IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 865/09

In the matter between:

M NCAPHAYI **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **1st Respondent**

COMMISSIONER LUNGILE MTIYA **2nd Respondent**

GAUTENG PROVINCIAL RETAIL OPERATIONS **3nd Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. This applicant seeks to set aside an award by the second respondent ('the commissioner') handed down on 25 March 2009, in which the commissioner concluded that the applicant's referral of an unfair dismissal dispute to the CCMA was defective because in CCMA proceedings on 17 November 2008 he had withdrawn a previous unfair dismissal case between himself and the third respondent (GP Retail Operations).

Background

2. The chronological sequence of events as outlined by the applicant in his founding affidavit in this application is summarised as follows:

2.1. He was employed by GP Retail on 10 August 2001 and was deployed to work for various retail clients of the company performing work relating to the retrieval of shopping trolleys. The last time the applicant worked he was supervising trolley collection at a branch of Woolworths.

2.2. On 9 September 2008, an incident occurred involving four other employees the applicant was supervising, which led to all of them being excluded from the client's premises. GP Retail tried to remedy the situation with the client but it seems the client refused to allow the employees to continue working for it.

2.3. According to the applicant, GP Retail management advised them to wait at home until it could arrange another work site for them. No alternative work was provided by the firm and the employees concluded they had in fact been dismissed.

2.4. This led to the first referral of an unfair dismissal dispute, made jointly by the four employees and the applicant, in which they claimed they had been dismissed on 11 September 2008, which was the last day they worked. The referral was made under CCMA case number GAJB 31687-08.

2.5. At the conciliation hearing on 17 November 2008, the applicant claims that GP Retail's HR manager said they were all still employees of GP Retail. This led them to withdraw the case, apparently in the renewed hope that the firm was still looking for an alternative work site for them.

2.6. The applicant claims he then asked for his UIF form U119 and saw that it showed he had absconded on 16 October 2008.

2.7. The applicant claims the last time he received a salary was for September 2008.

2.8. The applicant then referred a dispute to the CCMA again under a new case number GAJB 399-09 on 2 January 2009. This dispute was unsuccessfully conciliated on 9 February 2009 and set down for arbitration on 17 March 2009.

2.9. In the second referral the applicant cited the date of his alleged dismissal as 19 December 2008, which is the date he claims he learned of his supposed absconsion on 16 October 2008.

3. The respondent's answering affidavit did not respond in detail to events related in the applicant's founding affidavit, but the following can be gleaned from the vague response contained in the answering affidavit:

3.1. At the arbitration hearing GP Retail's HR manager testified that the applicant had absconded on 16 October 2008, when a client of the firm had advised that it no longer wanted the applicant on its premises and the firm had wanted to place the employees with another client.

3.2. The applicant then made the first referral.

3.3. The referral was withdrawn on 17 November 2008 as the CCMA did not have any jurisdiction as there had been no dismissal and the applicant elected to withdraw the matter.

4. In passing, I note that the respondent complains of the limited numbering of paragraphs in the applicant's founding affidavit. It is true that the applicant should have broken up his numbered paragraphs into more digestible sub-paragraphs, but I

do not think the failure to do this prevented the respondent from providing a more comprehensive response to the allegations set out there. It could still have set out its own version in more detail.

5. From the transcript of the arbitration proceedings of 17 March 2009 it appears that the employer raised the withdrawal of the previous referral as an *in limine* issue. It argued successfully that the matter could not be reconsidered as it had already been disposed of on 17 November 2008.

6. At the hearing the applicant appears to have stated his version of why he withdrew the first referral. He claims he did so because the company had advised him and his co-complainants that they were still part of the company, but they had to wait for the company to organise another work site for them. He expressed his confusion as to why the respondent subsequently claimed he had absconded.

7. At no stage during the arbitration hearing did the employer offer an explanation for the entry on the applicant's UIF form showing that he absconded on 16 October 2009. The employer's representative at the hearing, Mr D Khumalo, who is GP Retail's HR manager, appeared to have no personal knowledge about when the alleged absconsion took place. He claimed to be ignorant of how the date of 16 October 2008 came to be entered on the UIF form as the termination date because he did not deal with the forms.

