

SOUTH AFRICA / JUDGMENT

Same v Minister of Police and Others (PR126/21) [2022] ZALCPE 21 (12 July 2022) [2022] ZALCPE 21

COURT

Labour Court Port Elizabeth

BEFORE

C B Unwin

CASE / FILE NUMBER

PR126/21

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IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR126/21

In the matter between

NOXOLO MARY-LOUISE SAME

Applicant

and

MINISTER OF POLICE

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

SOLOMZI MPIKO NO

Third Respondent

Heard: 5 July 2022

Delivered: 12 July 2022

JUDGMENT

UNWIN, AJ

Introduction

- [1] The applicant, a Warrant Officer and Branch Commander at the Hofmeyr Police Station was dismissed for misconduct, the alleged theft of a cellular phone from a crime scene. The applicant referred an unfair dismissal dispute to the second respondent (“the SSSBC”) which was scheduled to be arbitrated by the third respondent (“the arbitrator”) on 5 August 2020. On the day of arbitration the applicant’s representative attended the arbitration to advise the arbitrator that the applicant could not attend on account of her quarantining as result of contact with a COVID-19 positive case. On 7 August 2020 the arbitrator issued a dismissal ruling in terms of which he recorded that the matter was dismissed at 15h25 on 5 August 2020 in terms of section 138(5)(a) of the Labour Relations Act 66 of 1995 (“the LRA”).
- [2] On 3 September 2020 the applicant applied for rescission of the dismissal ruling and on 25 May 2021 a rescission ruling, refusing rescission, was issued by the arbitrator. It is this rescission ruling which the applicant seeks to have reviewed and set aside in terms of section 145 read with section 158(1)(g) of the LRA. The first respondent filed a notice of opposition but no answering affidavit and as at time of the hearing of the application had confirmed that it no longer opposed the application and would abide by the decision of the Court.

The arbitration

- [3] As has been foreshadowed in the introduction the applicant’s union, POPCRU referred an unfair dismissal dispute on behalf of the applicant to the SSSBC following her dismissal for misconduct, the alleged theft of a cellular phone at a crime scene.
- [4] This dispute was scheduled for arbitration before the arbitrator on 5 August 2020. The applicant did not attend the arbitration but was represented at the arbitration by her representative, a union official of POPCRU, one Mr Melubakho Mkweta.
- [5] It would appear that Mr Mkweta informed the arbitrator that the applicant would not be attending the arbitration and that she was in isolation after being in contact with a COVID-19 positive person, her mother. There is a contradiction between the dismissal ruling and the allegations contained in the founding affidavit as to what transpired thereafter. The applicant alleges that proceedings were adjourned without a date pending production of proof of the applicant’s mother having contracted COVID-19, failing which the dispute would be dismissed. The dismissal ruling suggests that the arbitrator waited for 25 minutes and in the absence of proof of the applicant’s mother having contracted COVID-19 he dismissed the matter, placing reliance on section 138(5)(a) of the

LRA.

- [6] If the arbitration was adjourned, as opposed to postponed, it is likely that what the arbitrator records in his dismissal ruling is what transpired. In reaching this conclusion I have also taken into account that what the applicant alleges amounts to hearsay and is unsupported by a confirmatory affidavit from Mr Mkweta.
- [7] The arbitrator issued a dismissal ruling, dated 7 August 2020, confirming that which has been set out above and dismissing the dispute. It is this dismissal ruling which was the subject of the rescission application.

The rescission application

- [8] In a very brief application for rescission of the dismissal ruling the applicant stated that she was not in willful default because on 3 August 2020 her mother tested positive for COVID-19 and all the family members, including herself, quarantined. The applicant also confirmed that she informed Mr Mkweta of this and that he attended the arbitration and relayed this to the arbitrator. Lastly, of relevance, the applicant stated that her mother had received confirmation of having contracted COVID-19 from the Department of Health through a whatsapp group, that she was awaiting written proof and that she had made enquiries from the Department of Health on several occasions but was informed that written proof could not be provided at that stage due to a national backlog.

