



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not reportable

Case no: JR2064/12

In the matter between:

**AFRICAN METER READING (PTY) LTD**

**Applicant**

and

**SOLIDARITY ON BEHALF OF MULLER AND 1  
OTHER**

**First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**Second Respondent**

GREYLING, P N.O.

Third Respondent

Heard: 10 July 2015

Delivered: 23 October 2015

Summary: Review of a rescission ruling of the Commissioner.

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JUDGMENT

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COOK AJ;

Introduction

- [1] The Applicant seeks to review the rescission ruling of the Commissioner, under case number NWKD3384/12("the ruling"), and that the matter be remitted to the CCMA for a hearing before another Commissioner other than the Third Respondent.

Background

- [2] The arbitration was set down for 19 April 2012 at CCMA Klerksdorp. The Applicant's representative failed to attend the arbitration.
- [3] On 9 May 2012, the Applicant filed a rescission application of the default award. The rescission application was unopposed. The Commissioner dismissed the rescission application.
- [4] The Commissioner found:
- '14. It is common cause that the Applicant was fully aware of the date of the proceedings. The fact that he was absent and failed to notify anybody of his absence was entirely of his own making. The Applicant also failed to provide any reasonable prospects of success.'<sup>1</sup>

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<sup>1</sup> Bundle of Record at 38.

- [5] The Applicant filed a further rescission application on 26 June 2012. A ruling on 27 July 2012 stating

‘That the nature of the ruling is one of finality. That means that the final word has been said by the Commissioner regarding this matter. If the Applicant is still not satisfied with the ruling of the Commissioner, the Applicant is obliged to take the ruling of the Commissioner on review in the Labour Court.’<sup>2</sup>

### Case law

- [6] In *Herholdt v Nedbank Limited, (Congress of South African Trade Unions as Amicus Curiae)*,<sup>3</sup> 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.’

- [7] In *Chetty v Law Society, Transvaal*,<sup>4</sup> 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.’

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<sup>2</sup> Bundle of Record at 14

<sup>3</sup> [2013] 11 BLLR 1074 (SCA)

<sup>4</sup> 1985 (2) SA 756 (A) 765B-C.

- [8] In *Foschini Group (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others*:<sup>5</sup>

'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.'

### Analysis

- [9] In terms of the award, it was held that:

'11. It is admitted by the Applicant that the Applicant was fully aware of the arbitration and notice of set down and when it would take place. The Applicant's explanation was that Mr Sono was ill. Mr Sono did not provide any evidence as to what attempts have been made to apply for a postponement. After all Mr Sono knew on 18 April 2012, a day before the proceedings that he was not going to attend the proceedings. The Respondent's representatives' particulars as well as the CCMA particulars were available to him. Yet, Mr Sono made no attempt to notify any party to the proceedings of the possibility that he might not be able to attend or that he had no intention to attend. Mr Sono also made no attempt to ask his local office to send somebody with the necessary particulars of his illness and to apply for such postponement.'

- [10] In the founding affidavit, the deponent Sono sates:

'16. As the Applicant I could not notify the CCMA of my predicament let alone my employer as I was in bed for the whole day. I only realised on the 19<sup>th</sup> of April 2012 that I was not going to be able to make it for the CCMA than earlier thought. I suspect that the medication that I took made me dizzy and when I woke up the following day I was still not well.

17. I am the only person that deals with all the deutes (sic) or CCMA matters

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<sup>5</sup> (2002) 23 ILJ 1048 (LC) at para 21.

and no-one at work knew that the CCMA case was set down for this day hence not even a single person from the company made the call to the CCMA.

18. On 20 May 2012 I called the CCMA on 0861 161616 explained what happened and after requesting my case number I was then advised to await the ruling of the Commissioner and apply for rescission thereafter.'

[11] In the answering affidavit, the following is stated:

'2.13 It is submitted that the Applicant could have informed the CCMA and Solidarity of his illness. The Applicant was well aware of his illness on the 18<sup>th</sup> of April 2012. On or about the 18<sup>th</sup> of April 2012, the Applicant visited a medical practitioner and was booked off from the 19<sup>th</sup> of April 2012. The Applicant was in possession of the notice of set down and had the contact details of the CCMA of the CCMA and Solidarity.

2.14 The Applicant failed to proof (sic) that he took all reasonable steps to either attend the proceedings or postpone the matter. The Applicant further failed to arrange for a fellow colleague to attend the proceedings and request a postponement."

[12] The Applicant's representative, Mr Sono, had been present during the conciliation proceedings. The Applicant and the First Respondent had exchanged communication before the arbitration proceedings, the last communication having taken place on 8 March 2012."<sup>6</sup>

[13] The above tends to indicate that the Applicant had an intention to participate in the arbitration and had a present held desire to oppose the relief sought by the First Respondent.

[14] The Applicant has provided a reasonable and acceptable explanation for its default. In the circumstances, the non-attendance of the Applicant was not wilful. The reason given by Sono that he did not apply for a postponement was that he

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<sup>6</sup> First Respondent's heads of argument at 5.

only realised on the morning of the hearing that he was not going to be able to attend whilst the previous day, he thought he was going to be able to attend. Sono further states that he suspects the medication that he took made him dizzy and when he woke up the following day he was still not well and this is the explanation as to why he did not contact people on the day. Furthermore, he explains that he was the only person dealing with the disputes and, therefore, no one else in his office knew about the matter.

- [15] In respect of the prospects of success, it is alleged that the fixed term contracts which came to an end on 31 January 2011 were then replaced with a verbal contract for another period of 12 months and that the employees were notified in writing on 0 November 2012 that the fixed term contracts were not going to be renewed. This is a *prima facie* defence, which, if proved at the arbitration, could be a *bona fide* defence to the employee's unfair dismissal dispute.
- [16] The Commissioner seems, in his reasoning, to wish to place the blame on the Applicant for Sono not having made a postponement application or failing to notify the parties of his non-attendance. This enquiry seems to ignore the fact that Sono was not in wilful default but did not attend due to illness. The effect of the refusal to rescind the arbitration award is just because Sono was ill and did not apply for a postponement and/or notify the parties, that the Applicant's right to defend the matter has been lost. The effect of the ruling does not serve the interest of justice.

### Conclusion

- [17] The ruling is, accordingly, one that a reasonable commissioner could not reach on all the material that was before the commissioner.
- [18] The Court finds that the opposition to the review was not unreasonable in the circumstances and, accordingly, the Court will not order costs.

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

1. The rescission ruling is reviewed and set aside.
2. The matter is remitted to the CCMA for arbitration before another Commissioner other than the Third Respondent.
3. No order as to costs.

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Cook AJ

Acting Judge of the Labour Court of South Africa

#### APPEARANCES

For the Applicant: Advocate P R Ndlele.

Instructed by: Mabu Letaba Attorneys Inc

For the Respondent: N Greef.

Instructed by: Solidarity.