REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P 32/12

In the matter between:

EDWARD LEMLEY	**Applicant**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER E LOOCK N.O	**Second Respondent**
COMMISSIONER J FORBES N.O	**Third Respondent**
T SYSTEM SA (PTY) LTD	**Fourth Respondent**

Heard: 22 January 2013

Delivered: 17 April 2013

Summary: An applicant who has withdrawn a dispute from the CCMA before it is decided on its merits is not barred from referring the same dispute afresh. A ruling that the CCMA lacks jurisdiction to entertain a dispute when it in fact has such jurisdiction is erroneous and reviewable.

JUDGMENT

LALLIE, J

Introduction

[1] This is an application to review rulings of the second and third respondents in which the applicant was barred from referring a further dispute having withdrawn his original one. As this application has been filed outside the six weeks' period envisaged in Section 145 (1) (a) of the LRA,[1] the applicant filed an application for the condonation of its late filing. Both applications are opposed by the fourth respondent.

Condonation Application

[2] It is trite that in determining the condonation application I need to consider a number of factors including the degree of lateness, the explanation of such lateness, prospects of success, the importance of the case and prejudice. In this regard, see *Melane v Santam Insurance Co Ltd.*[2]

[3] I will now consider whether the applicant has made out a case for the grant of the condonation application. Section 145 (1) (a) of the LRA requires an applicant to file a review application within six weeks of the date that the award was served on the applicant. It, further, provides for instances in which the application may timeously be filed later than the six weeks period. The applicant's circumstances fall under the first category. The applicant alleged that this application is nine months late as he received both rulings in question in May 2011. The fourth respondent expressed the view that the rulings are two years and a year late respectively.

[4] Explaining the delay, the applicant submitted that after receiving the rulings in May 2011, he consulted with Advocate Ashley Moorhouse during July 2011. He was advised in December 2011, after many consultations, to review the rulings as the first was based on a error of law. As he was not satisfied with the delay from July to December 2011,

[1] Labour Relation Act 66 of 1995.
[2] (1962) (4) 531 at 532 B-F.

he approached a different firm of attorneys in January 2012 which assisted him file the review application on 13 February 2012.

[5] The applicant submitted that he has good prospects of success as the rulings in question are based on an error of law. He further submitted that he will suffer more prejudice than the fourth respondent should the condonation application be refused as he will be unable to pursue his dispute. He ,further, submitted that his claim for severance benefits has not prescribed.

[6] An analysis of the extent of the delay in the filing of the review application reveals that after the parties were verbally informed of the first ruling on 18 March 2010, it took the applicant a lot of effort and persuasion before receiving the written ruling, well over a year after it had been made. He had to wait for about two months for the second ruling. The CCMA's failure to serve the applicant with copies of the rulings shortly after they were made cannot be laid at the door of the applicant particularly because he did not just sit by and waited for what was lawfully due to him. With the assistance of his attorneys he kept asking the CCMA for copies of the first ruling. At face value the period between May 2011 when the applicant receive the first ruling and his first consultation with Advocate Moorhouse in July 2011 and the many subsequent consultations until December 2011 looks excessive. But when it is scrutinized, a picture of an applicant who keeps consulting with his counsel on his matter from time to time emerges. The applicant never lost interest in his case; this view is supported by his conduct of approaching a different firm of attorneys in January 2012 when his many consultations yielded no results. The new firm acted with the required urgency and filed his review application a month later. I am mindful of the line of decisions including *Saloojee and Another, NNO v Minister of Community Development*[3] which hold a litigant responsible for the delay of his or her chosen representative. Each case is judged on its merits and the circumstances of this matter require that the applicant's

[3] 1965 (2) SA 135 (A).

persistent efforts of trying to approach this court on review be acknowledged.

[7] The applicant has good prospect of success because the first ruling is based on the second respondent's incorrect assessment of the facts before her. The second ruling is based on the first. It is true that the applicant will suffer more prejudice than the fourth respondent should this application be refused as he will lose the opportunity of having his day in court.

[8] The review application is late by a period of about nine months. It is excessive, however, the applicant provided a good explanation for the lateness, he has good prospects of success and he will suffer more prejudice than the fourth respondent should this application be refused. Having considered all the relevant factors collectively and the circumstances of this case, I am convinced that the applicant has made out a case for the grant of the condonation application.

The review

[9] The review application is opposed by the fourth respondent, mainly, on the basis that the rulings which form the subject of this application are not reviewable in law.

[10] The applicant was employed by the fourth respondent and its predecessor until his dismissal for operation requirements on 25 September 2009. The applicant, assisted by his trade union UASA challenged the fairness of the dismissal for operational requirements at the first respondent (the CCMA). At the arbitration hearing scheduled for 9 December 2009, the applicant withdrew his case on the advice of his union official as he intended adding further claims to his unfair dismissal for operational reasons claim.

[11] The applicant referred a second dispute to the CCMA in which he augmented the relief he originally sought against the fourth respondent by adding or claim for entitlement to severance benefits. At its arbitration,

on 18 March 2010, the second respondent found that the CCMA lacked jurisdiction as the applicant had earlier withdrawn the dispute.

[12] The applicant's requests to the CCMA for a hard copy of the ruling fell on deaf ears and he referred another dispute to third respondent on 28 February 2011 challenging his unfair dismissal for operational reason and for severance benefits. It was scheduled for conciliation on 28 February 2011 before the third respondent who issued the ruling that the CCMA had no jurisdiction to deal with the dispute.

