IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1965-2016

In the matter between

GEORGE & MOSSIE'S SUPERMARKET (PTY) LTD t/a PICK' n PAY BRIGHTWATER COMMONS	**Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER FRANCIS TJALE	**Second Respondent**
EHAB ABDALLA	**Third Respondent**

Heard: **30 May 2018**

Delivered: **17 July 2018**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The second respondent (Commissioner) granted the third respondent, (Mr Abdalla), a default award at the Commission for Conciliation, Mediation and Arbitration (CCMA) on 27 June 2016, and subsequently dismissed an application to rescind that award in terms of a ruling issued on 12 September 2016.

[2] The applicant launched this application on 24 October 2016 to review and set aside both the rescission ruling and the default award. The applicant's Notices in terms of Rule 7A (8) (a), the supplementary affidavit and transcript of the proceedings before the CCMA were served on Abdalla on 29 November 2016. Abdalla's erstwhile attorney of record, Mr Johan Kotze passed away and his practice fell under the administration of Pranav Jaggan Attorneys.

[3] An extension of five weeks was then granted to Abdalla to file his Answering Affidavit in the week ending 13 January 2017. The deadline came and went, and the applicant's attorneys of record on 19 January 2017 sent correspondence to Pranav Jaggan Attorneys to establish whether an Answering Affidavit would be filed and served, and if so when.

[4] The applicant's attorneys of record's contention are that there was no response to its correspondence, including a further reminder in 14 February 2017. On 22 February 2017, Pranav Jaggan attorneys served Abdalla's answering affidavit via electronic mail despite no agreement in that regard having been reached with the applicant. A copy was subsequently physically served on 23 February 2017.

[5] The applicant's contention was that the Answering Affidavit was served some 72 days outside of the time limits set out in Rule 7A (9) of the Rules of this Court, and some 36 days outside the extension granted. A condonation application was not launched in that regard.

[6] The applicant had raised preliminary points in regard to the late filing of the Answering Affidavit, seeking that it be dismissed. The matter was set-down for pre-enrolment on 9 June 2017 at which Mr Goldberg, now Abdalla's attorney of record, withdrew the Answering Affidavit. The matter was nonetheless set-down for a hearing on 30 May 2018. At these proceedings, Mr Goldberg opposed the review application based on the applicant's own papers.

<u>The default award and rescission application:</u>

[7] Abdalla, an Egyptian national, was employed by the applicant as a receiving clerk in February 2014. He had referred a dispute to the CCMA on 23 May 2016,

alleging unfair labour practice, unfair discrimination and unfair dismissal. This according to his evidence before the Commissioner, was after the store manager had informed him in writing that he was not in possession of a valid work permit, and should obtain one within thirty days, failing which he would lose his employment.

[8] The matter was set-down before the Commissioner on 27 June 2016, resulting in a default arbitration award in terms of which it was found that Abdalla was dismissed, which dismissal was substantively and procedurally unfair. The Commissioner ordered the applicant to pay Abdalla an amount of R102 840.00 as compensation.

[9] The default award was obtained in circumstances where on the date of the con/arb hearing, the applicant had sent its representative, an HR Manager, Vilakazi, to merely deliver correspondence from its employer's organisation (SA) UEO, in which it was alleged that its Kevin Smith had received a call from the CCMA in respect of the set down a day before the hearing, but that no formal notice of set down had been received. A request was made to re-schedule the matter.

[10] The Commissioner upon receipt of the said correspondence then suggested to Vilakazi that an application for postponement should be made. The Commissioner however recorded in the default award that Vilakazi declined to make any submissions in that regard and left the proceedings. This was despite the Commissioner having warned him of the consequences of walking out. Upon Vilakazi having walked out, the Commissioner proceeded to hear the evidence of Abdalla, and issued the default award.

[11] The applicant launched an application to rescind the default award. The matter was set down for a hearing on 24 August 2016, but despite the parties being present at the hearing, the Commissioner was unavailable and had instead dealt with the matter on the applicant's papers. Abdalla did not file opposing papers.

[12] In the founding affidavit in support of the application for rescission, the applicant's Mr. T Vilakazi had averred the following;

12.1 On 14 June 2016, the applicant received a courtesy call from the CCMA advising that arbitration proceedings would be heard the following day.

12.2 Although it appeared that a notice of set-down was sent to the applicant at fax number 011 789 9955, such a notice was however not received and the applicant was not aware of the proceedings.

12.3 The default was not as a result of wilfulness or error on the part of the applicant, as the fax line used to transmit the notice was situated in an open area and unsecured, and was also used by suppliers, outsourced merchandisers and promotional persons.

