IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case No: JR892/07

REPORTABLE

In the matter between:

HENDRED FRUEHAUF TRAILERS (PTY) LTD	Applicant
and	
B DOMAN NO	First Respondent
K G MNGEZANA NO	Second Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Third Respondent
NUMSA obo MIYA	Fourth Respondent

JUDGMENT

MOSHOANA, AJ

INTRODUCTION

[1] On 07 November 2008, I issued an order in the following terms:-

1. The Review Application is dismissed with costs;
2. The application in terms of Section 158(1)(c) is hereby granted.

[2] What follows hereunder are the reasons for such an order.

[3] As a point of departure I need to mention that the Applicant was seeking to review two decisions. The first was by the First Respondent and the second was by the Second Respondent. The Second Respondent issued a condonation ruling and subsequently the First Respondent issued an award in favour of the Fourth Respondent.

BACKGROUND FACTS

[4] On or about 01 May 2002, the Applicant effected retrenchment and a number of employees including the individual Fourth Respondent, one Miya, were dismissed. The fairness of the dismissal was not challenged. The retrenched employees were paid severance pay in accordance with the relevant provisions of the Bargaining Council and

not in terms of the Collective Agreement between NUMSA and the Applicant. As a result of that a dispute in relation to the severance pay arose, the contention being that the severance pay was not paid in accordance with the Collective agreement. That dispute was referred to private arbitration in terms of Clause 7 of the Collective Agreement. At the arbitration proceedings, the parties arrived at an agreed statement of facts. A list of employees was prepared and agreed to be employees who would benefit out of the award, if a favourable one is issued. It is worth mentioning at this stage that the individual Fourth Respondent, Mr Miya was not in that list of the employees who would benefit out of a favourable award. At the conclusion of a private arbitration, the arbitrator issued an award in favour of the listed members of the Fourth Respondent, NUMSA. The effect of the award was that the Applicant should pay the individual members severance pay in terms of the Collective Agreement. As pointed out, the individual Fourth Respondent, Mr Miya was not included in the list. As a result an application was brought in terms of section 158 to make the award an order of court .

[5] On or about 13 October 2003 the Fourth Respondent's union, NUMSA, brought an application in terms of section 158(1) to this

Court, under Case Number J583/03, in which it sought to have the individual member, Mr Miya, included in the award. The application was opposed and subsequently withdrawn by NUMSA. On 12 November 2003, the Fourth Respondent union wrote a letter to the Applicant requesting that the matter in relation to the payment of the severance pay of Mr Miya be referred to private arbitration. The Applicant refused to agree to this. In its view, the matter had already become dealt with by private arbitration and has since become *res judicata.*

[6] On 03 December 2003, NUMSA referred a dispute concerning the interpretation and application of a Collective Agreement to the Third Respondent. The dispute was referred to arbitration, at which point the Applicant raised its objections. Commissioner P Stone heard the matter and came to the conclusion that there was a delay in the referral and that a proper application for condonation be made in terms of the CCMA rules. On 05 October 2005, the Fourth Respondent brought an application for condonation of late referral of the dispute. This application was also opposed by the Applicant. The condonation hearing was set down on 26 September 2006, before the Second Respondent. The Second Respondent heard argument from

both sides and issued a ruling to the effect that condonation has been granted and the matter should proceed to arbitration. On 13 February 2007, the matter was enrolled for arbitration. At the end, the First Respondent issued an award dismissing all the objections and ordered the Applicant to pay the severance pay as stipulated in clause 1 of the Collective Agreement, entered into on 22 August 1990, within ten (10) of receipt of the award. The Applicant was aggrieved by the award and brought an application in terms of Section 145 of the Labour Relations Act. In the selfsame application, the Applicant sought to review and set aside the ruling issued by the Second Respondent (condonation ruling). As it would be apparent, the ruling by the Second Respondent was issued long after the six week period to launch a Review Application. Without seeking condonation in the Notice of Motion, the deponent to the Founding Affidavit stated the following:-

"1. As stated above the award of the Second Respondent was handed down on 25 October 2006 in terms of which condonation was granted to the Fourth Respondent;

2. *The application is now brought some five (5) months later;*

3. *It is however clear from what is set out above, that the Applicant has raised three objections in limine from the outset. The CCMA*

chose to determine these objections in a piecemeal fashion, by firstly determining the condonation issue and then the other two objections in limine.

