Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J 5767/00

2002-06-19

In the matter between

SAB Applicant

and

CCMA & OTHERS Respondent

J U D G M E N T

NTSEBEZA AJ:

[1] This is an application in which the applicant seeks to review and correct or set aside the condonation ruling which was given by the second respondent, one Tembekile Nsibanyoni, acting in her official capacity as an arbitrator in the Commission for Conciliation Mediation and Arbitration, the first respondent. In respect of case reference number NP10324 that award was made on 30 October 2000. The application also

seeks to review and correct or set aside the jurisdiction ruling which was given by one Ebrahim Patella who also acted on behalf of the first respondent in respect of case reference NP10324 on 1 December 2000. There is a request that I should declare that the first respondent has no jurisdiction or had no jurisdiction to conciliate and/or arbitrate the disputes referred to it under the case number reference NP10324.

[2] There is no opposition to this application. Indeed, the facts have been summarised both in the papers as well as in the heads of argument prepared by the applicants.

[3] The history of this matter is as follows. On 19 September 1997, following a disciplinary inquiry, the fourth respondent, Joel Setati, was dismissed. His dismissal was upheld at an appeal hearing. There was a national recognition agreement in place between the applicant and the union to which the fourth respondent belonged and central to that agreement was a provision that required an employee who disputed the fairness of the dismissal to notify the applicant within 30 days of the date of his dismissal whereafter the dispute would be referred to private arbitration. Where the employee did not so notify the applicant of a dispute within a 30 day period, the dispute would be deemed to be resolved.

It is common cause that the fourth respondent did not do so within the requisite period. It was only on 1 December 1997 that the applicant received notification of a dispute and a request for arbitration. In response, the applicant notified the representatives of the fourth respondent that in view of their failure to comply with the provisions of the agreement that was in place, their request for arbitration could not be entertained. In March of the following year some three and a half months later, applicant received a notification from the attorneys acting for the fourth respondent requesting the applicant to entertain a referral to arbitration in relation to the fourth respondent's dismissal to which the applicant advised the attorneys that it would not be possible to do so because the provisions of the agreement in place had not been complied with. 18 Months later the applicant was to receive notification by telefax from the first respondent, to the effect that the fourth respondent had referred an unfair dismissal dispute to the first respondent, and that as this referral was late, the fourth respondent had been required to apply for condonation within fourteen days of receipt of the first respondent's letter, failing which the first respondent would close its file.

[5] It is clear from the papers that the applicant did not thereafter receive a copy of the fourth respondent's condonation application and yet on 18 November the applicant advised the first respondent that in view of the provisions of the recognition agreement, the first respondent did not have jurisdiction in relation to the fourth respondent's unfair dismissal dispute. It is also clear on the papers that the application for condonation by the fourth respondent was delivered in or about July 2000. This condonation application was never received by the applicant and the applicant was only to receive a ruling on 30 October 2000 in which condonation was granted by the first respondent.

[6] On 3 November 2000 (again it is common cause), the applicant received notification of a conciliation hearing from the first respondent. From the papers it is clear that there was no indication in the file of the first respondent that the condonation application had ever been served on the applicant. The fourth respondent, in applying for condonation had not advised the first respondent of either the existence of the agreement or of the provisions of the agreement. In his condonation application it is clear the fourth respondent led the CCMA, (the first respondent), to believe that the applicant

had deliberately failed to schedule an appeal hearing which had led to the delay in the fourth respondent referring a dismissal dispute to the first respondent.

[7] Even at the conciliation proceedings in November 2000 the applicant raised the issue of jurisdiction and argued that the first respondent did not have any jurisdiction in relation to the unfair dismissal of the fourth respondent because of the provisions of the agreement that was in place between the fourth respondent and the applicant. The attitude of the third respondent was that because condonation had been granted the first respondent had already assumed jurisdiction hence he could therefore not revisit the issue.

[8] No certificate of outcome was issued pending these proceedings. When the applicant received the written ruling on jurisdiction by the third respondent on 1 December 2000, the applicant, on 14 December 2000, instituted these review proceedings.

[9] It is common cause that in the interim between the date of the institution of these proceedings and today, the first respondent addressed to the fourth respondent, and to the applicant, a letter in which the first respondent conceded that both administrative and legal errors had occurred in the matter and

that the first respondent therefore proposed that the rulings and the processes to date should be abandoned.

[10] It does appear that this was communicated in so many words to the fourth respondent when he attended at the offices of the first respondent, but because there was no undertaking from him in writing that he accepted the concession by the first respondent that some administrative problems have attended the granting of all processes heretofore, the applicant was constrained to come to this court and present an argument that would seek to review both the jurisdiction issues as well as the condonation ruling.

