



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges

Case no: C 564/2022

In the matter between:

MALIBONGWE NOMBEWU

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

ALLIE RYKLIEF N.O

Second Respondent

PIONEER FOODS (PTY) LTD

Third Respondent

Heard: 30 April 2025

Delivered: 15 May 2025

Summary: (Review – Arbitrator excluding legal representation in arbitration proceedings to determine whether a dismissal took place – Arbitrator also not offering the slightest assistance to the employee – Employee denied a fair hearing – award set aside and matter remitted)

JUDGMENT

LAGRANGE, JNature of the application

- [1] This is an opposed review application. The applicant, Mr M Nombewu ('Nombewu') seeks to set aside a jurisdictional ruling by the second respondent ('the arbitrator'), who found that he had not been dismissed by his employer, the third respondent ('Pioneer').
- [2] Apart from the review application, there was also an application to condone the late filing of the review, which was seven days late.

The condonation application

- [3] Although the condonation application was formally opposed, Pioneer did not attempt to persuade the court during argument that condonation ought not to be granted. There being no demonstrable prejudice to Pioneer from what was a very short delay and given that it has prospects of success I see no reason to refuse condonation.

The review application*Factual background*

- [4] Nombewu had been employed by Pioneer, a temporary employment service business on a succession of three month contracts from 1 November 2019 to 31 January 2022. None of the contacts suggested that they would be automatically renewed when they expired. The termination of the contract occurred either at the end of the three month period or terminate on "*the task/project reason for contract*", whichever occurred first. The operative clause 2.1 is badly worded, but it seems the intention was that if the work in which the employee was engaged came to an end, then the contract would terminate then.

- [5] According to Pioneer, Nombewu's contract was not renewed on account of the job he was doing coming to an end. Nombewu believed he was going to be made permanent as conveyed to him by a manager and some of his colleagues had recently been permanently employed in October 2021. Pioneer advised him to seek alternative employment at Adcorp Blue, another temporary employment service, but he did not pursue that option.
- [6] At the arbitration hearing, Nombewu was represented by his attorney, but the arbitrator refused to entertain an application for legal representation. Pioneer was represented by Pioneer does not deny that the arbitrator refused to entertain an application for legal representation being made, but argues that because a formal application was not actually made for legal representation there is nothing before the court to consider on review relating to the issue of legal representation. Pioneer was represented at the hearing by an HR manager of the company who admitted to 'attending' previous CCMA arbitrations but denied she was any better equipped to handle the issues than Nombewu.

The merits of the review application

- [7] Nombewu raised four grounds of review. It is only necessary to consider two of them.
- [8] Nombewu argues that the arbitrator's failure to allow legal representation is reviewable, because an employee is not barred from having legal representation where the issue in dispute is whether a dismissal has taken place. On this line of reasoning, it was not even necessary for an application for legal representation to be made. Moreover, Nombewu was prejudiced by being denied legal representation.
- [9] The second ground of review under consideration is that the arbitrator failed to assist the applicant in presenting his case, in circumstances where he should have which also deprived him of a fair hearing.
- [10] Apart from arguing that there was no formal written application for the arbitrator to consider, Pioneer contends that it was a simple issue to determine whether Nombewu was dismissed or his employment ended by mutual agreement, when his last three month contract expired.

[11] Essentially, what was before the arbitrator, was to determine the basis on which Nombewu believed the termination of his service amounted to a dismissal, whether it was because he was contending there was other work because new persons were hired a couple of months before he was dismissed and that there was no reason not to renew his contract or, alternatively that he had been promised permanent employment. The arbitrator did not make the slightest effort to assist Nombewu in clarifying which parts of the definition of dismissal under s the nature of his claim under s 186(1)(b) of the Labour Relations Act, 66 of 1995 (‘the LRA’) he was relying on, if indeed he was even aware of that provision. When he was given an opportunity to make closing submissions, Nombewu simply said he wanted his job back. The arbitrator did not explain to him that he must motivate why he was dismissed based on the evidence presented, and not merely repeat the relief he wanted. He did not even ask him if he wished to respond to the employer’s closing submissions. One is left with the overall impression that the arbitrator was in somewhat of a rush to conclude the hearing. An important aspect of the ‘helping hand’ principle, to ensure that the issues in dispute are properly ventilated¹. I am satisfied that the arbitrator failed to provide Nombewu even the barest minimum assistance he should have. Nombewu’s legal representative, would have been able to present his case in a more coherent way and deal with the evidence more thoroughly than Nombewu was capable of.

[12] As to the failure to permit legal representation, the arbitrator was seized with determining if Nombewu was dismissed. He had no reason to assume he was seized with a matter concerning dismissal for misconduct or incapacity. Only in such disputes is the right to legal representation normally not allowed under CCMA Rule 25(1)(c), subject to exceptions. Accordingly, the arbitrator had no power to exclude Nombewu’s attorney from the proceedings.

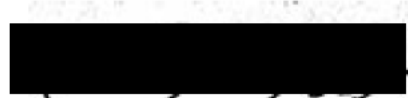
¹ See *Nkomati Joint Venture v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 819 (LAC), viz: “[18] ... The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.”

- [13] On the basis of what is set out above, I am satisfied that the arbitrator's conduct in excluding Nombewu's attorney from the proceedings and then not giving Nombewu the basic assistance required to ensure the proper ventilation of the issues, Nombewu was denied a fair hearing. Quite apart from that it, he exceeded his powers in excluding Nombewu's attorney. Accordingly, there are very good reasons for setting the award aside.
- [14] Pioneer urged the court not to remit the matter if the award was set aside. It was argued that all the evidence the court needed was in the record. I disagree. Because the arbitrator failed to ensure that the issues in Nombewu's case were properly ventilated, the court cannot be confident that all the relevant evidence that could have been led was led and all the relevant questions that could have been posed by his attorney were asked. For the court to decide the matter on the record, would simply compound the prejudice Nombewu already suffered.
- [15] Mindful of the fact that the court might be compelled to remit the case, the parties were urged to make an effort to settle the matter before judgment was handed down and were granted a few days to explore a settlement. Regrettably, notwithstanding the legal expertise at the parties disposal, they evidently did not settle the matter, and the dispute must be prolonged.

Order

1. The late filing of the Applicant's review application is condoned.
2. The arbitration award of the Second Respondent dated 27 September 2022 issued under case number WECT 3948-22 is reviewed and set aside.
3. The Applicant's unfair dismissal dispute is remitted back to the First Respondent for a hearing *de novo* before a commissioner other than the Second Respondent, at which the parties may be represented by legal practitioners.
4. The *de novo* hearing must be set down for hearing within 45 calendar days of this order.

5. No order is made as to costs.


R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:

Z Parker from Parker Attorneys

For the Respondent:

J Whyte from Norton Rose Fulbright South Africa
Inc.