REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2721/13

In the matter between:

Reggy MASHEGO	**Applicant**
and	
COMMISISONER L CELLIER N.O.	**First Respondent**
CCMA	**Second Respondent**
SOUTH AFRICAN AIRWAYS (PTY) LTD	**Third Respondent**

Heard: 29 October 2015

Delivered: 26 November 2015

Summary: Review – commissioner ruling that dispute is *res judicata* after striking matter off the roll on previous occasion – real dispute relating to dismissal for misconduct – remitted for arbitration. Purpose of LRA discussed.

JUDGMENT

STEENKAMP J

Introduction

[1] This case should never have served before the Labour Court. The fact that it was escalated to this level goes against the grain of the spirit, purpose and object of the Labour Relations Act.[1] The applicant was dismissed for misconduct. He wants that dispute arbitrated in the way that the LRA envisaged – in a simple, cheap and quick manner. But two and a half years and thousands of Rands of legal fees later, he is nowhere close to achieving that goal.

[2] The reason for this unsatisfactory state of affairs is, in a nutshell, that his trade union representative suggested in an initial arbitration that he was dismissed because of his trade union membership. The employee has since made it clear that that is not his cause of action. He accepts that he was dismissed for misconduct – the reason given by his employer, SAA. But because of that remark, the commissioner hearing the arbitration decided that the CCMA did not have jurisdiction. He struck it from the roll. When the employee tried to re-enrol the unfair dismissal dispute for arbitration, the commissioner ruled that it was *res judicata*. The employee – now having had to obtain legal representation – applied to have that ruling reviewed and set aside.

[3] Common sense dictates that the real dispute – unfair dismissal for misconduct – should be remitted to the CCMA for arbitration. But SAA – a state-owned enterprise[2] that is largely funded by the fiscus and hence the taxpayer – prefers to drag out the dispute in this Court, incurring further legal fees and forcing the employee to do the same.

[1] Act 66 of 1995.

[2] Although it is cited as South Airways (Pty) Ltd, its only shareholder is the State.

Background facts

[4] The employee was an airways customer service agent for 13 years. He received a notice to attend a disciplinary hearing to answer to allegations of misconduct comprising unauthorised absence and disobedience. He was dismissed in April 2013.

[5] He referred an unfair dismissal dispute to the CCMA. It was unresolved at conciliation. He referred it to arbitration. It came before the first respondent, Commissioner Lance Cellier. It is common cause that it was referred and heard as an unfair dismissal dispute relating to misconduct. SAA started leading evidence. The employee was represented by a union official, Mr Ephraim Mphahlele of the National Transport Movement (NTM) (an offshoot of SATAWU). During the course of cross-examining the first witness, the union official suggested that the employee's dismissal was based on his affiliation to NTM. The Commissioner suspended the proceedings and struck the matter from the roll on the basis that the CCMA does not have jurisdiction to continue to arbitrate the dispute.

The first ruling

[6] The arbitrator's handwritten ruling dated 26 August 2013 reads as follows:

> "This matter was part heard and continued with the cross examination of respondent's first witness. The line of questioning indicated a possible jurisdictional issue and in terms of rule 22 of the CCMA rules I called upon the referring party to prove that the commission had jurisdiction to arbitrate the dispute. The referring party in this instance was unable to do so as it is basing their case on section 187(1)(d) of the LRA – documentation in bundle A was referred to in support of their submissions. I must find in terms of s 191(5)(b)(i) of the LRA that the LC has jurisdiction to determine this dispute. This matter is to be struck from the CCMA roll."

<u>The second ruling</u>

[7] Faced with this scenario, the employee terminated the mandate of his union representative. He took legal advice and made it clear to his current attorneys of record that the real dispute did not relate to any allegation that he was victimised as a result of his association with NTM. Instead, it was simply an unfair dismissal dispute in relation to alleged misconduct.