12.4 The applicant had requested the CCMA to address all correspondence to another secure fax line or to (SA) UEO.

12.5 Upon receipt of the courtesy call on 14 June 2016, (SA) UEO had forwarded correspondence to the CCMA informing it that the notice of set-down was not received.

12.6 Vilakazi only attended the arbitration proceedings on 15 June 2016 to ensure that the Commissioner was in possession of the correspondence from (SA) UEO) and to highlight the fact that notification of the proceedings was not received.

12.7 In regards to the facts placed before the Commissioner leading to the default award, it was averred that those were untruthful, and the applicant had prospects of success on the merits if given the opportunity to defend the matter, as Abdalla had at no stage raised grievances or concerns that he may have had with management; that his services were never terminated as he had alleged; that in the months leading up to the dispute, he made himself guilty of misconduct due to insubordination and unauthorised absenteeism, was disciplined and issued with warnings.

12.8 Abdalla's application for leave on 25 and 26 May 2916 was declined due to short notice and short staff compliment of the applicant. He nonetheless disregarded this fact and proceeded to absent himself on

those days, and submitted copies of medical certificates in that regard, indicating that he was ill and booked off.

12.9 Abdalla was not the only foreign national requested to hand in valid work permits, and it was denied that he was ill-treated, discriminated against and or victimized in any way. He knew that he had committed misconduct hence he had referred an alleged constructive dismissal dispute.

12.10 Even though Abdalla had referred an alleged constructive dismissal dispute (under section 186 (2) (b) of the LRA, the Commissioner nonetheless dealt with the dispute under section 186 (1) (e) of the LRA, and this was despite the fact that it was set down as related to unfair suspension or disciplinary action.

12.11 Abdalla had in the referral indicated that the dispute arose on 23 May 2016, which was untruthful as he had applied for leave on 25 May 2016 and was booked off ill from that date.

12.12 Abdalla had also referred another alleged unfair dismissal dispute under a different case number, and as at the filing of the rescission application, a jurisdictional ruling was still pending before the CCMA.

12.13 In view of the above, it was averred that the applicant was not in wilful default, that it always intended to oppose Abdalla's claim and had not at any stage renounced its defence

[13] The Commissioner issued a ruling on 12 September 2016, and dismissed the rescission application. The Commissioner had regard to the provisions of section 144 of the LRA, and his approach was that the test to be applied was whether or not the notice of set-down was sent; whether there were reasons given for the default, and whether there were reasonable prospects of success.

[14] The Commissioner's reasoning was that the founding affidavit failed to mention that Vilakazi after handing in correspondence from (SA) UEO was advised to make a formal application for postponement and was warned prior to walking

out of the proceedings. Thus in the absence of an application for a postponement, nothing prevented him from exercising his discretion and proceedings in the applicant's absence. He further concluded that since it could not be established that the default award was erroneously made in the applicant's absence, the rescission application ought to fail.

The grounds of review and evaluation:

[15] The applicant submitted that the Commissioner committed misconduct in relation to his duties; committed a gross irregularity in the conduct of proceedings and exceeded his powers, and arrived at a decision not justifiable in relation to the reasons given.

[16] Applications for rescission or variation at the CCMA or Bargaining Councils are determined in terms of the provisions of section 144 of the LRA[1]. The approach to rescission applications under section 144 of the LRA was restated in *Pack 'n Stack v Commissioner Khawula N.O and Others*[2], where the Labour Appeal Court (per CJ Musi JA) held that;

> "…In *Shoprite Checkers (Pty) Ltd v Commissioner for Conciliation Mediation and Arbitration and Others*, it was said that;
>
> '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 and Others* [2001] 5 BLLR 539 (LC) at 545, paragraph [16], it was stated:

[1] Section 144: **Variation and rescission of arbitration awards and rulings**
Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner 's own accord or, on the application of any affected party, vary or 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;
(c) granted as a result of a mistake common to the parties to the proceedings; or
(d) made in the absence of any party, on good cause shown.

[2] (2016) 37 ILJ 2807 (LAC) at para 11 – 13.

> "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."'

And,

> 'In *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*, it was said that;
>
> > 'Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. Whilst 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.'

And,

> 'In *Harris v ABSA Bank Ltd t/a Volkskas,* Moseneke J set out the principles that ought to guide a court in the determination whether a party was in wilful default. He said the following:
>
> > 'Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which avoid the default and must appreciate the legal consequences of his or her actions.' (Full citations omitted)

[17] As appears from the rescission ruling, the Commissioner having had regard to the provisions of section 144 of the LRA nonetheless only made a finding based on the fact that it had not been established that the default award was erroneously sought or made in the absence of the applicant.

