



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1252/16

In the matter between:

VEA ROAD MAINTENANCE & CIVILS (PTY) LTD

Applicant

and

LEN DEKKER N. O

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

SOLIDARITY obo J.D.M BREDENHANN

Third Respondent

Heard: 2 May 2018

Delivered: 4 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] Following a referral of an alleged unfair dismissal dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) by Solidarity on behalf of its member, (Bredenhann), the matter was then scheduled for arbitration on 16 March 2016. At those proceedings, the applicant VEA Road Maintenance & Civil (Pty) Ltd ('VEA'), was to be represented by counsel (Adv. Le Grange). Attempts to settle the dispute by

the parties proved unsuccessful. Counsel for VEA excused himself before the proceedings could commence, in view of not having his witnesses available.

[2] The first respondent (Commissioner), then proceeded to hear the matter in default, and found that the dismissal of Bredenhann on 31 August 2015 on the grounds of incapacity was substantively and procedurally unfair, and awarded him an amount of R315 000.00 as compensation. Aggrieved by the default arbitration award, VEA filed an application for rescission which Solidarity opposed. That application was dismissed, leading to the review application before the Court.

[3] The evidence of Bredenhann leading to the default arbitration award as summarised by the Commissioner is as follows:

3.1. He was employed on a fixed term contract by the VEA as a Traffic Safety Officer. VEA is a road construction company, which was engaged as a sub-contractor by Raubex Group Ltd.

3.2. During 2004, he was involved in a motor accident, which caused him psychological trauma. He was thereafter diagnosed with Post-Traumatic Stress Disorder, and was further advised against exposing himself to future motor collision scenes because it may aggravate his condition. This meant that he could fulfil some of his obligations as a Traffic Safety Officer, but could not attend to motor vehicle collisions that had resulted in severe injuries and/or fatalities.

3.3. During July 2015, his medical condition was aggravated by other factors such as the passing of his mother, and the non-accommodative work environment, which ultimately led to his hospitalisation.

3.4. On 11 August 2015, Mr R Scheepers a Director of VEA wrote a letter to him which read:

“ ...

Your Meeting with Mr Regardt Scheepers this morning refers.

As per your doctor's order due to your state of nature and illness regarding trauma, you both agreed that your services with VEA Road Maintenance & Civils (Pty) Ltd will come to an end at 31 August 2015 and your final salary will be paid to you on month end August 2015.

...

3.5. Bredenhann disputed that there was such an agreement or that his medical doctor had endorsed the termination of his services. His last day in the employ of VEA was on 31 August 2015.

[4] Aggrieved by his dismissal, Bredenhann with the assistance of Solidarity then approached the CCMA with an alleged unfair dismissal dispute, which led to the default arbitration award that VEA sought to rescind. The Commissioner on 2 June 2016 issued a ruling dismissing the rescission application.

Rescission ruling:

[5] The founding affidavit in support of the rescission application before the CCMA was deposed to by VEA's director, Regardt Scheepers who had averred the following;

5.1 VEA was not in default and that there was an 'excellent and reasonable explanation' for not attending the proceedings. Upon receipt of the notice of enrolment of the con/arb hearing, VEA had instructed its previous attorneys of record to defend the claim. The attorneys of record in turn briefed counsel to appear on its behalf.

5.2 He (Scheepers), together with Ms A Henning were to be witnesses at the arbitration proceedings. He could however not be at the proceedings as he had to attend an 'urgent tender meeting' in Zeerust on short notice. He averred that if he had failed to attend the tender meeting, the company would have forfeited the possibility of securing a successful tender. A further complication was that on 18 March 2016, Ms Henning, who would have been required to testify at the arbitration proceedings resigned from VEA. Counsel for VEA was therefore compelled to withdraw from the dispute, as none of the witnesses were

available to give evidence in support of its case at the con/arb. In this regard, it was submitted that the above factors were indicative of the fact that at no point did VEA renounce its defence against Bredenhann's claim.

- 5.3 In respect of the prospect of success, it was contended that there were reasonable prospects of success in that Bredenhann was not dismissed but that the employment relationship was terminated in terms of a mutual separation agreement.

