



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Reportable
 C725/2021

In the matter between:

DETAWU obo NONCEBA ALICE TSHWILI

Applicant

and

BIDWEST SERVICES (PTY) LTD t/a
BIDWEST PRESTIGE CLEANING SERVICES

Respondent

Date heard: 3 May 2023

Delivered: 19 July 2023 by means of email; deemed received at 10.00hr on the 20 July 2023

Summary: Point in limine: res judicata and the doctrine of functus officio raised by the respondent; conciliating commissioner ruled the CCMA had jurisdiction in respect of the dispute, and in a second ruling an arbitrating commissioner found that the matter should serve before the Labour Court for want of jurisdiction. Held that the distinct processes of conciliation and arbitration as reflected in Rules 18 and 22 of the CCMA Rules mean that the point in limine must fail.

JUDGMENT

RABKIN-NAICKER J

[1] The respondent (the Company) has raised a point *in limine* which the parties have agreed to be heard before the trial of the action, as set out in the pre-trial minute.

[2] The point *in limine* reads as follows:

- “1. The Applicant’s dispute in this matter was referred to the CCMA under its case number WECT2036-21.
2. On 25 May 2021, Commissioner C Jacobs of the CCMA issued a ruling that “*the CCMA has the necessary jurisdiction to arbitrate the dispute*” (“**the First Ruling**”).
3. The First Ruling has not been set aside.
4. The parties are bound by the First Ruling in accordance with the principle of *res judicata* until such time as that ruling has been set aside.
5. On 18 November 2021, Commissioner JP Hanekom of the CCMA issued a jurisdictional ruling in respect of the dispute that: “*the CCMA does not have jurisdiction to entertain the instant dispute*” (“**the Second Ruling**”).
6. The CCMA was *functus officio* on the issue of its jurisdiction after the First Ruling and consequently the Second Ruling is void ab initio and of no force and effect.
7. The Applicant is thus precluded by the principle of *res judicata* from referring the matter to this Honourable Court and contending that this court has jurisdiction in the face of the First Ruling.”

Evaluation

[3] Was the Commissioner who made the Second Ruling precluded from doing so on the bases submitted by the respondent? The First Ruling was made pursuant to Rule 14 of the CCMA which reads:

“14 How to determine whether a commissioner may conciliate a dispute

If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation.”

[4] It is trite that the process of conciliation involves an attempt by a Commissioner to settle a dispute between the parties. It does not involve an adjudicative process leading to the granting of relief. This is distinct from the arbitration stage of proceedings under the auspices of the CCMA.

[5] Rule 22 of the CCMA Rules provides as follows:

“22. How to determine whether a commissioner may arbitrate a dispute

If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has jurisdiction to hear the dispute.”

[6] The duty of a Commissioner as set out in *Rule 18* above, extends only to determining jurisdiction to conciliate, as is plain from the wording of the Rule. If the ruling made by the Commissioner is to the effect that the CCMA does not have jurisdiction to conciliate the dispute, that decision is final and binding unless it is rescinded or reviewed. It is trite that a party must either rely on section 144 of the LRA to attempt to rescind the ruling, or approach the Labour Court for a review of that ruling.

[7] *Rule 22* explicitly deals with the requirement for a Commissioner to make a determination as to jurisdiction when the issue arises during arbitration proceedings. This may arise after a certificate of non-resolution has been issued after conciliation, or without formal conciliation, after 30 days have expired since the referral (or dies agreed to by the parties), and the dispute remains unresolved. ¹ In the Court's view, the jurisdictional ruling may also, as in this case, be made in the wake of a jurisdictional ruling that the CCMA can *conciliate* the dispute, but conciliation has failed, and the matter has been referred to arbitration.

¹ Section 191(5) of the LRA

- [8] The very inclusion of *Rule 22* providing that an arbitrator must determine a jurisdictional issue should it arise, reflects that in practice, in the face of evidence and legal argument in arbitration proceedings, the question of jurisdiction may require a ruling. Thus the decision of a conciliating commissioner that the CCMA has jurisdiction to conciliate cannot be considered as final, or as one that clothes the arbitrating commissioner with jurisdiction. If it was to be so considered, *Rule 22* would include a proviso to that effect. In my judgment, the Rules as drafted, properly reflect the legal distinction between conciliation and arbitration proceedings.
- [9] The respondent has relied on the doctrine of *functus officio*. In *MEC for Finance, Eastern Cape and Others v Legal Practice Council and Others*²², a full bench of the Eastern Cape division dealt with the doctrine stating that:
- “[60] At common law the court has no power to set aside or alter its own final order, as opposed to an interim order or an interlocutory order. In *Zondi* the Constitutional Court explained the foundation for the rule, thus:
- ‘The rationale for this principle is twofold. In the first place a Judge who has given a final order is *functus officio*. Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order.’”
- [10] Given the nature of conciliation, and the CCMA rules referred to above, a jurisdictional ruling that the CCMA does have the power to conciliate cannot be regarded as a final ruling in respect of its power to arbitrate. I am of the view therefore that the Second Ruling *in casu* is not in violation of the *functus officio* doctrine.
- [11] The respondent also places reliance on *res judicata*. *Res judicata* deals with the situation where the same parties are in dispute over the same cause of

²² 2023 (2) SA 266 (ECMk)

action and the same relief. As the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corp*³ stated

“[50] The leading case on the definition of 'cause of action' is McKenzie. In McKenzie Maasdorp JA approved the definition set out in the English case of *Cooke v Gill* and defined 'cause of action' as —

'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[51] Over a decade after McKenzie, the court in *Abrahamse & Sons* explicated this phrase as follows:

'The proper legal meaning of the expression cause of action is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.'”

[12] Conciliation proceedings under the LRA are the prelude to and are distinct from arbitration proceedings - a stage in a process in which the parties are brought together to try and settle their dispute through privileged interaction under the auspices of the Commissioner. The due presentation of the entire material facts and/or determination of an enforceable claim are not required or present in conciliation proceedings. Thus *res judicata* cannot be said to apply in respect of the two Rulings *in casu*.

[13] In view of all of the above, the respondent's point *in limine* must fail. The Second Ruling stands as binding on the parties who have not sought to rescind or review it.

[14] I therefore make the following Order:

Order

1. The Respondent's *in limine* objection to the jurisdiction of this Court is dismissed.

³ 2020 (1) SA 327 (CC)

2. There is no order as to costs.

H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant in the point in limine: Derek Haupt Attorneys

Respondent: Union Official