[18] An arbitration award like an order of court is erroneously granted if at the time of granting it, there existed facts which the Commissioner had not been aware

of, and of which had the Commissioner been aware of, would not have granted it. Equally so, an arbitration award will also be erroneously granted if it is shown that there was an irregularity in the proceedings, or that the Commissioner did not have the competency to grant it.

[19] To the extent that the provisions of section 144 (a) of the LRA as applicable to the CCMA are almost a replica of the provisions of section 165 (a) of the LRA as applicable to this Court, and since the latter provisions were interpreted to mean that whether the court grants a rescission application under that provision did not depend upon the applicant showing good or sufficient cause, and that it was simply enough if the order was erroneously sought or granted in the absence of that party[3], I see no reason why the same principle should not be applicable under section 144 of the LRA.

[20] What the above therefore implies is that in a rescission application before the CCMA, where a Commissioner makes a finding that an award was erroneously sought or made within the meaning of section 144 (a) of the LRA, the enquiry ends at that point, and rescission ought to be granted without the need to consider whether good cause under section 144 (d) was shown. For example, if it is established that the other party was not properly notified of the proceedings, a fact which the Commissioner was not aware of, and of which had the Commissioner been aware of, would not have granted the award, or it is shown that there was an irregularity in the proceedings, or that the Commissioner did not have the competency to grant the award, the enquiry ends at that point, and rescission ought to be granted.

[21] Where however it has not been established that the award was erroneously sought or granted, the enquiry then moves to other considerations under good cause as called upon by the provisions of section 144 (d) of the LRA. In this regard, the Commissioner is obliged to consider whether a reasonable and *bona fide* explanation for the default was proffered, whether the applicant has demonstrated a *prima facie* defence to the claim; whether it was demonstrated by the applicant that at no stage was its defence renounced, whether there was

[3] *F & J Electrical CC v MEWUSA obo E Mashatola and Other* [2015] ZACC 3; 2015 (4) BCLR 377 (CC); (2015) 36 ILJ 1189 (CC); [2015] 5 BLLR 453 (CC) at para 27.

a serious intention to proceed with the case, whether the application was brought *bona fide*, and what the considerations of fairness dictated to avoid any injustice being done[4]. As stated in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*[5], all of these elements are not to be assessed mechanistically and in isolation, but must be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.

[22] The starting point with the Commissioner's ruling was that he found that it was not established that the default award was erroneously sought or made. On the facts of this case, and in the absence of a response to the rescission application, it is not clear on what basis the Commissioner concluded that proper notification was received by the applicant. In fact, nowhere in the ruling does the Commissioner deal with that issue, other than to restate that he had warned Mr Vilakazi of the consequences if he walked out.

[23] The applicant's case was that the notification was not received timeously, and that the only notification from the CCMA was via telephone contact a day prior to the proceedings. The Commissioner seemed to have been persuaded by the presence of Mr Vilakazi at the proceedings, that indeed the applicant was properly notified, when in fact that was not the case. The applicant had in the founding affidavit explained the circumstances that led to Mr Vilakazi being at the hearing. It is appreciated that the applicant could have done more than merely send a messenger to the hearing to deliver a letter explaining why it was unable to attend those proceedings. Be that as it may, even if for reasons that do not appear in the ruling the Commissioner was not convinced that proper notification had not been received, there was no basis for a conclusion to be reached that there was wilful default on the part of the applicant, especially since there was an explanation as to the reason the matter could not proceed.

[24] What is further clear from the rescission ruling is that the Commissioner's enquiry ended at a point where he was satisfied that the default award in

[4] *Satinsky 128 (PTY) LTD t/a Just Group Africa v DRC and Others* Case no: JR 1479 / 2012 [2013] ZALCJHB 38 (26 February 2013), at para 23.
[5] 1994) 15 ILJ 1310 (LAC).

question was not erroneously sought or made, which approach in so far as he did not consider whether good cause was shown, is a failure to apply his mind to an important principle of law, which is a reviewable irregularity[6].

[25] A reasonable decision–maker would have applied his mind carefully to whether good cause had been shown. This would have been done by not only determining whether there was a reasonable explanation proffered, but by a further a consideration and weighing of all the facts placed before him. In this regard the Commissioner would have been required to determine whether on those facts it should be concluded that the applicant's explanation for the default was not *bona fide,* whether there was a *bona fide* defence to Abdalla's claims, and whether the applicant had at any stage indicated an intention to renounce its defence. These considerations are an integral part of an enquiry which the Commissioner clearly failed to have regard to.

