

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)

CASE NUMBER: JR1271/05

In the matter between:

SOUTH AFRICAN AIRWAYS (PTY) LTD

APPLICANT

AND

S OOSTHUIZEN (COMMISSIONER)

1ST RESPONDENT

CCMA

2ND RESPONDENT

UNITED ASSOCIATION OF SOUTH AFRICA

3RD RESPONDENT

F VAN OUDSTSHOORN

4TH RESPONDENT

REASONS FOR JUDGMENT

AC BASSON, J

[1] On 6 June 2007 this Court made the following order:

1. The Application to review and to set aside the rescission ruling that had been issued by Commissioner Oosthuizen under the auspices of the CCMA is dismissed.
2. The Applicant is ordered to pay the costs.

Herewith brief reasons for this order:

[2] This was an application to review and set aside the rescission ruling of the First Respondent (hereinafter referred to as “the Commissioner”) delivered on 11 May 2005.

[3] The Applicant is the South African Airways (Pty) Ltd (hereinafter referred to as “the Applicant”). The Fourth Respondent Mr. van Oudtshoorn (hereinafter referred to as “the Respondent”), was employed by the Applicant. The Respondent referred a dispute to the Second Respondent (hereinafter referred to as “the CCMA”) in terms of which he claimed that he had been unfairly constructively dismissed, alternatively that the Applicant had been guilty of selective re-employment. The Arbitration hearing became part-heard pursuant to the hearing held on 24 October 2004. The

hearing on 24 October 2004 was postponed because the Applicant's representative (Ntombela) requested a postponement as their witnesses were not available. The hearing was re-scheduled for 10 and 11 January 2005. The hearing continued on 10 January in the absence of the Applicant's representative (Ntombela).

Applicant's case

[4] The deponent to the founding affidavit (Ntombela) states that he did receive notification of the hearing and that it was his intention to represent the Applicant at the hearing. Ntombela, however, did not attend the hearing hence the default judgement against the Applicant. Ntombela further states in the founding affidavit that he did intend to attend the hearing but that he felt dizzy and nauseous on his way to the arbitration hearing. He stopped along the way and a person with the name of "Sabelo" came to assist him where he was lying on the grass lawn. This Sabelo then drove Ntombela to the doctor, Dr. Jo van Tonder, in Centurion. He was, according to his papers, administered a drip and was under the supervision of the doctor until 17H00. He was informed by his doctor that he showed signs of diabetes mellitus and that told to report back to the surgery the following day. Ntombela states that he asked Sabelo to

contact the CCMA and advise them of his sudden illness. According to him Sabelo did so twice in his presence but the phone was not answered by the CCMA. Ntombela also states that he left a message on the cellular phone of Mr. van Niekerk ("Van Niekerk" of the United Association of South Africa) the representative of the Respondent. He also phoned Mr. Adriaan Van Rensburg ("Van Rensburg") for assistance to reach Van Niekerk. According to Ntombela, Van Rensburg told him that Van Niekerk's cellular phone was switched off. Van Rensburg also informed Ntombela that he left a message on the cellular phone of a certain Ms. Susan Venter ("Venter"). According to the papers Venter was a witness of the Applicant.

- [5] The hearing proceeded in the absence of Ntombela and a default award was rendered in favour of the Respondent. The Applicant launched a rescission application setting out the events that gave rise to the default award. The application for rescission was opposed. The Applicant opposed the application for a rescission on various grounds. In brief, it was submitted (*inter alia*) on behalf of the Respondent that Ntombela was in willful default. It was submitted that this was the second time that a default award was made against the Applicant and that there was a clear pattern in the

conduct of the Applicant. It was further pointed out that the Applicant requested a postponement of the arbitration on the first day of the hearing due to the non-availability of certain witnesses. Yet when the arbitration resumed neither Ntomebela nor his witnesses arrived. Van Niekerk disputed the allegation that he received a call from Ntombela stating that he was ill. The only message received indicated that the Applicant's representative was not available as he was "*out of town*". Van Niekerk further stated that he only received a call from Ntomebla at 11H30 stating that he was not available to attend the case.

