IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case no: JR321706

IN THE MATTER BETWEEN

SONDOLO IT (PTY) LTD	**APPLICANT**
v	
GORDON HOWES	**1ST RESPONDENT**
JC SHARDLOW	**2ND RESPONDENT**
CCMA	**3RD RESPONDENT**

JUDGEMENT

AC BASSON, J

[1] This is an application to review and set aside a ruling of the Second Respondent Commissioner Shardlow. The crux of this application is whether or not Commissioner Shardlow, who was appointed to provide over the arbitration that was postponed to him by another

commissioner, erred in law in considering himself bound by the ruling of the earlier commissioner - Commissioner Zwane. Commissioner Zwane, in earlier proceedings, ruled that the application by the employer in the present matter (the Applicant in these proceedings) to bring a new charge of racism against the employee at the arbitration proceedings is declined. Despite the fact that Commissioner Zwane heard opening statements and made a ruling in respect of the admissibility of a new charge, he postponed the matter and ruled that it be set down before a different Commissioner. In effect it was Commissioner Zwane's ruling that the evidentiary material relating to the First Respondent's (Mr. Gordon Howes – hereinafter referred to as "Howes") alleged racist statements was inadmissible in arbitration proceedings concerning the fairness of his dismissal.

Brief background

[2] Howes was dismissed after a disciplinary enquiry found him guilty of serious misconduct. Howes was charged with 4 charges: The first charge related to the use of abusive language against a senior executive and a member of the management board and calling him insulting and derogatory names. The second to fourth charges related to, *inter alia,* incompatibility and disregarding working and communication standards. Howes referred a dispute about his unfair

dismissal to conciliation and when the dispute remained unresolved, the dispute was referred to arbitration.

The first arbitration hearing before Commissioner Zwane

[3] Commissioner Zwane presided over the first arbitration hearing. Commissioner Zwane is not party to these proceedings. During the opening statement the Applicant stated that it wished to prove a charge of racism or making racist statements against Howes evidence of which was given by a witness in the disciplinary hearing but which charge had not specifically been brought against Howes before the commencement of the disciplinary enquiry and on which the chairperson of the enquiry had not made any finding at all.

[4] Howes' representative in its reply to the opening statement, objected to the admission of such new evidence in the arbitration on the basis that it was a new charge the particulars of which were not known to him. The proceedings were adjourned to allow the Applicant to formulate the new charge and to give it to Howes. On the resumption of the proceedings Howes' representative again raised an objection to the Applicant seeking to introduce a new charge of racism or making racists statements against his client in the arbitration. Commissioner Zwane then called upon the parties to present arguments to him in order for him to make a ruling. The proceedings were adjourned.

Commissioner Zwane's Ruling

[5] Commissioner Zwane issued a ruling on 31 July 2006. In his ruling it is stated that the Applicant's application to bring new charges of racism against Howes, is dismissed. As already pointed out, the ruling also stated that the matter is to be allocated a new date for the arbitration and that a new commissioner would hear the matter.

The second arbitration hearing before Commissioner Shardlow

[6] At the commencement of the arbitration a new arbitrator, the Second Respondent (Commissioner Shardlow) presided over the arbitration. At the commencement of the arbitration, the Applicant again applied to be allowed to lead evidence relating to a charge of racism or making racist statements against Howes on the basis that Commissioner Shardlow was not seized with the matter and on the basis that Commissioner Shardlow had to determine afresh the issue of admissibility of evidence in the arbitration proceedings before him.

Commissioner Shardlow's ruling

[7] Commissioner Shardlow correctly pointed out in his Ruling that he had to decide whether or not he was bound by a written ruling issued by a previous Commissioner in terms of which it was ruled that it would be grossly irregular, unfair and inequitable to introduce a new charge of

racism against the Applicant at the commencement of arbitration proceedings. Commissioner Shardlow further pointed out in his ruling that he was not required to determine whether it was permissible to introduce a new charge at arbitration but that the only question before him was whether or not he was bound by an earlier decision by Commissioner Zwane who had already made a ruling that it would be unfair to introduce a new charge. Commission Sharlow concluded that he was bound by the earlier ruling and that the said ruling was binding until such a time it has been reviewed by the Labour Court in terms of section 158(1)(g) of the LRA. In coming to a decision Commissioner Shardlaw relied on two decisions of the Labour Court: *PSA obo Haschke v MEC for Agriculture & Others* [2004] 8 BLLR 822 (LC) and *Topics (Pty) Ltd v CCMA* [1998] 10 BLLR 1071 (LC). It is this ruling that is now being reviewed.

