THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2288/13

In the matter between

JP LANDGOED Applicant

And

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

HAROLD N MATSHEPE *N.O.* Second Respondent

MAGGY MATHOTO & 12 OTHERS Third to further Respondents

Heard: 17 February 2016

Delivered: 19 February 2016

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside both a default arbitration award issued by the second respondent (to whom I shall refer as 'the commissioner') and a subsequent rescission ruling in which he refused to rescind his award. In his default award, the commissioner found that the dismissal of the third to further respondents by the applicant was substantively and procedurally unfair. He awarded each of them compensation in an amount equivalent to 12 months' remuneration. In the application for rescission, the commissioner ruled that the applicant was in wilful default by failing to attend the arbitration hearing, that it had no prospects of success and that rescission ought therefore to be refused.

[2] I deal first with the rescission ruling. In his ruling, the commissioner records the applicant's concession that the notice of set down was timeously received. After condoning the late filing of the rescission application, the commissioner evaluated the applicant's reasons for its failure to appear. Broadly speaking, these were that the owner of the applicant, a Mr Beetge, had failed to attend because his wife had been admitted to hospital on the day prior to the scheduled hearing and that he was required to stay in Pretoria in order to be present with her. The undisputed facts to which he deposed were that his wife had been taken for a routine check following a previous operation to remove cancer of the thyroid and that on 27 June 2013, the day prior to the scheduled hearing, she was readmitted for urgent surgery.

[3] The commissioner goes on to say the following:

> 31. The difficulty I have with the above is that the affidavit does not indicate what steps were taken by the owner of the applicant to secure the services of someone else or a representative to attend to the CCMA and to request

a postponement.

32. The affidavit does not indicate why an official from an employer's organisation, that represented the applicant in the conciliation, was no longer available. The affidavit does not indicate how far the owner of the applicant went to secure a representative without success. The affidavit only indicate how he personally failed to attend but does not show how any other official of the applicant or a lawyer also failed to attend to request a postponement on that day.
33. It is my view that as the wife of the owner of applicant was admitted to the hospital on 27\6\13 the said owners should have delegated someone else or a lawyer to come to the CCMA on 28\6\13 and deal with the matter or request postponement.
34. I do not accept his reasons are sufficient enough and I believe that he was in wilful default on the 28\6\13.

[4] More important for present purposes are the commissioner's findings in relation to the applicant's prospects of success. In the affidavit filed in support of the application for rescission, Beetge recorded that the third to further respondents had been dismissed for reasons relating to its operational requirements, after a 'quite lengthy' consultation process and in the absence of any reasonable alternatives to retrenchment. He submitted that since the reason for dismissal concerned the applicant's operational requirements, the CCMA had no jurisdiction since the retrenchment affected more than one employee.

[5] The case made out in the application for rescission was that the third to further respondents had been dismissed for reasons related to the applicant's operational requirements after following a proper consultation process. Beetge unequivocally stated that the third to further respondents had been dismissed for operational reasons consequent on an increase in minimum wages and their failure to accept amended terms and conditions of employment which contemplated the reduction of working hours. The affidavit notes that all employees except those represented by the union of which the third to further

respondents are members accepted the alternative conditions on offer. In the absence of other viable alternatives open to the applicant, their services were terminated for operational reasons.

[6] The fact of any retrenchment was denied in the answering affidavit filed by the relevant union official. His version was that the third to further respondents were presented with new contracts of employment which they were ordered to sign. The result of their refusal to do so was their dismissal on 4 March 2013.

[7] The commissioner found that the third to further respondents had not been retrenched. He did so on the basis that the applicant had failed to file any documentation that indicated the existence of any retrenchment process and in particular, any notice of retrenchment as required by s 189 of the LRA, and any termination notices or proof of payment of severance pay. In the absence of any retrenchment, the commissioner concluded that the CCMA had jurisdiction to entertain the referral made by the third to further respondents.

[8] In the present proceedings, the applicant appears to suggest that the applicant did not dismiss the third to further respondents, or that they were dismissed by operation of law, and submits that the commissioner committed a gross irregularity by concluding that the third to further respondents had been dismissed. Given the version put up by the applicant in the rescission application, this is nothing less than disingenuous.

[9] Reverting to the ruling under review, the issue before the commissioner was not whether or not any retrenchment had taken place. The commissioner ought to have had regard to all of the material before him. Had he done so, he would have appreciated that what was immediately apparent from the papers that served before him is that both the reason for dismissal asserted by the respondents (a refusal to accept a demand in respect of a matter of mutual interest) brings the dispute outside of the CCMA's jurisdiction. The union official who deposed to the

affidavit opposing the application for rescission said the following:

> It is our submission that the dismissal of the third respondent was not related to operational requirements and no consultation was conducted between the third respondents and the applicant. The third respondent been Maggie Mathoto and 12 Others was dismissed on the 4 March 2013 after refusing to sign the new contract that the applicant intends to implement after the new sectoral determination and requested that the applicant to approach the union before they sign any contract to safeguard their employment rather than signed without knowledge of what they were supposed to signed, therefore the CCMA has jurisdiction to arbitrate the matter (sic)

[10] What the union ignores (and what the commission ignored) is that the reason for dismissal articulated under oath in these terms brings the reason for dismissal within the ambit of s 187 (1) (c), a refusal by employees to accept a demand made by their employer in respect of any matter of mutual interest. In such a case, an alleged automatically unfair dismissal, only this court has jurisdiction to determine the dispute. That being so, it seems to me that the CCMA was never clothed with jurisdiction to entertain the referral made by the third to further respondents and that for the purposes of the rescission application, the applicant's prospects of success were such that the default arbitration award ought to have been rescinded.

[11] It follows that if the respondents wish to pursue the dispute, they ought to make a referral in terms of Rule 6 together with an application for condonation for the late referral. I have no doubt that given the nature of these proceedings and what would appears to be nothing less than duplicitous conduct on the part of the applicant, this court will be inclined to grant condonation and afford the third and further respondents the opportunity to have their claim adjudicated.

[12] In the circumstances, it is not necessary for me to consider the application to review and set aside the default arbitration award, which as I have indicated,

ought to have been rescinded on account of a lack of jurisdiction to make the award.

[12] In so far as costs are concerned, s 162 of the LRA gives the court a broad discretion to make orders for costs according to the requirements of the law and fairness. In the present instance, in my view, there ought to be no order for costs. Much of what is content in the papers filed by the applicant is entirely irrelevant to the primary issue in dispute, as are the heads and supplementary heads of argument which seek to make out a case not articulated in the founding affidavit. In coming to the conclusion I have, I have afforded the founding affidavit a generous reading. Ultimately, the commissioner's failure to appreciate the obvious jurisdictional point raised in the papers before him is not the fault of either party and for that reason too, there should be no order as to costs.

I make the following order:

1. The rescission ruling made by the second respondent on 20 September 2013 under case number LP 2053-13 is reviewed and set aside and substituted by following:

   'The default arbitration award issued under case number LP 2053 – 13 dated 9 July 2013 is rescinded.'

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES
For the applicant: Mr M Thompson, Thompson Attorneys
For the third to further respondents: Union official