

REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**JUDGMENT**

Case no: C 734/2014

In the matter between:

COMPUTER STORAGE SERVICES AFRICA (PTY) LTD APPLICANT

and

CCMA**FIRST RESPONDENT****JOHN M SAIVHE N.O****SECOND RESPONDENT****MOHAU NTAOPANE N.O****THIRD RESPONDENT****VERONICA BOWIE****FOURTH RESPONDENT****Date of hearing: 16 September 2015****Date of judgment: 2 October 2015**

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside both an arbitration award issued by the second respondent and a rescission ruling issued by the third respondent. The arbitration award was issued by the second respondent on 31 March 2014. The second respondent held that the fourth respondent (the employee) had been unfairly suspended and ordered that she be reinstated. The rescission ruling under review was issued by the third respondent on 13 June 2014. In that ruling, the third respondent held that the applicant had failed to show good cause for rescission and that the application should be refused.
- [2] The applicant has applied for the condonation of the late filing of the review. In a founding affidavit deposed to by an official of the employers' organisation representing the applicant, the deponent states that on receipt by the applicant of the default award, he advised the applicant to file an application for rescission. On receipt of the rescission ruling, it became clear to him that the third respondent had been satisfied that the notice of set down in respect of the arbitration proceedings had been received by the applicant. What followed was an investigation conducted by the applicant into whether the notice of set down had in fact been sent, the consequence of which was that the review application was filed on 3 September 2014, some 20 days late.
- [3] It is clear from the terms of the affidavit that the deponent addresses only the lateness of the application to review the third respondent's rescission ruling. The application for condonation does not extend to the late filing of the present application in relation to the arbitration award granted by default by the second respondent. In this regard, the review application is some 14 weeks late. The applicant's representative appears to have assumed that it was sufficient to see condonation only in respect of the rescission application – this cannot be so, since the merits of review sought appear to canvass both the rescission ruling and the default arbitration award. To the extent that the applicant has failed to apply for condonation for the late filing of the review application in relation to the default arbitration award issued by the second respondent on 31 March 2014, this court has no jurisdiction to entertain a review against that award.

- [4] Insofar as the application for condonation extends to the rescission ruling issued by the third respondent, the explanation proffered for the late filing of the application relates, as I have indicated above, to attempts by the applicant to confirm proof of service on itself of the notice of set down in respect of the arbitration hearing. To the extent that the applicant submits that its prospects of success in the application to have the rescission ruling reviewed are good, the applicant relies primarily if not exclusively on its submissions regarding the notice of set down in respect of the arbitration proceedings. In summary, the applicant submits that there was no proof that the notice of set down had been served by the CCMA or received by the applicant and that on this basis, the arbitration proceedings ought to have been postponed. Insofar as the merits of the substantive issue referred to arbitration are concerned, the applicant avers that the employee was an independent contractor and not an employee, and that her referral ought to have been dismissed on that basis.
- [5] The case made out in the founding affidavit filed in support of the rescission application (the deponent is the same official who is the deponent to the founding affidavit in the present application) is that the second respondent erroneously came to the conclusion that the applicant had wilfully failed to attend the arbitration hearing. The deponent refers to the note by the second respondent in paragraph 1 of his award in which he records the following:

... The [applicant in the present proceedings] was absent and was not represented despite proper notification of the date, time and venue of the arbitration hearing sent by fast mail to the address provided by the applicant in the LRA 7.11 Form. The matter was set down for con\arb. There was no objection to arbitration commencing immediately after the matter was unresolved during conciliation; I therefore first set aside myself that proper notice of set down was served on the respondent and then proceeded with arbitration immediately after issuing unresolved outcome certificate. Telephonically spoke to James the CEO, who informed me that he was not aware of the set down, I disagreed with him since he confirmed the address which is the address to which the setdown was sent. It is therefore my conclusion that the respondents default was wilful.

- [6] The transcript of the proceedings on 26 March 2014 reveals that the second respondent stated on record that he had contacted the CEO of the applicant, James, to find out his whereabouts since the matter had been set down for 12 o'clock. The second respondent records that James indicated to him that he did not get the notice of set down. The second respondent continues to note that he had reference to the file which indicated that:

The fax went through and there is a letter sent through by fast mail to the address, 7539 Midrand – that is PO Box 7539 – in Midrand 1685. The address confirmed with the applicant, since it is in a business card. So it is my conclusion that the respondent's default is willful...