[26] In the absence of an answering affidavit, and in view of the applicant's detailed averments in regard to the default and the merits, there was no reason for the Commissioner to reject the applicant's contention that it was only informed of the proceedings a day before they took place via telephone call, or that it had a *bona fide* defence to Abdalla's claim, or that the rescission application was made *bona fide*, or that there was intention on the part of the applicant to renounce its defence. Nowhere in the ruling does the Commissioner indicate the reasons why all of these detailed averments as summarised somewhere in this judgment were rejected.

[27] Before the Commissioner, and for the purposes of the rescission application was a detailed explanation in regards to the default (even if Vilakazi attended to present correspondence). The mere fact that Vilakazi in his founding affidavit in support of that application had not mentioned that he was asked to make an application for a postponement is inconsequential, as the correspondence from (SA)UEO had indicated that the matter should be re-scheduled. Despite making reference to the provisions of section 138 (5) (b) of the LRA and the discretion conferred upon him, he nonetheless stated that the discretion was exercised

[6] See *Professional Transport Workers Union v Paul Malema* (JA67/12) [2014] ZALAC 53 (7 October 2014) at para 25.

based on the fact that Vilakazi was warned that proceedings would continue in his absence.

[28] It nonetheless gets worse in that as further submitted on behalf of the applicant, even if Vilakazi had stayed in the proceedings and made a 'formal' application for a postponement as suggested by the Commissioner, the latter had nonetheless indicated to him that he would proceed with the arbitration and would refuse to consider any postponement (application)[7] in any event.

[29] In circumstances where a Commissioner suggests to a party to bring an application, and in the same breath informs that party that the application would not be considered in any event, the message is clear that a fair and unbiased hearing would be elusive. This clearly constitutes gross misconduct in relation to the duties of a Commissioner as an arbitrator within the meaning of section 145 (2) (a) (i) of the LRA. Furthermore, it cannot in these circumstances be said that a discretion whether or not to continue with the proceedings was judicially exercised as the Commissioner contended in paragraph 17 of his ruling.

[30] In regards to other factors which the Commissioner failed to take into account, and in the absence of an answering affidavit, Vilakazi had made detailed averments as to the reason why Abdalla was not dismissed, victimised or discriminated against as he had alleged. Detailed averments were made as to why it could not be said that the application was not made *bona fide*, or why it could not be said that the applicant had renounced its defence. As to the reason the Commissioner ignored those factors is unknown.

[31] The applicant further contended that the Commissioner exceeded his powers by proceeding with the arbitration in its absence, in that where a matter is set down as a con/arb, in terms of Rule 17 (4) of the CCMA Rules, if a party fails to appear or be represented at a hearing, the Commissioner must conduct the conciliation on the date in the notification issued in sub-rule (1)[8].

[7] Page 1 -2 of the transcribed record of proceedings.
[8] In reliance to *Inzuzu I.T Consulting (Pty) Ltd v CCMA & Others* [2010] 12 BLLR 1288 (LC) at 2645D-E, where it was held that;

> 'The provisions of CCMA rule 17 make it clear that a commissioner is not empowered to proceed with the arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. When a party is in default of appearance, the commissioner concerned may

[32] Rule 17 (4) of the CCMA Rules must be read with sub-rule (5), which provides that it applies irrespective of whether a party has lodged a notice of objection in terms sub-rule (2). It must also be read with sub-rule (9), which provides that if the arbitration does not commence on the date specified in terms of the notice in sub-rule (1), the commission must schedule the matter for arbitration either in the presence of the parties or by issuing a notice in terms of Rule 21.

[33] Clearly the provisions of Rule 17 (4) cause confusion, particularly when read with the provisions of section 191 (5A) of the LRA[9]. The conundrum was also considered by Steenkamp J in *Pioneer Foods (PTY)Ltd t/a Sasko Milling and Baking (Duens Bakery) v CCMA and Others*[10], who held that Rule 17(4) cannot be reconciled with provisions of section 191(5A)(c) which are peremptory in that 'the commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved if no party has objected to the con-arb'. Steenkamp J further held that;

> '34. I find myself in respectful disagreement with the learned acting judge (In *Inzuzu*). As I have set out above, rule 17(4) must be read with, and is subordinate to, section 191(5A)(c)
>
> 35. The solution may lie in the word "commence". In terms of section 191(5A)(c), the Commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved if no party has objected to con-arb. It does not state that the arbitration must be completed on that occasion.
>
> 36. The correct interpretation, having regard to the plain language of section 191(5A)(c) and the apparent scope and purpose of rule 17 in that context, seems to me to be the following:

deal with the conciliation proceedings, but not the arbitration. The arbitration must be scheduled for a later date…"

[9] Section 191 (5A) provides;

"Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns –

(a) the dismissal of an employee for any reason relating to probation
(b) any unfair labour practice relating to probation
(c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection."

