



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 3191/11

Not Reportable

In the matter between:

STEVE TSHWETE HOUSING ASSOCIATION

Applicant

And

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER DAVIS MAILA N.O.

Second Respondent

MR DAVID NDALA

Third Respondent

Heard: 04 March 2015

Delivered: 04 June 2015

Summary: Review of the rescission ruling of the Commission.

JUDGMENT

Molahlehi, J

Introduction

- [1] This is an application to review and set aside the rescission issued by the second respondent under case number GATW2990-11 dated 09 November 2011. The rescission ruling rescinded the variation under the same case number. The variation ruling was made on 10 August 2011. The variation ruling is based on acceptance of evidence which was not submitted during the arbitration hearing.

Background Facts

- [2] The third respondent who I will refer to as “the employee” in this judgment was employed by the applicant as a housing maintenance supervisor in 2002 until his dismissal on 18 February 2011. I will also for ease of reference refer to the applicant as the “employer”.
- [3] The employee was dismissed following a disciplinary hearing concerning the allegations of misconduct relating to theft, fraud and dishonesty.
- [4] The employee being unhappy about his dismissal referred the dispute concerning an alleged unfair dismissal to the first respondent. He contended in this regard that his dismissal was both procedurally and substantively unfair.
- [5] The dispute was considered by Commissioner Maila, (the first Commissioner) who issued the arbitration award on 10 August 2011, in terms of which he found the dismissal of the employee to have been both procedurally and substantively unfair. It was for this reason that he ordered the reinstatement of the employee and compensation in the amount of R46, 800.
- [6] The applicant thereafter applied for the variation on the basis that the arbitration award was made on a mistake common to both parties. The alleged mistake relates to the failure to submit the fixed term contract of the employee during the arbitration hearing. In other words the applicant did not submit as evidence the fixed terms

contract as evidence to show that reinstatement would in those circumstances not be appropriate.

- [7] The second respondent (the second Commissioner) accepted the fixed term employment contract as evidence of the nature of the relationship between the parties and thus limited the relief sought by the employee to compensation for the remainder of the period of the fixed term employment contract. The reinstatement order made in the first arbitration award was accordingly revoked.
- [8] The employee was understandably unhappy about the variation and accordingly applied to have the variation rescinded.
- [9] In the rescission application the employee contended that he was never aware of the variation application and its outcome. He conceded in his founding affidavit that he was employed on a fixed term employment contract by the employer but contended that he was not informed about the possibility of not renewing the contract.
- [10] In its opposition to the rescission application the applicant raised two *points in limine*, the first point being that the employee had failed to apply for condonation for the late filing of the rescission application and the second being that rescission was not the proper process but rather the proper one was review.
- [11] The variation ruling was rescinded on the 9 November 2011 and accordingly the award of the first Commissioner dated 10 August 2011 was reinstated. The rescission ruling read as follows:
- “23. The application for condonation for the late filing of the rescission application is hereby granted.
- 24 The variation ruling dated 26-09-2011 issued by Commissioner Raphela is hereby rescinded and the arbitration award dated 10-08-2011 issued by Commissioner Maile is reinstated in its entirety.”
- [12] In granting the rescission application the second Commissioner was fully aware that the rescission application was late and that the employee did not formally apply for condonation. In granting the condonation he reasoned as follows:

- “17 Even though there was no formal application for condonation filed, the applicants submission on the reason for the delay is simply that though the fax number used to send the variation ruling on 26 September 2011 belonged to his representative, he did not receive the same and only became aware of the variation ruling on 7th October 2011 and launched application for rescission on 13th October 2011.
- 18 Whether or not the applicant did receive the variation ruling of 20th September 2011 would require technical evidence and for that reason the applicant would receive the benefit of the doubt and the application for condonation for the late filing of the application for rescission of the variation is therefore granted.
- 19 On the merits of the application, despite the terminology used by the applicant's representative in his argument during the application, the CCMA and not the labour court as argued by the respondent's representative, is the proper forum to hear the application for rescission.
- 20 It is common cause that the issue of the expiry of the applicant's fixed term contract of employment and it's renewal (sic) subject to the performance appraisal was never introduced as part of evidence during the arbitration hearing and it follows therefore that an application in terms of section 144 cannot be used to introduce new evidence which was never introduced during the arbitration hearing”.

- [13] As stated earlier the applicant is now seeking an order reviewing and setting aside the rescission ruling.

Grounds of Review

- [14] The case of the applicant in the present case is that the Commissioner exceeded his powers in that he issued a ruling for rescission without considering and ruling on a condonation application for the late filing of the rescission application.
- [15] The other ground upon which the applicant relies on in challenging the Commissioner's award is that it is not one that a reasonable Commissioner could have reached.

Analysis

- [16] The rescission or variations of CCMA Commissioner's arbitration awards or rulings are governed by the provisions of section 144 of the Labour relations Act¹, which reads as follows:

"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 or 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."

- [17] The time frame within which a rescission application has to be made is governed by rule 32 of the CCMA rules which provides:

"(1) An application for the variation or rescission of an arbitration award or ruling must be made within fourteen days of the date on which the applicant became aware of –

- (a) the arbitration award or the ruling; or
- (b) a mistake common to the parties to the proceedings

- [18] Rule 9 of the CCMA rules governs any referral or application filed outside the applicable time frames. It requires that condonation application must be made whenever documents are filed outside the prescribed time frame. Read with rule 31(2) of the rules an application for condonation must be brought 14 days prior to the date of the hearing on notice to other interested parties.

