

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

Case No: JR 152/06

In the matter between:

SCORE SUPERMARKET KWA THEMA

APPLICANT

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

FIRST RESPONDENT

D T MASOTE NO

SECOND RESPONDENT

M TSATSIMET

THIRD RESPONDENT

M RAFEE N O

FOURTH RESPONDENT

SACCAWU

FIFTH RESPONDENT

M MABENA

SIXTH RESPONDENT

JUDGMENT

INTRODUCTION

MOLAHLEHI J

- [1] The applicant in this matter seeks an order to review and set aside:
- a) the arbitration award dated 10 November 2004, including its variation which was issued by the second respondent on the 26th January 2005 under case number GA 33536-04,

- b) The ruling issued by the third and fourth respondents respectively dated August 2005 and October 2005.

[2] The applicant further raised the issue of CCMA's jurisdiction in the light of the fact the matter was disposed of through the ruling issued under case number GA 22967/04. In this regard the applicant pleaded *res judicata*.

[3] The applicant also filed an application for condonation for the late filing of its review application in terms of s145 of the Labour Relations Act 66 of 1995 (the Act) which was late by 18 (eighteen) days. The explanation for the lateness is said to be due to the fact that the attorney who was responsible for this matter went away on annual leave between the periods of 24 December 2005 to 9 January 2006. There was apparently during this period no one at the applicants attorneys of record to attend to this matter.

[4] The explanation proffered by the applicant is in my view reasonable and acceptable. The application was not opposed. The condonation is accordingly granted; regard being had to the period of the delay and the explanation.

Background facts

- [5] The Sixth respondent, Mr M Mabena (the employee) was dismissed by the applicant on the 11 June 2004, following a disciplinary hearing where he was charged with serious misconduct.
- [6] Following his dismissal the employee referred an unfair dismissal dispute to the first respondent (CCMA). The applicant disputed and challenged the alleged unfair dismissal dispute. The CCMA scheduled the dispute for a *con/arb* hearing on the 10 August 2004, under case reference GA 22967-04. It is alleged that the employee and the fifth respondent (the union) failed to attend the hearing and Commissioner Hlongwane dismissed the application for that reason.
- [7] The applicant contended that subsequent to the dismissal of the employee's initial referral which was under case number GA 22967-04 the applicant re- referred the matter to the CCMA under case GA 33536-04.

Grounds for review

[8] The applicant contended that the arbitration award under case number GA 33536-04 should be reviewed and set aside on the basis that the dispute between the applicant and the union and its members was *res judicata* at the time that the default award and the variation thereof were issued.

[9] The second ground upon which the applicant relied on was that it never received the notice of set down for the hearing of arbitration.

[10] The union contended that they only made one referral which is case number GA 3365-4 and that they were not aware of case number GA22967-05. The union also indicated that the applicant initially complied with the award in that the employee reinstated in terms of this award and that it was only after (5) five month of the reinstatement that the employee was told to leave his employment.

The award and rulings

[11] The arbitration award under case GA 33536-04 was issued by Commissioner Masote on the 26 January 2005.

[12] During August 2005, Commissioner Tsatsimpe issued a ruling in which an application to rescind the award issued under case GA 335360-04 was dismissed. In her background to the application for rescission Commissioner Tsatsimpe *inter alia* indicated that the employer contended before her that the unfair dismissal dispute referred to the Commission by the employee was dismissed on the 10 August 2004 and that matter was dismissed under case GA 222967-04.

[13] As concerning the dispute under case GA22967-04, Commissioner Tsatsimpe found that:

“It is correct that the Employee had referred a dispute to the Commission and was given the number GA 22967- 04 this case was indeed dismissed. The Employee again referred a dispute to the Commission. He stated on the referral that the dispute arose on the 11 June 2004. The Commission received it on 22 June 2004 well within the stipulated time period. This referral was served on the employer and the commission does have jurisdiction to deal with it”.

[14] Commissioner Tsatsimpe issued another rescission ruling this time around she accepted the applicant's explanation and rescinded the award granted under case number GA 335360-04.

[15] A month later Commissioner Raffee issued a ruling in terms of which he ruled as follows:

“On perusal of the file I found 2 conflicting rulings with rescission. The rescission ruling dated August

2005 does not grant rescission. The ruling dated 21 October 2005 grants the rescission to the employer. The employer did not make application to the Labour Court to set aside the ruling dated August 2005. Therefore the ruling dated August 2005 must be upheld and the ruling dated 21 October 2005 is irregular.”

[16] The essence of commissioner Raffee's ruling is that it reviewed and set aside the ruling of Commissioner Tsatsimpe of the 21 October 2005.

[17] Before dealing with the main ground of review raised by the applicant being *res judicate*, I am of the view that it is necessary to deal briefly with the ruling of Commissioner Raffee which declared the ruling of commissioner Tsatsimpe to be irregular.

[18] The question that arises from the ruling of Commissioner Raffee is whether the CCMA Commissioners have powers or authority to review or declare other Commissioners' ruling or arbitration awards irregular.

[19] It is trite that in dealing with unfair dismissals the CCMA Commissioners derive their powers and authority from the provisions of the Act and the CCMA rules. They are thus in this regard required to keep within these bounds of authority set out by the Act and the rules and therefore in exercising their powers as Commissioners they must do so in the manner prescribed by the Act.

[20] In as far as the power and authority to rescind their own and other Commissioners' ruling and award, their powers and authority are set out in section 144 Act.

