THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR892/24

In the matter between:

VERICRED COLLECTIONS (PTY) LTD	**Applicant**
and	
TEBOGO MOLOTO (cited in his capacity as Commissioner of the Commission for Conciliation, Mediation and Arbitration)	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
FHULUFHELO MUNYAI	**Third Respondent**

Heard: **26 September 2024**
Delivered: **12 December 2024.**

JUDGMENT

MPHAHLANE, AJ

Introduction

[1] The Applicant seeks relief in the following terms:

1.1 The rescission ruling issued by the Commissioner under case number GAJB1535-24 and dated 7 May 2024, be reviewed and set aside in accordance with the provisions of Section 145 and/or 158(1)(g) of the Labour Relations Act[1] (LRA);

1.2 That it be determined that the third respondent (Employee) resigned from the employ of the Applicant, and therefore, the Second Respondent (CCMA) lacked jurisdiction to adjudicate the matter;

1.3 Alternatively, that it be determined that the default award under case number GAJB1535-24, dated 12 March 2024, be reviewed and set aside, in accordance with the provisions of Section 145 and/or 158(1)(g) of the LRA, and that the matter be set down for arbitration on the merits thereof;

1.4 Further alternatively, that the matter be remitted back to the CCMA for the proper determination of the rescission application before a commissioner other than the Commissioner.

[2] The matter came before this Court on an unopposed basis. The Employee was, however, in attendance. The Employee confirmed that she had read and understood the Applicant's founding papers and that she was not opposing the application.

Factual background

[3] The Employee was employed by the Applicant, a debt collection business, in the position of Performance Manager since 1 June 2018.

[4] On the morning of 18 January 2024, the Employee informed the Applicant's Branch Manager, Susan Grobler (Grobler), that she has accepted an offer of

[1] Act 66 of 1995, as amended.

employment with a higher salary from a company called Nimble, a direct competitor of the Applicant. The Employee was to commence employment with Nimble on 29 January 2024. This meant that the Employee was giving the Applicant one week's notice, as opposed to a month's notice in terms of the Employee's employment contract.

[5] Later that day, Grobler convened a meeting with the Applicant's branch managers where she announced that the Employee had resigned. The Employee was present at the meeting.

[6] Given the fact that the Employee was joining the Applicant's direct competitor, the Applicant's Group Managing Director held the view that the Employee had become a high risk to the Applicant's business. To mitigate the risk, the Employee was required to leave the applicant's premises immediately with the promise that she would receive payment in *lieu* of notice.

CCMA proceedings

[7] The Employee was not happy that she was considered high risk and driven out of the Applicant's business with immediate effect – without serving her notice period and before she could submit a letter of resignation. Consequently, the Employee referred a dispute to the CCMA, claiming that she was unfairly dismissed. In the Employee's view, the Applicant was not entitled to request her to leave without having served her notice period.

[8] The Applicant received the referral form from the CCMA on 23 January 2024, and on 29 January 2024, the Applicant's Human Resources Consultant (HR Consultant) addressed a letter to the CCMA setting out what it considered to be the facts of the matter, including the fact that the Applicant did not dismiss the Employee, but that the Employee had in fact resigned from the Applicant's employment. The letter was accompanied by copies of correspondence between the Employee and the Applicant's payroll department, a sworn statement of the Applicant's Branch Manager, and confirmatory affidavits of two programme managers.

[9] On 7 and 28 February 2024, respectively, the Applicant sent follow-up emails to the CCMA requesting feedback in respect of the Applicant's letter of 29 January 2024. The Applicant did not receive any response from the CCMA.

[10] On 8 February 2024, the CCMA issued a certificate of outcome of the conciliation in terms of which the dispute was referred to arbitration. The Applicant was not represented at the conciliation because, according to Mr Carel Labuschagne (Labuschagne), the deponent of the affidavit supporting the rescission application and the founding affidavit in this application, the Applicant did not receive the notice of set down because it was sent to an incorrect email address.

[11] The arbitration was held on 7 March 2024, before the First Respondent (the Commissioner), under the auspices of the CCMA. The Employee appeared in person, and the Applicant was again not represented. The Commissioner found that the Applicant was properly notified of the arbitration proceedings, and accordingly, proceeded with the arbitration in terms of section 138(5)(b)(i) of the LRA.

