REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1673/13

In the matter between:

ARMAMENTS CORPORATION OF SOUTH AFRICA (SOC) LTD	**Applicant**
and	
CCMA	**First Respondent**
ESTER VAN KERKEN N.O.	**Second Respondent**
SOLIDARITY	**Third Respondent**
MORWA-MAPALE SETLAGO	**Fifth respondent**

Heard: **30 July 2013**

Delivered: **31 July 2013**

Summary: Urgent application to interdict arbitration pending review of rulings on jurisdiction and postponement.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an urgent application by Armscor to prevent the CCMA (the First Respondent) from conducting an arbitration today, 31 July 2013, under CCMA case number GATW634-13 ("the arbitration proceedings") and anytime thereafter until such time as its review application filed under case number JR1510/13 ("the review application") has finally been determined by this Court.

[2] The applicant seeks an order directing that the arbitration proceedings under the auspices of the CCMA be stayed pending the finalisation of the review application. In the alternative, it seeks an order reviewing and setting aside, alternatively, correcting the postponement ruling handed down by the fifth respondent, commissioner Setlago, under case GATW634-13 by declaring that the postponement ought to have been granted.

Urgency

[3] I accept that this matter is urgent and could not have been heard in the ordinary course. Mr *Kirstein* did not take issue with urgency either. The arbitration hearing is set down for today and if this application is not heard urgently it will be rendered moot.

Background facts

[4] The Fourth Respondent, Mr JM Joubert, was employed by Armscor from the 1st of July 1981 until the 18th of December 2012 when his contract of employment was terminated. Armscor argues that it was terminated by operation of law in terms of S37(2) of the Defence Act, No. 42 of 2002 ("the Defence Act"). Joubert and his trade union, Solidarity (the third and fourth respondents) argue that it amounts to a dismissal and that the dismissal was unfair.

CCMA hearing and jurisdictional ruling

[5] Joubert referred an alleged unfair dismissal dispute to the CCMA. The matter was set down for arbitration on the 22nd of May 2013, at which point the Applicant raised a point *in limine* that the CCMA lacked jurisdiction to arbitrate the matter on the basis that the employee was not dismissed in terms of section 186(1) of the LRA, but rather that his employment was terminated by operation of law in terms of the Defence Act.

[6] The point *in limine* was argued on the 28th of June 2013 and Commissioner Ester van Kerken (the second respondent) handed down her ruling on the 1st of July 2013. The Commissioner found that:

6.1 The LRA is applicable to the dispute between the Applicant and the employee;

6.2 The employment of the employee did not automatically terminate by operation of law;

6.3 The CCMA had jurisdiction to entertain the dispute; and

6.4 The CCMA should schedule the matter for arbitration as soon as possible.

[7] On the 8th of July 2013 the CCMA set the arbitration down for the 31st of July 2013.

Postponement Application

[8] On the 18th of July 2013 the Applicant requested the Fifth Respondent, commissioner Setlago, to postpone the arbitration proceedings pending the outcome of a forthcoming review application of the ruling on jurisdiction. A request for postponement was also sent to the Third Respondent, Solidarity, who was acting on behalf of the employee.

[9] On the 19th of July 2013, Commissioner Setlago advised the Applicant to make a formal postponement application in terms of the CCMA rules. The Applicant made the postponement application on the 22nd of July 2013.

Review Application

[10] On the 22nd of July 2013, the Applicant served and filed its review application. That application calls on the Court to review and set aside the ruling on jurisdiction. The Applicant submits that the commissioner erred in finding that she had the power to hear the dispute between the parties.

Urgent Application

[11] On the 23rd of July 2013 Commissioner Setlago dismissed the postponement application and indicated that the arbitration would proceed on the 31st of July 2013. On the 24th of July 2013, the Applicant delivered this urgent application for the arbitration to be stayed pending the outcome of the review.

THE LAW

Staying the Arbitration Proceedings

[12] The rules of the Labour Court does not specifically deal with applications to stay arbitration proceedings. Rule 8 deals with urgent applications and s 158(1)(a) grants the Court the power to make any appropriate order, including the grant off urgent interim relief.

[13] In terms of High Court Rule 33(4):

> "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[14] That rule does not specifically cover applications. However, Mr *Oppenheimer* referred me to *Reymond v Abdulnabi And Others*[1] where it was held that the High Court has the inherent power to entertain an application for an interim interdict pending the resolution of the main dispute that had been referred to oral evidence. I do not doubt that this Court has the jurisdiction to entertain a similar application; whether it should be granted, is a different question. The applicant still has to satisfy the requirement for urgent interim relief, i.e. a *prima facie* right; an apprehension of irreparable harm; the absence of an adequate alternative remedy; and that the balance of convenience favours it.

