



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

**Not Reportable
CASE NO: PR31/23**

In the matter between:

JABULILE LOLI SOLONTSI

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MQONDISI NODONGWE

Second Respondent

NELSON MANDELA UNIVERSITY

Third Respondent

NEHAWU

Fourth Respondent

Heard: 21 August 2024

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the Third Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 12h00 on 15 November 2024.

JUDGMENT

LALLIE J

[1] The applicant, exercising his right in terms of section 145(1) of the Labour Relations Act¹ (the LRA) filed this application seeking an order reviewing and setting aside an arbitration award of the second respondent who will be referred to as the commissioner in this judgment. The application is opposed by the third respondent.

[2] The applicant alleged that he was employed by the third respondent on two fixed term contracts. Based on an alleged reasonable expectation the third respondent created, the applicant held the view that his last fixed term contract would be renewed indefinitely. When it was not renewed, the applicant referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) against the third respondent. When the matter was set down for arbitration the third respondent raised a point *in limine* that it was not the applicant's employer.

[3] The hearing of the point *in limine* was scheduled for 12 September 2022 before commissioner Nyondo. After considering the matter commissioner Nyondo issued a ruling in which he found that the applicant had fully established the presumption of being an employee of both the third and fourth respondent and made the following ruling:

'33. Both Nelson Mandela University and NEHAWU are employers of the Applicant.

34. NEHAWU must be joined and cited as the second respondent in this case.

35. The point *in limine* that was raised by NMU to the effect that it was not the employer of the Applicant is dismissed.

36. The CCMA must reschedule the matter, cite NMU and NEHAWU as First and Second Respondents.

37. The arbitration must be set down before a different arbitrator.'

¹ Act 66 of 1995 as amended.

[4] The dispute was subsequently arbitrated by the commissioner. After considering the merits of the dispute and closing arguments the commissioner issued an arbitration award on 13 February 2023. In the award the commissioner found that the applicant was neither an employee of nor dismissed by the third respondent. In this application the applicant seeks an order reviewing and setting aside the commissioner's award dated 13 February 2023.

[5] The applicant's grounds for review are that the commissioner committed gross irregularities, committed gross misconduct and exceeded his powers in failing to consider and accept that the point *in limine* on who his employer was had already been determined. He submitted that after commissioner Nyondo had issued his ruling, the CCMA was *functus officio* on the issue of who his employer was and by reconsidering it, the commissioner committed a gross irregularity. It was, in his view, *res judicata*. The applicant alleged that the commissioner incorrectly and unreasonably failed to consider the merits of his unfair dismissal dispute but dealt with an issue which had already been determined. He submitted that the commissioner unreasonably rejected his unrefuted evidence proving his reasonable expectation to be permanently employed by the third respondent. He also misconceived the nature of the dispute before him and reached an unreasonable decision.

[6] The third respondent's grounds for opposing the application are that the award under review is based on the evidence tendered at arbitration and it is both correct and reasonable. It was submitted on behalf of the third respondent that nothing precluded the commissioner from determining whether the third respondent was the applicant's employer, not even commissioner Nyondo's ruling. It was therefore denied that the issue whether the third respondent was the applicant's employer was *res judicata* or that the third respondent was estopped from raising it. It was also denied that the commissioner could not determine the issue on the grounds that the CCMA was *functus officio*.

[7] The applicant submitted that the commissioner failed to comply with the provisions of section 138 of the LRA in conducting the arbitration. He failed to guide the applicant who was not legally represented and to administer the oath before

affording the applicant an opportunity to lead evidence. The omission created the impression that the applicant's evidence was his opening statement and that he would give evidence under oath later. The third respondent denied that the procedure the commissioner followed in conducting the arbitration was irregular. It was submitted on behalf of the third respondent that the procedure complied with the provisions of section 138(1) of the LRA.

[8] The way in which arbitration proceedings should be conducted is governed by section 38(1) and (2) of the LRA which provides as follows:

“138. General provisions for arbitration proceedings

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.”

[9] The significance of section 138(1) and (2) of the LRA is that it grants commissioners wide powers when conducting arbitrations. It frees them from the restrictions of rigid procedures and legal formalities in order to assist them deal with the substantial merits of the disputes before them. The purpose of section 138(1) and (2) of the LRA is to ensure that arbitrations are conducted fairly. The commissioner's power to determine how the arbitration should be conducted is also expressed in section 138(2) of the LRA which recommends the procedure to be followed. The subsection expressly states that the procedure is subject to the commissioner's discretion. The applicant's contention that the commissioner's failure to administer the oath before he gave evidence constituted a gross irregularity is not supported by the provisions of section 138(1) and (2) of the LRA.

[10] The applicant sought to rely on a number of alleged procedural irregularities the commissioner committed as he was conducting the arbitration. A reading of the record supports the third respondent's version that the commissioner conducted the

arbitration fairly. At the commencement of the arbitration the commissioner did not explain the procedure he was going to follow, however, a reading of the record reveals how he held the applicant by the hand and ensured that the arbitration was conducted fairly. He asked the applicant questions which guided him to present his case and provided information as the arbitration progressed. The applicant did not establish that the commissioner breached his duty to conduct the arbitration fairly.

