



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR406/14

In the matter between:

PIKITUP JOHANNESBURG SOC LIMITED Applicant

and

COMMISSIONER STEPHEN NTOMBELA N.O. First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
& ARBITRATION** Second Respondent

SAMWU obo BLAKKIE & 5 OTHERS Third Respondent

Heard: 15 January 2016

Delivered: 12 February 2016

Summary: Application for review of CCMA ruling, dismissing rescission application for lack of compliance with CCMA directive to file condonation application.

Held that as per *PT Operational Services (Pty) Ltd v Rawu obo Ngwetsana* (JA7/11) [2012] ZALAC 34; [2013] 3 BLLR 225 (LAC); 34 ILJ 1138 (LAC) (27 November 2012), the Labour Appeal Court has already set out the law as regards the nature of such a ruling.

Held by the LAC that where a rescission application which is out of time, is not accompanied by the necessary application for condonation, the CCMA cannot exercise its powers, duties or functions in terms of section 144 of the LRA, because the merits of the rescission application have not been heard;

Held further by the LAC that the CCMA in those circumstances is therefore not *functus officio* in dismissing the rescission application;

Held that in the light of the above, there was consequently no need to bring a review application.

Held that the application for review is dismissed. There is no order as to costs.

JUDGMENT

HARDIE, AJ

[1] This is an opposed application for review brought in terms of section 145 of the Labour Relations Act 66 of 1995 (“the Act”) on 12 March 2014, in which the Applicant seeks to review and set aside the ruling of the First Respondent (“the Commissioner”) made on 14 February 2014, under the auspices of the Second Respondent under CCMA case number GAJB 28986- 12.

[2] The background to the ruling is as follows. On 30 October 2013, the Commissioner had issued a directive in which he ordered the Applicant to do the following:

“(i) Within 14 days from the date of parties receiving this ruling, the applicant must:

(ii) File an application for condonation for the late filing of the rescission application.

(iii) Respond to the second point in limine raised by the Respondent.

(iv) Cure the defect in relation to the conflicting dates at pages 12 and 13 of its founding affidavit.

(v) If within the period specified in paragraph (i) above the Applicant does not comply, the rescission application is dismissed.”

[3] On 14 February 2014, the following ruling (which is being reviewed) was issued by the Commissioner:-

“(i) Due to the non- compliance of the Directive dated 30 October 2013, the applicant’s rescission application is dismissed.

(ii) I make no order as to costs.

[4] The Applicant’s grounds for seeking to review the ruling are firstly, that it had filed a supplementary affidavit which complied with the directive issued on 30 October 2013, and secondly, that the Commissioner was not empowered to dismiss the Applicant’s rescission application simply as a result of non- compliance with the procedural directive. He was duty bound to have considered that application on its merits.

[5] The Third Respondent (SAMWU) in opposing the review application, submitted that there is no basis to interfere with the ruling as on the basis of the material before the Commissioner, there was no other decision that he could have reached other than to dismiss the application.

[6] Quite why the Applicant brought the review application in the first place, and SAMWU elected to oppose it, is not clear, when the law relating to the status of a rescission application which is out of time and there is no application for condonation accompanying it, has been set out unequivocally by the Labour Appeal Court in *PT Operational Services*

(Pty) Ltd v Rawu obo Ngwetsana (JA7/11) [2012] ZALAC 34; [2013] 3 BLLR 225 (LAC); 34 ILJ 1138 (LAC) (27 November 2012).

- [7] In the *PT Operational Services (Pty) Ltd* judgment, the Labour Appeal Court was dealing with a similar CCMA ruling, namely that of 12 August 2004, where Commissioner Cellier had dismissed an application for rescission of an award because it had been filed late, and the applicant in the rescission application had not applied for condonation for that late filing.
- [8] In dealing with this ruling dated 12 August 2004, Musi, AJA held at paragraphs [37] and [38] as follows:-

“[37] To sum up. The commissioner could not consider the rescission application which was out of time without an application for condonation. He could therefore not exercise his powers, duties or functions in terms of section 144 (of the Act) because a condition precedent (condonation) has not been fulfilled. His order dismissing the application was just another way of saying I cannot consider the application at this stage because there is no application for condonation. Without such application I have no jurisdiction to exercise my powers in terms of section 144 of the LRA.

[38] I conclude that Cellier did not finally perform his statutory function or duty in relation to the merits of the rescission application on 12 August 2004. It cannot therefore be said that he exhausted his powers and discharged his mandate in relation to the rescission application. The Court a quo erred in coming to the conclusion that the ruling on 12 August 2004 rendered Cellier functus officio and that he could therefore not entertain the subsequent applications for condonation and rescission on 26 February 2007. There were proper applications before him. He applied his mind and granted the applications. It is not suggested that his ruling should be reviewed and set aside on any other ground other than him being functus officio. The Court a quo’s order relating to the ruling of 26 February 2007 ought to be set aside.”

- [9] The Labour Appeal Court has spoken clearly on how the CCMA is to treat rescission applications which come before the CCMA, which are

late, and unaccompanied by the requisite applications for condonation. A CCMA commissioner cannot consider the rescission application unless the condition precedent, namely an application for condonation has been considered and granted. A CCMA commissioner does not perform his statutory function in terms of section 144 of the Act in relation to the merits of the rescission application until that condition precedent has been met. Thus, it is not so that the Commissioner in this case, “dismissed” the review application- he could not have really done so in terms of section 144 of the Act because the merits of the rescission application were not properly before him. This should have been discerned by both the Applicant and the Third Respondent who were both legally represented from inception of the review application. A simple application for re-enrolment by the Applicant to the CCMA, setting out the law as articulated in the *PT Operational Services (Pty) Ltd* judgement, should have sufficed to get back into the game, without involving the Labour Court.

[10] In order to ensure that the law as articulated by the in *the LAC PT Operational Services (Pty) Limited* judgment is properly complied with and implemented by the CCMA, the Applicant is to ensure that this judgment together with the *PT Operational Services (Pty) Ltd* judgment is brought to the attention of the Director of the CCMA. CCMA commissioners need to be trained to implement the prescripts of the *PT Operational Services (Pty) Ltd* judgment, and to use the more appropriate wording when a late rescission application unaccompanied by an application for condonation comes before them, namely “In the absence of an application for condonation, I hereby strike the rescission application from the roll”. That way, the ambiguity which the word “dismissal” may present, is obviated.

[11] It goes without saying, given what is stated above, that this is not a case where either party is entitled to their costs. Both the Applicant and the Third Respondent were legally represented, and empowered as they were, either party should have stopped this bus before it travelled this far.

[12] I hereby make the following order:

1. The Applicant's review application is dismissed.
2. There is no order as to costs.

LABOUR COURT

Hardie, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: F. A. Boda

Instructed by: Moodie and Robertson

For the First Respondent: J Malane

Instructed by: Cheadle Thompson & Haysom

LABOUR COURT