[10] C 265/10) [2011] ZALCCT 62 (11 March 2011)

36.1 If no party has objected to con-arb, the Commissioner must conduct the conciliation on the scheduled date, even if a party fails to appear or be represented;

36.2 In those circumstances, there can obviously be no conciliation in the real sense. The Commissioner will then inevitably issue a certificate that the dispute remains unresolved.

36.3 The Commissioner must then commence the arbitration. There is no peremptory provision that he or she must conclude it.

36.4 Having commenced the arbitration, the Commissioner retains a discretion to adjourn it to a later date. This could be for a variety of reasons – for example, to enable a witness to attend the proceedings; or to provide the party who did not attend or who was not represented to attend or to obtain representation."

[34] I align myself with the approach of Steenkamp J in *Pioneer Foods*[11] to the extent that it recognises the Commissioner's discretion even if the provisions of section 191(5A) were to be strictly applied. The approach in *Inzuzu*[12] appears to have ignored the principle that the Rules of the CCMA or of this Court for that matter, as subordinate legislation, must yield to the LRA and to the Constitution[13], and had thus considered the provisions of Rule 17 (4) in isolation, when these should have been read together with those of section 191 and 138 of the LRA.

[35] The discretion referred to by Steenkamp J in my view is grounded in the provisions of section 138 (5) (a) and (b) of the LRA in the sense that even if a matter is initially set down as a con/arb under the provisions of section 191 (5A) of the LRA, once a certificate of outcome was issued and the matter proceeds to arbitration, the general provisions for arbitration proceedings under section 138 takes effect[14], and it follows that both provisions must be read in tandem.

---

[11] *Supra*.
[12] Supra at fn 9.
[13] See *September and Others v CMI Business Enterprise* CC (2018) 39 ILJ 987 (CC); [2018] 5 BLLR 431 (CC) fn 55 at page 22
[14] See also *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (LC) [2012] 6 BLLR 578 (LC); (2012) 33 ILJ 1733 (LC) at para 11 - 15.

[36] What this therefore implies is that in this case, once Vilakazi had indicated that the applicant was not in a position to attend the proceedings, the Commissioner ought to have conciliated the matter, where that was possible. To the extent that the matter could not be resolved, nothing prevented the Commissioner from exercising his discretion and postponing the matter to another date. As to whether an application for a postponement ought to have been made has been dealt with elsewhere else in this judgment. However, to the extent that the Commissioner had indicated that he would not even consider an application for a postponement, and had simply proceeded in hearing the matter in the absence of the applicant, it is more a question of the Commissioner not only having committed misconduct in relation to his duties, but also having failed to properly exercise a discretion conferred upon him in accordance with the provisions of section 138 (5) of the LRA.

[37] In conclusion, it is reiterated that the facts of this case are such that even if the Commissioner was not convinced that the applicant had not been properly notified of the proceedings, there was nothing placed before him to indicate that the rescission application was made not *bona fide*; or that the applicant clearly had no *bona fide* defence to Abdalla's claim; and or had renounced its defence to Abdalla's claim, even if Mr Vilakazi had walked out of the proceedings. In the end, the grounds upon which rescission was sought as placed before the Commissioner, dictated that it be determined that at the very least, just cause had been shown, and for a finding to be made in favour of the granting of rescission.

[38] In the circumstances, it follows that the Commissioner's ruling ought to be set aside on account of it not falling within the band of reasonableness. In the light of the full record and all available material placed before the Court, I see no reason why this matter should be remitted back to the CCMA to be considered afresh. The Court is accordingly in a position to substitute the Commissioner's ruling.

[39] I have further had regard to the issue of costs. I appreciate that the filing and withdrawal of the answering affidavit was prejudicial to the applicant. However, upon a consideration of the requirements of law and fairness, and the overall

circumstances of this case, I do not deem a cost order to be appropriate. Accordingly, the following order is made;

Order:

1. The rescission ruling issued by the Second Respondent under case number GAJB11205-16 dated 12 September 2016 is reviewed, set aside, and substituted with an order that;

   a) The default arbitration award issued on 27 June 2016 under case number GAJB11205-16 is rescinded.

   b) The CCMA is directed to enrol dispute between the parties for arbitration.

2. The default award issued by the Second Respondent dated 27 June 2016 is set aside.

3. There is no order as to costs.

_____

E Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr HE Duvenage of Duvenage Attorneys
For the Third Respondent:	Mr A Goldberg of Goldberg Attorneys