----------LABOUR NEWS-------------

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Ngweletsana v PT Operational Services (Pty) Ltd and Others [2010] ZALC 16

JUDGMENT:MOSHOANA AJ

Introduction

There are three applications before the court.

- The first one is an application in terms of **section 158(1) (c)**.
- The second is a review application seeking to review and set aside rulings made by a CCMA commissioner.
- The third is a review application seeking to review and set aside a ruling issued by another CCMA commissioner. These applications are interrelated.

Facts

The employee was employed by the employer as a cashier. A copy of the charges that led to the dismissal of the employee was not available to the court. In affidavits in

support of rescission applications, the employer's Industrial Manager referred to the fact that the employee was guilty of gross misconduct, which included assault on a fellow female employee whilst under the influence of liquor. In any event, after a disciplinary hearing, the employee was dismissed.

Referral

Aggrieved by his dismissal, he referred the dispute about the fairness of his dismissal to the CCMA. It appears that the matter was set down for arbitration. At the request of the employer, the matter was postponed. The new date for hearing was sent by registered post to the employer.

Default award

The employer failed to appear. After a 30 minutes grace, the CCMA commissioner proceeded with arbitration in terms of the provisions of **section 138 (5) (b) (i)** of the Labour Relations Act as amended. He heard the evidence of the employee. He issued an award reinstating the employee with back pay.

Rescission

The employer lodged an application for rescission of the default award. The CCMA's case management officer, advised the employer in writing that the application for

rescission is defective for reasons that condonation application was not filed and it shall not receive further attention. Further she advised that the file will be pended for a period of 14 days. Should the employer fail to correct the application within that time period, it will be presumed that it has abandoned the application and the file will be closed and sent to archives.

On receipt of the said letter, the employer wrote a letter to the CCMA holding the view that there was no need for condonation as they posted the application within the 14 days as contemplated in the Rules of the CCMA. The CCMA maintained its position, and, insisted on a ruling without the condonation application.

Dismissal of rescission

It is not clear whether the second respondent did in fact close the file after 14 days. Nonetheless, it appears that if the file was ever closed, it was reopened, because almost two months after the letter of the employer, the CCMA considered the application. Having done so, the application was dismissed.

Reinstatement application

The employer brought an application seeking the reinstatement of the dismissed application, and condonation of the late filing of the rescission.

In the meanwhile, the employee brought an application in terms of **Section 158 (1) (c)** to the Labour Court. This **Section 158(1) (c)** application was opposed by the employer.

CCMA Ruling: rescission and condonation

Almost two years after the application to re-instate was brought, the CCMA through the commissioner who initially dismissed the rescission issued a ruling granting condonation and rescission.

CCMA Rulings- dismissal and rescission

The said CCMA commissioner issued another ruling setting aside the above ruling regarding condonation and rescission and varying the ruling dismissing the rescission, by clarifying what the purpose of that ruling was. In addition, he ruled that in the interest of fairness, the application for re-instatement should be heard by another commissioner.

Review application one

The applicant was aggrieved by these two rulings. An application for review was launched to review and set aside the two rulings.

Further CCMA ruling

Following the ruling which was under review at the time, the CCMA appointed another commissioner who heard the re-instatement application and issued another ruling granting condonation and rescission of the default award.

Review application two

Aggrieved by that, the applicant launched yet another review application to set aside the ruling by the fourth respondent.

Grounds for review:

In all the two reviews, the applicant persistently raises as grounds of review, the fact that the two commissioners involved in the CCMA rulings did not have powers to issue the rulings.

- By issuing them, they exceeded powers and acted in a grossly irregular manner. It was contended that the CCMA commissioner could not interfere with his own ruling, where he dismissed the application before.
- The CCMA commissioner also exceeded his powers when varying the ruling.

- With respect to the last ruling, the applicant added that by entertaining the application whilst knowing that the applicant has taken the ruling on review it acted grossly irregular.

Legal Questions

This matter raises three very important legal questions:

- Does the doctrine of *functus officio* apply to the rulings of the CCMA?
- If *functus officio* applies, does the LRA allow the CCMA commissioners to set aside their own decisions?
- Did the second respondent in issuing the ruling exercise judicial or administrative function?

Does the doctrine of functus officio apply to the CCMA rulings?

In order to give accurate attention to this issue, it is perhaps apposite to define what the doctrine means. From the authorities reviewed, it appears that the doctrine means that once an official had discharged its official function would be unable to revoke, withdraw or revisit the decision. In general the doctrine applies only to final decisions. (See **President of the Republic of South Africa v SARFU [1999] ZACC 11; 2000 (1) SA 1 (CC**).

There is authority for the proposition that the CCMA performs administrative functions. So it seemed to the court that the doctrine must find application in CCMA rulings. Even if it could be said that in issuing rulings the CCMA performs judicial function, the doctrine would, in the court's view, still apply. **Section 10 (2) of the Interpretation Act 33 of 1957** provides thus:-

"Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder."

Section 10(1) provides thus:-

"Where a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires".