[11] One of the material questions that needs to be answered is whether the commissioner was precluded from considering whether the third respondent was the applicant's employer because commissioner Nyondo had already issued a ruling that the third and fourth respondent were the applicant's employer. It was argued on behalf of the applicant that after commissioner Nyondo had issued his ruling, the CCMA could not revisit the issue of who the applicant's employer was as it had become *functus officio*. The applicant relied on, *inter alia*, the following authority in support of the argument:

"[24] Pretorius explains the *functus officio* doctrine as follows:

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not an absolute rule."

[12] I accept the correctness of the applicant's argument that the *functus officio* doctrine applies at the CCMA. It must therefore be determined whether the applicant proved that after commissioner Nyondo had issued his ruling on who his employer was the CCMA, through the commissioner, violated the rule to exercise its powers only once in relation to the same matter. It was argued on behalf of the third respondent that the matter that was before commissioner Nyondo was different from

the one which resulted in the award under review. It was argued on behalf of the applicant that both commissioner Nyondo and the commissioner who issued the award under review determined the same issue. They consequently made decisions on who the applicant's employer was albeit their decisions are different.

[13] The only issue commissioner Nyondo had to decide was whether the third respondent was the applicant's employer. It was submitted on behalf of the third respondent that the distinction between the disputes that were before the two commissioners is expressed in the way in which the issue to be decided is couched in the award under review. The commissioner recorded it as follows:

'7. I am required to determine whether the fixed term contract of the Applicant was unfairly terminated by the 1st Respondent and whether he was employed by same.

8. Based on the new evidence presented, I must determine the true employer of the Applicant.

9. In the event I find in the Applicant's favor, he requested that I order retrospective reinstatement as a remedy.'

[14] The third respondent submitted that the commissioner dealt with the merits of the dispute the applicant had referred, namely, the fairness of the termination of his fixed term contract as well as the identity of his employer. The contention is supported by the evidence that was tendered at arbitration. This means that what was before the commissioner which he dealt with, is more than what was before commissioner Nyondo. The matters that served before the two commissioners were, in the circumstances not the same.

[15] It was submitted on behalf of the applicant that by determining who the applicant's employer was, the commissioner committed a gross irregularity. The third respondent's counter argument was that commissioner Nyondo's decision, was no impediment to the final determination of who the applicant's employer was because it is based on section 200A of the LRA which provides that:

"200A. Presumption as to who is employee

(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a

person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee.”

[16] Commissioner Nyondo found that the applicant had established the presumption that he was an employee of the third and fourth respondent in terms of section 200A of the LRA. He therefore left the door open for the contrary to be proved as envisaged in section 200A of the LRA. Section 200A(1) therefore enabled the third respondent to prove, when the dispute was arbitrated on its merits, that it was not the applicant's employer. The commissioner was equally empowered to determine whether the contrary had been proved and make a pronouncement on whether the third respondent was the applicant's employer. Section 200A creates a rebuttable presumption which can be disproved later. The section therefore permits the CCMA to afford parties an opportunity to prove the contrary after a decision presuming a person to be an employee of a particular employer.

[17] The applicant did not prove that the commissioner was precluded from deciding whether the third respondent was the applicant's employer by the *functus officio* doctrine or any principle which prevents the reconsideration of a matter which has been litigated to finality between the same parties. The commissioner therefore did not act unreasonably in determining whether the third respondent was the applicant's employer.

[18] A further ground the applicant sought to rely on was that the commissioner misconceived the dispute before him. A commissioner misconceives a dispute when he or she conducts the incorrect enquiry or the correct enquiry incorrectly. The manner in which the commissioner stated the issue he had to determine supports the third respondent's version that he conducted the correct enquiry. The commissioner asked the correct questions and afforded the parties before him a fair opportunity to present their respective cases. He accepted the common cause evidence that the applicant was employed on fixed term contracts. He correctly found that the applicant had to prove that he was employed and dismissed by the third respondent. His decision that the applicant failed to discharge the onus of proof is based on the evidence that was properly tendered by the parties. This court does not interfere easily with the discretion conferred by the LRA on commissioners to

determine unfair dismissal disputes. The applicant must provide cogent reasons for the interference.

[19] The applicant submitted that the commissioner unreasonably disregarded that the third respondent failed to tender evidence to refute his because it failed to lead its own witness. This allegation cannot be sustained because Mr Malotana (Malotana) gave evidence on behalf of the third respondent and refuted the applicant's evidence that he was employed and dismissed by the third respondent. Malotana's position as the fourth respondent's chairperson at the time of the applicant's employment and the termination of his contract of employment did not disqualify him from being the third respondent's witness. He was an employee of the third respondent who had personal knowledge of the relevant evidence. The applicant gave no valid reason for alleging that his evidence should not have been considered.

[20] The applicant did not establish valid grounds to have the award reviewed and set aside. His review application cannot succeed.

[21] In the premises the following order is made:

1. The application for review is dismissed.
2. There is no order as to costs.

MZN Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mrs L. van Staden of Justice Centre
For the Respondent:	Advocate L Voultsos
Instructed by	Joubert Galpin & Searle Inc