

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: JR 707/07

In the matter between:

ENFORCE SECURITY SERVICES (Pty) Ltd

Applicant

and

The COMMISSION FOR CONCILIATION

First Respondent

MEDIATION AND ARBITRATION

COMMISSIONER D.F. MATSHABA

Second Respondent

MHLONGO SIMON VUSIMUZI

Third Respondent

JUDGMENT

NYATHELA AJ:

Introduction

[1] This is an application for review in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA) of a rescission ruling issued by the second respondent on 26 February 2007 under case number GAJB 1572-05.

[2] The ruling reads as follows: “15. *The variation ruling issued under the hand of Commissioner Stephen Ntombela dated 23rd May 2005 is not rescinded and stands.*”

16. The applicant's application for rescission is hereby dismissed.

17. No order as to costs".

The parties

[4] The applicant is Enforce Security Services (Pty) Ltd, a company with limited liability, duly registered as such in terms of the laws of the Republic of South Africa.

[5] The first respondent is the Commission for Conciliation Mediation and Arbitration (The CCMA), a juristic person established in terms of section 112 of the LRA.

[6] The second respondent is Commissioner Dintle Frederick Matshaba. The second respondent is cited herein in his official capacity as the Commissioner who made the ruling.

[7] The third respondent is Mhlongo Simon Vusimuzi, a former employee of the applicant.

The facts

[8] Third respondent was employed by Wolf Security as a security officer. He was dismissed from such employment in November 2004. He referred an unfair dismissal dispute to the CCMA against Wolf Security for conciliation.

[9] The dispute was conciliated on 21 February 2005 but remained unresolved. The third respondent referred his dispute to arbitration. The arbitration hearing was held on 13 September 2005. Wolf Security did not attend the

arbitration hearing. A default award in favour of the third respondent was issued, Wolf Security was ordered to pay the third respondent R 7200-00 (Seven thousand two hundred rand) as compensation.

[10] On 01 April 2005, applicant purchased Wolf Security as a going concern four months after the dismissal of the third respondent.

[11] On 28 October 2005, the third respondent applied to have the award certified in terms of Section 143(3) of the LRA. The third respondent cited the employer as Enforce Security Services (Pty) Ltd (the applicant).

[12] During May 2006, third respondent made an application to the CCMA to vary the award by substituting the applicant as the employer party to the CCMA proceedings. A variation ruling was made on 23 May 2006 wherein the applicant was substituted for Wolf Security.

[13] The Arbitration award was also certified on 08 March 2006.

[14] On 5 October 2006, third respondent caused a writ of execution to be issued against the applicant for payment of an amount of R7200-00 plus interest thereon from 23 May 2006.

[15] The applicant applied to have the variation ruling of 23 May 2006 rescinded in terms of Section 144 of the “LRA”.

[16] The commissioner refused the application for rescission hence the review application.

Grounds for review

In the founding affidavit, the applicant set out the grounds of review upon which it relies in this matter as follows:

[17] The second respondent failed to apply his mind to the matter, was biased towards the third respondent in his rescission ruling, committed misconduct, and/or a gross irregularity and/or exceeded his powers in relation to his duties as an arbitrator.

[18] The second respondent's ruling was not rationally justifiable on the evidence that was placed before him at the arbitration hearing.

[19] The second respondent failed:

(a) to observe the *audi alterem partem* rule

(b) to provide a reasonable explanation to applicant's attorney as to the reasons for no formal variation application appearing in the CCMA file

(c) to take into account that the variation application was filed over seven months after the award and without an application for condonation of the late filing of the application for substitution and failure to the rule on the effect of third respondent's failure to apply for condonation.

(d) to take cognisance of applicant's affidavit and in his analysis of evidence, he concluded that by lodging the rescission application, the applicant had taken over the claim lodged by the third respondent.

(e) to apply his mind to the provisions of Section 197 of the "LRA."

[20] The third Respondent opposed the application for review and stated amongst others the following:

(a)The applicant was automatically substituted for the old employer with regard to contracts of employment

(b)The applicant was aware of the variation application

(c)The review application should be dismissed and the applicant should be ordered to pay the sum of R7 200-00 as per the award

(d)As the transfer of business was done as a going concern from 01 April 2005, the applicant has taken over the claim which had been lodged by the third respondent

(e)The CCMA can substitute a party without a formal application.

Application for rescission

The applicant stated amongst others the following:

[21] During May 2006, the third respondent made an application to vary the arbitration award to substitute the applicant as the employer party. The application was dispatched by registered mail at unit 2 Alphen Square, 16th Street, Midrand, 2146.

[22] On 5 October 2006, the third respondent signed an affidavit stating that the Applicant's address was 3 Cramer Avenue, Cramerville.

[23] From 1 April 2005 to 31 May 2005, applicant was carrying on business at Unit 2 Alphan Square, 16th Street, Midrand and moved to 3 Cramer Road, Cramerville.

[24] The applicant was unaware of the arbitration proceedings, the award, and the application to vary the award, the ruling on that variation and certification of the award until 13 November 2006 when it was served with a warrant of execution by the sheriff.

[25] The variation ruling was erroneously granted in the absence of the applicant.

Legal position

[26] Section 197(2) provides as follows: “*If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-*

(a) the new employer automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or commission of an

unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer;
(d)...

[27] Rule 26 (6) and (7) of the CCMA rules provide as follows: *“If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the Commissioner for an order substituting that party for an existing party, and a commissioner may make such order or give appropriate directions as to the further procedure in the proceedings.*

(7) An application to join any person as a party to proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person’s representative is already in possession of the documents”

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[28] Rule 31(1)(a) of the CCMA rules provides as follows: *“This rule applies to any – application for condonation, joinder, substitution, variation or rescission;”*.

