

SOUTH AFRICA / JUDGMENT

Pholo v Commission for Conciliation, Mediation and Arbitration and Others (J 818/20) [2020] ZALCJHB 192 (31 August 2020)

[2020] ZALCJHB 192

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

J 818/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 818/20

In

the matter between:

GOITSIONE
MOSES PHOLO
PHOLO
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND
ARBITRATION
First Respondent
FORSTER
MALULEKE
N.O
Second Respondent
GREATER
TAUNG LOCAL MUNICIPALITY
Third Respondent

Heard:

25 August 2020 (On papers)

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 31 August 2020.

JUDGMENT

MAHOSI. J

Introduction

- [1] This is an urgent application brought by the applicant for an order to interdict the pending arbitration proceedings scheduled to be held from 31 August 2020 to 02 September 2020 at the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number NWVB340-19. The applicant further seeks an order to stay the jurisdictional ruling issued by commissioner Makama and to reinstate him retrospectively from the date of his dismissal.
- [2] The third respondent filed a notice of intention to oppose this application together with an answering affidavit. However, the answering affidavit states that it was signed and sworn to on 14 June 2019 and this is confirmed by the stamp of the commissioner of oaths which is dated the same. This is odd as this application was brought on 18 August 2020.
- [3] It apparent that the deponent did not sign the answering affidavit in the presence of the commissioner of oath. Instead, the third respondent's attorneys, Kgomo Attorneys, simply did a cut and paste with a hope that this Court would not notice its remissness and sloppiness. This is unacceptable and has to be frowned upon by the Court. To an extent that there has not been substantial compliance with the regulations governing the commissioning of affidavits, in exercising its discretion, the Court will disregard the respondent's answering affidavit.

Background

- [4] Prior to his dismissal on 11 March 2019, the applicant was employed by the third respondent as its Director: Corporate Services. Aggrieved by his dismissal, the applicant launched an urgent application at this Court for an order to declare his dismissal unlawful and to be reinstated. This application was later withdrawn.
- [5] Subsequently, the applicant allegedly referred an unfair dismissal dispute to the South African Local Government Bargaining Council. It would seem like his referral was late and his condonation application was dismissed. The applicant denies this.

- [6] In April 2019, he referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. However, the dispute could not be resolved through conciliation. The applicant then referred the dispute to arbitration that was scheduled to be heard on 3 October 2019. At the arbitration, the third respondent raised two preliminary points, namely, CCMA's jurisdiction and *lis pendens*. The arbitration was postponed to allow the applicant to secure legal representation.
- [7] On 8 November 2019, the arbitration proceeded before commissioner Makama. On 20 November 2019, he issued a ruling (the first ruling) in terms of which he dismissed the third respondent's preliminary points and ruled that the CCMA has jurisdiction to arbitrate the matter.
- [8] The matter was then set down for arbitration on 29 June 2020. At the beginning of the proceedings, the third respondent raised a jurisdictional point alleging that the applicant's dismissal arose from an operation of the law. On 13 July 2020, the second respondent (commissioner Maluleke) issued a ruling in terms of which he found that the CCMA has jurisdiction to arbitrate the matter. The basis of his ruling appear on paragraph 13 of his ruling which reads:

'In order to answer the question raised in [section] 19(1) of the LRA, namely, whether the applicant was dismissed or not, evidence must be led on relevant facts and circumstances surrounding the termination of contract between the parties.'

- [9] The arbitration is set down to be further heard from 31 August 2020 to 2 September 2020. On 18 August 2020, the applicant launched this application.

Applicant's case

- [10] The basis on which the applicant seeks to interdict the pending arbitration hearing is not very clear. However, it seems that he is aggrieved by the fact that there were two jurisdictional rulings issued in this matter. This, according to him, amounts to unfairness as the CCMA cannot review its rulings.
- [11] On his dismissal, the applicant alleges that during the first jurisdictional hearing before commissioner Makama, the third respondent confirmed that no charges were levelled against him and further that no disciplinary enquiry was held against him. For that reason, he argues that the substantive fairness of his dismissal cannot be proven and that the second respondent has no determination to make. It is for this reason that he seeks this Court to urgently interdict the arbitration proceedings, to stay commissioner Makama's ruling and to reinstate him.