The rescission ruling

- [9] On 25 May 2021 the arbitrator issued a rescission ruling in terms of which he refused rescission.
- [10] The arbitrator described the rescission application as one which sought to rescind a default award between the parties.
- [11] The arbitrator correctly summarised the reason for the applicant's failure to attend the arbitration as being one where she was in isolation after having been in contact with her mother who had tested positive for COVID-19 but found that this was not a justifiable reason in the absence of any proof. The arbitrator also held that there was no justifiable reason as to why such proof could not be obtained. The arbitrator reasoned that such an excuse could be easily relied on for the failure to attend an

arbitration and therefore could not be a reason for the rescission of the default award.

- [12] As a consequence of the above the arbitrator found that the applicant did not establish good cause for the purposes of section 144 of the LRA and that rescission was refused.

The review application

- [13] In the review application the applicant reiterated much of that which has been set out above and which was contained in the rescission application.

- [14] As has been foreshadowed herein there is a contradiction between the dismissal ruling and the founding affidavit in that in the founding affidavit the applicant suggests that the arbitration was adjourned to an unknown date for the provision of proof that the applicant's mother had contracted COVID-19 whereas in the dismissal ruling it suggests that the matter was dismissed in the absence of such proof after the arbitrator had waited for 25 minutes.
- [15] In the review application the applicant adds that the certificate confirming that her mother had tested positive for COVID-19 was not supplied at the arbitration as it was not known that it would be required. This would appear to contradict that which is stated in the rescission application but was in any event not before the arbitrator and therefore cannot be taken into account for the purposes of the review.
- [16] The applicant suggests that the arbitrator committed misconduct and made a gross mistake of law, committed gross negligence or misdirected himself in that he, in his rescission ruling, refers to a rescission application of his "default award" as opposed to his "dismissal ruling".
- [17] The applicant further relies on an alleged lack of authority on the part of the arbitrator to dismiss the dispute in circumstances where the applicant did not attend, but her representative indeed did.

Evaluation

- [18] In *Glencore Operations SA (Pty) Ltd v CCMA and Others*,^[1] Moshoana J held as follows:
- [31] In light of the above, the conclusion this Court reaches is that dismissing a matter in the context of section 138 (5) (a) means that the dispute is withdrawn alternatively that the other party is absolved with the consequences that unless and until arbitration is requested again, the CCMA lacks jurisdiction the same way this Court lacks jurisdiction over a deemed withdrawn review. In my view, an aggrieved party has two options available to it. Either the decision to dismiss the matter is reviewed within the contemplation of section 158 (1) (g) of the LRA, given the fact that a functionary effects the dismissal exercising statutory powers or a re-request for arbitration of the dispute is made. There is no room for *res judicata* because the merits of the dispute could not have been resolved.
- [19] In his subsequent judgement of *Solomons vs Phokelano and Others*,^[2] Moshoana J confirmed the following principles, which are applicable to this matter:
- [19.1] An arbitrator does not have the power to dismiss a dispute in the absence of a party in terms of section 138(5)(a) of the LRA.
- [19.2] Dismissing a matter in terms of section 138(5)(a) of the LRA means no more than that the matter is struck from the roll and can be re-enrolled.
- [19.3] The bringing and entertaining of a rescission application of a dismissal ruling is not legally competent and the rescission ruling is a nullity in law.

[19.4] There is a distinction between a dismissal ruling and a default arbitration award issued in a party's absence and rescission is still available to a party which receives an adverse default arbitration award in its absence.

[19.5] The remedy for a referring party who has had their matter dismissed in terms of section 138(5)(a) of the LRA is to request the re-enrollment of the dispute and to apply for condonation, if necessary.

[20] Applying the above principles must mean that the rescission application and the rescission ruling are a nullity. The fact that the arbitrator referred to a "default award" in his rescission ruling does not serve to avoid this legal consequence. The dismissal ruling was titled as such and it clearly constituted a dismissal ruling as is contemplated by section 138(5)(a). The dismissal ruling did not deal with the merits of the dispute.

