

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

24/04/25
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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR926/24

In the matter between:

TARMAN GROUP HOLDINGS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER GS JANSE VAN VUUREN

Second Respondent

AMOS VUSI SEDIBE

Third Respondent

Heard: 25 February 2025

Delivered: 24 April 2025

Summary: Unopposed review application – employee dismissed for assaulting his colleague at work – employee alleging that the reason for the assault was that his colleague had sworn at him – unfair dismissal dispute scheduled for con/arb and arbitration occurring in the absence of employer despite the employer having delivered a notice of objection to con/arb albeit less than seven days before the scheduled con/arb hearing – rescission refused by Commissioner – reasonableness of Commissioner's decision.

JUDGMENT

MKWIBISO, AJIntroduction

- [1] In this matter the applicant (the employer) seeks to set aside on review a rescission ruling dismissing its application to rescind an award that was granted by default in favour of the third respondent (the employee).
- [2] The issue is whether the second respondent (the Commissioner), a senior commissioner who was appointed by the first respondent (the CCMA) to conciliate and arbitrate the dispute between the parties, unreasonably refused to grant the employer's rescission application.

Relevant facts and evidence

- [3] The employee was dismissed by the employer on 31 January 2024 for having assaulted his colleague at work. The employee had undergone a disciplinary hearing on 29 January 2024, prior to his dismissal. The outcome of that hearing acknowledged that the employee had pleaded guilty to the allegation of assault and, *inter alia*, provided the following:

"PROSECUTOR'S CASE:

The Prosecutor states that a fellow employee instructed the accused to take the water truck to a specified site as another employee required water in order to clean another truck, however this accused refused to follow said instruction which resulted in the fellow instructing employee and the accused getting into a fight and whereby the accused assaulted his fellow employee.

ACCUSED'S CASE:

The Accused states that his job was to fill up the milling machine with water. On 22 January 2024, his fellow instructing employee arrived on site and did not ask for water but that he just started shouting and fighting, after which he phoned his employer to inform him of his refusal to follow instructions. The accused states that he did in fact provide the water as instructed. The accused states further that prior to providing the water, he wanted to change the pipes and to turn the water truck around in an attempt to make it easier for the other

employee to use, which the other employee understood as the accused refusing to provide the water.

The accused states further that he did not speak badly to his fellow instructing employee, or cursed at him, but that his fellow instructing employee spoke badly to and cursed at the accused and threatened to call the police, which is when the accused assaulted his fellow employee. The accused states that the allegation that he does not follow instruction is false and that his fellow employee is lying about the fact that he does not follow instructions.

RECOMMENDATION:

In light of the above-mentioned and taking into consideration that the accused had received a written warning for insulting fellow employees on site in front of a client, and taking into consideration that the accused assaulted a fellow employee and the seriousness of such an offence, it is my recommendation that the accused be dismissed with immediate effect”.

- [4] It seems on 31 January 2024 the employee was issued with a letter informing him of the outcome of the disciplinary hearing and informing him that he was dismissed from his duties. Unhappy with his dismissal, the employee referred an unfair dismissal dispute to the CCMA.
- [5] The dispute was scheduled for a con/arb hearing on 19 March 2024. Having received the notice of the con/arb process, the employer objected to the con/arb process. However, this objection was filed on 15 March 2024, being four calendar days before the scheduled con/arb hearing. The objection had been served on the employee by registered post on 12 March 2024, which was seven days before the con/arb hearing.
- [6] The CCMA's case management officials did not bring the employer's objection to con/arb to the Commissioner's attention. As a result, the Commissioner proceeded with the arbitration hearing on 19 March 2024, in the absence of the employer. There is no evidence that the Commissioner attempted to conciliate the dispute before proceeding with the arbitration, which attempt would have involved having to contact the employer.
- [7] At the arbitration hearing, the employee was the only witness who testified.

- [8] On 22 March 2024, the Commissioner issued his arbitration award. The said award records that the employee was a Driver earning a salary of R8 000.00. The award reflects that the employee acknowledged having assaulted his colleague at work and advanced the defence that the said colleague had sworn at him. In other words, he effectively raised the defence of provocation.
- [9] The award did not make a finding as to whether or not the employee was guilty of misconduct, having assaulted a co-worker. The award did not specify what exactly the employee's colleague had said, which constituted swearing and which had provoked the employee into committing the misconduct of assault. There was no assessment of whether provocation was a complete defence against the misconduct of assault or whether it was a partial defence that could only be used as mitigation against a dismissal. As a result, the award did not reach a conclusion that the dismissal was too harsh a sanction for the misconduct of assault.
- [10] The award reasoned as follows:
- “[17] I am aware of the fact that the applicant's version has not been tested, but I have no reason to doubt his credibility and I consequently accept his evidence. An employer who ignores a notice to attend arbitration proceedings at the CCMA does so at its own peril.
- [18] The fact that the alleged victim had not been called to testify at the applicant's disciplinary hearing certainly raises the question whether the chairperson had, for instance, taken into consideration the fact that he had sworn at the applicant.
- [19] The respondent in its letter of 31 January 2024 advised the applicant of a recommendation by the “HR Attorneys of your immediate dismissal of duties at the company.” There is no indication that anybody in the service of the respondent had accepted that recommendation and that anybody had actually taken a decision to dismiss the applicant. The recommendation had, in any event, not been that the applicant should be dismissed – he only had to be dismissed of duties, whatever that may mean.

