



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable
Case no: JR1859/13

In the matter between:

NJR STEEL HOLDINGS (PTY) LTD

First Applicant

NJR STEEL - PRETORIA EAST (PTY) LTD

Second Applicant

and

**FEDERATED MINING AND ALLIED
INDUSTRIES WORKERS UNION OBO BEN
MATHABATHA AND 10 OTHERS.**

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER JOSEPH TSABADI N.O

Third Respondent

Heard: 15 January 2015

Delivered: 5 May 2015

Summary: Labour Law - dismissal - arbitration - rescission application- employees dismissed for reasons relating to their participation in an unprotected strike- Commissioner issued a default award in the First Applicant's absence recording dismissal substantively unfair- Applicant's launched rescission application - Commissioner refusing rescission application - review application in terms of Section 145 of the Labour Relations Act - Commissioner committing a gross irregularity - Commissioner failed to

correctly apply the test for a rescission application - Commissioner required to establish if notice of set down was sent, and then decide if default was wilful and whether the Applicant had reasonable prospects of success in its claim - reasonable decision maker must apply the relevant test - decision reached by the Commissioner not one that a reasonable decision maker could reach - rescission ruling reviewed and set aside - rescission granted - First Respondent directed to refer the dispute to the Labour Court subject to condonation for the late referral being granted

JUDGMENT

OLIVIER A J

Introduction:

- [1] This matter concerns an application by the First and Second Applicants to review and set aside a rescission ruling of the Third Respondent in his capacity as Commissioner of the CCMA, the Second Respondent. This application has been brought in terms of Section 145 of the Labour Relations Act ("the LRA").
- [2] Ben Mathabatha and 10 others as listed in the default award issued by the Third Respondent dated 12 April 2013 under case number JAPT2673-8 (hereinafter referred to as ("the individual respondents")) were all members of the Federated Mining and Allied Industries Workers Union ("the First Respondent") at the time of the issuing of the default award and the rescission ruling dated 15 August 2013. They were also represented by Mr. Maripa, an official of the First Respondent at the time of the arbitration hearing and the rescission application hearing.
- [3] The individual respondents were all employed by NJR Steel - Pretoria East (Pty) Ltd ("the Second Applicant") at the time of their dismissal during January 2008. Based on the founding affidavit and supplementary affidavit deposed

by a representative of the First Applicant (NJR Steel Holdings (Pty) Ltd) the individual respondents were dismissed by the Second Applicant on/or about 28 January 2008 after they failed to heed the contents of two ultimatums to stop their participation in an unprotected strike in support of a demand relating to bonus payments.

- [4] The Second Applicant is a private company conducting business as a steel merchant and supplier of hardware from premises in Silverton, Pretoria. The First Applicant is the holding company of the Second Applicant. The First Applicant has interests in the steel manufacturing industry, the manufacturing of paint in the chemical industry, and the wholesale and retail sector through businesses such as steel merchants and hardware suppliers. Its interest is represented in 23 subsidiary companies, each of which is operated and managed separately as distinct businesses. The Second Applicant is such a subsidiary. The First Applicant only exercises oversight and a supporting role in respect of its subsidiaries such as the Second Applicant.
- [5] The individual respondents filed a dismissal dispute relating to their dismissals on 28 January 2008, such referral was 17 days late and they then brought a condonation application. Such condonation application came before Commissioner A P Venter on 3 April 2008 under case number GAP T 2673-08. Commissioner Venter condoned the late referral but clearly stated that the issue of jurisdiction to adjudicate the dispute needs to be first determined. Venter clearly anticipated that this court may have jurisdiction to determine the dispute based on the fact that the reason for the dismissal related to strike action as was recorded in the LRA Form 7.11. In terms of Section 191(5)(b)(iii) this court has jurisdiction to determine a dispute if the reason for the dismissal is an employee's participation in a strike that does not comply with the provisions of Chapter IV of the LRA.
- [6] In the referral form the individual respondents cited the First Applicant as the Respondent employer party despite the fact that they were employed by the Second Applicant.

