REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P159/2014

In the matter between:

THAMSANQA MOTSOASELE **Applicant**

and

CARMEN WARD N.O **First Respondent**

JANA BURGER N.O **Second Respondent**

FREE STATE GAMBLING AND LIQUOR AUTHORITY **Third Respondent**

Heard: **30 July 2014**

Delivered: **12 August 2014**

Summary: The Labour Court may intervene in an uncompleted arbitration when a commissioner refuses to entertain an employee's application to re-open his/her case closed by a commissioner in his/her absence.

JUDGMENT

LALLIE, J

[1] On 4 June 2014, this Court issued an interim order restraining the first and second respondents from issuing any award on the merits of the arbitration of the unfair dismissal dispute which was finalised on 21 May 2014 pending the finalisation of the present application. A *mandamus* ordering the first respondent to enrol the applicant's application to reopen his case so that it would be heard in accordance with the Rules of the Conduct of Proceedings before the CCMA ("the CCMA Rules") was issued. A further *mandamus* was issued ordering the second respondent to entertain and adjudicate the applicant's application to re-open his case in accordance with the CCMA Rules.

[2] On the return date, the third respondent opposed the application. The facts of this matter are mainly common cause. The applicant was an employee of the third respondent. He was dismissed on 7 January 2014 pursuant to being found guilty of serious acts of misconduct. He challenged the fairness of his dismissal at the CCMA. When the dispute could not be resolved at conciliation, it was scheduled for arbitration on 10 March 2014 by the second respondent ('the commissioner'). The applicant was represented by Mr Jwayi (Jwayi), an official of his trade union NEHAWU. The third respondent led evidence first and after its first witness had testified, the arbitration was postponed to 20 an 21 May 2014. On 20 May 2014, only the third respondent attended the arbitration. It led its remaining witness and closed its case. The arbitration was adjourned to the following day.

[3] When the arbitration reconvened on 21 May 2014, the applicant attended with Mr Jwayi. Upon enquiring from the third respondent what the status of their arbitration was, they were informed that the third respondent had led its last witness, closed its case and the commissioner had closed the applicant's case. The applicant requested the commissioner off the record to afford him an opportunity to present evidence in support of his case. The commissioner declined the applicant's request off the record and on record requested the applicant and the third respondent to submit closing arguments on 28 May 2014. Instead of complying with the commissioner's request, the applicant's attorney contacted the first respondent in an attempt to ascertain the procedure for securing a date for the urgent hearing of the applicant's

application to reopen his case. The first respondent's response was that a date would not be allocated for the hearing of the application. The applicant's attorney was advised that the applicant could apply for rescission in the event of the award being granted against the applicant. The applicant persisted with his request to have his arbitration set down for the hearing of the application to re-open his case failing which he would move the present application. When he got no response, he launched this.

[4] On the return date, the respondent is obliged to show that the order should not have been granted at the outset on the grounds that no proper case was made out for the order.

[5] In *Jiba v Minister of Justice and Constitutional Development*,[1] the Court expressed the undesirability of this Court's interference in uncompleted arbitrations was expressed thus:

> 'I wish to deal with the application in so far as it relates to the chairperson's ruling on a more preliminary basis. Exceptional circumstances aside, it is undesirable for this court to entertain applications to review and set aside rulings made in uncompleted proceedings. In *The Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and other* (unreported, C249/09,14 April 2009) [reported at [2009] 8 BLLR 833 (LC) – Ed], I said the following in relation to the review of interlocutory rulings made by commissioners:
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> > "There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason – for this court to routinely in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced

[1] [2009] 10 BLLR 989 (LC) at para 11.

> rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court."'

[6] In *Booysen v Minister of Safety and Security*,[2] it was held that this Court has jurisdiction to interdict any unfair conduct. The Court cautioned that the intervention should be exercised in exceptional cases. The question whether failure to intervene would lead to grave injustice or whether justice might be attained by other means were cited as some of the factors to be considered.

[7] In this application, the applicant seeks to assert his right to have the application for the re-opening of his case heard by the commissioner. The applicant argued that he has the right to be heard at the CCMA. The right stems from the rules of natural justice. He denied having waived his right to be heard. The third respondent argued that this application should be dismissed as the applicant had failed to prove the existence of a right. It was further argued that the applicant failed to attend the arbitration on 20 May 2014 out of his own negligence as he was present when the commissioner informed the parties before her that the arbitration had been postponed to 20 and 21 May 2014. The third respondent sought to rely on section 138 of the Labour Relations Act 66 of 1995 ('the LRA'), which gives arbitrators the latitude to conduct arbitrations with the least of legal formalities.

