THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Reportable

CASE NO: JR391/22

In the matter between:

BLISS BRANDS (PTY) LTD	Applicant
and	
NASA THE WORKERS	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	Second Respondent
COMMISSIONER FREDDIE MATSHABA *N.O.*	Third Respondent
ENTIRWENI MANAGEMENT SERVICES (PTY) LTD	Fourth Respondent
SENIOR COMMISSIONER NEMUSHUNGWA *N.O.*	Fifth Respondent

Date heard: 28 February 2024
Date delivered: 4 March 2024
Summary: Application to review conduct of the CCMA in relation to withdrawal of organisational rights dispute by the first respondent.

JUDGMENT

DANIELS J

Introduction

[1] This judgment relates to an unopposed application, brought to review and set aside a ruling (hereafter "the withdrawal ruling") issued by the third respondent (hereafter "the commissioner") on 21 February 2022. In the ruling, the commissioner acknowledged the first respondent's entitlement to withdraw its dispute, during an arbitration convened in terms of section 21 of the Labour Relations Act 66 of 1995 (hereafter "the LRA").

[2] For ease of reference, the applicant is referred to as "the deemed employer" or "the applicant" and the first respondent is referred to as "the Union".

Material facts

[3] The Union recruited many employees of the deemed employer[1] and thereafter sent a notice to it in terms of section 21(1) of the LRA.

[4] In its notice, the Union sought the organisational rights contemplated in sections 12, 13, 14, 15 and 16 of the LRA. The Union and the deemed employer were unable to reach agreement (hereafter "the dispute"). Accordingly, the Union referred the dispute to the CCMA in terms of section 21(4) of the LRA. The dispute could not be resolved at conciliation.

[5] The Union requested that the dispute be arbitrated in accordance with section 21(7) of the LRA. In the request, Entirweni Management Services (Pty) Ltd, a Temporary Employment Service which supplied labour to the deemed employer, was cited as the second respondent.

[6] On 8 September 2021, the deemed employer referred its own dispute to the CCMA, described in the following terms: "*The dispute is brought in terms of Section 22. The deemed employer alleges that the Union acts unlawfully in relation to its dealings with the employer. Its modus operandi is one of illegality and unlawfulness*

[1] The term "deemed employer" is used by the applicant in its papers. The same terminology is adopted for ease of reference. The precise nature of the employment relationship is beyond the scope of this judgment.

and thus there is a dispute regarding organisational rights and recognition." The desired outcome was that the Union be denied organisational and bargaining rights. This dispute is, in my view, ill-conceived and will receive no further attention in this judgment.

[7] On or about 15 October 2021, a CCMA commissioner[2] issued a ruling (the "earlier ruling"). In it, the commissioner stated that the Union could not engage in protected industrial action in relation to the organisational rights dispute.[3] This ruling, which is not attached to the founding papers but is included in the record, is mentioned purely for the sake of completeness. The earlier ruling, which in my view is misguided, is irrelevant to this judgment, and is mentioned solely for the sake of completeness.

[8] The section 21 arbitration was convened on 10 November 2021 and 20 January 2022. On these occasions, evidence was presented by the parties. By 20 January 2022, the Union had closed its case, but not the applicant. On 26 January 2022, before the next set down date, the Union filed a notice of withdrawal. In the notice, the Union stated: "*Be pleased to take notice that the applicant hereby withdraws the matter case number GAJB11893-21*".

[9] The deemed employer, aggrieved by the sudden withdrawal of the section 21 dispute, asked the commissioner to determine the effect of the withdrawal. The commissioner issued his ruling, the subject of this review. In the ruling, the commissioner stated that the withdrawal should be treated as an absolution from the instance. In addition, said the commissioner, because of the withdrawal, there was no live dispute. The applicant now seeks an order setting aside the ruling and declaring that the notice of withdrawal is invalid. The applicant also seeks an order directing the CCMA to reconvene the arbitration before a commissioner other than the third respondent.

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[2] The commissioner is someone other than the third or fifth respondents

[3] Of course, the CCMA does not have the jurisdiction to make such a ruling. Only the Labour Court may declare a strike to be unprotected.

Legal analysis

[10] In its papers, the applicant contends that the withdrawal ruling falls to be reviewed on the following basis:

10.1 The dispute could not be unilaterally withdrawn. Equity requires that the dispute may only be withdrawn with the prior consent of the deemed employer and any other respondent.[4]

10.2 The LRA grants the Union an election as to whether to strike (for organisational rights) or to proceed to arbitration under section 21, and, once that election is made, the Union is bound by its election.

