) of the LRA

[4] County Fair Foods (Pty) Ltd v Theron NO and Others (2000) 21 ILJ 2649 (LC) at para 7

[5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24(CC).

[6] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others [2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at para [14]

[7] CUSA v Tao Ying Metal Industries and Others.

(2008) 29 ILJ 2461 (CC) at para 65, where it was held that; ‘Consistent with the objectives of the LRA, commissioners are required to ‘deal with the substantial merits of the dispute with the minimum of legal formalities’.... Thus the LRA permits commissioners to ‘conduct the arbitration in a manner that the commissioner considers appropriate’. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.’

[7] CUSA v Tao Ying Metal Industries and Others.

(2008) 29 ILJ 2461 (CC) at para 65, where it was held that;

‘Consistent with the objectives of the LRA, commissioners are required to ‘deal with the substantial merits of the dispute with the minimum of legal formalities’.... Thus the LRA permits commissioners to ‘conduct the arbitration in a manner that the commissioner considers appropriate’. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.’

[8] In Chabalala v Metal and Engineering Industries Bargaining Council and Others (2014) 35 ILJ 1546 (LC) at para 33

[9] McGenis v RAF 2009 JOL 24231 (KZD)

[10] See also *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC) at para [88] where it was held that; ‘The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish’.

[10] See also *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC) at para [88] where it was held that;

‘The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights.

Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish’.

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[12] See lines 15 – 22 on page 149 of the record

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