



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1922/08

In the matter between:

SUPER GROUP (PTY) LTD T/A SUPER

GROUPSUPPLY CHAIN PARTNERS

Applicant

and

BONISA MBOVANE N.O

First Respondent

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FRIGHT INDUSTRY

Second Respondent

CEPPWAWU OBO DLAMINI AND OTHERS

Third Respondent

Heard: 17 May 2018

Delivered: 13 November 2018

JUDGMENT

LALLIE, J

- [1] This is an application to review and set aside a ruling in which the first respondent (the arbitrator) refused to rescind an award she granted against the applicant. It is opposed by the individual third respondents (the respondents).
- [2] The respondents filed their answering affidavit late and applied for condonation. The condonation application is opposed by the applicant. The respondents submitted that their answering affidavit was filed late by 34 months and 3 days. The reasons they proffered for the delay are that the third respondent trade union, CEPPWAWU (the union) advised them that there was no use in opposing their review application as the matter would, in all probability be remitted to the second respondent for arbitration. A further reason was that the union told them that it had no money to spend on opposing the review application. The review application was served on the union on 26 May 2009. After the respondents accepted that their attempts to get assistance from their trade union were unsuccessful, they parted ways with it in December 2011. They sought assistance from the firm of attorneys which is representing them in this matter in January 2012 and it launched an application to make the rescission ruling an order of court in March 2012. It realized in April 2012 upon receipt of opposition to their application that the review application had been launched and took the necessary steps which culminated in the filing of the answering affidavit. The respondents submitted that they have excellent prospects of success and that the delay will not prejudice the applicant.

- [3] The test for condonation is stated as follows in *Grootboom v National Prosecuting Authority and Another*¹:

‘ It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default’.

The respondents’ main reason for filing their answering affidavit late is that they were denied assistance by their trade union. A delay of 34 months and 3 days is excessive and requires reasonable explanation.

- [4] The default award reinstating the respondents was issued on 17 June 2008. The ruling refusing to rescind the award was issued on 16 August 2008. By their own admission, the respondents were informed by the union of its decision and reasons for not assisting them to oppose the rescission and review application. If the respondents were committed in opposing the review application as they believed that they had an excellent case they should have sought alternative assistance within reasonable time. They cannot use the failure of their chosen representative, the trade union, as a defence against the consequences of the delay. Their ignorance of the relevant time frames cannot assist them to explain the delay of 34 months and 3 days because at all material times they knew that they needed assistance to be reinstated in terms of the default award. They sat on their rights at their own peril.

¹ 2014 [1] BLLR 1 (CC) at para 23.

- [5] The applicant did not establish their allegation of good prospects of success in the main application as they failed to make averments which, if proved, would lead to their success in the rescission application. The respondents provided no reasonable explanation for the excessive delay of 34 months and 3 days. They also have no prospect of success. Their condonation application cannot succeed.
- [6] The circumstances leading to the issuing of the ruling under review are that after receiving the default award reinstating the respondents, the applicant filed an application to have the award rescinded. The applicant relied on 2 reasons, namely, that it did not receive the notice to attend the arbitration and that it had good prospects of success in the unfair dismissal dispute. The rescission application was unopposed and the arbitrator decided it on the papers. She rejected the applicant's explanation for the default on the basis that having perused the file she noted that all the correspondence between the applicant and the second respondent was conveyed through the same fax number used to send the notice to attend the arbitration. She concluded that mere denial of receiving the notice of set down without plausible reasons does not constitute a good ground for rescission. The arbitrator's finding on prospects of success was that the applicant failed to seize the opportunity of defending its case.

[7] The applicant's main grounds for review are that the ruling is defective as envisaged in section 145 (2) of the Labour Relations Act² (the LRA) because the arbitrator committed gross irregularities in the conduct of the arbitration, made an error of law in considering the rescission application and reached an unreasonable decision. The applicant relied on the arbitrator's omission to consider its *bona fide* defence.

[8] The test for review based on errors made by arbitrators in the conduct of arbitrations is settled. It is expressed as follows in *Department of Education v Mofokeng & Others*³:

'...Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

[9] The first leg of the test requires the establishment whether the arbitrator made an error. The applicant's averments that the arbitrator made an error. The applicant's averments that the arbitrator erred are true because in determining rescission application two factors need to be taken into account. They are: whether the applicant was in wilful default and whether the applicant has a *bona fide* defence. The arbitrator did not consider the applicant's defence at all. Section 138(1) of the LRA enjoins arbitrators to deal with the substantial merits of disputes before them. The arbitrator failed to deal with the substantial merits of the issue before her when she failed to apply the full test

² 66 of 1995, as amended.

³ (2015) 36 ILJ 2802 (LAC) at para 32.

for rescission. The applicant submitted that had the arbitrator applied the test for rescission correctly, she would have reached a different decision as it had shown a *bona fide* defence which was unopposed. The arbitrator misconceived the dispute by conducting the enquiry incorrectly. Her ruling therefore stands to be reviewed and set aside.

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

Order

1. Condonation of the late filing of the answering affidavit is refused.
2. The rescission ruling issued by the first respondent under case number GPRFBC2017 dated 16 August 2008 is reviewed and set aside.
3. The matter is remitted to the second respondent for the rescission application to be determined *de novo* by an arbitrator other than the first respondent.
4. The application in terms of section 158(1)(c) of the LRA is dismissed.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Snider

Instructed by: Fluxmans Incorporated

For the Respondent: Mr Goldberg of Goldberg Attorneys

LABOUR COURT