[12] During the arbitration proceedings, the Employee alleged that she was dismissed by the Applicant without a reason – that her dismissal was substantively and procedurally unfair. She sought compensation.

[13] The Commissioner agreed with the Employee and ordered the Applicant to pay the Employee an amount equal to four months' salary, that is the sum of R 28 120.00.

[14] The Applicant contends that it did not receive the notice of set down for the arbitration hearing because the said notice was also sent to an incorrect email address. Labuschagne averred that the Applicant became aware of the arbitration award when the Employee sent the award to the Applicant on 1 April 2014 and requested feedback on the compensation awarded by the Commissioner.

[15] Having become aware that a default award had been issued by the Commissioner, the Applicant brought an application for rescission of the award on

the basis that the notice of set down was sent to an incorrect email address. The Applicant also asserted that the Employee was not dismissed – that she resigned on her own accord.

[16] The Employee did not oppose the rescission application, and it was determined on the papers. According to the rescission ruling, the Commissioner accepted the Applicant's explanation that the notice of set down, in respect of the arbitration proceedings, was sent to an incorrect email address, but found that the Applicant did not dispute that it was notified about the arbitration proceedings via SMS and on that basis, refused to grant the rescission application.

Main issues for determination in this application

[17] Firstly, this Court is required to review and set aside the rescission ruling of the Commissioner. Secondly, I am required to determine whether the Employee voluntarily resigned from the employ of the Applicant, as a result of which the Commissioner and the CCMA did not have jurisdiction to determine the dismissal dispute.

The rescission ruling

[18] In terms of the ruling of the rescission application, it is apparent that the Commissioner was satisfied that the Applicant was notified about the date of the arbitration hearing. According to the Commissioner, the CCMA file indicated that the Applicant was notified by SMS to attend the arbitration proceedings.

[19] The Commissioner reasoned that:

> 'The employer submitted that the incorrect email was used. The email was wrong. The employer does not dispute the notification to attend the CCMA proceedings via SMS. It is normal practice that all parties to the dispute, are also notified via SMS. The CCMA file clearly shows that the notification to attend the proceedings, was also on both parties via SMS (sic). The SMS invite constitutes sufficient notice to attend the proceedings. The SMS was sent on 14 February 2024. In terms of CCMA rules, this method of notification

constitutes a proper service to the party. In terms of, RULE 5A NOTICE OF CCMA HEARINGS, the CCMA may notify parties of any hearing by hand delivery, e-mail, registered mail, or SMS.'

[20] The Commissioner concluded that:

'Based on the above submissions, the rescission application should not succeed. The rescission application stands to fall on SMS notification or invite to attend the proceedings.'

[21] In *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others*[2], Sutherland AJ (as he then was) dealt with the review of a rescission ruling made by a commissioner and remarked as follows:

'It seems to me that a Commissioner in considering whether or not a notification of an arbitration hearing has indeed been received by a respondent, it is necessary to consider all the facts bearing on that question. Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of such receipt. A party to proceedings who claims that it did not receive a telefaxed notification, must be put in a position where it can consider the grounds upon which it is contended that a notice was furnished to it, and thereupon give an explanation as to whether or not it was received, could have been received, and any other germane circumstance, which has a bearing on the explanation tendered that the party was ignorant that the matter had been set down.'

[22] It does not appear that the Commissioner brought the existence of the SMS file entry to the attention of the Applicant in order for the Applicant to deal with it. In other words, the Applicant was not afforded an opportunity to present evidence or make submissions on this point, with the result that the Applicant was denied its right to have its rescission application fairly determined.

[2] [2001] ZALC 15; (2001) 22 *ILJ* 1173 (LC) at para 46.

[23] Labuschagne denies that the Applicant received the SMS notification and asserts that the Applicant does not have a cell number for purposes of receiving SMSes. Labuschagne explains that the Applicant did not "dispute" service via SMS in its rescission application because the relevant documents, namely the referral form, the notice of set down, and the default award, do not make any reference to the SMS notification. I find this explanation plausible.

[24] In terms of the judgment of the Labour Appeal Court (LAC) in *Arends and Others v South African Local Government Bargaining Council and Others*[3], the undertaking of proceedings in an unfair manner by the commissioner constitutes an irregularity.

