REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH
CASE NO: P 487/2009
In the matter between:
INZUZU I.T. CONSULTING (PTY) LIMITED Applicant
and
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent
COMMISSIONER NZOLISI NDUZULWANA Second Respondent
ANITA JACOBUS Third Respondent
JUDGMENT
DE SWARDT, A J:
This application concerns an Order for costs which the applicant has sought against the first and second respondents ('the CCMA' and 'the Commissioner' respectively).
The applicant was represented by its attorney of record, **Mrs M E Duvenage of Duvenage Attorneys.** The CCMA and the Commissioner were represented by Mr M Grobler, acting on instructions of Pagdens Attorneys.
The application has its origin in the dismissal of third respondent ('Jacobus') by the applicant and her subsequent reinstatement by the Commissioner in terms of an arbitration award granted by default.
Jacobus and a colleague with whom she had apparently conducted an intimate

relationship, one Melanie Westphal, had placed documents containing derogatory documents of a sexual nature on the walls of the applicant's office premises in East London. The documents were seen by all of the employees as well as by the applicant's independent auditors. Jacobus and Westphal were both dismissed at a joint disciplinary enquiry.
Jacobus referred an unfair dismissal dispute to the CCMA on 7 April 2009. The matter was scheduled for conciliation/arbitration ('con/arb') on 8 May 2009. Jacobus appeared in person, but there was no appearance for the applicant. The Commissioner had regard to the fact that the notice of set-down had been sent by registered mail to the applicant's address, as it was reflected on the referral form which had been completed by Jacobus, and continued with the proceedings. He issued a certificate stating that the dispute remained unresolved and, at the request

of Jacobus, proceeded to arbitrate the dispute. After hearing evidence by Jacobus,
the Commissioner made an award declaring Jacobus's dismissal to have been unfair
and ordering her reinstatement with retroactive effect, inclusive of 1 month's back
pay.
On 22 May 2009 Jacobus presented herself at the offices of the applicant and handed
over a copy of the arbitration award in support of her demand that she be reinstated.
The award came as a surprise to the applicant, who had not known that a date for
the hearing of the dismissal dispute referred by Jacobus to the CCMA, had been fixed.

The applicant thereupon brought a substantive application for the rescission of the
arbitration award in terms of section 144(1)(a) of the Labour Relations Act, No 66 of
1995 ('the Act'). The Notice of Motion which was filed with the CCMA indicated that
the applicant was represented by SAUEO, an employers' organisation, and that the
latter's address was appointed as its service address. SAUEO also filed a separate
document entitled '*Notice of Appointment of Employers' Organisation of Record*'
which expressly stated that the applicant appointed its address as the address at
which service of all notices and process pertaining to the matter would be received.
In the founding affidavit filed in support of the aforesaid application for rescission,
the applicant stated, inter alia, that the address to which the notice of set-down had
been sent (and which was reflected on the referral form) was incorrect. The notice
had been sent to 4 Leicester Avenue, Vincent, East London, whereas the applicant's
correct address was 4 Lancaster Road, Vincent, East London. The applicant
accordingly did not know that the matter was to come before the CCMA for con-arb
on 8 May 2009 and submitted that it had not been in wilful default when it failed to
appear at the those proceedings on the aforesaid date.
There was no reaction to the applicant's application for rescission until 28 August

2009 when a Rescission Ruling made by the Commissioner was received via facsimile. The Ruling failed to refer to any of the matters deposed to in the applicant's founding affidavit which was filed in support of the application for rescission. In terms of the Ruling, the Commissioner dismissed the application for rescission on the grounds that the applicant had failed to appear and was deemed
Page -4-
to be in wilful default. It is evident from the Ruling that the Commissioner, once again, relied on the fact that the notice of set-down in respect of the hearing of the
rescission application had been sent to the applicant at 4 Leicester Avenue - the incorrect address provided by Jacobus. The Ruling also referred to an e-mail copy
of the notice of set-down having been sent to the applicant. However, it subsequently transpired that the e-mail address which had been used, had also been
incorrect. The e-mail message was intended to reach applicant's Ms Engelbrecht, but
the letter 'b' in her surname was omitted. In the result, the e-mail address was incorrect and the notice of set down sent by e-mail failed to reach the applicant. In
any event, the service address provided by the applicant, being that of the employers' organisation SAUEO, was wholly ignored.
The applicant thereupon brought an application to this Court for the review of the
Rescission Ruling aforesaid and for an Order that the CCMA and the Commissioner
pay the costs of such application. In support of its prayer for costs, the applicant has
alleged that the Commissioner failed to apply his mind properly to the evidence before him, that his findings of fact are not justifiable in relation to the evidence that
was before him and that he exceeded his powers.
The CCMA and the Commissioner opposed the application, but their opposition was
confined to the costs order which was sought.
Mr Grobler, with reference to, *inter alia*, a recent decision of the Western Cape High
Court in *Claasen v Minister of Justice and Constitutional Development (Case No*
Page -5-
A238/09 - as yet unreported) submitted that a costs order was inappropriate in the
absence of evidence that the Commissioner acted *mala fide*.
Claasen had been brought before court in terms of a warrant of arrest due to his

