

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR476/09

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

MOLOKO HENRY SEKOBA

Second Respondent

and

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First Respondent

SIBONGISENI HINTSHO N.O.

Second Respondent

APPOLLO BRICKS (PTY) LTD

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside a ruling made by the second respondent (the commissioner) on 21 October 2008 after he had dismissed a referral made by the first applicant on behalf of the second applicant. The applicants are also seeking an order to review and set aside the rescission ruling made by the commissioner on 19 December 2008 after he had refused to rescind the order that he had made on 21 October 2008.
2. The review application was opposed by the third respondent.

The background facts

3. The second applicant was employed by the third respondent as a front-end loader driver on 28 February 2000. He was dismissed by the third respondent on a charge of theft in

that it was alleged that he had stolen a computer. His dispute was duly referred to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration. The dispute was set down for arbitration on 21 October 2008. The second respondent failed to attend and his representative arrived late. The commissioner then dismissed his case and served a copy of his ruling on the first applicant on the same day.

4. The applicants felt aggrieved with the dismissal ruling and applied to rescind it.

The commissioner's ruling

5. The commissioner issued a rescission ruling dated 19 December 2008. He has set out the parties' different versions. He recorded that the second applicant stated that he was absent from the arbitration hearing at the CCMA because he was sick, suffering from respiratory problems. He consulted a doctor in Germiston and attached a certificate as proof. His union representative went to the offices of the CCMA in Pretoria by mistake and they telephoned the Johannesburg CCMA office and the third respondent. The union official went back to Johannesburg but was delayed due to traffic and arrived at the CCMA offices in Johannesburg office and found that his referral had been dismissed. He had been accused of stealing a computer and said that no one had led evidence to that effect at his disciplinary hearing.
6. The commissioner also recorded in his rescission ruling that the third respondent opposed the rescission application on the grounds that the second applicant's reasons given for his absence at the arbitration proceedings were false. He had allowed a taxi driver into the third respondent's premises without authorisation and loaded a computer from his hostel

room which is on the third respondent's premises. He was implicated in removing the computer from the third respondent's premises. He was currently employed by First World Labour CC and on the day of the arbitration hearing was on duty and had worked the whole day. The third respondent had obtained proof from the second applicant's current employer. The third respondent investigated the second applicant's medical certificate which stated that he was ill from 21 until 27 October 2008. He had worked on the days when he was ill and a Mr Mtsoane from the doctor confirmed that the second applicant only saw the doctor on 27 October 2008. The third respondent met the union official who had arrived late for the arbitration hearing who told them that he could not get hold of the second applicant and did not know where he was.

7. The commissioner said that the second applicant gave a reasonable explanation for the late filing of the rescission application which was three days late. He said that the second applicant had stated that he was sick and could not attend the CCMA scheduled arbitration. The third respondent disputed these allegations in that the second applicant had obtained a medical certificate under false pretences to cover up his non appearance at the CCMA. The commissioner said that the Labour Appeal Court in the matter of *Shoprite Checkers (Pty) Ltd v the CCMA and other* had pronounced itself on rescission applications. The LAC held that in considering applications for rescissions commissioners are bound to consider good cause. It further held that good cause is the consideration of two factors namely the explanation for the absence and whether an applicant has a *prima facie* case. The commissioner said that the parties had received the notice of set down and were aware of the arbitration proceedings. The union attended late without any knowledge of the second applicant's whereabouts. He had said that he was

sick and provided a medical certificate which was backdated. He had worked on the day of the CCMA hearing although he alleged that he was sick which suggested that he could have attended the scheduled arbitration hearing. He did not inform his union on time about the alleged sickness nor did he apply for the postponement of the hearing.

8. The commissioner said that he accepted the third respondent's submission in that the second applicant only saw the doctor on 27 October 2008 to cover up for his non-attendance. He found that there was no reasonable explanation for the second applicant's non-attendance at the CCMA on 21 October 2008. The commissioner said that the submissions and evidence submitted by the parties about prospects of success suggested on a balance of probabilities that the second applicant did not have good prospects of success. The commissioner found that the second applicant was in wilful default of the matter. He condoned the late filing of the rescission application and dismissed the rescission application.

