

Not reportable

REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR924/05

In the matter between:

WESTMEAD CARRIERS CC

Applicant

and

GEVISSER A, N.O

First Respondent

NATIONAL BARGAINING COUNCIL FOR
ROAD FREIGHT INDUSTRY

Second Respondent

J E MAHLABA

Third Respondent

Heard: 1 November 2011

Delivered: 10 November 2011

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application to review and set aside a ruling made by the first respondent ('the commissioner') on 15 February 2005 in terms of which the application brought by the applicant to rescind a default arbitration award which had been made in favour of the third respondent was dismissed.

[2] The default arbitration award issued by the commissioner is dated by him as having been made on 9 November 2004. The applicant thereafter applied for the rescission of this award. In support of the rescission application, the applicant filed the affidavit of Mr Devanandan Pillay. In his affidavit Mr Pillay stated that both he and the human resources manager were unavailable on the date of the arbitration hearing and that an employee, Mr Neresh Sewpersad, was sent to the bargaining council's offices on the date of the arbitration hearing following 'numerous attempts' to postpone the matter. Mr Pillay stated only that the applicant had good prospects of success in the matter but took the issue of prospects no further. He submitted that the applicant had been prejudiced in the matter.

Rescission application ruling

[3] In dismissing the rescission application, the first respondent concluded that:

3.1. the applicant was aware that the respondent had not consented to a postponement but nevertheless informed the bargaining council via letter that it could not attend “due to prior arrangements” and proposed an alternative date for the arbitration hearing;

3.2. the suggestion by the applicant that it tried to comply with the rules must be viewed “with suspicion” given the context of the letter sent to the bargaining council and that the attitude of the applicant that it could unilaterally decide when it would attend was unacceptable;

3.3. the applicant failed to explain the unavailability of personnel and there is no confirmatory affidavit corroborating Mr Pillay’s version or explaining why this was;

3.4. it was “somewhat peculiar” that the applicant’s employee failed to attend the arbitration hearing when the applicant contends that such person was to attend;

3.5. the prospects of success had not been dealt with and the applicant failed to take the bargaining council into its confidence in this regard, instead providing “unsubstantiated explanations and submissions.”

Power to rescind

[5] Section 144(a) of the Labour Relations Act gives a commissioner the power to rescind an arbitration award ‘erroneously sought or erroneously made in the absence of any party affected by that award.’

In considering an application for rescission, a commissioner is required to consider whether the applicant has shown good cause to justify the granting of rescission, including whether the applicant was in wilful default of the arbitration process and that the applicant has a bona fide defence to the claim or reasonable prospects of success in the claim should the arbitration award be set aside.

See *Emfuleni Local Municipality v Sekhabisa N.O and Others* (JR2397/06) [2008] ZALC 58 (18 April 2008).

[6] While the applicant is not required to deal fully with the merits of the case, it is incumbent upon an applicant for rescission to show that there exists a bona fide defence to the claim which has reasonable prospects of succeeding were rescission to be granted. This requires of an applicant more than simply an averment that there exist prospects of success without any further substantiation of the statement. The purpose of requiring an applicant to show the existence of a bona fide defence to a claim or reasonable prospects of success is a well-founded one in that it seeks to prevent a rescission application from being granted where there exist no, or very limited, prospects of success in the matter when later adjudicated. This in turn obviates the unnecessary time and expense that would then be incurred in the hearing of the matter, where a rescission ought to be granted, with no bona fide defence or prospects of success.

[7] In terms of Rule 33.9 (a) of the bargaining council Rules for the Conduct of Processes and Proceedings before the NBCRFI (ver. 10/06), applicable at the time that this rescission application was determined, the council is required to allocate a date for the hearing of the application once a replying affidavit has been delivered, or once the time limit for delivering a replying affidavit has lapsed,

whichever occurs first. Mr Snyman argued for the applicant that the bargaining council had contravened the rule by failing to set the matter down for hearing. Rule 33.10 states that “[d]espite this rule, the Commissioner may determine an application in any manner it deems fit, and in particular may have applications determined on the papers delivered with hearing and agreement”.