[6] The Commissioner in dismissing the rescission application reasoned as follows;

- 6.1. The arbitration proceedings commenced on 16 March 2016 at 12:00. At that time, he (Commissioner) was preoccupied with another unrelated dispute. Counsel for VEA together with officials from Solidarity were informed that proceedings would commence at 14:00 once the Commissioner had disposed of the other dispute.
- 6.2. When the Commissioner returned at the scheduled time, he (the Commissioner) was informed by Solidarity's officials that Counsel for VEA had informed them that he was not properly briefed on the matter, and further that VEA's witnesses were unable to attend the proceedings. Counsel was therefore instructed telephonically to withdraw/excuse himself from the matter based on those factors.
- 6.3. The Commissioner appreciated VEA's averments that Counsel had been briefed to attend to the matter but as a consequence of the non-availability of witnesses, he was compelled to withdraw. The Commissioner however stated that in such circumstances, VEA ought to have briefed Counsel who was already present, to appear and explain to the CCMA, its predicament in regards to the unavailability of its witnesses, and to seek a postponement of the proceedings, rather than simply abandoning the proceedings. In the absence of Counsel having requested a postponement, good cause had not been shown for the default.

- 6.4. The Commissioner further noted that in seeking a rescission, reliance was placed by VEA on the provisions of section 144(d) of the LRA, which require that good cause be shown and that one of the factors to be considered in that respect was whether there was a *bona fide* defence against the main claim.
- 6.5. VEA had contended that there was no dismissal but rather a mutual separation, and the Commissioner found that there was no substance in VEA's contention that there was a *bona fide* defence, as no such averments were made to sustain that contention. In the result, the Commissioner found that the rescission application did not comply with the provisions of section 144(d) of the LRA and dismissed it.

Grounds of review and the submissions:

- [7] VEA's grounds of review centred around the Commissioner's characterisation of the dispute he was called upon to resolve. Its contention was that the Commissioner misconstrued the nature of the rescission application, in that, he dealt with the application before him in terms of the provisions section 144(d) of the LRA, as opposed to those of section 144(a) of the LRA. It was submitted that the Commissioner committed an error in facts and in law, by concluding that the provisions of section 144(a) of the LRA did not apply to the application before him.
- [8] VEA further submitted that the Commissioner's conduct amounted to a misdirection in respect of the applicable legal principles and that such misdirection constitutes an irregularity as contemplated in section 145(2) of the LRA. This argument was premised on the view that a rescission application ought to be granted where the default arbitration award was erroneously sought or granted in circumstances where at the time that it was issued, there were facts that existed, which the Commissioner was not aware of, and of which he had he been aware of, he would not have granted the award.
- [9] Notwithstanding the above contentions, VEA further argued that the submissions placed before the Commissioner supported the view that even if

its attorneys of record and Counsel were negligent in failing to make an application for postponement of the arbitration proceedings, such a failure could not have been to its determinant, as it was not wilful, nor was there an intention to abandon its defence before the CCMA.

[10] To the extent that the Commissioner had considered the element of *good cause* as contemplated in section 144(d) of the LRA, VEA further submitted that the Commissioner had unsatisfactorily done so, resulting in an unsustainable outcome, specifically since no assessment was made of its prospects of success on the merits of the main dispute.

[11] Solidarity on behalf of Bredenhann opposed the review application on a variety of grounds including that;

11.1. Once counsel was instructed to withdraw from the matter, VEA would have been expected to make an application for postponement but had failed to do so. Such a failure ought to render any application for rescission devoid of merits.

11.2. The withdrawal of Counsel from the proceedings not only resulted in the abandonment of VEA's defence, but VEA had also reconciled itself with the possibility of a default arbitration award being issued.

11.3. VEA had other alternatives available to it other than withdrawing from the proceedings for example Counsel could have moved for an application for postponement from the bar.

11.4. It is was not correct that there were facts which the Commissioner was unaware of at the time the default arbitration was issued and that this was apparent from the rescission ruling.

Evaluation:

[12] As mentioned above, central to the complaint in respect of the rescission ruling is that the Commissioner committed an irregularity by misconceiving the nature of inquiry before him, which resulted in the Commissioner arriving at an

unreasonable outcome. This complaint pertains to which provisions of section 144 of the LRA the Commissioner had placed emphasis on.