[25] Section 145 of the LRA clearly invites scrutiny of the process by which the result of arbitration proceedings was achieved, and a right to intervene if the commissioner's process-related conduct is found wanting. As Van Niekerk J (as he then was) put it:

> 'In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commis-sioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'[4]

[26] In the circumstances, the ruling of the Commissioner stands to be reviewed.

[3] [2014] ZALAC 69; [2015] 1 BLLR 23 (LAC) at para 19.
[4] *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* [2009] ZALC 68; [2009] 11 BLLR 1128 (LC) at para 17.

[27] The Commissioner records in the rescission application ruling that in considering the rescission application, he had regard to the provisions of the CCMA Rules and the LRA, in particular section 144. The Commissioner also records that he had regard to relevant case law and refers to the judgments of *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[5] (*Shoprite*) and *Mbatha v Vermaak*[6].

[28] Section 144(d) of the LRA provides that any commissioner who has issued an arbitration award or ruling, may on that commissioner's own accord or on the application of any affected party, vary or rescind an arbitration award or ruling made in the absence of any party, on good cause shown. The subsection was added to section 144 by Section 21 of the Labour Relations Amendment Act[7]. Before the amendment, section 144 empowered commissioners to rescind an arbitration award or ruling –

> '(a) erroneously sought or erroneously made in the absence of any party affected by that award;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings…'

[29] However, the LAC in *Pack 'n Stack v Khawula NO and Others*[8] noted that the requirement of good cause was always part of our labour law when dealing with rescission applications. The LAC referred to its *Shoprite* judgment where the LAC interpreted section 144 of the LRA and stated that:

> 'As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to s 144 of the Act, in such cases both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief. It follows, that if one was to hold that s 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an

[5] [2007] ZALAC 7; (2007) 28 ILJ 2246 (LAC).
[6] (2023) ZAGP JHC 399 (4 May 2023).
[7] Act 6 of 2014.
[8] [2016] ZALAC 31; (2016) 37 ILJ 2807 (LAC) at para 11.

applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by the wording of the section it could lead to unfairness and injustice. In my view this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret s 144 of the Act so as to include 'good cause' as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in s 34 of the Constitution because, if s 144 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise his right provided for in s 34 of the Constitution despite the fact that he may not have been at fault for his default. This could be a grave injustice.'[9]

[30] The LAC further stated that:

'[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a *prima facie defence.* In *Northern Province Local Government Association v CCMA & Other* (2001) 22 ILJ 1173 (LC); [2001] 5 BLLR 539 (LC) at 545 para 16 it was stated:

"An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made *bona fide* and he must show that he has a *bona fide* defence to the plaintiff's claims."

[36] In *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others* (1994) 15 ILJ 1310 (LAC) at 1311 I – 132 *Nugent* J had this to say: -

"Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence."

[9] *Shoprite supra* at para 33.

[31] Notwithstanding, the Commissioner refused the rescission application on the sole basis that proper notice had been received. The Commissioner did not assess or make any determination on whether the Applicant had a *bona fide* defence.

[32] The Applicant received the Employee's Form 7.11 referral form from the CCMA on 23 January 2024. On 29 January 2024, the Applicant's HR Consultant, Ms Loueen Jones-Paulsen (Loueen), sent a letter to the CCMA setting out the Applicant's response to the Employee's complaint. In the letter, Loueen submitted that:

32.1. the Employee resigned and was not dismissed by the Applicant;

32.2. the Employee's referral was frivolous;

32.3. the Employee intended to join the Applicant's competitor, and was therefore considered high risk, hence the Applicant was requested to leave the Applicant's premises immediately; and

32.4. the Applicant objected to the Con-Arb process and requested that the conciliation and arbitration be separated.

[33] Attached to the letter were sworn statements from the Applicant's Branch Manager and two performance managers.

[34] On 7 and 23 February 2024, respectively, Loueen wrote two follow-up emails to the CCMA requesting feedback from the CCMA in respect of the letter of 29 January 2024. The CCMA did not respond to this correspondence. The Applicant's conduct clearly demonstrates that the Applicant had the intention of participating in the CCMA proceedings, and believed that it had good prospects of success.

[35] In my view, the Commissioner failed to weigh together all the relevant factors in determining whether the Applicant has shown good cause for the rescission of the default award. There is no indication that the Commissioner considered the Applicant's representations on its prospects of success in the arbitration. As such, the Commissioner failed to apply the test for good cause as set out by the LAC in

MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA & Others[10].

