



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1679/13

In the matter between:

SIZANO ADAM MAHLANGU

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

JOSEPH MPHAPHULI N.O.

Second Respondent

SENTECH SOC LTD

Third Respondent

Delivered: 16 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant approached the Court in terms of section 158 (1) (g) of the Labour Relations Act¹ (the LRA) to seek an order reviewing and setting aside a rescission ruling issued by the Second Respondent (Commissioner) on 8

¹ Act 66 of 1995 as amended

July 2013 under case number GAJB9724-13. In his ruling, the Commissioner had dismissed the Applicant's application for rescission after his referral was dismissed on account of having failed to attend con/arb proceedings on 16 May 2013. The review application is opposed.

Background:

- [2] The Applicant was employed by the Third Respondent in the position of a Construction Artisan until his contract of employment was terminated on 27 March 2013. He then, with the assistance of Communications Workers Union, referred an alleged unfair dismissal dispute to the First Respondent (the CCMA). The dispute was set down for a con/arb process on 16 May 2013. None of the parties attended that process, and Commissioner Motsoeneng issued a certificate of outcome indicating that the dispute remained unresolved, and had further dismissed the matter.
- [3] The Applicant, on his own, launched an application for rescission which was considered by the Second Respondent (Commissioner) and dismissed in accordance with the ruling which is the subject matter of this review application.
- [4] In his application for rescission, the Applicant's submissions were essentially the following;
 - 4.1 Upon receipt of the ruling he had contacted an official of his Union to establish the reasons his matter was dismissed. His reason for not attending the con/arb hearing was that he was told by Alfred Hlongwane of the Union on 15 May 2012 that his case was to be postponed as a result of an agreement reached between the parties.
 - 4.2 In regards to the prospects of success, the Applicant averred that his dismissal was procedurally and substantively unfair in that at no stage was he called to a disciplinary hearing before his dismissal. Furthermore he stated that he was dismissed on the basis that the employer alleged that he could not drive a motor vehicle even when he was in possession of a valid driver's license.

4.3 He was a lay person and therefore did not fully understand the rules and regulations relating to the postponement of proceedings and had relied on the information provided by his Union which subsequently turned out to have misled him into not attending the hearing on the set down date.

[5] The Commissioner in his ruling stated that if an application for a postponement or an agreement to postpone was served in compliance with the rules, that application or agreement would be considered by another Commissioner. However the matter could only be deemed to have been postponed when a ruling to that effect had been issued. There were no documents on file to prove that the application for postponement was made in compliance with the rules and that the ruling to postpone the matter was made. What was merely before the Commissioner was that there was an application to postpone, which application was made after the fact as it was served on the CCMA on 30 May 2014, days after the matter was dismissed. Accordingly, the Commissioner held that the application for rescission did not meet the requirements of section 144 of the Labour Relations Act in that the dismissal ruling was not issued in error.

Grounds of review:

[6] The Applicant's grounds of review were as follows;

6.1 The Commissioner ought to have set the matter down for a hearing before simply determining the matter on the papers and dismissing it;

6.2 Secondly the finding by the Commissioner that the postponement application was made after the fact indicated that the Commissioner failed to apply his mind to the material before him and thereby committed an irregularity. In this regard, it was pointed out that the postponement application was dated and signed on 16 May 2013 by both parties. Therefore the Commissioner was required in the circumstances to convene a hearing and afford the parties an opportunity to clarify what was perceived to be at odds with the time frames prescribed by the CCMA Rules.

6.3 It was further submitted that the Applicant had given a reasonable explanation for his default in that he had indicated in this application that the parties had agreed to a postponement of the matter, hence neither party attended the hearing on 16 May 2013. It was further pointed out that the Third Respondent had not denied that the parties had agreed to a postponement of the con/arb proceedings.

6.4 It was further submitted that the Commissioner erred in his ruling by failing to take into account that the conciliating Commissioner ought to have convened the rescission hearing to enable the parties to explain the default rather than relying on the fact that there was no ruling for a postponement.