The Award

[6] In arriving at a decision, the Commissioner took the following into account:

- (i) The matter has dragged on for a number of years and in many instances the postponements were due to the requests from the Applicant. The Commissioner was of the view that the Respondent suffered prejudice as a result of the actions of the Applicant.

- (ii) The Applicant has failed to attend one of the previous hearings and that resulted in a default award (the first default award) which was eventually set aside.
- (iii) The present (second) default award was again as a result of the non-attendance of the Applicant. The Commissioner noted that Ntombela stated that he was ill. However, no confirmation of his version was presented to the CCMA. More in particular, the person Sabelo did not confirm his version.
- (iv) The allegation that Ntombela elicited the assistance of Van Rensburg and Venter is also unsubstantiated.
- (v) Finally, the Commissioner took into account the fact that the matter was postponed from 24 October 2004 in order for the Applicant to bring further witnesses. Despite this, the attendance register makes no mention of the fact that there were any witnesses for the Applicant.

[7] After evaluating the submissions on behalf of the Applicant, the Commissioner came to the conclusion that Ntombela was irresponsible in dealing with the matter. The rescission application was accordingly dismissed.

Merits of the review

[8] In brief it was the Applicant's case that the ruling "*was not rationally justifiable in light of the evidence and material placed before her*" and that "*she misdirected herself in a number of respects*". I have read the opposing papers filed on behalf of the Respondent. In brief it was their submission that the Applicant was engaged in a delaying tactic and in support of this submission set out the following background facts to this matter.

- (i) It appears that the matter formally commenced on 2 May 2003 when SAA raised a point *in limine* about the nature of the dispute. This resulted in a postponement of the hearing whereafter the CCMA Commissioner ruled against the Applicant.
- (ii) The matter was again set down for 9 October 2004. The Applicant's representative requested a postponement to allow him to bring additional witnesses. The request was approved and the case was postponed to 25 November 2003. Ntombela arrived at the CCMA and informed the CCMA that the witnesses were not available and requested a further postponement. The Respondent agreed to postpone after having been informed by Ntombela that the Applicant would consider a settlement. On 12 December

2003 the Respondent was informed that there would be no settlement.

- (iii) A new date for the hearing was set for 24 March 2004. On that date the representative of the Applicant did not attend and a default was made in favour of the Respondent. A rescission was subsequently granted and the matter was rescheduled for 24 October 2004 with a new commissioner. At the commencement of the hearing the point *in limine* – similar to the one raised on 2 May 2003 - was again raised and again rejected by the CCMA commissioner. At the end of the hearing the representative again requested a postponement to allow the Applicant to bring additional witnesses.
- (iv) A date was set for 10 and 11 January 2005. Again the representative of the Applicant did not arrive. A default award was rendered. Again the Applicant sought a rescission which was dismissed by the Commissioner. It is this rescission ruling that is now the subject of the present review.

[9] The rescission application was made in terms of Rules 31 and 32 of the Rules of the CCMA

[10] The Labour Court in *Northern Training Trust v Maake & Others* (2006) 27 ILJ 838 (LC) confirmed the test to be applied by a Commissioner in a application for rescission in terms of section 144(a) as follows:

"The enquiry in an application for the rescission of an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set-down was sent (for instance by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessarily deal fully with the merits of the case.

[11] In *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2007] 20 BLLR 917 (LAC) the Labour Appeal Court held that in applying section 144 of the LRA, a Commissioner "*is in the same position as a judicial officer in the civil courts when considering an application for rescission*". The Court was in agreement with the principle that the civil courts had always retained discretion to grant rescission of a judgment on good cause shown. The Court also referred to the decision in *De Wet & others v Western Bank Limited* 1979 (2) SA 1031 (A) at 1024F where the Appellate Division (as it then was) stated:

"Broadly speaking, the exercise of the court's discretionary power appears to have [been] influenced by consideration of justice and fairness, having regard to the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the application in each case, and he had to satisfy the court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default."

