



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR 2889/2011

In the matter between:

**DEPARTMENT OF ARTS
AND CULTURE**

First Applicant

and

**MZONDO JOB MOLAPO
(N.O.)**

First Respondent

**GENERAL PUBLIC SERVICE
SECTORAL BARRGAINING
COUNCIL**

Second Respondent

THANDI MDLELA

Third Respondent

Heard: 12 November 2015

Delivered: 17 November 2015

Summary: (Rescission – notice of set down – not coming to attention of attorney – arbitrator misconstruing evidence – ruling one that no reasonable arbitrator could reach on the evidence)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review and set aside a rescission ruling, in the alternative, a review of the original default award. The review application was also late and an application for condonation has been made.
- [2] There is also an application by the third respondent for the late filing of her answering affidavit in the review application. Further, there is a rule 11 application brought by the third respondent to dismiss the review application in view of the time taken to finalise the review. This mainly relates to the review relating to the default arbitration award. In view of my judgement relating to the review of the rescission ruling, issues relating to the review of the default arbitration award essentially fall away.

Condonation

The late review application

- [3] The rescission ruling was issued 17 September 2011 and the review and condonation applications were launched simultaneously on 15 November 2011. The default arbitration award had been issued on 28 October 2010.
- [4] It is obvious in relation to the review of the default arbitration award as such, the period of delay is extremely excessive, but consideration of that only arises if it is necessary for the court to entertain that application at all. The primary application to consider is the review of the rescission ruling. In relation to that ruling, the review application was little more than two weeks late and there was no discernible prejudice suffered by the third respondent in relation to that application. In view of the evaluation of the merits of the rescission application, I am satisfied that on consideration of all the factors relevant to condonation that, condonation for the late filing of the rescission application should be granted.
- [5] Similarly, the third respondent's application for condonation for the late filing of her answering affidavit, which is not opposed should be granted.

Merits of the rescission application

[6] The general principles in evaluating rescission applications are well-known:

“[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a *prima facie* defence. In *Northern Province Local Government Association v CCMA & other* (2001) 22 ILJ 1173 (LC); [2001] 5 BLLR 539 (LC) at 545 para 16 it was stated:

'An applicant 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 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.'

[36] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others* (1994) 15 ILJ 1310 (LAC) at 1311I-1312A Nugent J had this to say:

'These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.'¹

(emphasis added)

[7] In this case, the applicant had appointed an attorney of record. The notice of set down for the arbitration on 28 October 2010 was sent to the parties in September 2010. The applicant does not dispute receiving it, and believes it gave it to their attorneys of record. Mr Soldatos, who was handling the matter said he did not see the notice of set down if it was

¹ *Shoprite Ch*

eckers (Pty) Ltd v Commission For Conciliation, Mediation & Arbitration & others (2007) 28 ILJ 2246 (LAC) at 2257

received by him. According to the applicant's account it believed that the notice of set down had been included in a bundle of documents given to their attorneys. Soldatos does not deny that this was the case, but did not see the notice himself. The undisputed evidence was that Soldatos handled a number of matters for the applicant at the time.

[8] On 4 October 2010, the third respondent's attorney of record invited the applicant to attend a pre-arbitration meeting on 27 October 2010. The proposed meeting would have taken place the day before the scheduled arbitration, though the invitation itself made no reference to the arbitration date. The applicant's attorney's response on 5 October, forwarded to the third respondent's attorneys via the applicant, was prompt but somewhat noncommittal, stating: "We are in the process of taking instructions from our client in this regard and shall revert to you once we have had an opportunity of doing so."

[9] In fact, Soldatos was already committed to appear in two other arbitration hearings on 28 and 29 October 2010 in Cape Town both held under the auspices of another bargaining Council. Notices of set down in both these matters had also been sent out in mid-September. The second Cape Town hearing clashed with another hearing convened by the second respondent, the GPSSBC, in which the applicant was also a party and was represented by Soldatos. On 5 October 2010, as a result of the conflicting engagements on 29 October 2010, Soldatos sent the following email to Ms T Ramsumair, the assistant to the applicant's Director: Legal Services, Mr A Singh, which read:

"Hi Trisha

I have received the Ruling in terms of which the disputes have been consolidated and have noted that the Council has set this matter down for hearing on 29 October 2010.

Unfortunately I am involved in a part-heard matter in Cape Town on that day and under those circumstances I will not be in a position to represent the Department. I know that this is a particularly contentious issue and this is an important matter requiring my involvement.

