REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable
Case no: JA15/2013

In the appeal between

CSIR **Appellant**

and

MATSILA, NDADULENI AUBREY AND OTHERS **First Respondent**

GERHARD JANSEN VAN VUUREN *N.O* **Second Respondent**

PAUL POTO *N.O* **Third Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Fourth Respondent**

Date of judgment: 27 March 2014

Date edited: 20 May 2014

CORAM: DAVIS JA, NDLOVU JA, SUTHERLAND AJA

JUDGMENT

DAVIS, JA

[1] This is an appeal against a judgment of Bhoola J, which was delivered on

14 December 2012, in which the learned Judge in the Court *a quo* dismissed an application for review of an award which had been made by 2nd and 3rd respondents respectively. The facts appear to be fairly common cause, accordingly, I will deal with them briefly.

[2] On 8 October 2010, the appellant notified the 1st respondent to attend what was referred to as:

> "A poor performance hearing.
> On 19 October 2010, so that:
> "He could answer to allegations that he was performing poorly."

[3] During the period 1 April 2010 to 8 October 2010, five charges were raised against him, details of which are not entirely relevant to the dispute which confronts this court.

[4] The hearing was chaired by Mr B Khumalo, a panellist of Tokiso Dispute Settlement (Pty) Ltd. Ultimately, though the employer did not present oral evidence, Mr Khumalo found the respondent to be guilty of certain of the charges (charges 1, 2, 4 and 5). Accordingly, he recommended after a consideration of mitigating and aggravating circumstances that 1st respondent's services be terminated.

[5] On 2 November 2010, the appellant informed the 1st respondent of the termination of his employment. On 10 December 2010, 1st respondent referred to an unfair dismissal dispute to the CCMA in terms of section 191 of the Labour Relations Act 66 of 1995. In terms of this referral, he challenged his dismissal on both substantive and procedural grounds.

[6] On 27 January 2011, after the conciliation meeting, a Commissioner of the CCMA stated in the certificate of outcome that the dispute had remained unresolved. A notice was then generated by the CCMA on 10 February 2011 at an arbitration to be scheduled for 09:00 on 14 March 2011.

[7] Significantly, in paragraph 1 of the notice, the parties are informed that:

> "The arbitration process will commence punctually at the given time (in this case 09:00)."
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> Paragraph 3 of the notice states:
>
> "Failure to attend may result... the matter proceeding in the absence of the non-attending party."
>
> Paragraph 8 provides a further warning, and parties are warned that:
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> "Parking may be a problem, therefore make timeous arrangements."

[8] It appears that the 1st respondent, together with the attorney, Mr Myambo arrived at the premises of the CCMA at the appointed hour for the purpose of the arbitration. The appellant's representative and/or its witnesses were not, it is common cause, on the premises at 09:00 as had been specified in the notice. The arbitration was allocated to 2nd respondent. When the matter was called for the first time, nobody appeared on behalf of the appellant.

[9] There is a dispute as to precisely what happened insofar regarding Ms Ngubane who was to represent the appellant. She admitted that she arrived late. In her version (and there are at least two versions thereof in the record that but I shall pass over them because they are not particular relevant) she claims that she arrived at 09:15. She asked an unidentified person on the CCMA premises as to the location of the arbitration, but did not obtain a satisfactory reply. Ultimately, at 09:35 she found the 2nd respondent by which time the 2nd respondent had delivered the decision to which I shall refer presently.

[10] Pursuant to these events, two rescission applications were lodged, the relevant one being on 7 April 2011, in which the appellants lodged a rescission application. In the application for rescission following is stated:

> "The arbitration was conducted at the CCMA building in Pretoria and I, Nombuyiselo Ngubane, who was going to represent the respondent was late for about 15 minutes (*sic*) and the proceedings were conducted without respondent 'CSIR' being present and represented. I immediately brought the issue to the attention of the CCMA receptionist and I was told to wait until they call the case as they normally do.

> At about 09:35 I insisted to the receptionist (*sic*) to see the Commissioner and the receptionist directed me to the boardroom where the case was held. I approached the Commissioner and introduced myself. His response was that:
>
> 'Sorry, madam, I have heard the evidence of the applicant, I cannot help you any further, and you should wait for the award.'"

