

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

CASE NO JR 1216/2002

CAXTON LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

1ST Respondent

NTSOANE, D (N.O.)

2ND Respondent

CILLIERS, J C

3RD Respondent

JUDGMENT

LAGRANGE, J

Introduction

- 1] This matter has been a drawn out affair. It began on 21 June 1999 with an act of resignation by Mr J Cilliers, the third respondent in the review application ('the employee'). He then referred a dispute to the CCMA in good time, claiming that he had been constructively dismissed. A conciliation meeting was held on 27th of July 1999, at which the parties appeared to agree to address the points in dispute outside the forum of the CCMA. These discussions did not lead to a settlement. It seems the Commissioner was under the impression that the employee's claim of constructive dismissal had been withdrawn. For reasons which look as if they relate to the fact

that the original dispute did not contain a claim for overtime pay, it seems that the employee was persuaded to refer a fresh dispute referral under the same case number by the commissioner, which he and his union did. The overtime claim appeared in the second referral. That referral was not made within the 30 day period following the company's dismissal, but was only made on 25 August 1999, and was late.

- 2] A further conciliation meeting was convened to deal with this second referral on 1 September 1999. A certificate of the outcome to the effect that the dispute remained unresolved was issued on that date. The first date set for the arbitration of the dispute was 6 June 2000. In so far as it is the case that the dispute which was referred to arbitration followed on from the 'second referral', no condonation was applied for on account of the lateness and no objection was made by the employer to the matter proceeding to arbitration on this account. The employer never applied to review and set aside the certificate of outcome.
- 3] There is a dispute as to what happened at the hearing. The company ('the company'), which is the company in the review application claims in effect that neither Mr Cilliers nor his representative attended the hearing and after waiting a while, the arbitrator "saw fit to close the file", in the words of the company. A further notice of set down of the arbitration of the same case was sent out by the CCMA on 22 August 2001. The matter was set down for 11 September 2001 at 13h00 hours.
- 4] The day before the scheduled hearing on 11 September, the company's representative sent a fax to the CCMA indicating that it intended to raise a point *in limine* at the hearing. The company's objected to the matter proceeding because the CCMA had previously arbitrated the matter on 6 June 2000 and "*a formal award/ruling has been handed down.*" On this basis, the company submitted that the CCMA had no jurisdiction to convene a second arbitration hearing unless the third respondent had successfully rescinded or reviewed the first award. No copy of this ruling was attached to the submissions. In fact, no copy of the ruling has ever been produced by the company.

- 5] On the employer's account, a reversal of its early good fortune in the matter then occurred. It failed to attend the arbitration hearing scheduled on the second occasion, leading to a default award being issued in the employee's favour. Although the employer's *in limine* objection reached the arbitrator, he did not accept that the matter had been previously determined by another arbitrator, for reasons which will be discussed below, and proceeded to hear the matter on a default basis. He found that the employee had been constructively dismissed and awarded him 12 month's compensation. The company applied unsuccessfully to rescind this award, which was issued on 22 September 2001. It is the rescission ruling of 5 April 2002 which is the subject matter of the review application currently before court.
- 6] The review application was launched on 19 September 2002. On 9 February 2004, the company filed a notice in terms of rule 7A(8) of the Labour court rules notifying the employee that it stood by its notice of motion. The employee filed a notice of opposition and a supporting affidavit by 19 February 2004. Nothing further happened for over a year, and on 29th of April 2005 the employee filed an application to dismiss the review application. Some six months later, at the end of October 2005 the company filed its opposing affidavit. The reason given by the company for its delay in filing an opposing affidavit is that the dismissal application was sent to its previous attorneys of record, who did not advise it that the application had been received. It seems also there is some doubt it reached the former attorneys of record. It was only in late August 2005, when it received the notice of set down in the matter that it became aware of the existence of the dismissal application. The employee did not file a replying affidavit in this application. I believe the explanation is not implausible and in view of the merits of the dismissal application discussed below, the late filing of the opposing affidavit in the dismissal application is condoned.
- 7] The matter was set down for a hearing on the unopposed roll on 26 October 2005. On that occasion it appears to have been postponed *sine die* by agreement. The next occasion it was set down was on 2 April 2009 but was removed from the roll. On 19 during the same year it was again postponed *sine die*. Once again it was set down, this time for a hearing on 15 September 2009, but it was once more removed from the roll. Later it was re-enrolled for

a hearing on 27 January 2010. Once again the matter did not proceed. It was finally heard on 15 September 2010. In short, the matter has been ripe for hearing for over five years. There is an explanation for some of these delays one of them being the unavailability of the employee's counsel who was appearing *pro bono*. Another cause of delay was the fact that the registrar apparently would not set the review application down while the dismissal application was pending and would not set the latter application down, because a replying affidavit had not yet been filed. Eventually both applications were set down to be heard on the same day, which is what should have happened without waiting for the parties to request this.

