IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no.: JR 1762/17

In the matter between:

BLUECHIP DEVELOPMENT **Applicant**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

BENGANI KHUMALO *N.O.* **Second Respondent**

KARABO GABACOE *N.O* **Third Respondent**

CLEMENT RAMAQABE **Fourth Respondent**

Heard: **09 January 2019**

Delivered: **12 July 2019**

Summary: **Application for rescission of a default arbitration award and a rescission ruling. Re-statement of the principles relating to rescission applications and reviews. Review application granted. Consideration of review ground related to Commissioner's failure to have proper consideration to the facts of the matter.**

JUDGMENT

SNIDER AJ

[1] This is an application to review and set aside –

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1.1 a default arbitration award ("the default award") issued by the Second Respondent, dated 15 February 2017, and

1.2 a rescission ruling ("the rescission ruling") issued by the Third Respondent dated 8 August 2017.

[2] The application for rescission was made in an effort to rescind the default award. Both the rescission application and arbitration which culminated in the default award were heard under case number GAJB2311-16.

[3] The default award was granted in circumstances where the Applicant ("Bluechip Development") was not present at the arbitration.

[4] There is considerable effort devoted, by the Applicant, in this application and in the application for rescission, as to its knowledge (or lack thereof) of the set down of the arbitration. I do not regard this part of the evidence as decisive. The Third Respondent, in the rescission ruling, gives the Applicant the benefit of the doubt in finding that, apart from the explanation for not having been at the arbitration, he must also consider the merits of The Applicant's case.[1]

[5] I refer to the "benefit of the doubt" in this regard as there is not, at any point in the papers, a satisfactory explanation as to why the SMS notification which appears to have been sent out by the Commission for Conciliation, Mediation and Arbitration (CCMA) was not responded to timeously by the Applicant. In fact, on the contrary in this regard, there is an allegation in the founding affidavit[2] to the effect that "*the applicant only noticed the SMS reminder sent by the CCMA about a week after the matter was scheduled . . . .*". The representative of the Applicant however, never received the SMS, as his cell phone number changed in the interim. The Applicant has also failed to have regard to rule 5A of the rules of the First Respondent, which makes clear provision for the use of "short message service" to give

[1] Page 26 of the pleadings, page 6 of the rescission ruling.
[2] Page 12 of the rescission of the review application paragraph [8.7]

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notice of an arbitration.

[6] However, in respect of the consideration of the merits of the Applicant's case, the Third Respondent did not deal with the factual circumstances as they pertained to the merits of the dismissal, as per the Applicant's version at all.

[7] The only ground for review advanced by the Applicant that, in my view, has merit, is that the Third Respondent failed to apply his mind to the facts of the matter. This issue was, with respect, concisely dealt with by the Labour Appeal Court in *Head of Department of Education v Mofokeng & Others*[3] where the following was stated –

> "[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that

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> the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[8] The Third Respondent finds that withholding the employee's salary in order to force his attendance at a disciplinary enquiry is unusual and unconventional and does not accord with the general sense of fair and just practice.

[9] I am fully in agreement with this; however there certainly appears to be more to the dispute. The Applicant has, on an unopposed basis, alleged that the reason for the dismissal was that the Fourth Respondent was charged with the unauthorised removal of company property on 20 October 2016 and (uncommunicated) absence on 21 October 2016.

[10] The Employee was indeed not paid monies owed to him in order to secure his presence at the disciplinary enquiry which was arranged for 27 October 2016. The Employee failed to attend on 27 October 2016 despite having been sent an SMS to attend on this day, and the disciplinary enquiry was rescheduled for 31 October 2016. Once again the Employee failed to appear and the disciplinary enquiry was held in his absence.

[11] To my mind this is a factual dispute which the Third Respondent was duty bound to determine, in order for justice to be done. I am of the view that his failure to do so produced an unreasonable outcome and that it was material in the sense as set out in Mofokeng (*supra*).

[12] In the premises the following order is made:

Order:

1. The default award and the rescission award are set aside.

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[3] (2015) 36 ILJ 2802 (LAC).

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2. The CCMA is ordered to set the mater down for arbitration.

3. There is no order as to costs.

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Snider, A J

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Daniel Berry

For the Respondent: In person.

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