DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO.
(2) OF INTEREST TO OTHER JUDGES YES/NO.
(3) REVISED.

12/05/2020
DATE

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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case Number: JR 2203/16

In the matter between:

SARA NTHABISENG KWINDA **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER J.A. PRETORIUS *N. O.* **Second Respondent**

OK SHOPRITE FURNITURES **Third Respondent**

Heard: **10 January 2020**

Delivered: **12 May 2020** **"By Email"**

Summary:

Review Application – to review Dismissal Ruling of the 2nd Respondent acting under auspices of the 1st Respondent. The Applicant failed to set out a proper case on the Founding Affidavit – Application dismissed. Adverse Attorney and Client order *de bonis propriis* against Applicant's Attorneys who need to show cause why this Court should not make such an order against them

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JUDGMENT

RAMDAW, AJ

Introduction

[1] The Second Respondent (the commissioner), a commissioner acting under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) dismissed an arbitration under Case Number GNTWS-423/2016 as a result of the failure of the Applicant to attend. The Applicant and her union representative arrived after the arbitration was dismissed.

[2] An Application for Rescission of the aforesaid ruling was brought and opposed by the Third Respondent. Therein, the Applicant gave conflicting reasons for her absence which resulted in the said application being refused on 30 September 2016. This application is a review in respect of the ruling dismissing the arbitration due to non-attendance (the dismissal ruling) only and not against the dismissal of the rescission application (the rescission ruling), as no mention is made of same, which is borne out by the Applicant's grounds of review per the founding affidavit.

[3] The review application is dated 13 October 2016 and is brought outside the 6 weeks period from the date of the dismissal ruling which was given on 12 August 2016. No application for condonation for any late filing has been made.

[4] The Applicant changed attorneys of record six times and on the date of the hearing of this matter there was no appearance by any legal practitioner for the Applicant. The Applicant insisted that the matter proceed and that she will represent herself. The Court assisted her to the extent necessary and took into consideration all the pleadings as well as the heads of arguments filed on her behalf.

Background

[5] Recorded in the dismissal ruling of the commissioner on 12 August 2016, the Applicant failed to attend the arbitration scheduled for 12h00. After 15 minutes grace the same was dismissed at 12h20. The Second Respondent was satisfied that proper notice was given to the Applicant per registered post before dismissing the arbitration.

[6] On 23 August 2016 the Applicant brought an Application for the rescission of the aforesaid dismissal ruling. The same was opposed by the Third Respondent. In her application, she stated under oath that she became aware of the aforesaid ruling on 13 of August 2016. Further, that she did not attend the arbitration hearing as she was off-sick for the whole of 12 August 2016. She then went to the CCMA on 13 August 2016 to check on her matter *"after being better from illness to find that my case was dismissed due to non-appearance"*. She stated that *"on the 12th of August 2016 I was sick and I could not be able to attend the CCMA. The Doctor gave all day of 12th of August 2016 to rest"*.

[7] She went on to state that the CCMA sent her an SMS notifying her of her arbitration. On the date of the arbitration she did not make it due to her falling ill on 11 August 2016 at around midnight. On 12 August 2016 she went to attend a Doctor who gave her a sick note for the day to rest.

[8] She contests both the procedural and substantive fairness of her dismissal and states that she has good prospects of success. She sought a rescission of the dismissal ruling as it was erroneously issued in her absence. On 30 September 2016 the Second Respondent issued a written ruling dismissing the application for rescission.

[9] The commissioner drew a negative inference from the conflicting versions as set out in the Affidavit as to the reasons why the Applicant did not attend the arbitration proceedings scheduled for 12 August 2016. He did recall the Applicant and her union representative arriving late after the dismissal of the arbitration for non-attendance. He stated that on 3 occasions her name was called out by the CCMA staff, and there was no response.