6.5 The Applicant further averred that his application for a rescission was made in good faith in that his failure to attend the hearing was occasioned by the agreement between the parties to postpone the scheduled hearing.

[7] The Third Respondent which had not initially opposed the rescission application before the Commissioner nevertheless opposed this review application on the following basis;

7.1 Rule 23 of the CCMA Rules governs the postponement of proceedings. Thus proceedings can only be postponed by agreement between the parties or through an application to the CCMA for that postponement.

7.2 If the parties agreed to a postponement, that the agreement must be in writing and must be received by the CCMA seven days before the date of the scheduled hearing. In this case, the parties agreed on 16 May 2013 to postpone, and thus the agreement was not received by the CCMA before the proceedings commenced.

7.3 There was no compliance with Rule 23 (2) of the CCMA Rules. The Applicant had not brought an application in terms of Rule 31 to postpone the conciliation hearing set down for 16 May 2013. In the absence of compliance with Rule 23 (2) and (3) of the Rules, the

CCMA was therefore entitled to deal with the referral in terms of Rule 30 (1) (a) and to dismiss the matter.

The legal framework and evaluation:

- [8] The applications for rescission of awards and rulings are determined in terms of section 144 of the LRA which provides that;

‘Variation and rescission of arbitration awards and rulings.

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, 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.’

- [9] Flowing from the decision in *Shoprite Checkers (Pty) Ltd vs CCMA and others*², it is now accepted that ‘good cause’ should be read into the above provisions when considering rescission applications. The test for good cause involves a consideration of at least two factors. The first is whether there is an explanation for the default, and secondly whether the applicant has a *prima facie* defence. This Court in *Northern Province Local Government Association v CCMA and Other*³ stated the approach in establishing good cause as follows:

“An application for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause

² (2007) 28 ILJ 2246 (LAC)

³ [2001] 5 BLLR 539 (LC) at para 16

an applicant must give a reasonable explanation for his default, his explanation must be made *bona fide* and he must show that he has a *bona fide* defence to the plaintiff's claims."

- [10] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and Others*⁴, it was held that while the absence of one of the two essential elements would usually be fatal, they are not to be considered mechanically and in isolation, but they are to be weighed together with other relevant factors in determining whether it should be fair and just to grant the indulgence⁵.
- [11] Section 158 (1) (g) of the LRA under which this application was brought, provides that subject to section 145, this Court may review the performance or purported performance of any function provided for in the Act on any grounds permissible in law. To the extent that the Commissioner considered the application before him in terms of section 144 of the LRA, section 145 of the LRA permits the review of an arbitration award where a defect in any arbitration proceedings is alleged. A defect means that (a) the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator; (b) committed a gross irregularity in the conduct of arbitration proceedings; or (c) exceeded the commissioner's powers.
- [12] In this case, the Applicant's grounds of seeking to review the Commissioner's ruling was that the latter had committed a gross irregularity. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁶, it was held that;

⁴(1994) 15 ILJ 1310 (LAC) at 1311J-1312A.

⁵ See *Grant v Plumbers (Pty) Limited* 1949(2) SA 470 20 (O) as referred to in *Edgars Consolidated Stores Limited v Dinat and others* (2006) 27 ILJ 2356 (LC), where it was held that the following requirements should be complied with in order to show good cause viz;

"(a) An applicant must give a reasonable explanation of his default. If it appears that his default was wilful, or that it was due to gross negligence, the Court should not come to his assistance.

(b) The application was bona fide, and not made with the intention of merely delaying plaintiff's claim.

(c) The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

⁶ [2014] 1 BLLR 20 (LAC)

“Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material”⁷.

