

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

CASE NO: JR 232/11

In the matter between:

URBAN AFRICA SECURITY CC

Applicant

and

COMMISSIONER T . HLATSHWAYO

First Respondent

COMMISSIONER S.CHRISTIANSEN

Second Respondent

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

Third Respondent

P. MALULEKE

Fourth Respondent

Date of hearing :19 July 2011

Date of judgment :22 July 2011

JUDGMENT

MOLETSANE AJ

Introduction

1. This is unopposed application to review and set aside the default arbitration award under case number GAJB 8020-10, dated 9 April 2010 issued by the first respondent and the rescission ruling under the same case number dated 4 January

2011 issued by the Second Respondent.

2. The application is brought in terms of Section 158(1)(g) of the Labour Relations Act 66 of 1995.

Background facts

3. The Fourth Respondent is an adult male formerly employed by the applicant as a security officer.
4. The fourth respondent's last date of work was 18 February 2010. He referred a dispute to the third respondent ("the CCMA") alleging that he was dismissed on 23 February 2010.
5. The fourth respondent posted the referral dispute form (LRA 7.11) per registered mail to the Applicant on 9 March 2010. On the same day the fourth respondent filed the LRA form with the CCMA.
6. The con/arb hearing was scheduled to take place on 9 April 2010 and the fourth respondent was in attendance.
7. The first respondent (Commissioner Hlatshwayo) issued a default award on 9 April 2010 in which he awarded the fourth respondent six months compensation.

8. On 4 May 2010, the CCMA attempted to fax the default award to the applicant but the transmission was not successful. It appears that the wrong fax number was used.
9. On 7 May 2010, the CCMA posted the default award to the applicant per registered mail.
10. On 8 June 2010, the fourth respondent faxed to the applicant the default award.
11. On 18 June 2010, the applicant's attorney filed a rescission application with the CCMA.
12. On 1 July 2010, the CCMA Case Management Officer (Constance Khumalo) issued to the applicant a directive. In summary, the directive was to the effect that the rescission application was defective as the application for condonation for the late filing was not submitted. The directive was faxed to the applicant's correct fax number but it was not addressed to a specific person.
13. On 4 January 2011, The second respondent (Commissioner Christiansen) issued a rescission ruling dismissing the rescission application. In his rescission ruling at paragraph 3, Christiansen wrote :

“The Commission notified the applicant in a letter dated the 1st July 2010 to submit a condonation application for the late

filing. The applicant was informed to submit the above condonation application within (14) days of the said letter. The applicant has failed to heed/follow the directive issued by the Commission.”

Applicant`s submissions

14. In its founding affidavit the applicant states :

- 14.1. It did not receive the default award from the CCMA that was posted per registered mail on 7 May 2010.
- 14.2. It only received the default award only on 08 June 2010 when it was faxed by the fourth respondent.
- 14.3. It did not receive the letter of directive from the CCMA dated 1 July 2010 directing it to file application for condonation of the late filing of the rescission application.
- 14.4. The rescission ruling was made within 10 days of the matter after the applicant became aware of the default arbitration award.

Relevant Rule of the CCMA

15. Rule 32(1)(a) reads as follows:

“An application for the variation or rescission of an arbitration award or ruling must be made within fourteen (my emphasis) days of the date on which *the applicant became aware* (my emphasis) the arbitration award or ruling.”

Evaluation

16. The applicant's version that it received the default award only on 08 June 2010 is uncontested. Also, the applicant's contention that it did not receive the directive from the CCMA to apply for condonation of rescission application is also uncontested. Mr. Matthee for the applicant referred me to the case of *Northern Province Local Government Association v CCMA and Others*,¹ where it was held that commissioners are not entitled to regard a fax transmission slip as definitive proof that a party received notice of the arbitration hearing. Also, Faber AJ in *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA and Others*,² draws a distinction between "service" and "notification" and that the commissioner should satisfy himself/herself that the defaulting party has received the notice before the proceeding with the hearing in his or her absence. I fully agree.
17. When one scrutinises the letter of directive, it makes no mention that the applicant must apply for condonation within fourteen days. It follows that Commissioner Christiansen's statement in his ruling that the applicant was informed to submit the condonation application within fourteen days from the date of the letter of directive was something that he imagined in his mind.
18. Furthermore, paragraph 3 of the affidavit supporting rescission application clearly states that the award was received by the applicant on 8 June 2010. Had Commissioner Christiansen read the affidavit before making a ruling, he would

1 (2001) 5 BLLR 539 (LC)

2 (2001) 8 BLLR 911 (LC)

have been duty bound to consider whether in light of paragraph 3, there was any need at all for the applicant to be directed to apply for condonation.

19. In my view, the conduct of the Commissioner above in not properly considering the information that was in the file is reviewable in terms of section 158(1)(g) of the LRA.³

Appropriate relief

20. In the notice of motion, the applicant seeks an order reviewing and setting aside of both the default award and the rescission ruling and/or referring the matter back to the CCMA for arbitration and/or corrected in terms of section 145 and section 158(1)(g) of the LRA.

21. In my view, it is not necessary for this court to consider whether or not the default award should be set aside. Commissioner Christiansen never had an opportunity of dealing with the merits of the case relating to the condonation application. Furthermore, the Labour Court has sometimes adopted the approach that it does not have power to rescind the CCMA arbitration awards on the grounds contemplated in section 144 of the LRA and the Labour Court must not usurp the powers expressly given to the commissioners by the LRA.⁴⁵

³ See *Cash Paymaster Services (Pty) Ltd V Mogwe and Others* (1999) 20 ILJ 610 (LC).

⁴ See *Els Transport V Du Plessis and Others* (2001) 22 ILJ 1390 (LC)

22. It follows that the proper relief will be to remit the matter back to the Commissioner who was supposed to have dealt with the rescission ruling for him to properly deal with the matter. When considering the rescission application, the Commissioner must bear in mind that the application for rescission was filed within the requisite time frame of 14 days as contemplated in Rule 32 of the CCMA.

23. In the event, the following order is made:

23.1. The rescission ruling issued by the second respondent (Commissioner S. Christiansen) under case number GAJB 8020-10 is reviewed and set aside.

23.2. The matter is remitted back to the second respondent (Commissioner S. Christiansen) to reconsider the rescission application.

23.3. I make no order as to costs.

Moletsane AJ

Appearances

For the Applicant : Attorney Matthee

Instructed by Riki Anderson Attorneys