



REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 801/13

In the matter between:

STEPHEN FIRE MNGOMEZULU

First applicant

and

VODACOM (PTY) LTD

First respondent

CCMA

Second respondent

Commissioner N E ISAACS N.O.

Third respondent

Commissioner D I K WILSON N.O.

Fourth respondent

Heard: 12 May 2017

Delivered: 21 June 2017

SUMMARY: Application to re-open case. Review application withdrawn by previous attorney. Actual authority, ostensible authority and estoppel considered. Application dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Mr Stephen Fire Mngomezulu, has applied to re-open a review application that was withdrawn by his erstwhile attorney, Mr E J Simons of Simons van Staden attorneys, on 18 August 2014. He only brought this application more than two years later, on 15 November 2016.
- [2] The applicant represented himself in these proceedings. The matter was set down for hearing on the opposed motion roll on 3 May 2017. On that day, for the first time – and despite the fact that all previous pleadings and correspondence, including internal emails drafted by the applicant, had been in English – he requested the services of a Zulu-speaking interpreter. No interpreter fluent in isiZulu was available. The matter was postponed to 12th May in order to obtain the services of an interpreter. The Registrar made the necessary arrangements with the High Court on the very same day. Despite having received confirmation on 8th May, when the matter was called on 12 May, there was no interpreter to be found. The Court had to adjourn once again. After further calls to the responsible person at the High Court, Mr Christopher Blow, an interpreter eventually arrived at 11:00.

Background facts

- [3] The applicant faced various allegations of misconduct. On 23 May 2013, after a disciplinary hearing, he agreed to be issued a final written warning and five days' unpaid suspension as an alternative to dismissal. Despite the agreement, he referred an unfair labour practice dispute to the CCMA¹. Commissioner N E Isaacs² found that the CCMA did not have jurisdiction as there was an agreement and thus no dispute to be decided in terms of s 186(2)(c) of the LRA.³

¹ The second respondent.

² The third respondent.

³ Labour Relations Act 66 of 1995.

- [4] Undeterred, the applicant – represented by Simons van Staden attorneys – brought a review application to this Court under this case number (C 801/2013) on 21 October 2013.
- [5] On 16 December 2013 the applicant was called to a disciplinary hearing concerning different, unrelated and subsequent allegations of misconduct pertaining to insubordination, insolence and his refusal to follow reasonable instructions. He was dismissed on 2 January 2014. He referred an unfair dismissal dispute to the CCMA.
- [6] On 18 August 2014 the applicant's attorneys filed a notice of withdrawal in the first review application (pertaining to the ruling on the unfair labour practice complaint by Commissioner Isaacs) under this case number (C 801/2013). It is headed "**NOTICE OF WITHDRAWAL OF APPLICATION**", signed by the applicant's attorney, E J Simons of Simons van Staden, delivered to all the respondents, and reads⁴:

"**KINDLY TAKE NOTICE THAT** Applicant hereby withdraws his application, filed under the abovementioned case number against the abovementioned respondents.⁵

FURTHER TAKE NOTE that the parties are to carry their own respective legal costs."

- [7] In early 2015, the dismissal dispute was referred to arbitration, conciliation having failed. It came before Commissioner D I K Wilson.⁶ The applicant was still legally represented by Mr Simons. In the applicant's presence, the following exchange occurred:⁷

"ARBITRATOR: Just looking through the file I see that the matter was previously postponed because of the pending Labour Court proceedings.

MS BOGATSHU: Yes.

ARBITRATOR: Which I gather was a review in relation to the final written warning.

MS BOGATHSU: Yes.

⁴ (Underlining, capitalisation and bold lettering as in original).

⁵ The respondents being Vodacom (Pty) Ltd, the CCMA and Commissioner Isaacs.

⁶ The fourth respondent.

⁷ Ms Bogatshu was Vodacom's representative in the dismissal arbitration.

ARBITRATOR: Is that correct?

MS BOGATSHU: The applicant withdrew that ...

ARBITRATOR: That was withdrawn.

MS BOGATSHU: Yes.

MR SIMONS: I'll address you on that Mr Commissioner."

- [8] Then, in the applicant's presence, Mr Simons explained the reasons for the applicant withdrawing his review application under this case number pertaining to the unfair labour practice ruling by Commissioner Isaacs. He stated:

"What complicated the matter even further Mr Commissioner was the fact that now we were faced with the issue as to whether our review application is not an academic exercise at best because even [if we] get the ULP overturned we're still faced with the issue that the applicant has effectively been dismissed and in order to alleviate this problem much of last year was spent in postponing the arbitration proceedings in order to finalise the review application."

- [9] During this exchange the applicant was present, yet he did not dispute that the unfair labour practice review had been withdrawn on his instructions.
- [10] The arbitrator, Commissioner Wilson, found that the applicant's dismissal was fair. The applicant then brought another review application, still represented by Simons Van Staden, to this court under case number C 370/15 on 20 May 2015.
- [11] Five months later, on 23 October 2015, Simons van Staden withdrew as the applicant's attorneys of record. And another four months later, on 18 February 2016, the applicant addressed a letter to the Registrar alleging that he had not instructed his attorneys to withdraw the unfair labour practice review. He did not copy Simons van Staden in on that letter. Another nine months passed before he brought this application to reopen his case on 15 November 2016 – in other words, two years after his attorneys had withdrawn the application to review the unfair labour practice ruling of Commissioner Isaacs.