- [7] The First Applicant then applied to this court to review the ruling by Commissioner Venter under case number JR908-08. In the interim the dismissal dispute also came before Commissioner Nowdsenetz on 5 June 2008. Commissioner Nowdsenetz postponed the adjudication of the dispute on the basis that the review application was still pending and may affect the jurisdiction of the Second Respondent to hear the dispute. The case was postponed pending the decision of this court.
- [8] This court under case number JR908-08 later refused the Applicants' review application and the matter was again at the request of the individual respondents and the First Respondent set down for an arbitration hearing before Commissioner Joseph Tsabadi, the Third Respondent, on 4 April 2013. In the request for arbitration the First Applicant was again cited as the relevant respondent party. Mr. Maripa of the First Respondent represented the individual respondents at this arbitration hearing. However in the 1 February 2013 request to enrol the matter for arbitration the First Applicant requested the Second Respondent to enrol the matter but on the condition that "*....only if you have jurisdiction to hear this matter or issue the certificate directing the matter to Labour Court -¹*". This clearly indicated that the First Respondent and its representative knew that based on the reason for the dismissals this court may have jurisdiction to adjudicate the dispute.
- [9] The First Applicant failed to attend the arbitration hearing before the Third Respondent. The Third Respondent proceeded to hear the matter in the absence of the Applicants and ruled that the First Applicant did get notice of the hearing by fax and that Mr. Maripa had also hand delivered a notice to the Second Applicant. As such he proceeded to hear the matter as a default hearing and issued an award.
- [10] At this hearing one of the individual respondents, Ben Mathabatha testified that they were dismissed on 25 January 2008 for reasons unknown to them and without having had a hearing. In the award the Third Respondent however recorded that Mathabatha stated that the Applicant's manager had

¹ Refer page 189 of the record

alleged that they had been on a strike. The Third Respondent then on 12 April 2013 recorded in a default award that the dismissal was substantively unfair as there was no plausible reason for the dismissal and also procedurally unfair. He re-instated the individual respondents listed in the award with back pay equivalent to 5 years' salary. The default award was made against the First Applicant, NJR Steel Holdings (Pty) Ltd, and not the Second Applicant.

[11] On 8 May 2013 the First and Second Applicants launched a rescission application in respect of the aforesaid default award. In a detailed affidavit by Penelope Chanee, the HR Manager of the First Applicant, all the relevant grounds for the rescission of the default award were recorded. In such affidavit Chanee set out in detail the relevant background of the dispute. She also fully explained the reason for the First Applicant's failure to attend. The notice of set down was issued in the name of the First Applicant but no proof existed whether it was ever served on the First Applicant. A notice was indeed hand delivered by Maripa to the offices of the Second Applicant. Again no fax transmission sheet could be found proving that it had been sent to the Second Applicant by the Second Respondent.

[12] The Second Applicant had at the time appointed a new manager who was not aware of the facts of the dismissals which occurred in 2008. He assumed the case related to the First Applicant as stated in the notice and forwarded the request to the First Applicant by email. Chanee on receipt of the email decided to wait for a formal notification from the Second Respondent. No such formal notification was ever received and accordingly the First Applicant failed to attend the arbitration hearing. The First and Second Applicants separately found out about the default award and on 8 May 2013 launched their rescission application.

The rescission application hearing:

[13] It is important to note that during the arbitration hearing the number of individual respondents increased from 10 to 11. Of the 11 only 8 were originally cited as applicants in the initial LRA Form 7.11. Two employees

were never a part of the original referral at all. In the rescission application, proper grounds were also set out showing the Applicants prospects of success.

- [14] On 12 April 2013 and after the Third Respondent had heard both the First Respondent and the Applicant's representative, he refused to rescind the award and gave the following reasons:

"The Respondent (the First Applicant) was in wilful default. The fax that the CCMA sent to the Respondent advising it of a set down for this matter was indeed duly received. Secondly the trade union official hand delivered the notice of set down and handed it to a manager of the Respondent. The Respondent elected not to attend the arbitration proceedings".

- [15] After receiving the aforesaid rescission ruling the First and Second Applicant launched the current review application.

The grounds of review of the First and Second Applicants

- [16] The Third Respondent in the manner in which he conducted both the arbitration proceedings and the rescission application hearing acted in a manner which was reviewable. This conduct was irregular and he arrived at a decision in the rescission application that a reasonable arbitrator could not have reached in the circumstances. In its affidavits the Applicants were able to show that no fax transmission slip showing that the Second Respondent had indeed faxed the notice of set down to the First Applicant existed. Accordingly the first ground for review is that the Third Respondent erred in finding that the Second Respondent faxed a copy of the notice of set down to the First Applicant.

