

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Number: J 2825/98

In the matter between

J OOSTHUYZEN

Applicant

and

TURBO SERVICES PRETORIA CC

Respondent

JUDGMENT

WAGLAY A J

- 1 In this matter the Applicant applied in terms of s 158 (1) (c) of the Act to make the arbitration award made by the Commission for Conciliation Mediation and Arbitration (CCMA) on 29 July 1998 an order of this Court.
- 2 The Respondent opposes this application on the grounds that Applicant secured the award as a result of fraudulent evidence presented to the Commissioner. Respondent thus seeks to rescind the arbitration award alternatively to refer the matter to the CCMA for rescission or further alternatively for this Court to review and set aside the said award.

3 Respondent argued that notwithstanding s 144 of the Act this Court by virtue of its inherent jurisdiction is entitled to rescind the award of the CCMA and relies on the decision of Landman A J as he then was in the matter of Deutsch v Pinto and another [1997] 18 ILJ 1008 [LC] at 1015 A where the Court held under the heading of “ The common - law power of rescission” that

“Another supervisory power which this Court probably has is to be found in the inherent jurisdiction of this Court, which is a superior Court having inherent jurisdiction. It has the power to rescind an order of a tribunal subject to its jurisdiction at least on the grounds of fraud.”

4 The fraud that the Respondent states Applicant committed as stated earlier was that the evidence Applicant presented at the arbitration was false.

5 According to the Respondent the Applicant was contracted by it as an independent contractor as a sales / marketing representative from 1 September 1997 and earned an amount of R 2000.00 per month plus a commission in

respect of business introduced by the Applicant. Further no PAYE or tax was deducted from his salary and that Respondent exercised no control over the Applicant and Applicant could perform the work as he saw fit.

6 In October of the same year Respondent employed the Applicant on a fixed term contract as a site foreman on a specific project the completion date of which was anticipated to be either the end of November or December of 1997.

7 Respondent further states that Applicants services as an independent contractor ended when he was given the fixed term contract and that it was not going to be renewed once the fixed term contract had ended.

8 Applicant in response thereto denied that he was employed as an independent contractor but as an employee in a sales / marketing representative capacity and that as and from 1 September 1997 he was employed as a site foreman by the Respondent not on a fixed term contract but on a full time basis.

9 Respondent was not present during the arbitration at the CCMA and the only evidence presented to the Commissioner was that of the Applicant. The Commissioner under the heading “ Background to the Issue” records

“The employee started working for the employer on 1 September 1997 as a representative earning R 2000.00 and 10% commission per month. One of the foreman on the Gromer farm was dismissed in October 1997 and the employee was asked to go and work on the farm until the specific project was finished for R 4000.00 per month. The work entailed sandblasting and painting of tiles. This was a temporary arrangement and he would have resumed his normal duties in January 1998.”

Under the heading of “Award” the commissioner records under paragraph (a)

“... Although it is common cause that the employee would have started working as a representative again in January 1998 for R 2000.00 plus 10% commission ... ”

10 From this it is clear that the evidence which the Applicant

presented at the arbitration was that his appointment as a site foreman was a temporary one or for a fixed period - “until the specific project was finished”, and after the project was completed which he expected to be by the end of December 1997 he would revert to his position as a sales / marketing representative for the Respondent.

11 The Applicant’s statement in his affidavit headed replying affidavit is clearly in conflict with the evidence he tendered at the arbitration, in that while his evidence at the arbitration had been that his appointment as a site foreman was of limited duration, in response to Respondent’s allegation to the same effect Applicant states in paragraph 3 of his affidavit aforesaid that

“ ... After one Pieter Lingerfelder was dismissed by Respondent it was agreed between me and respondent that I am appointed as site foreman on the Gromer Farm. The anticipated completion date of the project was not at the end of November or middle December. It was not even discussed. The Respondent was to close down for the holidays and I was to resume my normal duties in January as site foreman at Gromer Farm. My salary was R 4000.00 (four thousand rand) per month.

(emphasis added)

The Applicant again in paragraph 5.1 of the affidavit states

“ ... I was an employee when I was appointed as sales / marketing representative. I deny that the Gromer Farm work was completed and *I deny I was appointed on an ad hoc basis ...*”

(emphasis added)

12 While normally I would be obliged to accept the version of the Applicant given the fact that his affidavit to Respondents application constituted an answering affidavit I cannot do so because of the obvious conflict between what is stated in his affidavit and the evidence he tendered at the arbitration. In the circumstances I reject the averments made by the Applicant as it is not for me to accept one or the other of his versions.

13 Having rejected the Applicant's version the only evidence before me is that of the Respondent. This I must accept and in doing so the only conclusion I can arrive at is that the Applicant deliberately and wilfully made incorrect

statements at the arbitration and as such committed fraud. While I do not express any opinion on whether the Commissioner would have arrived at any different award had he been presented the version Applicant has placed before this court on affidavit, that is not a decision I have to make. The fact is that on the version of the Respondent which is in effect the only one before me the Commissioner would have arrived at a different decision. This I believe constitutes sufficient ground to grant the Respondent a rescission so that both parties in so far as they may wish to continue with the matter can present their cases to the Commissioner for him to decide on the fairness or unfairness of the dismissal or whether or not there was a dismissal at all.

14 In terms of the inherent jurisdiction of this Court as provided for in s 151 (2) this Court I believe this court is entitled to rescind the award granted by the CCMA.

15 I am also mindful of the fact that Applicant's behaviour in failing to attend the arbitration proceedings border on contempt of the CCMA, the reasons provided by it for its

failure to attend the arbitration are not acceptable to this Court. But for the fraud the Applicant's application for rescission would not have succeeded.

16 Finally I have taken the Respondent's conduct in failing to attend the arbitration into account in determining whether or not on the basis of law and equity an order for costs should be granted.

17 In the result I order that:

1. The arbitration award made by Commissioner H Bendeman under the auspices of the CCMA dated 29 July 1998 under CCMA case number GA 30340 is hereby rescinded
2. the Applicant may apply to the CCMA for the matter to be set down for arbitration afresh
3. there is no order as to costs.

B WAGLAY

Acting Judge of the Labour Court of South Africa.

SIGNED AND DATED THIS 14th DAY OF May 1999.