[21] As in Solomons it must then be considered whether the review application, which seeks to review the rescission ruling, should be dismissed for

mootness. Also, as within Solomons I am satisfied that the applicant seeks to review not only the rescission ruling, but also the dismissal ruling. In this regard the applicant seeks an order that the SSSBC is directed to enroll the dispute relating to the applicant's dismissal for arbitration

before another arbitrator and further and/or alternative relief. The applicant also alleges, in the founding affidavit, that the

arbitrator was not authorised in law to dismiss the dispute in the absence of the applicant in circumstances where the applicant's

representative was in attendance. Lastly, Mr Mdlangazi, appearing for the applicant, pertinently requested that the dismissal ruling, which is not referred to in prayer 1 of the notice of motion, be reviewed and set aside under prayer 4 of the notice of motion, the prayer for alternative relief.

[22] With regard to the allegation in the founding affidavit that the arbitrator was not authorised in law to dismiss the dispute in the absence of the applicant in circumstances where the representative was in attendance, section 138(5)(a) of the LRA reads as follows:

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

(a) had referred the dispute to the Commission, the Commissioner may dismiss the matter...” (emphasis supplied)

[23] Section 3.5.1(m) of the Dispute Resolution Procedures in the SSSBC, which is echoed by the Dispute Resolution Rules reads as follows:

‘(m) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings the arbitrator may –

(i) dismiss the matter...’ (emphasis supplied)

[24] Section 4.11 of the Dispute Resolution Procedures of the SSSBC deals with representation and reads as follows:

‘4.11 In any conciliation/arbitration/joint conciliation and arbitration proceeding, a party to the dispute may appear in person or be represented only by, in the case of an employee or trade union:

...

- (c) a shop steward, office bearer, an official or a legal representative employed/contracted by that party's trade union recognized in the sector, and such shop stewards shall be regarded to be on duty, provided that the person must have been a member in good standing of such trade union, at the time that the cause of action which had led to the dispute arose; or
- (d) an office bearer or official of that party's trade union recognized in the Public Service provided that the person must have been a member in good standing of such trade union at the time that the cause of action which had led to the dispute arose; or ...’

[25] The applicant was represented by a union official of POPCRU, which was in fact the referring party on behalf of the applicant. The arbitrator thus did not have the power to dismiss the matter in the absence of a party to the proceedings. All parties were present and represented. What the arbitrator ought to have done was to consider an application for a postponement and either grant or refuse the postponement. Had the arbitrator refused the postponement then he could potentially have conducted a default arbitration in the absence of the applicant; however, given that the onus rested upon the first respondent that would have entailed the first respondent presenting its evidence which could have been challenged by Mr Mkweta, who was in attendance and appearing for the applicant.

[26] I am therefore satisfied that the arbitrator exceeded his powers and did not act, correctly or as a reasonable arbitrator would in dismissing the matter in the presence of the applicant's representative. The dismissal ruling stands to be reviewed and set aside on this ground alone.

[27] In any event, there was no reason for the arbitrator to conclude that the applicant was in willful default. There was nothing unreasonable in the explanation advanced for the applicant's absence, at the height of the COVID-19 pandemic. There was ex facie no reason to believe that an applicant who had been dismissed would seek to delay the finalisation of the dispute. For this reason too the dismissal ruling cannot stand.

Costs

[28] The first respondent did not oppose the application beyond the filing of a notice of opposition and subsequently confirmed that it did not intend opposing the application and would abide by the decision of the Court. There is no reason why it should be saddled with costs.

[29] In the premises, the following order is made:

Order

1. The rescission application filed by the applicant on 3 September 2020 and the ensuing rescission ruling issued by the arbitrator and dated 25 May 2021 are a nullity.
2. The dismissal ruling issued by the arbitrator and dated 5 August 2020 is reviewed and set aside.
3. The SSSBC is directed to enroll the unfair dismissal dispute for arbitration before another arbitrator other than the third respondent.
4. There is no order as to costs.

C. B. Unwin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mdlangazi of W Mdlangazi Attorneys

[1]

[2021] 10 BLLR 1013 (LC)

[2] (JR99/2021)

[2021] ZALCJHB 192 (2 August 2021)

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Prepared on 12 October 2026 · Esheria