The dismissal application

- 8] The employee relied on limited grounds for launching the dismissal application. In his founding affidavit in support of this application he claims that the company did not serve him with a record or transcripts of the CCMA proceedings. He claimed also that it failed to comply with the court rules and it was delaying the matter by not setting it down for a hearing.
- 9] The company replied that it did serve a copy of the record on the employee and as evidence of this attached a registered postal slip dated 26 November 2004 addressed to him. In a later affidavit related to the review application, the employee admitted the possibility of having received service of the record in this manner. He did not identify which specific rules of court the company had allegedly not complied with, but I presume he intended to refer to the rules governing reviews and, in particular, the time period for filing a record. The company says it is blameless for the matter not being set down because it was advised that the review application could not be set down until the dismissal application had been decided and that the registrar of the court determines the date for this only once the pleadings have closed. It seems that the fact the employee did not file a replying affidavit might have caused the registrar not to set the matter down, even though it was not necessary to wait for a replying affidavit to be filed, once the time for a reply had expired.
- 10] It seems critical to me that the employee did not try to dispute the company's allegation

that it served the record on him by registered post. Had it been otherwise, he might have had better grounds for asking for the dismissal of the review application. I also accept that the delays in setting the review application down cannot simply be attributed to the company alone. In any event, the only record before the court did not include a transcript of the proceedings.

- 11] For these reasons, I do not think that Mr Cilliers has provided compelling grounds for dismissing the review application.

The review application

The arbitrator's rescission ruling

- 12] The only record of what transpired at the rescission application hearing is the ruling itself. The focus of the arbitrator's reasoning was on the question of whether or not there was wilful default on the part of the company in failing to attend the hearing. In reaching the conclusion that it was in wilful default, the arbitrator based his finding essentially on two subsidiary inferences he drew from the evidence. Firstly, he concluded that the explanation of the company's representative that he had been held up because of the road accident which took 20 minutes to clear could not explain his failure to arrive at the hearing because if he had driven straight from the accident to the CCMA he would have found the hearing in still in progress. Secondly, the arbitrator remarked on the absence of any witnesses for the company at the hearing and concluded that the company's representative could not have had any evidence to present at the rescission hearing, which would have been crucial to the success of the application. By implication, the arbitrator inferred that the employer had not seriously intended to defend the claim.

The grounds of review

- 13] The company raises a number of grounds of review in its founding affidavit, which it decided not to supplement or expand upon when it filed a rule 7A(8) notice.

For the most part, the company's cause of complaint is the arbitrator's handling of the evidence before him. Firstly, it complains that the arbitrator failed to deal with all its evidence, which it claims was plain from his statement in his default ruling that "*besides, Mr Ross had nothing to present to the rescission hearing as evidence.*"

14] Further, it claims the arbitrator did not apply his mind to the evidence in finding that after the accident in which the company's representative was involved was cleared up in 20 min, the representative did not proceed to the CCMA, whereas the company's representative had stated in his affidavit in support of the rescission application that he had arrived at the CCMA offices at approximately 13h56, but the arbitrator was not present.

15] In addition, the company submits that the arbitrator relied on inadmissible evidence in coming to the conclusion that he would still have been busy with the default application hearing if the company's representative had arrived when he said he did.

16] The company argues further that in coming to the conclusion that it was in wilful default, the arbitrator had paid lipservice to the principles of fairness and had clearly disregarded all the admissible evidence it had placed before him.

17] It also complains that the arbitrator did not consider the *in limine* objection when he issued his rescission ruling.

18] The company's most forceful attack on the arbitrator's reasoning is that he failed to apply his mind to the legal principles governing the rescission of an award. If he had he done so on the admissible facts before him he could only have come to the conclusion that there was no wilful default on the part of the company in failing to attend the hearing.

The test for rescission

19] Section 144 of the Labour Relations Act, 66 of 1995 ('the LRA') reads as follows:

“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 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.”*

20] The only provision of this section which might apply to the company is subsection 144 (a). However, the Labour Appeal Court has held that applicants for rescission may also rescind a default award if they can show good cause for setting it aside:

“Section 144 must be interpreted so as to also include good cause as a ground for the rescission of a default arbitration award. Accordingly, a commissioner may rescind an arbitration award under s 144 where a party shows good cause for its default.”¹

21] The LAC reiterated the requirements of good cause:

“[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the company has a prima facie defence. In Northern Province Local Government Association v CCMA & other (2001) 22 ILJ 1173 (LC); [2001] 5 BLLR 539 (LC) at 545 para

¹ *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2007) 28 ILJ 2246 (LAC)*

16 it was stated:

'An company for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an company must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims.'

