



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Reportable

CASE NO: J 898/14

In the matter between:

SEDIBENG DISTRICT MUNICIPALTY

Applicant

and And

MOABI MOSOTHO PETLANE

First Respondent

COMMISSION FOR CONCILIATION

Second Respondent

MEDIATION AND ARBITRATION

MARGARETH SMITH N.O.

Third Respondent

Heard : 14 January 2015

Judgment: 06 May 2015

Summary: A failure to attend arbitration proceedings, pending an application to this Court to stay such proceedings, should not prevent a commissioner from proceeding with such arbitration and such application should not constitute good cause for the rescission of a default award.

JUDGMENT

MTHOMBENI AJ.

Introduction

- [1] This is an application for the reviewing and setting aside of a default arbitration award (“the award”), dated 4 December 2013, made by the third respondent; the reviewing and setting aside of a ruling, dated 1 April 2014, made by the third respondent refusing the rescission of the award; and staying the enforcement of the award, pending the judgment of this Court. The application is opposed.
- [2] The third respondent concluded in her award that the applicant had dismissed the first respondent and that the dismissal was procedurally and substantively unfair.

Preliminary Issues

- [3] The first respondent served and filed its answering affidavit in accordance with the Rules of this Court, while the applicant delayed in serving and filing its replying affidavit and made no application for condonation.
- [4] The applicant failed to file and serve a record of the rescission hearing as envisaged by Rule 7A (6).

Background

- [5] On 8 May 2009, the applicant and the first respondent entered into a fixed-term contract of employment, commencing from 1 April 2009 until 28 February 2012. In terms of the contract, the applicant employed the first respondent as an Executive Director: Corporate Services.
- [6] On 2 February 2012, the applicant appointed the first respondent as an acting Executive Director: Social Services with effect from 1 March 2012 until 30 June 2012.
- [7] At the expiry of last-mentioned contract of employment, the first respondent applied for the positions of Executive Director: Corporate Services and Executive Director: Social Services. He was shortlisted and interviewed, but he was not appointed.

- [8] Aggrieved by this, the first respondent referred a dispute to the second respondent for arbitration, claiming unfair dismissal.
- [9] The second respondent scheduled the arbitration hearing for 20, 21 and 22 November 2014.
- [10] Upon application by the first respondent, the third respondent issued subpoenas to certain individuals. The applicant, being of the view that the subpoenas were not necessary, on 19 November served and filed an urgent application seeking an order setting the subpoenas aside.
- [11] On 20 November 2014, the third respondent and the first respondent were present at the arbitration hearing, but the applicant failed to appear or to be represented at the hearing. The first respondent advised the third respondent that the applicant had on the eve of the arbitration hearing served him with an urgent application to this court for an order, *inter alia*, to stay the arbitration proceedings pending the hearing of that application. This notwithstanding, the third respondent proceeded in the applicant's absence and later made an award in which she concluded that the applicant had dismissed the first respondent and that the dismissal was procedurally and substantively unfair.
- [12] On the same day, Shaik AJ called the first respondent and requested him to attend at court on the following day. However, the first respondent did not attend, for he had been advised on his way to court that the applicant had withdrawn its application.
- [13] The applicant made an application the second respondent for the rescission of the award. The third respondent refused to grant rescission of the award.
- [14] Aggrieved by this, the applicant brought this application.

Grounds of Review

- [15] The applicant made the following submissions:
- 15.1 The third respondent was biased against it and her conduct was actuated by malice in that she had proceeded with the arbitration hearing while she was aware that the applicant had brought an urgent application to this court.

- 15.2 The third respondent's conduct in this regard was grossly irregular.
- 15.3 The award was improperly obtained in that the first respondent gave this court an impression that he would attend, while he knew that the arbitration hearing had been concluded.
- 15.4 The third respondent's refusal to grant the rescission of her award was not supported by evidence in that the applicant's pending urgent application indicates that it was not in wilful default. In the same vein, the third respondent stated that the applicant had some prospects of Success.

Applicable Legal Principles

- [16] Clause 11.4 of this court's Practice Manual ("the Manual") states that:

"Where the respondent... has filed its opposing affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which the right to object shall lapse."