- [13] It is further accepted that like the courts, commissioners enjoy a discretion whether or not to grant an application brought under section 144 (a) of the LRA⁸. The exercise of this discretion obviously involves a consideration of whether facts exist which makes the award or ruling to be rescinded on any ground under the provisions of section 144 of the LRA, and whether the applicant had shown good cause as to why he or she should be entitled to an order of rescission. A failure to consider or apply one’s mind to any of these relevant factors by the commissioner in his or her consideration of the rescission application could make such a decision unreasonable or defective as envisage in s145 of the LRA. In *Martin*, the appropriate approach in this regard was stated as follows;

“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 the notice of set down was sent (which she did) and then

⁷ At para [14], in reference to the review test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC)

⁸ *Martin v Commission of Conciliation Mediation and Arbitration* (2008) 29 ILJ 2254 (LC)

determine 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.”⁹

- [14] In this case, it was common cause that the parties were properly notified of the set-down date, and that both had not attended those proceedings. I further did not understand it from the Third Respondent's submissions to be that there was no agreement between the parties to postpone those proceedings, *albeit* that agreement only reached the CCMA after the date of the hearing.
- [15] It can further not be doubted that any postponement sought arising from the agreement had not complied with the provisions of Rule 23 of the CCMA Rules in that the agreement in that regard was only concluded on the date of the hearing, and had not been brought to the attention of the CCMA more than seven days prior to 16 May 2013. *Prima facie*, and on the strict interpretation of the provisions of Rule 23 of the CCMA Rules, there was no proper application for a postponement before Commissioner Motsoeneng on 16 May 2013 when he dismissed the matter.
- [16] Having established that the provisions of Rule 23 of the CCMA had not been complied with in seeking a postponement, the next issue which the Commissioner was required to establish was whether the Applicant's default was wilful. Thus the Commissioner was therefore required to determine whether the applicant had proffered a reasonable explanation for his default, and whether his explanation was made *bona fide*.
- [17] One of the difficulties with the Commissioner's ruling is that he made a finding that the application for rescission did not meet the requirements of section 144 of the LRA on the basis that the dismissal ruling was not issued in error. This in my view implies that other factors pertinent to whether the Applicant had shown good cause were not considered at all in arriving at that decision. Nowhere in the ruling is it mentioned or determined whether the Applicant's default was wilful or not, whether the explanation for the default was proffered

⁹ At para [25]

in good faith, whether he had any prospects of success, or whether the Applicant had evinced any intention of not pursuing his matter. These considerations were indeed important, and by failing to address them, the Commissioner indeed committed a reviewable irregularity.

[18] It is accepted that in terms of Rule 31 (10) of the CCMA Rules, Commissioners may deal with applications identified under Rules 31 (1) in any manner that they deem fit. Reservations have been expressed about allowing Commissioners latitude in this regard as this may infringe upon *audi alteram partem* principles¹⁰. Essentially, the concern is that it is simply not appropriate to just deal with rescission applications on the documents filed, and fairness and the requirements of the principle of *audi alteram partem* dictates that a hearing to determine the issue of rescission must be convened, no matter what the Rules of the CCMA or bargaining council may provide as to conducting proceedings in a manner deemed appropriate.

[19] I share the concerns raised in *Satinsky* in regards to the blanket approach in dealing with such applications. One acknowledges the discretion Commissioners enjoys in terms of the provisions of Rule 31 (10) of the CCMA Rules when determining applications identified under Rule 31 (1) of the Rules. At the same time, one cannot be prescriptive about how such applications should be dealt with in view of the discretion enjoyed and in my view, the decision to convene a hearing should be considered in all applications irrespective of whether they are opposed or not. This is even more apposite in the light of the standard application forms that are completed by the applicant parties in regard to these applications and the limited information they can give in those forms.

[20] Furthermore, it is appreciated that the discretion enjoyed under Rule 31 (10) also has the objective of achieving CCMA efficiencies and dealing with such applications as expeditiously as possible. It is also appreciated that dealing with such applications on the papers is indeed convenient, less time consuming, inexpensive and also dispenses with such applications

¹⁰ See *Satinsky 128 (Pty) Ltd t/a Just Group Africa v Dispute Resolution Centre and Others* (JR 1479/2012) [2013] ZALCJHB 38 (26 February 2013) at paragraphs [45 to [47]

expeditiously. However, considerations of expediency and efficiencies cannot come at the expense of fairness, which is the underlying principle governing the functions of the CCMA. Thus where the merits of an application require that a hearing should be convened in order to enable a Commissioner to come to a reasonable and well considered decision, a discretion in that regard should be exercised accordingly.

