REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2448/13

In the matter between:

SAMWU **First Applicant**

M QIQIMANE and 24 others **Second and further applicants**

and

CCMA **First Respondent**

ZENZELENI CLEANING AND TRANSPORT SERVICES CC **Second Respondent**

Heard: **14 November 2013**

Delivered: **21 November 2013**

Summary: Mandamus – CCMA ordered to enrol application for condonation in respect of fresh referral of dismissal dispute. *Ncaphayi v CCMA* followed.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicants, represented by their trade union, withdrew an unfair dismissal dispute referred to the CCMA. They issued a fresh referral, coupled with an application for condonation. Should the CCMA be compelled to enrol the condonation application and the second referral for arbitration, or are the applicants bound by their election? And what is the effect of a pending review application concerning the CCMA's jurisdictional ruling on an application to re-enrol the first referral?

Background facts

[2] The South African Municipal Workers Union (SAMWU) represents 25 of its members. They allege that they were unfairly dismissed by their employer, Zenzeleni Cleaning and Transport Services cc (the second respondent). In May 2011 the union referred two (subsequently consolidated) disputes to the CCMA ("the first referral"). Conciliation was unsuccessful. At the arbitration hearing on 16 April 2012, the applicants withdrew the first referral. They did so because they intended – apparently on legal advice – to institute a claim for breach of contract in the High Court instead. SAMWU's organiser, Victoria Masina, signed a *pro forma* "notice of withdrawal" at the CCMA. There is no dispute that she was authorised to do so and that she acted with the mandate of the union members. The withdrawal form makes provision for a number of alternatives with boxes to be ticked under "the reason for withdrawal". She ticked "other" without elaborating. She signed the notice that states, in a pre-typed form:

> "I confirmed that I signed this Notice of Withdrawal of my own free will. I understand that there will be no further process in this matter and that I am not able to re-refer or re-open this case".

[3] The applicants and their attorneys subsequently formed the view that they had saddled the wrong horse, or as their attorney, Mr Daniels, put it in his founding affidavit, "that the contractual dispute had very poor prospects of success". On 2 November 2012 they applied to the CCMA to have the first referral re-enrolled. The re-enrolment application was heard by Commissioner Timothy Boyce. He refused it on 25 March 2013. He ruled

that the CCMA had no jurisdiction to re-enrol the dispute, based on the doctrine of election. He expressed the view that the applicants should, instead, refer a fresh dispute and apply for condonation.

[4] The applicants did so on 4 April 2013 ("the second referral"). They also applied to this Court to review commissioner Boyce's jurisdictional ruling. That application is still pending. The CCMA refuses to set the second referral and the condonation application down for arbitration. It says that is bound by Commissioner Boyce's ruling unless it is set aside on review. In short, it argues that the dispute is *res judicata*, alternatively *lis pendens.* Zenzeleni accepts that that is not the case. It argues that the fresh referral is not competent because the applicants are bound by their election to withdraw the first referral.

[5] The applicants now seek an order, in the form of a *mandamus*, compelling the first respondent (the CCMA[1]) to set down the condonation application in respect of the second referral.

The legal issues

[6] The issues raised by the respondents were, initially, the following:

6.1 Urgency;

6.2 Does the CCMA lack jurisdiction to entertain the second referral and the condonation application?

6.3 Is the jurisdictional issue *res judicata*? and

6.4 Is the jurisdictional issue *lis pendens*?

[7] At the hearing of the application, the issues became more crystallised. The CCMA still takes issue with urgency; Zenzeleni does not. Mr *Hollander*, for Zenzeleni, also clarified his client's argument: It does not contend that the CCMA lacks jurisdiction in the second referral. Nor does it contend for *res judicata* or *lis pendens.* Instead, he argued that the applicants are bound by their election to withdraw the dispute before the CCMA; and that they have an alternative remedy, being the pending review application.

[1] The Commission for Conciliation, Mediation and Arbitration.

Evaluation / Analysis

[8] I shall deal with each of these arguments in turn.

Urgency

[9] Zenzeleni does not take issue with the fact that the applicants brought this application on an urgent basis. The CCMA does.

[10] Mr *Moultrie*, for the applicants, accepted that the application should be treated as "semi-urgent". This Court's rules do not provide for a semi-urgent roll. What he has overlooked, though, is paragraph 12.14 of the Practice Manual:[2]

> "An applicant that wishes to have an application heard on an expedited but not an urgent basis may approach the Judge President or his deputy, with a properly motivated request in writing, for a direction as to the conduct of the application, time periods that will apply and the allocation of a date for the hearing."

[11] That would have been the preferred route for the applicants to follow in this application, the review application, or both, Nevertheless, I take into account that there is a full set of papers before me and all the parties have had sufficient opportunity to argue the matter fully; and that Zenzeleni does not object to the matter being heard on an urgent basis, as it is considered to be "semi urgent". The parties have been able to exchange full affidavits and heads of argument over the course of two weeks. Without in any way encouraging a practice of placing matters before this Court that are not urgent and to "jump the queue" for the hearing of ordinary applications, I accept that there is a need for the parties to obtain clarity on the further conduct of the main dispute in order to have that dealt with on the merits, should the CCMA have the jurisdiction to do so.

[12] I was therefore prepared to hear the matter on the urgent basis requested, after all the parties had had the opportunity to deliver their answering and replying affidavits.

[2] Practice Manual of the Labour Court of South Africa, issued by the Judge President with effect from 2 April 2013.