- [17] Even were it to be that such a fax transmission report existed, the First Applicant's representative stated under oath in the rescission application that the First Applicant did not receive the notice of set down allegedly faxed. As such, the Third Respondent erred in not having had regard to the representatives of the First Applicant statements under oath. The hand delivery of the notification by Mr. Maripa to a manager of the Second

Applicant was not proof of delivery or service on the First Applicant. In the premises the Third Respondent ought to have found that no conclusive proof existed that the First Applicant received a copy of the notice of set down.

- [18] Further grounds of review relied upon by the Applicants relate to the fact that the Third Respondent committed a reviewable irregularity by failing to consider whether the First Applicant had reasonable prospects of success in opposing the relief sought by the individual respondents in the arbitration. So for instance did the Third Respondent fail to consider that the First Applicant would have succeeded in establishing that an employment relationship never existed between it and the individual respondents and accordingly the Second Respondent does not have jurisdiction to adjudicate the alleged dispute.
- [19] The individual respondents were dismissed by the Second Applicant and not the First Applicant with whom it did not have an employment relationship. Proper evidence was placed before the Third Respondent in relation to the employment relationship between the individual respondents and the Second Applicant. The Second Applicant also dismissed the individual respondents based on their failure to comply with ultimatums to return to work pursuant to their participation in an unprotected strike action in support of a demand to be paid bonuses. The ultimatums were clearly issued by the Second Applicant and not the First Applicant.
- [20] The First Applicant also indicated in its rescission application that it had good prospects of demonstrating that the Second Respondent does not have jurisdiction over the dispute as it concerned dismissals resulting from participation in unprotected strike action. Only this court has jurisdiction over disputes concerning dismissals resulting from strike action. As such, the Third Respondent failed to determine the true reasons for the dismissals and he should have concluded that the Second Respondent does not have jurisdiction to adjudicate the dismissal dispute.

The relevant legal principles and the test for review

- [21] In *Shoprite Checkers (Pty) Ltd vs CCMA and others (2007) 28 ILJ 2246 LAC*, the Labour Appeal Court held that good cause should be read into Section

144 of the LRA when considering rescission applications. The rescission in that case confirmed *Northern Training Trust vs Maake and others* (2006) 27 828 LC, where the test for rescission in Section 144(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 the reasons proffered by the Applicant who failed to attend the arbitration proceedings. Such Applicant needs to prove that he or she was not wilful 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".

The relevant test for review

- [22] The proper review test to be used comes from the Judgment in *Sidumo and another vs Rustenburg Platinum Mines Limited and others*.² where Navsa JA held that in light of a constitutional requirement (in Section 33(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")), everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that "the reasonableness standard should now suffuse Section 145 of the LRA". The majority of the Constitutional Court set the threshold test for reasonableness of an award or ruling as the following:

"Is the decision reached by the Commissioner one that a reasonable decision maker could not reach".

- [23] An arbitration award can be reviewed on the grounds listed in Section 145 of the LRA i.e. if there is a defect in the award. Defect means that the Commissioner:

23.1. Committed a misconduct in relation to the duties of the Commissioner;

² (2007) 281ILJ 2405 (CC)

23.2. Committed a gross irregularity in the conduct of the arbitration proceedings;

23.3. Exceeded the Commissioner's powers; or

23.4. The award was improperly obtained.

[24] The main objective of a review is for the Labour Court to determine whether a Commissioner had perpetrated some irregularity that has denied the other party a fair hearing. This may be determined from the manner in which the hearing was conducted, from the manner in which the Commissioner approached the evidence or from the conclusion the Commissioner drew from the evidence.

[25] Generally slight procedural irregularities or minor errors of reasoning do not constitute grounds for review if they did not materially prejudice a party. Where however a procedural misdirection or an error of reasoning denies a party a fair hearing, the Court is entitled to intervene.

[26] The starting point in determining the power of the Labour Court to intervene is as stated above in the case of *Sidumo*. According to the Constitutional Court the main objective of review is to determine whether the Commissioner has perpetrated some irregularity that has denied either party a fair hearing. A review of a Commissioner's decision is not an appeal. The test in the *Sidumo* matter reduces the significance of an arbitrator's reasons because the reviewing Court applying the test examines the result. There is a low threshold of interference set by *Sidumo*.

