IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J3077/98

In the matter between:

MARATHON EARTHMOVERS Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION First Respondent

(THE COMMISSIONER) Second Respondent

JAMES TEBOHO NHLAPO Third Respondent

JUDGMENT

MARCUS AJ:

INTRODUCTION:

[1] In an application dated 23 December 1998, the applicant ("the company") instituted proceedings in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") for the review and setting aside of an arbitration award handed down by the second respondent ("the Commissioner") on 5 October 1998 in which

the Commissioner held that the third respondent ("the employee") had been unfairly dismissed. I shall refer to this application as "the review application".

[2] The Commissioner ordered the company to pay the employee an amount of R12 000 on or before 22 October 1998. The company, although aware of the date and venue of the arbitration proceedings, was not present. It wrote a letter to the CCMA explaining that attendance was not possible but now states that it did not realise that the matter would be dealt with in its absence.

[3] It is appropriate that I quote the relevant paragraph from the founding affidavit. The deponent states the following:

"After being notified of the arbitration hearing my employee, Azael Khathatsi, a personnel and plant manager for Marathon Earthmovers sent a letter to the CCMA advising that he would be unable to attend such hearing, a copy of which is attached hereto marked Annexure A. Such letter was sent as neither myself nor Azael Khathatsi was available at the time specified in the letter from the CCMA. At the time we were both under the impression that the same was merely an invitation to a meeting and did not realise that we were obliged to attend the meeting at the time specified in the letter from the CCMA.

Due to our ignorance we did not realise the importance of the letter or the effect of the outcome of the meeting. In this regard I point out that neither

myself nor Khathatsi have any legal background or any training in Labour Law. Accordingly the concept of the CCMA was completely foreign to ourselves."

[4] Annexure A was omitted from the founding affidavit. However, in a supplementary affidavit filed on 1 June the letter was annexed. It states:
"I regret to inform you that I cannot abandon my duties to attend your meeting. You are very welcome to come to my office late in the afternoon ..."
This letter is dated 12 June 1998. It was, as far as I can ascertain, a response to attend at the CCMA on 28 September 1998. The notice was more than adequate, the response somewhat curt.

[5] The company did not annex the notification from the CCMA to its papers. The employee, however, has done so. It states inter alia: "You are required to attend ... " and the date of 28 September 1998 and venue are indicated in the notice. The use of the word “required” bears the connotation of an instruction and not merely an invitation as suggested by the Company.

[6] Thereafter the company was notified of an application by the employee to have the arbitration award made an order of court. The company's attorney unsuccessfully applied for a postponement of this application. The arbitration award was made an order of court by Grogan AJ on 17 December 1998.

[7] In a second application, also dated 23 December 1998, the company applied to set aside the order made by Grogan AJ in terms of which the arbitration award was made an order of court. I shall refer to this application as "the rescission application".

[8] Mr Swanepoel, who appeared for the company, argued the review application first. He did so on the basis that should the arbitration award be reviewed and set aside it would "follow naturally" that the order by Grogan AJ would be rescinded until the finalisation of the dispute. This argument is superficially attractive. However, in my view, it amounts to an intellectual sleight of hand. It would mean that the requirements for rescission could simply be by-passed. I propose therefore to deal with the rescission application first.

THE RESCISSION APPLICATION:

[9] The grounds on which the company seeks to have the order of Grogan AJ rescinded are set out in the founding affidavit as follows:

"2. On 17 December 1998 application was made to the above Honourable Court for an arbitration award under Case No. GA26327 issued on 5 October 1998 by Commissioner G Tshegofatso of the Commission for Conciliation, Mediation and Arbitration to be made an order of court in terms of section 158(1)(c) of the Labour Relations Act, No. 66 of 1995, as amended.

3. My legal representative attended court to oppose such order being

granted as I intended to apply to have the arbitration award of the CCMA reviewed and set aside.

4. The application for the review and setting aside of the arbitration award has been served and filed.

5. I feel that it is necessary for the order made by the Honourable Judge Grogan to be set aside so that I will be in a position to attend any meeting scheduled by the CCMA to make representations to them."