[20] It is, however, clear that the respondent had immediately proceeded to terminate the applicant's service without further ado. The applicant's UIF documents were prepared for collection by him that very same day and he was effectively dismissed".

- [11] The award found that the dismissal was substantively and procedurally unfair and granted to the employee compensation in the amount of ten months' remuneration, being the amount of R80 000.00. The employee had insisted on compensation instead of reinstatement.
- [12] The award reached the employer on 22 March 2024. Unhappy with the outcome, the employer served and filed an application for rescission of the award on 28 March 2024. In this application, the employer provided evidence by way of emails showing that it had filed its objection to the con/arb process on 15 March 2024, as well as evidence of the service of the objection on the employee by registered post on 12 March 2024. The employer further alleged that it had good prospects of success because it had conducted a disciplinary hearing before dismissing the employee, at which he had pleaded guilty to the allegation of assaulting a colleague at work. The employer pointed out that the late filing of the objection to con/arb, four days before the hearing, did not render the objection invalid on the authority of *Valinor Trading 133 CC t/a Kings Castle v CCMA and Others (Valinor Trading)*¹.
- [13] The Commissioner dismissed the rescission application in a ruling dated 13 May 2024. The rescission ruling held that section 144(a) of the Labour Relations Act² was not applicable because it was not the employer's case that it had not been notified of the con/arb hearing.
- [14] The rescission ruling found that the employer had provided a reasonable explanation for its default:

"[17] It is not necessary to refer to the Labour Court's judgment in *Valinor Trading 133 CC t/a Kings Castle v CCMA* because I had not ignored or rejected

¹ *Valinor Trading 133 CC t/a Kings Castle v CCMA and Others* (2023) 44 ILJ 1106 (LC); [2023] 4 BLLR 321 (LC).

² Act 66 of 1995.

the respondent's objection. I had, in fact, been unaware of the respondent's objection to the con-arb process for the simple reason that no such objection had been placed in the case file. I consequently accept that the respondent has furnished a bona fide, reasonable and acceptable explanation for its default".

[15] The rescission ruling acknowledged that the rescission application had advanced an argument that the employer had good prospects of success on the merits of the unfair dismissal dispute. However, the ruling held that the employer had sidestepped the crux of the award, contained in paragraph 19 of the award quoted above. In other words, the Commissioner was of the view that the employee's dismissal was substantively and procedurally unfair because after the disciplinary hearing of 29 January 2024 he had been issued with a letter dated 31 January 2024 in which the recommendation of dismissal made by the Chairperson of the disciplinary hearing was not specifically adopted by the employer and because the recommendation was that the employee be dismissed from duties which was different from being dismissed. This was the basis on which the employer's rescission application was dismissed.

[16] Unhappy with the outcome of the rescission application, the employer applied to have the rescission ruling set aside on review before this Court. The review application was filed timeously on 10 June 2024. The employer contends that the Commissioner's decision to dismiss the rescission application is not one that a reasonable commissioner could make.

Analysis

[17] The test for setting aside an award on review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³ the Constitutional Court held that section 145 of the Labour Relations Act was suffused by the Constitutional standard of reasonableness:

"[110] To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), para [110].

it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair” (own emphasis).

- [18] In *Herholdt v Nedbank Ltd*,⁴ the Supreme Court of Appeal summarised the review test in the following terms:

“[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable” (own emphasis).

- [19] The employer’s application for rescission was not limited to section 144(d) of the Labour Relations Act. Whether the award was issued erroneously as envisaged by section 144(a) of the Labour Relations Act was a live issue in terms of the application for rescission.
- [20] Section 144(a) of the Labour Relations Act provides that a commissioner who has issued an award may rescind that award if it was made erroneously in the absence of a party affected by the award.
- [21] The Commissioner’s finding that the employer had a *bona fide*, reasonable and acceptable explanation for its default must stand as it has not been challenged on review. This finding clearly accepts that the award was erroneously made in the absence of the employer as the Commissioner should not have proceeded

⁴ *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA), para [25].

with the arbitration hearing in light of the objection to the con/arb process. The award should have been rescinded on this basis alone. In this regard, it should be recalled that section 191(5A)(c) of the Labour Relations Act provides that:

“(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns –

(a) ...

(b) ...

(c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection”.

