

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO: JR1974/2009

In the matter between:

PRODUCTION INSTITUTE OF

SOUTHERN AFRICA (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

GERALDINE DUNN

Second Respondent

SISANDA SONTSHAKA

Third Respondent

Judgment

Molahlehi J

Introduction

1]This is an application to review and set aside the ruling issued by the second respondent (the commissioner) under case number GAJB36806-08. In terms of the ruling the commissioner rescinded the ruling which had dismissed the third respondent's (the employee) unfair dismissal claim. The case of the employee had been dismissed because of his failure to attend the arbitration

hearing which had been scheduled for 25 March 2009. It is common cause that the employee did receive the notice of arbitration hearing but for the reasons set out later in this judgment failed to attend the hearing. His attorney also failed to attend the hearing and explanation has been rendered.

Background facts

- 2] The employee was dismissed following several charges of misconduct. He did not agree with the fairness of the dismissal and as result referred a dispute concerning an alleged unfair dismissal to the first respondent (the CCMA) for arbitration. The arbitration was scheduled for hearing on the 25th March 2009 at 12h00.
- 3] Mr. Lottering, the deponent to the founding affidavit of the applicant arranged to have a preparation meeting earlier at 10h00, on that day with the applicant's attorney. Whilst waiting at the restaurant he received a telephone call from the applicant's attorney informing him that the employee's attorneys had sent a letter indicating that the matter would not proceed on that day as the employee was sick and had attached to the letter a doctor's sick note.
- 4] As stated earlier it is common cause that neither the applicant nor his attorney attended the arbitration hearing. After satisfying himself that a proper notice of the hearing was issued to the parties, the commissioner dismissed the employee's claim due to failure to attend the hearing. The employee was unhappy with the decision to dismiss his referral and

accordingly launched a rescission application in terms of s144 of the Labour Relations Act 66 of 1995 (the LRA).

5]On the 10th June 2009, another commissioner issued a ruling rescinding the dismissal ruling referred to above. In rescinding the ruling the commissioner ceased with the rescission application reasoned as follows:

“The application for arbitration was dismissed on the 25th March 2009. I find that the dismissal was erroneously issued as the applicant was indisposed on the day and had submitted proof of same. I therefore find that there is good cause for rescission.”

Principles governing rescission

6]The rescission ruling was granted in terms of the provisions of s144 of the LRA. Section 144 reads as follows:

“144. Variation and rescission of arbitration awards and rulings

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 or ruling -

(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; or

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

7]The procedure for instituting a rescission application is set out in rule 32 of the Rules of the CCMA. Rule 32 of the CCMA rules reads as follows:

“32 How to apply to vary or rescind arbitration awards or rulings

1) An application for the variation or rescission of an arbitration award or ruling must be made within fourteen days of the date on which the applicant became aware of-

a) the arbitration award or ruling; or

b) a mistake common to the parties to the proceedings.”

8]In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others* (2007) 28 ILJ 2246 (LAC), the court held that good cause should be read into s144 of the LRA. The decision in that case confirmed what had already been decided in *Northern Training Trust v Maake & Others* (2006) 27 ILJ 828 (LC), where the test for rescission in terms of s144(a) of the LRA was said to be the following:

“The enquiry in an application for rescission on 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, a probability 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 willful 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 need not deal with the merits of the case.

9]The discretion that a commissioner exercises in considering a rescission application is very wide and is the same as that of judicial officers in civil cases. See *Martin v Commission of Conciliation Mediation and Arbitration* (2008) 29 ILJ 2254 (LC). However, in exercising the power to either grant or refuse the rescission application, the commissioner has to make sure that in doing so he or she applies his or her mind to the factors relevant to such a determination. Failure to consider or apply one's mind to any of the relevant factors by the commissioner in his or her consideration of the rescission application could make such a decision unreasonable or defective as envisage in s145 of the LRA. As stated in *Martin's* case, the Labour Appeal Court upheld the appeal largely because the commissioner in that case had taken into account only one aspect of the applicable test.