[15] Mr *Kirstein*, for the third and fourth respondents (Solidarity and the employee) referred the Court to *Workforce Group (Pty) Ltd v National Textile Bargaining Council*[2] in which the principles relating to urgent applications to stay arbitration proceedings pending review were set out. In that judgement, the Court reiterated the following sentiments expressed by Cele J in *EOH Abantu (Pty) Ltd v CCMA:*[3]

> ""[E]ven if the court finds that the decision of the [CCMA] is one which could be reviewed, the appropriate remedy is to discharge the interdict against the [CCMA], because:
>
> 15.1.1.1 The expeditious resolution of labour disputes is not served by a piecemeal approach such as the one adopted by the applicant in this matter. Had the issue of jurisdiction properly been considered by the arbitrator after the benefit of hearing oral evidence on both the merits and the jurisdictional issue, then the Labour Court would have been saved [*sic*] on two occasions...
>
> 15.1.1.2 The applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issues. It would like to, and the Commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it will be able to seek to review the award in accordance

[1] 1985 (3) SA 348 (W), at 349.

[2] (2011) 32 *ILJ* 3042 (LC) paras 19-23.

[3] (2008) 29 *ILJ* 2588 (LC) at para 16.

> with the LRA. This will mean the Labour Court will have the benefit of the CCMA's decision and will not become involved prematurely in matters. This will prevent a flood of similar applications."

[16] In the *Southern Sun* case[4], referred to in *Workforce Group*[5], I aligned myself with the sentiments expressed by Van Niekerk J in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others*[6] regarding the practice of seeking the court to intervene in part heard CCMA proceedings by way of interdict:

> "There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason – for this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court."

[17] As the court pointed out in *Bioinformatics,* this conclusion was recently underscored by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others.*[7]

[18] Similarly, in *Jiba v Minister of Justice and Constitutional Development*[8], this Court stated:

> "Exceptional circumstances aside, it is undesirable for this court to entertain applications to review and set aside rulings made in uncompleted proceedings."

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[4] *Southern Sun v CCMA* (2011) 32 *ILJ* 2756 (LC).

[5] *Supra* para 20.

[6] (2009) 30 *ILJ* 2513 (LC) at paras 3 and4.

[7] (2008) 29 ILJ 2461 (CC) at paras 62-5 (per Ngcobo J).

[8] [2009] 10 BLLR 989 (LC) para [11].

Evaluation

[19] Referring to case law in the context of an application for the separation of issues of liability and quantum of damages in a third party action, Mr *Oppenheimer* argued that the court is obliged to grant the application of a party for separation unless it appears that the questions cannot be conveniently decided separately. It is incumbent on the party who opposes the application to satisfy the court that such order should not be granted on the basis that the balance of convenience favours him.[9] But that is not what this application is about. This an application to stay an arbitration hearing pending review of a jurisdictional ruling. It is in that context that this Court needs to decide whom the balance of convenience favours. The question of prejudice is tied up with that weighing up exercise.

[20] Mr *Oppenheimer* suggested that the Applicant stands to incur real prejudice should the arbitration proceedings continue for the following four reasons:

20.1 First, the Applicant, who can ill-afford wastage of State resources, stands to incur unnecessary costs in preparing for and attending the arbitration proceedings.

20.2 Second, the Applicant risks incurring an adverse award against it for reinstatement or compensation in respect of the employee. Should this occur and subsequently the Court grants the review in favour of the Applicant, the result will be that the arbitration award is of no effect. This would cause significant unnecessary disruptions to the applicant's business operations and possible financial prejudice.

20.3 Third, should the arbitrator grant the employee an award of either reinstatement or compensation, this could possibly open the floodgates of litigation against similarly situated former employees of

[9] *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C), at 939.

the Applicant seeking redress for the termination of their employment by operation of law. This again may result in unnecessary costs and resources expended by the Applicant.

20.4 Fourth, the applicant serves an important function in South Africa and is involved in an industry that cannot afford any type of security risk with regard to its staff. If the employee (and others in his situation) were reinstated without having the requisite security clearance it would pose a threat to the SANDF and national security.

[21] Against these arguments the Court must take into account the possible prejudice to the employee. He alleges that he will suffer prejudice on the basis that he has incurred significant travel expenses in order to attend the arbitration hearing – he had to fly back to South Africa from the USA. Also, the arbitration hearing is set down for and should be finalised today. It would be in the interests of expeditious dispute resolution to finalise the arbitration. Should Armscor still be dissatisfied, it can pursue its remedies – including the review application – in the normal course.

Conclusion

[22] Armscor has not shown exceptional circumstances justifying the application for interim relief pending the review application. This is not a case where the court should exercise its discretion to interfere with arbitration proceedings *in medias res*.

[23] Both parties have argued that costs should follow the result. I agree. I do not agree with Mr *Kirstein*, though, that a punitive costs order is warranted.

ORDER

[24] The application is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Mark Oppenheimer Instructed by Bowman Gilfillan Inc.
THIRD AND FOURTH RESPONDENTS:	Paul Kirstein Instructed by Serfontein Viljoen & Swart.