



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1275/12

In the matter between:

JOY GLOBAL (AFRICA) PROPRIETARY LIMITED

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION,

AND ARBITRATION

First Respondent

NICHOLUS SONO N.O.

Second Respondent

HAPPY QIBIE

Third Respondent

Heard: 06 June 2013

Delivered: 12 June 2013

JUDGMENT

BENJAMIN, AJ

- [1] This is a judgment in an application to review a default arbitration award handed down by the second respondent on 28 March 2012 as a well as a rescission ruling handed down by the second respondent on 14 May 2012.

- [2] The case arises out of a dismissal of Qibie – the third respondent - by the applicant employer on 9 December 2011. The employee referred an unfair labour practice dismissal dispute to the CCMA. The matter was set down for arbitration on 26 March 2012 at the Makhado Labour Centre by way of a fax sent to the employer and employee on 17 February 2012. (It was not clear from the record supplied by the CCMA whether or not there had been a conciliation hearing but nothing turned on this in the application).
- [3] This fax was received by the employer and the employer's group human resources manager, Mr Skhosana. The following day, Mr Skhosana sent an email to the case officer at the CCMA advising that in the employer's view the CCMA did not have jurisdiction as the company fell within the registered scope of the Metal and Engineering Industries Bargaining Council (MEIBC). The CCMA did not respond to this email and it does not appear to have been brought to the attention of Mr Sono, the second respondent, who conducted an arbitration by default on 26 March 2012. The second respondent was satisfied that there had been proper service on the applicant employer and, having heard the employee's evidence found that he had been unfairly dismissed and ordered his retrospective reinstatement in employment.
- [4] The default award of reinstatement was issued on 28 March and on 13 April 2012, The applicant employer brought an application for the default award to be rescinded. They did so on the basis that the matter should have been referred to the Centre for Dispute Resolution of the Metal and Engineering Industries Bargaining Council under whose jurisdiction the applicant states it falls.
- [5] The rescission application was dealt with by the second respondent. The Commissioner referred to the employer's email in which it recorded its objection to the matter proceeding within the CCMA and stated that :

The CCMA's failure to respond to the email did not exempt the employer to attend the hearing on 26 March 2012. Further the employer did not provide any proof of registration with the MEIBC. The CCMA can assume jurisdiction to any dispute that falls under the jurisdiction of any Bargaining Council if the jurisdictional issue is not or was not raised at the beginning of the arbitration.

- [6] The arbitrator concluded that the employer had failed to give a reasonable and justifiable reason for its default and found that the employer was in wilful default of proceedings and that the rescission application “stands to be declined”.
- [7] The first issue that I need to deal with is the question of the competing jurisdictions of the CCMA and the MEIBC. The arbitrator’s assumption that the CCMA is entitled to exercise jurisdiction in respect of a dispute under the jurisdiction of a bargaining council if the jurisdictional issue is not raised at the beginning of the arbitration is not a correct reflection of the law. While it is correct that there are circumstances in which the CCMA may deal with a dispute otherwise falling within the jurisdiction of a Bargaining Council, these provisions are not consistent with the arbitrator’s view of his jurisdiction.
- [8] The relevant provision is in section 147(2) (a) of the Labour Relations Act –
- ‘147
- (2) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the Commission may -
- (i) refer the dispute to the council for resolution; or
- (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.’
- [9] In the present case, it is common cause that at the commencement of the arbitration award, the arbitrator was not aware of the fact that the employer contended that the matter fell within the jurisdiction of the MEIBC. However, he had such knowledge by the time of the rescission hearing. The applicant employer made a submission under oath in an affidavit that it fell within the jurisdiction of the Bargaining Council. The arbitrator rejected this submission on the basis that he was entitled to exercise jurisdiction irrespective and, that in any event, the employer had not submitted a certificate of registration.

