

SOUTH AFRICA / JUDGMENT

Zulu v Commission for Conciliation, Mediation and Arbitration and Others (D279/2022) [2022] ZALCD 40 (29 August 2022)

[2022] ZALCD 40

COURT
Labour Court Durban

BEFORE
Allen-Yaman

CASE / FILE NUMBER
D279/2022

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IN
THE LABOUR COURT OF SOUTH AFRICA
DURBAN
Case
no: D279/2022
Not
Reportable
In

the matter between: NDABENHLE
N
ZULU
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
COMMISSIONER
B S MTHETHWA
Second Respondent
UNIVERSITY
OF ZULULAND
Third Respondent

Heard: 16 August 2022

Delivered: 29 August 2022

JUDGMENT

ALLEN-YAMAN AJ

Introduction

[1] The applicant seeks an order in the following terms,

‘(i) that the CCMA’s refusal to process the applicant’s rescission application in terms of section 144 of the LRA and Rule 32 of the CCMA Rules was both unlawful and unconstitutional.

(ii) that the CCMA process the applicant’s rescission application of an award made under case number KNRB 1279-21, filed on 4 May 2022 in terms of section 144 of the LRA.

(iii) that the CCMA appoint a senior commissioner to hear the matter.

(iv) that the CCMA set a date for the application to be heard.’

[2] Whilst the third respondent delivered a notice of opposition to the applicant’s application, it did not deliver an answering affidavit. At the hearing of this matter Mr Schumann who appeared for the third respondent indicated that the third respondent consented to an order in terms of prayer (ii) of the relief sought by the applicant. The remaining relief sought by the applicant remains to be determined.

Background

[3] The application has as its origin the applicant’s apparent dismissal by the third respondent on 14 November 2014. Whilst the existence of such dismissal was accepted by the applicant in previous proceedings, he has more recently disputed that he was dismissed on that date.

[4] The applicant’s apparent dismissal having been upheld by an appeal tribunal which had been constituted by the third respondent to consider the applicant’s appeal on 7 January 2015, the applicant duly referred a dispute to the first respondent in which he challenged the fairness thereof.

[5] On the first occasion on which the dispute was enrolled for arbitration, it was dismissed as a result of the applicant’s failure to have attended the proceedings. He subsequently successfully applied for the rescission of such dismissal Ruling. The dispute was once more enrolled for arbitration, the result of which was an award in favour of the applicant.

[6] The third respondent was dissatisfied with the outcome of the arbitration and duly sought to review and set aside the award. Its application succeeded and this court remitted the matter to the first respondent to be arbitrated de novo before a commissioner other than the commissioner who had previously arbitrated the dispute.

- [7] The third respondent applied for legal representation at the commencement of the further arbitration proceedings, which application was granted. The applicant then applied for a postponement of the arbitration to enable him to approach this court to review the Ruling granting the third respondent legal representation.
- [8] The postponement application was refused, however, the arbitration stood adjourned to the following day. The applicant did not attend the proceedings that day and the commissioner, acting in terms of section 138(5) of the LRA, dismissed the applicant's dispute.
- [9] The applicant then applied to this court to review and set aside both the Ruling granting the third respondent legal representation as well as the Ruling dismissing his dispute. The applicant's review application was dismissed by this court on 26 March 2019. Attempts on the part of the applicant to appeal the judgment of this court proved to be unsuccessful.
- [10] Undeterred, the applicant referred a new dispute to the first respondent on 10 November 2021. He categorised this dispute as an Unfair Labour Practice in terms of section 186(2)(b). This dispute was premised upon the applicant's assertions that he had been suspended without pay by the third respondent for the period from 11 November 2014 until 20 August 2021, and that he had resigned from the employ of the third respondent on that date.
- [11] The arbitration of the applicant's Unfair Labour Practice dispute took place on 8 April 2022. Upon the conclusion thereof the second respondent Ruled that the first respondent did not have jurisdiction.
- [12] His Ruling was derived from his finding that the applicant must have been aware that the third respondent had ceased to pay him his salary by no later than 11 November 2014. His dispute had accordingly been referred to the first respondent outside of the 90-day period which he had been afforded to do so in terms of section 191(1)(b)(ii), which had expired on 10 February 2015. In the circumstances of the applicant having referred his dispute to the first respondent on 10 November 2021, it was required to have been accompanied by an application for condonation in terms of section 191(2), which it had not been. The second respondent accordingly found that the applicant's dispute had been referred outside the prescribed period, and accordingly the first respondent lacked the requisite jurisdiction to process the applicant's dispute.
- [13] On 4 May 2022 the applicant applied to the first respondent for the rescission of the award in terms of section 144. A copy of the applicant's rescission application has not been included in the applicant's present application papers, however, the email under cover of which it was transmitted to the first respondent has been annexed to his founding affidavit.