[22] In *Valinor Trading*, the Court found section 191(5A)(c) to mean that “*once a party objects to arbitration, arbitration cannot lawfully commence.*”⁵ The Court also dealt with the requirement in rule 17(2) of the CCMA rules to file an objection to con/arb not less than seven days prior to the hearing, and found that this rule could not mean that an objection filed less than seven days prior to the con/arb hearing was invalid in light of the fact that section 191(5A)(c) of the Labour Relations Act did not provide any time frames for objecting to con/arb and the Labour Relations Act had to prevail over the CCMA rules.⁶

[23] The Commissioner’s finding that section 144(a) of the Labour Relations Act did not apply simply because it was not the employer’s contention that it was not notified of the con/arb hearing was unreasonable. The mere fact that the arbitration proceeded despite the objection to con/arb that was filed four days prior to the hearing meant that there was an error as envisaged in section 144(a) of the Labour Relations Act and justified the rescission of the award without having to consider issues of good cause.⁷

⁵ *Valinor Trading* (supra), at para 11.

⁶ *Valinor Trading* (supra), at para 15 and 20 - 22.

⁷ *F&J Electrical CC v MEWUSA obo E Mashatola and Others* (2015) 36 ILJ 1189 (CC).

- [24] If section 144(d) of the Labour Relations Act were to be applied instead of section 144(a), then section 144(d) provides that a commissioner who has issued an award may rescind that award if it was made in the absence of any party, on good cause shown. A reasonable and acceptable explanation for the employer's default coupled with good prospects of success on the merits of the unfair dismissal dispute would constitute good cause. As mentioned above, the Commissioner's finding that the employer's absence was *bona fide*, reasonable and acceptable stands. The only issue would be whether or not the employer has good prospects of success on the merits of the unfair dismissal dispute. In my view, no reasonable commissioner would conclude that there were no prospects of success on the ground that the employer did not accept the recommendations of the presiding officer of the disciplinary hearing and because the letter of dismissal said the employee was being dismissed from duties and not dismissed as an employee of the employer. It seems the Commissioner was clutching at straws here. It is clear that the employee was dismissed by the employer following a disciplinary hearing in which he pleaded guilty to assaulting a co-worker. The employee considered himself to have been dismissed and he claimed that his dismissal was unfair due to his allegation that he was provoked by being sworn at, not because he felt there was some process that was not followed after his disciplinary hearing was concluded. It is quite obvious that the employer dismissed the employee because it had accepted the findings of the presiding officer of the disciplinary hearing. Even if the Commissioner was correct that there was no formal acceptance of those findings, this would only be a procedural issue and the question would still remain as to whether the employer had a good case on the merits or substantively, relating to the admitted misconduct of assault committed by the employee. The Commissioner unreasonably found his tenuous procedural concerns to constitute issues of substantive fairness.
- [25] Ultimately, it was unreasonable for the Commissioner to dismiss the employer's rescission application. The Commissioner should have granted the application in order to allow the parties to fully address their dispute on the merits at a fresh arbitration hearing.

- [26] It is worth noting that had the Commissioner made proper attempts to conciliate the matter before proceeding with the arbitration hearing in the con/arb process, the employer would have been contacted and would have informed the Commissioner of the objection to con/arb once conciliation had failed to resolve the dispute. It is important to remind commissioners of the following principle articulated by the Labour Appeal Court in *Premier Gauteng and Another v Ramabulana NO and Others*⁸ regarding conciliation proceedings:

"[10] What the provisions of sec 191(4) mean is that, once the CCMA or a bargaining council with jurisdiction, has received a referral of a dismissal dispute as contemplated in sec 191(1) of the Act for conciliation within the prescribed period of 30 days or, I am sure, within a longer period and has condoned the late referral, the CCMA or the bargaining council has an obligation to attempt to conciliate it. While in many cases this may mean that the parties must be physically present at a conciliation meeting, I do not think that it can be said that the CCMA or a bargaining council cannot undertake attempts to conciliate a dismissal dispute simply because one party is not physically at the conciliation venue even if he is only a telephone call away and is available to telephonically participate in attempts at conciliation" (my emphasis).

- [27] Making a proper attempt to conciliate this matter would probably have avoided the delays that have been caused by the need to rescind the default award.

Costs

- [28] The application was not opposed and as such there should be no order as to costs.
- [29] In the premises, the following order is made:

⁸ *Premier Gauteng and Another v Ramabulana NO and Others* (2008) 29 ILJ 1099 (LAC); [2008] 4 BLLR 299 (LAC), at para 10.

Order

1. The rescission ruling of the second respondent dated 13 May 2024 under case number GAEK2446-24 is reviewed and set aside.
2. The rescission ruling is replaced by an order that the arbitration award of the second respondent dated 22 March 2024 under case number GAEK2446-24 is rescinded and the matter is remitted to the first respondent for an arbitration hearing *de novo* before a commissioner other than the second respondent.
3. There is no order as to costs.

A handwritten signature in black ink, appearing to be 'VG Mkwibiso', is written over a horizontal line. To the right of the signature is a black rectangular redaction box.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant : Adv N Strydom

Instructed by : Lionel De Villiers (LDV) Attorneys

For the Third Respondent : No appearance