- [7] The deponent submits that in the circumstances, the default award was issued erroneously in the absence of the applicant and that the applicant was therefore entitled to the rescission of the award.
- [8] The application for rescission, as I have indicated, was supported only by an affidavit deposed to by the applicant's representative. The applicant's case was a denial by its CEO that the notice of set down had been received. There was no confirmatory affidavit filed in that application by the applicant's CEO. One might have expected, given the second respondent's assertions regarding service and the reference in the record to a successful fax transmission, that the applicant deal with these, or at least provide some response or explanation beyond the unsubstantiated assertion that the notice was not received by the CEO. But there is no reference to any of the methods of service referred to by the commissioner, either in the form of the successfully transmitted fax referred to in the transcript or the posting of the notice by fast mail to an address verified as that of the applicant. In the circumstances, it was incumbent on the applicant to place before the third respondent an adequate and sufficient explanation for its assertion that it had not received the notice. What the applicant appears to do is to place the onus on the respondents to prove effective service and receipt of the notice of set down in circumstances where the facts indicate successful service by both fax and fast mail.

- [9] Insofar as the applicant relies in support of its submission that it has good prospects of success on the terms of the agreement concluded between itself and the fourth respondent, the less said about this the better. The so-called consultancy and confidentiality agreement entered into between the parties record that there is no employment relationship between them. This despite the fact that the fourth respondent was clearly required in terms of the agreement to abide at all times with the rules, policies and procedures implemented by the applicant a 'disbursement' of R 10 000 per month to cover costs (payable during the course of the first six months of the contract period) and further payments and commissions based on performance and gross profits. It is clear from the terms of the agreement that the fourth respondent was required to devote a full time and attention to the business of the applicant. Many years ago, before the amendments effected to the LRA in 2002, this court exposed similar agreements as shams which seek to conceal the reality of an employment relationship. After the introduction of list of factors introduced by s 200A to determine the existence of an employment relationship and the statutory presumption of employment, there can be little doubt that despite the label and the content of the contract in which the applicant relies, the reality in the present instance is one of employment. The applicant does not address the merits of the fourth respondent's referral, i.e. that she was summarily suspended without pay after expressing her dissatisfaction at the fact that a colleague had received a better offer from the applicant.
- [10] Any assessment of the prospects of success in a review application must necessarily take into account the high threshold that applies. This court is entitled to interfere if and only if the decision to which the third respondent came was so unreasonable that no reasonable decision-maker could come to the same decision on the available material. As the Labour Appeal Court has observed, it is not often that this threshold will be met.
- [11] In short, despite the fact that the delay in filing the application to review the rescission ruling is not inordinate, I am not persuaded that the applicant has any

prospects of success in the review application. The application for condonation accordingly stands to be refused.

- [12] I deal next to the issue of costs. The present application was enrolled for hearing in Cape Town. When the applicant's representative was asked why the matter had been so enrolled given that the applicant was located in Johannesburg, that the arbitration award and rescission ruling had been issued in Johannesburg and that the fourth respondent was resident there, the applicant's representative could do no more than submit that it was convenient for the applicant's adviser to institute proceedings in Cape Town. While it is correct that this court is a single court with national jurisdiction and that a litigant is entitled to institute proceedings in any city where the court has a seat, any abuse of this provision can justifiably be taken into account in the exercise of the broad discretion conferred by s 162 in relation to costs. In the present instance, the applicant elected to institute these proceedings in Cape Town knowing full well that the fourth respondent would be prejudiced in her opposition to the application. This is indicative of an attitude on the part of the applicant that pervades this matter, and in my view there is no reason to deny the fourth respondent her costs, such costs to include the travel and accommodation costs of her attorney.

For the above reasons, I make the following order:

1. The application to condone the late filing of the application for review is dismissed.

2. The applicant is to pay the costs of these proceedings, such costs to include the travel and accommodation costs of the fourth respondent's attorney reasonably incurred in relation to his attendance at court in Cape Town on 16 September 2015.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr Carelse, Carelse Khan Attorneys

For the fourth respondent: Mr A Lahree, Afzal Lahree Attorneys.