4. *The final determination of the objections in limine took place by way of the award of the First Respondent which was served on the Applicant on 09 March 2007;*

5. *It was entirely rational and justified for the Applicant to have first waited for the determination of all of its objection in limine before approaching the above Honourable Court for relief. This is a responsible and proper cause of action and in fact has support in law. Legal argument in this regard will be submitted to the above Honourable Court at the hearing of this matter.*

6. *Also, the facts of all three objections in limine as is clear from what is set out above are so interwoven and commonly bound, that it is simply inappropriate to determine the matter piecemeal. The CCMA in fact made this error.*

7. *In so far as it therefore is required and on the above grounds, it is prayed by the Applicant that condonation should be granted for any late filing of this application in respect of the Second Respondent's award.*

THE GROUNDS OF REVIEW

[7] The Applicant sought to raise as a ground of review, the fact that the Third Respondent lacked jurisdiction to entertain the dispute, on the basis that the matter has become *res judicata*, and that there was a pending litigation. The Applicant further contended that since there was an agreement to have a dispute dealt with by way of a private arbitration, the CCMA had no jurisdiction.

ARGUMENT

[8] In court, Groenewald appearing for the Applicant persisted that the CCMA did not have jurisdiction on the basis that the matter has become *res judicata* and there was a *lis pendes*. During the course of her submission, the Court drew her attention to the fact that the ruling by the Second Respondent was made outside the six weeks period and there was a need for a condonation application. On that score, she sought to seek a postponement of the matter in order for an application for condonation to be brought. In reply, after the Fourth Respondents' representative Mr Ngako pointed out to the court an

attempt to seek condonation, she conceded that, that which was purported to be an application for condonation does not set out an explanation why there was a five months delay. At best, she submitted that because the Applicant did not wish to take a piecemeal approach it waited for an award to be issued before approaching the court for review. On the other hand she conceded that from the papers it was clear that Mr Miya intended to be a party to the private arbitration but did not become a party to the private arbitration. She also conceded that the issue of *lis pendens* was not raised at the arbitration proceedings, however she contended that it is well within the entitlement of the Applicant to raise such a point at the Labour Court.

[9] On the other hand Mr Ngako submitted that the principle of *res judicata* did not find application, in that Mr Miya was not a party to the private arbitration. He further argued that the issue of *lis pendes* was indeed not raised but *lis pendes* would mean same dispute before different forums. He submitted that what was sought in the Labour Court was different from what was sought at the CCMA. In the first instance at the CCMA, the Fourth Respondent was seeking interpretation and application of a Collective Agreement whereas in

the Labour Court it was seeking a declaratory to the effect that Mr Miya is to be joined in the award issued by the private arbitrator.

ANALYSIS

[10] The first issue to be decided is the condonation for late filing of the Review Application in respect of the ruling by the Second Respondent. It is clear that the Applicant brought the Review Application outside the six weeks period. The Applicant only states that there was a delay of five months. Other than setting out the view it holds, being that it did not want to approach the matter in piecemeal, it offers no explanation why there was a delay of five months. In any application for condonation, an Applicant must provide a reasonable explanation for the delay. In my view, it is not a reasonable explanation to state a view held by a litigant. It does appear that the Applicant took a gamble that if it had succeeded in raising its objections at the arbitration proceedings, it would not have brought the application for review of the ruling granting condonation. Surely if the granting of the condonation was something that was done irregularly, the Applicant should have brought an application for

review at the time when it held a view that same was granted irregularly.