Did Simons van Staden have authority to withdraw the application?

- [12] The applicant now says that, when his attorneys withdrew the review application in 2015, they did so without his authority or instructions. He did not include a confirmatory affidavit (or any other affidavit) by Mr Simons or any other attorney at that firm.
- [13] The employer, Vodacom, argues that Simons had actual authority to withdraw the application; alternatively, he had a sensible authority; and in any event, the applicant is estopped from now claiming that his attorney did not have such authority.
- [14] The principles on actual authority, central authority and estoppel were recently set out by the Constitutional Court in a case involving the same respondent, *Makate v Vodacom (Pty) Ltd*⁸:

“Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.”

- [15] On the evidence before me, I am satisfied that, on a balance of probabilities, Mr Simons did have actual authority to withdraw the application on the applicant's instructions. That should be clear from the following facts:

15.1 Having withdrawn the application in August 2014, Mr Simons continued to represent the applicant. In the applicant's presence, and at the unfair dismissal dispute arbitration proceedings some months later, Simons explained to the Commissioner in clear terms that the applicant had withdrawn his review application in this matter.

⁸ 2016 (4) SA 121 (CC) par 45.

15.2 The applicant did not take issue with that assurance or indeed, with the earlier withdrawal. He only raised the alleged absence of authority in February 2016, more than a year after the withdrawal of the review application and many months after Simons had brought that fact to the attention of Commissioner Wilson in the applicant's presence. And when the applicant did write to the registrar claiming that Simons did not have authority, he did not copy Simons van Staden in; and until today he has not put any version by Simons before the court.

[16] But even if Simons did not have actual authority to withdraw the matter, he had ostensible or apparent authority to do so. The Constitutional Court set out the relevant principles as follows in *Makate*:⁹

"The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.

A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was imported as it is into our law in *NBS Bank* and other cases that followed it."

[17] In this case, it appeared to Vodacom that Simons did have the authority to withdraw the application on behalf of the applicant.

⁹ Above paras 46-47.

[18] Both the applicant and Vodacom were represented at the arbitration proceedings before Commissioner Wilson when both parties confirmed, in the presence of the applicant, that the application to review Commissioner Isaacs's ruling had been withdrawn. The applicant did not object. Neither did he do so until a year later. In those circumstances, Vodacom reasonably accepted that Simons had acted on the authority of the applicant.

[19] Given my view on actual and sensible authority, I need not strictly consider whether estoppel is also applicable. But Vodacom would also succeed in its plea of estoppel. The relevant principles were again summarised by the Constitutional Court in *Makate*:¹⁰

“It is significant to note that in the statement¹¹, Lord Denning stressed that: ‘Ostensible or apparent authority is the authority of an agent as it appears to others’. This underscores the distinction between it and estoppel. The features of estoppel make this distinction even more noticeable. The essential elements of estoppel in the field of agency are the following:

- (a) a representation made in words or by conduct, including silence or inaction;
- (b) the representation must have been made by the principal to the person who raises estoppel (the representee);
- (c) the principal must reasonably have expected that her conduct may mislead the representee; and
- (d) the representee must reasonably have acted on the representation to his own prejudice.”

[20] In this case:

20.1 The applicant made a representation – at least through his silence at the CCMA arbitration – that Simons, who remained his attorney, had the authority to withdraw the review application.

20.2 The applicant must reasonably have expected that Vodacom would have been misled by his inaction, given that Vodacom was led to

¹⁰ Above par 45.

¹¹ *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) (*Hely-Hutchinson CA*) at 583 A-G.

believe through an official notice to this Court that the applicant had withdrawn his review application.

20.3 Vodacom acted on that representation to its prejudice. It has accepted that the review application had been withdrawn and that Commissioner Isaacs's ruling in the unfair Labour practice dispute stands. It has an interest in finality. It would be to its prejudice now, two years after the event, to have to incur further costs in defending a review application that had been withdrawn.

Conclusion

[21] For all these reasons, the application to re-open the case cannot succeed.

[22] With regard to costs, I take into account that there is no longer any relationship between the parties; that the employee had initially agreed to the sanction that he then challenged at arbitration; and that the employer has had to incur further unnecessary costs after the dispute had been subject to final and binding arbitration at the CCMA and after the applicant's attorney had withdrawn the subsequent review application. In law and fairness, though, I do not think that the applicant should be ordered to pay the wasted costs for the postponement on 3rd May 2017. Even though he did not need to lead any evidence, he appeared to express himself well in English, and he only asked for an interpreter on the day. It is his Constitutional right to do so. It is also due to no fault of his that the Court had to stand down for another hour on Friday 12th May to wait for an interpreter. Those costs must also be excluded.

Order

The application is dismissed with costs, such costs to exclude the wasted costs incurred by the postponement on 3 May 2017 and the unavailability of an interpreter from 10:00 until 11:00 on 12 May 2017.

Steenkamp J

APPEARANCES

APPLICANT: In person.

FIRST RESPONDENT: Riaz Itkin

Instructed by Edward Nathan Sonnenbergs.