[8] The employee's attorneys applied to have the unfair dismissal dispute re-enrolled for arbitration at the CCMA. In an affidavit accompanying the application for enrolment, the employee stated under oath that his union representative acted without his instructions when he stated that his dismissal was premised upon his affiliation to NTM; that he had been advised that the Labour Court does not have jurisdiction to entertain an unfair dismissal dispute as a result of misconduct; and:

> "The dominant reason for my dismissal was for alleged misconduct. I do not intend to rely upon any other reasons such as victimisation or the fact that I was involved in union activities or the fact that I was a shop steward."

[9] The application for re-enrolment was not opposed by SAA. Nevertheless, the CCMA refused to re-enrol the unfair dismissal dispute. Instead, the same Commissioner (the first respondent) issued a ruling on 22 November 2013 that his earlier ruling of 26 August 2013 was *res judicata*. He refused to re-enrol the dispute on this basis:

> "I am not aware of any provision in the LRA which confers jurisdiction on me to set down and/or re-enrol the matter for arbitration before the commission under these circumstances or the circumstances detailed by the employee party.
>
> The application is denied."

[10] The employee seeks to have that ruling reviewed and set aside in terms of s 158(1)(g) of the LRA.

Review grounds

[11] The employee has applied to have only the second ruling (refusal to re-enrol) reviewed and set aside. Mr *Sibanda*, for SAA, criticised him and his legal team for that fact. He argued that they should have brought an application to have the first ruling – to which he referred as a jurisdictional ruling – reviewed by this Court or rescinded by the Commissioner. I debated that with Mr *Hutchinson* in the course of argument. But, on reflection, it is clear that the first ruling is not a final ruling that could have been taken on review. The Commissioner made it clear that the matter was simply struck off the roll. That is not a ruling that is final in nature.

[12] The employee seeks to have the second ruling set aside on the grounds that it is unreasonable; and that the Commissioner misconceived the nature of the enquiry. The employee did not challenge the correctness of the Commissioner's first ruling and was not asking him to change it; he was simply stating that he had elected to abandon the grounds proffered by his union representative that would form the subject matter of an automatically unfair dismissal dispute. Therefore the Commissioner should simply have re-enrolled the real dispute, i.e. an unfair dismissal dispute based on misconduct.

Evaluation / Analysis

[13] The employee, in clear terms, disavows any reliance upon and allegation of an automatically unfair dismissal. He did so under oath in his application for re-enrolment at the CCMA. He did so again in this review application. And his counsel reiterated from the bar that, insofar as it may be necessary, he abandoned any reliance on such a cause of action. Quite simply, he accepts that he was dismissed for misconduct; he submits that it was unfair; and he wants that unfair dismissal dispute to be arbitrated at the CCMA.

The appropriate test

[14] It does not seem to me that the reasonableness test is the appropriate review test in this context. The question whether the dispute was *res*

judicata is a jurisdictional one. Therefore correctness, and not reasonableness, is the test.[3]

Context: The LRA, its aims and objectives

[15] The Constitution guarantees the right to fair labour practices.[4] The LRA gives effect to those rights. One of its primary objects is to promote the effective resolution of labour disputes.[5] In order to be effective, dispute resolution should be speedy.[6] And both time and legal costs should be minimised. In *National Education Health and Allied Workers Union v UCT*[7] the Constitutional Court recognised this principle and said:

> "By their nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily. . ."

[16] As the learned authors in *Labour Relations Law: a Comprehensive Guide*[8] point out, the drafters of the LRA intended that disputes be resolved quickly. The Explanatory Memorandum noted that the brief of the task team drafting the LRA was, amongst other things, to "provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration". It was meant to adopt "a simple non-technical and non-jurisdictional approach the dispute resolution". By providing for the determination of dismissal disputes by final and binding arbitration, the act adopted "a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal."

[17] None of these objects have been met in this case.

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[3] Cf *SARPA v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC).

[4] Constitution s 23.

[5] LRA s 1(d)(iv).