[10] The Applicant and her union representative averred that they were present and their names were not called hence their non-appearance. The Third Respondent opposed this application and stated that the Applicant was dishonest in that she committed herself to four different versions to explain her absence at the arbitration. The Third Respondent states that the relief as sought by the Applicant and set out in the notice of motion is vague and embarrassing.

[11] The Applicant's Union wrote to the Third Respondent requesting leave of absence for a potential witness for the hearing set down on 12 August 2016 which confirms that they were well aware of the date and time of the hearing. The Applicant failed to include the Third Respondent's Answering Affidavit to the Application for Rescission on record and the same was submitted by the Third Respondent in their answering affidavit.

[12] The Applicant states that she became aware of the hearing on the night of 11 August 2016 and not earlier, which appears to be incorrect. The Third Respondent states that no proper case for a review has been made out in the Founding Affidavit which makes no mention of the rescission hearing being reviewed.

[13] As per a memorandum dated 11 August 2016 from HOTELLICA, a Trade Union representing the Applicant, Mr R Msele addressed the HR and / Manager of OK Furniture stating:

> "Kindly take note that MR DAVID MURAGA is the witness of the Applicant. We therefore require the company to release the witness at CCMA on the 12th of August 2016. The matter will be held at 12h00 at the CCMA in Pretoria".

[14] The Applicant appeared to have fell ill on the night of 11 August 2016 and attended a Doctor who, per his Medical Certificate is a *"Traditional Healer"* and not a practising Medical Practitioner.

[15] The arbitration was set down for 12 noon on the 12 August 2016. The CCMA has roll call at 09h00 and thereafter at 12 noon. The Second respondent states

that the Applicant's name was called on 3 different occasions and only after 12h20 was the dismissal ruling made.

[16] The Third Respondent recalls that the Applicant and her union representative coming to him at about 12h50 complaining that their names were not called and if called they did not hear same being called, hence their non-appearance. They were advised that the matter was already dismissed and that the Third Respondent's representative had already left. This is all contained in the transcript filed by the Third Respondent. As per a badly drafted "vague and embarrassing" notice of motion annexed to an equally badly drafted founding affidavit the Applicant seeks *inter alia* the following crucial relief:

"Review of the whole Dismissal Ruling of Commissioner JA Pretorius."

[17] It is stated in the Notice of Motion that *"the legal representative aver and submitted to the Honourable Commissioner Pretorius that the Applicant will arrive late and will not attend the Arbitration proceedings should the medical practitioner deem the Applicant right to attend activity".* He goes on to say that there was a request for a postponement which was turned down.

[18] The Applicant states under oath in her rescission application that she attended the CCMA on 13 August 2016 to enquire as to what happened in her matter to be advised that the same was dismissed as a result of her non-appearance. The Third Respondent argues that this is factually incorrect as 13 August 2016 was a Saturday and the CCMA Offices are closed on a Saturday.

[19] It is quite clear that what is stated under oath to have happened on the 13th August 2016 actually took place on the 12th August 20126 have anything happened on the 12th of August 2016 if she did attend the CCMA offices. She was represented by a Union Official who despite her illness would have been in attendance of the CCMA arbitration to seek a postponement. It does appear that he never did so as he was aware of both the date and time of the hearing. The medical certificate issue appears to be nothing but a cover-up to explain the Applicant's absence and not being fit for work on the 12th of August 2016.

It is rather absurd as she was already dismissed and on her own version was at the CCMA. It could only be on the 12th of August 2016 as the 13th of August 2016 was on a Saturday.

[20] The Applicant states under oath that she only became aware of the set down for 12 August 2016 at midnight of 11 August 2016 per a SMS message from the CCMA. This is rather absurd as firstly the Union wrote a memo to the Third Respondent on 11 August 2016 about a potential witness. The Applicant would have been advised of the date as the notice was sent via registered post. The CCMA does remind parties of the dates for the hearing at least a few days before the hearing but not at midnight. The Third Respondent having dismissed the arbitration could not entertain an application for a postponement or to stand the matter down.