[21] Section 144 (a) of the Act gives the Commissioner the power to rescind an arbitration award erroneously made in the absence of any party affected by the award. It has been held that in order to succeed in an application for rescission the applicant must show

good cause for not attending the hearing on the scheduled date. See **Northern Training Trust v Marquee and Others (2006) 27 ILJ 838(LC), Foschini Group (Pty) Limited v/s Commission for Conciliation Mediation and Arbitration and Others (2002) 23 ILJ 1597 (LC); Halcyon Hotel Pty Ltd t/a Varaze v CCMA and Others (2001) 8 BLLR 911 Shoprite Checkers (Pty) Ltd v/s CCMA and Other (2007) 20 BLLR 9178 (LAC).**

[22] In my view the ruling of Commissioner Raffee that the ruling of Commissioner Tsatsimpe is “*irregular*” amounts to an action lacking in authority.

[23] I now proceed to deal with the explanation by the applicant for not attending the hearing of case GA33536-04. The explanation given by the applicant for not attending the hearing was that it never received the notice of set down. The last time it received a notice was when the matter was set down under case number GA 22967-04 for 10 August 2004. On that day the matter was dismissed for non attendance by the employee. There is no proof in the record that indicates that the notice of set down for case

number GA 33536-04 was served on the applicant.

[24] Thus the award under case number GA 33536-04 ought to have been rescinded because it was issued erroneously in the absence of the other party. It also ought to be rescinded because the applicant had shown good cause for not attending the hearing.

[25] I now proceed to deal with the issue of *res judicata*. In terms of rule 30 of the CCMA rules the Commissioners have power to dismiss the matter if the referring party fails to attend the proceedings. In exercising the powers given to him, Commissioner Hlongwane issued a written ruling on the 10 of August 2004 dismissing the employee's case under case no: GA 22967/04. This ruling was never rescinded or reviewed and set aside.

[26] Although the union during argument submitted that they were not aware of the referral of the same dispute under case GA 22967/04, it is clear from the ruling of the second respondent that the second referral form used by the employee was the same referral form used by the employee under case GA 33536-04. It is apparent that the same referral form which gave rise to case number GA

33536-04 was submitted by the union on behalf of the employee.

The other alternative possibility is that the CCMA may have used the same form twice and allocated two different case numbers to the same matter.

[27] The union representative indicated in her submissions that initially the matter was handled by another union representative. She however did not indicate at what stage she took over the matter. She also did not indicate whether by the time the matter landed on her desks the dispute had already been referred to the CCMA.

[28] It is evidently clear that the 7.11 dispute referral form was faxed to the CCMA twice. It is undisputed that the CCMA received the referral relating to the alleged unfair dismissal which arose on the 11 June 2004 on the 22 June 2004. It is this referral which was scheduled for a hearing on the 10 of August 2004 and it is the same referral which was dismissed for non attendance of the employee on that same day.

[29] The question that arises from accepting that two referral forms were sent to the CCMA is whether the second referral was made

with the view of institution proceedings once it became known that the case number GA 22967/04 was dismissed or the 7.11 forms were sent by the union and the employee respectively, with the view to ensuring that the referral is indeed received by the CCMA. If the former was proven then the plea of *res judicata* would be sustainable. However, if the probability favours the latter then it would be unfair in my view to uphold the plea.

[30] It is an established rule of our law that for the plea *res judicata* to succeed it is necessary to establish that a final judgement has been made involving:

- a) the same subject matter;
- b) based on the same facts; and
- c) Between the same parties.

See Food and General Workers' Union and Others v Picardy Hotels Limited (1999) 12 BLLR 1274 (LC) and Mitfords Executive v Abden Executors 1917 AD 683

[31] There is no doubt that the referral forms used by the employee and the union in both cases GA 22967/04 and GA 33 536-04 were the

same. The subject matter is the same and the parties are the same. On the basis of this, the conclusion should be that the plea of *res judicata* is sustainable. There is, however, authority that in labour matters consideration of whether or not to uphold a plea of *res judicata*, depends on whether in all the circumstances of a given case it is fair to do so. See **BMW (DA) (Pty) Ltd v Van Walt (2000) 21 ILJ 113 (LAC)**.

[32] It is apparent to me that in the circumstances of this case it would not be fair to uphold the plea of *res judicata*. The employee and the union deny knowledge of the existence of case number GA 22967/04. The probabilities strongly point to an administrative error on the part of the CCMA in the opening of the two cases. On this point alone, fairness dictates that the plea of *res judicata* be dismissed. There is also no evidence indicating that case number GA 33536-04 was filed consequent to the dismissal of case number GA 22967-04.

[35] I am of the view that in the interest of fairness and to clear the confusion that has arisen, both cases GA 22967/04 and GA 33 536-

04 should be reviewed and set aside.

[36] In my view it would not be appropriate in the circumstances of this case to award costs.

[37] In the premises I make the following order:

1. The late filing of the review application is condoned.
2. The plea of res judicata is dismissed.
3. The arbitration award dated 10 November 2004, which was issued by the second respondent on the 26 January 2005 under case number GA 33 536-04, is reviewed and set aside.
4. The arbitration award issued on 10 August 2004, under case number GA 22967/04 is reviewed and set aside.
5. The ruling issued by the third and fourth respondents respectively date August 2005 and 21 October 2005 and 30 November 2005, issued under case number GA 33 536- 04 is reviewed and

set aside.

6. This matter is remitted back to the first respondent for consideration on the merits of the dispute and to be heard by a commissioner other than the second to the fourth respondents.

7. There is no order as to costs.

Molahlehi J

Date of hearing: 13 March 2008

Date of Judgment: 05 June 2008

APPEARANCES

For the Applicant: Ms MM NTSHOANE (ATTORNEY)

Instructed by: SNYMAN ATTORNEYS

For the Respondent: Mr MPHO MJEZA (UNION OFFICIAL)

Instructed by: SACCAWU