[11] To the question as to why the rescission should be granted, the appellant listed a series of procedural issues:

> "The employee was informed of allegations in a manner that the employee understood. The employee was given a reasonable time to prepare and to respond to the allegations. The employee was given an opportunity to state his case during the proceedings. The employee was represented by a legal person. The employee was informed in writing of the decision regarding incapacity hearing. The employer gave clear reasons for terminating the service of the employee."

[12] As to the justification on the grounds of substantive fairness for the application for rescission, only the following appears:

> "Employer has strong evidence to prove poor work performance against the applicant (Mr Matsila)."

[13] When the case was heard by this Court, Mr van der Westhuizen on behalf of the appellant sought to argue that there were grounds for reviewing the award of the Arbitrator, which was granted by default on 26 March 2011, on a range of grounds to which I shall refer presently. In the absence thereof, he submitted that there was justification for the application for rescission to have been brought against this award on 7 April 2011.

[14] Let me turn to the points of substance. In the first place, there is an argument developed by the appellant that, when the proceedings took place before the 2nd respondent on 26 March 2011, no proper application had been brought in terms of Rule 25 (3) (C) of the CCMA Rules to ensure that the 1st respondent could be represented by his lawyer, Mr

Myambo. Accordingly, the proceedings stood to be set aside because a legal representative was representing the appellant in circumstances where the proper procedures for such representation had not been followed.

[15] It is common cause that Mr Myambo was present at the hearing. Mr van der Westhuizen goes further and suggests that it must follow that Mr Myambo had a role to play in the proceedings because 2nd respondent, in making an award in favour of the 1st respondent ordered the appellant to pay the 1st respondent's costs.

[16] Mr van Graan, who represented the 1st respondent, observed that the award of costs is a fairly standard practice insofar as CCMA awards are concerned and there is insufficient evidence to justify the inference that what was intended was to compensate the attorney, Mr Myambo, for the work that he had done in representing the 1st respondent at the hearing.

[17] But there is more powerful evidence in favour of the 1st respondent in this regard. The record contains the CCMA transcription. The case was conducted by the 2nd respondent in an inquisitorial fashion. There is nothing on the record which suggests that Mr Myambo came on record, made any contribution to the proceedings, made any representations to the 2nd respondent or did anything more than accompany the 1st respondent to the hearing. On this alone, there is insufficient evidence to set aside an award on the argument developed by the appellant insofar as the improper admission of a legal representative is concerned.

[18] The second issue concerned the fact that it was common cause that the appellant's representative, Ms Ngubane, had arrived late for the hearing, on 26 March 2011. Mr Van der Westhuizen pressed the point that there is a practice that arbitrators, conducting arbitrations under the aegis of the CCMA, wait for 30 minutes before they will make a default award. That is an award in which the one side is not present. Mr van Graan characterised this as an indulgence as opposed to a practice, submitted further that to insist on a rigid application of the 30-minute rule would be to

erode the discretion of an Arbitrator to run the hearing in the manner that he or she deems fit.

[19] But there is a further question because, on the papers, there can be no doubt that the first communication that took place between Ms Ngubane and the 2nd respondent was at 09:35. Until then, there had been no communication nor could it be said that the 2nd respondent in any way would have known that somebody was going to arrive to represent the appellant on the particular day in question.

[20] Ms Ngubane's conduct, when she approached the 2nd respondent, is described in the rescission application and in her founding affidavit in the review application. What is clear is that she never asked the 2nd respondent to reopen the case. It may have been that, had she asked the 2nd respondent to reopen the case when she confronted him at 09:35, and had presented a formal application in support thereof, a refusal may have constituted the kind of irregularity which would have supported the appellant's case.

[21] But in the absence of an application, there does not appear to be any basis on which the 2nd respondent was required to exercise the kind of discretion which has now been attacked by the appellant. There is thus no merit in disturbing the decision that was made by the Court *a quo*.