[13] Under the provisions of section 144 of the LRA, Commissioners enjoy a wide discretion to rescind or vary award or ruling in the following circumstances;

- a) If it appears to the Commissioner that the arbitration award was erroneously sought or granted in the absence of the other party;¹
- b) there is an ambiguity, material error or omission;²
- c) where there is a common mistake to the parties to the proceedings³; or
- d) where the award was issued in the absence of any party and good cause is demonstrated for the default.⁴

[14] VEA's case as I understand it is that the Commissioner erred and therefore committed an irregularity by finding that the provisions of section 144(a) were not applicable to the current dispute, and by resolving the dispute in terms of the provisions of section 144(d) of the LRA.

[15] In *F & J Electrical CC v MEWUSA obo E Mashatola and Others*⁵, it was held that whether a rescission is granted in circumstances where an order (award) was erroneously sought or granted in the absence of the other party, this did not depend upon the applicant showing good cause or sufficient cause. It was sufficient if the order or award was erroneously sought or granted in the absence of that party. This implies that for an order or award to be claimed to have been erroneously sought or granted in the absence of the other party, there must have been a patent defect which was unknown to the Court/Commissioner at the time the order/award was issued. Examples in this regard include but are not limited to instances where the defaulting party was

¹ Section 144(a) of the LRA

² Section 144(b) of the LRA

³ Section 144(c) of the LRA

⁴ Section 144(d) of the LRA

⁵ [2015] ZACC 4; 2015 (4) BCLR 377 (CC); (2015) 36 ILJ 1189 (CC); [2015] 5 BLLR 453 (CC) at para [27]

not properly served with a notice of set-down; where the pleadings instituting the claim were not properly served on the defaulting party etc⁶.

- [16] VEA's averments in respect of the rescission application before the Commissioner were clearly not grounded in the provisions of section 144(a) of the LRA. There is no allegation that the default arbitration was erroneously sought or obtained. On the contrary, the averments fell on all fours within the ambit of section 144(d) of the LRA. The facts of the case before the Commissioner was that indeed the notice of set-down was received, and there was an attendance by VEA's counsel, who on its own version, had to withdraw from the matter as no witnesses were available. The Commissioner in the absence of an application for a postponement did not hear from VEA that it had a predicament due to the unavailability of its witnesses. That information came from Bredenhann's representative.
- [17] In circumstances where a party's witnesses are unavailable for whatever reasons, which reasons were not formally placed before a Commissioner for the purposes of seeking an indulgence, it cannot be said that an award was erroneously sought or obtained where no attempts were made to bring that fact to the attention of the Commissioner, whether prior to or on the set-down date. The fact that witnesses were not available on its own in any event, without an application for a postponement, cannot be a patent defect for the purposes of a determination whether an award was erroneously sought or obtained.
- [18] Significant with this matter is that it is unusual for counsel (where instructed) to simply abandon matters before they come before a court or Commissioner. Even if counsel was instructed to withdraw from the matter for whatever reason before it commenced, at most, courtesy required that even if an application for a postponement was not to be pursued due to lack of instructions, at most, counsel ought to have formally advised the Commissioner that he no longer had instructions to continue with the matter and was thus withdrawing. It was therefore unusual for counsel to simply inform his opponents of his predicament and leave before the proceedings

⁶ See *Bakoven Ltd GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F

could commence. It follows from these conclusions that there is no merit in the contention that the Commissioner committed a reviewable irregularity in failing to consider the provisions of section 144(a) of the LRA when no legal or factual basis was laid in that regard. At most, the conduct of abandoning the arbitration proceedings without even an appearance before the Commissioner or a request for a postponement evinced an abandonment of VEA's defence, contrary to its contentions that it had not done so.

- [19] Once the provisions of section 144(a) of the LRA were found to be inapplicable or unsustainable to a set of facts as in this case, the defaulting party is then required to show good cause for its default under the provisions of section 144(d) of the LRA. The requirements of good cause were explained in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape Order*⁷ as follows;

"... In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and others v Western Bank Ltd*, supra). The authorities emphasize that it is unwise to give a precise meaning to the term good cause. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait*:

"When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352–3*). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances."

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait, supra, Chetty v Law Society, Transvaal*)."

⁷ [2003] 2 All SA 113 (SCA)

[20] VEA had in the alternative, argued that the rescission ruling was reviewable because the conclusion reached by the Commissioner that it had failed to satisfy the requirement of good cause was unreasonable. It outlined the following facts in support of its contention:

20.1. The instruction to Counsel to withdraw from the arbitration proceedings did not amount to a renunciation of its defence.

