



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D621/11

In the matter between:

THEMBINKOSI KHUZWAYO

First Applicant

BHEKOKWAKHE MAPHUMULO

Second Applicant

JULIUS E.T. SIBEKO

Third Applicant

And

**COMMISSION FOR CONCILIATION
MEDIATION & ARBITRATION**

First Respondent

COMMISSIONER C MUNKS N.O.

Second Respondent

SANITECH (PTY) LTD

Third Respondent

Heard: 3 February 2015

Delivered: 4 February 2015

Summary: Review of CCMA ruling: review of rescission ruling; requirements for rescission

JUDGMENT

Whitcher J

- [1] This is an application to review and set aside a rescission ruling made by the Second Respondent on 3 June 2011 (“the rescission ruling”).

Background facts

- [2] In July 2010 the Third Respondent carried out an investigation which allegedly implicated the Applicants in the theft and selling of the Third Respondent’s products to members of the public.
- [3] Following certain exchanges between the Third Respondent and the Applicants regarding the investigation report, the Applicants resigned in writing in terms of which they confirmed that they had been given an opportunity to attend a disciplinary hearing, but had chosen not to do so. These resignations were concluded on 26 July 2010. I will return to the alleged circumstances under which the resignations took place.
- [4] The Applicants referred a dispute to the CCMA and on 16 September a con-arb was set down by the CCMA under case reference KNDB 1024-10. A commissioner of the CCMA, one Oliver, ruled that the Applicants and their Trade Union failed to attend the con/arb hearing and as a result thereof, the matter was dismissed. The commissioner issued a written ruling in this regard. The Applicants filed three applications for rescissions in respect of this ruling; on 20 October 2010, 20 January 2011 and 1 April 2011. The last application was drafted by their attorneys.
- [5] On 3 June 2011, the Second Respondent handed down a ruling pursuant to the hearing of the application for rescission.

Applicable law to Rescission Applications

- [6] As indicated by the Third Respondent, it is trite law that not only must a party provide a reason as to their absence, good cause is also a requirement for the rescission of any arbitration award and by good cause, an Applicant has to

provide a reasonable explanation for its absence, and a reasonable prospect of succeeding in the main action (see *Shoprite Checkers (Pty) Ltd v CCMA & Others* (2007) 28 ILJ 2246 (LAC))

- [7] Furthermore, the court in the matter of *Northern Training Trust v Maake* (2006) 27 ILJ 828 (LAC) stated that:

“The enquiry in an application for the rescission of an Arbitration Award is consequently bipartite. The first leg is one which is concerned with whether or not the Notice of Set Down was sent (for instance by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the Applicant who failed to attend the Arbitration proceedings. Such Applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the Award be set aside.”

- [8] As indicated by the Third Respondent, ultimately, in this matter the Court will have to come to the conclusion that by the Second Respondent dismissing the Rescission application that this was a conclusion that a reasonable decision maker could not reach.

Application of the law to the facts

Explanation for Default

- [9] In my view the Third Respondent demonstrated that the Applicants provided no reasonable explanation for failing to attend the arbitration proceedings and further demonstrated that the Applicants were in wilful default.
- [10] In this regard the Third Respondent pointed out that with regards to the explanation provided by the Applicants in the rescission applications, Khuzwayo gave two completely different and mutually destructive versions under oath.

[11] In one of the rescission applications, Khuzwayo details his non-appearance as follows:

"There was even a hearing that was held on 16 September 2010 which I did not know about that is why I did not attend."

[12] However, in the affidavit put up as part of the third application for rescission, Khuzwayo claims:

- (a) He knew of the date of the hearing and that he, together with the second and third applicant attended upon the offices of SAMWU, meeting the Union Official, Chamane at 08:00am;
- (b) Chamane was to represent the Applicants at the Arbitration hearing;
- (c) A process of preparing for the Arbitration commenced;
- (d) At 08.50am Khuzwayo asked Chamane about the lateness of the matter, given it was due to be called at 09:00am to which Chamane responded that as long as they were no longer than 30 minutes late, the matter would not proceed;
- (e) The three Applicants, in the company of Chamane left the offices of SAMWU at 09:05am arriving at the First Respondent at 09:20am, where they were informed that their matter had been called and dismissed due to non-appearance.

[13] The Third Respondent pointed out further that no further submissions have ever been made as to why the Applicants would not have received the Notice of Set Down for 16 September 2010 hearing. As submitted by the Third Respondent, the explanation provided by Khuzwayo in the third rescission affidavit would most certainly be proof of wilful default on the part of the Applicants. The notice of set down would have the specific time and date for

the hearing. It is not up to the Union official or the Applicants to decide that they may present themselves any later than the advised start time.

- [14] On the Applicants' own version, they were aware that the matter was to start at 09:00am and purposefully did not present themselves at that time. This is wilful default.
- [15] During the review hearing, the Applicants' legal representative tried to give an explanation for the conflicting versions deposed to by Khuzwayo, but these allegations are not contained in any of the affidavits to the review application, let alone the rescission application.

The prospects of succeeding in the main action

- [16] The sum total of the Applicants' allegations on prospects of success in their rescission applications is that there was no Disciplinary Hearing held and that the misconduct did not warrant dismissal. On the other hand, the Third Respondent, in their answering affidavit to the rescission application, alleged that the Applicants were not dismissed and supported this contention with signed resignations from the Applicants. They alleged that when the Applicants were advised of pending disciplinary action, they elected to resign. The Applicants did not dispute these allegations in any replying affidavits to the rescission application.
- [17] With this information before him, the Second Respondent reasonably found that the Applicants' prospects of success were remote given that they had resigned voluntarily in order to avoid a Disciplinary Enquiry, as set out in the Third Respondent's answering affidavit and not denied in any replying affidavit.
- [18] The Applicants attempted in this review application to provide a counter version to the Third Respondent's allegations that they had resigned. They

claimed that they had resigned under duress from the Third Respondent. However, in a review application, the issue is what material was before the Second Respondent at the time of the rescission application.

[19] In all the circumstances set out above, the final decision reached by the Second Respondent was a reasonable one. There is thus no basis to review and set aside the rescission ruling by the Second Respondent.

[20] The Court accordingly makes the following order:

1. The application to review and set aside the ruling by the Second Respondent is dismissed.
2. There is no order as to costs.

Whitcher J

Judge of the Labour Court

APPEARANCES:

Applicant: V Ntlokwana from Ntlokwana & Associates

Respondent: G M Kirby-Hirst from MacGregor Erasmus Attorneys