Grounds for review

[13] The applicant submitted that the second and third respondents committed misconduct and gross irregularity in relation their duties in reaching the unreasonable decision that he was unable to refer another dispute to the CCMA after withdrawing the same or similar dispute in the past. The applicant further submitted that he retained the right to refer the dispute to the CCMA again after abandoning the original one. The disputes were different in that the first referral was an unfair dismissal dispute and in the subsequent ones he added severance benefits to the unfair dismissal for operation reasons claim.

[14] I now consider whether the applicant proved the existence of grounds to review and set aside the ruling of the second respondent (the first ruling) which is the subject of this application. It is common cause that at the arbitration hearing which was schedule for 9 December 2009, the applicant voluntarily withdrew and abandoned the unfair dismissal for operational reasons dispute. He, subsequently, filed another dispute against the fourth respondent in which he sought the following relief:

> '1. Retrospective reinstatement at Port Elizabeth, in a position agreed to by both parties; or
>
> 2. Severence package to be paid in accordance to the ARMA retrenchment policy version 2, clause 7.2; or
>
> 3. Alternative relief.'

[15] When the dispute was scheduled for arbitration on 18 March 2010, the second respondent issued the first ruling in which she found that the CCMA lacked jurisdiction to entertain it as the applicant had earlier withdrawn and abandoned the same dispute, relating to the same set of facts and requiring the same relief.

[16] The second respondent erred in stating that the applicant sought, in the dispute before her, the same relief he sought in the referral he had withdrawn.

[17] It is common cause that the dispute the applicant withdrew on 9 December 2009 is not the same as the one before the second respondent. The former related to the applicant's unfair dismissal for operational reasons and the latter related to the unfair dismissal for operation requirements and entitlement to severance benefits. The second respondent's decision was based on her error in her assessment of the dispute before her. Had the second respondent assessed the dispute before her correctly, she would have reached a different decision. Her incorrect decision prejudiced the applicant in that it denied him the opportunity of having his case heard. The correct approach to be adopted in determining whether the CCMA has jurisdiction is laid down in *SARPA v SA Rugby (Pty) Ltd and others*, *SA Rugby (Pty) Ltd v SARPU,*[4] where it was held that it is whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exists the CCMA had no jurisdiction irrespective of the commissioner's finding. The court further held, relying on *Benicon Earthworks and Mining Services (Pty) Ltd v Jacobs NO and Other* [5] that the CCMA may not grant its jurisdiction which it does not have nor deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has.[6]

[18] Section 191 (1) (a) (ii) of the LRA confers jurisdiction to conciliate unfair dismissal disputes on the CCMA. Section 41 of the Basic Condition of

[4] (2008) 9 BLLR 845 (LAC) at para 41.
[5] (1994) 15 ILJ 801 (LAC)
[6] Above n 4 at para 40.

Employment Act 75 of 1997 (the BCEA) grants the CCMA jurisdiction to conciliate and arbitrate disputes regarding entitlement to severance benefits. Section 191 (12) grants the CCMA jurisdiction to arbitrate disputes regarding the fairness of dismissals for operational requirements of the employer. When the second respondent made her finding, the dispute regarding the applicant's entitlement to severance benefits had not been withdraw from the CCMA by the applicant. The dispute before the second respondent was materially different from the one the applicant had withdrawn. When the dispute before the second respondent is considered objectively the only conclusion that can be drawn is that the CCMA had jurisdiction to arbitrate at least the entitlement to severance benefits dispute.

[19] I agree with the approach in *Ncapayi* v *Commission for Conciliation, Mediation and Arbitration and Others*[7] that disputes which have been referred to the CCMA and withdrawn before they are decided on their merits may be referred afresh. The applicant is, therefore, not barred from referring afresh the unfair dismissal dispute he withdrew before the CCMA decided it on the merits. The second respondent, therefore, erred in finding that the CCMA lacked jurisdiction to entertain the dispute before her as the CCMA has jurisdiction to entertain the entire dispute before her. Her decision is, therefore, stands to be reviewed and set aside.

[20] The third respondent's approach of refusing to review the second respondent's jurisdictional ruling is correct. However, because his finding is based squarely on the incorrect finding of the second respondent's ruling, that the CCMA lacked jurisdiction to entertain the dispute before her as it had been withdrawn and abandoned, it is equally incorrect and reviewable.

[21] The fourth respondent did not act unreasonably by opposing this application; and a costs order will, therefore, not be appropriate in the circumstances.

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[7] (2011) 32 ILJ 402 (LC) at para 27.

[22] In the circumstances, the following order is made:

22.1 The application for condonation of the late filing of the review application is granted.

22.2 The second respondent's ruling under case number ECPE 5759-09 and dated 18 March 2010 is reviewed and set aside;

22.3 The third respondent's ruling under case number 497-11 and dated 4 March 2011 is reviewed and set aside;

22.4 The first respondent is directed to schedule the dispute under case number ECPE 5759-09 for arbitration before a commissioner who will consider all the necessary enquiries including condonation, other than the second and third respondents ;

22.5 No order is made as to costs.

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Lallie, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate M Grobler

Instructed by: Van Der Walt Attorneys

For the Fourth Respondent: Mr F Le Roux for

Mohlaba & Moshoana Inc