[6] Cf *CWIU v Darmag Industries (Pty) Ltd* [1999] 8 BLLR 754 (LC) para [29];

[7] 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) para [31].

[8] Du Toit et al, *Labour Relations Law: a Comprehensive Guide* (6ed 2015, LexisNexis p 117).

The first ruling and the real dispute

[18] It is significant that, in his first ruling, the arbitrator did not make a final ruling. He simply stated that the matter should be struck from the CCMA roll. That becomes significant when considering the second ruling.

[19] Before turning to the second ruling, though, something needs to be said about the readiness of CCMA commissioners to relinquish jurisdiction at the first sign of an alternative cause of action being raised, and without having heard all the evidence. Van Niekerk J recently had occasion to comment on the same trend.[9] I align myself with those comments:

> "The applicant's case appears, to some extent at least, to rest on the assumption that it was somehow incumbent on the commissioner to intervene in the process and herself to decide that the real dispute between the parties was one that concerned a dismissal on account of pregnancy. There is a trend in the CCMA for commissioners to intervene on this basis and to halt arbitration proceedings and refer a dispute to this court when the commissioner forms the view that he or she has no jurisdiction on the basis that the real dispute between the parties concerns a reason for dismissal that is listed as automatically unfair. This is an unfortunate trend. A party referring a dispute to the CCMA must stand or fall on the merits of that dispute. If it is clear from an initial interrogation of the dispute that the applicant has erred in referring a dispute concerning an automatically unfair dismissal to the CCMA, there can be no harm done in advising an applicant of that fact and that the matter ought appropriately to be referred to this court for adjudication. However, where as in the present instance, the parties make conscious decisions to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene by abandoning the proceedings, thereby dictating to parties what he or she thinks their real dispute is and how it should be litigated."

[20] In this case, despite the initial confusion created by his trade union representative's comments, the employee made it clear – in his initial referral and in his re-enrolment application – that he wished to continue with the arbitration on the basis that he abandoned any claim to an

[9] *Ngobe v JP Morgan Chase Bank* [2015] ZALCJHB 317 (17 August 2015) para [12].

automatically unfair dismissal. It is in the context of the question arises whether the Commissioner correctly ruled that the dispute was *res judicata*.

The second ruling: res judicata?

[21] A ruling that the dispute should be struck from the roll is not final in effect. The arbitrator committed an error of law when he ruled that the dispute was *res judicata*. That led to an unreasonable result depriving the employee of having the real dispute – unfair dismissal based on misconduct – arbitrated before the CCMA, which is the forum with jurisdiction to hear that dispute.

[22] The Labour Appeal Court has confirmed that the *functus officio* doctrine – closely aligned to that of *res judicata* – does apply to CCMA commissioners.[10] But it only applies when they have made a ruling that is final in effect.[11] In *PT Operational Services*[12] Musi AJA stressed that "it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions was spent by its first exercise." In that case, he expressed the view that it was unfortunate that commissioner Cellier – the same commissioner as the first respondent in this case – dismissed the application before him instead of striking it from the roll. He continued: "I have seen many rulings of a technical or formalistic nature where the correct order ought to be striking a matter from the roll but the matter would be dismissed instead." Perhaps taking that admonition to heart, Commissioner Cellier in this case did strike the matter from the roll instead of dismissing it. For that reason, it was not *res judicata.* In the context of a matter being struck from the roll for lack of

[10] *PT Operational Services (Pty) Ltd v RAWUSA obo Ngweletsana* (2013) 34 *ILJ* 1138 (LAC) para [28].

[11] *SAMWU v South African Local Government Bargaining Council* (2014) 35 *ILJ* 2824 (LAC) para [19].

[12] *Supra* para [30].

urgency, Musi AJA cited with approval the following *dictum* by Cameron JA (as he then was) in *Hawker Air Services:*[13]

> "Where the application lacks the requisite element or degree of urgency, the court can, for that reason, declined to exercise its powers under rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is ordinarily to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."