[36] *In MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others (1994) 15 ILJ 1310 (LAC) at 1311-1312A Nugent J had this to say:*

*'These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.'"*²

22] In ***Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)***, Miller JA stated at 765A-C that:

“The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairns' *Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

- i) *that the party seeking relief must present a reasonable and acceptable explanation for his default ; and*

2 *Shoprite* at 2257

(ii) *that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.'*

23] In the *Shoprite* case, the LAC set aside a rescission ruling by a Commissioner who declined to set aside a default award because in considering good cause, the Commissioner only took one aspect of the case into account and consequently failed to weigh together all the relevant factors in determining whether it was just and fair and therefore with a good cause had been shown for the decision of the award. Had he applied his mind to all the issues before him in the circumstances of that case he would have rescinded the default award.³

24] Considering the arbitrator's ruling in this case it is difficult to escape the conclusion that he only had regard to whether or not the company had given a reasonable explanation for its default. In his assessment of the evidence, he essentially dismissed the company representative's explanation on the basis that if he had arrived at the CCMA when he said he did, the hearing would still have been in progress. This crucial finding depends on the arbitrator's own estimate of how long the rescission hearing took. It is noteworthy in this regard that the arbitrator simply says that it "*could have*" lasted 45 minutes, which is an unambiguous indication he was not certain of the duration of the hearing. If one has regard to the evidence of Mr Cilliers at the default hearing as recorded by the arbitrator, it is difficult to believe that it would not have been completed in under 20 minutes, if not much less. The company representative testified that he arrived at the CCMA at 13h56, which was nearly an hour after the hearing was scheduled. It is not implausible in the circumstances that the hearing might have been concluded a few minutes before he arrived. While the arbitrator was obviously entitled to take into account his own recollection of the length of the hearing, it was unreasonable of him to simply prefer what he knew to be mere speculation against the more precise affirmation by the company representative.

25] Another thing which the arbitrator took account of was that no witnesses appeared for the company. The company however believe that the arbitrator would be compelled to uphold its *in limine* objection. Moreover, the *in limine* objection

3 *Shoprite*, par [37]

was filed the day before the hearing was due to take place, which was clearly indicative of the company's intention to oppose the arbitration proceedings. It is difficult to understand how the arbitrator could have concluded that the company had not demonstrated a serious intention of defending the matter. Having regard to the evidence before him, was the arbitrator's finding that the company was in wilful default reasonable? I do not think that on the evidence before him he could have reached the conclusion he did without entirely ignoring the implication of the *in limine* objection in so far as it related to the company's intention to defend the matter.

26] Moreover, it seems apparent that the arbitrator determined the rescission application on one consideration only, without having regard to issues such as whether the company had a *bona fide* defence to Mr Cilliers' claim. It is true, as the employee points out, that in its application for rescission, the company gives the briefest account of its defence. Essentially that defence boils down to the fact that it contends that the employee resigned of his and free will. In support of that contention the company attached what appears to have been the employee's written resignation on 21 June 1999. That simply read:

"To whom it may concern

I, J C Cilliers hereby hand in my resignation as from Monday, 21 June 1999.

Yours faithfully

J C Cilliers"

27] Nothing on the face of that letter suggests that the employee felt he had no other alternative but to tender his resignation, nor does it even hint at a reason therefore. In the rescission application, the company also pointed out that the employee bore the onus of proving that he was dismissed.

28] I agree that the statement of the company's defence on the merits is terse. Nonetheless, the statement of defence does not have to go into great detail:

“It is sufficient if [the company for rescission of judgment] makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”⁴

29] If one considers Cilliers' version of events as recorded by the arbitrator in the default award, it appears he was replaced by someone else who took over his functions and he was re-assigned to night-shift work. When he complained, he was told peremptorily that he could leave, which prompted his resignation. If this was a condonation application, in which the prospects of the company's success had to be weighed, it is doubtful that the company would succeed, but the test in a rescission application is merely to evaluate if the company's stated defence is one that might succeed if it can be proven.

30] Given the circumstances, I'm satisfied that the company had a genuine intention of defending the matter, even if its ultimate prospects of success as a matter of probability do not appear particularly strong. The company's stated defence, if proven, is one that could succeed and the obstacles that face an employee who claims constructive dismissal could still prove to be ones that the employee is unable to overcome in a hearing where both parties lead evidence and test each other's evidence.

31] Accordingly, the application to review the rescission ruling must succeed and the original default arbitration award in the company's favour on 22 September 2001 must consequently be set aside.

