

CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 01/09  
[2009] ZACC 10

NETHERBURN ENGINEERING CC t/a  
NETHERBURN CERAMICS

Applicant

versus

ROBERT MUDAU N.O.

First Respondent

COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION

Second Respondent

JANE MOABELO

Third Respondent

Decided: 1 April 2009

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JUDGMENT

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THE COURT:

[1] This is an application for leave to appeal against a judgment of the Labour Appeal Court dated 5 December 2008. The case arises out of the dismissal by the applicant of the third respondent, Ms Jane Moabelo, more than ten years ago, on 26 October 1998. The time that has elapsed since the dismissal is cause for significant concern and in the account of the facts that follows, we set out the relevant dates that appear from the record.

[2] Following upon her dismissal for misconduct, Ms Moabelo referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) alleging her dismissal to have been unfair. The arbitration was set down for hearing on 17 May 2000. At the hearing, Ms Moabelo was represented by a trade union official, Mr Sibiya, and the applicant by an attorney. Mr Sibiya objected to the applicant being represented by an attorney in terms of section 140(1) of the Labour Relations Act 66 of 1995 (the Labour Relations Act). That section then reads:

“If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee’s conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless—

- (a) the commissioner and all the other parties consent; or
- (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering—
  - (i) the nature of the questions of law raised by the dispute;
  - (ii) the complexity of the dispute;
  - (iii) the public interest; and
  - (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.”

[3] It is clear that this section conferred a discretion upon the commissioner to determine whether a party should be permitted legal representation, even where the other party or one of the other parties to the dispute opposes legal representation. In this case, the commissioner (Mr Mudau) refused to permit the applicant to be represented by a lawyer and ordered that the arbitration should commence immediately. The applicant’s request for a postponement, on the ground that its

managing director was unable to proceed immediately without his lawyer, was refused. The applicant then withdrew from the arbitration. On 13 June 2000, the commissioner found that Ms Moabelo had been unfairly dismissed and ordered the applicant to reinstate her in her employment and to pay her compensation.

[4] We pause here to note that after the arbitration had taken place, section 140(1) of the Labour Relations Act was repealed by section 28 of the Labour Relations Amendment Act 12 of 2002. It was, in effect, replaced by rule 25(1) of the CCMA Rules which were promulgated on 25 July 2002.<sup>1</sup> Rule 25(1) provides:

“If a party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of the Act, the commissioner must determine this issue.”

This provision is not in identical terms to section 140(1). We should add that the rules as published contain a footnote referring to section 135(4) (which dealt with representation at conciliation proceedings), section 138(4) (which dealt with representation in arbitration proceedings other than unfair dismissal proceedings) and section 140(1).<sup>2</sup> It is not clear why these provisions are footnoted in the Rules, particularly as they have now all been repealed. This is a riddle we do not need to solve in this case: Rule 25(1) had no application in these proceedings.

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<sup>1</sup> Published in GN R961 GG 23611 of 25 July 2002. It should be noted that when section 55 of the Labour Relations Amendment Act of 2002 inserted item 27 into schedule 7 of the Labour Relations Act, item 27 provided that “until such time as” rules were made for the CCMA, section 140(1) shall remain in force. The CCMA Rules were adopted on 25 July 2002. The question was raised in the Labour Court whether the rules were competently adopted – see *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & Others* (2003) 24 ILJ 1712 (LC) at 1722. This is not a matter with which we now need to be concerned.

<sup>2</sup> All three of these sections were repealed by the Labour Relations Amendment Act 12 of 2002 which came into force on 1 August 2002.

[5] The applicant then sought to review and set aside the award in the Labour Court. The review was based on the ground that the commissioner had not provided any rational basis for refusing the applicant the right to legal representation; that the commissioner was biased against the applicant; and that the applicant's constitutional right to legal representation had been ignored. The founding affidavit in the review application asserted that the applicant had an unconditional constitutional right to legal representation. Both the Ministers for Labour and Justice and Constitutional Development were informed of the constitutional challenge but neither placed any evidence or argument before the Labour Court. The review application was heard by the Labour Court on 22 August 2003.

