



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR666/2014

In the matter between:

CONSTANCE NKOMO

Applicant

and

KGK DIAMONDS SA (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

MUSOLWA MPHO RAPALALANE N.O

Third Respondent

Heard: 10 July 2015

Delivered: 23 October 2015

Summary: Review of a ruling dismissing the Applicant's rescission application

JUDGMENT

COOK AJ;

Introduction

- [1] The Applicant seeks to review and set aside the Third Respondent's ("Commissioner") ruling dated 27 March 2014, under case number GAJB29662-139 ("ruling"), dismissing the Applicant's rescission application and substituting it for an order rescinding the ruling of the Respondent dated 21 January 2014 dismissing the Applicant's case. Furthermore, the applicant seeks for an order that the Second Respondent set the dispute down for conciliation and arbitration.
- [2] The First Respondent ("the employer") opposes the application and prays that the application be dismissed with costs.

The award

- [3] The Commissioner found:

'16 I do concur with the Respondent that the Applicant failed to substantiate as to why they failed to attend the arbitration. This matter was conciliated on 28th August 2013 at the Bargaining Council for the Diamond Cutting Industry; I therefore fail to understand as to what steps did the representative or the Applicant in person took [sic] to establish what was happening with her case. The Applicant simply submitted that the notice of set down never reached them. Nothing was submitted if [sic] the address and telefax were still the same or not.

17. In this case I find the Applicant's explanation not to attend an arbitration proceeding to be unreasonable and unjustifiable.

18. Turning to prospects of success; the Applicant submitted that he [sic] was charged with gross negligence and summoned to a disciplinary hearing prior to his dismissal. The Applicant did not submit if his [sic] dismissal was fair or not; although the Applicant needs not necessarily

deal fully with the merits of the case. However it is the Applicant's responsibility to indicate on the fact of it that he/she had a bona fide case. I therefore find the Applicant failed on the face of it to show that he has good prospects of succeeding in this matter.¹

Case law

[4] In *Herholdt v Nedbank Limited, (Congress of South African Trade Unions as Amicus Curiae)*,² the SCA described the standard of review as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the 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. A 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 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 any consequence if their effect is to render the outcome unreasonable.'

[5] In *Chetty v Law Society, Transvaal*,³ the court in considering when there ought to be a rescission of a judgment, stated the following two requirements:

- '(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such a party has a bona fide defence, which, prima facie, carries some prospect of success.'

[6] In *Foschini Group (Pty) Limited v Commission for Conciliation, Mediation and*

¹ Review Application Pleadings at 24 and 25.

² [2013] 11 BLLR 1074 (SCA) at para 25.

³ 1985 (2) SA 756 (A) at 765B-C.

*Arbitration and Others:*⁴

'To establish that there is a reasonable probability of success on the merits, it suffices if an applicant shows a prima facie case in the sense of setting out averments which, if established at the proceedings, would entitle the party to the relief asked for. An applicant need not necessarily deal fully with the merits of the case.'

[7] In *MTN South Africa v Van Jaarsveld and Others*,⁵ the court held:

'[13] It is plain from anyone who attends the hearings of the Labour Court, that the enormous growth in the number of applications for rescission in circumstances where the respondent party claims that albeit on the face of it a telefax transmission was sent, it was not received or did not reach the person responsible for giving it attention, leads to the conclusion that the provisions of the Act in this regard require reconsideration. In my view, it is appropriate that the statute be reappraised in this regard and that the Rules Board for the Labour Courts gives its attention to this matter of procedure. As aptly illustrated on the facts of this case, the arrival of a document in the midst of a deluge of others, handled by staff not inducted to divine, in the absence of some clue, who should be given the document nor how rapidly that should happen, may predictably lead to delay or misplacement or outright loss of the document.'

Analysis

[8] In the application for the rescission of the dismissal ruling, the following is stated:

'30. On the other hand, the Applicant is not guilty of the charges against her, as she performed her duties to the best of her ability, and dismissal was inappropriate in the circumstances.'⁶

Further:

⁴ (2002) 23 ILJ 1048 (LC) at para 21.

