THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 565/17

In the matter between:

Applicant

MEC FOR HEALTH: MPUMALANGA PROVINCIAL GOVERNMENT

and

NONSIKELELO JOYCE MADUNA **First Respondent**

PUBLICH HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **Second Respondent**

FAITH GUMEDE N.O **Third Respondent**

Enrolled: 23April and 1 July 2020

Delivered: July 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on July 2020.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant filed an application to review and set aside a rescission ruling dated 23 February 2017 and issued under case number PSHS407-16/17. The Third Respondent (arbitrator) refused to rescind an arbitration award that was issued on 18 January 2017.

[2] The First Respondent (Respondent) opposed the application.

[3] The matter was initially enrolled for hearing on 23 April 2020 but due to the level 5 lockdown measures that were in place during April 2020, the matter was removed from the roll. The matter was re-enrolled on 1 July 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the parties.

Material background facts

[4] The Respondent was employed by the Applicant as a professional nurse on 12 September 2003. She was dismissed in June 2016 after a disciplinary hearing was held and found her guilty of a charge pertaining to fraud in that she submitted a fraudulent matric certificate through a Z83 application form in June 2003, reflecting that she had obtained a matric certificate in 1992.

[5] The Respondent subsequently referred an unfair dismissal dispute to the Second Respondent. The dispute was set down for arbitration on 26 October 2016, but was postponed at the Applicant's request. The arbitration proceeded on 11 January 2017 in the absence of the Applicant and a default arbitration award was issued on 18 January 2017.

[6] The arbitrator found the Respondent's dismissal substantively and procedurally unfair and ordered that she be reinstated retrospectively. The

Applicant applied for the rescission of the default arbitration award, which application was dismissed and is the subject of this review application.

The rescission application

[7] In order to assess the arbitrator's findings and the ruling she ultimately issued, it is necessary to consider the evidence placed before her.

[8] It is evident from the transcript of the proceedings of 11 January 2017 that the dispute was initially set down for arbitration on 26 October 2016, but that the Applicant was not present. The arbitrator contacted the Applicant and was informed that the person who was supposed to represent the Applicant at the arbitration proceedings, was on leave.

[9] On 11 January 2017, the arbitrator recorded that at 10:10 she spoke to one Valencia, the Applicant's IR officer, who indicated that Mr Jabu Matshika (Mr Matshika), who was supposed to represent the Applicant at the arbitration proceedings, was on leave and that she would revert to the arbitrator. At 10:50 the arbitrator recorded that she had still been waiting for a call from the Applicant, but nobody called to inform her whether there would be representation for the Applicant. The arbitrator was satisfied that the Applicant was informed about the arbitration set down for 11 January 2017 and she decided to proceed without the Applicant being present.

[10] The Applicant applied for rescission of the default award and explained that it was not in wilful default but that during the period January 2017, the Applicant's representative was on leave and the Applicant did not receive any sms or fax to the effect that the arbitration was set down for 11 January 2017. The Applicant was surprised to receive the default arbitration award.

[11] The Applicant's case was that if the notice of set down was indeed sent, it might have been sent to the incorrect fax number at head office or the Gert Sibande district office, but no one from the Applicant's office received or had seen the notice of set down. There was no proof of which fax number the notice of set down was indeed sent to.

[12] The Applicant's representative was on leave until 16 January 2017 and he was the only person dealing with the matter from the stage of the disciplinary hearing.

[13] The arbitrator recorded that the Applicant was notified by fax on 6 December 2016 that the matter was set down for arbitration on 11 January 2017. The Applicant took issue with this and stated that although the arbitrator accepted that the Applicant was notified by fax, there was no proof of service by fax and absent such proof, the arbitrator should not have proceeded with the matter.

[14] The Applicant submitted that the Respondent was charged with an act of serious misconduct, namely fraud. The case of fraud was investigated by the Public Service Commission (PSC) and it was recommended that the Applicant take disciplinary action against her. The Applicant further submitted that the Respondent was provided with all the necessary documentation to enable her to prepare for the disciplinary hearing, which was chaired by an independent presiding officer. The Applicant's case was that a proper procedure was followed and the Respondent was duly represented by a trade union. The sanction of dismissal was recommended due to the gravity of the misconduct.

[15] In short, the Applicant submitted that there were no procedural defects. Procedural defects relating to the lodging of an appeal, does not render the disciplinary hearing procedurally unfair.

[16] The Applicant also attacked the Respondent's version presented during the arbitration proceedings to the effect that the Applicant submitted no evidence to support its allegations and submitted that the Applicant indeed called witnesses and submitted documentary proof at the internal disciplinary hearing.

