



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 53/13

In the matter between

MZINGISI MJAKUCA

Applicant

and

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

First Respondent

COMMISSIONER LAMEESHA ST CLAIR MARKS

Second Respondent

ALGOA BUS COMPANY (PTY) LTD

Third Respondent

Heard: 29 April 2015

Delivered: 4 February 2016

Summary: When an applicant for rescission has failed to give reasonable explanation for his or her default, the arbitration ruling refusing the rescission application is not reviewable.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside the arbitration award of the second respondent ("the arbitrator") in which she dismissed the application for rescission which had been launched by the applicant at the first respondent ("the bargaining council"). It was filed late and the applicant applied for condonation for the delay. Both applications are opposed by the third respondent.

Factual background

- [2] The applicant was an employee of the third respondent from 9 February 2010 until his dismissal for misconduct on 5 November 2012. As he was a member of TAWU ("the trade union"), the trade union referred an unfair dismissal dispute to the bargaining council on his behalf. The dispute was not resolved at conciliation and it was scheduled for arbitration on 7 February 2013. The case was not arbitrated on the scheduled date but dismissed owing to the applicant's non-attendance. The applicant filed an application for the rescission of the dismissal ruling. The application was opposed by the third respondent. On 25 March 2013, the arbitrator issued a ruling dismissing the applicant's rescission application. In the application at hand, the applicant seeks an order reviewing and setting aside the arbitration award dismissing his rescission application.

Condonation

- [3] The applicant filed the review application late. The extent of the delay is about five weeks. The reason the applicant furnished for the delay is that he was informed by his union representative, Mr Tiso (Tiso) to wait for the arbitrator to furnish them with the rescission ruling. He trusted Tiso and waited for his call. As the applicant was unemployed, he lacked funds to make enquiries about the progress of his case. After two unsuccessful attempts to contact Tiso, he managed to get hold of him on 18 April 2013. He informed him that the outcome of his rescission application was available at the union office. The

applicant collected the rescission ruling the following day from the union office where he was told that the union would not be able to assist him further. He was eventually advised to approach the Legal Aid office for assistance. His first consultation was on 5 June 2013. His application was successful and on 2 July 2013, he attended a consultation with the attorney to whom his case was allocated. She filed the review application on 4 July 2013. The applicant submitted that the matter is important to him as he was a first offender when he was dismissed after serving the third respondent for two years. He is still unemployed and unable to survive financially. He submitted that he suffers prejudice as he is unemployed and maintained that the third respondent will suffer no prejudice should condonation be granted. The applicant submitted that he has good prospects of success on review because the arbitrator committed gross irregularities. Her finding that no grounds for rescission existed is not supported by evidence. She failed to apply her mind to all the evidence before her and irrationally and unreasonably concluded that the applicant failed to present grounds to have the dismissal ruling rescinded.

- [4] The third respondent opposed the condonation application mainly on the basis that the applicant's submissions in respect of Tiso's role constituted hearsay evidence in the absence of his confirmatory affidavit. The applicant filed Tiso's confirmatory affidavit. The third respondent submitted that the extent of the delay was almost double the statutory limit and the applicant failed to explain the entire delay. He was not entitled to sit back and wait for the outcome of his application for assistance by the Legal Aid office. He further failed to plead facts from which it could be inferred that he had reasonable prospects of success in the application to have the rescission ruling reviewed and set aside.
- [5] In *SA Post Office Ltd v CCMA and Others*,¹ the court confirmed that in exercising the discretion whether to condone the late filing of pleadings, factors that need to be considered include the degree of the delay, its explanation, prospects of success of the party seeking condonation, prejudice

¹ [2012] 1 BLLR 30 (LAC).

that the parties will suffer if condonation is granted or refused and whether it is in the interests of justice to grant condonation.

