# THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

**Not Reportable**

Case no: JR2680/13

In the matter between:

**ALPINE SWISS FOODS CC** **Applicant**

and

**FOOD AND ALLIED WORKERS UNION**

**OBO MUNYANI,ELLA &11 OTHERS** **First Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION** **Second Respondent**

**TELADIA,SHAHID *N.O*** **Third respondent**

**Heard**: 3 August 2017

**Delivered**: 4 August 2017

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**JUDGMENT**

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VAN NIEKERK J

[1] This is an application to review and set aside a rescission ruling made by the third respondent on 5 December 2013. In her ruling, the third respondent, to whom I shall refer as the commissioner, refused to rescind an arbitration award in favour of the first respondent granted on 24 September 2013. The ruling under review incorporates a ruling in relation to condonation for the late filing of the rescission application. That part of the ruling is not challenged in these proceedings.

[2] The factual background to the ruling is not in dispute. The applicant and the first respondent were engaged in a dispute that during the course of February 2013 culminated in a strike at the applicant's premises. Various attempts were made to resolve the dispute. I shall revert to this issue in due course, but for present purposes it is sufficient to note that by 25 June 2013, the applicant had taken the view that the first respondent's members had absconded. On 11 June 2013, the second respondent, the CCMA, issued a default arbitration award in favour of the first respondent following the applicant's failure to attend arbitration proceedings scheduled for 7 June 2013. That award was rescinded on 31 July 2013. On 22 August 2013, the CCMA sent a letter by registered post, giving notice of the set down of an arbitration hearing on 19 September 2013. On 16 September 2013, the CCM I telephoned the applicant's offices and spoke to one Lewis (Louis) du Plooy to confirm the hearing. Lewis is the applicant's administrator. The applicant did not attend the hearing on 19 September 2013 and after hearing evidence, the commissioner issued a default award on 24 September 2013. In that award, the commissioner found that the employees had been substantively and procedurally unfairly dismissed, and ordered the applicant to reinstate them.

[3] On 30 October 2013, the applicant filed an application for rescission, seeking to rescind the default award issued on 24 September 2013. On 5 December 2013, the commissioner issued a ruling refusing the application. That ruling, as I have indicated above, is the subject of the present proceedings.

[4] The grounds for review are not readily apparent from the founding affidavit. The applicant appears to attack the correctness of the

commissioner's decision, and has cast the application in terms more appropriate to an appeal. The applicable approach requires the applicant in a review application to establish acts of misconduct or a gross irregularity in relation to the proceedings or some other reviewable irregularity, and further to establish that the result of the proceedings (in this case, the ruling) falls outside of a band of decisions to which a reasonable person could come on the available material. That is not the case that the applicant has made out in the founding affidavit, and is in itself a basis on which the present application ought to be dismissed. Be that as it may, there are three grounds of complaint discernible from the founding affidavit which, for present purposes, I shall treat as grounds for review. The first is the CCMA's failure to comply with the *audi alterem partem* rule in that it failed to notify the parties of the rescission hearing and made a ruling solely on the papers. The second ground relates to the issuing of the notice of set down and the telephone conversation with Lewis. The third ground relates to the existence or otherwise of any *bona fide* defence to the first respondent's claim, and the commissioner's findings in this regard.

[5] Turning first thing to the alleged failure to comply with the *audi* rule, rule 31 (10) of the CCMA rules entitles a commissioner to determine an application in any manner that he or she deems fit, provided that the parties are informed of how the process will be conducted and given an opportunity to be heard. This court has previously held their there is no hard and fast rule as to when a hearing should be convened, and that cases of this nature ought to be assessed on a case-by-case basis (*Satinsky 128 (Pty0 Ltd v Just Group Afroca v DRC & others* [2013] ZALCJHB (26 February 2013)).

[6] In the present instance, the applicant's attorneys were advised by the CCMA that the application for rescission would be decided on paper. The deponent to the founding affidavit records that this advice was given during the week preceding 23 November 2013 when the applicant's representative was advised of that fact and that the ruling would be made by 6 December 2013. The applicant's attorneys did not dispute the nature of the process, nor did they demand a *viva voce* hearing. Instead, they

instructed counsel to draft heads of argument which were filed. The rescission ruling indicates that the commissioner had before her a bundle of documents filed by the applicant, and that the application was unopposed.

[7] Clearly, in terms of the applicable rule, the commissioner had a discretion to determine the rescission application on the papers. In these proceedings, the applicant does directly not challenge the exercise of that discretion; it simply states that it was 'clearly not in default of attendance of the rescission hearing'. That is not the issue – the issue is whether the commissioner's award is reviewable on account of her electing to decide the rescission application on the papers. As I have indicated, she was entitled to do so and the applicant's representatives had been notified of her intention to do so. I fail to appreciate how the applicant can be said to have suffered any material degree of prejudice on account of the application having been decided in chambers. In my view, the commissioner committed no reviewable irregularity in regard to the process adopted in issuing the rescission ruling.