The Labour Appeal Court also stated that circumstances may exist which fall outside of those referred to in section 144 of the LRA and that in such cases, logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded a remedy. The Court concluded as follows:

"It follows that if one was to hold that section 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances, allowed by the wording of the section, it would lead to unfairness and injustice. In my view, this would be inconsistent with the spirit and primary object of the Act referred to above. Furthermore, I am of the view that to interpret section 144 of the LRA, 66 of 1995 so as to include 'good cause' as a ground for rescission to give the Act an interpretation that is in line with the right provided for in terms of section 34 of the Constitution of the

Republic of South Africa 1996 because, if section 144 of the LRA 66 of 1995 is not interpreted in that way a party who can show good cause for his default will be denied an opportunity to exercise his right provided for in section 34 of the Constitution of the Republic of South Africa, 1996, despite the fact that he may not have been at fault for his default. That would be a grave injustice." (At paragraph [33]).

The Labour Appeal Court in that case upheld the appeal on account the basis that the Commissioner had taken account only of one aspect of the applicable test. The Court thus concluded that the Commissioner had failed to weigh together all the relevant factors in determining whether it was just and fair, and, therefore, whether good cause had been shown for the rescission of the arbitration award.

[12] Should the Commissioner's refusal to grant the application for rescission be reviewed and set aside? In deciding this issue regard must be had to the decision in *Sidumo & others v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). In this

case the Court held that the test for review is the co-called "*reasonable decision-maker test*". The question to be asked is whether or not the decision arrived at is one which a reasonable decision maker could not have arrived at. If this question is answered in the affirmative this Court will interfere with an arbitration award or ruling. In *Edcon Limited v Pillemer NO & Others* (2008) 29 ILJ 614 (LC). The Labour Appeal Court held as follows in respect of the discretionary powers of the Commissioner:

"... boils down to saying the decision of the commissioner is to be reasonable ... meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision-maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof." (Ad paragraph [21].)

[13] If regard is had to the reasoning of the Commissioner in arriving at a decision I am of the view that the decision arrived at is one which a reasonable Commissioner could have arrived at. The decision of the Commissioner certainly falls within the bounds of reasonableness (see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (4) SA 490 (CC):

“[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to

ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution. “

[14] A reasonable Commissioner could have arrived at the conclusion reached by the Commissioner in the present case. It is certainly not unreasonable to refuse the rescission on the basis of the largely unsubstantiated claims of illness (in the absence of a confirmatory from the doctor or from Sabelo who allegedly drove him to the doctor). The Commissioner was also entirely reasonable to take into account that the claims that Van Rensburg and Venter who allegedly assisted Ntombela were unsubstantiated. There is no explanation why these two individuals could not depose to confirmatory affidavits. According to the papers Venter was one of the Applicant's witnesses. The Commissioner specifically finds that no witnesses for the Applicant signed the attendance register. At the very least one would have expected Venter to confirm in an affidavit that she was there. Yet she remained silent. I also find that it was not unreasonable for the Commissioner to have found that there was a pattern of postponements in order to obtain witnesses and then not to appear. It happened twice. Lastly, the

Commissioner was also not unreasonable in drawing an adverse finding from the fact that there is no evidence that the witnesses for the Applicant did in fact appear at the hearing in January in circumstances where their attendance was the reason for the postponement in the first place. As already pointed out Venter could have deposed to an affidavit stating that she was there as a witness. I am accordingly satisfied that the Commissioner properly evaluated all the evidence and came to a reasonable decision.

[15] In the event I find that there is no reason to interfere with the discretion exercised by the Commissioner.

AC BASSON, J

DATE OF REASONS: 5 MARCH 2009