

SOUTH AFRICA / JUDGMENT

Steel Sensations (Pty) Ltd v Conway and Others (J2811/12) [2013] ZALCJHB 184 (8 August 2013)

[2013] ZALCJHB 184

COURT

Labour Court Johannesburg

BEFORE

Visagie

CASE / FILE NUMBER

J2811/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

not reportable

Case No. J2811/12

In the matter between:

STEEL SENSATIONS (PTY) LTDApplicant

and

CONWAY PATRICK RICHARDFirst Respondent

COMMISSIONER L T MTIYA N.O.Second Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCILThird Respondent

Heard: 23 April 2013

Delivered: 08 August 2013

Summary: Application to review and set aside certificate of outcome, granted.

VISAGIE, AJ

- [1] This is an application to review and set aside a certificate of outcome issued by the second respondent under the auspices of the third respondent on 31 July 2012. The application was unopposed.

Background facts

- [2] On 25 May 2012, the first respondent referred an unfair dismissal dispute to the CCMA together with an application for condonation for the late filing of the dispute. In the referral the first respondent indicated that the dispute arose in the Metal Industries. It appears from the papers that the CCMA then referred this matter to the Metal and Engineering Industries Bargaining Council ("MEIBC"). The MEIBC, on 12 June 2012, forwarded a facsimile to the applicant indicating that it had received a condonation application from the first respondent and inviting the applicant to file an opposing affidavit in the event that the applicant wished to oppose the condonation application. The applicant then filed an affidavit opposing the condonation application with the MEIBC on 18 June 2012.
- [3] The MEIBC informed the parties that the application for condonation would be heard on 31 July 2012. Prior to the hearing of the application for condonation by the MEIBC, the CCMA took it upon itself to grant condonation in respect of the referral. None of the parties appeared before the CCMA when this condonation application was granted. On 6 July 2012, the CCMA addressed correspondence to the applicant stating that a conciliation/arbitration process was set down by the CCMA for 26 July 2012.
- [4] At the MEIBC hearing, set down for 31 July 2012, the applicant argued that in light of the CCMA's ruling in respect of the condonation application of 5 July 2012, jurisdiction of the MEIBC had been ousted and that the second respondent had no jurisdiction to deal with the matter further. After listening to the parties, the second respondent indicated that she had to ascertain certain facts and circumstances concerning the referral of the dispute to the CCMA and also that she had to ascertain on what basis the CCMA dealt with the condonation application. Upon her return to the hearing, she indicated that she was going to issue a certificate of outcome in which she would record that the dispute remained unresolved. She, accordingly, issued a certificate of outcome indicating that the dispute remained unresolved. On 19 September 2012, the CCMA rescinded its ruling.
- [5] Advocate Hollander, on behalf of the applicant, argued that the MEIBC never granted condonation because it did not properly consider the condonation application submitted by the first respondent and opposed by the applicant. He conceded that the MEIBC has jurisdiction to deal with the dispute, but that the third respondent was not entitled to issue the certificate in the absence of having properly considered the condonation application and giving the parties an opportunity to ventilate the condonation application before her. The fact that she decided to issue the certificate on the basis of her enquiry from the CCMA was irregular. Advocate Hollander further argued that based on the decision of Van Niekerk, J, in the case of Bombadier Transportation (Pty) Ltd vs Mtiya N.O,¹ before the third respondent could be seized with the matter the required jurisdictional fact had to be present

that being the consideration of the condonation application was not present. As a result, second respondent was not entitled to issue the certificate and the

certificate stands to be set aside.

[6] In *Bombardier Transportation (Pty) Ltd vs Mtiya N.O.*² the court stated the following:

‘The only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time limit prescribed by Section 191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all. The distinction to be drawn is one between facts that the legislature has decided must exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in

the course of exercising its statutory powers.’

[7] Van Niekerk J was of the view that a conciliating commissioner has an election to determine any question of jurisdiction or to refer it to the arbitration stage. However, the court stated that:

‘In making that election, the commissioner will generally regard a challenge to the effect that the dismissed person was not an "employee" as defined or that she was never dismissed as matters that are not truly jurisdictional issues, and defer the challenge to the arbitration phase. In respect of either challenges, the commissioner ought to be guided by the nature of the challenge, the extent to which matters are intimately bound up with the substantive merits of the dispute, the determination of difficult questions of mixed law and fact, and the need for evidence to resolve them.’³

[8] In my view, the consideration of the condonation application was a jurisdictional fact ‘that the legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and the fact that the legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers.’⁴

[9] The fact that the application was properly before the second respondent after the third respondent acknowledged receipt of the condonation application and invited the applicant to oppose such condonation application which the applicant did, and further after the third respondent informed the parties that the condonation application will be heard on 31 July 2012, enjoined the second respondent to hear the condonation application before issuing the certificate of outcome. The failure of the second respondent to do so amounted to a material irregularity in the proceedings and accordingly the certificate of outcome was erroneously issued.

Conclusion

[10] In the result, the certificate of outcome issued by the second respondent under the auspices of the third respondent of 31 July 2012 is set aside. The third respondent is to hear the condonation application by the parties first before dealing with any

further steps in the matter. As this matter was unopposed, I can see no reason for any cost order. In any event, Advocate Hollander did not ask for costs against any of the respondents. Accordingly, there is no order as to costs.

Order

[11] The certificate of outcome issued by the second respondent under the auspices of the third respondent on 31 July 2012 is set aside. The third respondent is to hear the condonation application filed by the parties under case number NEGA369/13.

Visagie, AJ

Judge of the Labour Court

APPEARANCES

For Applicant: Advocate L Hollander,

Instructed by: Louis and Associates

1[2010] 8 BLLR 840 (LC).

2Ibid at para 13.

3Ibid at para 16.

4Id at para 13.

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