⁵ (2002) 23 ILJ 1597 (LC) at para 13.

⁶ Record Bundle at 13, para 30.

'27. It is submitted that, as the notice of set down for the arbitration never reached the Applicants or their representative, there are good prospects of success of the rescission application.

28. In particular, even the CCMA confirmed that the fax number to which the notice of set down was sent was not the Applicant's number.

29. The postal copy of the notice of set down never reached us.⁷

and

'34. I submit that as it is reflected below, the absence of the Applicant and I on the 21st day of January 2014 was not deliberate, but due to the fact that we were not aware that the matter had been set down for arbitration, as notice of set down never reached us.⁸

[9] The finding that the Applicant failed in her responsibility to indicate that she had a *bona fide* case is not a reasonable finding, as the Applicant in her affidavit made out a *prima facie* case in the sense of setting out averments which, if established at the arbitration, would entitle the Applicant to the relief sought.

[10] The Commissioner failed to deal with the registered letter not having been sent to the Tshiawelo Post Office as evidenced in terms of Annexure "B" to the replying affidavit in the rescission application.⁹

[11] The Commissioner also failed to take into proper consideration the Applicant's allegations in the replying affidavit¹⁰:

'21. On the 21st day of January 2014, when the Commissioner called Rabothata and said the notice of arbitration set down had been successfully transmitted to the Applicant, Rabothata asked him about the number to which the notice has been faxed, according to the fax transmission report the Commissioner had. In response the

⁷ Record Bundle at 12.

⁸ Record Bundle at 13.

⁹ Record Bundle at 46.

¹⁰ Record Bundle at 39

Commissioner mentioned two numbers, one an 011 and the other an 086.

22. Rabothata then told him that both numbers were not of the Applicants and referred the Commissioner to the Applicants' contact numbers as reflected in the arbitration referral, which reflected 011 403 9421 as the only fax number for the Applicants, and which number is not one of those the Commissioner had said the notice had been sent to.

23. Although the notice of set down reflected our correct fax number, but it was not sent to this number, and event the CCMA fax report did not reflect the number on the notice of set down, according to the Commissioner arbitrating the matter.'

[12] The notice of set down attached as Annexure "B" to the First Respondent's answering affidavit is illegible and one cannot determine from the heading to which number the fax was sent. Furthermore, there is no fax transmission report in respect of the set down.

[13] However, even if the notice of set down was faxed through to the Applicant's representative, this in itself does not mean that it came to the attention of the relevant person. From the evidence, it was clear that on the day that the matter was set down for arbitration, the parties were not in attendance and the Commissioner then phoned in order to find out their whereabouts. Both the representative and the employee indicated that they were not aware of the notice of set down. On a balance of probabilities, their version should be accepted, as there is no good reason as to why they would not have attended if they were aware of the notice of set down.

[14] Even if the notice of set down was sent through to the employee's representative, on the facts before me, the conduct of the employee was not such that the negligence of the representative should be extended upon the employee.

[15] This matter highlights the perils of setting matters down by way of fax and that is why the Practice Manual in this Court requires that if a party does serve by way

of fax, a follow-up call is made to ensure that the person received the fax.

Conclusion

[16] Accordingly, the Court is of the view that the ruling of the Commissioner is unreasonable in light of all the facts and evidence that were properly before the Commissioner.

[17] The Court finds that the opposition to the review was not unreasonable in the circumstances and, accordingly, the Court will not order costs.

[18] In the circumstances, the Court makes the following order:

1. The Third Respondent's ruling dated 27 March 2014, under case number GAJB29662-13, is reviewed and set aside.
2. The ruling is substituted with the order that the ruling of the Third Respondent dated 21 January 2014 dismissing the application is rescinded.
3. The Second Respondent is to set the matter down for arbitration.
4. No order as to costs.

Cook AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr E S Makinta

Instructed by: E S Makinta Attorneys

For the Respondent: A Bosch

Instructed by: Snyman Attorneys

LABOUR COURT