- [19] In a case where the applicant has failed to comply with the fourteen days requirement in instituting the rescission application rule 35 of the CCMA rules

¹ Act 66 of 1995.

provides for condonation for such non-compliance. The applicant is in that respect required to show good cause for non-compliance.

- [20] In exercising the powers under rule 35 a Commissioner may act in such a manner as he or she deems appropriate in the circumstances of the given case. This means that in certain circumstances a Commissioner could consider an application for condonation even when brought orally on the day of the hearing depending on the circumstances of the case. The principle that condonation can be considered even where no application has been made as required by the rules is based on consideration set out in *Federated Trust Ltd v Botha* ²(A) in the following terms:

“The Court does not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts”

- [21] In *Kloberie v Absa Bank Ltd*, ³ the court held that:

”[11] In *McGill v Vlakplas Brickworks (Pty) Ltd* **1981 (1) SA 637** (W) at 643 the court held that the court may hear a condonation application brought orally from the bar where the objection to the application is technical and the other party(s) will not suffer prejudice.”

- [22] The approach that a Commissioner of the CCMA can dispense with the requirements of the rules in relation to condonation without a formal application is informed by the very spirit of the LRA that requires disputes to be dealt with expeditiously with minimum legal formalities. The approach is also informed by the well-known principle that;

“*The rules are not an end in themselves to be observed for their own sake.*”⁴

- [23] It has not been disputed that the rescission application was filed outside the period prescribed by the CCMA rules neither has it been disputed that there was no application for condonation for such application.

² 1978 (3) SA 645 654C-F.

³ [2013] ZAGPJHC 208 (16 August 2013).

⁴ *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* (2) 1971 (4) SA 532 (C) at 535 (last paragraph); *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754D-E; *Vitorakis v Wolf* 1963 (3) SA 928 (W) at 932F-G.

- [24] It follows from the above that the issue which the Commissioner had to determine before entertaining the merits of the rescission application was whether the CCMA had jurisdiction to entertain the matter in light of the application been made outside the time frame provided for in rule 32 of the CCMA rules.
- [25] It is trite in our law that when a jurisdictional point is raised at any stage of the proceedings, the forum ceased with the matter, in this instance the CCMA, must require the applicant to prove that that forum has requisite jurisdiction to entertain the matter. The same approach applies even where it is the forum that becomes aware of the jurisdictional point, in which instance the presiding officer is enjoined to call upon the applicant to prove that the forum has jurisdiction.
- [26] In conducting proceedings before them the CCMA Commissioners are given very wide powers to conduct proceedings in the manner they consider in order to determine the dispute fairly and quickly. These powers are subjected to the Commissioner having to deal with the substantial merits of the dispute with minimum legal formalities.
- [27] In the present matter it could, on face value be said that the Commissioner in adopting the approach as he did exercised the powers under section 138 of the LRA. There are no records relating to both the variation of the rescission proceedings. It is however clear that the Commissioner issue of condonation on the basis of the submission made by the parties
- [28] The applicant, having raised the issue of condonation, the second respondent considered the condonation without necessarily the third respondent filing an application for that purpose. It would appear that the rescission application was brought 18 days after the variation ruling which means it was four days late. In his founding affidavit the employee states that he only became aware of the variation ruling on 07 October 2011 and thereafter launched the rescission application on 13 October 2011. There is no mention in the parties respective affidavits as to how long was the delay in the filing of the rescission application.
- [29] The employee says that he did not receive the variation ruling because it would have been served on his attorneys who has been instructed to handle his arbitration

case by the legal insurance. His contention is that their mandate was limited to dealing only with the arbitration proceedings and not the variation application.

- [30] The issue to be determined in this matter is whether the Commissioner has requisite jurisdiction to hear the rescission application in light of the preliminary point raised by the applicant.
- [31] The rescission application seems to have been drafted by the applicant himself. It follows that in considering his matter the Commissioner was for that reason, required to adopt a more liberal approach in dealing with it. It is trite that in a condonation application, the Commissioner is required to consider the degree of lateness, explanation for the full period of the delay; the prospects of success and the prejudice that the parties would suffer.
- [32] Accepting that the discretion of the Commissioner to condone non-compliance with the rules is wide and flexible one its exercise, has to be informed by several considerations, including ensuring fairness prevails to both parties. In the circumstance of this case it would appear that in striking a balance between the interest of both parties the Commissioner may have been influenced by the consideration of the period of the delay.
- [33] In my view, having regard to the provision of the LRA that disputes must be resolved expeditiously and with limited legal formalities, the Commissioner cannot be criticised for exceeding his powers. I am also of the view that the reasons proffered by the Commissioner at the conclusion of his ruling cannot be said to fall outside the bounds of reasonableness, as envisaged by Sidumo⁵ and recently affirmed in *Herholdt v Nedbank Ltd*⁶.
- [34] In light of the above discussion, I find that there is no basis to interfere with the decision of the Commissioner. Accordingly, the applicant's application to review the Commissioner's rescission ruling stands to fail. I do not, however, believe that I should allow costs in the circumstance to follow the result.

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

⁶ (2013) 34 ILJ 2795 (SCA).

Order

- [35] In the premises, the applicant's application to view and set aside the rescission ruling made by the Second Respondent under case number GATW2990-11 is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant: A P Brandmuller

For the Respondent: In Person