[10] In the replying affidavit, and for the first time, the company seeks to elaborate on the grounds upon which it seeks to have the order of court set aside. The deponent states in reply:

"Our legal representative argued a postponement and advised the Honourable Judge Grogan that the applicant had no knowledge of the hearing which allegedly took place on the 28th September 1998 as it had forwarded a letter to the Registrar of the CCMA advising that it is not in a position to attend the hearing on that specific date. In addition, my legal representative argued that an amount of R225,00 was paid to the defendant in full and final settlement of notice of pay during a meeting held with the Department of Labour on the 18th November 1998 and I accordingly assumed that the matter was settled. This assumption was clearly incorrect as I only became aware that something was wrong when I received

documentation to appear in the Labour Court on the 17th December 1998. I was clearly under the wrong impression and due to my absence at the arbitration hearing I was unable to discharge my onus of proving the fairness of the dismissal of the respondent. I apologise for my ignorance and any inconvenience caused by my absence at the arbitration hearing but I would clearly like to be afforded the opportunity to show that the third respondent was in fact fairly dismissed."

[11] The employee for his part seeks the dismissal of the review and rescission applications and the reissuing of the warrant of execution previously issued.

[12] Before considering the grounds for rescission it is necessary to deal with a number of technical objections advanced by the company. It is argued that the answering affidavit is out of time and in the absence of condonation the employee is disentitled to oppose the application. While in no way minimising the importance of compliance with the Rules of the Labour Court, this is not a case where any prejudice has been occasioned by the delay. The issues have been fully canvassed on the papers and, in any event, this court enjoys general powers to condone the non-compliance with the rules. (See in this regard Rule 11)

[13] In a supplementary affidavit the company advances a fresh ground for rescission concerning what it contends was the incorrect citation of the company.

It is contended that the employee instituted proceedings "against an entity by the name of Marathon Earthmovers". The deponent disingenuously, in my view, states that he has no knowledge of an entity by the name of Marathon Earthmovers as at all times the trading name of the company has been Marathon Earthmovers CC. This is an after-thought and entirely without merit. It cannot seriously be contended that there has been any prejudice by this obvious error. Indeed, in all the documents by the company up to this point, it referred to itself simply as Marathon Earthmovers.

[14] The company also contends that the employee has consented to the order sought. In this regard it is argued that the employee stated that he does not oppose the application and abides the decision of this court. The fact that the employee abides the decision of the court is not the same as consenting to an order of rescission. In any event, it is now clear that the employee actively opposes the relief sought by the company and seeks the reissue of the warrant of execution.

[15] The company bears the onus of establishing proper grounds for the rescission of the order of Grogan AJ. Applications for the rescission orders by the Labour Court are made in terms of section 165 of the Act. This section envisages that an affected party may apply for rescission of a judgment or order "erroneously sought, or erroneously granted in the absence of any party affected by that judgment or order". Section 165 of the Act is clearly modelled on Rule 42 of the

Rules of the High Court. The wording is virtually identical. The Supreme Court has frequently held that in applications for rescission in terms of Rule 42, it is not incumbent upon an applicant to show good cause for rescission (see e.g. Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30D-E; Topol and Others v L S Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) at 650D-J). Where, however, rescission is sought in terms of the common law, not only must the party seeking relief "present a reasonable and acceptable explanation for his default" but in addition such party must show that on the merits he or she "has a bona fide defence which prima facie carries some prospect of success" - per Miller JA in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765B-C. The court went on to observe at 765D-E:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules, was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospect of success on the merits."

[16] The logic of the common law is compelling. Nevertheless, I assume that those who drafted the Act intended section 165 to be interpreted much in the same

way as Rule 42 of the Rules of the High Court. Hence prospects of success on the merits need not be shown where the application is brought in terms of section 165 of the Act. This was the approach adopted by Pretorius AJ in Construction and Allied Workers Union and Another v Federale Stene (1991) (Pty) Ltd (1998) ILJ 642 (LC) and it is the approach which I will adopt in the present case. However, I should point out that Rule 16A of the Rules of the Labour Court which took effect on 4 September 1998, appears to have modified this approach and to require good cause to be shown for purposes of rescission. It is not necessary for purposes of this judgment, however, to decide that issue.

