



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR123/2011

In the matter between:

JDG TRADING (PTY) t/a JOSHUA DOORE

Applicant

and

**MODIPA, S N.O. (cited in his capacity as Commissioner
of the Commission for Conciliation, Mediation and
Arbitration)**

First Respondent

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

Third Respondent

FOURIE LESLIE

Heard: 16 January 2014

Delivered: 6 March 2014

**Summary: Review- rescission ruling before the CCMA. Interpretation of
section s144 considered.**

JUDGMENT

PHALA A J

Introduction

- [1] This is an application to review and set aside the ruling of the First Respondent in terms of which he refused to rescind the award issued by the Second Respondent under case number NWKD2180-10 dated the 30 December 2010.

Background facts

- [2] The Applicant employed the Third Respondent Leslie Fourie since 2002 as a Branch Manager at a Zeerust store and his services were terminated on the 18 March 2010 for misconduct.
- [3] The Third Respondent was at all material times to this matter a paid up member of the trade union SACCAWU.
- [4] The Third Respondent was absent from work for the period from 2 March 2010 to 07 March.
- [5] As a result the Third Respondent was notified on the 10 March 2010 to attend a disciplinary hearing to be held on 17 March 2010 on three charges of breach of company policy and dishonesty.
- [6] The disciplinary hearing was conducted on the 18 March 2010 and the Third Respondent was dismissed on the same day pursuant to such disciplinary hearing.
- [7] After his dismissal the Third Respondent did not agree with the fairness of his dismissal and as a result referred a dispute concerning an alleged unfair dismissal dispute to the Second Respondent.
- [8] The arbitration hearing took place on the 16 November 2010 and the Third Respondent was present and represented by an attorney but the Applicant or representative failed to appear.
- [9] The matter was heard in the absence of the Applicant and a default arbitration award was handed down in favour of the Third Respondent by the First

Respondent where the dismissal of the Third Respondent was found to be substantively unfair.

- [10] The First Respondent re-instated the Third Respondent and ordered the payment of accrued remuneration in the amount of R64 000 which is equivalent to the Third Respondent salary for a period of eight months.
- [11] The Applicant thereafter applied for rescission of the default arbitration award and the said application was served and filed on the 30 November 2010.
- [12] The Third Respondent opposed the application and on the 30 December 2010 the First Respondent handed down a ruling in terms of which he refused to grant rescission.
- [13] In declining the rescission application the First Respondent stated 'It should be noted that the Commissioner proceeded with the case on the 16 November 2010 as he found that the Respondent was duly notified by a fax dated 20 October 2010 at 12h06. This is the same fax number that the CCMA used to send the Award which is currently challenged '
- [14] In line with the cited case *Law of Northern Province Local Government Association v CCMA and Others*¹, I as a Commissioner noted that the CCMA further contacted the respondent telephonically on 22 October 2010 at 018 642-1062 where Mr. Arens confirmed that they were aware of the sitting and that they intend attending. I believe this was in compliance with Case Law that it seems to me that a Commissioner in considering whether or not a notification of an arbitration hearing has indeed been received by a respondent, it is necessary to consider the facts bearing on that question.
- [15] I have also taken into consideration the Respondent's submission that he was informed by his Attorney Mr. Obakeng Lawrence Thobegane, that the Applicant was aware that this matter was set down for hearing on 16 November 2010. 'According to Mr. Thobegane, on the 09 November 2010, he personally went to Joshua Doore Zeerust to serve the Applicant with a copy of the bundle of documents that were used during Arbitration. The said index of bundle was received and signed for by Mr. Erens Laaka, the new Branch Manager. In support of this allegation, he attached a copy of the index of the bundle marked annexure "LF1'

¹ [2001] 5 BLLR 539 (LC).

bearing Mr. Erens Laaka's signature as well as the stamp of JDG TRADING (Joshua Doore)'

- [16] I have therefore, come to the conclusion that the Applicant has not succeeded in making a case for rescission.

Principles for Rescission

- [17] Rescission of CCMA awards are governed by s144 of the LRA. That section reads as follows:

'144. Variation and rescission of arbitration awards and rulings.---

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award ruling---

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.

- [18] The procedure for instituting a rescission application is set out in rule 32 of the Rules of the CCMA which reads as follows:

' 32 How to apply to vary or rescind arbitration awards or rulings.

- (1) An application for the variation or rescission of an arbitration award or ruling must be made within 14 days of the date on which the applicant became aware of:
 - (a) the arbitration award or ruling; or
 - (b) a mistake common to the parties to the proceedings.'

- [19] In *Shoprite Checkers (Pty) v CCMA and Others*², the court held that good cause should be read into s144 of the LRA. The decision in that case confirmed what had already been decided in *Northern Training Trust v Maake and Others*³, where the test for rescission in terms of s144(a) of the LRA was said to be the following:

“The enquiry in an application for rescission on an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set down was sent, ..., a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not in willful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant need not deal with the merits of the case”.

- [20] In exercising the power to either grant or refuse the rescission application, the commissioner has to make sure that in doing so he or she applies his or her mind to the factors relevant to such determination. Failure to consider or apply one's mind to any of the relevant factors by the commissioner in his or her consideration of the rescission application could make such a decision unreasonable or defective as envisaged in s145 of the LRA.

- [21] In *Martin v Commission for Conciliation Mediation and Arbitration and Others*⁴ Van Niekerk A J (as he then) was stated:

‘A reasonable decision maker in the present circumstances would apply the relevant test—in other words, the test referred to in North Training Trust and affirmed by the Labour Appeal Court in Shoprite Checkers. This required her to establish that the notice of set down was sent (which she did) and then to determine whether the applicant's default was wilful, and whether she had reasonable prospects of success in her claim. A commissioner's decision cannot be said to be reasonable when the commissioner fails to consider all the materially relevant factors prior to making that decision’.