8. Mr Khumalo was nonetheless adamant that the applicant had absconded and there had been no employment relationship between GP Retail and the applicant since that time. He denied that any undertaking had been made to the applicant that he remained an employee of the firm.

9. He further claimed that the commissioner at the first conciliation hearing had advised the applicant that he had no case which led him to withdraw the matter.

The commissioner's ruling

10. According to the arbitrator it was common cause the applicant had not been employed by GP Retail Operations after the dispute had been withdrawn on 17 November 2008. It seems that in making this observation, the arbitrator was trying to say that there could not have been a subsequent dismissal of the applicant which could have been referred to the CCMA after that date, and therefore the second referral of an unfair dismissal dispute could only have concerned the same dispute which had been withdrawn.

11. The commissioner then concluded that, unless the notice of withdrawal in respect of the previous referral was set aside by the Labour Court, the re-referral of that dispute could not be considered by the CCMA. This is the essential *ratio* of the commissioner's ruling.

12. Despite finding that he could not reconsider the earlier termination of the applicant's employment because that dispute had been withdrawn and this court had not set aside the notice of withdrawal, the commissioner was clearly inclined to the view that the applicant's services had terminated when he supposedly absconded on 16 October 2008.

13. The hearing of the *in limine* objection raised by the employer was conducted in a loose and freewheeling manner with no evidence being heard on oath, without following any clear sequence as to who was supposed to be presenting evidence or argument, or any distinction been made between evidence and argument. In the course of the proceedings, the employer's representative refused to answer questions the applicant sought to ask him about why the date of absconsion reflected on the UIF form appeared to be 16 October 2008, whereas he last worked on 11 September 2008. The arbitrator made no attempt to persuade the employer's representative to answer what were obviously relevant questions about its version of events.

14. The conduct of the proceedings alone would warrant the award being set aside in my view, but the applicant did not attack the arbitrator's conduct on these grounds.

Grounds of Review

15. Although the applicant was represented by an attorney at the hearing of the review application, Mr Scholtz, he seems to have drawn up his founding affidavit without any advice or assistance. Accordingly the grounds of review are not articulated with the clarity one might expect in the case of professionally drafted papers.

16. However he does appear to identify the following issues as a basis for his review application:

    16.1. The commissioner took the respondent's side in not considering the employer's failure to engage him on another site as constituting a dismissal.

    16.2. The commissioner failed to address the question about when he was supposed to have absconded if his last day at work was 11 September 2008 yet his termination date on the UIF form is stated to be 16 October 2008.

17. Essentially the applicant's attack is that the commissioner did not consider all the relevant evidence in deciding that he had not been dismissed.

18. A pillar of the arbitrator's reasoning on the question of the applicant's employment status was that it was common cause the applicant was not employed by the respondent at any time after the conciliation of the first dispute on 17 November 2008. Given this, the commissioner appears to have accepted that the applicant could

not have been dismissed on 19 December 2008, but must have been dismissed by 17 November 2008.

19. Having reached this conclusion, the arbitrator did not go further to determine the actual date of termination though it seems he was inclined to accept it was 16 October 2008, which is the date appearing on the applicant's UIF form when the employer claims he absconded. He is also sympathetic to the third respondent's contention that the applicant withdrew the case on 17 November 2008 because he accepted that he had not been dismissed.[1] The applicant took issue with the analysis not because of the legal flaws in the reasoning, but because he felt the arbitrator had failed to consider the absence of evidence from the employer explaining why 16 October 2008 was the date he supposedly absconded, when he not worked since 11 September 2008.

20. Immediately after making his observations on the termination of the applicant's services owing to his absconsion and the withdrawal of the first referral, the commissioner concludes in paragraph 5.3. of the award: "The applicant's re-referral of the matter is therefore defective unless the notice of withdrawal is set aside by the Labour Court." It is an inescapable inference that the arbitrator had concluded that the only dispute over the termination of his services which the applicant could have referred was the same one he had previously withdrawn.