[11] The applicant has placed before me legal argument by way of very comprehensive heads. I really have nothing to add to the heads that have been drawn, and to the submissions made on behalf of the applicant. It seems clear to me that as far as the jurisdiction issue is concerned, the law is quite clear that where there is an agreement in place, an agreement that indicates that the parties to the agreement had voluntarily entered that agreement, such agreement should be given primacy.

[12] In *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council & Others* 2001 22 (ILJ) 2684, this

court emphasized this principle namely that the Labour Relations Act encourages voluntarism and collective agreements which should be given primacy over the provisions of the Labour Relations Act. Reference is made in that case to other cases notably *Free State Buying Assosiation Ltd t/a Alpha Pharm v SA Commercial Catering & Allied Workers Union & Another* (1998) 19 ILJ 1481 (LC); [1999] 3 BLLR 223 (LC).

[13] I accept the submissions made on behalf of the applicant in this application that when parties to a collective agreement agree to resolve their dismissal disputes by way of a private arbitration, they clearly seek to regulate their own affairs without having recourse to the Labour Relations Act save only in those instances which are made exceptions by provisions of Section 158(1)(g) of the Labour Relations Act.

[14] I also accept the submissions made on behalf of applicant that if a dispute resolution procedure is provided for in a collective agreement, then the Commission for Conciliation, Mediation and Arbitration does not have jurisdiction. This much was stated in the case of *Mthimkhulu v CCMA and Another* (1999) 20 ILJ 620 (LC) particularly at paragraphs 26 and 27:

"**Collective agreements enjoy precedence over the provisions of the Act in this regard. The Act prefers collective agreements concluded on a voluntary basis by the parties concerned, in keeping with the**

objectives of the Act. Section (1)(c)(i) and (d)(i) of the Act contains the objectives, to provide a framework within which employees and the trade unions, employers and employers' organizations can ... collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy' and to promote orderly collective bargaining."

[15] And in paragraph 27, my brother Basson, goes on to say:

"**In the event, precedence is given to the products of collective bargaining and as a rule the labour court will uphold the products of collective bargaining, save for instance where the collective bargaining agreement itself is *contra bonos mores* and therefore void on such basis.**"

[16] I cannot agree more with the further submission made by the applicant that where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, the particular tribunal cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of such jurisdiction are satisfied. It is necessary for the requisite jurisdictional facts to exist before a tribunal can claim to have power to act.

[17] It is quite clear to me that in this particular case the third respondent failed to apply his mind to the existence or otherwise of the necessary jurisdictional issues before him in accordance with the requirements of the Labour Relations Act. I am quite satisfied that this alone constituted a gross

irregularity, the nature of which should entitle the applicant to be successful in his application on that basis alone.

[18] I am satisfied that first respondent did not have the necessary jurisdiction to consider the dispute and that consequently the decision of both the second and third respondent fall to be set aside.

[19] It now brings me to the question of whether the applicant is entitled to succeed in its submission that in granting condonation when the fourth respondent had delivered his condonation application some nine months after the 14 day time period specified in the first respondent's letter had expired, the second respondent had committed a gross irregularity which has resulted in a grave injustice to the applicant.

[20] I am satisfied that the second respondent's condonation ruling happened in circumstances where it is arguable, in favour of the applicant, that the second respondent did not apply his mind to the issue. In any event it is clear that he never gave the applicant an opportunity to make representations as to why the fourth respondent's failure to apply for condonation within the specified 14 day period, should in itself be condoned. The applicant was reasonably entitled to rely on

the statement that had been sent to the fourth respondent that should his condonation application not be received within 14 days, the first respondent would close its file.

[21] It is also clear that all the correspondence by way of telefax machine that had been sent to the first respondent by the applicant, was never considered by the second respondent in granting the condonation.

[22] I am satisfied, on that basis therefore, that in granting condonation, the second respondent exceeded its powers since the first respondent did not have jurisdiction in relation to the fourth respondent's dismissal dispute, and in any event the condonation came woefully out of time by way of an application made by the fourth respondent seeking such condonation.

[23] I am also satisfied that this application for review, even though it was brought in 2000, has been brought within a reasonable time, and that the delay in it being heard only today does not negatively reflect on the applicant.

[24] In the circumstances I am satisfied that a proper case has been made on behalf of the applicant, for the relief it seeks, and I accordingly order as follows:-

1. The condonation ruling given by the Second Respondent in

respect of case reference **NP 10324** on 30 October 2000 is reviewed and set aside.

2. The jurisdiction ruling given by the Third Respondent in respect of case reference **NP 10324** on 1 December 2000 is reviewed and set aside.
3. The First Respondent had no jurisdiction to conciliate and/or arbitrate the dispute referred to it under case reference **NP 10324.**

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D B Ntsebeza

Acting Judge

e Applicant: Mr. T. Ngcukayithobi

On behalf of Bowman Gilfillan Inc.

e Respondent: No appearance