- [21] The facts before the Commissioner in this case appeared to be straightforward when this was clearly not the case. Firstly, the application before him was unopposed, and there was nothing to gainsay the Applicant's averments in regards to the reasons for his default or other factors pertaining to that application. In my view, the Third Respondent had not opposed the application in that it knew that it had agreed to the postponement. For the Third Respondent to suddenly oppose this review application is not only opportunistic, but also in bad faith in the light of its agreement to postpone the con/arb proceedings.
- [22] Whilst the Commissioner's findings that there was no proper application for a postponement hence the matter was dismissed cannot be faulted, the matter however should not have ended there and the next enquiry was whether there was wilful default. The Commissioner had not considered that factor, and before him was an explanation that the Applicant had relied on his Union which had informed him that the matter was postponed by agreement between the parties. The issue to be considered therefore was whether that explanation was reasonable, acceptable, plausible or *bona fide*. There was nothing before the Commissioner to gainsay that explanation and if he was not inclined to give the Applicant a benefit of the doubt, this would have been one of those instances where a hearing should have been convened, more specifically since from the standard application before the Commissioner, it was apparent that the Applicant had filed that application on his own and had relied on the information of the Union in not attending the proceedings on 16 May 2013. Furthermore, the Commissioner had acknowledged a copy of the agreement to postpone before him, *albeit* this was filed after the hearing date.

In these circumstances, the Commissioner ought to have given the Applicant a benefit of the doubt.

- [23] In my view, in the light of the application not being opposed, and further it being apparent that the Applicant had brought it without the assistance of the union, a reasonable decision maker would have accepted the explanation as reasonable and made *bona fide*, and a conclusion would have been that the Applicant's default was not wilful, as he had relied on the *bona fides* of the Union and the Third Respondent that indeed the proceedings were postponed by agreement.
- [24] A further aspect which the Commissioner failed to address in establishing whether good cause had been shown pertained to whether on the merits, he had prospects of success in regards to his claim of unfair dismissal. It is trite that it is not necessary to give details of one's claim in such applications, but that at most, a *prima facie* case should be made out. Again, there was nothing to gainsay the Applicant's contentions that his dismissal was procedurally and substantively unfair, and to the extent that the Commissioner failed to address this issue, the conclusion to be reached is that he indeed committed a reviewable irregularity.
- [25] According to the Applicant, the dismissal ruling came to his attention on 10 May June 2013. He had on the same date filed an application for rescission, and there was nothing before the Commissioner to suggest that the Applicant had no serious intention of proceeding with his claim. In merely addressing the issue of whether there was a proper application for a postponement, the Commissioner in refusing to grant rescission, considered the relevant factors mechanically and in isolation contrary to the principles set out in *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and Others*. To the extent that the Commissioner failed to take into account all the other factors pointed out above, it follows that his decision cannot be said to fall within a band of reasonableness, and accordingly out to be reviewed and set aside.

[26] I have further had regard to all the documentation and the record placed before the Court, and no purpose will be served in remitting the matter back to the CCMA to be considered *de novo*. I have further regard to considerations of law and fairness and I am of the view that the Third Respondent's conduct in opposing this application was blatantly opportunistic and in bad faith in the light of its agreement to postpone the con/arb proceedings scheduled for 16 May 2013 before the CCMA. To this end, it is appropriate that it should be burdened with the costs of this application. In the circumstances, the following order is made;

Order:

- i. The rescission ruling issued by the Second Respondent on 8 July 2013 under case number GAJB9724-13 is reviewed and set aside.
- ii. The ruling is substituted with an order that;
"The application for rescission of a dismissal ruling issued on 16 May 2013 is granted"
- iii. The First Respondent is ordered to set down the alleged unfair dismissal dispute referred to it under case number GAJB9724-13 for arbitration.
- iv. The Third Respondent is ordered to pay the costs of this application.



Tlhotlhalenaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr D Majare of Mabaso Attorneys

On behalf of the Respondent: Mr X Njokweni of Knowles Husain Lindsay INC

LABOUR COURT