



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P 337/11

In the matter between:

CROWN CHICKEN (PTY) LTD

T/A SOVEREIGN FOODS

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

FAIZEL FATAAR N.O

Second Respondent

SATAWU ON BEHALF OF

FALTEIN

Third Respondent

Heard: 21 August 2012

Delivered: 18 April 2013

Summary: The filing of a rescission application does not oust a CCMA commissioner's power to rescind his or her dismissal ruling on his own accord in terms of section 144 (a) of the LRA.

JUDGMENT

LALLIE, J

Introduction

[1] This is an application to review and set aside a ruling issued by the second respondent (the arbitrator) on 3 June 2011 in which he rescinded the dismissal ruling he issued on 29 June 2010.

Background

[2] A summary of the events leading to the filing of this review application is that the applicant dismissed Mr Faltein (Faltein) for misconduct on 19 September 2009. The third respondent challenged the fairness of his dismissal at the first respondent. On 19 January 2010 the first respondent issued an award in which commissioner Du Plessis found in favour of Faltein having held the arbitration in the absence of the applicant which successfully applied for the rescission of commissioner Du Plessis's award. The rescission ruling was issued by commissioner Cokile on 19 April 2010. The matter was rescheduled for arbitration on 29 June 2010 when it was dismissed by commissioner Fataar for the third respondent's failure to attend.

[3] On the 20 January 2011 the applicant received notice from the first respondent informing it that the matter was scheduled for hearing of a rescission application on 28 February 2011. The applicant opposed the application and raised two points *in limine*. The first was that the third respondent filed the rescission application 41 days outside the 14 day period prescribed in Rule 31 of the Rules of Conduct of Proceedings before the CCMA (the CCMA Rules) and had failed to apply for the condonation of the lateness. The second was defective service in that the third respondent had served its rescission application on the applicant on a fictitious fax number which the applicant had earlier advised the third respondent that it was not one of its fax numbers. The

third respondent was aware of the firm of attorneys which represented the applicant in an earlier rescission application . The applicant argued that the points *in limine* alone constitute good grounds for the dismissal of the third respondent's rescission application.

- [4] The hearing of the rescission application was scheduled for 25 May 2011. In his ruling dated 3 June 2011 the second respondent did not deal with the third respondent's submissions, the points *in limine* and other submissions made by the applicant in its opposing papers. He decided to invoke the provisions of section 144 (a) of the LRA ¹ and rescinded his ruling on his own accord on the basis that it was erroneously made in the absence of the third respondent. The applicant's request for the second respondent to reconsider his ruling was turned down.

Grounds for review

- [5] The applicant submitted that the second respondent committed a gross irregularity by not considering the points *in limine* it raised in opposing the rescission application. The applicant attacked the approach adopted by the second respondent on the grounds that it rendered his ruling unreasonable and unjustifiable in relation to the law as the ruling consists of a number of random and mutually contradictory observations. A further criticism of the commissioner's ruling is based on his failure to consider and determine the rescission application based on the evidence before him.

The Ruling

- [6] The commissioner decided to rescind his dismissal ruling on his own accord in terms of section 144 (a) of the LRA.

Review

- [7] The commissioner's ruling can be reviewed if it is a ruling which a reasonable decision-maker could not reach. In this regard see *Sidumo*

¹ Labour Relation Act 66 of 1995.

*and Another v Rustenburg Platinum Mines Ltd and Others.*² A review application can also be process based and lead to the reviewing and setting aside of a commissioner's ruling based on the conduct of the proceedings at the CCMA. In this regard see *Herholdt v Nedbank Ltd.*³

[8] It is common cause that at the time of making a determination on the rescission application, the commissioner was in possession of the rescission application and its opposing papers. He also had the knowledge that at the time he dismissed Faltein's matter owing to his failure to attend the arbitration, Faltein was in fact present at the CCMA. The commissioner elected not to entertain the rescission application at all but rescinded his ruling on his own accord. The factual basis of the commissioner's ruling is that on 26 June 2010 when the matter was scheduled for arbitration, he called the third respondent's name along the hearing room passage. When he got no response he dismissed the matter. A few minutes later Faltein entered the hearing room and informed him that he had been waiting for his matter to be heard at the case management area well before the scheduled time. He further informed him that no one had told him to wait at the hearing room area. He realised that he had seen Faltein sitting at the case management area but was not aware that he was the applicant in the case before him as he had never seen him before.

[9] Had the commissioner been aware that Faltein was waiting at the case management area even before his case was called, he would not have dismissed it. However, it is the applicant's case that when the third respondent filed the rescission application which was opposed by the applicant, the commissioner was obliged to determine the application and his failure to do so rendered his ruling reviewable.

[10] The applicant suggests that when the rescission application was filed the commissioner forfeited his power to rescind his ruling on his own accord. Section 144 does not limit the period within which commissioners may

² [2007] 12 BLLR 1097 (CC).

³ [2012] 33 ILJ 1789 (LAC).

rescind rulings on their own accord. Section 138 (1) of the LRA requires a commissioner to conduct an arbitration in a manner a commissioner considers appropriate in order to determine the dispute fairly and quickly but to deal with it with the minimum legal formalities. Rule 32 (10) of the CCMA Rules provides that a commissioner may determine an application, (including a rescission application) in any manner he or she deems fit.

[11] The purpose of granting commissioners the power to rescind their rulings on their own accord is partly to save a party who is a victim of a commissioner's error from suffering the prejudice of an erroneous ruling and the hardship of having to make a rescission application with its concomitant potential prejudice. The case before the commissioner is a classic example of the mischief the legislature sought to address by granting commissioners that power because in its absence or had the commissioner refused to exercise it, the third respondent would be compelled to apply for the rescission of the dismissal ruling. His rescission application could, for whatever reason be dismissed and he would lose his opportunity of having his case determine on its merits at the CCMA. He would be compelled to approach this court at substantial expense to reclaim his right to be heard.

[12] The legislature has bestowed on CCMA commissioners the power to rescind their rulings on their own accord. This does not readily deny commissioners of their statutory powers. When the commissioner had to determine the rescission application he had the power to rescind his ruling based on his knowledge of the presence of Faltein at the CCMA when his case was called. He also had the authority to base his decision on the application before him. He had to choose the power to exercise and he elected to rescind his ruling on his own accord. He can therefore not be faulted for preferring rescinding his ruling on his own accord over basing his rescission ruling on the opposed rescission application before him.

[13] Ideally, the arbitrator should have exercised his power to rescind his ruling on his own accord soon after realising that he had acted erroneously by dismissing the third respondent's matter. However, the commissioner's delay and the filing of the rescission application did not oust the commissioner's power to rescind his dismissal ruling on his own accord. I therefore find the commissioner's finding reasonable and consistent with section 144 (a) of the LRA.

[14] I have considered the applicant's ground for review based on the commissioner's error on the date of the dismissal ruling. The commissioner stated that the dismissal ruling was issued on 26 June 2010 when it was issued on 29 June 2010. Not every error made by a commissioner renders a ruling reviewable. The error did not affect either the reasonableness of the ruling or the process followed by the commissioner in reaching it. It did not make the ruling susceptible to review.

Cost

[15] The applicant and the third respondent trade union have a continuing relationship and the applicant did not act unreasonably by launching this application. A cost order in the circumstances will not be appropriate.

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

16.1 The application is dismissed.

16.2 No order is made as to costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Grobler

Instructed by: JP Van Der Walt

For the first Respondent: Minnaar Niehaus of Minnaar Hiehaus Attorneys

LABOUR COURT