non-appearance on a criminal charge. He instituted a delictual claim for damages under the Lex Aquilia arising from the fact that the magistrate summarily remanded
him in custody without affording him an opportunity to explain why he had failed to
appear before court on the previous occasion and without advising him of his rights
to obtain legal representation and to apply for bail. Binns-Ward J was satisfied that
the magistrate had acted negligently, but found that a remedy in damages should not
be extended to a case where a person is detained unlawfully as a consequence of an
order negligently made by a magistrate acting outside the authority of the law. The
learned Judge referred to the fact that judges (and other persons exercising adjudicative functions) have been held immune against actions for damages arising
out of the discharge of their judicial functions. An exception from such immunity was
only granted when the judge's conduct was malicious or in bad faith (see *Telematrix*
(Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1)
SA 461 (SCA) and *Moeketsi v Minister van Justisie & 'n Ander 1988 (4) SA 707 (T)).*
As was pointed out by Harms JA in the *Telematrix*-case, supra (at 471C-E), ' *(T)he*
decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to rule fearlessly. Litigants (like those depending on an administrative process) are not "entitled to a perfect process, free from innocent (ie
non mala fide errors" . The threat of an action for damages would "unduly hamper

the expeditious consideration and disposal" of litigation. In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although damages are not indeterminate in any particular case, the
"floodgate" argument (with all its holes) does find application.' ... Similar considerations apply to the immunity afforded to arbitrators and quasi-arbitrators, ie,
persons who (usually by virtue of a contract) are entrusted with an adjudicative function that imposes on them a duty to act impartially.'

The Legislature was clearly aware of the aforesaid principles. Section 126 of the Act
expressly provides that the CCMA (inclusive of persons acting as commissioners in
terms of the Act) is not liable for any loss suffered by any person as a result of any
act performed or omitted in good faith in the course of exercising the functions of the
CCMA.
The question which arises, is whether the provisions of section 126 of the Act and
the principle that a judicial officer is not liable for damages unless they have acted
maliciously or *mala fide*, also preclude the making of a costs order against the CCMA
or the Commissioner.
There appears to me to be a fundamental difference between a damages claim and
a claim for costs which have been incurred as a consequence of a judicial officer's
conduct. As was pointed out in the *Telematrix* -matter referred to above (at 468A),
the first principle of the law of delict, is that damages rest where they fall. That
means that each person has to bear the loss he or she suffers. Acquilian liability

provides for an exception to the rule and in order to be liable, the defendant must
have acted wrongfully and negligently and must have caused the loss.
In the instant case, the applicant has not sought to claim damages as against the CCMA or the Commissioner and it appears to me that the principles applicable to delictual actions cannot simply be extended to prayers for costs against a judicial officer without any modification, because different considerations apply. Costs orders
cannot be equated with damages awards. However, it does appear to me that judicial officers, inclusive of commissioners and arbitrators, must enjoy a measure
of immunity from costs orders.
Commissioners and arbitrators, like judges, are required to adjudicate upon matters
without fear or favour. Commissioners and arbitrators are, however, not judges of
the Supreme Court of Appeal or of the Constitutional Court and it is to be expected

that mistakes will be made. If a commissioner or arbitrator were to be liable to pay
the costs of every review application which arises from a mistake on his/her part, or
if the CCMA were to be liable for such costs, it would serve to undermine their independence. For this reason, the CCMA as well as arbitrators and commissioners
clearly ought to be protected against costs orders being granted in instances where
bona fide mistakes have been made, or in instances where a measure of negligence
has occurred.
On the other hand, litigants before the CCMA, Bargaining Councils or other arbitration
institutions, are entitled to have their matters adjudicated upon by commissioners

