Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C 912/2018

In the matter between:

THABISO JEREMIA LALA & OTHERS	**Applicant**
and	
MEDICLINIC BLOEMFONTEIN	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Second Respondent**
COMMISSIONER: MASILO KOENANE (*N.O.*)	**Third Respondent**

Date of Hearing: 11 June 2020 (in chambers)

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 22 June 2020.

Summary: (Review – jurisdictional ruling – review application misdirection – unnecessary for commissioner to call for representations when correcting a patent error in ruling – commissioner not seized with rescinding earlier condonation ruling)

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed application to review and set aside a ruling of the third respondent dated 24 April 2018, as varied by a variation ruling on 17 July 2018.

[2] The parties have agreed that the matter may be determined on the papers and their heads of argument.

Background

[3] On 8 February 2018, Commissioner T G Chobokoane dismissed an application for condonation for the late referral of the applicants' unfair dismissal dispute. The condonation application was enrolled for hearing on 25 January 2018 under case number FS 1-18.

[4] Neither the applicants nor their attorney, Mr M Khang, were present, but the respondent ('Mediclinic') was represented. Consequently, the condonation application was heard by default in the absence of the applicants. The ruling recorded that they had been notified of the condonation hearing by fax of the hearing on 2 January 2018. The applicants contend that the notice of set down for the condonation hearing had not been sent to their attorneys but to NEHAWU, a union which had never represented them in the dispute.

[5] The applicants were dismissed on 31 August 2017 and their dispute was referred to the CCMA only on 19 December 2017, which was 80 days late. Mediclinic claims that their services were terminated by mutual agreement in terms of which they obtained a voluntary severance package. They approached an attorney on the same day they were dismissed, who wrote

to the unions representing employees at Mediclinic to obtain information. The only response he received was from NEHAWU on 3 November 2017, which merely referred him to the head office of the union. Nothing else was received from the unions. The applicants had to raise funds to pay the attorney and it was only after the final payment was made on 14 December 2017 that the referral was made on 19 December 2017.

[6] The arbitrator hearing the condonation application found that the applicants have not explained what transpired from the date of the dismissal and when they approached their attorney on 31 August and 3 November 2017 when NEHAWU's response was received. They also did not explain why they had not approached the unions, if they could not afford and attorney, and why they had signed full and final settlement agreements with Mediclinic without consulting beforehand with either of the two unions which had been involved in the retrenchment consultations. In the circumstances, the commissioner dismissed the referral, even though he had declined to accept the opposing submissions made by Mediclinic, because it had not complied with CCMA rules in opposing the application.

[7] On 26 February 2018, the applicants' attorneys sent a letter to the CCMA requesting the outcome or progress report relating to the condonation application as a matter of urgency.

[8] On 6 March 2018 the applicants' attorneys received a notice setting the matter down for a process described as "in limine/conciliation" on 29 March 2018. It is important to note that this notice of set down was between the same parties, but under a new case number FSBF 1165-18 and the description of the dispute was that it concerned section 191 [5] [a][iii] of the Labour Relations Act, 66 of 1995 ['LRA'], which refers to a dismissal where the employee does not know the reason for it.

[9] Mediclinic claims it never received a referral form for this dispute and claims that it subsequently learned that the applicant's attorney had filed a second referral. The applicants claim that this is an attempt to mislead the court because no second referral was made and the notice of set down received on 6 March 2018 simply contained a different case number from

the one appearing in the condonation ruling. In light of the condonation ruling already handed down in February and given that no rescission application had been launched by the applicants at that stage, it is mysterious why the CCMA would have enrolled it a second time for a proceeding described on the notice of set down as 'In limine/Conciliation'. In any event, the applicants attended the hearing on that date and it was then that they claim they first learned of the condonation ruling.

[10] The applicants claim that when the Commissioner seized with the matter on that date (the third respondent) realized why they had not attended the condonation hearing on 8 February 2018 he reserved his ruling. On 26 April 2018, nearly a month later, the applicants' attorneys received his ruling, which was subsequently varied. That ruling is the subject matter of this review application.

[11] The first version of the ruling characterized the dispute as an alleged dismissal which was "referred as condonation for the late referral." The arbitrator went on to note the default ruling of the previous Commissioner. He further noted the applicant's contention that they had not received the notice of set down. He thought this might be plausible and that MediClinic might not oppose "the application". He did not indicate what application he was referring to, but judging from what followed it seems that he had a rescission application in mind, viz:

> 'However, it is not for me to speculate, the fact is that, I cannot hear this application. Doing so would amount to reviewing the ruling of my colleague, Commissioner Chobokoane acting *ultra vires*.
>
> The applicant party can either apply for rescission or approach labour court to review my colleague's decision.
>
> RULING
>
> Having considered the parties' submissions by rule as follows:
>
> 1. CCMA does have jurisdiction to hear this dispute.'

