

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: JR 2383/09

In the matter between:

NUM obo GABELA, J

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

CELLIER L, (N.O.)

Second Respondent

**KLOOF GOLD MINE,
A DIVISION OF GOLDFIELDS SA (PTY) LTD**

Third Respondent

JUDGMENT

LAGRANGE, J:

Introduction

^{1]} This is a review application to set aside a rescission ruling issued by the second respondent ('the arbitrator') on 3 July 2009. The applicant, Ms J Gabela ('Gabela') also applies for condonation for the late filing of the review application, which was 12 days late. The latter application is unopposed and condonation for the late filing of the review application is granted.

Background facts

2] On 27 November 2008 the applicant referred an unfair dismissal dispute arising from an alleged constructive dismissal through her union, the National Union of Mineworkers ('NUM'), to the CCMA. On 12 February 2009, following the unsuccessful conciliation of the dispute, the applicant referred it to arbitration. The dispute was set down for a conciliation - arbitration process on 25 March 2009. According to Gabela, the notice of set down for these proceedings was sent to NUM's regional office, which in turn forwarded it to the branch office. The branch office then notified her full-time shop steward, Mr Ramokone ('Ramokone'), who contacted her.

3] On 25 March 2009, Gabela and Ramokone attended the proceedings and a written agreement was concluded between the union and the mine. The agreement was recorded on a CCMA template form bearing the heading 'AWARD/RULING/ORDER/DIRECTIVE'. Beneath the heading, the parties recorded the following:

"The above-mentioned parties hereby consent to postpone the matter sine die. This postponement is granted by virtue of the agreement between both parties above mentioned.

File GAJB 36254 - 08, file GAJ B37534 - 08 and file GAJB 26684/08 to be consolidated into one file with the primary issue being constructive dismissal."

(sic)

4] Gabela claims that at this hearing, Ramokone advised the arbitrator that he would prefer the CCMA to send the notice of set down directly to his fax number contained in the request for arbitration of 29 January 2008 in order to avoid the notice been sent from the regional office to the branch office. The respondent does not dispute this allegation, but points out that these allegations were only made in the review application and were not placed before the arbitrator when he decided the rescission application.

5] The matter was enrolled for arbitration on 7 May 2009. According to the arbitrator, a notice of the hearing had been sent to both parties by fax on 2 April 2009. At the hearing neither the applicant nor her union representative attended and the matter was dismissed in terms of section 138 (5) (a) of the Labour Relations Act, 66 of 1995 (' the LRA'). Gabela claims that the reason they did not attend the arbitration was that NUM's regional office did not receive the notice of set down for 7 May 2008, nor did it fax a notice of the set down to Ramokone's own fax number which appeared on the 7.13 Request for Arbitration form. She further claims that Ramokone only became aware on 11 May 2009 during a conversation with Mr Brits ('Brits'), the applicant's manager, that the matter had been set down on 7 May 2009. Brits had asked Ramokone why he had not attended the arbitration proceedings to which the latter respondent that he had not been aware of the notice of set down. Once again, the company does not dispute these facts but reiterates that they were not placed before the arbitrator when he considered the rescission application

and accordingly cannot be relevant to the review thereof.

6] In its answering affidavit to the review application the mine alleges that Ramokone contacted Mr Heathcote ('Heathcote'), an IR officer of the mine, sometime after 2 April 2009 in order to schedule a pre-arbitration meeting on 23 April 2009. The applicant claims that the deponent to the mine's answering affidavit Mr Rautenbach ('Rautenbach') could not attest to this as it was only Heathcote, who is now deceased, who would have had knowledge of the telephone conversations between himself and Ramokone. However, Heathcote, when he was still alive, did say as much in his answering affidavit in the original rescission application. In that affidavit, Heathcote went further and said that Ramokone did not attend the scheduled hearing and only contacted him again after the arbitration.

7] Gabela says she only personally learnt of the date of the arbitration from the company's industrial relations officer, Ms Khoza ('Khoza'), on 14 May 2009. The following day she made enquiries at the CCMA where she received a copy of the dismissal ruling.

