



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable/Not Reportable

**Case No: JR 852/15**

In the matter between:

**LIBERTY GROUP LIMITED**

**Applicant**

And

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**THEMBEKILE NSIBANYONI N.O.**

**Second Respondent**

**SACCAWU obo TIYISELANI MAPHIRI**

**Third Respondent**

**Heard: 5 July 2016**

**Delivered: 20 July 2016**

**Summary:**

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**JUDGMENT**

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MYHILL, AJ

Introduction

- [1] This is an application, *inter alia*, to review and set aside the arbitration award issued by the Second Respondent, dated 23 April 2015, under case number GAJB 24606-13. The application is brought in terms of sections 158(1)(g) and 145 of the Labour Relations Act 66 of 1995 (“the Act”) on the basis that the Second Respondent acted *ultra vires* when making a rescission ruling *mero motu*, ostensibly in terms of section 144 of the Act on the basis of an “obvious error of law”.
- [2] There is no opposition to this application but the Applicant, nevertheless, has to make out a case for the relief it seeks.

Background

- [3] The employee (Maphiri) was dismissed on 25 September 2013 whereafter she referred a dispute to the CCMA on 1 October 2013. On 22 October 2013, the Applicant filed an application contending that the CCMA had no jurisdiction to entertain the matter as Maphiri was contractually obligated to challenge her dismissal by way of Compulsory Private Arbitration. The Commissioner dismissed this jurisdictional point and ruled that the arbitration should proceed in the CCMA.
- [4] This ruling was, however, successfully taken on review before the Labour Court which ordered that:

‘The matter is remitted to the First Respondent [the CCMA] which is to exercise its discretion of directing the parties to a compulsory private arbitration or to appoint a Commissioner specifically to arbitrate this matter as envisaged in section 147(6) of the Labour Relations Act 66 of 1995.’

- [5] The CCMA then re-enrolled the matter for arbitration where the Applicant raised the jurisdictional point again. The Second Respondent heard and considered full argument on the point and allowed the parties time to deliver additional representations before making a ruling on 7 April 2015, in favour of the Applicant, ordering that the matter be referred to private arbitration.
- [6] Despite this, on 23 April 2015, the Second Respondent, of her own accord, handed down a rescission ruling in terms of section 144 of the Act. She stated that it was her erroneous belief that she was vested with jurisdiction to decide whether the CCMA had to arbitrate this matter or not. She interpreted the order of the Labour Court to mean that the CCMA has a discretion to order that the matter should be referred for Compulsory Private Arbitration or to appoint a commissioner to arbitrate the matter. She found that by scheduling the matter for arbitration, the CCMA had exercised its discretion to have the matter arbitrated by the CCMA and should thus have proceeded to arbitration. She decided that she had acted *ultra vires* since the decision on jurisdiction had already been made by the CCMA. She thus rescinded her Ruling, dated 7 April 2015.

#### Grounds of Review

- [7] Mr Theron, on behalf of the Applicant, submitted that in terms of section 144 (b) of the Act, a commissioner may vary or rescind a ruling/award:

‘In which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission.’

- [8] He submitted that this is intended to allow a commissioner to correct a clerical, arithmetical or other obvious error in the ruling/award so as to give effect to its

true intention. This power does not extend to altering its intended use, substance or the conclusion arrived at. In this respect, the Second Respondent is *functus officio*.

- [9] He referred to the case of *McDonald SA (Pty) Ltd v CCMA and Others*<sup>1</sup> as authority for this.
- [10] He submitted that the rescission ruling is premised on the Second Respondent's mistaken conclusion that she had committed an obvious error of law by considering the *in limine* application and adjudicating the jurisdictional issue under circumstances where the First Respondent had already done so. He submitted that this could never have been the case as the First Applicant had not heard the submissions of the Applicant and the Respondent on this issue.
- [11] The Second Respondent had thus failed to properly apply her mind, thereby committing a gross irregularity by acting beyond the bounds of her statutory duty and power when delivering the rescission ruling. She had also failed to apply the *audio alteram partem* rule so her decision should be reviewed and set aside.
- [12] The Second Respondent's own Rules provide for the manner in which jurisdictional disputes must be determined. Rule 22 provides:
- '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 arbitrate the dispute.'
- [13] This was in fact the process initially followed when the *in limine* application was considered and later discarded. The Second Respondent thus failed to apply the Rules of the CCMA.
- [14] He submitted that as an automatic consequence of law, setting aside the

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<sup>1</sup> [2003] JOL 11387 (LC).

rescission ruling would allow the jurisdictional ruling to stand. To avoid any uncertainty, however, the Applicant seeks an order declaring that the jurisdictional ruling of the Second Respondent, dated 7 April 2015, is of lawful force or effect.

### Evaluation

- [15] I agree with the submissions made by Mr Theron. The Second Respondent did not make an obvious error by deciding that she was vested with jurisdiction to decide whether the CCMA had to arbitrate this matter or not. By setting the matter down for arbitration, the First Respondent (CCMA) did not exercise its discretion to determine whether it had jurisdiction to determine the dispute referred to it. It merely made an administrative decision to set it down for arbitration. It could not have exercised the discretion in this regard as required by the decision of the Labour Court. It could not have done so because in order to exercise such discretion properly, it would have to hear submissions from both parties in this regard. It did not do so.
- [16] In terms of Rule 22, this discretion was to be exercised by the commissioner appointed by the First Respondent to arbitrate the dispute if it appeared that a jurisdictional issue had to be determined. A jurisdictional issue was raised by the Applicant before the Second Respondent on 18 March 2015 and she heard the submissions from both parties in this regard before exercising her discretion in finding that the CCMA did not have discretion as the agreement between the parties made it compulsory for the employee to refer the dispute to private arbitration.
- [17] I agree that she was *functus officio* after she made her ruling in this regard on 7 April 2015 and acted *ultra vires* when she rescinded this Ruling on 23 April 2015.
- [18] I agree that the Second Respondent committed misconduct, alternatively, a gross irregularity in terms of section 145 (2)(a) in the conduct of the arbitration proceedings/duties by rescinding her Ruling, dated 7 April 2015.

[19] In the premises, I make the following order:

- 19.1 The Rescission Ruling of the Second Respondent, dated 23 April 2015, under case number GAJB 24606-13 is reviewed and set aside;
- 19.2 The Jurisdictional Ruling made by the Second Respondent, dated 7 April 2015, is declared to be of lawful force and effect;
- 19.3 There is no order as to costs.

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Myhill AJ,

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Adv. P.L. Theron

Instructed by: Hlatshwayo, Du Plessis, Van der Merwe, Nkaiseng Inc.

For the Respondents: No appearance

Instructed by:

LABOUR COURT