



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR964/12

In the matter between:

AM GERMISHUIZEN t/a AC PAYROLL AND

RECRUITMENT SERVICES SOLUTION CC

Applicant

and

MICHAEL DAVID FULTON

First Respondent

THE CCMA

Second Respondent

COMMISSIONER JOHN SHARDLOW

Third Respondent

COMMISSIONER R MCGREGOR

Fourth Respondent

Heard: 4 July 2013

Delivered: 6 May 2014

Summary: Review of rescission application and jurisdictional ruling- applicant not attending arbitration hearing- default arbitration granted against applicant- reason for non attendance unreasonable- commissioner dismissing rescission application – commissioner not having jurisdiction to entertain arbitration

hearing- commissioner rescission and jurisdictional rulings reasonable – review applications dismissed.

JUDGMENT

MANCHU AJ

Introduction

- [1] The applicant has brought an application to review and set aside two decisions of the second respondent.
- [2] The first decision is a rescission ruling handed down on 1 February 2012. The second is an arbitration award handed down on 8 March 2012.
- [3] Although the review is against the above two decisions, there are in effect three rescission rulings that form part of the facts of this review.
- [4] The three rescission rulings are concerned with the same matter that had been referred to arbitration and consequently from the same default arbitration award.
- [5] It appears that in the end, the applicant wishes to have this Court placed the applicant in a position where it can have the facts around the dismissal dispute finally heard at the CCMA. The background facts against which this review is brought are set below.

Background facts

- [6] On 15 February 2011, the first respondent referred an unfair dismissal dispute to the CCMA. The dispute remained unresolved after conciliation and it was then referred to arbitration on 9 May 2011.
- [7] The applicant failed to attend the arbitration hearing on 9 May 2011 and the arbitration proceeded in its absence.

- [8] The third respondent, Commissioner John Shardlow, handed down a default award in which he found the first respondent's dismissal unfair and ordered the applicant to, *inter alia*, pay compensation in the amount of R 60 000, outstanding commissions in the amount of R 138 530.30 and notice pay in the amount of R7500.00. The award is dated 15 May 2011 and I shall refer to it as the default award.
- [9] The applicant alleges that it failed to attend the arbitration proceedings because it did not receive a notice of set down. This allegation is disputed by the first respondent. A dispute on this issue became a central issue in the various rescission applications that followed.
- [10] On 01 June 2011, the applicant brought an application to rescind the default award.
- [11] Although the first respondent did not attend the hearing, he did file an opposing affidavit. The opposing affidavit argued that the applicant did in fact receive the notice of set down and that the rescission application was one day late but that the applicant failed to bring a condonation application.
- [12] The rescission application came before Commissioner Shardlow who gave a ruling rescinding the default award. I will refer to this rescission ruling, which is dated 29 July 2011, as the first rescission ruling.
- [13] It is unclear whether Commissioner Shardlow considered the opposing affidavit, his ruling however said that the matter was unopposed.
- [14] The matter was then set down for arbitration on 7 September 2011.
- [15] Before the arbitration was heard in September, the first respondent brought an application to rescind the first rescission ruling. This application was brought on 11 September 2011.
- [16] The application to rescind the first rescission ruling was heard on 7 September, the date on which the arbitration hearing was meant to commence.

- [17] Commissioner Shardlow was persuaded that the first rescission ruling had been erroneously granted because the applicant had failed to bring a condonation application for the late filing of the rescission application. Therefore, a second rescission ruling, which rescinded the first rescission ruling, was made. I refer to the rescission ruling of September 2011 as the second rescission ruling.
- [18] The applicant alleged that a condonation application was in fact brought and that Commissioner Shardlow had failed to consider this. This allegation was brought to the attention of Commissioner Shardlow, in a formal application.
- [19] On 2 February 2012, Commissioner Shardlow issued a condonation ruling, condoning the late referral of the first rescission application and a second ruling declining to rescind his second rescission ruling. I will refer to the ruling declining to rescind the second rescission ruling as the third rescission ruling.
- [20] I am unable to establish from the papers, with certainty, whether the various rescission applications were the appropriate remedial courses for the parties for revisiting Mr Shardlow's various decisions. None of the parties that appeared before me raised any attack on this issue. Therefore I accept, for purposes of this judgment, that they were appropriate courses.
- [21] The matter was finally set down for arbitration on 8 March 2012 and it came before the fourth respondent, Commissioner McGregor.
- [22] Commissioner McGregor found that he did not have jurisdiction because the default arbitration award remained in force.
- [23] This review application is against Commissioner Shadlow's third rescission ruling and Commissioner McGregor's jurisdiction ruling.

Rescission ruling

- [24] Commissioner Shardlow, found that the applicant gave different versions of what led to the first respondent's dismissal and that these could only be tested at arbitration. The commissioner was accordingly minded that the applicant raised a

defence worth referring to arbitration. This spoke to the applicant's prospects of success.

- [25] The real dispute was whether the applicant had given a reasonable explanation for its failure to attend the arbitration on 09 May 2011.
- [26] Ms Germishuizen said that she failed to attend the hearing on behalf of the applicant because she did not receive the notice of set down. Although the notice of set down was sent to her fax number, it did not come to her attention.
- [27] The first respondent's account contradicts Ms Germishuizen's version. The first respondent says that Ms Germishuizen was aware of the set down and in fact advised her legal representative that she could not attend the hearing because she wished to attend a funeral. He further alleges that Ms Germishuizen failed to provide any proof of such funeral or that there has indeed been a death affecting Ms Germishuizen.
- [28] The version put forward by the first respondent was not met or contradicted by the applicant. The applicant in its replying affidavit, in the rescission application did not place any substantial allegations or facts to meet the first respondent's account.
- [29] Since this was the primary issue in the rescission application, one would have expected the applicant to deal with this version in its founding affidavit to the rescission application in this Court, but it failed to do so.
- [30] Commissioner Shardlow considered the parties' versions on whether the applicant was aware of the hearing and found that the first respondent's version was more probable. It is difficult to see how he would have found otherwise in the absence of evidence showing to the contrary.
- [31] Although the applicant has demonstrated prospects of success, he has failed to give a satisfactory explanation for his default.

- [32] It is not sufficient if only one of these requirements is met. An ordered judicial process would be negative if a party who could offer no explanation of his default other than his disdain of the rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.¹
- [33] Since the applicant sought rescission, it was encumbered on it to give a satisfactory explanation for his default.²
- [34] I find that Commissioner Shardlow's finding on the applicant's failure to attend the arbitration hearing to be reasonable and not susceptible of interference.
- [35] Commissioner McGregor's findings stand or fall on the judgment in respect of Commissioner Shardlow. Since the court upholds Commissioner Shardlow's rescission ruling, the award of Commissioner Mc Gregor is also upheld.
- [36] The review application is accordingly dismissed with no order to costs.

Manchu AJ

Acting Judge of the Labour Court of South Africa

¹ *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A), at 765D-F.

² *Meintjies v HD Combrinck (EDMS) Bpk* 1961 (1) SA 262 (A) at 263 H - 264A; and *Salojee and Another v Minister of Community Development* 1965 (2) SA 135 (AD) at 13E-F.

APPEARANCES:

For the Applicant: J N W Botha

Instructed by: M D Swanepoel Attorneys

For the Respondents: J F Du Toit

Instructed by: Henk Kloppers Attorneys

LABOUR COURT