[36] In *Martin v Commission of Conciliation, Mediation and Arbitration*[11] Van Niekerk AJ (as he then was), said the following:

> 'A reasonable decision maker in the present circumstances would apply the relevant test – in other words, the test referred to in North Training Trust and affirmed by the Labour Appeal Court in Shoprite Checkers. This required her to establish that the notice of set down was sent (which she did) and then to determine whether the applicant's default was wilful, and whether she had reasonable prospects of success in her claim. A commissioner's decision cannot be said to be reasonable when the commissioner fails to consider all the materially relevant factors prior to making that decision.'

[37] I am satisfied that, in addition to providing good reasons for non-attendance of the arbitration hearing, the Applicant had reasonable prospects of success in the arbitration.

[38] In the circumstances, I am of the view that the Applicant succeeded in making out a case that the Commissioner committed reviewable irregularity. Therefore, the Commissioner's rescission application ruling stands to be set aside.

Whether the Employee resigned from the employ of the Applicant

[39] The Applicant requires this Court to determine that the Employee was not dismissed but voluntarily resigned from the employ of the Applicant, as a result of which, the CCMA did not have jurisdiction to determine the dispute. The Employee alleged that she was verbally dismissed by the Applicant on 18 January 2024.

[40] The background to this issue is that on the morning of 18 January 2024, the Employee informed Grobler, the Applicant's Branch Manager, that she had accepted

[10] (1994) 15 ILJ 1310 (LAC).
[11] (2008) 29 ILJ 2254 (LC) at para 25.

an offer of employment from a company called Nimble and that she was to commence employment with Nimble on 29 January 2024.

[41] According to Grobler, the Employee regretted giving the Applicant one week's notice as opposed to a month's notice in terms of her employment contract, to the extent that the Employee broke down in tears and gave Grobler a chocolate bar with the words "*I AM SORRY"* printed on the wrapper. The Employee insisted on giving a week's notice because, according to her, she did not want to miss the opportunity of joining a better-paying employer.

[42] Later that day, Grobler convened a meeting with other branch managers where she announced that the Employee had resigned. The Employee was present at the meeting.

[43] Given the fact Nimble was the Applicant's direct competitor, the Employee was required to leave the Applicant's premises immediately with the promise that she would receive payment in *lieu* of notice.

[44] During the afternoon of 18 January 2024, the Employee sent the following email to the Applicant:

> 'Good day Leandre
>
> Before I can send my resignation letter. I would like to understand am I going to be paid in full salary as I couldn't serve my notice period due to that I was told to leave the premises immediately and I was told that I am "high risk" to the business. (sic)
>
> Kindly clarify that for me before I can send the actual resignation letter. I was supposed to serve till the 28th of January, and if it not going to affect my salary, annual and annual leave please put it in writing for me then I will send it. (sic)
>
> Thank you.'

[45] The next day, on 19 January 2024, the Applicant replied as follows:

> 'Phulu
>
> Your termination / resignation date will then be 28/01/2024.

However, you were supposed to give 20 days (4 weeks) notice but only gave 6 days notice. 14 days insufficient notice will be deducted for your final remuneration. (sic)
Hope your find this in order. (sic)
Please remember to send us your official resignation as indicated by you.
Kind regard / Groete.'

[46] The same day, the Employee responded as follows:
'How things were handled on my side was unfair, others were allowed to served their notices but on my side, I'm being told that I am a "risk" to the business I should leave the premises immediately and how is my notice being waved without any formal letter (sic)
This sounds like I was "unfairly dismissed" like what I was asking Leandra when I call seeking for clarity which I didn't get. (sic)
And now there will be 14 days insufficient leave deduction for what as you guys haven't received anything from me and it was all just done verbally. I don't know if I should seek advise on my side before I could send any letter? (sic)
Thank you
Kind regards.'

[47] To the Applicant's surprise, on 23 January 2024, the Employee referred a dismissal dispute to the CCMA. In the referral form, the Employee claims that she was dismissed verbally and that her dismissal was procedurally unfair because the Applicant had no reason to dismiss her as she was supposed to serve her notice period which was supposed to come to an end on 28 January 2024.