Urgency

- [12] I first deal with the issue of urgency. Rule 8(2) of the Rules of this Court, which governs urgent applications provides as follows:

‘(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(2) The affidavit in support of the application must also contain-

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not

complied with, if that is the case; and

(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.’

[13] In *Jiba v Minister of Justice and Constitutional Development and Others*[2], this Court considered rule 8 and stated as follows:

‘Rule 8 of the rules of this court require a party seeking urgent relief to set out the reasons for urgency and why urgent relief is necessary. It is trite law that there are degrees of urgency. And the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.’

[14] The requirements for urgency are trite.[3] A party seeking urgent relief must set out the reasons for urgency and why urgent relief is necessary. In *Maqubela v SA Graduates Development Association and Others*,[4] considerations for urgency were set out as follows:

‘Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary.’

[15] In the case where a party seeks final relief on an urgent basis, such as the applicant in this matter, the bar is raised even higher and I find the following passage in *Tshwaedi v Greater Louis Trichardt Transitional Council*[5] instructive:

‘... An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief...’

[16] In this matter, the applicant failed to set out an explanation why the relief is sought on an urgent basis, why the timeframes set out in the Rules should be abridged and why the Rules of this Court relating to forms and service should be dispensed with. It follows that he has not made out a case to justify an expedited hearing and has not set out the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. Therefore,

the applicant has, in my view, failed to make out a case for urgency in this case and his case should be struck off the roll.

Relief

- [17] For this Court to grant the final interdict, the applicant must establish three requisites, all of which must be present. These are a clear right, injury actually committed or reasonably apprehended and the absence of an alternative legal remedy.
- [18] In order to establish a clear right, the applicant has to prove, on a balance of probabilities, the right that he seeks to protect. The applicant seeks an order to interdict the arbitration on the basis that there are two rulings confirming the CCMA's jurisdiction to arbitrate his matter.
- [19] It is apparent from the reading of both jurisdictional rulings that the third respondent raised a jurisdictional point on two occasions mainly because of its allegation that there was no dismissal but the termination of a contract, albeit using different wording. What is not apparent is the reason why commissioner Maluleke decided to reconsider the issue of jurisdiction in the presence of commissioner Makama's ruling. Be that as it may, in the absence of an order reviewing and setting it aside, the ruling issued by the latter confirming the CCMA's jurisdiction stands. Therefore, the applicant's right to a fair hearing is still protected.
- [20] The fact that there are two rulings, cannot be a basis for the applicant to approach this Court on an urgent basis. More so when such rulings are not contradictory. All that these rulings do, is to confirm the CCMA's jurisdiction to arbitrate the applicant's dispute. There is, therefore, no basis for this Court to interdict the pending arbitration.
- [21] The ruling issued by commissioner Makama, which the applicant seeks to stay makes no determination in relation to the procedural and substantive fairness of the applicant's dismissal. The applicant's submission that it confirms that his dismissal was unfair is clearly misguided. As aforesaid, the ruling simply states that the CCMA has jurisdiction to arbitrate the applicant's dispute.
- [22] The dispute that it has to determine is whether the applicant was dismissed, and if so, whether his dismissal was substantively and procedurally unfair or not. Therefore, there is no basis for this Court to stay the ruling and to reinstate the applicant on the strength of the ruling issued by commissioner Makama.
- [23] The applicant has failed to satisfy the requirements of a final interdict. As such, the arbitration hearing must be allowed to take its course for all the issues to be properly ventilated and for

determination.

Costs

[24] This Court has a wide discretion in awarding costs. The guiding principle is that of equity and fairness. In this matter, it is my view that this is a case where the interests of justice and fairness will be best served by making no order as to costs.

[25] Accordingly, the following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Representatives:

For the applicant:

In person

For the third respondent: Kgomo Incorporated Attorneys

[2] (2010) 31 ILJ 112 (LC) at para 18.

[3] See: Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977

(4) SA 135 (W).

[4] (2014) 35 ILJ 2479 (LC) at para 32.

[5] [2000] 4 BLLR 469 (LC) at para 11.

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