



**REPUBLIC OF SOUTH AFRICA**  
**IN THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN**  
**JUDGMENT**

Not Reportable  
Case no: D477/11

In the matter between:-

**HOSPERSA**

**First Applicant**

**E. JOB**

**Second Applicant**

and

**CHITANE SOZA N.O.**

**First Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**SANPARKS**

**Third Respondent**

**Heard :** 15 March 2013

**Delivered:** 24 July 2013

**Summary:** Application for review of arbitration ruling refusing condonation for late delivery of rescission application.

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**JUDGMENT**

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HASLOP AJ

- [1] The applicants have applied to this court for the review and setting aside of a ruling by the first respondent who refused to condone their late filing of an application for the rescission of an arbitration award granted in favour of the third respondent in the absence of the applicants. They have also applied for the first respondent's refusal to grant rescission to be reviewed and set aside.

- [2] Although the application refers to the late filing of the condonation application, it is probably more correct to refer to the late delivery of the condonation application, since the application was timeously filed with the second respondent, but only served on the applicants some 22 days after the 14 day time period provided for in the second respondent's Rules had lapsed.
- [3] The relevant Rule of the second respondent (Rule 9 (3) of the Rules for the Conduct of Proceedings before the CCMA) reads as follows:

“(3) An application for condonation must set out the grounds for seeking condonation and must include details of the following:

- (a) the degree of lateness;
- (b) the reasons for the lateness;
- (c) the referring parties' prospects of succeeding with the referral and obtaining the relief sought against the other party;
- (d) any prejudice to the other party; and
- (e) any other relevant factors.”

- [4] This Rule repeats the longstanding requirements for a successful condonation application, which were set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). In that case, the court explained, at page 532C-F, that the determination of an application for condonation involved the exercise of a discretion, and went on to indicate how that discretion ought to be exercised:

“(T)he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive ... save of course that if there are no prospects of success there would be no point in granting condonation. ... What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.”

- [5] The background to this matter is that an arbitration to deal with a claim by the second applicant that he had been unfairly dismissed by the third respondent was enrolled by the second respondent, the CCMA, for hearing on 26 January 2011. However, his trade union, the first applicant, one of whose officials, one Olivier, was to have represented him at the arbitration, only found out about the arbitration date the day before, telephonically, from an official of the CCMA. Olivier had faxed the CCMA to establish the arbitration date, because he needed to subpoena witnesses, and had been contacted by the CCMA official with the news that the matter would be heard the next day.
- [6] It transpired that the CCMA had sent the notice advising the parties of the date of the arbitration to the applicants, care of the first applicant, by registered post on 29 December 2010. Although this method of service is one of those permitted by its Rules, Olivier points out in his affidavit in support of the subsequent application for rescission that he had advised the CCMA that the first applicant's offices would be closed from 16 December to 3 January, but that the arbitration notice could be faxed to it during that period because somebody would be visiting the office.
- [7] In his ruling the first respondent mentions that the post office had confirmed that the relevant notification was in the first applicant's post box on 29 December. It is not clear where he obtained that information. Since the CCMA notice was only posted on 29 December it seems improbable that it would have reached the first applicant's post box on the same day. The registered postal slip which forms part of the record before this court does not appear to bear the date of 29 December. Indeed, the only legible date on it is 11 January, and it is not clear what that date reflects. It appears to be a "datum van aflevering", a date of delivery, but it is not clear precisely what that means.
- [8] Nevertheless, despite the fact that the first applicant's offices reopened, on its own version, on 3 January, it has never been suggested by it that the CCMA notice was not in its post box, or that notification that it had arrived at the post office was not in its post box prior to Olivier having been telephonically advised of the date on 25 January. Nor has any explanation been given for the fact that the first applicant had apparently not checked its post box earlier than 25 January.