10] In dealing with the test which a commissioner faced with rescission

application has to apply Van Niekerk AJ, as he then was, in *Martin's* case had the following to say:

“A reasonable decision maker in the present circumstances would apply the relevant test- in other words the test referred to in North Training Trust and affirmed by the Labour Appeal Court in Shoprite Checkers. This required her to establish that the notice of set down was sent (which she did) and then determine whether the applicant's default was willful, and whether she had reasonable prospects of success in her claim. A commissioner's decision cannot be said to be reasonable when the commissioner fails to consider all the materially relevant factors prior to making that decision.”

11] Even before considering a rescission application the most important point for the commissioner in the present matter was to be satisfied that he or she has jurisdiction to entertain the application. The commissioner does not have the power to entertain a rescission application if such an application is filed late and no condonation has been granted. It is trite that when an application is late an application for condonation for the late filing of the application has to be made. The principles governing the approach to be adopted in dealing with an application for condonation, is summarised by the Labour Appeal Court in *National Union of Mineworkers v Council for Mineral Technology* (1999) 3 *BLLR* 209 (LAC), wherein it was held that:

"The approach is that the court has discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated, they are not individually decisive. What is needed is an objective conspectus of all facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue of the delay, the prospects of success no matter how good the explanation for the delay, an application for condonation should be dismissed."

12]It is generally accepted that in a case involving an individual a strong case need to be made before condonation can be granted. It has also been generally accepted that all the factors to consider in a condonation application are interrelated and should be weighed together. However, there is also authority that says that absence a reasonable explanation or prospects of success condonation should be refused. Prospects of success does not entail the applicant having to proof on the balance of probabilities that he or she will succeed when the full merits of the matter is considered. What an applicant needs to do is to provide a basis that shows that he or she has a good chance of succeeding when the matter is considered on its merits. It is however not good enough for the applicant to make a broad and sweeping

statement that he or she has good prospects of success. An averment that there are prospects of success or bona fide defense must be substantiated and backed by facts. A commissioner who simply accepts a bare statement that the applicant in a condonation application has prospects of success fails in the performance of his or her duties. It is also a fundamental duty of a commissioner to satisfy himself or herself that the condonation is properly served on the respondent for it to be entertained. In other words a condonation application not served on the other party can never be said to be properly before the commissioner.

Evaluation

13]It is apparent from the reading of the ruling that what influenced the commissioner in arriving at the conclusion that the dismissal ruling ought to be rescinded was the fact that the employee was ill on the day in question and therefore the default was not willful. This seems to be the only factor which the commissioner considered in arriving at the decision as she did. The commissioner did not however, consider and apply her mind to some critical issues that required her attention in the consideration of whether or not rescission should be granted and more importantly whether the application was properly placed before her.

14]The first issue relates to the late filling of the rescission application. The ruling dismissing the applicant's claim was made on 25th March 2009 and the rescission application was launched on the 12th May 2009. The employee

says that his attorney received the ruling on the 3rd April 2009. The rescission application still remain late even on the applicant's own version. The employee did not apply for condonation when he initially launched his rescission application.

15]Although, the rescission application was outside of the 14 (days) within which to file a rescission application from the day of becoming aware of the ruling the employee filed his rescission without filing a condonation application. The issue of the lateness of the rescission application was raised by the applicant in its answering affidavit which was filed on the 25th May 2009. In his replying affidavit the employee indicates that condonation for the late filing of the rescission application had been filed with the CCMA and that the application was only one day late.

16]After, receipt of the replying affidavit the applicant's attorney wrote a letter informing the employee's attorneys that they had not received the condonation application. The employee's attorney did not take any trouble to respond to the query and the same applies to the subsequent reminder.

17]As indicated earlier the commissioner issued the ruling condoning and rescinding the dismissal ruling. The question that has arisen as a result of this review application is whether there is any defect in the granting of the condonation and the rescission ruling as issued by the commissioner. In my view the answer to this question has to be in the positive for the reasons set out below.

18]It is trite that a commissioner has a duty in law of ensuring that all affected parties are properly served with all relevant process related documents.

