IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: J1934/98

In the matter between

PROFESSIONAL SECURITY ENFORCEMENT — Applicant

and

J NAMUSI — Respondent

[1] This is an application for leave to appeal against an order granted by this Court on 17 December 1998, in terms of which a CCMA arbitration award in favour of the respondent was made an order of court.

[2] The events preceding the respondent's application in terms of section 158(1)(c) were as follows. The respondent initially filed the application on 3 August 1998. It was set down on the unopposed roll on 22 September 1998. The respondent did not appear when the case was called on that day, and the application was struck off the roll with the instruction that it was not to be re-enrolled unless the respondent satisfied a judge to the contrary. The respondent succeeded in so doing, after he had explained that he was at Court on 22 September 1998 but could not gain access as the court room was crowded and he had not been informed that the case had been called. The application was re-enrolled on 12 November 1998. On that day, Basson J issued an order that the applicant (then respondent) serve and file a proper review application within two weeks, and pay the wasted costs of the respondent (then applicant).

[3] The reason for this order was apparently that on 3 November 1998 the applicant had filed a notice of motion seeking an order that the respondent's application to have the arbitration award made an order of court be "set aside" (sic) together with the award itself. Accompanying the application was an affidavit by one Joubert, general manager of the applicant, who explained that the reason for the applicant's non-appearance at the arbitration hearing was that they had been called to attend to a robbery at the time. He said that the CCMA had been informed of this immediately, but had nevertheless continued with the arbitration.

[4] There is nothing in the file to indicate that the applicant made any attempt to comply with the order of 12 November 1998. However, in an affidavit filed on 15 December 1998 in support of the notice of intention to oppose the renewed application under section 158(1)(c), the applicant's attorney, one Lubbe, filed an affidavit to which copies of letters to the CCMA dated 17 November and 9 December 1998, respectively, were annexed. The first letter, which had already been filed with the Court on 24 November 1998, refers to several alleged defects in the award, and requests a date for "the proper hearing of the application to have the award rescinded". The second requests a response to the first letter. Lubbe states further that an application for review of the award was set down for 24 November 1998, but had been withdrawn for reasons unbeknown to him. A document in the Court file dated 20 November 1998 inexplicably gives notice of removal of the application from the roll because the matter had "already been heard". That notice was apparently not served on the respondent, who promptly filed a letter stating that he attended Court on 24 November 1998, only to find that the review application had not been enrolled, and advising that he accordingly wished to re-enroll his application. Also on the file is a letter from one Ms Hoosen, dated 7 December 1998, stating that to date she had received no copy of an application for rescission of the award in question.

[5] This was the state of affairs when on 17 December 1998 the Court heard the respondent's application to have the award made an order of court. Had the application been heard on 22 September 1998, when it was initially set down, there would have been no basis for the Court to decline to make the award an order of court. The applicant had taken no steps at that stage to launch a review application, and the six-week time-limit set by section 145 of the Labour Relations Act 66 of 1995 ("the Act") had already passed. Due to purely fortuitous circumstances, the respondent's application was postponed. The Court then granted the applicant the indulgence of permitting it to file an application for review within two weeks. No such application was filed.

Instead, the applicant's attorneys appear to have realised that the better alternative was to seek rescission of the award in terms of section 144 of the Act.

[6] Lubbe states in his affidavit that he was merely handling the matter in the absence of his partner. It is therefore clear that he did not have personal knowledge of how or whether the letter of 17 November was served on the CCMA. Attached to the copies thereof annexed to his affidavit is a telefacsimile transmission slip dated 10 December 1998, indicating that three pages had been successfully transmitted to the CCMA on 10 December 1998. There is no proof that the letter dated 17 November 1998 had been faxed earlier. Nor was any proof provided that the letter had been served on the CCMA when it was faxed to the Court on 24 November 1998. There is accordingly nothing on the file to contradict Ms Hoosen's statement (albeit not made under oath) that by 7 December 1998 no application for rescission had been received by the CCMA.

[7] At best for the applicant, therefore, an application for rescission of the award was received by the CCMA on 10 December 1998 – some six weeks after the deadline set for filing of a proper review application by Basson J, and five months after the award was issued.

[8] The applicant now seeks leave to appeal against the order making the award an order of court on the basis that the Court erred "in finding that no proper application for rescission of the arbitration proceedings is pending before the CCMA or has been applied for", and because the Court failed to find that "the steps taken by the Applicant to have the arbitration award rescinded, complied with the Labour Relations Act No 66 of 1995, as no proper procedures or prescribed forms exist as to the manner in which such an application should be launched".