20.2. Even if the withdrawal and the default was due to the Counsel's negligence in not applying for the postponement of the matter, the negligence should not be attributed to VEA and it should not be punished for such negligence. Because VEA's failure to attend the arbitration proceedings was not due to its own fault but of its legal representatives, the default cannot be wilful.

20.3. The Commissioner applied the requirements of good cause in terms of the provisions of section 144(d) of the LRA incorrectly. The Commissioner failed to take into consideration the prospects of success in the main dispute, whether *prima facie* VEA could successfully defend its decision to dismiss the employee. This is because there was evidence before the Commissioner that there was in fact no dismissal but rather a mutual separation. According to VEA, the failure to consider the prospects of success constituted a reviewable irregularity.

[21] A perusal of the Commissioner's ruling indicate that the above complaints were dealt with, as he had concluded that VEA's Counsel would have been expected to appear and explain the non-availability of witnesses and seek postponement, rather than simply abandoning the proceedings.

[22] The difficulty that VEA has in this case is that it seeks to absolve itself from its actions and those of its representatives that led to the dispute being heard in default. It has already been indicated that for reasons that are not clear, other than the fact that witnesses were not available, counsel left proceedings without advising the Commissioner of his predicament. Inexplicably, no attempt was made to seek a postponement. A second factor is that

Scheepers chose to attend a 'tender meeting' rather than availing himself as a witness. I did not understand his averment to be that counsel was instructed to advise the Commissioner of his predicament, and even then, it is doubted that the Commissioner would have been sympathetic given the excuse. Thus, the fact that the tender meeting was convened at short notice is not a valid excuse. A third factor is that Ms Henning resigned on 18 March 2016, whilst the arbitration proceedings were held on 16 March 2016. I fail to see the relevance of this excuse in circumstances where Ms Henning was still an employee as at the date of the proceedings. Even if she was serving notice at the time, there is no reason why arrangements could not have been made to secure her availability as a witness even if by means of subpoena. A fourth factor is that even if VEA for some strange reason sought to absolve itself from what can be viewed as negligence on the part of its attorneys in not instructing counsel to seek a postponement before departing, it remains trite that applicants cannot be excused from the tardiness or negligence of their chosen representatives. In the end, the Commissioner's conclusions that the explanation proffered for the default was unsatisfactory cannot be faulted.

- [23] The Commissioner had proceeded to make an enquiry as to whether VEA had made averments which established prospects of success on the merits, and concluded that there were none. In coming to that conclusion, the Commissioner had regard to the documents submitted as evidence, and in particular, the disputed correspondence related to the alleged agreement of mutual termination of the employment relationship. VEA offered nothing in its founding affidavit to the rescission application other than that there was a mutual separation. This scant averment, in circumstances where VEA was in possession of a copy of the default award in which an extensive account of how the dismissal was deemed to have been unfair was given, can hardly suggest or establish *prima facie* prospects of success. It was not sufficient, as can be gleaned from the application before the Commissioner⁸ for VEA to simply aver that its single version (that there was mutual separation) constituted reasonable prospects of success, or simply to aver that its version

⁸ Paragraphs 15 – 19 at page 32 of Index to Pleadings

is vastly different to that presented by Bredenhnn, when that version was not pleaded.

[24] To summarise, VEA had not before the Commissioner, established a case to rescind the default award under section 144 (a) or 144 (d) of the LRA. It had failed to demonstrate any good cause before the Commissioner, and the latter's ruling is clearly unassailable. Solidarity had in the opposing affidavit, also sought an order making the default award an order of court. There is nothing from the circumstances of this case that precludes this Court from making such an order.

[25] In the premises, the following order:

Order:

1. The Applicant's application to review and set aside the rescission ruling issued by the First Respondent dated 2 June 2016 is dismissed.
2. The default award issued under case number GAEK 11702-15 dated 16 March 2016 is made an order of court in terms of the provisions of section 158(1)(c) of the Labour Relations Act.
3. There is no order as to costs.

E Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:

Mr C. Higgs of Higgs Attorneys

For the Third Respondent:
SOLIDARITY

Mr G.J Visser (Union official) of

LABOUR COURT