Cora Hoexter in Administrative Law in South Africa 2007 Juta had the following to say about **section 10 (1)**, which the court believed applied with equal vigour to **section 10 (2)**:-

"This enigmatic provision could be interpreted as allowing for the free variation or revocation of non-legislative acts, in accordance with the proposition that effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. But the better interpretation is that section 10 (1) merely enables administrators to exercise their powers anew in different situations-not to revisit or revoke their existing decisions whenever they like. There are good reasons for this. The rule of law holds that individuals should be entitled to rely on governmental decisions, and be able to plan their lives around such decisions, insulated at least to some degree from the injustice that would result from a sudden change of mind on the part of an administrator. There is also the fundamental principle that administrators must have lawful authority for everything they do –or undo".

The court was in agreement with the above view. The court said that it seems to be against public policy for administrators to blow hot and cold. Finality with regard to

disputes is of paramount importance. The LRA for instance has as one of its purpose, the effective resolution of labour disputes. It cannot be said that allowing CCMA commissioners, at the altar of the provisions of **section 144**, authorising them to act at own accord, to revisit their decisions is consistent with effective resolution of disputes. *In casu*, the commissioner decided to dismiss the application; therefore he took a final decision in as far as the rescission application was concerned. He cannot, in the court's view, reverse his decision as he did. The only course available would have been to approach a review court to set aside that decision.

Does the LRA permit revisit?

The court considered the enabling legislation in particular **section 144**. The section provides thus:-

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award-

> **(a) Erroneously sought or erroneously made in the absence of any party affected by that award.**

(b) In which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission.

(c) Granted as a result of a mistake common to the parties to the proceedings.

In the court's view, the section permits only the commissioner who had issued the award or a ruling to act on own accord-*mero motu*. It seems impossible that a commissioner, who had not issued an award or a ruling can pull out an award or ruling issued by a fellow commissioner and seek to rescind and or vary it on his own applying the requirements in (a)-(c). The only time another commissioner can rescind or vary an award issued by another commissioner is when an application is made by the affected party.

The court further held that it is settled law that if a statute allows revisiting of a decision, the requirements of those enabling provisions should be the limitation. *In casu*, it should either be in terms of (a), (b) or (c) and nothing more or less. (**See Thompson, Trading as Maharaj and Sons v Chief Constable, Durban 1965 (4) SA 662 (D) and Maluleke v The Northern Province MEC for Health and**

Welfare and Another (1999) All SA 407 (T). If the requirements in (a) to (c) do not arise, the commissioner is not empowered to rescind its own decision. See also **Carlson Investment Share Block v Commissioner SARS 2001 (3) SA 210 WLD**

Does the CCMA perform judicial or administrative function when issuing rulings?

The issue was considered in the celebrated Sidumo judgment of the Constitutional Court. It was considered in the context of arbitrations and not rulings like the ones this judgment is concerned with. Again, the intention there seems to have been to determine whether PAJA found application or not. In the judgment of Navsa J, the view is that arbitrations are administrative actions and therefore PAJA applied. In Ngcobo J (as he then was)'s judgment a view emerges that it depends on the nature of the function. In issuing rulings, the court doubted whether it could be said that the functions were judicial. Although the function mirror, in cases of rescissions, that which is performed by the judiciary. In the court's view, issuing of a ruling of rescission amounts to an administrative action. Although the court have already concluded that even if the function is judicial, the doctrine still finds application. The court said if it was right, then the doctrine of *functus officio* applies to them. The doctrine is in tandem with the principle of legality, which should apply to all administrative actions.

Is the ruling granting rescission and condonation reviewable?

In the court's view the commissioner in issuing the ruling was already *functus officio*, in that he had issued a decision that is at odds with that. It is clear that in revisiting the application, the second respondent was not acting *mero motu*. He did so upon an application to reinstate. By entertaining the application and issuing a contradictory ruling, the second respondent acted unlawfully. That is so by application of the *functus officio* doctrine.

Is the ruling setting aside and varying the above ruling reviewable?

The court held that the most obvious difficulty with this ruling is that it seeks to set aside the ruling in favour of the employer. But the most telling about it is that the basis thereof is the commissioner's own negligence. He called that an obvious error. It therefore means that he intended to bring himself within the purview of (b). However having attempted to bring himself within the purview of (b), he does not vary to the extent of the error. He sets aside the entire award and actually passed the buck in the altar of fairness. By so doing he acted outside the enabling section.

Is the last ruling by a different commissioner reviewable?

The court was of the view that the ruling seeks to ignore the existence of the initial ruling dismissing the rescission application. Therefore in applying the *functus officio*

doctrine, the CCMA cannot set aside its own decision. In any event he does not do so; he issues another award which seeks to contradict the previous one. This is untenable. Two mutually destructive decisions cannot be allowed to stand. A party can apply to court to have its own decisions reviewed and set aside. Such was the course open for the CCMA (see **Nfshangase v MEC for Finance: KwaZulu Natal and another (2009) 30 ILJ 2653 (SCA)**).

The section 158(1) (c) application.

The court held that there was nothing left to impede the exercise of discretion to make the award an order of court.