[11] Other than the fact there was no explanation at all, I hold a view that the Applicant had no prospects of success in having the condonation ruling reviewed and set aside. For practical reasons, even if I were to review and set aside the condonation ruling, what then follows is whether the subsequent award by the First Respondent is a reviewable award? If I find, which I did, that the First Respondent's award is not reviewable, then it would have been purely academic to order that the ruling is reviewed and set aside. An argument may be raised that if condonation is set aside, it follows as a matter of course that the First Respondent would not have had jurisdiction to arbitrate. The difficulty with that argument is that it is in its nature belated, in that the First Respondent acquired jurisdiction to arbitrate because there was a condonation for the late referral. It does not accord to a litigant to approach matters in the manner in which the Applicant did. It was in my view unwise not to challenge the ruling for granting of condonation. The nett effect of such a challenge would have been that the arbitration probably might have been stayed pending the outcome of the decision of the court on the reviewability of the

condonation ruling. In which event, if the court found the condonation ruling reviewable, it then becomes appropriate to argue that since condonation has not been granted, the CCMA lacked jurisdiction to arbitrate. However this matter stood at a different level, in that Commissioner Stone was the one who directed the parties to bring a condonation application. His ruling was not challenged but was abided by the Fourth Respondent. In terms of Section 24, there is no provision made in respect of the time period within which the referral of such disputes should be made. It then follows that if there are no prescribed time periods there is no need for condonation. Referrals to the CCMA are not like reviews in terms of which it could be said that once a reasonable time has elapsed without bringing the application, such could be the basis to refuse to entertain the application, particularly where there is no condonation application. It does appear that Commissioner Stone approached this matter on those basis. Having said that, the effect of the ruling by the Second Respondent is that he condoned something that is not to be condoned as it were.

[12] In the matter of **Premier of Gauteng and Another v Ramabulana NO and Others (2008) 4 BLLR 299 (LAC)**, at page 307 para 25 C-E, the Labour Appeal Court per Zondo JP had the following to say:-

"*In other words, the granting of the condonation application did not give the employee party a right that it did not already have, nor did it take away from the employer party a right which it had acquired before such order was made. That being the case, the employer party should not have brought a review application to set aside the decision condoning the so-called "late referral". Even if the order condoning the "late referral" were granted, as it was, and that order was set aside, in law that would not have prevented the employee party from making the request for arbitration and having the dispute arbitrated. For this reason the bringing of the review application by the employer party was moot and an exercise in futility that would not have brought the employer party any practical benefit. For that reason, it should not have been brought. It could, and, should, have been dismissed by the Labour Court on that ground alone."*

[13] I am in full agreement with the sentiments expressed above. In my view the sentiments also find application in this instance, in that the bringing of the condonation application was something that the Applicant ought not to have done in the first instance and the refusal of condonation would not have prevented the Fourth Respondent to have the matter arbitrated. At best, what the Fourth Respondent did

was to comply with a ruling made by Commissioner P Stone which although not set aside appears to be a nullity, in that Commissioner Stone had no powers to order condonation. It therefore follows that the review application ought not to have been brought. As the Labour Appeal Court has pointed out, it ought to be dismissed on this ground alone. In my view, this goes to the prospects of success, I find that there was no basis to entertain the review of the ruling by the Second Respondent.

[14] Insofar as the award by the First Respondents is concerned, the Applicant seems to be raising the issue of jurisdiction on the basis that there was *res judicata, lis pendes* and that the matter should have been referred to private arbitration. The Applicant raises no basis that this is an award that a reasonable commissioner would not have made, even if he had jurisdiction.

DID CCMA LACK JURISDICTION?

[15] Starting with the point of *res judicata,* it is clear that that point is defeated by the fact that Miya was not a party to the arbitration proceedings accordingly he was not prevented to have his own

dispute considered by a forum. In **South African National Defence Union and Another v Minister of Defence and Others 2003 24 ILJ 2101(T)**, it was held that the requisites for a valid defence of *res judicata* are that the matter adjudicated upon must have been for the same cause, between the same parties and the same thing must have been demanded.

[16] In **Fidelity Guard Holdings (Pty) Ltd v Professional Transport Workers Union and Others 1999 20 ILJ 82 (LAC)**, the Court with reference to the rule as set out by Voet quoted paragraph 44.2.3, where it stated that the exception is allowed

where the concluded litigation is again commenced between the same parties in regard to the same thing, and for the same cause of action, so much so that if one of those requisites is wanting, the exception fails.