Merits

[8] Sections 138(1) and (2) provide the legislative framework within which a commissioner must conduct an arbitration. It provides that:

> *"(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with*

the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner."

[9] Paul Benjamin "*Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA"* (2007) 28 ILJ 1 at 8 aptly describes the functions of a commissioner as follows:

"Commissioners have a wide discretion as to how to conduct arbitration proceedings. The Act, unlike many other statutory arbitration or adjudication systems, does not prescribe a basic format or procedure for an arbitration hearing. As a result, an arbitrator is required to exercise a discretion in terms of s 138(1) in each arbitration as to the procedure to be adopted during that arbitration. This places a very significant burden on the shoulders of individual arbitrators and is an issue of great significance that must be addressed in any consideration of the future operation of the CCMA as an arbitration forum.

The decision as to which mode of hearing to adopt must be made in the light of the requirement to ascertain the 'substantial merits' of the dispute. This obligation is not fulfilled by an initial determination of process at the outset of proceedings and this duty persists throughout the course of an arbitration. As the case law discussed below indicates, situations may arise during an arbitration which will require an arbitrator to exercise his or her discretion as to how to ensure that the substantial merits of the dispute are dealt with."

[10] Section 138(1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In dealing with the matter the commissioner may rule on the evidence which may be presented to the arbitration and may also make rulings which may restrict the range of issues on which the parties are required to give evidence. The commissioner may therefore narrow down the issues and in doing so the commissioner may decide what evidence it wants to hear. In exercising this discretion, the commissioner will consider the facts and circumstances of the particular case and also the nature of the dispute

that was referred to arbitration. This principle was confirmed by the Labour Court in *Moloi v Euijen v CCMA & Another* (1997) 18 ILJ 1372 (LC):

> *"In terms of s 138(1) of the Act, a commissioner, such as the first respondent, is empowered to conduct an arbitration in a manner that he considers appropriate in order to determine the dispute fairly and quickly. This power, in my view, includes the power to decide what evidence will be allowed or disallowed."*

[11] When requested to make a ruling upon the admissibility of evidence or, as in the present case, rule whether the employer may prove an additional charge, the commissioner is entitled, and in fact, obliged when called to do so, to make a ruling in respect of the scope of the evidence which may be introduced. This discretion can be made on a *prima facie* view of relevance. The question before this Court is whether or not a ruling about the inadmissibility of certain evidence made at the commencement of an arbitration hearing or any other ruling which has the effect of narrowing down the issues, is binding upon a subsequent commissioner who is subsequently seized with the duty to deal with the substantive merits of the dispute. In the present case, as already pointed out, a previous commissioner (Zwane) made

a ruling in respect of the admissibility of evidence which he as a commissioner was entitled to do in the proceedings before him. The arbitration in respect of the substantive merits of the unfair dismissal claim did, however, not proceed before Commissioner Zwane but was postponed to another commissioner, Commissioner Shardlow. Was Commissioner Shardlow bound by the ruling by Commissioner Zwane in respect of the introduction of a new charge? Before considering the merits of this question certain preliminary remarks should be made.

[12] It is, for purposes of this judgment, necessary to draw a distinction between jurisdictional rulings and rulings which pertain to the substantial merits of the dispute. It is not unusual, and is in fact quite common for commissioners to make rulings in respect of jurisdictional issues such as whether or not a referral was made in time (condonation rulings) or whether or not the Applicant before the CCMA is an employee as contemplated by the LRA. These rulings are necessitated by the simple fact that the CCMA is a creature of statute and hence it only has jurisdiction over those disputes referred to it in terms of the LRA - see section 115(4) of the LRA in terms of which it is provided that:

> "*The Commissioner must perform any other duties imposed and may exercise any other powers conferred on it by or in*

terms of this Act and is committed to perform any other functions entrusted to it by any other law."

The CCMA's main statutory function is to resolve disputes through conciliation and to arbitrate those disputes referred to it "*in terms" of* the powers conferred upon it by the LRA and the Rules. The CCMA (as a creature of statute) will therefore act *ultra vires* should it assume jurisdiction in circumstances in which it clearly does not have the necessary jurisdiction. (See, *inter alia, Eoh Abantu (Pty) Ltd v Commissioner For Conciliation, Mediation and Arbitration and Mostert, Johannes Frederik (* CASE NO: J68/08).