[21] At the rescission Application hearing (which was recorded and forms part of the transcription submitted as the records) the Applicant and her Union Representative gave other explanations for her absence when questioned by the Second Respondent. The Third Respondent is correct when stating that "*four different versions*" were given as this is evident from both the affidavits and records of the proceedings.

Test for Review

[22] This test for a review of a CCMA award or ruling has been cemented in the case of *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commissioner for Conciliation, Mediation and Arbitration and Others*[1] wherein it was held that there must be a ground listed in section 145(2) of the Labour Relations Act[2] (LRA) present, and the presence of such ground must render the award unreasonable.[3] It is therefore a two pronged test.

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[1] [2014] 1 BLLR 20 (LAC).
[2] No. 6 of 1995, as amended.
[3] See: *Gold fields Mining* (supra fn 1).

[23] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[4] the Constitutional Court held that section 145 of the LRA is "*suffused*" by the constitutional standard of reasonableness and that the test for reasonableness is: "*Is the decision reached by a commissioner one that a reasonable decision-maker could not reach?*"[5]

[24] Furthermore in reaching such a decision, the Labour Court in *Sasko (Pty) Ltd v Buthelezi and Others*[6] provided that a commissioner cannot ignore material evidence in a review, as such ignorance will amount to misconduct justifying the setting aside of an award.[7]

[25] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*[8] the Court reaffirmed the *Sidumo* test as a stringent test allowing the setting aside of the award where the outcome is entirely disconnected from the evidence or is unsupported by evidence or involves speculation by the commissioner.[9] Therefore, for a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result.[10]

Analysis

[26] The Applicant lodged the review application outside the 6 weeks period calculated from 13 August 2016, the date on which the Applicant states that she became aware of the dismissal ruling. No application for condonation by any of the 6 different sets of attorneys on record, have been made. The Applicant elected to argue her own case and the Court assisted her to the extent necessary to place all the facts, pleadings and arguments before the

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[4] [2007] 12 BLLR 1097 (CC).
[5] Ibid at paras 88, 104, 105 and 110.
[6] [1997] 12 BLLR 1639 (LC).
[7] Ibid at p. 639
[8] [2013] 11 BLLR 1074 (SCA)
[9] Paragraph 13
[10] *See: Herholdt* (supra fn 8). See also: *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 LAC at paras 32-33.

Court. I will accept that the review application is against the dismissal of the rescission application read with the dismissal ruling. If so the same has been lodged within the 6 weeks period and there was no need for a condonation application.

[27] The commissioner dealt with a Rescission Application and had to take into consideration the reasons for the default, prejudice to the parties, prospects of success and had to consider the application before him in terms of applicable principles and case law. His reasoning in dismissing the rescission application is the decision of a reasonable decision maker and his earlier ruling dismissing the arbitration stands.

[28] The fundamentals of the *Sidumo* test has been met and so has the components of reasonableness been met showing that both these rulings were a decision of a reasonable decision maker. I cannot find that the commissioner committed a gross irregularity in arriving at the decision he made, given the different conflicting versions made under oath as to the non-appearance at the arbitration. There has been a grave deal of tardiness and negligence on the part of both the Union representing the Applicant and her initial attorneys who drafted a review application in a very haphazard and absurd manner in that it failed to set out a proper case for a review. A case has to be made out in the Founding Affidavit, not in any reply, supplementary affidavit or heads of arguments.

Negligence of the applicant's representation

[29] The applicant had 6 sets of attorneys on record, who are as follows:

29.1 Madala Komape Attorneys
29.2 Sekgale Seshabe Attorneys
29.3 Ranthoko Attorneys
29.4 A Malaza Attorneys
29.5 Ma Selota Attorneys
29.6 Ntulini Attorneys

[30] Ntulini Attorneys filed the Applicants Heads of Arguments on 8 February 2019. On 30 September 2019 the Registrar of this Honourable Court served the Notice of set down on Ntulini Attorneys[11] and an "OK Transmission Report" was received. I am satisfied that there was proper service. Further, the Applicant appeared on 10 January 2020 which confirms proper receipt of the Notice of Set Down and Ntulini Attorneys failed to attend the hearing of the matter, despite a timeous receipt of a Notice of Set Down.