- [17] From this perspective, the first respondent's contention that the applicant filed its replying affidavit outside the time limit has no merit, considering that the first respondent has failed to file and serve a Notice of Objection.
- [18] It is apposite to mention that the Manual is not a substitute for the Rules of this court, but it concerned chiefly with the manner in which the Rules are observed in the daily functioning of this court and what is expected of the litigants and the representatives.
- [19] While Rule 7A requires the applicant to file and serve a record of the rescission proceedings and it has failed to do so, I am, nonetheless, able to determine the issues *ex facie* the rescission ruling and the record of the application for review without a record of the rescission proceedings.

[20] The test for the review of arbitration awards is encapsulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ (“the Sidumo test”). This Court must, therefore, determine whether the decision reached by the third respondent is one that a reasonable commissioner could not reach.

[21] It is trite that an application to stay any proceedings should not, prior to an order by a relevant court to stay such proceedings, prevent the concerned presiding officer from proceeding with a hearing.

[22] Section 138 (5) (b) of the Labour Relations Act 66, 1995 (“the LRA”) stipulates that:

“If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party had not referred the *dispute* to the Commission, the commissioner may-

- (i) continue with the arbitration proceedings in the absence of that party;
or
- (ii) adjourn the arbitration proceedings to a later date.”

[23] It is also well established in this Court that Section 138 (5) (b) clothes a commissioner with discretion. When exercising such discretion, the third respondent stated in her award that:

“The applicant provided me with an application served by the respondent on the eve of the Arbitration hearing, i.e. 19 November 2013, requesting the Labour Court to suspend the proceedings and for the subpoenas issued against the witnesses to be rescinded. The applicant opposed the application in the Labour Court. The application was not yet heard at the time of the commencement of the arbitration process nor was a Court order served on me and/or the CCMA preventing me from continuing with the arbitration process.

The respondent did not attend the process even after granting them a waiting period of more than 30 minutes. Based on the above information elected to proceed in the absence of the respondent with the arbitration hearing in terms of Section 138 (5) (b) (i) of the Labour Relations Act 66 of 1995.”

¹ [2007] BLLR 1087 (CC) para 110

- [24] In my view, the third respondent exercised her discretion judicially, for there was no basis on which she could have invoked Section 138 (5) (b) (ii). The applicant never proffered her any explanation for its absence. Even if it did, an urgent application to this court to stay the arbitration proceedings would not, in my view, without a court order justify an adjournment of the proceedings to a later.
- [25] Thus, the applicant's contention that the third respondent was biased against it and had malice is misplaced cannot support a reviewable irregularity by the third respondent.
- [27] In terms of Section 145 (2) (b) of the, one of the grounds of review is that an award has been improperly obtained. In this respect, the applicant relies on the allegation that the first respondent created a false impression on Shaik AJ that he would be present at court at the hearing of the applicant's urgent application, while he was aware that the subject matter of that application had been disposed of by the third respondent.
- [28] I find this submission preposterous, for in my view in the circumstances the first respondent's undertaking in this regard had not influenced the third respondent to make an award in the first respondent's favour.
- [29] This court has a dearth of jurisprudence on Section 145 (2) (b). In this connection, Maserumule AJ in *Moloi v Euijen and Others*² stated that:
- “The grounds of review set out in the section distinguishes between misconduct by the commissioner (section 145 (a) (i) and the improper obtaining of an award as a separate ground of review (section n145 (2) (b)). In my view, the latter subsection contemplates a situation where the one party to the arbitration, through fraud or other improper means, obtains an award in his or her favour. This can be in the form of a bribe or by misleading and false or fraudulent representation which lead to an award being granted in that party's favour.”
- [30] In *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others*³, Wallis AJ, when considering the powers of review in terms of Section 145 of the LRA which

² [1997] 8 BLLR 1022 (LC)

³ [2000] 7 BLLR 835 (LC)

this court enjoys in respect of arbitration awards made by commissioners stated the following concerning Section 145 (2) (b):

“Reverting to the general principles governing reviewability of awards the last situation is the case where an award has been improperly obtained... In my view, if one looks at the structure of section 33 (1) of the Arbitration Act it is clear that this head of review covers matter which relate primarily, if not entirely, to conduct on the part of the successful party to the arbitration which would justify the setting aside of the award. Thus an award procure through fraud or the subordination of perjury could be set aside on this ground.”

