



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1146/15

In the matter between:

SENATOR INTERNATIONAL LOGISTICS (PTY) LTD

Applicant

and

COMMISSIONER T RAPHELA N.O

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

BONGANI VINCENT NGWENYA

Third Respondent

Heard: 15 February 2018

Delivered: 22 February 2018

JUDGMENT

MAHOSI. J

Introduction

- [1] This is an application in terms of section 158(1)(g) of the Labour Relations Act¹ (LRA) in terms of which the applicant seeks an order to review and set aside an award granted by the first respondent (the commissioner) under the auspices of the second respondent the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAJB20566/14 on 28 May 2015, in terms of which the commissioner dismissed an application by the applicant for the rescission of an award granted by default on 2 March 2015 against the applicant and in favour of the third respondent (the employee).
- [2] The applicant seeks that the default award be rescinded, alternatively that the applicant's application for the rescission of the default award be remitted back to the CCMA for determination afresh before a commissioner other than the first respondent.
- [3] The applicant further seeks condonation for the late filing of the review application.

Background

- [4] The employee was employed by the applicant as a driver from April 2013 until his dismissal on 29 September 2014. The reason for his dismissal was that he committed an act of misconduct in that he allegedly deviated from his routes despite numerous previous verbal warnings. Dissatisfied with his dismissal, the employee referred his dispute to the CCMA. The dispute could not be resolved through conciliation as the applicant was not in attendance. The arbitration was scheduled for 17 February 2015. At the arbitration, only the employee was in attendance. The commissioner proceeded with the arbitration in the absence of the applicant and issued a default award on 2 March 2015. In his arbitration

¹ Act 66 of 1995 as amended.

award, the commissioner found that the employee's dismissal was substantively and procedurally unfair. Consequently, the applicant was ordered to pay the employee an amount of R33000.00, being compensation equivalent to his six months' remuneration.

- [5] On 24 March 2015, the applicant filed an application before the commissioner seeking rescission of the aforementioned default award. The rescission application was dismissed on the basis that the applicant failed to show good cause for its failure to attend the arbitration proceedings despite being properly notified of the date and time. It is this rescission ruling that the applicant seeks to have reviewed and set aside.

Condonation

- [6] The applicant became aware of the default award on 11 June 2015, and the review application was filed on 21 August 2015, almost a month out of the prescribed time. Essentially, the applicant's reason for not filing the review application timeously is that its attorney failed to diarise the matter properly, and was out of the country for the period 10 July 2015 to 21 July 2015. The employee opposed the condonation application on the basis that there is no reasonable or satisfactory explanation for the delay and that no proper case for condonation has been made.
- [7] In terms of Rule 12(3) of the Labour Court Rules, the court may, on good cause shown condone the non-compliance with any period prescribed by these Rules. This Court has consistently followed the well-known case of *Melane v Santam Insurance Co Ltd*.² The factors that need to be considered are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. The Labour Appeal Court (LAC) in *NUM v Council for Mineral Technology*³ emphasised that the two crucial elements for deciding on the issue

² 1962 (4) SA 531 (A).

³ [1999] 3 BLLR 209 (LAC) at para 10.

of condonation are prospects of success and a good explanation for the delay. According to the court:

‘...Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

- [8] The applicant’s delay in filing the review application is not excessive. In view of the evaluation of the merits of the review application, I am satisfied that, considering all factors relevant to condonation application, the condonation for the late filing of the review of rescission ruling should be granted.

Rescission Ruling

- [9] The commissioner considered the reasons for the applicant’s failure to attend the arbitration and summarised them as follow:

‘...The employer said that she became aware of the award on the 14 March 2015. She received the notice to attend the hearing on the 21 January 2015. The employer sent documents to the CCMA on the 4 February 2015 to a CCMA official. The employer said she was under the impression that the CCMA were satisfied about the documentation. She further said that it was a genuine mistake that since documents were submitted there was no need to attend the arbitration hearing. The employer said the prospects of success are good in succeeding with the case.’⁴

- [10] The commissioner referred to the provisions of section 144 of the LRA which deal with the grounds for the rescission of an arbitration award or ruling. He then made the following findings:

‘(6) It is evident that the employer was notified about the date of the hearing and she failed to attend the hearing. I am not convinced that the employer could have not been aware that she was to attend the CCMA and defend her case and

⁴ Index to pleadings, page 8, para 2 of arbitration award.

further that sending documentations through emails was sufficient not to appear before the Commission. It is a practice that if any person is invited to a court of law, he/she must appear in person. It is evident that failure to attend was to undermine the process of the CCMA or deliberate intention to delay the case. In terms of the prospects of success I am satisfied with the awards issued. I further find that the employee will suffer more prejudice than the employer as this matter was heard in 2014. The applicant was dismissed on the 29 August 2014 and given a week's notice which is the 29 September 2014.

- (7) I have perused the file and I am satisfied that the employee has complied with all the requirements to serve the employer with the referral. I thus find that the employer has failed to show cause for non-attendance.⁵

[11] It is this ruling that the applicant seeks to review and set aside.