[17] The Applicant's case was that it did not waive its right to defend the case, as the Respondent was dismissed for a fair reason and in accordance with a fair procedure, but the Applicant did not receive the notice of set down. The Applicant also addressed the issue of the importance of the case and the prejudice to be suffered if the arbitration award was not rescinded.

The rescission ruling

[18] The issue to be decided by the arbitrator was whether or not to rescind the default arbitration award issued on 18 January 2017.

[19] The arbitrator recorded the Applicant's and the Respondent's submissions made in support and in opposition of the rescission application. In her determination, the arbitrator recorded that the matter was set down for arbitration on 26 October 2016, but was postponed because Mr Matshika was on his annual leave. On 11 January 2017, the arbitrator was once again informed that Mr Matshika was on leave and she informed Ms Maswanganyi that it was the same excuse when Mr Matshika failed to attend the arbitration proceedings in October 2016. Ms Maswanganyi did no revert back to the arbitrator and she proceeded because the telephone call proved that the notice was properly served.

[20] In respect of the prospects of success, the arbitrator found that the Applicant waived its right to defend its case because it failed to attend the arbitration on numerous occasions without any compelling reasons. There was not a speedy resolution of the dispute, which has prejudiced a party seeking justice in this matter.

[21] The arbitrator referred to the *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[1] *(Shoprite)* where the Labour Appeal Court (LAC) held that 'good cause' also included a valid ground for rescission. The test for good cause is two-fold, firstly the explanation for the default must show that the applicant for rescission was not in wilful default, at no stage abandoned its defence of the case and secondly that it has a genuine or *bona fide* defence by alleging facts, which if proved, would entitle the applicant for rescission to relief.

[22] In conclusion, the arbitrator found that the Applicant has not shown good cause and she dismissed the application for rescission.

The test for the grant of rescission

[1] (2007) 28 ILJ 2246 (LAC).

[23] The relevant legal principles to be applied in an application for rescission, are well established.

[24] In *Northern Training Trust v Maake and Others*[2], the Court held:

> 'The enquiry in an application for the rescission of an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set down was sent. Should the evidence show that it was sent, a probability is then created that the notice was sent and received. The second leg of the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessary deal fully with the merits of the case.
>
> The two requirements of fairness and expedition should be balanced. Where there is an apparent conflict between the two, fairness should be given precedence lest injustices are done.
>
> The first respondent placed undue emphasis on the fact that the transmission record showed a successful transmission of the fax message. That was by no means proof of proper notification and regard should have been had to the facts that the applicant placed before him.
>
> …the first respondent's decision not to rescind his award is reviewable as he misconceived the nature of the discretion conferred on him by s 144 of the Act. He failed to take into account all relevant considerations. He failed to apply his mind to the relevant issues and has thus committed a gross irregularity.'

[25] In *Shoprite*[3] the LAC found that 'good cause' should be included as a ground for rescission and it was held that:

> '[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the

[2] (2006) 27 ILJ 828 (LC) at paras 28 – 30 and para 36.
[3] *Supra* n 1 at para

explanation for the default and, secondly, whether the applicant has a prima facie defence.

…

[37] In considering good cause, the second respondent took into account only one aspect of the test…. He clearly did not consider the appellant's defence to the third respondent's claim as he made no mention of it in his decision. In my view, the second respondent failed to weigh together all the relevant factors in determining whether it was just and fair and, wherefore, whether good cause had been shown for the rescission of the arbitration award. It follows that the second respondent did not apply his mind to all the issues before him and if he did, he ought, in the circumstances of this case, to have rescinded his earlier default award.'

[26] In short, in an application for rescission two factors need to be considered: the explanation for the default and whether there is a *prima facie* defence.

[27] It is in this context that an application for rescission stands to be determined.

The test on review

[28] I have to deal with the merits of the review application within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[29] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[5] affirmed the test to be applied in review proceedings and held that:

'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[4] 2007 28 ILJ 2405 (CC) at para 110.
[5] (2014) 35 ILJ 943 (LAC) at para 16

Grounds for review and analysis

[30] The gist of the Applicant's grounds for review is that the arbitrator failed to consider the two critical factors in an application for rescission namely the explanation for the default and the existence of a defence, thus she failed to appreciate and failed to apply the applicable test. Further that the arbitrator misconducted herself by concluding that the Applicant's failure to attend the arbitration proceedings constituted a waiver of its right to defend its case.

[31] In my view, there is merit in the grounds for review raised by the Applicant.

[32] It is evident from her ruling that the arbitrator was well aware of the fact that the test for good cause is two-fold, namely the explanation for the default and the existence of a *prima facie* defence.