Review test

[8] This court, with reference to the grounds of review, is entitled to set aside an arbitration award or ruling if the commissioner’s decision falls outside of a band of decisions to which a reasonable person could come on the available evidence (see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*).¹ It is accordingly not the correctness of the commissioner’s decision which is relevant but whether the result of the arbitration proceedings is reasonable.

[9] In *Bestel v Astral Operations Ltd and Others*,² Davis JA emphasised:

‘...that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’

[10] The test in *Sidumo* for determining whether a decision is reasonable is a stringent one that will ensure that awards are not lightly interfered with.³ Clearly, an award that is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence may be considered unreasonable.⁴

Grounds of review

[11] The applicant has raised a number of grounds of review:

11.1. The commissioner failed to comply with the provisions of the Act pertaining to the conducting of fair and proper arbitration/rescission proceedings;

11.2. The commissioner made no proper factual findings whatsoever in respect of the evidence and documents properly placed before him in the matter;

11.3. The commissioner exceeded his powers in terms of the Act;

11.4. The commissioner did not properly, rationally and justifiably apply his mind to the facts or the law and failed to comply with the fundamental principle of *audi alteram partem*;

11.5. The commissioner failed to properly apply the provisions of the Constitution;

11.6. The commissioner failed to afford the applicant a hearing at all in the circumstances;

¹[2007] 12 BLLR 1097 (CC)

² [2011] 2 BLLR 129 (LAC) at para 18.

³ At para [100] of the judgment.

⁴ See A Myburgh ‘*Sidumo v Rusplats: How the Courts deal with it*’ (2009) 30 ILJ 1

11.7. The award is not justifiable in relation to the reasons given for such award and is not rational or justifiable in its merit or outcome;

11.8. The commissioner failed to properly, justifiably and reasonably determine and assess the evidence properly before him in the matter.

11.9. The award constituted a defect as contemplated by section 158(1)(g) and should be reviewed and set aside.

Evaluation

[12] Apart from a bald averment that it held prospects of success in the matter, the applicant provided no further details to show the existence of any such prospects. In the circumstances, the applicant failed to meet the test to justify the rescission of the arbitration award granted against it in default.

[13] In addition, the finding of the commissioner that the applicant did not explain the unavailability of personnel, nor did it file a confirmatory affidavit corroborating or explaining Mr Pillay's averments regarding the whereabouts of the applicant on the date of the arbitration hearing, is a conclusion justified on the evidence before the commissioner.

[14] In determining the rescission application on the papers, the commissioner dealt with the matter in a manner he deemed fit in accordance with the Act and the bargaining council's rules. There is nothing to suggest that the requirements of fairness and expedition were not appropriately balanced (see *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 ILJ 1597 (LC); *Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA and Others* [2001] 8 BLLR 911 (LC)) or that the applicant's fundamental rights were impinged upon in any way.

[15] The decision of the commissioner to dismiss the rescission application is one which falls within the band of decisions to which a reasonable person could come on the available evidence. In the circumstances, the application for the review and setting aside of the rescission ruling must fail.
Costs

[16] With regards to the issue of costs, in terms of section 162 of the LRA, this court has a discretion as to whether or not to award costs taking into account considerations of law and fairness. In exercising this discretion, ordinarily, it is the party that is wholly successful in an action or application that is awarded costs.

'...In other words, the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case.'⁵

[13] I can find there to exist no reasons as to why costs should not follow the result in this matter.
Order

⁵ *The Trustees of the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others* (Open Democracy Advice Centre as Amicus Curiae) (A831/2005) [2008] ZAGPHC 135 (13 May 2008) 2008 JDR 0442 (T) at para 31

[17] The application is dismissed with costs.

K M Savage
Acting Judge

APPEARANCES

APPLICANT: Mr S Snyman
 Snyman Attorneys

THIRD RESPONDENT: Mr H E Marx
 Instructed by Roets & Du Plessis Attorneys