8] The individual applicant then applied for rescission of the dismissal of her case. Gabela claims that she filed the rescission application without the assistance of NUM because Mr Ramokone was on leave at the time and was the only one who knew about the facts of the case. On 3 July 2009, the

application for rescission was dismissed. The arbitrator's brief reasons for dismissing the rescission application read as follows:

"2) In spite of evidence to the contrary filed in the CCMA file, the employee alleges that his union NUM did not receive notice of set down and was therefore not in wilful default of the proceedings. There is no confirmatory affidavit from NUM. The employer argues that further to receiving the notice of set down from the CCMA they engaged with the NUM official and scheduled a pre-arb meeting for 23 April 2009. NUM failed to attend the meeting, but they were indeed aware of the set down for the arbitration. The submission is not in dispute.

3) The employee argues that his constructive dismissal allegation arises from the failure by the employer to promote him which evolved into an untenable employment relationship caused by the employer. The employer argues that the applicant filed an alleged ULP dispute regarding the promotion issue, but resigned prior to the resolution of that dispute. He has subsequently been re-employed by their sister company South Deep Gold mine.

4) The employee's explanation for failing to attend the arbitration proceedings has little merit. His prospects of success are equally unconvincing."

(sic)

9] According to Gabela, the rescission ruling was faxed to her direct fax number and to the regional office of NUM.

The evidence before the arbitrator

10] In her affidavit in support of the rescission application, Gabela provides the following reasons for her failure to attend the arbitration hearing on 7 May 2008:

"At all material times prior to the date of hearing I did not receive a notice of set down from the CCMA. I am aware that the CCMA also sends text message and despite my cell number appearing on the 7.11 form, I was not notified. Further, in this matter I am represented by the National union of Mineworkers and the offices were not notified by the CCMA."

(sic)

11] In the paragraph headed "General" on the pro forma affidavit, Gabela further states that she had not lost interest in the matter as she intended to finalise the proceedings before the CCMA and that she would be prejudiced if the rescission application was refused because there is no forum that could deal with the matter at little cost.

^{12]} From the bundle of documents that was before the arbitrator it does appear in the 7.13 Request for Arbitration form that the applicant did provide a different fax number from that of the regional office. This is contrary to Heathcote's answering affidavit opposing the rescission application in which he stated: "*It is submitted that the applicant at no stage made amendments in respect of the cited contact facsimile number nor for that fact on any detail relating to the representative in the matter, the NUM.*" (sic). However, because the applicant never made an allegation to the contrary in her founding affidavit, nor filed a replying affidavit to gainsay what Heathcote had stated, her version of her alternative fax details was not drawn to the arbitrator's attention.

^{13]} Apart from what has been mentioned elsewhere, Heathcote confirmed that the mine received notice of the set down of the arbitration from the CCMA on 2 April 2009. He also claims that when the parties met on 25 March 2009 the arbitrator asked him to hold a pre-arbitration meeting before the next scheduled date. This tied in with his claim that he had arranged a pre-arbitration meeting with Mr Ramokone for 23 April 2009. He further confirmed, with reference to the necessary supporting document, that the notice of the arbitration had been faxed to NUM's regional office, and confirms what appears on the 7.11 form, namely that the fax number given by the union when the dispute was referred was the same.

^{14]} On the merits of her unfair dismissal dispute, Gabela said the following in her

founding affidavit in the rescission application:

"I referred a constructive dismissal dispute against the respondent after I was overlooked for promotion when I applied for a senior position. The respondent even changed the requirements of the position to suit a person with much lesser qualifications and experience than me. Further, when I applied for the position, the respondent suspended the appoint to that position. The respondent's supervisor, Johan Brits, became very personal and aggressive against me, resulting in a serious breakdown of the employment relationship between me and the respondent. I submit that I followed all internal procedures by lodging grievances prior to resigning on the basis of constructive dismissal."

(sic)

^{15]} In Gabela's supplementary affidavit in the review application, she elaborates on her allegations that she was thwarted by Brits and another supervisor, Scheepers, in her efforts to obtain training and promotion. Once again it must be noted that this was not before the arbitrator who had to decide if she had demonstrated some prospects of success.

