

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 843/15

In the matter between:

GLENCORE COAL SOUTH AFRICA LIMITED

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER T NTIMBANA N.O.

Second Respondent

R CHIPANE

Third Respondent

V CHIBI

Fourth Respondent

Heard: 16 July 2019

Delivered: 08 October 2019

JUDGMENT

SAUNDERS, AJ

Introduction

- [1] This is an application brought by the applicant to review and set aside a rescission ruling issued by the second respondent on 31 March 2015 and received on 6 April 2015, in which the second respondent dismissed an application for the rescission of a default arbitration award issued on 4 March 2015.

- [2] The default arbitration award found that the dismissal of the third and fourth respondents was substantively and procedurally unfair and ordered their reinstatement with full retrospective effect.

Background Facts

- [3] A dismissal dispute launched by the third and fourth respondents was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and set down for con-arb on 27 February 2015. The applicant was not present on 27 February 2015 and a default award was issued under case number MP953-15 by the second respondent.
- [4] The default award was received on 6 March 2015 and the deponent to the rescission application states under oath that he immediately contacted the CCMA and requested the relevant documentation.¹ The rescission application was deposited to and launched timeously. The rescission application remained unopposed and was ultimately refused by the second respondent.
- [5] The applicant launched this review application in May 2015, which was opposed by the third and fourth respondents. The answering affidavit is, on the version of the third and fourth respondents, 140 days late. I am of the view that the interests of justice warrant the granting of condonation in respect of the answering affidavit.
- [6] This matter turns on whether there was proper notice of set down of the con-arb process served on the applicant. It is common cause that the notice of set down was sent by registered post on 13 February 2015 for a hearing on 27 February 2015. The notice of set down was also faxed to the applicant. There was an element of confusion as to how many numbers it was faxed to. This shall be dealt with hereunder.
- [7] In respect of the postal address, the papers state that the applicant did not receive the notice of set down sent via registered post. In argument, it was highlighted that the incorrect address was used. While the number of the postal address was correct, a PO Box address was used by the first

¹ Pleadings Bundle, page 22, Annexure SK2, Rescission Application.

respondent, instead of the correct address, which was the Private Bag X address².

[8] On this basis, it is not necessary for me to consider whether this service was timeous and whether it gave the requisite notice in terms of the rules of the CCMA. Simply put, it was the incorrect address and therefore service was not effected.

[9] In respect of the fax numbers, three fax transmission slips were included in the bundle.³ Two of the transmission slips illustrate an unsuccessful transmission and the third indicates transmission to the following number: (013) 655 2348. The version set out by the applicant was that this was unsuccessful as it was sent to a totally different complex, the Impunzi complex.⁴ The fax number (013) 653 5349 is a correct number for the applicant, but the first, third and fourth respondents erroneously used 3549 instead of 5349.⁵ This is evident from the con-arb set down notice as well as the Form 7.11 submitted by the third and fourth respondents.

[10] In short, no service of the set down was effected.

[11] The second respondent's finding is encapsulated at paragraph [16] which states as follows:

'After consideration of the above submissions, failure to attend by the respondent was wilful. The notice of set down was properly served to the respondent on time by registered mail on the same address as provided in this application for rescission...'

[12] The award continues at paragraph [17] to state that:

'There was no explanation as to how a default award was received within three days after such award was issued. It is evident from the file that the respondent received the default award through the same fax number used to

² Record Bundle, page 13.

³ Record Bundle, page 9-11

⁴ Pleadings Bundle, page 14 at para 35.

⁵ Pleadings Bundle, page 66, Replying Affidavit at para 21.

serve the notice of set down. In the circumstances, the respondent failed to show good cause for non-attendance.'

- [13] As highlighted above, this was not the case, as the first respondent and the third and fourth respondents had made an error in the fax numbers. The default award had been received but the notice of set down and Form 7.11 had not.
- [14] The first ground of review was that the commissioner committed an irregularity by finding that the applicant had received proper notice of set down of the con-arb when the registered post had not been sent with the requisite 14 days' notice of the set down. Furthermore, it was not received.
- [15] The second ground of review was that the commissioner found that the applicant had received the posted notice of set down which was not the case. The commissioner found that service by fax to a number at a different site to the Impunzi complex (which belonged to the applicant) could constitute service.
- [16] The third ground of review was that the commissioner should not have found that the individual respondents had been dismissed on the basis of two letters, when the individual functions had been outsourced to Burea Veritas in terms of a section 197 of the Labour Relations Act (LRA)⁶ transfer and the respondents were both employed by Burea Veritas thereafter. Reinstatement would therefore be an impossible remedy in circumstances where the third and fourth respondents are already employed by another employer as a result of outsourcing.
- [17] The fourth ground of review is that the commissioner placed relevance on how the default award was received from the different complex to the Impunzi complex.
- [18] The fifth ground of review was that the commissioner granted relief in circumstances where it was clear that the third and fourth respondents had

⁶ Act 66 of 1995 as amended.

been employed by the organisation which had taken over the laboratory function of the applicant.

The relevant test for review of rescission applications

[19] As one of the central issues is whether or not the second respondent properly applied the principles relating to rescission applications, it is important to set out exactly what these principles are. The fact is that the failure by the second respondent to apply the required principles in determining a rescission application as required by law would constitute a reviewable irregularity.