- [6] The reasons proffered by the applicant for filing the review application late are mainly that he was failed by his trade union and sought alternative assistance by applying for legal aid. His application was not determined immediately but he had to wait for its outcome. The third respondent's argument that the applicant failed to account for each and every day of the delay is true, however, the applicant's intention and efforts to have the review application filed cannot be denied. While there is no special dispensation for litigants assisted by the Legal Aid office, the reality that the Legal Aid office needs internal procedures in performing its duties cannot be overlooked. Each case is determined on its merits. The third respondent's argument that the applicant should not have waited for the outcome of his application for legal aid but should have taken steps to pursue his review application is untenable. Having been told that his application was being processed by the legal aid office, there was nothing that the applicant could have done in the interim other than wait for the outcome of his application. He sought assistance as he could not pursue his review application on his own. He therefore did not act unreasonably by waiting for the outcome of his application. The extent of the delay is substantial however, its explanation is reasonable.
- [7] The applicant will suffer more prejudice than the third respondent should the condonation application be refused because he will be denied of the opportunity of having his review application heard. While the third respondent will suffer the prejudice of not having the dispute resolved expeditiously, it will suffer less prejudice than the applicant. It is possible to compensate the third respondent for the prejudice by taking the delay into account in the event of an order being made in favour of the applicant. The applicant made averments that he had reasonable prospects of success by stating that the arbitrator committed a gross irregularity in that her finding that no grounds for rescission existed was not supported by evidence. If the averments can be proved, the applicant's review application could be successful. He therefore has reasonable prospects of success. When all the relevant factors are

considered collectively, they prove that the applicant has shown good cause to have the delay condoned. The application for condonation must therefore succeed.

The review application

[8] An arbitration award may be reviewed and set aside if the decision of the arbitrator is one which a reasonable decision-maker could not make on the facts before the arbitrator. In this regard, see *Herholdt v Nedbank Ltd*². The applicant seeks an order reviewing and setting aside the arbitrator's ruling dismissing his rescission application. He submitted that the decision dismissing his matter for his failure to attend the arbitration hearing was erroneously made because he was present at the arbitration venue when his matter was dismissed. He conceded that the arbitration hearing was scheduled for 09h00 on 7 February 2013. He however, submitted that on 6 February 2013, he was phoned by Sabata of TAWU who told him to present his case at the bargaining council's offices on 7 February 2013 at 09h15. He arrived at 09h05 and went to the hearing room where the conciliation of his dispute with the third respondent was held. When he realised that he was at the wrong venue he made enquiries from a cleaner who referred him to the reception area. On his way to the reception area at 09h18, he met the third respondent's representative who told him that his case had been dismissed because he was three minutes late. In the dismissal ruling, the commissioner recorded that he dismissed the applicant's case after the 15 minutes' grace period had expired. The third respondent submitted that the applicant arrived at about 09h20.

[9] The applicant argued that the arbitrator failed to apply the correct test for rescission which requires the applicant to give a reasonable explanation for his default and that he has a *bona fide* defence. He also sought to rely on *Shoprite Checkers (Pty) Ltd v CCMA and Others*³ where the court accepted that failure by a representative of an employee to record the arbitration date correctly in his diary constituted good reason for failure to attend the

² [2013] 11 BLLR1074 (SCA)

³ [2007] 10 BLLR 917 (LAC)

arbitration. The third respondent submitted that the applicant failed to establish grounds to have the rescission ruling reviewed and set aside because he gave no reasons for being told that the arbitration was scheduled to commence at 09h15 instead of 09h00. Sabata, who told the applicant that the arbitration would commence at 09h15 failed to file an affidavit giving reasons for misinforming the applicant. The applicant explained in the replying affidavit that he could not locate Mr Madolo who I assume is the person he has referred to as Sabata in his founding affidavit, as he does not work at the Port Elizabeth offices. He is also unable to reach him through the telephone. Sabata Madolo was a representative of TAWU, a trade union the applicant was a member of and his representative of choice. He may therefore not use TAWU's failure to give him reasons for misinforming him about the commencement time of the arbitration as a defence.

[10] The applicant's explanation for his default is one of the factors which the arbitrator had to consider in determining his rescission application. His submissions do not disclose a clear reason why his trade union gave him the incorrect arbitration commencement time. On the information before the arbitrator the applicant failed to give reasonable explanation for his default. Even in the *Shoprite* case the applicant seeks to rely on, the default is explained. It is the failure of the representative to diarize the arbitration date correctly. In the absence of the reason why the applicant was told that the arbitration was scheduled to commence at 09h15 instead of 09h00 the arbitrator correctly and reasonably found that the applicant did not advance a reasonable explanation for the rescission of the dismissal ruling as required in section 144 of the Labour relations act 66 of 1995. In the circumstances, the applicant failed to establish grounds to have the rescission ruling reviewed and set aside. His application can therefore not succeed.

[11] In the premises, the following order is made:

11.1 The late filing of the review application is condoned.

11.2 The application for review is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant: Ms Van Staden of the Justice Centre

For the Third Respondent: Advocate Grogan

Instructed by Joubert Galpin Searle

LABOUR COURT