[17] The company has simply not made out a proper case for rescinding the order of Grogan AJ. The Company was present when Grogan AJ made the arbitration award an order of court. It unsuccessfuly sought to have the matter postponed. There is no suggestion whatsoever that Grogan AJ in any way misdirected himself or that his decision is assailable on any acceptable basis. It seems that the company's real complaint is that the arbitration took place in its absence. The order of Grogan AJ making the arbitration award an order of court, is an obstacle in the company's way to an attack on the arbitration award itself. Nevertheless the absence of a proper basis for rescission of the order made by Grogan AJ is fatal to the company.

THE REVIEW:

[18] Although not strictly necessary to do so, I propose to deal with the application for review. The test for review in terms of section 145 of the Act has been authoritatively settled by the Labour Appeal Court in Carephone (Pty) Ltd v Marcus NO and Others (1998) 10 ILJ 1425 (LAC). The question to be asked is whether there is "a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at" - at 1435E.

[19] The affidavit in support of the application for review of the arbitration award comprises just over three pages, most of which sets out the history of the matter. With regard to the arbitration award itself, no facts are advanced in support of a review. The company does no more than state that if given the opportunity, it would produce evidence to rebut the employee's version. The affidavit discloses what evidence would be led should that opportunity be afforded to the company. The affidavit then concludes with the following statement:
"I humbly ask the above Honourable Court to review and set aside the arbitration award made by the CCMA on 5th October 1998 under Case No. GA26327".

[20] In argument before me, Mr Swanepoel advanced a number of grounds of review. First, it was argued that the Commissioner, in deciding to proceed in the absence of the company, committed misconduct in relation to his duties as an

arbitrator. It is argued that having regard to the letter of 12 June referred to above, the Commissioner should have realised that the company's members were ignorant as to the importance of the arbitration hearing. Hence, it is contended, the Commissioner ought to have exercised his powers under section 142 of the Act to call upon the company's members to be questioned.

[21] Secondly, it is contended in the heads of argument that by reason of the misconduct flowing from proceeding in the company's absence, the Commissioner -

"failed to apply his mind to the matter at hand, failed to allow information that would have assisted in resolving the dispute and failed to provide (the company) with an opportunity to be heard in a situation where the rules of natural justice demanded it from him."

The argument then proceeds to impugn the Commissioner's finding on the basis of a lack of substantiation for the conclusions reached. The contention advanced is that the Commissioner would not have made the award he did had he applied his mind to the matter and had he gathered the information which would have helped him resolve the dispute.

[22] These grounds of review are simply not foreshadowed in the papers at all. This much Mr Swanepoel concedes. They are not questions of law. They

embrace factual issues. At no stage has the Commissioner or the employee had the opportunity to deal with these contentions. This is not competent (see generally Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 270 (T) at 323G-325C).

[23] Mr Swanepoel seeks to place reliance upon the decision in S A Freight Consolidated (Pty) Ltd v Chairman, National Transport Commissioner and Another 1988 (3) SA 45 (W) where it was stated at 518A-E that -

"where a decision-maker takes a decision unsupported by any evidence or by evidence which is insufficient to reasonably justify the decision arrived at or where the decision-maker ignores uncontradicted evidence which he was obliged to reflect on, the decision arrived at would be set aside."

This situation simply does not arise in the present case by reason of the fact that no factual basis for the review relied upon has been made out in the founding affidavit. I am accordingly of the view that the review application cannot succeed.

[24] The remains the employee's request for the re-issue of the warrant of execution. His affidavit states that on 21 December 1998 a writ of execution was issued directing the sheriff to attach and take into execution the movable goods of the applicant for purposes of sale at a public auction. In my view, the company ought to be given a reasonable opportunity to comply with the terms of the arbitration award.

[25] In the circumstances I make the following order:

1. The application for rescission of the order made by Grogan AJ on 17 December 1998 in which he made the arbitration award issued on 5 October 1998 by the second respondent under Case No. GA26327 ("the arbitration award") an order of court is dismissed with costs.

2. The application to review the arbitration award is dismissed with costs.

3. The applicant is ordered to comply with the arbitration award within 14 days of this order, failing which the writ of execution issued on 21 December 1998 may be executed against the applicant.

_____

G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 11 JUNE 1999

DATE OF JUDGMENT: 11 JUNE 1999

For the applicant: Adv J Swanepoel instructed by DYKES VAN HEERDEN

For the Respondent: Adv Mashavha instructed by MQONGOZE ATTORNEYS