Please enquire if there is any way that the matter may be removed from the roll on 29 October and perhaps enrolled for hearing in the following week, for example, 3, 4 or 5 November 2010. If this is not possible, then perhaps we will have to be somebody else to attend this matter, but I am loathe to do so given all the considerations.

...”

According to Soldatos, he was then instructed to apply for the postponement of the applicant's matter enrolled 29 October. He claims that if he had been aware of the third respondent's matter set down the day before, he would have also sought a postponement of that.

[10] On the day of the arbitration hearing in this matter, Soldatos was in Cape Town attending to the first of the other arbitration proceedings set down there. Nobody appeared for the applicant in the proceedings convened under the auspices of the second respondent. Soldatos said he only became aware of the clashing hearings on 28 October during the lunch adjournment in his proceedings in Cape Town when he was contacted by his secretary to tell him that the applicant's legal service's Department had been trying to get hold of him to find out why he was not at the GPSSB hearing. At the hearing itself, the Commissioner contacted the applicant after 30 minutes and was advised that if the applicant's Legal Services section was dealing with the matter and was apparently told that the applicant would get back to him “in five minutes”. After waiting about 10 minutes after that call, he started the arbitration. There is no indication that he made any attempt to contact the applicant's attorneys of record and it is very probable the arbitrator himself was unaware that attorneys had been appointed since he contacted the applicant directly and was only advised that the applicant's Legal Services section was attending to the matter.

[11] The reasoning of the arbitrator who made the rescission ruling is very limited and appears to misconstrue the nub of the applicant's reasons for not being represented at the hearing. The arbitrator reasoned thus:

“4. The crux of this application is that the applicant seeks to have default award that was made in their absence rescinded because the applicant's assigned attorney of record Mr Ari Soldatos from Fluxmans Inc had a heavy workload to attend to. The deponent Mr Soldatos raises two issues that I

found wanting: firstly that after receiving the notice of set down he was busy with another case which had a lot of paperwork applicant also thought that his colleague attend to the matter. The applicant in this matter did not show that the award was erroneously made its absence.

5. The Commissioner was satisfied that the applicant was served properly with the notice, which the applicant admits. The applicant seeks to inconvenience both the council and the respondent in this matter by expecting that its administrative defect should be remedied by the rescission of this award.

6. It is my considered view that granting an application will not only promote laxity in the Public Service but also defeat the primary person purpose of dispute resolution at the level of this Council. “

[12] It is true that Soldatos may have taken on too many matters and that may have contributed to him not seeing the notice of set down. However, there was no evidence that he thought a colleague was attending to the matter as the arbitrator seems to have assumed. On the contrary, he did not think that the matter was proceeding on the same day that he was in Cape Town. The arbitrator completely misconstrued the applicant's explanation why it was not represented on that occasion. As such, cannot be said that he acted reasonably in drawing the conclusions he had. Had he not misconstrued the evidence and if he had considered the fact that Soldatos had clearly tried to make arrangements to postpone another matter which clashed with one of his Cape Town hearings, he would have found it hard to conclude that Soldatos knowingly did not attend the hearing on 29 October, or make an alternative arrangement for someone else to do so. There is no evidence to suggest that the applicant did not intend to defend itself against the claim.

[13] In the circumstances, I am satisfied that the rescission ruling should be set aside. It is not necessary to consider in any detail the parties' relative prospects of success save to say that if the applicant is able to prove the allegations it makes against the third respondent, it should succeed in demonstrating that the applicant was guilty of serious misconduct that might justify her dismissal. I wish to emphasise that this is not a finding based on the probabilities but merely a consequence of applying the

attenuated test for prospects of success in rescission applications, otherwise characterised as having' a *bona fide* defence'.²

Order

- [14] The third respondent's late filing of her answering affidavit in the review application is condoned.
- [15] The applicant's late referral of its review application in respect of the rescission ruling of the first respondent dated 17 September 2011 under case number GPBC 2475-2010 is condoned and the rescission ruling is reviewed and set aside.
- [16] The first respondent's rescission ruling is substituted with a ruling rescinding the arbitration award issued in favour of the third respondent by panellist M J Malopo on 10 November 2010.
- [17] The third respondent's unfair dismissal claim is remitted to the second respondent for a hearing *de novo* before an arbitrator other than the first respondent or panellist M J Malopo.
- [18] No order is made as to costs.



Lagrange J

Judge of the Labour Court of South Africa

² See **MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others (1994) 15 ILJ 1310 (LAC)** at 1312G-I.

APPEARANCES

For The APPLICANT:

Z Z Matebese instructed by
Magaga Inc.

For The THIRD RESPONDENT:

B Joubert