[48] The Employee also alleged that:
'On the 18th of January 2024 I went to my branch manager's office (Susan Grobler) to alert her that I found a new job and I am going to start serving notice so she said okay and I was suppose to serve the notice till 28th January as at my new employer I am required to start on the 29th of January 2024.' (sic)

[49] However, as is apparent from the default award, in the arbitration hearing, the Employee said something different. The Employee testified that she *"told her friend about her new employer"* whereupon the Applicant told her that she was a high risk and must leave immediately. The Employee was obviously not candid. Actually, the Employee misled the Commissioner.

[50] In terms of our law, the resignation of an employee does not constitute a dismissal unless it is a constructive dismissal, that is a resignation construed as a dismissal because it was brought by the unfair conduct of the employer.

[51] A resignation is a unilateral termination of a contract of employment by the employee.[12] Our courts have held that for an employee's conduct to be regarded as a resignation, the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention. In *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass & Aluminium 2000 CC*[13] (*CEPPWAWU*), the LAC stated the following:

> '... the test for resignation that an employee has to "either by words or conduct evidence a clear and unambiguous intention not to go on with his contract of employment". … he has to "act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract".'

[52] The Employee went to Grobler, her supervisor, and informed her that she had accepted an offer of employment from Nimble, and that she was required to commence work on 29 January 2024, thus she would serve a week's notice because she did not want to miss the opportunity of joining a better-paying employer. There is nothing unclear or equivocal about this communication. Its terms are not ambiguous.

[53] It is immaterial that the Employee's verbal communication was not followed up by a resignation letter. The fact that the Employee indeed started work at Nimble on

[12] See: *Sihlali v SA Broadcasting Corporation Ltd* [2010] ZALC 1; (2010) 31 ILJ 1477 (LC) (*Sihlali*) at para 11.
[13] [2012] ZALCJHB 163; (2002) 23 ILJ 695 (LAC) at para

29 January 2024, evinces the Employee's clear and unambiguous intention to leave employment with the Applicant and join Nimble.

[54] It is also apparent from the email correspondence between the Employee and the Applicant that the Employee did not wish to let the opportunity from Nimble pass her by. Rather, the Employee was concerned about whether she was going to be paid her full salary and for unused leave days given that she could not serve her notice period because she was required to leave the Applicant's premises immediately.

[55] It is also clear that the Applicant understood that the Employee had decided to leave employment with the company and join its competitor, hence Grobler convened a meeting with other programme managers to inform them that their colleague had resigned. Furthermore, the Employee was required to leave the Applicant's premises immediately because she intended to join the Applicant's direct competitor.

[56] Resigning employees are obliged to work through their notice period. However, it is permissible for employers to exempt the employees from this obligation, in which case, the employees must be paid in *lieu* of notice, which was the case in this matter. It is not uncommon for employers to require employees to leave immediately after they have resigned in order to protect the employer's proprietary interests.

[57] The fact that Grobler convened the meeting with programme managers to inform them that the Employee had resigned, and the fact that the Employee was required to leave the Applicant's premises immediately, is indicative of the Applicant's unconditional acceptance of the Employee's resignation. Having said that, I should not be understood to be saying that a resignation tendered by an employee requires acceptance by the employer party as observed *obiter* by the LAC in *CEPPWAWU*. I fully agree with Van Niekerk J[14] that the effect of a long list of

[14] *Sihlali supra* at para 20.

authorities is that a resignation is a unilateral act by an employee that does not require acceptance by the employer.

[58] In sum, this Court is satisfied that the Applicant did not dismiss the Employee, but that the Employee resigned on her own accord.

Costs

[59] With regard to costs, considering the requirements of law and equity, I am of the view that this is a matter in which there should be no order as to costs.

[60] In the circumstances, I make the following order:

Order

1. The rescission ruling dated 07 May 2024, handed down by the First Respondent acting under the auspices of the Second Respondent under case number GAJB1535-24 is reviewed and set aside.
2. The default award dated 12 March 2024 issued by the First Respondent acting under the auspices of the Second Respondent under case number GAJB1535-24 is rescinded.
3. The default award is substituted with the determination that the Third Respondent was not dismissed by the Applicant, and therefore the First and the Second Respondents had no jurisdiction to entertain the dismissal dispute.
4. There is no order as to costs.

T. Mphahlane
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr C. Higgs of Higgs Attorneys
For the Third Respondent: In person