



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 496/13

In the matter between:

MFANIMPELA MABUZA

APPLICANT

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

FIRST RESPONDENT

JOSEPH MPHAPHULI N.O

SECOND RESPONDENT

AUTOMATIC MASS PRODUCTION

THIRD RESPONDENT

Heard: 11 August 2015

Delivered: 12 August 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] On 25 November 2010, the first respondent (the Bargaining Council) issued a certificate to the effect that an unfair dismissal dispute referred to the council by the applicant remained unresolved and that the dispute may be referred to arbitration. On 11 March 2011, the Bargaining Council issued a notice of set down for an arbitration hearing before panellist Karen Kleinot. The arbitration hearing was convened for 19 May 2011. On 9 May 2011 the third respondent applied for a postponement of the arbitration hearing. It did so on the basis of an affidavit deposed to by the owner of the third respondent who stated that he would be on holiday from 19 May to 22 May 2011 and that he had made financial arrangements in respect of that holiday and that any postponement of the holiday would cause him financial prejudice. The applicant in the present proceedings did not agree to the postponement. On 19 May 2011, the commissioner issued a ruling in terms of which the matter was postponed on the basis that no further postponements were to be countenanced.
- [2] The applicant was clearly unhappy with the ruling and filed an application in the High Court to have the matter reviewed and set aside. It is not clear from the papers before me what the result of that application was, but it appears that on 28 November 2011, the Constitutional Court declined to hear a direct appeal lodged by the applicant against the order granted by the South Gauteng High Court.
- [3] In the interim, on 10 August 2011, the applicant wrote to the Bargaining Council to advise that Commissioner Kleinot did not advise of the new date of any

arbitration hearing when the matter was postponed. The applicant recorded that on 2 August 2011 he had visited the Bargaining Council's offices and was told that the matter had been postponed and that it would be heard by another commissioner. He says the following:

'I suspect the commissioner conspired with the employer to hold the arbitration behind my back so that the case could be dismissed due to my absence. Could you please provide me with the date of the arbitration hearing so that I can apply for condonation. You should know the date because you were the case manager handling this case.'

- [4] On 10 August 2011, the Bargaining Council sent out a notice of set down in terms of which the arbitration hearing was enrolled for 17 October 2011. The matter came before Commissioner Williams who on account of the applicant's failure to attend the hearing, dismissed the applicant's case.
- [5] On 31 January 2013, some 18 months later, the applicant applied for the rescission of the dismissal ruling. In his application, the applicant refers to his letter dated 10 August and his request to the case manager to disclose the date on which Commissioner Kleinot had dismissed his case. He submitted that he was not in wilful default since the case had already been dismissed by Commissioner Kleinot, and recorded that he had advised the Bargaining Council that he would not attend the arbitration hearing set down for 17 October 2011. The applicant went on to say that the Bargaining Council should give him the dismissal ruling issued by Commissioner Kleinot so that he could apply for condonation for not attending the arbitration 'that they held behind my back'. The applicant also appears to make allegations of bribery against the Registrar of the High Court in relation to the issuing of a court order dismissing his application and noted that he was 'still dealing with the fraudulent order which was issued by the registrar of the constitutional court'.
- [6] On 19 February 2013, the second respondent issued a rescission ruling in which he refused to rescind the order granted on 17 October 2011. He recorded that

the arbitrator concerned had reason to believe that the parties had been notified of the process timeously and properly. He recorded further that the applicant had submitted that he had no intention to attend on the day, since that as far as he was concerned, the matter had been dismissed on an earlier date. The second respondent went on to find that the applicant made a conscious decision not to attend the scheduled proceedings, and that in those circumstances, there was no reason to reverse the ruling to dismiss his referral and that the application for rescission accordingly should not succeed.

- [7] The present proceedings are concerning an application to review and set aside that ruling.

The applicable legal principles

- [8] The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; in the event that a gross irregularity in the conduct of the proceedings is established, it is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material*'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material.

- [9] What this analysis requires where what is at issue is any assessment of whether a reviewable defect and/or irregularity has occurred or what its impact is to be upon an award, is a determination first of the nature of the error alleged to have been committed by the arbitrator and any distorting effect that the error may have had on the outcome of the arbitrator's award. If it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then it is *prima facie* an unreasonable award. The court must then have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test
- [10] The applicant has not clearly articulated in any grounds for review. What he states in his founding affidavit is that when his dispute was enrolled for arbitration in May 2011, a postponement was granted by Commissioner Kleinot and that she did not tell him of the new date on which the arbitration would take place when she postponed the matter on 19 May 2011. The applicant goes on to say 'The MEIBC then set down the matter for hearing on 17 October 2011. A new Commissioner was appointed to hear the matter. I did not attend that arbitration because the case had already been dismissed by the previous Commissioner'. The applicant continues, in relation to his prospects of success, to aver that the second hearing convened by the Council on 17 October 2011 was 'fraudulent' because Commissioner Kleinot had already dismissed the case.
- [11] None of the above discloses any grounds for review as contemplated by section 145 of the LRA. What the applicant does in the present application is simply to restate the case already placed before the commissioner in the application for rescission.
- [12] Even if I were to assume, reading the present application generously, that the applicant contends that the second respondent committed one or another gross irregularity in the conduct of the proceedings under review, that is clearly not so. The second respondent was clearly aware of the test to be applied and applied that test to the facts before him. He cannot be faulted in reaching the conclusion

that he did, particularly in circumstances where on the applicant's own version, he had been aware of the date on which the arbitration proceedings had been set down and consciously elected not to attend. It was not open to the second respondent to make any finding other than that the applicant had failed to show good cause for his default. Although the second respondent does not make any determination into existence or otherwise of any *prima facie* case or prospects of success on the part of the applicant, given the manifest failure to explain the failure to attend the hearing, this was not necessary in the circumstances.

- [13] In my view therefore, the applicant has failed to establish any irregular conduct on the part of the second respondent and in any event, the second respondent's conclusion falls within the band of decisions to which reasonable decision-makers could come on the available material. The application for review accordingly stands to be dismissed.
- [14] Finally, I would add that the applicant has been misguided in initiating and conducting the present litigation. When this matter was originally enrolled for hearing during July 2014, this court postponed the application and directed that the applicant obtain pro bono legal assistance (which is available at this court) with the intention to remedy non-compliance with the provisions of the rules of this court regulating review applications, and in particular, Rule 7A (6) and (8). Instead of heeding that advice, the applicant filed an application to rescind that order, which he indicated at the hearing of the present application that he would not be pursuing. The applicant has persisted throughout in contending that the postponement of the arbitration hearing somehow constituted a dismissal of the case. He has also persisted with unfounded and scurrilous allegations of fraud and forgery on the part of the commissioners concerned, and the registrars of the High Court and the Constitutional Court. This is a case in which ordinarily, the applicant's conduct would have justified a punitive order for costs. However, since the present application is unopposed, the issue of costs does not arise.

For the above reasons, make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: In person