



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR2253/13

In the matter between:

**TIGER BRANDS LIMITED t/a ALBANY
BAKERY GERMISTON**

Applicant

and

THOKOZANI MVELASE

First Respondent

STEVEN NTOMBELA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 21 April 2016

Delivered: 25 January 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction

[1] This is an application in terms of the provisions of section 158(1)(g) of the Labour Relations Act¹. The Applicant seeks an order reviewing and setting aside a rescission ruling issued by the Second Respondent (the

¹ Act 66 of 1995

Commissioner) on 8 October 2013. The Commissioner rescinded a ruling made on 20 January 2012 in terms of which the First Respondent's (Mvelase) referral to the CCMA was dismissed in his absence.

Background

[2] The protracted history of this matter is as follows;

- 2.1 Mvelase was employed by the Applicant for approximately 5 years until 3 June 2010 when he was dismissed for misconduct. He had allegedly assaulted a fellow employee. Pursuant to his dismissal he had referred an unfair dismissal dispute to the CCMA.
- 2.2 Following unsuccessful attempts at conciliation, the dispute was referred for arbitration and set down on 22 September 2010. Mvelase failed to make an appearance or be represented at the proceedings, and his dispute was dismissed. He subsequently launched a rescission application on or about 5 August 2011 (the first rescission application). This was about some 11 months after the dismissal ruling. This application was granted on 1 September 2011.
- 2.3 The matter was then re-scheduled for a hearing on 12 October 2011 but was postponed at the request of the Applicant. It was again postponed at the request of the Applicant on 3 November 2011.
- 2.4 The matter was again set-down for arbitration on 30 January 2012. Mvelase did not attend the proceedings. However, his representative, Mr Mbatha of Inqubela Phambili Trade Union had attended and sought to request a postponement on the basis that Mvelase was unwell as he was involved in a motor vehicle accident two days prior to the hearing. The Commissioner (The Second Respondent in this application) was not satisfied with the explanation especially in the absence of a copy of a medical certificate verifying the reasons Mvelase could not attend the proceedings. He had then dismissed the matter.

2.5 On 8 February 2012, Mvelase launched and served a rescission application on the Applicant in respect of the second dismissal ruling. It appears however that his application was never filed with the CCMA and was thus not pursued by Mvelase.

2.6 On 26 July 2013 Mvelase had launched a third rescission application. This was some 18 months since the second dismissal ruling was issued. The Applicant had opposed this application. The Second Respondent had considered and granted the application in terms of a ruling issued on 8 October 2013, which ruling is the subject matter of this review application.

[3] In its opposition to the rescission application before the CCMA, the Applicant contended that it had questioned the CCMA's jurisdiction to determine the rescission application in the absence of an application for condonation for its late filing. The Applicant also attacked Mvelase's grounds for rescission and highlighted material contradictions in the contents of the second and third rescission applications which were deemed to be mutually destructive to his contentions that he had showed good cause.

The Rescission Ruling

[4] In arriving at his conclusions, the Commissioner stated that Mvelase had not been in wilful default as he was ill on the date of the proceedings, and had backed up that contention with a copy of a medical certificate as attached to his affidavit. The Commissioner in the same vein stated that he was unable to pronounce on the validity of the medical certificate, but had accepted it for what it was. The Commissioner further concluded that Mvelase had good prospects of success in respect of his claim as he was not given an opportunity to respond to the allegations against him.

The grounds for review

[5] The Applicant attacked the rescission ruling on a number of grounds, including that;

- 5.1 The Commissioner had committed a gross irregularity and/or exceeded his powers in dealing with the rescission application in the absence of an application for condonation which he found was unnecessary;
- 5.2 The Commissioner committed a material error of law in that he allegedly failed to apply the general principles of evidence applicable to motion proceedings when he decided the matter;
- 5.3 The Commissioner reached an irrational decision that no reasonable decision maker could reach on the evidence before him.
- [6] Mvelase in opposing the review application accused the Applicant of merely delaying the matter to avoid facing an arbitration. The substance of his opposition is that the Court has no jurisdiction to hear the matter (even though he does not suggest a basis for such submission); He had further contended that his application for rescission at the CCMA was filed on time and in accordance with the Rules and procedures of the CCMA. Accordingly, he was of the view that there was thus no need for him to apply for condonation.

Evaluation

- [7] Central to this application is whether there was a need on the part of Mvelase to apply for condonation in respect of the rescission application considered by the Commissioner. It follows that if indeed there was a need for such an application, the Commissioner would not have had the requisite jurisdiction to determine the application. To the extent that this might be the case, this would be the end of the matter, as the resultant ruling would have been issued *ultra vires* and thus a nullity.
- [8] The starting point is Rule 32 of the CCMA Rules, which provide that an application for the variation or rescission of an arbitration award or ruling must be made within fourteen days of the date on which the applicant became aware of the arbitration award or ruling. To the extent that the time frames stipulated in Rule 32 are not complied with, Rule 9 of the CCMA rules stipulates that a party must apply for condonation in compliance with the

provisions of Rule 31(2), whilst Rule 35 of the CCMA requires of a party seeking condonation to show good cause for non-compliance.