[13] I have to point out that Mr. Campanella on behalf of the Applicant, is in agreement with the principle that that rulings in respect of condonation or other rulings in respect of jurisdiction should stand and that those rulings are therefore binding on a successive commissioner. A condonation ruling at conciliation will thus bind the commissioner conducting the arbitration. What the Applicant is submitting is that Commissioner Shardlow made an error in law in deciding that he was bound by Commissioner Zwane's ruling and that Commissioner Shardlow was in fact free to disregard the ruling. Mr Campanella argued that Commissioner Shardlow was in fact obliged to disregard the ruling and, as a result, the ruling is reviewable in that

Commissioner Sharldow asked himself the wrong question or applied the wrong test. Commissioner Sharldlow asked himself: *"Am I bound by Commissioner Zwane's ruling*" whereas he should, according to the Applicant, have asked: "*Does the statute require me to exercise and independent and unfettered discretion in dealing with the true merits of the dispute that I must arbitrate?"*

[14] It is clear from the record that Commissioner Zwane was fully seized with the matter when he ruled on the application before him and in making the ruling he entered into the arena of the substantive merits of the dismissal dispute. For some or other reason Commissioner Zwane, however, decided not to proceed with the substantive merits of the dispute but to postpone it to another Commissioner. The LRA does not give guidance on what would happen in the event a Commissioner is unable to proceed with the merits of the arbitration whether as a result of death, retirement or for any other reason (as in this case) or where a commissioner recuses himself from the process. Section 17 of the Supreme Court Act 59 of 1959, provides in respect of proceedings in the High Court that, if at any stage during the hearing of any matter by a full court any judge dies or retires or is otherwise incapable of acting or is absent, the remaining judges (provided that they constitute the majority of the judges before whom the proceedings commenced) will proceed with the matter. If only a

minority of the judges or if only one judge remains, the hearing shall commence *de novo* unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges. This will be the case where a judge becomes unavailable at any stage during the proceedings whether at the beginning or during the hearing or even after the conclusion of argument and after judgment has been reserved (see *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue* 1986 (2) SA 645 (T) at 655D – 656A). Where there is only one presiding judge and that judge is unable to proceed with the trail, the trail will resume *de novo* before another judge. Where a judicial officer in civil proceedings recuses himself or herself he or she becomes *functus officio* and can take no further part in the case. In fact, the proceedings become a nullity and the matter will be postponed to another judicial officer for a *de novo* hearing. Unless the parties agree that the succeeding judicial officer may have regard to the record of the evidence that had been adduced in the first trial, the trail will commence *de novo* (see in general Erasmus *Superior Court Practice* A1-14G) A similar rule applies in criminal matters. Where a magistrate, for example, retires or resigns, the accused will not be entitled to a demand a verdict but it is for the prosecutor to decide whether it wishes to proceed *de novo.* In *S v Suliman* 1969 (2) SA 385 (A) the Appellate Division also confirmed that an accused may be tried *de*

novo where the Judge dies during the criminal trial.

[15] Although the LRA and the Rules of the CCMA do not expressly offer any such express guidance in respect of proceedings before the CCMA, I am of the view that the provisions of section 138(1) of the LRA are sufficiently clear to support a conclusion that a commissioner cannot be bound by the rulings made in respect of the substantive merits of a dispute in earlier proceedings. Section 138(1) and (2) of the LRA make it clear that a commissioner, once seized with a matter, has a statutory duty to determine the substantial merits of the dispute before him or her and in doing so must determine the scope of the merits and rule on what evidence may or may not be admissible in the proceedings before him or her. It is inconceivable (apart from the fact that it is also contrary with practice in the High Court in both civil and criminal matters) that rulings in respect of the substantive merits of the dispute would bind a succeeding commissioner in circumstances where the earlier commissioner is unable to proceed with the arbitration. In the event the Ruling of the Second Respondent is reviewed and set aside. I make no order as to costs and each party will pay its own costs.

Order

[16] The following is ordered:

(i) The Ruling of the Second Respondent dated 20 November 2006 under case number GAJB 32406-05 is reviewed and set aside.

(ii) There is no order as to costs.

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AC BASSON

Date of judgment: 13 January 2009

Date of proceedings: 5 June 2008

FOR THE APPLICANT:

ADV. J CAMPANELLA: INSTRUCTED BY L CIRONE

FOR THE RESPONDENT:

LM ERASMUS OF ERASMUS INC