[9] No reasons were requested for the order made by this Court on 17 December 1998. The applicant therefore merely assumes that the findings in respect of which the Court is alleged to have erred were the main or only reasons for the order. Whether or not the alleged findings influenced the Court's decisions is, however, immaterial. The fact is that the Court has a discretion, to be exercised in a judicial manner, to grant applications brought under section 158(1)(c). Even were the

Labour Appeal Court to find that the applicant had properly lodged an application for rescission, it would not follow that the order appealed against would have to be set aside. On this basis alone, I would be disposed to refuse leave to appeal.

[10] However, I will deal further with the possibility that the Court might have erred in exercising its discretion to make the award an order of court. Neither the Act nor the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person against whom it is to be made has applied for its rescission or review. This Court has, however, adopted the practice of postponing applications brought under section 158(1)(c) if the respondent has filed an application for review. This was, I believe, the basis for the indulgence granted by Basson J in this matter. However, there is no proof on the papers that the respondent did anything to defend its interests until the applicant had sought twice to exercise his rights in terms of section 158(1)(c). The first extension arose because of the respondent's misfortune in not having heard his case called. The second extension was granted as an indulgence by the Court. On the papers before me, there is no proof that the applicant took any practical steps for about six months after learning of the award.

[11] While it is so that section 144 provides no time limit or formal procedure for the lodging of applications for rescission of CCMA arbitration awards, it does not follow that such applications can be delayed indefinitely. In Pep Stores v Laka NO & others (1998) 19 ILJ 1534 (LC) Mlambo J, discussing the remedies available to those dissatisfied with CCMA arbitration awards, observed that the structure of the Act relating to arbitrations conducted by the CCMA

> "… culminates in ss 144 and 145. These two sections provide for the rescission and review of awards produced by arbitrators under the Act. Viewed holistically the

arbitration regime ousts any other role by any other section of the Act within this regime. The provision for a time frame in s 145 is important confirmation of the legislature's objective of finality in dispute resolution. Any legal challenge by way of rescission (s 144) or review (s 145) must be brought within this period. If there is no such challenge the award remains final and binding in terms of s 143."

[12] While I do not agree with this passage if it is intended to suggest that section 144 has an implicit time limit of six weeks (for, unlike section 145 it contains no such express time limit), I am nevertheless in agreement that the legislature must be taken to have intended that applications for rescission must be brought within a reasonable time. What is reasonable in this context must be determined in relation to the purposes of the Act and the circumstances of each case. One of the purposes of the Act is the effective resolution of labour disputes: see section 1(d)(iv). This objective is served by the provisions relating to arbitration in general and, in particular, by section 144, which provides that arbitration awards are final and binding. Section 158(1)(c) is merely a method of ensuring enforcement of such awards. An award is still "final and binding" even though it has not yet been made an order of court. Sections 144 and 145 are the only

methods open to persons against whom awards have been made to obtain relief. The time limit in section 145 indicates that if review proceedings have not been launched within six weeks, there can be no bar to an application to have an award made an order of court at any time thereafter, save perhaps for a manifest jurisdictional defect or, perhaps, the existence of compelling reasons to condone a late application for review. The same considerations, it seems to me, apply to applications for rescission in terms of section 144. The object of expeditiously resolving labour disputes would certainly be compromised were employers to be permitted with impunity to ignore awards indefinitely without taking action under sections 144 or 145, and then block the employee when he ultimately seeks to have the award enforced under section 158(1)(c). I do not say that there may not be circumstances in which an employer should be permitted to do so. But that question must be decided in relation to the circumstances of each case.

[13] In my view, this was not a case in which the section 158(1)(c) application should have been dismissed or postponed because the applicant had requested the CCMA to rescind the award. The applicant did nothing to protect its interests for some six months. It did not utilise the opportunity extended to it by the Court to launch the review application that it professed to be contemplating in November. It apparently sought a court date for such an application, but withdrew it without affording the respondent the courtesy of telling him that it had done so, or that it had apparently decided to bring an application for rescission instead. Only on hearing that the respondent had decided to pursue his action under section 158(1)(c) did the applicant take steps to seek confirmation that the CCMA had in fact received the

application that it had purportedly made. Even then, the applicant and/or its representative had a further ten days before the hearing of the respondent's application to take further steps. These could have included a personal visit to the CCMA to ascertain the status of the rescission application and to ensure that a date had been allocated for the hearing thereof, or at least to acquire official confirmation that the Commission had not as yet been able to allocate a date. In the event, all the applicant has presented to this Court is a letter that was faxed to the CCMA seeking confirmation of receipt of an earlier application for rescission that had purportedly preceded it.

[14] In my opinion, the applicant's conduct was so tardy that it did not warrant further frustrating the respondent's bona fide attempts to have the award made an order of court.

[15] The sole question at issue in the present application is whether there is a reasonable possibility that another Court might reach a different conclusion. In my opinion there is not.

[16] Leave to appeal is accordingly refused.

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GROGAN A J
ACTING JUDGE OF THE LABOUR COURT

Judgment date: .