^{16]} The mine made two points directly relevant to the merits of the applicant's case in its answering affidavit in the rescission application. Firstly, it submitted that resignation could not have been the appropriate path to follow and that it was trite that constructive dismissal claims are extremely onerous for an

employee to prove. It also pointed out that the applicant had resigned before the dispute, which she had referred to the CCMA as an alleged unfair labour practice regarding promotion, could be resolved. In the light of this, it argued, the applicant had not given the dispute resolution process an opportunity to resolve the matter before deciding to resign.

The grounds of review

^{17]} The applicant complains that the Commissioner acted irregularly and unreasonably in reaching his conclusions in the rescission ruling. Firstly, the applicant submits that just because there was no confirmatory affidavit from NUM to support the allegation that it did not receive the notice of set down, this could not be relied on by the arbitrator. She argued that this was because such an affidavit could not confirm the non-receipt of the notice of set down. I do not understand this proposition. If an official at NUM had attested an affidavit explaining why the fax did not come to anyone's attention or that the fax machine did not reflect a record of that fax that might well have explained why nobody acted on it.

^{18]} The applicant goes further and says that when the Commissioner realised there was no confirmatory affidavit from NUM he ought to have set the matter down for argument and sought confirmation from NUM whether or not the notice was received. The applicant also attacks the Commissioner's finding

that it was undisputed that NUM was aware of the set down and even arranged a pre-arbitration meeting which it failed to attend. The applicant appears to argue that such a claim supports her version that neither she nor the union knew about the set down and date of pre-arbitration meeting. With respect, the conclusion the applicant seeks to draw does not follow from the fact mentioned.

^{19]} Gabela also says that the arbitrator ought to have been aware that her failure to file a replying affidavit was because she was not assisted by NUM and therefore would not have known that she needed to do so. This is also a matter that the applicant contends should have prompted the arbitrator to set the matter down for a hearing so that the allegations could be disputed by herself or the union, particularly as he relied on the absence of a replying affidavit in reaching her findings.

^{20]} In her supplementary affidavit, Gabela raises two more grounds of review. Firstly, she criticises the arbitrator for failing to realise that if the notice of set down have been sent directly to Ramokone's number she would not have failed to attend the hearing. In this regard she says the Commissioner failed to have regard to the problems of indirectly communicating with Ramokone which the latter had raised directly with him. She points out that the rescission ruling was sent directly to her fax number and to the NUM's regional offices fax number.

21] On a different theme, the applicant attacks the Commissioner's conclusion that the prospects of success were "not convincing". She criticises the arbitrator's reasoning for not providing a more detailed account of how he came to this conclusion, particularly in the light of the fact that she believed she had set out sufficient facts to show that her manager had made working conditions intolerable for her.

Evaluation

22] A central issue in the review application is whether or not the arbitrator's finding that the union and the applicant were indeed aware of the set down for arbitration was reasonable given the evidence of the fax transmission to the union of the notice of set down and the undisputed evidence of the employer that a pre-arbitration meeting had been scheduled on a date *after* the notice of set down was issued. In essence, Gabela submits that the Commissioner could not simply have relied on this evidence to conclude that she and her union did in fact receive the notice of set-down for 7 May 2009, given the her denial that she had received notice of the hearing.

23] I accept that there are decisions which have held that a fax transmission slip is not necessarily sufficient proof of its receipt. However, it is *prima facie* evidence of service of the notice, and other evidence is needed to rebut the inference it gives rise to. A mere denial, without, for example, any explanation

of investigations made about the receipt of faxes around the time the fax was supposedly sent, or without some elaboration of the applicant's explanation of why she believes it did not come to her attention despite apparently having been transmitted, does not do much to shift the probabilities in the applicant's favour.