- [9] Olivier then tried, according to his affidavits, to contact two of the third respondent's officials in an effort to obtain its consent to a postponement of the arbitration, but both of their phones transferred him to their voice mail. He did not leave messages with those voice mail services. He does not explain why.
- [10] He then telephoned a senior commissioner at the CCMA (though not the arbitrating commissioner) and advised her that he had heard that the roads from Kimberley, where he was, to Upington, where the arbitration was to take place, might be closed as a result of torrential rains, though he conceded that his information had not been confirmed. He also advised her that he needed to subpoena witnesses for the arbitration. Finally, he advised her that he was required to take his wife to Bloemfontein for radiation treatment for cancer. It appears from a medical certificate that he sent to the CCMA the following day that the treatment took place on 26 January, the day of the arbitration.
- [11] In fact, Olivier accompanied his wife to Bloemfontein, and to the doctor. He did not attend the arbitration. This appears to be the real reason for his failure to attend the arbitration. One has sympathy for his situation, even though it appears that, had the first applicant emptied its post box timeously, it would probably have discovered the date of the arbitration earlier than it did. I should mention that Olivier was the first applicant's Provincial Secretary for the Northern Cape and therefore a senior official.
- [12] What remains unexplained is why Olivier did not arrange for somebody else from the first applicant – neither another official, nor a legal representative, nor even the second applicant himself – to attend the arbitration, even if it was only to explain the position and apply for a postponement. The second applicant is, after all, the employee in respect of whose dismissal the arbitration was scheduled. It is not even clear from the papers that he knew what had transpired and that his arbitration was scheduled for 26 January.
- [13] On 26 January the first respondent dismissed the matter in the absence of the applicants. It appears that he was, at that stage, in possession of a medical certificate which indicated that Olivier had accompanied his wife for medical treatment, but no other information.

- [14] The first applicant received the default award on 1 February 2011 and filed an application for rescission in terms of section 144 of the LRA with the CCMA six days later, on 7 February.
- [15] Rule 32 of the CCMA requires an application for rescission to be made within 14 days of the date on which the applicant became aware of the award, in other words by 15 February in this case. Rule 31 requires an application to be brought on notice to all parties who have an interest in it.
- [16] The first applicant's explanation, given by Olivier, is that he misunderstood the requirements of the CCMA rule and did not realise that it was not sufficient simply to file a rescission application with the CCMA, but that a copy had to be served on the employer party as well. It seems unusual that the provincial secretary of an established trade union would not have known this, but the fact that the application was in fact not served on the third respondent, despite the fact that it would have been well within the prescribed time limit for doing so, suggests that, for some reason, Olivier did not know the rule in question.
- [17] It appears from the papers that, realising that proper service had not taken place, the CCMA wrote to the first applicant on 9 February pointing out this fact. According to Olivier, the first applicant did not receive that letter. It seems to have attached the letter to its eventual condonation application without explaining how it did come to its attention. It also fails to indicate how the need to serve the rescission application on the employer eventually came to its notice.
- [18] Nevertheless, the first applicant did serve the rescission application on the third respondent, along with an application for condonation in respect of the late delivery. It seems to have been common cause that the application for rescission was finally and properly delivered 22 days late.
- [19] The rescission application deals largely with the question of whether the first applicant was in wilful default of appearance at the arbitration proceedings. However, the affidavit in support of the application does end with the complaint that "the Applicant did not receive the Notice of the Arbitration timeously". I will return to this below.

- [20] The information set out in the condonation application is very sketchy. It deals mainly with the degree of lateness and the reasons for the delay, which focussed on Olivier's misunderstanding of the rules relating to service. It hardly mentions the prospects of success, except to claim that the commissioner's ruling was made unfairly and in the applicants' absence. Under the issue of prejudice he mentions, almost in passing, the alleged unfair treatment of the second applicant by the third respondent.
- [21] As I have pointed out, the first respondent was required, in considering the application, to consider the degree of lateness, the reasons for the delay, the prospects of success, the prejudice to the parties and any other relevant factor.
- [22] In his ruling the first respondent accepted that the degree of lateness was "minimal" but he did not consider the reasons given for that lateness to be acceptable, holding that Olivier ought to have known and applied the CCMA Rules correctly. He appears to have reasoned that the second applicant should stand or fall by the negligence of his union representative, although he does not specifically say so, possibly because the union itself was the applicant at that stage, acting on behalf of its member, the second applicant. He pointed out that the paucity of information in the condonation application regarding the prospects of success made it difficult to gauge those prospects, and said that no submissions had been made regarding prejudice.
- [23] The prejudice to be suffered by a former employee whose unfair dismissal application has been dismissed in his absence is self-evident, unless he is able to have that dismissal ruling rescinded. To require that to be pertinently stated on affidavit seems unnecessarily formalistic.
- [24] As far as the prospects of success are concerned, the prospects to be considered in the condonation application were not the prospects of a successful arbitration award on the merits of the case, but of a successful rescission application. Because the first respondent was in possession of that application, he was in a position to assess those prospects despite the fact that the applicants' allegations in that regard had not been repeated in the condonation affidavit.