[17] Further in explaining the rule and with reference to various authorities, the court stated that the reason for the rule is to prevent difficulties arising from mutually contradictory decisions due to same action being heard more than once in different judicial proceedings.

[18] As I have already stated, it is common cause that Mr Miya was not party to the private arbitration, accordingly there is no basis upon which this defence would have succeeded because one of the element would be lacking.

[19] Secondly, the issue of *lis pendes,* is almost the same as *res judicata,* however *lis pendes* relates to the principle that one could not have the same cause of action been considered by different forums. The first difficulty with this is that it was never raised at the arbitration proceedings. Accordingly it is not a fact on which the First Respondent rejected to found jurisdiction. The argument that the defence of *lis pendes* can still be raised in this Court is without merit. In the first instance, I agree with Mr Ngako that the matter that was pending at the Labour Court was for a different cause of action albeit involving the same parties. The second difficulty I have with that argument is that as at the time when the dispute was being arbitrated upon by the First Respondent, the litigation in the Labour Court was no longer pending as it was withdrawn. Therefore factually there was no pending litigation. That in my view, could be the reason why the defence of *lis pendes* was not raised at the arbitration proceedings.

Accordingly I find no basis upon which the jurisdiction of the CCMA was affected thereby.

[20] Thirdly, insofar as the issue of the private arbitration is concerned, it is common cause that when the Fourth Respondent sought to request arbitration by a private arbitrator, the Applicant refused. Since private arbitration is consensual, if one of the parties does not accept to have private arbitration, there will be no private arbitration. On the other hand the jurisdiction of the CCMA is such that there is compulsory arbitration if the matter falls within its powers. In terms of Section 147 of the Labour Relations Act, the following obtains:-

"*If at any stage after a dispute has been referred to the commission, it becomes apparent that dispute is about the interpretation or application of a Collective Agreement, the commission may:-*

i) *Refer the dispute for resolution in terms of the procedures provided for in that Collective Agreement; or*

ii) *Appoint a Commisssioner or, if one has been appointed confirm the appointment of the commissioner to resolve the dispute in terms of this Act."*

[21] It follows that the CCMA is not divested of its jurisdiction simply because the Collective Agreement provides private arbitration procedures, particularly in respect of disputes relating to interpretation and application of a Collective Agreement. The Section provides that the commission may charge a party to a Collective Agreement a fee if that party has frustrated the resolution of the dispute.

[22] It is so in this matter that the Applicant was asked to have the dispute resolved by way of private arbitration, but it refused. It therefore follows that it frustrated the process itself and at best the commission could have charged it a fee but that does not divest the commission of its jurisdiction to deal with the matter.

[23] As to whether there was any basis upon which this award could be interfered with on the basis of it being not reasonable, I wish to refer to **Phalaborwa Mining Company Ltd v Cheetam and Others 2008 6 BLLR 553 (LAC)** where Patel JA in a separate but concurring judgement stated the following:-

"*Sidumo enjoins the court to remind itself that the task to determine the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was a legislative intent and as*

much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test ultimately, is whether the decision reached by the Third Respondent is one that a reasonable decision maker could reach at all the circumstances. On this test I cannot gainsay that decision of the Third Respondent. I therefore concur with the conclusion and order by Willis JA".

[24] I can say no more with regard to the decision arrived at by the First Respondent. The First Respondent considered the objections raised and came to the conclusion that the objections did not divest him of jurisdiction. In the circumstances that would not necessarily make his ruling one which a reasonable commissioner could not reach.

THE ISSUE OF MAKING AN ARBITRATION AWARD AN ORDER

[25] The Fourth Respondent brought a counter application which largely depended on the ruling that the Review application is dismissed. There existed no reason why such an application should not be granted in terms of Section 158(1)(c).

CONCLUSION

[26] It was for the reasons set out above that I came to the conclusion that the review applications should be dismissed and the arbitration award be made an order of court.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 07 November 2008

Date of Judgment: 07 November 2008

Date of Editing: 05 December 2008

APPEARANCES

For the Applicant: A Groenewald from Snyman Attorneys

For the Respondent: X Ngako from Ruth Edmonds Attorneys