[8] Turning next to the second ground for review, it ought to be recalled at the outset that the issue in the rescission application was one of wilful default. It was not, as the applicant would appear to contend, one of the validity of the notice of set down. Indeed, the thrust of the applicant's case is that in the absence of a valid notice of set down, it could not be in wilful default. Rule 5A of the CCMA rules does not require the CCMA to 'serve' a notice of set down on parties. The CCMA is required to do no more than provide notice of the hearing date of a conciliation or arbitration. It was not incumbent on the CCMA to serve the notice of set down on the applicant using one or another of the permissible forms of service contemplated by rule 6. It is not disputed that the arbitrator had before her a schedule dated 22 August 2013 which reflects a list presented by the CCMA to the post office, reflecting items addressed to various parties, including the applicant, to be sent by registered post. The schedule was stamped by the Benoni post office on the same date. The applicant contends that the document does not indicate that the notice of set down was indeed sent by registered mail and it denies having received the notice. It is not

incumbent on the CCMA to prove that the letter it delivered to the post office for posting by registered post was actually posted. Be that as it may, despite the fact that the notice of set down was presented at the post office for delivery by registered post, even if I were to accept that the applicant did not actually receive the letter, the fact remains that the CCMA was in telephonic contact with the applicant on 16 September 2013, through Lewis, to confirm the hearing date. In the rescission application, the applicant did not file an affidavit by Lewis denying either the fact of the phone call or its content. Indeed, no such affidavit has been filed in these proceedings. The applicant says no more than that Lewis is employed in an administrative position, that she has no dealings with employee relations and that a telephone conversion between her and the CCMA did not constitute service for the purpose of the CCMA rules. In the answering affidavit in the present proceedings, the deponent avers that Lewis is indeed employed by the applicant as an administrator and that in his experience, she always answered telephone calls and received telefaxes and that there was no reason why she should not state that she was aware of the notice of set down. This is not disputed. In my view, there is no basis to call into question the commissioner's reliance on the conversation with Lewis as confirmation of the applicant's knowledge of the date of the arbitration hearing. To the extent that the applicants persisted with its submissions to the effect that regardless f any conversation with Lewis the notice of set down was invalid and that this necessarily had the consequence that the applicant was not in wilful default, it always remained open to the applicant to attend at the hearing and take that point, or to seek a postponement on the grounds of insufficient notice. Significantly, the founding affidavit does not reflect that the deponent, the managing member of the applicant, was actually unaware of the hearing date. His averments extend only to the assertion that the CCMA's 'service' by registered post was not in compliance with the rules, and that Lewis was employed in an administrative capacity and therefore not the appropriate or responsible person with whom the notice of the hearing by the CCMA ought to have been telephonically confirmed. It follows that the commissioner did not commit a reviewable irregularity when she relied on the fact of the telephone call to establish wilful default on the part of the applicant.

[9] In regard to the third ground for review, the commissioner had before her the version of the applicant in relation to the events of February 2013. She also had before her (in the application for default arbitration) a record of the first respondent's version. She found that the applicant had failed to show in its submissions that it had engaged with the respondent on 6 February 2013 and 21 February 2013, when the first respondent sought feedback and confirmation on the employees' return to work. The commissioner added that the first respondent had written to the applicant stating that employees would return to work on 11 February 2013 and had appealed for access to the premises. The applicant did not respond to this email and it was only after the first respondent again contacted the applicant on 21 February 2013 requesting a response as a matter of urgency that on 25 February 2013, the applicant advised that the first respondent that the employees had been dismissed on the grounds of desertion. The fact remains that the applicant did not respond to the first respondent or engage with it when the employees did not return to work on 11 February 2013 as the applicant expected them to do. Instead, it ignored further communications from the first respondent and simply, some two weeks later, advised the first respondent that the employees were no longer employed. The offer of an appeal after the fact takes matters no further. In these circumstances, I fail to appreciate how it can be said that the commissioner committed a reviewable irregularity in assessing the requirement of good cause as she did, or how it can be said that her conclusion fails to meet the reasonableness threshold.

[10] In short, in my view, the applicant has failed to establish that the commissioner committed any irregularity or other misdirection that had the result of a ruling so unreasonable that no reasonable person could come to the decision that she did on the available evidence. The review application accordingly stands to be dismissed. Finally, there is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs

André van Niekerk

Judge

APPEARANCES

APPLICANT: Adv AJ Nel, instructed by Lindeque Van Heerden Attorneys

FIRST RESPONDENT: Mr M Makhura, Cheadle Thompson and Haysom Inc.