- [25] It appears, though, as if the first respondent did consider the prospects of success with reference to the affidavit in support of the application for rescission. He ruled that the applicants' failure to appear at the arbitration was as a result of wilful default.
- [26] However, he did not appear to consider the importance of Olivier's claim, referred to above, that the first applicant did not timeously receive the notice scheduling the arbitration. In fact he does not mention this at all.
- [27] The CCMA was required, by its own Rules, to give the parties at least 21 days notice, in writing, of the arbitration hearing. (Rule 21 of the Rules for the Conduct of Proceedings before the CCMA)
- [28] The last day of any period was required to be excluded if it fell on a day "during the period between 16 December to 7 January". (Rule 3 (2) of the Rules for the Conduct of Proceedings before the CCMA)
- [29] The last day of the period during which the CCMA might validly give the parties 21 days' notice of an arbitration hearing on 26 January did fall between those dates, and the effect of Rule 3 (2) seems to be that the last day of the period in question will then be deemed to be 8 January, unless that day falls on a Saturday or Sunday. That being the case, valid notice of the arbitration hearing, in accordance with its own Rules, was not given by the CCMA.
- [30] Although this reasoning was not spelt out either in the rescission application or in the applicants' argument on review, the question of inadequate notice was raised as an issue in the former, and in the latter I was urged, without my attention being specifically drawn to the provisions of Rule 3 (2), to have regard to the time of the year at which this matter unfolded. I am therefore satisfied that I am not only able, but required, to take the issue into account.
- [31] Section 144 of the LRA provides as follows:

"Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may ... on the application of any affected party, ... rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;

(b) ...;

(c) ....”

[32] In addition, rescission may be granted where the applicant for rescission demonstrates good cause. In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 ILJ 2246 (LAC), the court set out the test for good cause as follows:

“[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a prima facie [case].”

[33] If the rescission application had only concerned itself with the issue of good cause, it would have fallen short of establishing such good cause by virtue of the fact that it only dealt with Olivier’s justification for his absence from the arbitration, and did not deal at all with the second applicant’s prospects of success on the merits, the absence of which would usually be fatal. See, in that regard, *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others* (1994) 15 ILJ 1310 (LAC) at 1311I-1312A.

[34] But it seems to me that the effect of Olivier’s complaint that the CCMA notification was not timeously received takes the matter beyond good cause only and firmly into the precise wording of Section 144. The award, he appears to be contending, was in fact erroneously made in the absence of a party affected by it.

[35] In the *Shoprite Checkers* judgment referred to above, the Labour Appeal Court held that there might be circumstances where a party, able to show good cause, but unable to bring its case within the precise wording of Section 144, might unfairly be denied relief if good cause was not accepted as a ground for rescission. However, it did not appear to find that good cause has replaced the precise wording of the section. At the very least, it seems to me that a commissioner dealing with a rescission application in which the kind of error envisaged by the section is alleged must have regard to that error in coming to his decision. He must at least consider, for example, the effect on the first applicant’s absence of the fact that the CCMA had not complied with its own rules relating to set down, and the effect that may have had on Olivier’s

absence, required, as he was, to accompany his wife for cancer treatment in Bloemfontein. It was clear from the default award that the first respondent was in possession of the medical certificate in that regard.