[6] On 31 August 2003, the Labour Court handed down its judgment.<sup>3</sup> Landman J held that the commissioner had not misdirected himself in refusing to permit the applicant to be legally represented. The Court also dismissed the attack based on bias. On the constitutional point, the Court concluded that a right to legal representation before a statutory tribunal does not exist at common law. The Court found that arbitration does not constitute administrative action within the meaning of section 33 of the Constitution,<sup>4</sup> and that no right to legal representation before an independent and impartial tribunal is to be found in section 34 of the Constitution.<sup>5</sup> He also

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<sup>3</sup> *Netherburn Engineering* above n 1.

<sup>4</sup> *Id* at 1726-7.

<sup>5</sup> *Id* at 1728. Section 34 of the Constitution provides:

concluded that the commissioner had not infringed the applicant's right not to be unfairly discriminated against.<sup>6</sup>

[7] However, the Court held that the commissioner's failure to postpone the proceedings once he had barred the applicant's lawyer constituted a misdirection. The Court concluded that the applicant "had required a breather to be primed by his attorney" as to how to present the case.<sup>7</sup> This the commissioner had refused and the Court found that the arbitration award should accordingly be set aside and referred back to the CCMA for arbitration by a different commissioner.<sup>8</sup>

[8] The applicant then sought and obtained leave to appeal to the Labour Appeal Court. It obtained leave on 3 January 2005 and concluded its oral argument before the Labour Appeal Court on 16 March 2006. There was no opposition in the Labour Appeal Court and that Court, without consulting the applicant, appointed an amicus curiae to make submissions on the constitutional question. The amicus (Mr MJD Wallis SC) submitted his written argument on 18 December 2006. The Labour Appeal Court delivered judgment on 5 December 2008. Two judgments were written in that Court, one by Zondo JP and the other by HM Musi JA. Both dismissed the arguments raised by the applicant that it had a constitutional right to legal representation. Unfortunately, however, the judgment by Zondo JP (in which Jappie

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"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

<sup>6</sup> *Netherburn Engineering* above n 1 at 1729.

<sup>7</sup> *Id* at 1720.

<sup>8</sup> *Id*.

JA concurred) overlooked the fact that the Labour Court had set aside the arbitration award on the grounds that the applicant should have been given an opportunity to prepare once the commissioner had refused it the right to legal representation.

[9] The applicant now approaches this Court for relief. There is no doubt that the question whether section 140(1) of the Labour Relations Act is constitutional does raise a constitutional question. The next issue that arises is whether it is in the interests of justice for this Court to entertain the application at this stage.

[10] We are not persuaded that it is. In the first place, section 140(1) was repealed nearly seven years ago and apparently replaced by rule 25(1) which, though enigmatically alluding in a footnote to the repealed section, is not in identical terms. This Court has held that where a legislative provision has been challenged, but since repealed, it may be in the interests of justice to determine the constitutional challenge if it would have any practical effect.<sup>9</sup> Given the time that has elapsed since section 140(1) was repealed, we think it extremely unlikely that determining its constitutionality at this stage will have any effect on pending proceedings. And since rule 25(1) is not in identical terms to section 140(1), any determination we make relating to the constitutionality of section 140(1) will not be determinative of a challenge to rule 25(1).

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<sup>9</sup> *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 16.

[11] Secondly, more than ten years have elapsed since Ms Moabelo was dismissed. Neither Ms Moabelo nor her union was represented in the Labour Appeal Court; and neither has sought to be represented here. At this stage, it is probable that there is no live dispute between the applicant and Ms Moabelo. Should there be, Ms Moabelo would be entitled to approach the CCMA in terms of this judgment and the judgment of the Labour Court for a fresh arbitration hearing. If the dispute is, however, indeed moribund, no direct purpose at all will be served by this Court determining the constitutionality of section 140(1).

[12] We conclude by noting once again that it is a matter of concern that proceedings concerning an unfair dismissal in October 1998 should not have reached their final resolution some ten years later. It is not clear to us from the record before us where the blame for the delay lies (and so far as we can discern it does not lie singly), and so we can take the matter no further now.

[13] We find then that it is not in the interests of justice for the constitutional point relating to legal representation before the CCMA to be determined in this case and we expressly refrain from comment on that issue. In short, the application is dismissed because there is, in all probability, no live dispute which would be affected by a determination of the constitutionality of section 140(1) of the Labour Relations Act. The question of the constitutionality and meaning of CCMA rule 25 thus stands over for another day. As this application has attracted no opposition, no order of costs is necessary.

[14] The application for leave to appeal is dismissed.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J,  
Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.



For the applicant:

Bowman Gilfillan Inc.