[8] It is common cause that the applicant had the right to be heard when he appeared at the arbitration on 21 May 2014. Section 138(1) of the LRA provide as follows:

> 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

[9] While section 138(1) bestowes commissioners with the power to conduct arbitrations in a manner they consider appropriate, it places a duty on them to determine disputes fairly and requires them to deal with the merits of the dispute. It is common cause that not only was commissioner's response to the

[2] [2011] 1 BLLR 83 (LAC) at para 54.

applicant's request to have his case re-opened extra curial, she did not even ask for reasons for his request. The request was of vital importance as it involved his right to be heard. A decision denying a party of the right to be heard should not be taken lightly. By refusing to entertain the applicant's application to have his case re-opened especially without affording him an opportunity to persuade her to make a ruling his favour, the commissioner violated the applicant's right to be heard.

[10] It was argued on behalf of the third respondent that the applicant was not without alternative remedy as he could have presented his closing arguments as directed by the second respondent, waited for the arbitration award to be issued and followed the first respondent's advice of applying for rescission or review. There is merit in the applicant's submission that launching a rescission application was untenable. Section 144 (a) of the LRA provides for the rescission of a ruling erroneously made in the absence of any party affected by the ruling. Had the applicant filed closing arguments, he would not have been eligible to rely on section 144 (a) as the ruling would not have been made in his absence. He was present and participated on the first day of the arbitration hearing. He would have been present and participated on the last day had he filed closing arguments.

[11] A ruling may be rescinded in terms of section 144 (b) if it has an ambiguity or an obvious error or omission but only to the extent of the ambiguity, obvious error or omission. The third respondent's argument that the applicant failed to prove the existence of a right bears testimony to the absence of an ambiguity, obvious error or omission. In terms of section 144 (c) a ruling may be rescinded if it is granted as a result of a mistake common to the parties to the proceedings. The applicant was denied the opportunity to have his case re-opened as a result of his absence at the arbitration on 20 May 2014. The third respondent submitted that the absence resulted from the applicant's negligence as he was present when the arbitration was postponed. The applicant submitted that his absence from the arbitration was caused by Jwayi's mistake. There is therefore no mistake common to the parties. Section 144, therefore, did not provide the applicant with alternative remedy.

[12] The applicant has a well-grounded apprehension of harm as he faces the grave injustice of being denied the right to present his case. The balance of convenience favours the applicant as he stands to suffer more prejudice than the third respondent in the event of this application being denied.

[13] The third respondent argued that the applicant should have awaited the finalisation of the arbitration and pursued review proceedings as alternative remedy. The applicant seeks to have his application to re-open his case and be heard before a determination of the fairness of his dismissal is made. The test for review is whether the commissioner reached a decision that a reasonable decision maker could not reach on the evidence before the commissioner.[3] A review is decided on the totality of the evidence and excludes a piece-meal approach. In the event of the applicant waiting for the award to be issued, his evidence will not form part of the evidence before the second respondent in the event of the arbitration being finalised without his case being re-opened. He will, therefore, be on the back foot when approaching this Court on review. He cannot ask this Court in his review application for the order that he is presently seeking. A review application is, therefore, no alternative to the present application. Failure to intervene at this stage will, therefore, lead to a grave injustice.

[14] In *Booysen* (*supra*), the Court expressed the view that judicial intervention may prove to be time saving and less costly if the process is not proceeded with. It may also prevent costly litigation. The matter at hand cries out for such intervention.

[15] The applicant acted with the necessary urgency in approaching this Court after the first respondent had refused to schedule his arbitration for the hearing of the application to re-open his case. In the circumstances, I am satisfied that the applicant has made out a case for the relief that he is seeking.

[16] The applicant sought a costs order against the third respondent on the basis that it was not necessary for it to oppose this application. The third respondent sought costs on the basis that it uses public funds in this litigation and was

[3] See *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

forced to instruct an attorney and counsel as its employee who was an attorney and responsible for this matter has since left its employ. It was not necessary for the third respondent to defend this application when regard is had to the reality that the applicant seeks to affirm his right to be heard which he was denied by means of an extra curial ruling made without affording the applicant an opportunity to be heard. A costs order against the third respondent is, therefore, justified.

[17] In the premises, the *rule nisi* issued on 4 June 2014 is confirmed with costs.

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Lallie J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Louw
Instructed by:	Honey Attorneys
For the Third Respondent:	Advocate Molotsi
Instructed by:	L Molatseli Attorneys