- [10] In terms of section 147(2) (a), once it becomes apparent that the parties to the dispute are parties to a council, a Commissioner can only continue to hear the matter if his or her appointment is confirmed by the Commission. This requires that someone other than the presiding Commissioner, presumably the Senior Regional Commissioner or another official to whom this responsibility has been delegated, consider the matter and decide whether or not to confirm the arbitrator's appointment. This procedure was not followed in the present case.
- [11] Once the employer had made the contention under oath that it was covered by the MEIBC, the provisions of section 147(2) obliged the arbitrator either to refer the dispute to the MEIBC or request the Commission management to make ruling on whether his appointment as Arbitrator to hear the dispute ought to be confirmed. This was not a decision that he could make himself. The fact that he assumed that he was entitled to continue dealing with the matter shows that he was mistaken at his powers as an arbitrator. For this reason, the decision in the rescission hearing falls to be reviewed and set aside.
- [12] Once the ruling in the rescission hearing is set aside, it is necessary for me to decide whether the default award should stand. Mr Bank, for the employer contended that I should set it aside on the basis that the arbitrator made a reviewable error by assuming jurisdiction in a case that fell within the jurisdiction of a bargaining council. In my view, this is not a ground for reviewing or rescinding the default award. This is because section 147(2) contains a procedure for dealing with issues of precisely this type. As indicated, where evidence that the parties are covered by a bargaining council emerges, either the Commissioner or the parties must seek a ruling from the Commission as to whether or not the appointment should be confirmed. Accordingly, the fact that the dispute fell within the jurisdiction of the MEIBC is not an absolute bar to the CCMA hearing a case.
- [13] In this rescission ruling, the arbitrator examined the reasons for the employer being absent from the initial arbitration. He concludes that because the default was "wilful" the rescission application must be declined. Even though the

employer's conduct may involve a mistaken assumption, this does not automatically translate into a wilful default. As the Labour Appeal Court has indicated in *Shopleft Checkers (Pty) Ltd v the CCMA and Others*¹, the grounds on which a rescission can be granted must be read as including "good cause".

- [14] The employer failed to attend a single hearing as a result of the incorrect view that the matter would be referred to the MEIBC. This is not a case such as *Silplat (Pty) Ltd v CCMA and Others*² in which there was repeated negligent conduct by the employer's legal representatives. The employer's error is an "understandable" error in the sense described by the Labour Appeal Court in *Shopleft Checkers (Pty) Ltd v the CCMA and Others*³. I must now consider whether this constitutes "good cause" for rescinding the default award.
- [15] As Judge van Niekerk (Acting Judge, as he then was), states in *Martin v CCMA and Others*⁴, a Commissioner conducting a rescission hearing must balance the competing considerations of expedition and justice. The interests of justice are served by a party having a full opportunity to ventilate their case, even where they may have failed to appear at a previous hearing. A rescission of the default ruling would have meant that the arbitration could have commenced before the bargaining council within a short period of time. The interests of expedition would not have been compromised and, if the employee again succeeded in gaining reinstatement, the order could have been made retrospective to the same date as the order granted at the default hearing.
- [16] The employer has put up a detailed defence in its papers to the merits of the employee's claim for unfair dismissal, including a claim that the employee had committed sabotage. This meets the requirements of a *bona fide* defence. I therefore believe that the interests of justice will be served by an arbitration on the merits of the claim. Accordingly, I am of the view that there is good cause

¹ (2007) 28 ILJ 2246 (LAC); [2007] 10 BLLR 917 (LAC).

² (2011) 32 ILJ 1739 (LC).

³ (2007) 28 ILJ 2246; (2007) 10 BLLR 917 (LAC).

⁴ (2008) 29 ILJ 2254 (LC).

for the award in the default arbitration hearing conducted on 28 March 2012 to be rescinded.

- [17] There is a further matter that I will deal with: an opposed condonation application for filing the review (to the extent that it related to the default arbitration award) outside of the six week time period. Ultimately, as I have rescinded rather than reviewed the default award, nothing turns on the period in which the review of the default award was filed. However, I do indicate that this is an appropriate case for condonation to be granted as the delay was occasioned by the fact that the employer first sought to have the default award rescinded, which is the appropriate course of action to have undertaken.
- [18] While I have set aside the rescission ruling and the default award, I do not consider that this is an appropriate matter in which to make an award of costs against the employee. The Applicant contributed significantly to the situation that occasioned this litigation and it is not unreasonable for an employee to seek to defend a default award in his favour.
- [19] The best resolution for this matter is for an arbitration on the merits to be conducted under auspices of the MEIBC as quickly as possible. It would be extremely unfortunate if this were to be delayed by further technicalities. Accordingly, the third respondent should have a period of thirty days to refer the matter to the MEIBC for arbitration. If this is done, the referral must be considered to have been made in full compliance with the Act and there will be no need for the Second Respondent to seek condonation for the lodging of the dispute at this stage.
- [20] Accordingly, I make the following order –
- a) The award made by the Second Respondent in the rescission hearing on 14 May 2013 is reviewed and set aside;
 - b) The award made by the Second Respondent in the default hearing on hearing on 28 March 2013 is reviewed and set aside;

- c) The Metal and Engineering Industries Bargaining Council is directed to enrol the matter for arbitration, once a referral form is filed with the Council by Third Respondent.

Benjamin, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv: Warren Bank

Instructed by Webber Wentzel

For the Third respondent: L.D. Mantsha from Lugisani Mantsha Inc.

LABOUR COURT