19]The employee does not deny that the condonation application was not served on the applicant but contends that it was not necessary to do so because the commissioner rescinded the dismissal ruling on his own accord. This is factually incorrect because the rescission process was put in motion by the employee's application dated the 12th May 2009 which was accompanied by all the relevant documentation in support thereof including the confirmatory affidavit by the employee's attorney. The application was as indicated opposed by the applicant who in the answering affidavit raised the issue of the late filing of the rescission application including the fact that it was not accompanied by a condonation application. Thus this was a formal application in terms of s144 of the LRA and processed in terms of rule 32 of the CCMA Rules which required the commissioner to satisfy herself that there was compliance with the rules of natural justice and fair hearing in the ventilation of the issues in dispute.

20]In the light of the above the first enquiry which the commissioner ought to have conducted before considering the condonation application was whether, proper service had been served on the applicant. It is common cause that the condonation application for the late filing of the rescission application was not served on the applicant. Accordingly, the commissioner failed in the performance of her duties and therefore committed a gross irregularity

whose consequences amounted to a denial of a fair hearing for the applicant. Put differently, the commissioner considered an application for condonation for the late filing of the rescission application which was not properly before her. It is for this reason that, on this ground alone, the ruling of the commissioner stands to be reviewed.

21] Assuming for whatever reason that the above finding was to be found to be incorrect, the next question that would arise in the review application is whether the commissioner in considering the condonation application and subsequently the rescission application, applied the relevant test. The key issue in this regard has to do more with the issue of prospects of success, an issue which the commissioner needed to consider in relation to the application for condonation.

22] Whilst I accept that prospects of success does not entail the employee having to prove on the balance of probabilities that he or she will succeed when the dispute is considered in the main matter, it is important that the employee should have given more details of the charges which were proffered against him. He says that a wrong procedure was followed during the disciplinary hearing. And as concerning substantive fairness the employee had the following to say:

“I further state that there are also issues relating to substantive unfairness such as unfair duplication of charges or instances where charges were not supported by evidence in terms of the

disciplinary record but I was nevertheless convicted on those charges.”

23]It is not clear from the above what charges the employee faced and in what way were they duplicated. I am aware of the general approach that says in default hearings commissioners should not be expected to interrogate what is put before them by the party that has attended the hearing. This principle does not however extend to situations where the appearing party simply makes bare allegations unsupported by evidence. In the context of proving prospects of success a litigant has to show by way of evidence that there exist a chance of succeeding when the matter is considered in the main hearing.

24]In the present instance had the commissioner applied her mind to what was presented by the applicant in as far as prospects of success is concerned and taken into account the totality of the case presented by the employee she would have come to the conclusion that the employee had failed to discharge his duty of showing prospects of success. This is even more so if regard is had to the stand that the CCMA has taken in relation to matters of this nature. The CCMA has generally taken a strict approach. In dealing with rescission, that approach received support from the courts. An example of where the court supported the CCMA strict approach in dealing with rescission can be found in several cases dating back to *Carephone (Pty) Ltd v Marcus NO & others* [\[1998\] 11 BLLR 1093](#) (LAC), where the applicant's

attorney could not attend the CCMA hearing because of a bereavement. See also *MIT Tissue v Theron & others* [\[2000\] 8 BLLR 947](#).

25]Similarly, the commissioner failed to apply her mind to the degree of lateness of the rescission application. She found the delay not to have been excessive. It would seem this finding was made on the basis of the submission of the employee that the rescission application was one day late. In dealing with the degree of lateness the employee says that:

“I submit that from the date that the Senior Commissioner insisted on a formal application that my application for rescission is late by one day only.”

1) In his founding affidavit to the rescission application the employee says:

“ (22) *I am advised, which advice I accept that commissioner*

*Maseko has to date not refuted the true position that my medical certificate was in the file at the time of him making the erroneous ruling. Further, this position has not been challenged by the Senior Commissioner in his correspondence save for him to state that “**the commissioner has indicated that a formal application must be made**” without relying on any application on urgency, which directive or*

demand.