and arbitrators who are properly qualified for the position which they hold and who
perform their duties in a fair and responsible manner. If a commissioner or arbitrator
acts in a frivolous or vexatious manner, acts maliciously or *mala fide*, commits a gross derelection of duty or is grossly negligent in the performance of his/her tasks,
it would be manifestly unjust and unfair to deprive an aggrieved litigant of the costs
which he/she is obliged to incur in order to set matters right.
The Commissioner was employed to adjudicate upon and to determine disputes referred to the CCMA in terms of the Act. In order to enable himself to perform this
task, the Commissioner must acquaint himself with the relevant law, inclusive of the
Rules of the CCMA, and with the facts of the case which is brought before him. The
latter exercise entails that the Commissioner must, at the very least, read the documents on the file before him, listen to the evidence and/or argument(s) advanced to him, consider and apply his mind to all of the aforegoing and make a
ruling or order which determines the dispute before him.
There are three possible reasons why the Commissioner failed to appreciate that the
notice of set-down in respect of the rescission application had been sent to an incorrect address: (1) he had not read the application for rescission; or (2) the

application for rescission was not on the file before him; or (3) despite having read
the application for rescission, the Commissioner disregarded the contents.
It is quite clear that the Commissioner, if he had read and considered the application
for rescission, could not have failed to notice that (a) the address to which the notice

of set down for the con/arb proceedings had been sent, was incorrect; (b) the aforesaid error was perpetuated when the notice of set-down for the rescission application was sent to the same incorrect address; and (c) when the applicant launched the rescission application, it appointed a particular service address, but that
the notice of set-down in respect of the rescission application had not been sent to
such address.
The conclusion is accordingly inescapable that the Commissioner either failed to read
the application for rescission, or failed to give any consideration thereto, prior to making the Ruling. Such conduct on the part of the Commissioner clearly constitutes
a gross dereliction of duty. If the application for rescission was not on the file which
had been placed before the Commissioner, such fact cannot serve to excuse his subsequent conduct. He was clearly aware of the fact that an application for rescission had been made and if the application itself was not before him, he was duty bound to search for it and to read and consider it, before making any Ruling.
It is also clear that the Commissioner failed to apply his mind and/or exceeded his
powers when he made the arbitration award. CCMA Rule 17(1) provides that the CCMA must give parties 14 days' written notice that a matter has been scheduled for
con-arb in terms of section 191(5A) of the Act. Rule 17(4) expressly provides that
if a party fails to appear, or to be represented at a hearing scheduled in terms of subrule (1) '*the commissioner must conduct the conciliation on the date specified in*
the notice issued in subrule (1)'. Rule 17(9) provides that if the arbitration does not
commence on the date specified in terms of the notice in sub-rule (1), the CCMA

must schedule the matter for arbitration in the presence of the parties or by issuing

a notice of set-down in terms of Rule 21.
The provisions of CCMA Rule 17 make it clear that a commissioner is not empowered
to proceed with the arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. When a party is in default of appearance, the commissioner concerned may deal with the conciliation proceedings, but not the arbitration. The arbitration must be scheduled for a later date. In the instant case,
the Commissioner was either unaware of the provisions of Rule 17(4), or he disregarded or failed to apply his mind to such provisions. As a result, he acted outside the ambit of his powers and/or authority.
It is clear from what has been stated above that the applicant has been constrained
to launch review proceedings in this Court in order to enable it to have its case adjudicated upon in accordance with the rights it derives from the Constitution and
the Act. In so doing, the applicant has incurred legal costs and expenditure and such
costs have been incurred as a direct consequence of the failure of the Commissioner
to perform the task(s) he was appointed to perform in terms of the Act. The Commissioner's conduct in the matters before him constituted nothing other than a
gross dereliction of duty and borders on recklessness. In these circumstances, I am
satisfied that the applicant should not be out of pocket.
The following Order is accordingly made:

1. The applicant's application for the review of the Rescission Ruling made by the Second Respondent on 23 August 2009 under Case Number ECEL 1129-09 is upheld and such Rescission Ruling is hereby reviewed and set aside.
2. The applicant's application for the review of the Arbitration Award made by the Second Respondent on 11 May 2009 under Case Number ECEL 1129-09 is upheld and such Arbitration Award is hereby reviewed and set aside.
3. The dispute between the applicant and the third respondent is referred back to the first respondent for a fresh arbitration before a Senior Commissioner other than the second respondent.
4. The first and second respondents are ordered to pay the applicant's costs in this application, jointly and severally, on the scale as between attorney and client, the one paying, the other to be absolved.

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A M DE SWARDT, A J

For Applicant: Mr M E Duvenhage of Duvenhage Attorneys
For Respondent: Mr M Grobler, acting on instructions of Pagdens Attorneys
Date of Hearing: 11 May 2010
Date of Judgment: 23 June 2010