The *in limine* objection

4 *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)* at 476-7

32] Strictly speaking it is not necessary to consider any other ground of review but I would also like to address the objection relating to the arbitrator's alleged handling of the *in limine* objection in determining his rescission ruling before moving on to deal with the status of his finding on that issue in the original default application.

33] It must be said that, contrary to the company's submissions, the arbitrator clearly did have regard to the point *in limine* raised by the company in its letter sent to the CCMA the day before the rescission application hearing. However, it is unclear what his final conclusion was about the relevance of this issue to the rescission application. After mentioning the *in limine* point, he stated: "*It's not clear whether the letter sought to stay the proceedings.*"

34] However, it is important to place this apparently indecisive treatment of the *in limine* issue against the backdrop of the prior default hearing in which the arbitrator had already considered the merits of the company's *in limine* point in some detail. At the default hearing he had asked the employee's union representative to respond to the employer's claim that on 6 June 2000 the matter had been previously arbitrated and concluded. According to the arbitrator, the representative said he had attended the arbitration hearing on that day and the respondent's representative was also present. He said further that he had advised the commissioner that the employee was ill in hospital and wouldn't be able to attend the arbitration. He had requested a postponement for this reason, which the granted. Apart from hearing the contrary version of the employee, the arbitrator also noted the fact that no award had been produced by the employer, and he checked the CCMA case management system. He recorded that the system showed that the case had not been closed, which was at odds with a claim that it had already been determined.

35] The arbitrator concluded that the CCMA would not have set the matter down for arbitration if it was closed. He dismissed the *in limine* objection as having no basis.

36] Nothing suggests that when the rescission hearing took place, the company advanced any further points in support of its argument for rescission based on the *in limine* point. Consequently, there was no reason for the arbitrator to reconsider the merits of that

objection. Nevertheless at the default hearing, he did at least consider the possibility that it might have been the employer's intention to raise the *in limine* objection as a reason to postpone the rescission hearing, but he evidently discounted this because the employer's letter did not make that clear.

37] Before proceeding further, it is necessary to deal with the *in limine* point on which the company placed so much reliance. Essentially it claimed that the matter had already been determined in the previous arbitration held in June. However, to date it has been unable to produce a copy of any award or ruling dismissing the employee's claim. When the *in limine* point was dealt with in the absence of the company at the default arbitration hearing, the employee's union representative, who claimed to have been present on the first occasion, said that he requested a postponement of the arbitration on account of the company being ill and in hospital, which request was granted.

38] The company was obviously aware of this contrary version when it filed its rescission application, but does not attempt to deal with it at all. It also does not appear to have been canvassed at the rescission application hearing, where one might have expected the company to try and bolster its claim that the matter could not be set down again for arbitration. The arbitrator investigated the status of the matter at the time of the default hearing and found that the matter had not been closed.

39] The company also subsequently investigated the record of the matter's progress at the CCMA, but could not come up with clearer evidence that the matter had been finalised on 6 June 2000. All that investigation revealed was that four dates for the matter had been set down, one for conciliation and three for arbitration. Although the company contends that this is consistent with its claim that the matter was arbitrated on 6 June 2000, it is equally consistent with the matter being postponed once and set down on two further occasions, namely the default hearing in September and the subsequent rescission hearing. In the light of all these factors, the arbitrator's finding on the *in limine* objection given what was before him at the default hearing was not unreasonable.

40] However, because the default award should have been rescinded, his ruling on this

question in that hearing also cannot stand and it is possible that on a full re-hearing evidence might be canvassed which could lead to a different conclusion.

Remedy

41] The absurdity of this matter is that after 10 years, the parties have still not participated in a hearing in which their respective versions of the merits of the unfair dismissal claim have been properly canvassed in evidence. Ordinarily, where there has been a delay of this nature, the court would be loathe to refer it back to the CCMA for a hearing. However, the evidence of events leading to the employee's resignation is simply insufficiently detailed to permit a fair evaluation of the merits of the matter on what is available.

42] With great reluctance therefore, I am referring it back for a fresh hearing on the in limine ruling, and, if necessary, the merits. I am mindful of the fact that either or both parties may be prejudiced by their inability to obtain the testimony of certain witnesses after such a long time and that witnesses' memories of events might be vague. There is no reason to believe that the parties might not be equally prejudiced in this respect, but to decide a constructive dismissal dispute on the sketchy and patchy evidence available would be even worse in my view.

Order

43] Accordingly, the following order is made:

(a) The second respondent's rescission ruling 05 April 2002 is reviewed and set aside and so too is the second respondent's default award on 22 September 2001.

(b) The first respondent is directed to set the matter down for a hearing before another commissioner other than the second respondent, to determine both the in limine objection

based on the alleged prior ruling/award of 6 June 2001, and if necessary, the merits of the third respondent's unfair dismissal claim.

(c) No order is made as to costs.