

SOUTH AFRICA / JUDGMENT

Pheme v S (A11/2022) [2023] ZALMPPHC 1 (16 January 2023)

[2023] ZALMPPHC 1

COURT

Limpopo High Court, Polokwane

BEFORE

Graham Nasious Moshoana

CASE / FILE NUMBER

A11/2022

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-FLYNOTES: LABOUR – Settlement agreement – Made arbitration award – By commissioner at Education Labour Relations Council – Parties in agreement asked that settlement agreement be made an arbitration award – Award is not same as contemplated in section 138(7) of the LRA – Since the arbitration award was made with the necessary jurisdictional powers, the commissioner was correct that the Council did not have jurisdiction to rescind the arbitration award – His ruling is not reviewable – Labour Relations Act 66 of 1995, s 142A.

THE LABOUR COURT OF SOUTH AFRICA , POLOKWANE

case no: Jr 1217/22

Reportable

In the matter between:

DEPARTMENT OF EDUCATION

Applicant

and

M J SHILOWA

Respondent

Heard: 09 June 2023

Delivered: 09 June 2023

Edited: 19 July 2023

ex tempore judgment

MOSHOANA, J

- [1] Before me is an application brought in terms of the provisions of the Labour Relations Act (LRA)[1]. It is not necessary to set out the section in terms of which the present application is launched. This Court takes a view that it is one that is contemplated in section 158 (1) (g) of the LRA because the commissioner had performed some function that ostensibly arise from the LRA.
- [2] In effect, what the Department of Education (Limpopo) is seeking is the following: An order reviewing and setting aside a rescission ruling issued by the fourth respondent, Commissioner Masethi, under the auspices of the Education Labour Relations Council (ELRC) and substituting that ruling with an order that the rescission is granted, alternatively, remit the matter back to the Labour Relations Council, to be considered by a different commissioner.
- [3] Briefly, the facts appertaining this dispute are simple and straight forward. Mr Shilowa (Shilowa) was at some point employed by the Department of Education as a Head of a Department (HOD). On 17 August 2020 an advertisement of the post of a headmaster was published by the department. Shilowa applied for the post, he was shortlisted and cracked an interview. On his version, he was recommended for appointment; however, the runner up, one Mr Mahlaule (Mahlaule), who is the second respondent before me, was instead appointed. Aggrieved thereby, Mr Shilowa referred a dispute to the ELRC and alleged a commission of an unfair labour practice by

the department. Conciliation failed to resolve the alleged dispute and same was referred for arbitration. At arbitration, when the parties arrived they entered into settlement discussions, which culminated into an agreement being reached resolving the dispute of the alleged unfair labour practice dispute. Ultimately that settlement agreement was by agreement made an arbitration award.

- [4] That notwithstanding, around January 2022, Mr Shilowa made an application seeking to have the same settlement agreement cum arbitration award to be made an order of the Labour Court, in terms of section 158 (1) (c) of the LRA. This Court was informed by the parties that, that application is still pending adjudication by this Court. I pause to remark that it was indicated to Mr Verveen, who appeared on behalf of Mr Shilowa that a section 158 (1) (c) application is an overkill because on the common cause facts the said settlement agreement is already made an arbitration

award and in terms of section 143 of the LRA and, it will be treated as if it is an order of Court if it is subsequently certified.

- [5] Nevertheless, the Department then sought to rescind the arbitration award made under the circumstances that are already outlined above. In fact, Masethi is the Commissioner in the rescission ruling, who then issued the following ruling:

“The matter is sub-judice and the Council does not have jurisdiction to preside over it.”

- [6] Effectively, the effect of this ruling is that the Education Labour Relations Council will not have jurisdiction to entertain the rescission of the settlement agreement already made an arbitration award. Albeit, that jurisdiction was declined on the strength of the sub judice rule, as it shall be demonstrated below, it is correct that the ELRC is bereft of jurisdictional powers. Of Course the department was aggrieved thereby and brought an application to this court to have the above ruling reviewed and set aside.

Key issues raised in the present application.

- [7] This matter raises a very important issue. As argued by counsel for the department, Mr Siya, the issue is whether the arbitration award involved in this matter need to be treated the same way as the arbitration award that is issued under section 138 (7) of the LRA. Allied to the issue is whether it is appropriate for a commissioner to consider whether he or she has the necessary jurisdictional powers to make such an arbitration award. In terms of rule 22 of the CCMA Rules, it is required of the referring

party to prove that the Commission has jurisdiction to arbitrate the dispute. To arbitrate a dispute means after hearing the arguments and opinions of both parties a decision is made. Such did not happen before the arbitration award involved herein was made.

- [8] This Court extensively debated the issues with Mr Siya and pointed out that in this instance, the issue was a simple one of discretionarily making the settlement agreement, which remains the property of the parties, an arbitration award. Mr Siya fervently argued that, even under the circumstances where the settlement agreement morphed into an arbitration award, the fact that the referral was made out of time, would suggest that the Commissioner would not have had the jurisdictional power to make that settlement agreement an arbitration award. The argument is an attractive one; however, when the Court considers the issue of jurisdiction, it has regard to where the statutory power arose from. It must be emphasised that time period affects jurisdictional power only in instances where the legislature has prescribed a time period within which to exercise a statutory power or where the common law requires an action to be taken within a reasonable period (delay rule). The argument advanced by the department relates to the time period as opposed to the statutory power itself. Sadly, that argument is an outlier in this matter. Section 191 referral plays no role in this regard. The request is not to arbitrate but make an agreement reached an arbitration award. The applicable section 142A of The LRA provides as follows:

“(1) The Commission may, by agreement between the parties, or an application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission an arbitration award.

