

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no.: JR 899/14

In the matter between:

MOTHOLE BUS SERVICE CC

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER DONALD KGALAKE
NKADIMENG N.O.**

Second Respondent

KHUTSO ZEBELON RASETSOKE

Third Respondent

Heard: 9 January 2019

Delivered: 12 July 2019

Summary: Application to review a rescission ruling. The principles concerning rescission applications considered. The law relating to the reviewing of rescission rulings considered. Review granted.

JUDGMENT

SNIDER, AJ

[1] This is an application for the review of an award dated 25 April 2015, issued by the Second Respondent (“the Commissioner”) with case number LP7237-13 under the auspices of the First Respondent (“the CCMA”).

[2] The award which the Applicant seeks to review is a ruling on a rescission

application which was made by the Commissioner.¹

Background

- [3] The Third Respondent (“the former employee”) was charged with gross dereliction of duty, and a breach of his contract of employment, for failing to hand certain urgent email communication from the South African Revenue Services to the deponent to the Applicant’s affidavits, a Mr Modjela, who is also the managing member of the Applicant.²
- [4] The Applicant appeared before a disciplinary enquiry on 9 October 2013 and was dismissed by the Applicant on 23 October 2013.
- [5] Subsequent to the former employee’s dismissal it is alleged on behalf of the Applicant that, until 30 January 2014, it did not receive any referral form from the former employee or, for that matter, from the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [6] It is perhaps worth noting, at this stage, that in order to refer a dispute to the CCMA for conciliation³ the referring party must sign the document, and attach to the referral document written proof, in accordance with rule 6 of the CCMA’s rules, that the referral document was served on the other parties to the dispute; and if the referral document is filed out of time, attach an application for condonation in accordance with Rule 9(3) read with Rule 31.
- [7] On 30 January 2014 the Applicant received a referral form and an application for condonation from the former employee.⁴
- [8] Pursuant to the application for condonation, the Commissioner ultimately made a ruling⁵ condoning the late referral of the dispute. The Applicant

¹ Page 15 of the pleadings bundle.

² Page 8 of the pleadings bundle.

³ Rule 10 of the Rules of the CCMA .

⁴ Page 8 of the pleadings para [4.4].

⁵ The ruling appears at page 43 of the bundle.

then brought an application for the rescission of the condonation ruling⁶ which application was unsuccessful. The rescission application was unsuccessful.⁷

[9] It is under these circumstances that the review application is brought in respect of the rescission ruling.

Analysis

[10] As a point of departure I refer to the application for condonation for the late referral.⁸ The former employee was dismissed on 23 October 2013 and it appears that the affidavit in the condonation application was signed and telefaxed on 30 January 2014. The Applicant admits having received it.

[11] The reason given for the former employee's lateness⁹ was that "*he faxed the referral form on 23 October 2013 (the date of his dismissal) and waited for a notice of set down.*" The former employee's lawyer then phoned the CCMA on 27 January 2014 and was informed that the former employee had not signed the referral form. This presumably led to the matter not being processed.

[12] The former employee states his prospects of success to be the following:

12.1 he was dismissed because he allegedly failed to give a personal email from SARS to the Director and this duty did not form part of his obligations in terms of his contract of employment, and

12.2 in relation to the issue of prejudice, the former employee stated "*I won't be given an opportunity to defend my case, the lady to whom I gave the printed email will not be able to testify as a witness, I do not have a job at the moment and therefore I am struggling financially.*"

⁶ Page 18 of the pleadings.

⁷ Page 15 of the pleadings.

⁸ Page 41 of the pleadings.

⁹ Page 41 para [3] of the pleadings.

- [13] The Commissioner observed that the application for condonation was unopposed, came to the conclusion that the degree of lateness was not excessive, if account is taken of the fact that the first referral was made on the day of dismissal.
- [14] The Commissioner further found that the reason for the delay is excusable because the CCMA help desk, where the former employee sought assistance, should have given him proper advice. The Commission also found merit in the former employee's case and accordingly that he should be allowed to present his case at arbitration. In those circumstances the application for condonation of the late referral of the dispute was granted.
- [15] The next step in the process was the application for rescission of the award.¹⁰ The former employer, in its affidavit, deals extensively with the merits of the dismissal dispute. The elements of a rescission application are well known in our law. In order to show good cause for the rescission, a party must show an acceptable explanation for being in default and a *bona fide* defence on the merits. The test was formulated as follows in *Northern Training Trust v Maake and Others*¹¹ -

“The enquiry in an application for the rescission of an arbitration award is bipartite. The first leg is one which is concerned with whether or not the notice of set down was sent, (for instance by fax or registered post). Should evidence show that the notice was sent a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself the reasons proffered by the Applicant who failed to attend the arbitration (here condonation) proceedings. Such Applicant needs proof that he or she was not in wilful default, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the Applicant need not necessarily deal fully with the merits of the case.”

- [16] The Applicant does show why the condonation application was not

¹⁰ Page 18 of the pleadings bundle.

opposed.¹² Its reasoning is that no case number was sent to the Applicant; although I see no reason why the Applicant could not have approached the CCMA and obtained a case number in the circumstances.

- [17] To investigate these allegations in more depth is of no particular value as the rescission application was not dealt with by the Commissioner as he ought to have dealt with it.
- [18] The prospects of success in the main matter (i.e. the dismissal matter) and the reasons for the default are extensively dealt with by the Applicant in the rescission application and the matter should thus have been dealt with by the Commissioner in accordance with the recognized method, that is to say, considering whether the Applicant has an acceptable explanation for being in default and a *bona fide* defence on the merits. The Commissioner must consider the two aspects together and reach a reasoned conclusion.
- [19] The Commissioner who evaluated the rescission application appears to have done so on the basis of whether or not the condonation application should have been granted.
- [20] This he did without performing an analysis of the allegations made by the Applicant in relation to the merits of the dismissal matter and its reasons for being in default.
- [21] Although the Commissioner does, to some extent, consider the reasons for default, which it must be stated are relatively thin, he does not consider the implications and weight of the allegations that there was no case number on the condonation application, which consideration could have operated in the former employee's favour, and, oddly, refers to a conversation between himself and the case management officer, which was clearly of an extra-curial nature, and not admissible.¹³

¹¹ [2006] 5 BLLR 496 (LC) at para 28.

¹² Page 34 of the pleadings bundles.

¹³ Page 16 para [5.6] onto page 17.

[22] The Commissioner then states that the condonation ruling does not finally dispose of the dispute between the parties and that there exists no reason for the rescission of the ruling in question.

[23] It is clear that the Commissioner had scant, if any regard to the requirements for analysing and deciding a rescission application. He should have properly considered the merits, and explanation for default averred by the Applicant.¹⁴

[24] The Commissioner's failure to properly adjudicate the rescission application is clearly unreasonable given the test set out in *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*¹⁵:

“... whether the decision that the arbitrator arrived at is one that falls in a band of decision to which a reasonable decision maker could come on the available material.”

[25] In light of the above I make the following order:

Order

1. The rescission ruling dated 25 April 2014 under case number LP7237/13 is reviewed and set aside and the matter is referred back to the Second Respondent for the rescission ruling to be determined afresh by another Commissioner;
2. There is no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

¹⁴ *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2002) 23 ILJ 1048 (LC) at para 17 – “If the explanation given for a party's non-appearance at the arbitration proceedings does not demonstrate that the absent party was wholly blameless, the force of that explanation must still be balanced against the force of the case G which that party seeks to present in support of its case. The weight of a solid bona fide case will usually make up for a thin explanation for default.”

Appearances:

For the Applicant: Makgalabone MT

LABOUR COURT