- [36] So, too, a commissioner dealing with a condonation application relating to the prospects of success of such a rescission application and required by the CCMA Rules and by *Melane v Santam Insurance Co* to consider such prospects, would also have to take the applicant's allegation that such an error had occurred into consideration.
- [37] The existence of a fact of which the commissioner was unaware at the time of granting the default award, the knowledge of which would have precluded the granting of such award, constitutes an error for the purposes of section 144. See, for example, *Martin v CCMA & others* [2008] 8 BLLR 774 (LC) at paras [11] and [12].
- [38] The failure of the first respondent to have regard to the allegation that the CCMA notification had been timeously served means that, in assessing the condonation application, he did not properly consider the applicants' prospects of success in the rescission application. Indeed, he states, at paragraph 13 of his award, that "(i)f ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success then this is one of those cases".
- [39] Although he does not say so in his award, he also appears to have considered it to be an inflexible rule that an applicant cannot lay the blame for delay at the door of his representative. As the court pointed out in *Martin v CCMA* at para [19], it is not. If he did not consider this, then he did not consider the second's applicant's position in relation to the conduct of his representative at all. It seems to me, therefore, that he did not properly consider the explanation for what he concluded was a "minimal" delay.
- [40] As set out in the passage from *Melane v Santam Insurance Co* set out above, a commissioner assessing an application for condonation is required to exercise his discretion by way of a proper consideration of all the facts, and a reasonable decision maker would certainly do so.

- [41] Because the first respondent did not do so in this case, his ruling refusing condonation is not one that a reasonable decision maker could have made. In the circumstances, it does not meet the test set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and therefore falls to be reviewed and set aside.
- [42] I do not believe, by the way, that it is necessary for me to decide whether, in the light of the fact that the time limits for a rescission application are set out in the CCMA Rules rather than in the Labour Relations Act, the question is properly one of jurisdiction, in which case the test to be applied would be whether the decision was wrong rather than unreasonable. Because the first respondent did not, in my view, exercise his jurisdiction in the manner set out in *Melane v Santam Insurance Co*, I believe that the conclusion to which he came was in any event wrong and must be set aside for that reason anyway.
- [43] Counsel for the applicants suggested, during his address, that, since this court is in possession of all of the necessary facts, it should allow condonation, grant rescission, and refer the matter to the second respondent for the arbitration to be heard on the merits by a commissioner other than the first respondent. Indeed, the applicants have, in their notice of motion, sought the review of the first respondent's "refusal to grant rescission".
- [44] The difficulty, however, is that the first respondent appears not to have considered the rescission application at all, except possibly in relation to the issue of prospects of success regarding the condonation application, precisely because he refused to condone its late delivery, and even then he did not properly consider all of the facts.
- [45] The third respondent has argued that the first respondent, correctly, did not even consider the application for rescission because, having refused condonation, he had no jurisdiction to do so. Irrespective of whether or not this is properly a jurisdictional question, it seems clear that the first respondent did not consider the application for rescission.
- [46] Although the ruling itself is on what appears to be a pre-printed document and is headed "Rescission Ruling", it appears from the content of the ruling that the first respondent appreciated that his was not in fact a ruling on rescission, but

one on condonation only. He says, in paragraph 16 of his ruling, "Since the application for condonation is not condoned, the rescission application cannot be entertained."

[47] Assuming that he meant "granted" when he used the word "condoned", I consider that to be a correct statement of the position.

[48] Although it may well, depending upon the outcome of the rescission application, have the effect of subjecting this matter to an additional CCMA process, it is my view that the rescission application must still be heard under the auspices of the CCMA.

#### Order

[48] In the circumstances I make the following order:

1. The ruling of the first respondent dated 29 April 2011 refusing to condone the late delivery of the rescission application in respect of an unfair dismissal dispute set down for arbitration by the second respondent under the second respondent's case number NC2235/10 is hereby reviewed and set aside,
2. The applicants' late delivery of the rescission application is hereby condoned.
3. The matter is referred to the second respondent for the rescission application to be heard by a commissioner other than the first respondent, such commissioner to permit oral argument by the parties.
4. There is no order as to costs.

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Haslop, AJ

Judge of the Labour Court

Appearances:

For the Applicants: P J Blomkamp.

Instructed by Llewellyn Cain Attorneys,  
Pietermaritzburg.

For the Third Respondent: D Short.

Fairbridges Attorneys, Johannesburg.

LABOUR COURT