The review application

9. The applicants felt aggrieved with the rescission ruling and brought this review application. They have raised several grounds of review. I do not deem it necessary to repeat those grounds of review. The question to be decided is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach.

Analysis of evidence and arguments raised

10. It is clear from the explanation given by the second applicant in his founding affidavit in the rescission application for his absence on 21 October 2008 is that he was sick,

suffering from respiratory problems. He consulted a doctor in Germiston and attached a copy of the medical certificate. He said that he did not call the union, because his telephone was damaged and did not have his representative's telephone number. His representative went to the wrong CCMA offices and was delayed due to the traffic between Pretoria and Johannesburg due to road works. The medical report states that he was examined on 21 October 2008 and was found to have a respiratory tract problem and would be unfit from work from 21 October 2008 to 28 October 2008. The second applicant did not say in his founding affidavit that at the time he was employed at First World Labour. When this was pointed out in the third respondent's opposing papers, he admitted that he was employed by and said that he was doing night shift on 21 October. He said that he was sick and on 21 October 2008 bought tablets from a pharmacy and drank them. He said that although he was sick he dragged himself to work as he was new at his work place because he had started only on 10 August 2008. He did not want to lose the job, as it was a temporary job. He worked night shift the week of 21 to 27 October 2008. He denied that the medical certificate was false and said that he was sick from 20 October 2008.

11. The explanation tendered for his absence at the CCMA hearing was patently false. He did not tell his representative where he was on 21 October 2008. He did not tell him that he was employed. If he was sick as contended by him and had obtained a medical certificate to that effect, it does not make sense that he would still report to work although he was booked off. The attendance register and the letter from his employer showed that he continued to work. It is not clear why if he continued to work he went to obtain a doctor's letter. The doctor's letter states that he was examined on 21 October 2008. He said that he was working night shift on 21 October 2008 and had bought tablets from a

pharmacy and drank them. The second applicant in his founding affidavit is vague and states that he saw the doctor but does not state when. He does not clear this up in his replying affidavit and only repeats that he was sick. If he had doctored himself, it is unclear why it is stated in his doctor's letter that he was unfit for work and would resume on 28 October 2008. He said that he was sick from 20 October 2008 but the letter states that he was sick from 21 October 2008. The letter was signed on 27 October 2008 but states that he was examined on 21 October 2008. It is not clear at what time he consulted the doctor. Was it on the morning of 21 October 2008 after he had left his work. When did he take the tablets?

12. The second applicant stated that he had to drag himself to work although he was sick. He had taken tablets when he was ill but could not telephone his union representative. He did not deem it necessary to drag himself to the CCMA offices. Since he did not need a medical letter from his employer, he clearly obtained that to mislead the commissioner about his non attendance on 21 October 2008. Nowhere in the review application does he state that he could not contact his representative because his telephone was damaged.
13. Once the commissioner had found that there was no reasonable explanation for the non attendance on 21 October 2008 there was no need for the commissioner to have considered the question of prospects of success. He however proceeded to deal with that and found that from the submissions and evidence submitted by the parties about prospects of success suggested on a balance of probabilities that the second applicant did not have good prospects of success.

14. It cannot be said that the commissioner ruling is not one that a reasonable decision maker would have made. The fact is that the second applicant was absent from the arbitration hearing on 21 October 2008. He had to give a reasonable explanation for his absence which he clearly did not. His representative did not know where he was. He had requested for the matter to stand down but arrived late at the hearing. The commissioner was not expected to wait for him until he eventually arrived.
15. The application to review the dismissal ruling was filed late. No proper case has been made out for condonation. In any event since second applicant has not given a reasonable explanation for his absence at the arbitration hearing it follows that the application to review the dismissal ruling and rescission ruling stands to be dismissed.
16. There is no reason why costs should not follow the result.
17. In the circumstances I make the following order:
- 17.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : ATTORNEY M E S MAKINTA

FOR THIRD RESPONDENT : ATTORNEY ME DUVENAGE

DATE OF HEARING : 1 OCTOBER 2010

DATE OF JUDGMENT : 26 NOVEMBER 2010