



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/ Not reportable

Case no: JR 236/09

In the matter between:

EDWIN RATSHITANGA

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

JOHN SIAVHE

Second Respondent

ROSY BLUE (PTY) LTD

Third Respondent

Heard: 09 January 2013

Delivered: 06 March 2013

Summary: Review application-rescission ruling. Fax transmission creates a presumption of receipt of service but is not conclusive proof of that fact.

JUDGMENT

NAIDOO AJ

Introduction

- [1] This is an application to review and set aside a rescission ruling made by the second respondent (the Commissioner) under case number GAPT 4192-08, in terms of which the applicant's rescission application was dismissed.
- [2] Despite opposing the application, the third respondent was not represented at the hearing. Once satisfied that proper notice had been sent to the third respondent, I continued to hear the application in default. I did however consider the salient points of the third respondent's argument as set out in its papers.

Background facts

- [3] On 13 June 2008 the applicant's dismissal dispute was set for arbitration. Both parties attended but as a result of there being no Tshivenda speaking interpreter to assist the applicant, the process was postponed.
- [4] The first respondent rescheduled the arbitration for 10 September 2008 and allegedly served the applicant with notice via registered mail. Due to the applicant's non attendance, his dispute was dismissed once the arbitrator was satisfied that proper notice had been affected.
- [5] The applicant became aware of the dismissal ruling on 11 November 2008 and soon thereafter, together with an application for condonation, lodged his application to rescind the dismissal ruling.
- [6] On 23 December 2008 the Commissioner condoned the late filing of the applicant's rescission application and in a separate ruling, dismissed the applicant's rescission application. It is the Commissioner's second ruling which forms the subject matter of in these proceedings.

Grounds of Review

- [7] Mr. Makinta, instructed by the Legal Aid Board of South Africa, argued that the Commissioner erred in finding the applicant was informed of the arbitration

proceedings, this despite the applicant's averments denying ever being notified of such a date. The crux of the matter, as Makinta put it, was that the applicant did not receive any notification from the first respondent and was, for the first time informed of the arbitration date on 11 November 2008. Makinta further argued that the fact that the applicant attended the arbitration on 13 June 2008 was indicative of his intention to pursue his dispute. In essence the argument proffered, as I understand it, is that the applicant's rescission application was on the basis that the dismissal ruling was erroneously granted and that the Commissioner did not properly evaluate the evidence in support of this.

The rescission ruling

- [8] In his ruling the only issue the Commissioner deals with is whether or not the applicant received proper notification. In finding that proper notice was given to the applicant, the Commissioner relies on the fact that the address used to send the notice, via registered mail, was the same address tendered by the applicant in his referral forms, which address the applicant had received notices in the past. On this basis the Commissioner was satisfied that the applicant was properly served and therefore dismissed his rescission application.

Evaluation

- [9] From the Commissioner's ruling it is unclear whether or not he had sight of a registered slip establishing that notice had been sent to the address the applicant tendered. The applicant takes issue with the fact that no proof, in the form of a registered slip, was attached to the third respondent's papers in this matter. I do not intend probing this issue and for purposes of this judgment will assume notice was sent via registered mail and proof to such effect was on file.
- [10] The presence of a registered slip does not lay foundation to a legal claim that the intended recipient did in fact receive same. The slip creates nothing more than a positive presumption regarding receipt, which is open for the intended recipient to rebut.

- [11] While I accept the presumption is strengthened by the fact that the applicant received notice in the past using the same method of service, this on its own does not necessarily confirm the presumption. In *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and Others*,¹ faced with a similar enquiry, the court said the following:

‘As indicated above the fax slip creates a presumption of receipt but does not constitute conclusive proof of receipt. The applicant in the present matter does not deny the correctness of the fax number used to fax the statement of case. It however denies ever receiving the same, thereby refuting the presumption of receipt. The burden is then on the respondents to show that the applicant did indeed receive the statement of case through the fax transmission. The evidence that the applicant did receive other documents through the same fax number previously is not in my view sufficient to discharge the duty on the respondents to show that the applicant did receive the statement of case sent through the same fax number.’

- [12] From a reading of the Commissioner’s ruling it becomes plain to see that he accepts, as conclusive proof, the applicant did receive notice once it was established that notice was sent to an address the applicant tendered and which address he received prior notices. Nothing in the ruling remotely suggests that the Commissioner was alive to the fact that the evidence before him, created a mere presumption that notification was received. It was for the commissioner to consider the allegations made by the applicant, together with other relevant information (including the fact that the applicant did attend the previous arbitration which was postponed due to no fault of his own) and weigh this against the presumption created. In the absence of adopting such an approach, the ruling stands to be set aside.
- [13] In its opposing papers, the third respondent mero motu attacks the applicant for not dealing with the issue of ‘good cause’ in his rescission application. I am uncertain as to what point the third respondent wishes to make in setting out this argument. While it is correct the applicant did not deal with this issue in his application before the Commissioner, what should not be forgotten is the fact that it is the

¹ (2011) 32 ILJ 1917 (LC) at para 19.

Commissioner's ruling that is at the core of this application. In his ruling the Commissioner also does not deal, or even make mention of the aspect of good cause and as stated above, arrives at his conclusion on the sole basis that the applicant did received proper notification. It seems to me the Commissioner's failure to apply the applicable test, which includes addressing the issue of good cause, lends support for the setting aside of the ruling;² a conclusion I am sure the third respondent's is not asking me to make.

It can hardly be argued that the applicant's failure to address the issue of good cause, in his rescission application nullified the Commissioner's duty to address the issue. On this point the Labour Appeal Court, in *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*³ had the following to say:

'....where the law is that a commissioner must take into account a certain factor in deciding a certain question, he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account. If the factor was a critical one and he did not take it into account, he may well have committed a gross irregularity justifying the reviewing and setting aside of his award.'

- [14] It was open for the Commissioner to dismiss the applicant's rescission application on grounds that the applicant did not address the issue of good cause, alternatively to refer the application back to the applicant for him to supplement same. As mentioned the Commissioner failed to chose either option and in doing so, confined his enquiry to whether the applicant received notice or not.
- [15] In light of the above I am satisfied that the applicant has made out a case which warrants the setting aside of the rescission ruling. On the issue of costs, fairness and justice dictates that each party bear their own costs.

Order

- [16] In the premises, the following order is made:

² See *Martin v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2254 (LC) at para 17;

³ (2008) 29 ILJ 2189 (LAC) at para 11.

- 16.1 The rescission ruling made by the second respondent under case number GAPT 4192-08 is reviewed and set aside
- 16.2 The matter is remitted to the first respondent to be considered afresh by a commissioner other than the third respondent.
- 16.3 There is no order as to costs.

Moksha Naidoo, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: M.E.S Makinta instructed by Legal Aid South Africa

For the Respondent:

LABOUR COURT