- [14] Such email correspondence indicates that the applicant transmitted his rescission application under cover of two separate emails to one Joanne Vermaak at the offices of the first respondent. She in turn forwarded the emails in question to two other employees of the first respondent on the day on which they were received by her, with the request they attend to process the applicant's rescission application.
- [15] On 23 May 2022 the third respondent made an application for the variation of the award, also in terms of section 144, it then having sought to have certain typographical errors which had been contained therein corrected. The award appears to have been varied in the manner requested by the third respondent on 26 May 2022, although the award so varied has not been included in the present application.
- [16] On 30 May 2022 the applicant addressed correspondence to the first respondent in which he questioned the basis upon which the second respondent had varied the award. In addition, he requested that his rescission application be dealt with by a senior commissioner, other than the second respondent.
- [17] An exchange of correspondence between the applicant and Ms Vermaak pertaining to whether the applicant's rescission application had been brought timeously culminated in an email addressed to the applicant by Ms Vermaak on 6 June 2022 in which she advised him as follows,

'Dear Mr Zulu

Trust that you are well.

In relation to your communication below, you wish to have Commissioner Mthethwa's jurisdictional ruling issued on 13 April 2022 rescinded, however s144 of the LRA does not find application and your rights are reserved to have the ruling reviewed by the Labour Court.

Kind regards.'

- [18] The applicant launched the present application on 14 June 2022.

Analysis

- [19] The applicant states, quite correctly, that the first respondent, '... was effectively dismissing [his] application before it had been handed over to a commissioner for hearing and ruling.'
- [20] The Rules for the Conduct of Proceedings before the CCMA ('the Rules') regulate proceedings of the first respondent. Rule 31, which stipulates the procedure which is to be followed in application proceedings, together with Rule 32, which applies to rescission applications, are of relevance.
- [21] The applicable provisions thereof read as follows,

‘31 How to bring an application

...

- (9)(a) The Commission must allocate a date for the hearing of the application once a replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first.
- (b) The Commission must notify the parties of the date, time and place of the hearing of the application.
- (c) Applications must be heard on a motion roll.
- (10) Despite this Rule, the Commission or a commissioner may determine an application in any manner it deems fit, provided that the Commission or the commissioner informs the parties of how the process will be conducted and gives the parties an opportunity to be heard.

32 How to apply to vary or rescind arbitration awards or rulings

An application for the variation or rescission of an arbitration award or ruling must be made within fourteen (14) days of the date on which the applicant became aware of the arbitration award or ruling.’

- [22] Regardless of what the merits or otherwise of the applicant’s rescission application are perceived by the functionaries of the first respondent to be, the fact remains that the applicant has brought an application in terms of section 144 read with Rules 31 and
32. Having done so, he is entitled to the determination thereof by a commissioner appointed as such in terms of section 117. It is only a commissioner who is so appointed who is empowered to consider the applicant’s application and to determine the outcome thereof.
- [23] The applicant is accordingly entitled to an order that the first respondent be compelled to appoint a commissioner to determine the applicant’s application for the rescission of the award, and that the application be enrolled for hearing in terms of Rule 31.
- [24] The applicant has already requested the first respondent to appoint a senior commissioner to adjudicate his rescission application. As the matter has not yet been enrolled for hearing before a commissioner, no decision pursuant to the applicant’s request appears yet to have been taken.
- [25] In consideration of both the LRA and the Rules, nowhere is the appointment of a senior commissioner provided for in regard to the determination of applications, the only applicable provision being section 137 which provides for the appointment of a senior commissioner to resolve a dispute through arbitration in specific circumstances. There is accordingly no basis upon which the first respondent can be compelled to adhere to the applicant’s request that a senior commissioner be appointed to deal with his rescission application.

- [26] As the applicant's request in this regard is still pending before the first respondent, it is however foreseeable that when allocating the applicant's rescission application to a commissioner for determination, the first respondent will give due consideration to the fact that this matter has a long and complex history, and further that the determination thereof will necessitate consideration of both the factual circumstances which gave rise to the award as well as the application of the principles relevant to rescission applications in terms of section 144, and will be guided accordingly.
- [27] As the order sought in prayer (i) of the applicant's Notice of Motion will have no practical effect, in light of the further orders which are to be granted, it is unnecessary for this court to make any findings in regard thereto.
- [28] Neither party sought an order relating to costs.

Order

1. The first respondent is directed process the applicant's application for the rescission of the award made by the second respondent under case number KNRB 1279-21 dated 13 April 2022 by:
 - (a) appointing a commissioner to consider and determine the merits thereof,
 - (b) allocating a date for the hearing of the application, and
 - (c) notifying the applicant and the third respondent of the date, time and place of the hearing of the application.
2. There is no order as to costs.

Kelsey Allen-Yaman

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Mr N N Zulu, in person

RESPONDENT: Mr P Schumann, briefed by J Philip Attorneys

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