[33] In considering whether or not to grant rescission, the arbitrator had to embark on the bipartite enquiry by considering why the Applicant was in default and whether it has a reasonable defence against the Respondent's case of unfair dismissal.

[34] *In casu,* the arbitrator had no consideration for the explanation put forward by the Applicant, namely that it did not receive the notice of set down and that Mr Matshika was on leave. The arbitrator accepted that the phone call she had with Ms Maswanganyi proved that the notice was served properly. It is evident from this finding that she had no regard to the explanation tendered by the Applicant. The arbitrator also found the fact that Mr Matshika was on leave and therefore unable to attend, to be an excuse for failing to attend, when in fact it was a valid explanation which the arbitrator never considered properly.

[35] It is evident from the rescission ruling that the arbitrator did not properly considered the first leg of the enquiry.

[36] The second leg of the enquiry that the arbitrator had to consider was whether there was a reasonable, *prima facie* defence against the Respondent's claim. It is evident from the rescission application that the Applicant made submissions in respect of the procedural fairness as well as the substantive

fairness of the Respondent's dismissal. The Applicant explained that the misconduct was serious and that it would be prejudiced if the default arbitration award is not rescinded.

[37] Instead of considering the submissions made by the Applicant and determining the question whether the Applicant established a *prima facie* defence by alleging facts, which if proved, would entitle the Applicant to the relief it sought, the arbitrator found that the Applicant has waived its right to defend its case because it was absent from the proceedings. Glaringly absent from the rescission ruling is any consideration of the second leg of the enquiry namely the *prima facie* defence.

[38] The arbitrator clearly misdirected herself and committed a gross irregularity by failing to consider the factors which she knew she had to consider in an application for rescission. She not only failed to appreciate the test she had to apply, but she failed to apply it.

[39] The arbitrator's findings in respect of waiver constituted a serious misdirection.

[40] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[6] the Constitutional Court had set out the requirements of a waiver as follows:

> 'Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or

[6] [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC).. *(Mphaphuli).*

> by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.[7] ' (Footnotes omitted.)

[41] The mere fact that the Applicant was absent from the arbitration proceedings cannot constitute a waiver of its right to defend the Respondent's claim that she was unfairly dismissed, more so where the Applicant's absence was followed by an application for rescission. The arbitrator committed an error of law by finding that the Applicant's absence constituted a waiver.

Conclusion

[42] I have to consider the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him.

[43] *In casu,* it is evident that the arbitrator failed to weigh together all the relevant factors in determining whether it was just and fair and whether good cause had been shown for the rescission of the default arbitration award.

[44] The test for review is well established *and* in applying the principles as set out *supra* as well as the test for review, this Court cannot but find the arbitrator's decision to refuse rescission to be unreasonable and therefore reviewable.

Relief

[45] This leaves the issue of relief.

[46] In the event that an award or ruling is set aside on review, this Court has a discretion whether or not to finally determine the matter. The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[47] The principles had been set out by the LAC in *Palluci Home Depot (Pty) Ltd v Herskowitz*[8] as follows:

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[7] Id at para 81.

[8] (2015) 36 ILJ 1511 (LAC) at para 58.

> 'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is "in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.'

[48] *In casu,* the Court has the entire record before it and is well-placed to make a decision on the merits of the rescission application and to decide and finally determine it on the record as it is before me and where the parties' cases were fully ventilated. On a consideration of all the facts before the arbitrator at the time, it is evident that the most reasonable outcome upon a consideration of all the facts was that the default arbitration award be rescinded and that the matter be arbitrated *de novo.*

[49] In the circumstances, it follows that the rescission ruling ought to be set aside, and I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute the ruling. No purpose would be served by remitting the rescission application back to the Second Respondent for reconsideration. It is also in the interest of justice to determine the matter finally and not to delay the arbitration hearing any longer as that would undermine one of the key objects of the LRA namely; expeditious dispute resolution

Costs

[50] This Court has a wide discretion in respect of costs. This is a matter where ultimately the arbitrator got it wrong and the interest of justice will be best served by making no order as to cost.

[51] In the premises, I make the following order:

Order

1. The rescission ruling dated 23 February 2017 under case number PSHS407-16/17 is reviewed and set aside;

2. The rescission ruling is substituted with the following ruling:

   "The default arbitration award issued on 18 January 2017 is rescinded";

3. The first respondent's unfair dismissal dispute is to be set down for a hearing *de novo* before a commissioner other than the third respondent;

4. There is no order as to costs.

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Connie Prinsloo
Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Adendorff Theron Inc Attorneys

For the First Respondent: Macgregor Erasmus Attorneys