- [31] From this vantage point, in my view, as stated earlier herinabove, the alleged conduct by the first respondent cannot be impugned as to render the award reviewable as contemplated in Section 145 (2) (b).
- [32] Concerning the application for the review of the rescission ruling, the applicant is reliant on the allegation that the ruling is not supported by evidence and that the applicant was not in wilful default, for the application for the stay of the arbitration proceedings was pending in this court.
- [33] *In Shoprite Checkers*⁴ the Labour Appeal Court held that:
- “Section 144 must be interpreted so as to also include good cause as a ground for the rescission of a default award. Accordingly, a commissioner may rescind an arbitration award under section 144 where a party shows good cause for its default... The test for good cause in an application for rescission normally involves the consideration of at two factors. Firstly, the explanation for the default and secondly whether the applicant has a *prime facie* defence.”
- [34] While the third respondent had not approached the application for rescission on this basis, she found that the applicant was in wilful default, her conclusion was, nevertheless, reasonable.
- [35] In my view, the applicant was in flagrant disregard of the rules of the second respondent. Neither the applicant nor its representatives brought an application for a postponement of the arbitration hearing as contemplated in Rule 23. As indicated hereinabove, an application to this court to stay the

⁴ *Supra* at page 917

arbitration proceedings could not have prevented the third respondent from proceeding without a court order barring her from doing so.

[36] In this connection, the third respondent stated the following in her award:

“The applicant argued that the notice of set down wasn’t properly served on the applicant. The documents provided by the respondent however submitted that Mr. Laxa collected the notice of set down on the 7th November 2013. This was not disputed. It is evident that the applicant wanted to interdict the process, NOT because of the alleged insufficient notice, but due to the subpoenas that were issued by the CCMA. The applicant was fully aware of the fact that the arbitration hearing was set down for the 20th -22nd November 2013. It did not apply for a postponement. I agree with the respondent that the applicant could have addressed the issue of the inadequate notice in an application for postponement, instead of running to the Labour Court to have the subpoenas set aside. The applicant made this abundantly clear in its letters. No Court order was filed (sic) on the CCMA or the Commissioner interdicting same from continuing with the process, it is thus my view that the applicant was in wilful default from attending the arbitration process.”

[37] The applicant contended that the third respondent had mentioned in her rescission ruling that the applicant carried some prospects of success. However, the applicant does clarify why it considers this to be a reviewable ground. This is just a bald statement which does not specify the alleged defect on which the applicant seeks to rely. It is incumbent on an applicant in a review application to establish clearly the grounds of review. (See *Naidoo v NBCCI [2012] 9 BLLR 915 (LAC)*).

[38] The applicant did not pursue in this application its contention that it had not been properly served with a notice of the arbitration hearing. However, its explanation for the default is not reasonable.

[39] I do not propose to deal with the applicant’s prospects of success. Suffice to state the third respondent concluded the applicant carried some prospects of success.

[40] From this background, in my view the third respondent correctly determined that the applicant did not show good cause as the explanation for the default

was unreasonable. To fortify my view in this regard, in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*⁵ the Labour Appeal Court stated that:

“Those two essential elements ought nevertheless not to be assessed mechanically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.”

[41] To conclude, the third respondent's award and ruling were not so unreasonable that no reasonable decision maker could have come to the same conclusion.

[42] The applicant has displayed a cavalier attitude throughout the arbitration proceedings and this application, while it enjoyed eminent legal representation. Thus, there is no reason in law and fairness why the applicant should not follow the result.

Order

[43] I, accordingly, make the following order:

43.1 The application for the review of the rescission ruling is dismissed;

43.2 The application for the review of the arbitration award is dismissed; and

43.3 The applicant is ordered to pay the first respondent's costs.

M Mthombeni

Acting Judge of the Labour Court

⁵ (1994) 15 ILJ 798 (LAC)

Appearances

For Applicant: Advocate M L Phiyega.

Instructed by: Seleka Attorneys.

Respondent appearing in Person.

LABOUR COURT