



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1796/12

In the matter between:

PRODIN (PROPRIETARY) LIMITED

Applicant

and

NUMSA obo LAWRENCE FUNO

First Respondent

CENTE FOR DISPUTE RESOLUTION (MEIBC)

Second Respondent

JOSEPH MPHAPHULI

Third Respondent

Heard: 2 July 2013

Delivered: 6 May 2014

Summary: Review of a rescission ruling- applicant failing to show good cause for not appearing at the arbitration hearing- commissioner rescinding award- rescission ruling review and set aside- rescission application dismissed.

JUDGMENT

MANCHU AJ

Introduction

- [1] The Applicant has brought an application to review and set aside a rescission ruling issued by the Second Respondent under case number MEGA 33898.
- [2] The facts that give rise to this application are set out below.

Background facts

- [3] Mr Lawrence Funo ("Mr Funo") was dismissed on 17 August 2011 after being found guilty of a charge of intimidation and assault.
- [4] The First Respondent, on behalf of Mr Funo, referred his dismissal to conciliation on 12 September 2011. The events of 12 September are important for the determination of this review.
- [5] The dispute that was referred to conciliation on 12 September 2011 remained unresolved and a certificate to that effect was issued. What is significant is that, with both parties present, the arbitration was postponed to 16 April 2012. Therefore, both parties were aware, as at 12 September 2011, that the hearing was postponed to 16 April 2012.
- [6] On 16 April 2012, Mr Funo failed to attend the arbitration.
- [7] It appears that, by chance, two officials from NUMSA were at the CCMA for another matter and they became aware that the First Respondent's arbitration hearing was also set down. These two officials, who were not initially involved in Mr Funo's referral, then attended the hearing. Their attendance was presumably for purposes of obtaining a postponement.
- [8] The arbitration was dismissed on account of Mr Funo's non-appearance.
- [9] The First Respondent brought a rescission application against the dismissal award.

- [10] In the affidavit in support of the rescission application, the First Respondent gave an account on how the facsimile of the notice of set down had not reached his attention and how the First Respondent was unaware that the arbitration hearing had been set down for 16 April 2012.
- [11] The affidavit also alleged that the First Respondent's prospects of success were good because 'the presiding officer despite the fact that she found that there was no evidence that the Applicant had incited a group of people to attack and assault (his) co-employees, she concluded that she had to find in favour of respondent' (the Applicant). Nothing more of substance was said of the First Respondent's prospects of success.
- [12] The Applicant filed a comprehensive opposing affidavit in opposition to the rescission application. The affidavit raised several points *in limine* and dealt *ad seritium* with the allegations in the founding affidavit.
- [13] Of significance, the opposing affidavit highlighted the fact that the First Respondent ought to have been aware of the date of arbitration because the date was determined at conciliation, with both parties present. There was no replying affidavit before the Second Respondent, therefore, this allegation remained an undisputed fact.

Discussion of the award

- [14] In his rescission ruling, the Third Respondent found that Mr Funo had not attended the scheduled arbitration on 16 April 2012 because he had no knowledge that the matter had been scheduled for that day. The Third Respondent also found that Mr Funo was not found guilty of any misconduct at the pre-dismissal hearing. These findings were not consistent with the evidence in the affidavits before him.
- [15] The grounds on which a commissioner can rescind awards are set out in section 144 of the LRA. The grounds are essentially the same as those that permit judges and magistrates to rescind judgments or orders.

[16] In *Shoprite Checkers (Pty) Ltd v CCMA and Others*,¹ the Labour Appeal Court held that section 144 must be interpreted so as to include good cause as a ground for the rescission of a default arbitration award.

[17] Good cause has been found to be present when an Applicant has given reasonable explanation for his default and has shown a *bona fide* defence or prospect of success to the claim.²

Explanation for default

[18] The First Respondent argued that it was not aware of the arbitration hearing because the notice, although properly served, was not brought to the attention of the relevant person at the NUMSA.

[19] This argument ignored the fact that the date of the arbitration hearing was determined at conciliation, where both parties were present.

[20] The matter was specifically postponed for arbitration on 16 April 2012 at the conciliation hearing. The First Respondent did not explain why it defaulted in appearing when it was apprised of the date already in September 2011.

[21] Furthermore, there were no allegations in the affidavit explaining why Mr Funo failed to attend the hearing. The affidavit instead confined itself to explaining the default of the NUMSA representative.

[22] Even if I accept that the notice of set down did not reach the attention of the relevant official at NUMSA, there still has not been a proper explanation on why the First Respondent himself failed to appear.

[23] The First Respondent did not need the notice of set of down to advise him of the date because he was already advised of the date at conciliation.

¹ [2007] 10 BLLR 917 (LAC) at para 38.

² See *Total Facilities Management Co (Pty) Ltd v CCMA* [2008] 1 BLLR 73 (LC) at para 24.

[24] I am, accordingly, of the view that there is no reasonable explanation for Mr Funo's default in appearing at the hearing.

[25] The Third Respondent's finding on this issue is not one which a reasonable decision-maker could make.

Prospects of success in the referral

[26] The Third Respondent found that the First Respondent enjoyed prospects of success.

[27] From the record of the rescission application, I am unable to see how the Third Respondent was persuaded of the First Respondent's prospect of success. The First Respondent failed to give a satisfactory account of its prospect of success.

[28] The Applicant in turn, gave a detailed account of the events that led to the Mr Funo's dismissal. The First Respondent failed to deal or respond to these allegations.

[29] The Third Respondent appears to have not placed any weight or consideration to the allegations made by the Applicant.

[30] The Third Respondent found that the "submission that the dismissal lacked legal and factual support in that the Applicant was found guilty of misconduct makes for a successful application" was not supported by any evidence before him. This appears to be a conclusion reached by the Third Respondent and submitted by the First Respondent, without any evidentiary support.

[31] Accordingly, I find that the First Respondent's rescission application did not demonstrate any prospects of success by the First Respondent.

[32] Lastly, there was a condonation application before me for the late filling of the First Respondent's answering affidavit. The affidavit was filed some 41 days late. After considering the application for condonation, I am inclined to grant

condonation. My findings above include a consideration of the First Respondent's affidavit.

[33] I, accordingly, make an order:

- 1) Reviewing and setting aside the rescission ruling that was issued by the Second Respondent under case number MEGA 33898.
- 2) Dismissing the First Respondent's rescission application that was launched on 9 May 2012 relating to the dismissal ruling that was issued.
- 3) Ordering the First Respondent to pay the costs of this application.

Manchu AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Joe Campanella

Instructed by: Dewey-DeSouza Attorneys

For the Respondents: Tumiso Manasoe

Instructed by: NUMSA