(23) *I am advised that on the basis of the letter dated 21st April 2009 from Senior Commissioner that there is no necessity to apply for condonation as it is not alleged in that correspondence that I am out of time except be ordered to bring my application on urgency, which I submit I have.”*

(24) *I submit therefore that there is very good reason why the ruling made by commissioner Maseko on the 25th March 2009 should be rescinded or varied as I was not in willful default and has good prospects of success.”*

26]It is apparent from the above that the employee calculated the period from which he had to make his application for rescission from date he received the letter from the Senior Commissioner saying that a formal rescission application should be made. There is nothing in the letter from the Senior Commissioner that suggests anything to do with the time frame within which the rescission application needed to be done. In fact a prudent litigant, who is keen in ensuring that his or her dispute is finalized as soon as possible, would have read the letter different to the advice given to the employee by his attorney. The letter indicates that a formal application needs to be made and that it be made urgently.

27]The confusion, if any arose, in the letter of the Senior Commissioner is irrelevant particularly if regard is had to the fact that the employee had throughout been assisted by an attorney. The approach adopted by the employee's attorney in this matter is however very strange and extraordinary. In the first instance the employee's attorney seems to have interpreted s144 of the LRA to impose a duty on the commissioner to rescind an arbitration award or ruling on his or her (the commissioner) own accord if in the opinion of any of the parties that award or ruling was erroneously issued. In my view this interpretation is totally misplaced. It is clear from the reading of s144 of the LRA that the commissioner may if he or she is of the opinion that there was an error in issuing of the arbitration award or the ruling on his own accord rescind the award or the ruling. There is nothing in law that compels or requires the commissioner to *mero mutu* rescind an arbitration award or ruling or give reasons for not doing so. Where the commissioner does not exercise his or her discretion to *mero mutu* rescind an arbitration award or a ruling the law is very clear as to what the parties in that instance need to do. Section 144 of the LRA gives any of the parties the right to file a rescission application on the basis of the grounds set out therein. And more importantly rule 32 of the CCMA Rules states very clearly that a rescission application should be brought within fourteen days of the date on which the applicant became aware of the arbitration award or ruling.

28]It therefore means that in considering whether there has been compliance with the provisions of rule 32 of the CCMA Rules the first factual enquiry is to determine the date upon which the party bringing the rescission application became aware of the arbitration award or the ruling. In the present instance the employee says that he became aware of the ruling on the 3rd April 2009. That is the date when the fourteen days as provided for in the rules started running.

29]Having established the date when the employee became aware of the ruling the commissioner needed to calculate fourteen days from that day which would have been around the 17th April 2009. The employee's application having been launched on the 12th May 2009 was clearly late. In my view this is the frame work within which the commissioner ought to have considered the extend of the delay when she considered the delay in the launching of the condonation application, which as I have indicated was in any case not properly before her because it was not served on the applicant.

30]According to the employee the fourteen days as provided for in the CCMA rules commence running as from the 21st April 2009 when he received the letter from the Senior Commissioner. The correct legal position as indicated above is that the employee became aware of the ruling on the 3rd April 200. Thus the case of the employee as was presented before the commissioner who issued the rescission ruling was that the only indulgence he was seeking was only for one day when in law his application was late by more than

double the period provided for by the CCMA rules. Whereas the employee sought an indulgence of one day the commissioner gave him what he did not ask for.

31]In the light of the above I am satisfied that the applicant has made out a case for reviewing the ruling of the commissioner. As concerning the costs I see no reason why in law and fairness the applicant should be burdened with the costs in a matter where there was no basis for opposing the review application particularly if regard is had to the fact that the employee did not deny that the condonation application was not served on the applicant. He was therefore aware that the matter was never properly placed before the commissioner.

32]In the premises the following order is made:

1. The ruling of the second respondent issued under case number GAJB36806-08 dated 10 June 2009, is reviewed and set aside.
2. The ruling issued under the same case number date 25 March 2009, confirmed.
3. The respondent is ordered to pay the costs of the applicant.

Molahlehi J

JUDGE OF THE LABOUR COURT

Date of Hearing: 27th August 2010

Date of Judgment : 13th January 2011

Appearances

For the Applicant : Adv W Hutchinson instructed by Kirchmanns Inc.

For the Respondent: Mr. Samuels of Samuels Attorneys