10.3 The commissioner's recognition of the withdrawal is inimical to orderly collective bargaining.[5]

10.4 The commissioner has a statutory duty to arbitrate the dispute to finality.[6]

10.5 The commissioner's recognition of the withdrawal is unfair to the employer because it ignores the inconvenience and cost to it.

10.6 The employer is entitled to certainty, and the ruling means it could be forced to deal a new recognition dispute at any time.

10.7 The ruling exposes the applicant to industrial action, which is likely to be unprotected.[7]

[4] No authority was given for this proposition.

[5] This broad assertion was made, once again, without authority. The applicant did not explain how orderly collective bargaining is undermined.

[6] During argument, no specific section of the LRA was referred to.

[7] The applicant did not clarify exactly how the absence or presence of an arbitration award would impact on strike action.

10.8 The commissioner deprived the applicant of an opportunity to address him in relation to the section 22 dispute.[8]

[11] The applicant brings the review application under section 158(1)(g) of the LRA, which permits the review of the performance or purported performance of any function provided for in the LRA on any grounds permissible in law.

[12] As is immediately noticeable, the applicant threw everything but the kitchen sink at the withdrawal ruling. I don't intend to address all the points raised and will direct my attention only to those seriously pursued in argument. In my view, none of the points raised have merit.

Effect of a withdrawal

[13] Neither the LRA, nor the CCMA Rules, deal with the withdrawal of disputes.

[14] However, this court considered the effect of a withdrawal of a dispute in *Ncaphayi v CCMA & others*[9] where it held as follows:

[25] The commissioner then concluded that, unless the notice of withdrawal in respect of the previous referral is set aside by the Labour Court, the re-referral of that dispute could not be considered by the CCMA.

[26] Implicit in the commissioner's reasoning is an assumption that the submission of a notice of withdrawal by a referring party constitutes action which this court can review. However, the withdrawal of a referral to the CCMA is not an act of any functionary, but the action of an employee party to a dispute. The commissioner plays no role in that decision. This is the first difficulty with the commissioner's reasoning in arriving at his conclusion that he had no jurisdiction to entertain the matter.

[8] This argument was not pursued with any vigor.

[9] (2011) 32 ILJ 402 (LC)

[27] The second reason relates to the effect of a withdrawal of a referral to conciliation. The LRA does not deal with the withdrawal of matters referred to the CCMA and neither do the Rules of the CCMA. Rule 13 of the Labour Court Rules merely deals with the procedure to be followed if a party wishes to withdraw proceedings. It is instructive to note how the High Court has considered the effect of a withdrawal of a matter. It has been held that the withdrawal of a matter by a party is akin to an order of absolution from the instance. Ordinarily, an order of absolution from the instance does not prevent a party from reinstituting proceedings and the defendant absolved in the first proceeding will not be able to raise the exception rei judicatae if sued again on the same cause of action.

[28] If the withdrawal of the matter in the High Court at a stage when it is ripe for hearing does not necessarily prevent the institution of fresh proceedings, it would be anomalous if the withdrawal of a matter at the conciliation stage of dispute resolution under the LRA when no decision on the merits of the dispute is even possible precluded a party from making a fresh referral. Obviously, if the withdrawal under consideration is part and parcel of a final settlement of the dispute the situation would be quite different. However, in this case, the withdrawal was at the applicant's own instance and not an intrinsic part of a settlement agreement. It should also be mentioned that the commissioner presiding at the first conciliation did not issue a certificate of outcome so the question of whether or not that would have to be set aside before the matter could be reconsidered does not arise in this case.

[29] In the circumstances, I believe the commissioner misconstrued his powers to conciliate the dispute by concluding that the applicant's withdrawal of the dispute needed to be set aside by this court before he could entertain it." (Own emphasis)

[15] Absolution from the instance may be understood as a ruling or judgment where the court finds that the applicant or plaintiff has not established a cause of action but, for reasons of justice or convenience, it does not wish to finally pronounce on the merits.[10] A court may grant absolution even where evidence has been

[10] *SA Municipal Workers Union on behalf of Members v Mangaung Metropolitan Municipality* (2023) 44 ILJ 360 (LC) at paras 52 – 53

presented. Given that the court does not finally pronounce on the merits, the plaintiff is not barred from instituting further proceedings on the same cause of action.

[16] In this matter, the withdrawal did not emanate from a settlement. The withdrawal was voluntary and implemented at the instance of the Union. It is trite that a court is bound, not only by decisions of a higher court, but also by its own decisions unless the earlier decisions are clearly wrong.[11] The applicant sought to distinguish *Ncaphayi* on the basis that the court, in that matter, dealt with a "rights dispute" whereas, in this matter, the dispute relates to an "interest dispute". For the reasons set out below, I believe this is a false dichotomy. *Ncaphayi* is neither distinguishable nor is it clearly wrong.