The CCMA's jurisdiction

[13] As I have noted, Zenzeleni accepts that the CCMA does have jurisdiction over the second referral. Its argument is that the applicants have elected to withdraw the underlying dispute and they are bound by that election or by waiver. It appears, though, that the CCMA still takes the view that it has no jurisdiction over the second referral. I will, therefore, deal with that aspect.

[14] The effect of the withdrawal of a dispute at the CCMA was carefully considered by Lagrange J in *Ncaphayi v CCMA & others*[3]. He held:

> "[25] The essential issue is whether the commissioner was correct in concluding that he could not entertain the applicant's unfair dismissal claim unless the notice of withdrawal in respect of the first referral was not set aside by this court.
>
> [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 dispute 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.
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> [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 proceedings will not be able to raise the *exceptio rei judicatae* if sued again on the same cause of action.

[3] (2011) 32 *ILJ* 402 (LC) paras [25] – [28] (footnotes omitted).

> [28] If the withdrawal of a 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."

[15] On the face of it, similar considerations apply in the case before me. Whether the notice of withdrawal can be seen to be akin to a settlement agreement, is a different question that I will address under the heading of "election". But it seems to me that, as was the case in *Ncaphayi*, the withdrawal of the first referral was akin to an order of absolution from the instance. That does not deprive the CCMA of jurisdiction to enrol the second referral for arbitration. Whether that referral has any prospects of success, and whether the applicants will succeed in their application for condonation, is for the arbitrator to decide. So is the defence of election or waiver.

[16] As Mr *Moultrie* pointed out, it is always open to a claimant to institute a new action or application (or file a fresh referral), subject to specific defences that may be raised by the defendant or respondent – including election.[4] He also drew the Court's attention to a recent decision by this Court that a notice of withdrawal in the CCMA may itself be withdrawn and that the matter must then be considered by the CCMA, subject to questions of prejudice:[5]

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[4] *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Ltd* 2008 (3) SA 585 (SCA) para [9].

[5] *Kgobokoe v CCMA & others* (2012) 33 *ILJ* 235 (LC) paras [54] – [58], relying on *Roupell v Metal Art (Pty) Ltd* 1972 (4) SA 300 (W).

> "...I am of the view that a firm principle is established in [*Roupell*] and I see no reason why it should not be authority for the proposition that a withdrawal can be withdrawn ... The fact that the applicant has a right to reinstate the matter on the roll does not mean that he or she is guaranteed success in every such case. I'm of the view that where the respondent may be prejudiced by the reinstatement, for example, where a long time has elapsed before such a case is reinstated and all evidence is lost, eg witnesses can no longer be traced, have died, etc and applicant should not succeed."

[17] It is clear that the CCMA has jurisdiction to enrol the second referral. The issue of an election may then be the subject of that arbitration. And the question of the CCMA's jurisdiction to entertain the first referral is the subject of the pending review application, to be decided on another day; it is not part of this application before the Court.

The effect of the CCMA's jurisdictional ruling and the pending review application

[18] The effect of the jurisdictional ruling cannot be that the dispute is *res judicata.* Commissioner Boyce commented that the CCMA does have jurisdiction to entertain a fresh referral. That is correct, and that is the route the applicants followed. Whether their application for condonation will succeed, is for another commissioner to decide.

[19] Neither is the second referral *lis pendens*. The relief sought in the review application is to re-enrol the first application. It may seem like an unnecessary "belts and braces" approach to have filed a fresh referral at the same time; but the fact of the pending review application does not preclude the CCMA from setting the second referral down for arbitration. Commissioner Boyce's ruling stands until it is set aside. The first referral thus remains withdrawn and there is no pending *lis* between the parties in the CCMA, other than the second referral.

[20] For these reasons, the pending review application does not constitute an adequate alternative remedy either. Whatever the outcome of that application, the CCMA has to consider the second referral.

Are the applicants bound by their election?

[21] As I have stated above, the merits of the argument based on the doctrine of election is for the arbitrator in the second referral – and not for this court – to decide. At that hearing, Zenzeleni can raise the defence of election. It will then have to discharge the onus of showing that it applies. The principle is summed up by Christie:[6]

> "... the true nature of the doctrine of election is ot a mechanical rule of law but a combination of waiver and estoppel – the onus is on the defendant to prove that, as a question of fact, the plaintiff has waived the relief he claims or, failing such proof, that he is estopped from claiming it."

Conclusion

[22] The defence of election does not affect the CCMA's jurisdiction. The pending application to review the jurisdictional ruling on the first referral also does not amount to the second referral being *lis pendens* or the dispute forming the basis of the second referral being *res judicata*. The CCMA must enrol the second referral for arbitration. Should Zenzeleni wish to raise the defence of election, it may do so at that arbitration.

Costs

[23] All of the parties asked for costs to be awarded in their favour. I am not inclined to exercise my discretion in favour of a costs award for any party. The applicants have been successful, but the litigation was to a large extent as a result of their own *volte-face*. The CCMA should be commended for entering the fray and explaining its position, even though the Court did not agree with it. And Zenzeleni similarly had to present it arguments on the issue. A costs order is not appropriate.

Order

[24] In the result, I make the following order:

[6] Christie *The Law of Contract* (6ed, LexisNexis Durban, 2011) at 563.

24.1 The applicants' non-compliance with the time periods prescribed in the rules of the Labour Court is condoned and the application is heard as one of urgency.

24.2 The CCMA (the first respondent) is directed to set down the applicants' condonation application in respect of the referral dated 4 April 2013 for hearing.

24.3 There is no order as to costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Richard Moultrie Instructed by Cheadle Thompson & Haysom.
FIRST RESPONDENT:	A H Swanepoel of the CCMA.
SECOND RESPONDENT:	Louis Hollander Instructed by Webber Wentzel.