- [9] In respect of the rescission application before the CCMA, it was not disputed that the Mvelase had initially launched the first application on 8 February 2012. Ordinarily, this application would have been filed on time, save for the fact that it was not properly filed with the CCMA. In essence then, there was no proper application before the CCMA.
- [10] The second application in respect of the same dismissal ruling was subsequently filed on 26 July 2013, some 18 months since the dismissal ruling was issued. The Applicant's contention was that it had raised the issue of condonation with the Commissioner, and from the reading of the ruling, it does not appear that the Commissioner considered the issue. This was despite the Applicant having submitted copies of Mvelase's previous rescission application, in which he had averred having received the dismissal ruling on 8 February 2012, whilst in the subsequent affidavit he had averred that he only became aware of the dismissal ruling on 23 July 2013. Even if there was a dispute as to the date on which Mvelase became aware of the dismissal ruling, it is improbable that he could not have been made aware of that ruling on 30 January 2012, as he was represented by Mbatha at those proceedings.
- [11] Even if the Applicant had not raised the issue of condonation, the Commissioner was still obliged to satisfy himself that indeed the rescission application was properly before him. In his ruling, the Commissioner failed to deal with this jurisdictional requirement, and on that ground alone, the rescission ruling is a nullity and thus ought to be set aside.
- [12] Even if the Commissioner for some reason believed he had the requisite jurisdiction, on the merits of the application itself, he ought not have granted the rescission. This conclusion is based on the following;
- 12.1 Mvelase's reason for failing to attend the arbitration proceedings on 30 January 2012 was that he was not feeling well and was attended to by

a medical doctor. However, on 30 January 2012 and when Mbatha sought a postponement, his reasons were that Mvelase had been involved in a motor vehicle accident two days prior to the hearing. A copy of the medical certificate attached to his affidavit is however dated 30 January 2012, and Mvelase is diagnosed with a 'back pain'.

12.2 To the extent that Mvelase's reasons for his default as proffered by Mbatha were substantially different from those he had proffered in his application before the Commissioner, it follows that a conclusion should have been reached that he was indeed in wilful default, specifically since it appeared that he did not take the CCMA into his confidence. Furthermore, even if the Commissioner sought to rely on the copy of the medical certificate presented, it is trite that such a certificate on its own is not sufficient proof in respect of the Mvelase's absence², and merely constitutes hearsay. Worst still however, rather than pronouncing on the validity and admissibility of that copy, the Commissioner chose not to, and accepted the copy for what it was worth. This in my view constituted a reviewable irregularity on the part of the Commissioner.

12.3 In regards to Mvelase's prospects of success, his contention in his affidavit before the CCMA was that he was not afforded an opportunity to respond to the allegations against him, and the Commissioner had concluded that if Mvelase's statement was anything to go by, this constituted a serious procedural irregularity. As I understood Mvelase's contentions, his primary complaint was that his dismissal was procedurally unfair. This contention was further repeated during argument by Mr. Luthuli on his behalf, who had also added that Mvelase was dismissed simply because he was a shop steward.

12.4 The contention that Mvelase was dismissed because he was a shop steward is clearly a redherring. This allegation was never raised in his

² Mgobhozi v Naidoo NO & Others [2006] 3 BLLR 242 (LAC)

application for rescission before the CCMA. Furthermore, the Applicant in its response had attached minutes of a disciplinary hearing leading to Mvelase's dismissal, and *prima facie*, his contentions that his dismissal was procedurally unfair as he was not afforded an opportunity to dispute the Applicant's allegations of misconduct against him could not have been sustainable.

[13] In the light of the above conclusions, it follows that the rescission ruling issued by the Commissioner is reviewable and thus ought to be set aside. The Commissioner had no jurisdiction to determine the application in the absence of an application for condonation for its late filing, and in addition, Mvelase had not shown good cause as to why rescission should have been granted. Given the protracted nature of this matter, and the material that was placed before the Court, it would not be in the interests of justice to remit this matter back to the CCMA for re-consideration. Further having had regard to the requirements of law and fairness, a cost order is not deemed to be warranted in this case.

Order

[14] Accordingly, the following order is made;:

1. The rescission ruling issued by the Second Respondent is reviewed, set aside, and replaced with the following order;
 - 1.1 The application for rescission of the dismissal ruling issued on 30 January 2012 is dismissed.'
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa.

APPEARANCES:

On behalf of the Applicant: Mr M Khoza of Edward Nathan Sonnenbergs Inc.

On behalf of the Respondent: Mr E Luthuli of Inqubelaphambili Trade Union

LABOUR COURT