[22] The third question that arose, turned on the evidence which the 2nd respondent had heard from the 1st respondent at the default hearing of 26 March 2011. Mr Van der Westhuizen submitted that the evidence which was presented before the 2nd respondent was skeletal in nature, sufficiently thin to justify a conclusion that there was an inadequate evidential basis to come to a conclusion that there had been an unfair dismissal.

[23] To that, there are at least two responses. In the first place, once the issue concerns a default hearing, manifestly that which is required by way of oral evidence from a party is much less than would be the case if the

matter was opposed. In ordinary default hearings where evidence is required, the evidence is of a relatively perfunctory nature to establish the major requirements to ensure that the cause of action is real and can be justified.

[24] In the second place, I am somewhat reluctant to raise the forensic bar to an excessive height when one considers that cases which concern arbitrators in a highly-pressed institution such as the CCMA. The standard which is required must be one of fairness and justice. It does not require the precision that maybe required from proceedings before the High Court.

[25] With those remarks in mind, I turn to examine that which was led before the 2nd respondent. The 2nd respondent established that the 1st respondent was employed as a Senior Manager Stakeholder in the Stakeholder Relations and Communication Department. He established that the 1st respondent had been dismissed with effect from 30 November 2010. He established evidence to the extent of 1st respondent's remuneration. He then established that an interview had taken place and, allegations had been that:

> "I was not performing according to the expectation."

[26] He was asked whether he agreed with this conclusion, and when he said no, he went on to say:

> "After all these allegations because she put me under immense pressure, trying to frustrate me in the process (superior supervisor) and eventually there was a dismissal hearing."

He then describes this hearing. He also informed the 2nd respondent that he has been given insufficient training. This may not be a fully-blown forensic inquiry, but it did establish in the mind of the 2nd respondent that he was dealing with an employee who alleged that he had been unfairly dismissed, that he had been found guilty on four of the five charges which had been brought against him, that he had not been given counselling or training, that he had been put under immense pressure, and that he

considered that the dismissal was completely unfair.

[27] Given the threshold which I have described, it appears that this was a sufficient basis to allow the default hearing for a party such as the second Commissioner to determine that there was a cause of action and a remedy should follow therefrom. Again, I emphasise that these remarks are made within the context of a hearing where one party does not appear and, has not presented its case.

[28] In the circumstances, I find that on the substantive and procedural questions of the review against the award of the 2nd respondent of 26 March 2011, there is insufficient basis to interfere with the award, and further, that the ultimate conclusion arrived at by the Court *a quo* stands to be upheld.

[29] Turning to the rescission application, I have already set out the grounds which were put up by the appellant in support of the rescission application. I must confess that I find the conduct of appellant somewhat strange in the situation. Having already found itself into trouble by virtue of being late for the hearing, one would have expected that by the time appellant came around to the preparation of the application for rescission, careful legal advice would have been sought and a comprehensive justification in support of such an application would be forthcoming. It is true that under the grounds of procedural fairness, six bullet points appear, to which I referred above. When it comes to substantive fairness, simply to say:

> "Employer has strong evidence to prove poor work performance against the applicant is utterly unsatisfactory, this is tantamount to no explanation, no case being made out in support of why there is good cause for the case of the appellant. It is simply unsatisfactory to bring an application for rescission and to say so little, of so little moment in so important a matter. In the result, the application of rescission albeit that it was dealt with in terms of its reasons in a fairly cursory fashion, stands to be upheld."

[31] For these reasons, the appeal is dismissed and the order of the Court *a quo* is upheld. I confirm the award of the 2nd respondent dated 26 March

2011 save for this caveat. Given the amount of time that has lapsed from the granting of the award to these proceedings, it appears that the 1st respondent should provide information regarding remuneration that he would have earned in the interim period, that is from the time of the date of the dismissal until the date of this judgment, so that a setoff of any remuneration earned against that which flows to be paid to the 1st respondent pursuant to the award can be made between the parties.

[32] Further, the costs of this application are to be paid for by the appellant.

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Davis JA

Judge of Appeal

Ndlovu JA & Sutherland AJA concurred

Appearances:

For the Appellant: G Van Der Westhuizen

Instructed by: MacRobert Inc

For the First Respondent: ESJ Van Graan SC

Instructed by: De Swart Vogel Myambo Attorneys