IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C155/18

In the matter between:

FOOD AND ALLIED WORKERS UNION

obo Raeez Swartz — Applicant

and

CCMA — 1st Respondent

URSULA BULBRING — 2nd Respondent

ALBANY BAKERIES – TIGERBRANDS

FIELD SALES (PTY) LTD — 3rd Respondent

Date heard: 2 December 2020 by virtual hearing
Delivered: 31 March 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an *in limine* Ruling by the second respondent (the Commissioner), in which she found that the dispute referred to the CCMA had become settled and accordingly that she did not have jurisdiction to hear the dispute. There is also an opposed application for condonation for the late filing of the review. I deal with the condonation application at the outset.

[2] The Ruling was issued on the 29 September 2017. The notice of motion in the review application is dated the 13 of March 2018. As the third respondent (the Company) has pointed out, it was filed some four months late. This cannot be regarded as a short delay.

[3] The applicant (the Union) avers that the matter was late by 22 days. In submission this estimate was explained as a mistake by the union i.e. that it based the delay on the 90 day period for referrals rather than the 6 week period for reviews. The explanation for the delay is contained in three paragraphs in the founding papers. These refer to a family tragedy that befell an official in the legal department of the union which led to a backlog in dealing with cases to the Labour Court. No dates or detail regarding the four month period is given.

[4] The four month delay is not insignificant. However, it is not excessive, and this is not a case where no explanation whatsoever is given for the delay. Mr Whyte for the third respondent emphasized the long delay in the matter coming before Court, and the need for the principle of the speedy resolution of disputes to be taken into account. He is correct to do so. However, in this particular matter there was an agreement between the parties that the Company consents to the late filing of the record and the union on its part, consents to the filing of a second answering affidavit by the Company. In all these circumstances, I am prepared to grant condonation and entertain the merits of the review.

[5] This is a jurisdictional ruling and as the Court in summarized in **Moses v Commission for Conciliation, Mediation & Arbitration & others**[1] :

"[11] ……In a review of a jurisdictional ruling, the applicable threshold is not that of reasonableness; the review court must determine whether or not the commissioner's decision is correct. In SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC) the LAC said the F following:

'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The

[1] (2019) 40 ILJ 2371 (LC)

significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.'

[12] More recently, in Phaka & others v Bracks NO & others (2015) 36 ILJ 1541 (LAC); [2015] 5 BLLR 514 (LAC), the LAC confirmed that when the jurisdiction of an arbitrator is in question (the case concerned a bargaining council but the same holds for the CCMA), the issue is whether he or she objectively had jurisdiction in law and fact — a finding that the arbitrator had jurisdiction because he or she might reasonably have assumed as much 'is wholly untenable in principle'. In other words, the question of the reasonableness of the commissioner's decision does not arise and in effect, the commissioner's decision is of no real consequence. The court must decide the jurisdictional issue de novo on the basis of the record filed in the review proceedings."

[6] The transcribed record reflects that the representatives of the parties to the contested settlement agreement were before the Commissioner. Ms Dhlamini for the Company and Mr Mbana for the Union. The said agreement that the Company relied on was not a written agreement signed by the parties, but was in part oral and in part consisted of email correspondence between the two of them. In addition, two third parties, an employee of Consul Glass, and the dismissed employee, Mr Swartz, were potential witnesses to conversations relevant to the question of whether the Company had performed its obligation in terms of the settlement agreement, were not present at the proceedings.

[7] The Commissioner did not put either representative under oath and instead heard submissions from both of them. It was on the basis of these submissions, and in the absence of the third parties, that she came to her decision on the terms of the terms of the settlement agreement and its conclusion. In other words she

did not hear evidence relating to the purported conclusion of the settlement agreement.

[8] I should add that the transcript of the arbitration shows that the terms of the agreement were disputed in submission before the arbitrator. In the Court's view, the Commissioner committed a gross irregularity in failing to hear evidence in respect of the alleged settlement agreement. Without evidence she was unable to determine whether she had jurisdiction or not, thus also committing a mistake of law in coming to a conclusion in the matter. Because there is no evidence before this Court to determine whether the Jurisdictional Ruling is correct or not, the matter must be remitted for re-hearing.

[9] I therefore make the following order:

Order

1. Condonation for the late filing of the review is granted.

2. The Ruling under case number WECT 3796-17 is reviewed and set aside.

3. The Jurisdictional point *in limine* is to be remitted to the first respondent for re-hearing before a Commissioner other than the second respondent.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Company: Norton Rose

For the Union: Union Official