[20] The basic test for determining a rescission application is found in the judgment of *Superb Meat Supplies CC v Maritz*,⁷ where it was held as follows:

‘The applicant must give a reasonable explanation of his default; his application must be made bona fide; he must show that he has a bona fide defence to the plaintiff’s claim. This needs to be shown prima facie only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out facts which, if established at the trial, would constitute a good defence. The defence must have existed at the time of the judgment.

In determining whether or not good cause has been shown, the court is given a wide and flexible discretion in terms of rule 31(3)(b). When dealing with words such as ‘good cause’ and ‘sufficient cause’ 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. The court’s discretion must be exercised after a proper consideration of all the relevant circumstances.’

[21] In *Northern Training Trust v Maake and Others*,⁸ the Court said:

‘The enquiry in an application for the rescission of an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set-down was sent (for instance by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which

⁷ (2004) 25 ILJ 96 (LAC) at paras 21 and 22.

⁸ (2006) 27 ILJ 828 (LC) at paras 28 and 29.

concerns itself with the reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessarily deal fully with the merits of the case.

The two requirements of fairness and expedition should be balanced. Where there is an apparent conflict between the two, fairness should be given precedence lest injustices are done.'

- [22] The above clearly illustrates that a rescission application requires a proper determination of the issue of whether "good cause" exists to rescind a default award. The determination of "good cause" requires a two- tier investigation, the first being the consideration of the explanation for the default and the second being a consideration of the issue of prospects of success. Furthermore, was the application a *bona fide* one. Finally, there are considerations of fairness.

The issue of the explanation

- [23] It is apparent that service of the notice of set down was not effected, either timeously or at all. In this respect, the second respondent was incorrect in his finding.

- [24] The judgment in *Ndhlela v Transnet Ltd*⁹ is pertinent:

'An ingredient of the requirement that good cause be shown is that the element of wilfulness must be absent. The reasons for an applicant's absence or default must be set out because they are relevant to the question of whether or not the default was wilful. Before an applicant can be said to be in wilful default the following elements must be shown:

- knowledge that the action is being brought against him or her;
- a deliberate refraining from entering an appearance or appearing, though free to do so; and

⁹ (2004) 25 ILJ 565 (LC) at para 30.

- a certain mental attitude towards the consequences of default.'

- [25] With regard to the issue of the explanation provided by the applicant in this matter, the simple explanation of the applicant is that the notice of set down was sent to the incorrect postal address and to the incorrect fax number. This was set out extensively in the papers and the argument. There is little doubt that the applicant did not receive the notice of set down. On this basis, there can be no knowledge of the pending dispute and therefore no wilfulness in the resultant absence by the applicant.
- [26] The second respondent does not deal with any of the above issues. The second respondent did not cross-reference the correct fax numbers and postal addresses. A proper analysis of the Form 7.11 and the proof of faxes and postal address against the letters of dismissal would have highlighted that the details were not, in fact, correct. On this basis, service could not have been effected and therefore, the conclusions that service was effected and that the default was wilful are unsustainable and irregular and fall to be set aside. The explanation that the applicant was unaware of the hearing date was reasonable and acceptable.
- [27] It is accordingly my view that there was a proper, and in essence, an undisputed explanation as to why the applicant did not attend the arbitration, being that it in fact never received the set down notice and was unaware of the con-arb process on 27 February 2015. Reference is accordingly made to the judgment in *Electrocomp (Pty) Ltd v Novak*¹⁰ where the Court held as follows:
- 'The principle laid down in *Federale Stene* and a line of preceding cases including *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W), establishes that where a party to an application was genuinely unaware of the date of set down, the granting of judgment by default would be erroneous and it is not necessary for the party concerned to have shown or proved good cause.'

¹⁰ (2001) 22 ILJ 2015 (LC) at para 12.

[28] In the circumstances, where not only was the applicant unaware of the set down, but the set down had not actually been served, the granting of the judgment by default was erroneous, and similarly, so was the refusal of the application for rescission.

[29] I conclude that the applicant has provided a *bona fide* and acceptable explanation for not attending at the arbitration on 27 February 2015. Finally, fairness in this instance dictates that the applicant be afforded the opportunity to present its case on the merits of the matter.

Conclusion

[30] Based on all of the above, it is my view that the rescission ruling of the second respondent constitutes a reviewable irregularity and cannot be allowed to stand. The applicant did provide an acceptable explanation for its default and has shown the requisite prospects of success. Finally, it is in the interest of justice and fairness that the applicant be given an opportunity to present its case on the merits of this matter. After hearing submissions in respect of this matter, I intend to substitute the rescission ruling of the second respondent with an order that the applicant's application for rescission is granted.

[31] This then only leaves the issue of costs. While the matter was opposed, the fact that a hearing on the merits between the parties is still to come, I do not believe that a costs order is appropriate. In the interests of fairness in this instance, I intend to make no order as to costs.

[32] In the premises, I make the following order:

Order

1. The condonation application for the late filing of the answering affidavit is granted.
2. The rescission ruling issued by the second respondent under case number MP 953 dated 31 March 2015 is reviewed and set aside and substituted with the following order:

- 2.1 The default award issued by the second respondent is rescinded.
3. The first respondent is directed to set the arbitration proceedings down for hearing on the merits before an arbitrator other than the second respondent.
4. There is no order as to costs.

S. Saunders

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B. Masuku of Mervyn Taback Incorporated

For the Third Respondent: Mr N. Mahomed of Nadeem Mahomed Attorneys