- (2) For the purposes of subsection 1, settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7)”
- [9] The arbitration award involved in this dispute falls under the category contemplated in the above section. Of importance in respect of such an arbitration award is whether the dispute so settled is one that a party has the right to refer to arbitration or adjudication. Mr Siya conceded, rightly so, that there was no arbitration proceedings conducted within the contemplation of section 138
- (1) of the LRA. I must point out that where the right to refer is mentioned in subsection 142A (2), reference is made to the right to make a referral and not the right to have the referral entertained. A party who is out of the prescribed time period retains the right to refer a dispute to either arbitration or adjudication. However, the arbitrator or the Labour Court is bereft of powers to arbitrate or adjudicate unless the non-compliance with the time period is condoned.
- [10] Howbeit, the argument of Mr Siya is predicated on the fact that, nowhere did the parties abandon the arbitration process because initially the dispute was referred for resolution by way of arbitration. The simple answer to that argument is the following: The parties themselves resolved to remove the referred dispute out of the hands of the arbitrator and settled it themselves. By entering into a settlement agreement the parties actually abandoned the referral, otherwise it would make illogical sense to suggest that the referral still remained even if the parties have resolved the dispute. Mr Siya conceded, rightly so yet again, that, if the court takes the approach that there is an abandonment of the referral, then his entire case will fall flat. Indeed, it is the approach that this court takes and the entire case is naturally bound to fall flat.
- [11] As a reminder, what I am asked to review is a jurisdictional ruling. The applicable test would be that of correctness. Was the Commissioner correct in saying that the ELRC had no jurisdiction to rescind the arbitration award that came into existence in the manner in which I have already outlined above? As already indicated, jurisdiction was correctly declined albeit for different reasons. Without a shadow of doubt, the Commissioner was correct that the ELRC had no jurisdiction. There was no jurisdiction because the arbitration award sought to be rescinded is in itself, effectively is a consensual product. Parties settled a dispute which they had the right to refer for arbitration and or adjudication; parties, in agreement, asked that the settlement agreement they reached should be given another colour, which is that of an arbitration award. Put it differently, as allowed by the LRA, all what the commissioner did was to, in the exercise of his discretion, paint the settlement agreement and adorned it with arbitration award colours. This arbitration award is not same as the one contemplated in section 138 (7) of the LRA.

[12] The one contemplated in section 138 (7) is a sequel of arbitration proceedings. The section is perspicuous; “(7) within 14 days of the conclusion of the arbitration proceedings”. The arbitration award involved herein is not the product of arbitration proceedings. As an added factor, when making the

arbitration award involved herein, an exercise of discretion was involved. As a general principle, a Court of review is loath to

intervene where an exercise of discretion is involved unless capriciousness, mala fides and application of wrong principles are shown to exist.

[13] As I conclude, this Court comes to the determination that the arbitration award involved herein is not to be treated the same way as the one contemplated in section 138 (7) of the LRA. The arbitration award involved herein was made with the necessary jurisdictional facts being present. The said jurisdictional facts are:

- (a) Referral of the dispute to the Commission occurred;
- (b) Dispute is one that a party has the right to refer for arbitration or adjudication;
- (c) Agreement to settle the dispute occurred;
- (d) Existence of a written settlement agreement; and
- (e) Agreement to make the settlement agreement an arbitration award arose.

[14] Since the arbitration award involved herein was made with the necessary jurisdictional powers, the commissioner was correct that the ELRC did not have jurisdiction to rescind the arbitration award. Accordingly, his ruling is not reviewable. The application for review falls to be dismissed.

Issue of costs

[15] What remains is the issue of costs. Mr Verveen fervently argued that there must be a costs order made and the costs must be made on a punitive scale because a letter was sent to the effect that there will be a request for a punitive cost simply because the department was impugning, as it were, a settlement agreement and that approach is one that is bad in law. Perceptibly, it may be correct that, that approach is bad in law, but that does not discount the fact that the department may have had an arguable basis to exercise an automatic right of review. The Constitutional Court has already decreed that the Labour Court cannot make an order

of costs based on success. Shilowa has become successful. Would that automatically translate into an award of costs? Of course, the Constitutional Court says; no. Having regard to the fact that there was an arguable point of law, although that argument was not accepted by this court, the appropriate order to make in relation to costs would be that of no order as to costs. In as much as the court would have wanted to entertain the request for the costs as set out in the letter at page 82 that would have been possible if this court had powers to make an order of costs on the basis

of success. Since success is not the basis upon which this court must make an award of costs then that argument would not be taken into account.

ORDER

[16] In the circumstances the order I make is the following:

1. The application for review is dismissed.
2. I make no order as to cost.

Graham Nasious Moshwana

Judge of the Labour Court of South Africa

[1] Act 66 of 1995 as amended.

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