And Musi AJA also cited Jones J in *Vena v Vena:*

> "My understanding of an order for the dismissal of a claim in circumstances such as these is that, generally speaking, it is equivalent to an order for absolution from the instance, in which event it is open to an applicant to set the matter down again. In a given set of circumstances, it may be that dismissal may amount to a final judgement on an issue, with the consequence of *res judicata*. But that is not in the normal course where the case turns on a procedural point, and, I believe, it is not the case here."

[23] Musi AJA concluded:

> "One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. If not, then it is not final."

[24] A party to a dispute before the CCMA may withdraw it before it has been finally decided and re-enrol it.[14] In my view, similar considerations apply in this case. Although the employee did not withdraw the dispute, the commissioner struck it from the roll. He did not finally decide it on the merits. I do not see why that precluded the employee from re-enrolling it.

<u>Conclusion</u>

[25] In this case, the Commissioner struck the matter from the roll when he made his first ruling. He did not dismiss the dispute on the merits. The dispute was not *res judicata*. When he ruled that it was, after the employee

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[13] *Commisioner, SA Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner for SARS v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) para [9], cited in *PT Operational Services (supra)* para [33] – [34].

[14] *SAMWU v CCMA* (2014) 35 *ILJ* 2011 (LC); *Ncaphayi v CCMA* (2011) 32 *ILJ* 402 (LC).

had applied for the real dispute to be re-enrolled, he committed an error of law. That led to not only an incorrect finding, but also an unreasonable result that must be reviewed and set aside. The real dispute must be remitted to the CCMA for arbitration before another Commissioner.

Costs

[26] Section 162 of the LRA enjoins this court to take into account the requirements of law and fairness when making an order for the payment of costs. When deciding whether or not to order the payment of costs, the court may take into account –

(a) whether the matter referred to the court ought to have been referred to arbitration and, if so, the extra costs incurred in referring the matter to the court; and

(b) the conduct of the parties –

(i) in proceeding with or defending the matter before the court; and

(ii) during the proceedings before the court.[15]

[27] In this case, SAA was entitled in law to defend the arbitrator's ruling; but in fairness, it should, in my view, have agreed that the dispute – being an alleged unfair dismissal for misconduct – be referred back to arbitration.

[28] When I criticise the conduct of SAA in proceeding with and defending this matter, rather than agreeing to have it remitted to arbitration, I intend no slight to its counsel. At no stage did I form the impression that Mr *Sibanda* persisted in advising his client to do so. Instead, he was clearly acting on instructions. After I had raised the question in chambers whether the dispute should not simply be referred back to arbitration, he took instructions. When the parties could not reach agreement, the matter was called in open court. I raised the question again from the bench. He again took instructions. He then informed me in open court that he had been instructed "from the highest levels in SAA" to proceed.

[15] LRA s 162(2).

[29] In the circumstances, taking into account the aims of the LRA and the provisions of fairness, SAA should be held liable for the employee's costs. Even though it is a notorious fact of which I can take judicial notice that SAA is constantly running at a loss, it still has deeper pockets than the applicant, an individual employee who has been dismissed. There was a simple solution to this matter that would have curtailed the costs that the employee had to incur. In fairness, SAA should carry those costs.

Order

[30] Taking all these factors into account, I make the following order:

30.1 The ruling of the first respondent (Commissioner Lance Cellier) dated 22 November 2013 under case number GAEK 3812 – 13 is reviewed and set aside.

30.2 The CCMA (the second respondent) is directed to set the unfair dismissal dispute referred to it by the applicant under case number GAEK 3812-13 in terms of s 191(5)(a) of the LRA down for arbitration before a commissioner other than the first respondent.

30.3 The third respondent (SAA) is ordered to pay the applicant's costs.

Steenkamp J

APPEARANCES

APPLICANT:	W Hutchinson Instructed by Fluxmans Inc.
THIRD RESPONDENT:	M Sibanda Instructed by Norton Rose Fulbright.