21. Having decided that the second referral was essentially the same dismissal dispute as the one in the first referral, the commissioner concluded he had no power to entertain the dispute afresh. This amounted to a jurisdictional finding. This aspect of his award

[1] It should be noted that if the arbitrator had decided the matter on this basis he would have done so by relying on a misconception that an act of absconsion by an employee means the employee terminates the contract unilaterally. The correct legal construction is that an act of desertion is a material breach of contract by an employee which entitles the employer to terminate the contract by dismissing the employee on account of that breach. The position is clarified by Sutherland AJ in ***SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration and others*** **(2001) 22 ILJ 487 (LC)** at 492-3, par [16].

was not attacked in the grounds of review raised by the applicant in his founding affidavit, but was raised in argument at the hearing of the application by Mr Scholtz.

22. The respondent's representative, Ms Strijdom, recognised the jurisdictional component of the arbitrator's award and argued that the review ought to have been brought under section 158(1)(g) of the LRA for this reason. There is merit in this argument but when a jurisdictional question of this nature arises the court cannot simply ignore it because it was not raised in the founding papers. When a commissioner makes an incorrect jurisdictional finding that finding may be set aside by this court under section 145(2)(a)(iii) of the LRA.

23. Mr Scholtz argued that the commissioner had effectively approached the withdrawal of the first dispute as if the subject matter of the first dispute should be treated as *res judicata.*

24. To give both parties a fair opportunity to address the jurisdictional question, they were invited to make any further written submissions on the question whether or not a commissioner has jurisdiction to conciliate or arbitrate a dispute which was previously withdrawn, if the Labour Court has not set aside the notice of withdrawal. By the end of June, supplementary written submissions were received from both parties, which I have considered.

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 applicant's 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.

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 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.[2] 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*[3] if sued again on the same cause of action**.**

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.[4]

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[2] See ***Kaplan v Dunell Ebden and Co* 1924 EDL 91** at 93 where Van der Riet J stated that the effect of a withdrawal of a case by a plaintiff was that *"…the case disappears from the roll as though absolution from the instance had been given."*, cited approvingly in ***Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and others* 2005 (6) SA 123 (E)** at 127I-128C

[3] ***MV Wisdom C United Enterprises Corporation v Stx Pan Ocean Co Ltd* 2008 (3) SA 585 (SCA)**, at 588, par [9]

[4] In this regard see the case of ***Dairybelle (Pty) Ltd v Lupondwana NO & others* [2001] 7 BLLR (LC)**

29. In the circumstances, I believe the commissioner misconstrued his power to conciliate the dispute by concluding that the applicant's withdrawal of the dispute needed to be set aside by this court before he could entertain it.

30. For the purposes of this decision it is not necessary to determine the actual date on which the applicant's services with the third respondent terminated and whether he was in fact dismissed. These are matters which will have to be considered when the matter is reheard. If the applicant claims that his date of alleged dismissal was not 19 December 2009, which is the date he claims he learned of the date of his supposed absconsion, but that it was some date before 3 December 2009, he ought to file a condonation application with the CCMA, in respect of the second referral on 2 January 2010, to be considered by the commissioner appointed to rehear the matter.

Costs

31. While the applicant might ordinarily have had some expectation that the costs of his representation in court would be paid by the third respondent, his conduct in not serving documents at the third respondent's chosen address for service and his failure to raise the jurisdictional challenge until the matter was argued, would make such a cost order inequitable in the circumstances. Accordingly, no order is made as to costs.

Order

32. Accordingly, it is ordered that –

    32.1. the ruling of the second respondent under case number GAJB399-09 dated 25 March 2009 is reviewed and set aside;

32.2. the first respondent must set the matter down for arbitration before a commissioner other than the second respondent, and

32.3. no order is made as to costs..

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing : 19 March 2010
Date of judgment: 3 August 2010

Appearances:
For the Applicant:
W P Scholz of Jansens Inc. Attorneys

For the Respondent:
H Strijdom of Helena Strijdom Attorneys.