Evaluation

² (2007) 28 ILJ 2246 (LAC)

³ (2006) 27 ILJ 828 (LC) at para 28.

⁴ (2008) 29 ILJ 2254 (LC) at para 25.

- [22] I have noted that the case number of the ruling the Applicant seeks to review and set aside is KNPM2191 but on the ruling and the arbitration award (which is not the subject of the review but was attached to the paginated bundle of documents) is NWKD2180-10. The Third Respondent did not make it an issue in the opposing papers and the parties are the same. I therefore, conclude that the Applicant party made a bona-fide mistake and this should not affect the substance of the application.
- [23] In arriving at a conclusion that the arbitration award he handed down should not be rescinded, the Second Respondent appear to have been influenced by primarily two things, that the Respondent was duly notified by a fax dated 20 October 2010. Secondly that the Third Respondent's Attorney Mr. Obakeng Thobegane informed him that the Applicant was aware that the matter was set down for hearing on the 16 November 2010 because he personally served the index of the bundle which was received and signed for by Mr. Erens Laaka, the new branch manager.
- [24] In *Local Government Association v CCMA and Others*⁵ Sutherland AJ had this to say:
- ‘It seems to me that the commissioner in considering whether or not a notification of an arbitration hearing has indeed been received by a respondent, it is necessary to consider all the facts bearing on that question. Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of such receipt...’
- [25] In its founding papers’ the Applicant states that the only reason for non-attendance at the hearing was because it was not aware that the arbitration would take place on the 18 November 2010.
- [26] The Third Respondent averred that his legal representative served the index to the bundle and also had a discussion with the new store manager a Mr. Erens Laaka about the date of the arbitration. The Applicant submitted that the mere handing over of the bundle did not constitute service of the notice of

⁵ (2001) 22 ILJ 1173 (LC) at para 46.

set down. Moreover, Laaka was a new employee and may not have been aware of the facts of the case.

[27] It is notable that neither the Applicant nor the Third Respondent sought a confirmatory affidavit from Erens Laaka about his involvement in the matter. However, the Applicant had a greater burden to disprove the allegations of the Third Respondent on this aspect. The probabilities favour the Third Respondent that the Applicant was aware of the set down through Erens Laaka.

[28] The First Respondent did not deal with the prospects of success in the ruling. The approach to be adopted in dealing with the prospects of success is well established. In *Foschini Group (Pty) Ltd v CCMA and Others*⁶ Francis J said:

‘An applicant who wants to have a decision of a commissioner who has refused to rescind an award reviewed must show that he has a bona fide case to place before the tribunal and that it had not lost interest in having its case heard and its absence at the hearing has been reasonably explained.

If the explanation given for a party's non appearance at the arbitration proceedings does not demonstrate that the absent party was wholly blameless, the force of that explanation must still be balanced against the force of the case which that party seeks to present in support of its case. The weight of a solid bona fide case will usually make up for a thin explanation for default’.

The Honourable judge further stated;

‘...to establish that there is a reasonable probability of success on the merits, it suffices if an applicant shows a prima facie case in the sense of setting out averments which, if established at the proceedings, would entitle that party to the relief asked for. An applicant need not necessarily deal fully with the merits of the case’.

[29] In *Chetty v Law Society, Transvaal*⁷ the court in dealing with prospects of success has this to say:

⁶ (2002) 23 ILJ 1048 (LC) at paras 16-17 and 21.

⁷ 1985 (2) SA 756 (A)

- (ii) that on the merits such party has a *bona fide* defence which *prima facie*, carries some prospects of success.

- [30] In considering the prospects of success the commissioner does not have to pronounce on the merits of the case. All, what the Commissioner has to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard.
- [31] The First Respondent did not deal with the prospect of success in the ruling he issued. As a result he failed to apply the correct principles on how to deal with prospects of success in an application for rescission. Consequently the First Respondent committed a gross irregularity because he failed to analyze, fully and properly the likelihood of the Applicant succeeding in its defence at the unfair dismissal hearing.
- [32] On this ground the ruling handed down by the First Respondent stands to be set aside.
- [33] The Applicant in the Notice of Motion prayed that the rescission be granted and that the matter be referred back to the CCMA for arbitration on the merits thereof on an opposed basis. In this regard I am guided by what Molahlehi J in *SADTU v CCMA and Others* ZALC 7 2007⁸ said:

‘In the time available I have not been able to find an appeal decision that interprets s144 or any section of the LRA that gives a court a concurrent jurisdiction with that of the CCMA in as far as rescission of awards is concerned. The provisions of s144 are in my view perfectly clear on this point. The power to rescind arbitration awards is conferred on the commissioner and not this court. See *Deutch v Pinto & Another* (1997) 18 ILJ 1008 (LC) and *Mimmo’s Franchisee Cc & others v Spiro & Others* (2000) 21 ILJ 2065 (LC).

Conclusion

- [34] In the premises, I make the following order:

⁸ Case no JR 2896/05 at para 40.

- (a) The ruling issued under case number NWKD2180-10 on the 30 December 2010 is reviewed and set aside.
- (b) The application for rescission is remitted to the Second Respondent to be heard by a Commissioner other than the Second Respondent.
- (c) There is no order as to costs.

Phala A J

Acting Judge of the Labour Court of South Africa.

APPEARANCES

APPLICANT: S Morgan (Attorney)

FIRST RESPONDENT: O L Thobegane (Attorney)