



IN THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not Reportable

CASE NO: JR 2355/15

In the matter between:

PEERMONT GLOBAL (PTY) LTD t/a KORONI

HOTEL CASINO CONVENTION RESORT

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

DANIEL PHEEHA SEOPELA N.O

Second Respondent

NDIVHALENI GLORIA NEMAVHOLA

Third Respondent

Heard: 14 September 2017

Delivered: 29 March 2018

Summary: A commissioner's ruling refusing rescission because of the untruthfulness of the explanation for the default and the applicant's failure to show serious intention to proceed with the arbitration, falls within bounds of reasonableness. It may not be reviewed and set aside.

JUDGMENT

LALLIE, J

- [1] The third respondent was employed by the applicant until her dismissal for misconduct. She challenged the fairness of the dismissal at the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) where the second respondent (the commissioner), having arbitrated the dispute in the applicant's absence, issued an award in the third respondent's favour. The applicant filed an application for the rescission of the award. The commissioner refused rescission. In this application the applicant seeks an order reviewing and setting aside the rescission ruling. The application is opposed by the third respondent.
- [2] The commissioner gave a number of reasons for refusing rescission. He found that the applicant was in wilful default because it was aware that the matter was scheduled to commence at 09h00 on 20 August 2015. He noted that Ms Emmenis (Emmenis) an employee of the applicant submitted that Mr Malope (Malope), the applicant's representative, arrived at Khoroni Hotel at 09h05 on 20 August 2015. Malope submitted that he arrived at 08h00 and was delayed by the consultation he held with the financial manager and the whistle blower who were going to be witnesses at the arbitration. He concluded that they misled the CCMA. He held a dim view of the applicant's failure to send someone from Khoroni Hotel (the hotel) to the Thohoyandou Labour Centre, where the arbitration was held, to request that the arbitration should commence later than scheduled. The hotel is situated less than a kilometre from the arbitration venue. The commissioner further found Malope's explanation that he was delayed in traffic and that he was not an ambulance and could therefore not activate a siren for other road users to give him the right of way, was a sign of lack of remorse. The commissioner also found that the third respondent should not suffer because the applicant's representative failed to prepare his witnesses on time and decided to sleep at Burgersfort, a distance from Thohoyandou. He concluded that the applicant was in wilful default.
- [3] The commissioner considered the submissions on prospects of success. He took into account the applicant's failure to seize the opportunity to present its case and prospects of success. He concluded that the applicant had no

prospects of success. He further found that granting rescission would prejudice the third respondent and constitute a miscarriage of justice as the applicant was in wilful default.

- [4] The applicant sought to rely on a number of grounds to have the rescission ruling reviewed and set aside. The grounds include the submission that the commissioner committed gross misconduct in wrongly concluding that it was in wilful default. He took into account irrelevant submissions of the contradiction in the applicant's explanation of its default when the relevant consideration in rescission applications is that the applicant party was absent when the default award was obtained. A further attack on the award is based on the commissioner's alleged improper conclusion that the applicant waived its right to be heard. He unreasonably concluded that granting rescission would constitute miscarriage of justice. He reached wrong findings that the applicant would not suffer prejudice as a result of the refusal of the rescission application. He incorrectly took into account prospects of success in circumstances where the applicant was not present when the default award was obtained. The applicant further submitted that the commissioner reached an unreasonable decision. The third respondent's basis for opposing the application was that the rescission ruling is correct and reasonable. She submitted that the applicant had not established grounds to have the rescission ruling reviewed.
- [5] When this application was argued counsel for the applicant sought to raise arguments which are not foreshadowed in the papers to the objection of the third respondent's counsel. The applicant's pleaded case is in essence that the rescission ruling is unreasonable because the commissioner incorrectly considered whether it was in wilful default when the correct consideration was that the applicant was absent when the award was obtained. The commissioner cannot be faulted for enquiring whether the applicant was in wilful default. The following test for default judgment enunciated in *Shoprite*

*Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*¹ has not changed:

“[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* defence. In *Northern Province Local Government Association v CCMA & others* [2001] 5 BLLR 539 (LC) at para 545, paragraph [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 defence, 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* defence to the plaintiff's claims”

[36] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others* (1994) 15 ILJ 1310 (LAC) at 1311J-1312A, Nugent J had this to say:

“Those 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.”

- [6] An award or ruling of a commissioner of the CCMA may be reviewed and set aside when the commissioner has misconceived the enquiry before him or her or when the commissioner has reached a decision that a reasonable decision-maker could not reach on the evidentiary material before him or her. The totality of the evidentiary material before the commissioner supports the third respondent's case that the commissioner cannot be faulted. In applying the test for rescission the commissioner correctly and reasonably enquired whether the applicant was in wilful default. He based his decision on the evidence before him that the explanation for the default was neither reasonable nor *bona fide* because Emmenis and Malope gave contradictory explanations and the commissioner found that it was an attempt to mislead

¹ [2007] 10 BLLR 917 (LAC) para 35 and 36.

the commission. The gravity of attempting to obtain rescission by misleading the CCMA constitutes valid grounds to refuse rescission. It falls in the category of cases in which the absence of one essential element is fatal to the application.

- [7] It was also argued on behalf of the applicant that the ruling should be set aside on the basis that the applicant was not in default but its representative arrived late. It was correctly argued on behalf of the third respondent that the applicant's argument overlooks some reasons the commissioner gave for his decision. The commissioner recorded that the arbitration was postponed on 14 July 2015, on the basis that the representative of the respondent was booked off sick as he was involved in an accident. He requested Emmenis who was sent to request the postponement to provide a medical certificate supporting the request. When she could not find Malope, the commissioner postponed the arbitration hearing and told Emmenis to tell Malope to bring the medical certificate and the accident report when the matter was next scheduled for arbitration. It is common cause that Malope did not bring the accident report. It is also not in dispute that the applicant was aware that the arbitration was scheduled to commence at 09h00 on 20 August 2015. Malope's version is that he arrived in Thohoyandou at 08h00 on the morning of the arbitration. He had not obtained the accident report. He consulted with the applicant's witnesses and without attempting to seek permission from the CCMA arrived at the arbitration venue 45 minutes late when the third respondent was about to leave. As Malope was the applicant's representative and the applicant conducted the arbitration through him, the commissioner reasonably expressed his disapproval of his conduct which did not show serious intention to proceed with the case.
- [8] The applicant's attack on the commissioner's finding that granting rescission would prejudice the third respondent and constitute miscarriage of justice is invalid. The finding is based on the evidentiary material before the commissioner and consistent with the test for rescission which required the commissioner to determine if it would be fair and just to grant the indulgence.

The applicant did not establish valid grounds to have the rescission ruling reviewed and set aside.

[9] The third respondent sought a costs order against the applicant. Granting the costs order will be fair and just as the third respondent should not be out of pocket for reasonably opposing the review application.

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

Order

1 The application is dismissed with costs.

Z Lallie

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate Botha

Instructed by Mohlaba & Moshwana Inc

For the Third Respondent: Advocate Mosholane

Instructed by: Radzilani Attorney

LABOUR COURT

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