[29]The applicant averred in its submissions that it had not been notified about the application for variation which led to the granting of the order in which it was substituted for Wolf Security on 23 May 2006.

[30] It further contended that it only became aware of the arbitration proceedings, the award, the application to vary the award, the ruling on that variation and certification of the award on the 13th November 2006 when it was served with the warrant of execution by the sheriff.

[31] The above contentions by the applicant are not disputed by the third respondent and I therefore accept same as correct for purposes of this judgement.

[32] In paragraph 12 of the rescission ruling of 26 February 2007 which is the subject of this review, second respondent stated the following: *“In terms of the rules of the Commission, the Commission or Commissioner can make a ruling to substitute without a formal application. The circumstances in this matter created an environment where the Commissioner can make such a ruling”*.

[33] The applicant contended in his grounds for review amongst others that, the second respondent committed a gross irregularity in the conduct of the rescission proceedings. On page 2 para 10 of the record of the rescission application proceedings, applicant’s contention was that he had not been notified of the proceedings in which he had been substituted for Wolf Security.

[34] It is this contention which second respondent dismissed on the ground that the CCMA rules allow a commissioner to substitute a party for another without a formal application.

[35] As pointed out above, Section 197 (2) provides that where a business is transferred as a going concern, like what appears to have taken place in this matter, the new employer is automatically substituted for the old employer even in respect of arbitration proceedings which were pending or concluded at the time of the transfer. Thus in this matter, second respondent was correct in holding that the applicant automatically substituted Wolf Security as the employer in the arbitration proceedings which were pending at the time of the transfer.

[36] However section 197 does not explain how the substitution has to take place. This aspect is dealt with in Rule 26 (6) and (7) of the CCMA Rules. As pointed out above, Rule 26 only provides that any party may apply to the commission for

an order substituting an existing party by another party. Apart from the fact that Rule 26(7) requires that the party who is substituting an existing party must be served with all documents which had already been filed in the proceedings at the time of the application, Rule 26 does not specifically mention that the application for substitution should comply with Rule 31 of the CCMA rules.

[37] It is to be noted that Rule 31(1)(a) specifically provides that the rule applies to amongst others, applications for joinder, substitution etc, thus I have come to the conclusion that an application for substitution of a party like what happened in this case, should be done in compliance with the provisions of Rule 31 of the CCMA rules.

[38] Rule 31(2) provides that “*An application must be brought on notice to all persons who have an interest in the application*”. In this matter, the applicant is the person who was substituting Wolf Security as an employer in the variation application. It is clear that as employer, the applicant is the party who would eventually be expected to implement the arbitration award in respect of which the substitution was sought. The applicant therefore had an interest in the outcome of the variation proceedings and thus Rule 31(2) requires that the applicant should have been notified of the proceedings.

[39] It is clear from the record of the rescission proceedings, that the information in para 32 above was before the second respondent at the time when he made the ruling that the rules of the CCMA allowed a commissioner to substitute a party for another without a formal application.

[40] In this matter therefore, this court has to decide whether the conclusion reached by the second respondent cannot be said to be one that a reasonable

decision maker could not reach based on the materials before him? *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

[41] I have already stated that in paragraph 12 of the ruling under review, the second respondent held a view that the CCMA rules allowed a commissioner to substitute a party for another without a formal application. Based on this reasoning, the second respondent proceeded to dismiss the applicant's rescission application.

[42] As pointed out above, Rule 26 read with Rule 31 of the CCMA rules do require that a substantive application accompanied by all documents which have been filed in the proceedings at the time of the application for substitution should be served on all persons who have an interest in the application. There is nothing in the CCMA rules which supports the reasoning of the second respondent that the rules allow a commissioner to substitute a party without a formal application. I conclude therefore that second respondent's understanding and application of the relevant rules was incorrect. In view of the substantial interest which the applicant had on the variation application, second respondent's incorrect application of the rules was prejudicial to the applicant.

[43] There is further no dispute in this matter that third respondent's application for substitution was filed out of time. The applicant submitted that the said application was not accompanied by an application for condonation. Furthermore, applicant contended that there was no ruling made condoning the late filing of the substitution application.

[44] The above averments are not in dispute and thus I accept same as the facts in this matter. In view of the fact that a ruling on condonation of a late application is a precondition for exercising jurisdiction on the application itself. I conclude that

the second respondent ought not to have ignored this fact in arriving at his decision on whether to rescind the ruling or not. I find that second respondent committed a gross irregularity in ignoring the fact that a crucial jurisdictional issue had not been dealt with when the substitution order which applicant sought to rescind was granted.

[45] In the light of the above analysis, I conclude that the decision which second respondent arrived at is not one which a reasonable decision maker could have arrived at given all materials which were before him at the time of making the decision.

[46] The application stands to be granted.

[47] I do not believe that this is a matter where costs should follow the results.

Order

In the circumstances, I make the following order:

[48] The rescission ruling of the second respondent under case number GAJB 1572-05 dated 25 February 2007 is hereby reviewed and set aside.

[49] The matter is remitted to the first respondent to be dealt with a commissioner other than the second respondent.

[50] No order is made as to costs.

NYATHELA AJ

Date of hearing: 21 April 2009

Date of Judgement: 27 July 2009

Appearances

For the applicant: C. Levin

(Clifford Levin Attorneys)