^{24]} The applicant also submitted that the arbitrator effectively had no regard to the specific arrangements made by Ramokone to have the notice of set-down sent to his fax address rather than to the regional office. However, in a rescission application of the applicant makes no mention of this. This is difficult to understand if, as she claims, she was expecting to receive communications through a different union channel from the one previously used. Even if she had drafted the rescission application without assistance, this explanation would have been uppermost in her mind, and I find it difficult to accept that she did not mention in it. I mention in passing that the style in which the affidavit is drafted does not seem to support her claim that she had no assistance. If Gabela had drawn the arbitrator's attention to the different addresses which appeared on the 7.13 request for arbitration form, the argument that the arbitrator failed to have regard to a relevant fact, might have carried more force. But given that, in explaining why she did not attend the hearing, she simply denies receiving the notice and blames the CCMA for not notifying her by SMS and further confirms that she is represented by the union which was not notified, I do not think the failure of the arbitrator to notice the

change of fax addresses in the 7.13 form is an error which can be laid at his door. There is nothing in the Gabela's affidavit to alert the arbitrator to the specific arrangements allegedly made by Mr Ramokone with him on the previous occasion, and it was reasonable of the arbitrator to evaluate her explanation with reference to what she alleged, not on what she failed to mention.

25] I agree with the respondent that, having regard to the points raised by the applicant in her founding affidavit, the arbitrator's conclusion that the applicants and the union were aware of the set down for arbitration, was not unreasonable.

26] In argument the applicant argued that the arbitrator erred in that he failed to consider whether the applicant's default was wilful. Firstly, this was not raised as a ground of review in either the applicant's founding or supplementary affidavits. In any event, the facts before the arbitrator were that the notice had been sent to the same fax number of the union as before and the applicant's representative had failed to attend a pre-arbitration meeting. It would not have been unreasonable in the circumstances to believe that applicant party had lost interest in the dispute.

27] On the question of the prospects of success, it is true that the arbitrator provides no evidence of his reasoning in arriving at the finding that the

applicant's prospects were "unconvincing". Though it is not necessary for the arbitrator to set out every consideration in arriving at a decision, in this instance, the arbitrator failed to cite any factual claim on which his conclusion was based.

28] However, even considering the relatively light requirements of demonstrating a bone fide claim, it must be said that the merits of the applicant's case as sketched out in the rescission application do not support the conclusion that if she was able to prove what she alleges that a she would be entitled to succeed on a claim of constructive dismissal. Whatever the truth of Gabela's claims of being thwarted in her promotion or training aspirations were, what is set out in the rescission application is simply insufficient to justify her resignation as a last resort.

29] The other basis on which her claim of constructive dismissal rests is that her supervisor became 'personal and aggressive' towards her resulting in a breakdown in the relationship between her and the mine. She claimed to have used grievance procedures to attempt to resolve this but to no avail. Of course, it is conceivable that an irresolvable conflict between an employee and their manager might prompt an employee to resign after despairing of any solution to the conflict. However, the mine pointed out that Gabela's resignation took place before the applicant had exhausted the proceedings in the LRA which might have resolved her grievances. I cannot say in the light of

this that the arbitrator unreasonably concluded that the applicant's case of constructive dismissal was unconvincing.

30] The biggest difficulty the applicant faces is that she did not refute any of the allegations made by the mine in its answering affidavit, and her own founding affidavit failed to raise issues she now raises on review. The arbitrator's reasoning can only be evaluated on the basis of the case for rescission that was put before him, not on what might have been said but was not. The drafting of the founding affidavit was clearly done by someone who ought to have been able to set out her claim for rescission with sufficient competence and there was no obvious reason for the arbitrator to have felt she was not assisted or that she needed advice on filing a replying affidavit. Secondly, she did not say that she had not been able to obtain the union's assistance in drafting it. In any event, if she had filed a reply, much of what she might have said is material that should have been in her founding affidavit and would suffer the usual problems of making out a case in reply.

31] In the circumstances, I am satisfied that there is no reason for setting aside the arbitrator's rescission ruling

Order

32] The applicants' review application is dismissed.

33] No order is made as to costs



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 14 September 2010

Date of judgment: 30 June 2011

Representation

For the Applicants: L Malan instructed by Finger Phukubje Inc.

For the Respondent: L Hollander instructed by Webber Wentzel Attorneys