It is obvious on the face of the ruling that the order meant to read that the CCMA did *not* have jurisdiction to hear the dispute.

[12] On 10 May 2018, having learned of the earlier condonation ruling issued in February, the applicants claim to have applied for rescission thereof. Although a covering letter to the CCMA bearing the same date and purporting to refer the rescission application to the CCMA is attached to the founding affidavit, there is no other evidence of the rescission application itself or evidence of transmission thereof to the CCMA or Mediclinic, though Mediclinic does not dispute that a rescission application was made. The applicants undertook to provide the condonation application and rescission application when the matter was heard, but nothing was filed with the court subsequently.

[13] The applicants further claim the rescission application was duly enrolled on 27 June 2018 for arbitration but on account of it being postponed because of Mr Khang being ill, it was postponed to 16 July 2018. On 27 June 2018, the hearing was re-enrolled on 30 July 2018, but another notice issued on 24 July somewhat confusingly states that the matter was erroneously enrolled for arbitration on 16 July 2018 and that it would not proceed as scheduled, but the parties would be notified of 'further process'. The applicants do not elaborate on why this notice was issued.

[14] On 17 July 2018, the ruling issued on 26 April was varied to reflect that the CCMA did not have jurisdiction in the referral under case number FSBF 1165-18. A copy of this variation ruling was received in early August 2018 by the applicants' attorney.

Grounds of review

[15] The applicants claim that in varying his ruling, the arbitrator came to a conclusion that no reasonable arbitrator could have arrived at, because:

15.1 he should not have varied the ruling on his own initiative without giving them a chance to respond.

15.2 Further, they contend that he did not apply his mind to the material facts of the application because the ruling they sought rescission of was the condonation ruling and they never received notice of the set down of their rescission application, which they claim was a mistake made by the CCMA and its various commissioners.

[16] Mediclinic claims that, in the absence of the original condonation ruling of 8 February being rescinded or set aside on review, the dispute concerning the applicants' unfair dismissals has been disposed of. It further argues that the application is misdirected because the jurisdictional ruling as varied, has no bearing on the condonation ruling which still stands.

Evaluation

[17] Insofar as it is claimed the arbitrator should have addressed the applicants' rescission application there is no basis for this submission. His ruling was made before any rescission application had been launched. There is no evidence that the subsequent rescission application launched in May 2018 was even placed before him by the time he corrected his ruling in July 2018. Simply put, he was never seized with having to determine a rescission application.

[18] In relation to the arbitrator's variation of his ruling, it is patently obvious on the face of his original ruling that he clearly did not believe he had jurisdiction to entertain the dispute in view of the previous condonation ruling not being reviewed or rescinded, which are the very alternative courses of action he advised the applicants to consider. In his reasoning he considered that the applicants might have had some prospect of overturning the condonation application but "…, it is not for me to speculate, the fact is that, I cannot hear this application. Doing so would amount to reviewing the Ruling of my colleague, Commissioner, Chobokoane and acting *ultra vires.*" This could hardly be a clearer expression of his understanding that he could not hear the dispute. Accordingly, his variation of the ruling was merely giving effect to its true and obvious meaning, which he was empowered to do under s 144(b) of the Labour Relations Act, 66 of 1995, which provides that:

> 'Any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling -
>
> (a) …;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; …'

(emphasis added)

[19] When it comes to the correction of such a patent error, which is essentially a typographical mistake, there is no reason why he needed to canvass the parties before he corrected it. In this regard, it is unclear what the applicants would have submitted in any event if they had they been asked to make representations before he made the correction. Nowhere do they suggest that the correction could never have been simply intended to bring the ruling in line with what the arbitrator intended. The fact that his error might have been brought to his attention on seeing a copy of a letter from Mediclinic to the senior convening commissioner, alerting the latter to the error, is neither here nor there. He was not amending the substantive ruling he had clearly intended to make.

[20] In view of the above, the review application cannot succeed.

Costs

[21] At the applicants have relied on an attorney and do not appear to be the agents of the mistakes made in prosecuting this matter, even if they need not have sought an attorney's assistance in filing the initial referral, I am disinclined to make an adverse cost award against them.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

REPRESENTATIVES

APPLICANTS:	Mphafi Khang Inc
FIRST RESPONDENT:	Fairbridges, Wertheim Becker