[27] In one of the most recent cases i.e *Herholdt vs Nedbank Limited*³ the Supreme Court of Appeal held that the test is as follows:

"A review of CCMA awards is permissible if a defect within the proceedings fall within one of the grounds in Section 145(2)(a) of the LRA. For a defect in the

³ (2013) 34 ILJ 2795 SCA

conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and the relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if the effect is to render the outcome unreasonable."

[28] Where a Commissioner evaluated all the facts presented at the hearing and came to a conclusion the question is whether that conclusion is reasonable based on the evidence before him. It needs to be considered whether the Commissioner decision falls within a band in which reasonable Commissioners might reasonably agree.

[29] In *Martin vs Commission for Conciliation, Mediation and Arbitration and others*⁴ Van Niekerk AJ (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 a notice of set down was sent (which she did) and then to decide 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....."

[30] Applying the aforesaid dicta it is clear that the Third Respondent failed to consider or apply his mind to the relevant factors in the rescission application.

[31] It should have been clear to the Third Respondent as was recorded by the two Commissioners who have previously dealt with the matter (Venter and Nowdsenetz) that the matter related to a dismissal for participation in an unprotected strike and that the CCMA therefore did not have jurisdiction. It

⁴ (2008) 28 ILJ 2254 LC at paragraph 25

must have been clear to him that this was an issue that he needed to consider and rule on.

- [32] In exercising his power to either grant or refuse the rescission application the Third Respondent had to make sure that in doing so he applied his mind properly to all the relevant factors. He clearly did not apply his mind to the relevant issue as to whether the First Applicant was duly served with a notice of set down. It is clear from the evidence that this was not the case. As such there was no basis for him to find that the First Applicant had indeed received a fax transmission relating to the set down.
- [33] Furthermore, the Third Respondent erred and committed a gross irregularity by failing to consider whether the First Applicant had reasonable prospects of success in opposing the relief sought by the individual respondents at the arbitration.
- [34] It must have been clear from all the relevant evidence and documentation in his possession that an employment relationship had never existed between the First Applicant and the individual respondents. The default award was therefore clearly awarded incorrectly against the First Applicant. The Third Respondent also clearly failed to consider in relation to the prospects of success that the Second Respondent does not have jurisdiction over the dispute as it concerns dismissals resulting from participation in an unprotected strike. Only this court has jurisdiction over such disputes.

First Respondent's notice dated 12 March 2013

- [35] It is important also for this court to take note of the fact that the First Respondent on 11 March 2014 served a notice on the Second Respondent in which it indicated that it would like to "withdraw" the default award and any application to enforce the award under case number GAPT2673-08.
- [36] In the notification to the Second Respondent the First Respondent clearly indicated that it was of the view that the CCMA had no jurisdiction to arbitrate the matter as the individual respondents were accused of embarking on unprotected strike action. The notification also indicated that the First

Respondent was aware that the individual respondents were employed by the Second Applicant and not the First Applicant in respect of whom the award had been made.

[37] The aforesaid notice to the Second Respondent was also filed with the Registrar of this court on 12 March 2014 and formed part of the consideration of the matter. As such the First Respondent had abandoned any reliance on the default award on such grounds which are in support of the application made by the First and Second Applicant.

[38] However it needs to be recorded that in the review application, the representatives of the First Applicant made a number of serious allegations of fraud and other misconduct against the First Respondent's representative, Mr. Maripa as well as the individual respondents. These aspects need to be further investigated at the hearing of the matter before this court should this matter proceed to be adjudicated.

Conclusion

[39] In the circumstances I conclude that the Third Respondent acted in a grossly irregular manner and that the Applicants were deprived of a fair hearing in the rescission application and that the Applicants were therefore able to prove that relevant grounds of review existed in terms of Section 145 of the LRA which makes the rescission ruling of the Third Respondent one that a reasonable Commissioner could not have reached.

[40] As such the rescission ruling stands to be set aside.

In the premises I make the following order:

- I. The rescission ruling issued by the Third Respondent on 15 August 2013 under the auspices of the Second Respondent case reference GAPT2673-08 is reviewed and set aside.
- II. The rescission ruling of the Third Respondent is substituted with an order:

- i. That the First and Second Applicant's application for rescission is granted; and
 - ii. Directing the First Respondent to refer the individual respondents' dismissal dispute to this court for adjudication subject to the Labour Court first granting condonation for the late referral of the dispute.
- III. Cost to be cost in the cause when this matter is heard by this court.

OLIVIER AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Landman
Instructed by: O'Donovan Attorney
For the Respondents: No appearance

LABOUR COURT