Grounds for review

[12] The applicant seeks to have the commissioner's rescission ruling reviewed and set aside on the basis that the commissioner acted unreasonably in his finding that the applicant failed to show good cause for its non-attendance at the arbitration.⁵ Further that he failed to consider the evidence presented by the applicant regarding the fairness of the employee's dismissal.

Applicable law and analysis

[13] Section 144 of the LRA deals with variations and rescissions, and it provides as follows:

'144. Variation and rescission of arbitration awards and rulings

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-

⁵ Index to pleadings, page 9, para 6 and 7 of arbitration award.

- (a) Erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) In which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
- (c) Granted as a result of a mistake common to the parties to the proceedings; or
- (d) Made in the absence of any party, on good cause shown.⁶

[14] The applicant's case is that the commissioner failed to consider “good cause” as required by the judgment in *Shoprite Checkers (Pty) Ltd v CCMA and Others*.⁶ In the said case, the LAC interpreted section 144 of the LRA and stated as follows:

[33] As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to section 144 of the Act in such cases both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief. It follows, that if one was to hold that section 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by the wording of the section it could lead to unfairness and injustice. In my view this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret section 144 of the Act so as to include “good cause” as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in section 34 of the Constitution because, if section 144 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise his right provided for in section 34 of the Constitution despite the fact that he may not have been at fault for his default. That could be a grave injustice.’

⁶ [2007] 10 BLLR 917 (LAC) at para 33.

[15] The LAC further stated that:

‘[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and secondly whether the applicant has a *prima facie* defense. In *Northern Province Local Government Association v CCMA and Other* [2001] 5 BLLR 539 (LC) at 545 at para 16 it was stated:

“An application for the rescission of a default judgment must show good cause and prove that he at no time denounced his defense, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made *bona fide* and he must show that he has a *bona fide* defense to the plaintiff’s claims.”

[36] In *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others* (1994) 15 ILJ 1310 (LAC) at 1311 I – 132a Nugent J had this to say: -

“These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.”

[16] In this case, it is apparent that the commissioner was satisfied that the applicant was notified about the date of the arbitration hearing. However, the applicant failed to attend. It was the applicant’s submission that its non-attendance was based on a *bona fide* but mistaken belief that documentation submitted to the CCMA by e-mail would be taken into account by the commissioner and that it would be sufficient to have the employee’s referral dismissed. In this regard, the commissioner held that:

‘...I am not convinced that the employer could have not been aware that she was to attend the CCMA and defend her case and further that sending documentation through email was sufficient not to appear before the commission...’

- [17] The commissioner did not consider the second aspect of the test. On the prospect of success, he simply stated that he was satisfied with the award issued. There is no indication that he considered the applicant's submissions on its prospects of success in the arbitration. As such, the commissioner failed to apply the test for good cause as set out by the LAC in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others* judgment. In so doing, he committed a gross irregularity.
- [18] In light of the above, I am of the view that the applicant succeeded in making out a case that the commissioner's finding that the applicant failed to show good cause is a finding which is not supported by evidence and/or reasons contained in the ruling. Therefore, the commissioner committed a reviewable irregularity, and his ruling stands to be set-aside on this ground alone. To remit the rescission application to the CCMA for a fresh consideration would be against the principle of speedy resolution of disputes. There is enough material before this Court to substitute the decision of the commissioner.
- [19] In its application for rescission, the applicant submitted that it has good prospects of success in that the employee contravened its valid and reasonable rule that he was aware of. The applicant further submitted that the employee was dismissed pursuant to a disciplinary process that started with a verbal warning through to a disciplinary hearing that was held on 29 August 2015, which was disputed by the employee. I agree with the employee's submission that it was careless of the applicant to have relied on the mistaken belief that sending documents to the CCMA would exempt it from attending the arbitration hearing despite the clear wording of the notice of set down. The applicant's explanation for its default is clearly unreasonable.
- [20] Although the applicant failed to provide good reasons for its non-attendance of the arbitration hearing, I am satisfied that it has reasonable prospects of success in the arbitration proceedings. In the premise, fairness dictates that the matter

should be set down again for arbitration to enable both parties to state their cases.

[21] With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[22] In the circumstance, I make the following order:

Order

1. The rescission ruling dated 28 May 2015, handed down by the first respondent acting under the auspices of the second respondent under case number GAJB20566/14 is reviewed and set aside and substituted with the following ruling:
 - 1.1 The default arbitration award issued under GAJB20566/14 dated 2 March 2015 is rescinded.
2. The second respondent is directed to set down the unfair dismissal dispute referred by the third respondent for arbitration to be heard by an arbitrator other than the first respondent to determine whether or not the dismissal of the third respondent was procedurally and substantively unfair.
3. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate H P West

Instructed by Nolans Inc

For the Respondent: Advocate Henno Viljoen

Instructed by Mervyn Taback Inc

LABOUR COURT