[31] No Notice of withdrawal of Attorneys of Record appears in the Court file nor has there been any explanation from this firm of attorneys showing discourtesy to both this Court and to their client. This Court can only sympathise with the Applicant who received poor representation from both her Union and the 6 firms of attorneys she may have engaged out of desperation to cover up an oversight by her Union Representative who failed to arrive timeously at the CCMA arbitration. He arrived 50 minutes late after the matter was dismissed. However, this Court is bound by the pleadings before it and has to decide this matter on the said pleadings. The said union representative was very evasive and argumentative when questioned by the Second Respondent as per the transcript filed. It is clear that the reasons for non-attendance were unacceptable and conflicting. Despite this, 6 firm of attorneys pursued this review application which can only be termed as frivolous and vexatious. I agree with the Third Respondent's counsel who terms this as nothing but perjury as they were all made under oath.

Costs

[32] The court has a discretion when it comes to cost. This application is both frivolous and vexatious, lacking any merit and is both a poorly and badly drafted application which the Third Respondent had no choice but to oppose to finality. The fact that six firms of attorneys are on record for the Applicant speaks for itself that the union HOTELLICA may have been driving the process. The case

[11] At facsimile no: 086 662 9712.

number used was initially incorrect and the pleadings were misfiled leading to delays. A formal application was brought to correct same.

[33] This application could have been easily withdrawn given a lack of merit in light of the strenuous opposition, yet all six firms of attorneys pursued this matter. However, after flogging a dead horse the last firm of attorneys of record elected not to appear before this Court to present their client's case, which is both highly unethical and unprofessional. The have thrown their client to the wolves and this Court had to guide her to the extent necessary as she wanted this matter finalized after presumably being mulcted in costs by her six legal representatives.

[34] As a matter of disapproval of such conduct whilst the Applicant could have been referred to either Legal Aid, SASLAW (who has an office at the seat of this Court) or any *pro bono* organisation the said attorneys all elected to be parties to a botched up application and failed to discharge their professional and ethical duties as outlined herein.

[35] I do not see any reason why all six law firms as listed herein should not pay the Third Respondent's costs on an Attorney and Client scale *de bonis propriis*. This order will deter legal practitioners who get involved in bringing frivolous and vexatious actions lacking merit to this Court, increasing its already over-burdened court roll, impacting on the expeditious resolution of labour disputes as *"justice delayed is justice denied"*. This remains a 2016 matter heard in 2020 some 3 years later.

[36] Our Constitution promotes the speedy and expeditious resolution of labour disputes and this Court promotes same as per the many judgements issued to date condemning delays and applications lacking any merit.

[37] In the premises the following order is made:

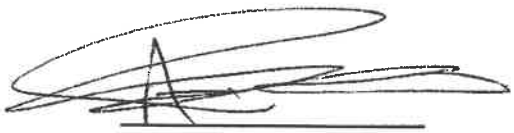
Order:

1. The Application for review is dismissed.
2. The six firms of attorneys who are on record for the Applicant from the inception of this matter namely:

    2.1 Madala Komape Attorneys
    2.2 Sekgale Seshabe Attorneys
    2.3 Ranthoko Attorneys
    2.4 A Malaza Attorneys
    2.5 Ma Selota Attorneys
    2.6 Ntulini Attorneys

    are hereby directed to appear before this Court on a date to be determined by the Registrar to show cause why an order should not be made in the following terms:

    a. That each of the six firm of attorneys listed above are jointly and severally liable, the one paying and the other to be absolved for the Third Respondent's costs granted *de bonis propriis* against them on the scale as between Attorney and Client.



A. Ramdaw
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Sarah Nthabiseng Kwinda

For the Third Respondent: Jonathan Jones from Norton Rose Fullbright South Africa Inc.