Doctrine of Election

[17] The applicant argues that the Union having made an election to seek organizational rights through the medium of section 21, is bound by its election and cannot engage in protected strike action thereafter. Of course, this argument is better made when the applicant is faced with strike action. Presently, the applicant, as employer, faces no threat of strike action. In any event, I believe this argument is incorrect. It mistakes the structure of the LRA, and it attempts to compartmentalize disputes into "interest disputes" and "rights disputes". The Constitutional Court, in *Department of Home Affairs & another v Public Servants* Association *& others*[12] begins by stating: "[1] *Some might have harboured the hope that this judgment would clarify the distinction between so-called 'rights disputes' and 'interest disputes' in labour law and under the Labour Relations Act (LRA/Act), and whether and to what extent the right to strike as embodied in that statute depends on the distinction*…..". And then, just when many began salivating, in earnest anticipation, the court dropped the bomb by stating: "*Interest and rights disputes are both matters of mutual interest*."

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[11] *United Transport & Allied Trade Union/SA Railways & Harbours Union & others v Autopax Passenger Services (SOC) Ltd & another* (2014) 35 ILJ 1425 (LC) at para 55

[12] (2017) 38 ILJ 1555 (CC)

[18] In truth, a dispute over organizational rights is a "rights dispute" (if the Union elects to refer a dispute to arbitration in terms of section 21) as well as an "interest dispute" (if the Union elects to engage in strike action). This dispute illustrates well why matters of mutual interest include both interest and rights disputes.

[19] It is not a simple matter of saying, as the applicant contends, that the LRA requires an election as to whether to secure organisational rights through strike action or arbitration. The LRA does not limit the right to strike for organisational rights where a union failed to secure organisational rights through arbitration. Instead, the LRA limits the use of arbitration (for a defined period) to seek organisational rights where the union has already issued a notice of strike action seeking organisational rights.

[20] In any event, the doctrine of election is irrelevant here given that the Union has not issued a notice of strike action - for organisational rights. If the Union had done so, the Union would be unable to seek organisational rights through arbitration for the next twelve months.

Relevant provisions of the LRA

[21] The underlying premise of the applicant's argument, that employers and workers possess equal bargaining power, is incorrect. The Constitutional Court explains:

"*Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers*." (Own emphasis)

[22] The applicant complains firstly of the costs associated with arbitration, and secondly that there is no finality on the issue. Leaving aside the obvious (that certainty can be achieved by granting the Union organizational rights) the submission ignores one of the fundamental premises of the LRA, that employers

wield greater economic and social power. The LRA seeks to address the power imbalance. The applicant also ignores the other stark reality – the Union can, and most likely will, continue to seek organizational rights until it is finally satisfied. The LRA does not permit one to read in limitations on the fundamental rights to strike or engage in collective bargaining, particularly where these limitations are based on a false premise – that employers require protection from the Union.

[23] Nevertheless, regardless of whether it is strictly necessary, the LRA does afford employers some measure of protection. The LRA creates a limitation on the use of arbitration to secure organizational rights, for a period of 12 months after a strike notice has been issued in relation to the same issue. This limitation, although contained in section 65, appears only to limit the use of arbitration rather than strike action.

[24] The applicant's submissions do not fully appreciate a further tenet of the LRA – the absence of a justiciable duty to bargain (despite the existence of a constitutional right to engage in collective bargaining) was exchanged for the right to engage in protected strike action, a strong collective bargaining framework, and two routes to secure organizational rights. The respected authors of *Law @ Work (Fifth Edition)* explain the issue as follows: "*The trade-off is immediately apparent – a voluntarist system of collective bargaining, underpinned by a strong set of organisational rights extended to registered trade unions, coupled with a right to strike over recognition and bargaining demands*."

[25] The applicant's submissions also failed to consider the language used in sections 21(4) and 21(7) of the LRA. Those sections permit the employer to pursue the dispute about organisational rights. The employer has not taken these steps, even though they are available to it.

Conclusion

[26] The applicant is unable to point to any provision of the LRA to ground its case. Its argument is premised the equal bargaining position between the employer and

the workers, which is incorrect. The commissioner committed no error of law, let alone a material error of law.

[27] In the circumstances, the application to review and set aside the withdrawal ruling falls to be dismissed.

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Cliffe Dekker & Hofmeyr