

SOUTH AFRICA / JUDGMENT

Orical Environmental Services (Pty) Ltd v Maimane N.O (JR2190/23) [2024] ZALCJHB 392 (4 October 2024) [2024] ZALCJHB 392

COURT

Labour Court Johannesburg

BEFORE

P Naidoo

CASE / FILE NUMBER

JR 2190/23

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 2190/23

In

the matter between:

ORICAL
ENVIROMENTAL SERVICES (PTY) LTD
Applicant
and
MORGAN
MAIMANE N.O
First
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
Second
Respondent
DESMOND
KHOZA
Third
Respondent

Heard:

9 May 2024

Delivered: 04 October 2024
(This judgment was handed down electronically by circulation to the parties, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 04 October 2024.)

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant seeks to review and set aside a rescission ruling issued by the first respondent (the commissioner) on 26 September

2023. In his ruling, the commissioner refused to grant the application for rescission of his default award issued on 8 August 2023. In his default award, the commissioner found that the third respondent's dismissal was substantively unfair and awarded him compensation of R17 500.00 (equivalent to 5 months' salary). The review application is unopposed.

The commissioner's default award

[2] The commissioner issued a default arbitration award on 8 August 2023 (the default award). In the default award, the commissioner records that:

2.1 The applicant, Orical Environmental Services (Orical) failed to appear and was not represented, despite being notified;

2.2 Prior to the commencement of the hearing the commissioner called Orical on their cellphone number provided on the 7:11 form and they indicated that they were supposed to be represented by LabourNet;

2.3 Having been satisfied that the provisions of rule 8 of the CCMA rules were complied with and in the absence of a reason for non-appearance, he proceeded in terms of s 138 (5) of the Labour Relations Act 66 of 1995, as amended (the LRA) and continued with the arbitration proceedings in the absence of Orical.

The application for rescission

[3] On 28 August 2023, Orical brought an application for rescission of the default award. Mr Lukas Vermaak, Orical's Integrated Contracts Manager (Vermaak) deposed to the founding affidavit. Vermaak made inter alia; the following submissions in the founding affidavit:

3.1 He received the notice of set down on 27 July 2023 and forwarded it to Orical's service provider, LabourNet. In accordance with usual practice, he expected that LabourNet would serve an objection (to con-arb) and would instruct the Proactive Employers Association of South Africa (PEASA), of which Orical is a member, to attend the conciliation on its behalf. The notice of set down was sent to Ms Ntuli, a consultant at LabourNet (Ntuli);

3.2 When Vermaak received no response from Ntuli, he sent a follow-up email to the LabourNet support desk on 3 August 2023. After the fact, it came to his attention that he included a different set down notice in his follow-up email, which was already actioned by LabourNet, hence the support desk of LabourNet took no action in respect of his follow-up email;

3.3 Vermaak was later informed by LabourNet that his initial email to Ntuli was not received as Ntuli was on sick leave. He attached a confirmatory and supplementary affidavit from Predashnee Moodley, Senior Industrial Relations Support Consultant from LabourNet (Moodley) confirming the allegations in his founding affidavit as to LabourNet's involvement;

3.4 It is correct that Orical was contacted on the day of the arbitration, however, they were mistakenly of the belief that LabourNet was dealing with the matter;

3.5 Vermaak referred to the supplementary affidavit of Moodley in which Moodley confirmed that when Orical's non-attendance came to her attention on the day of the arbitration, she immediately telephonically contacted the CCMA to "rectify or resolve" the matter however, the phone lines were not answered and she could not reach anyone at the CCMA;

3.6 Orical's non-attendance was an "honest mistake" and as a result of miscommunication and/or misunderstanding between Orical and LabourNet - there was no wilful intention not to attend the con-arb or any intention not to be present;

3.7 If Orical were given an opportunity to defend the dismissal dispute, it had good prospects of success on the merits. This was because the third respondent was found guilty and dismissed for gross insolence, threatening behaviour and gross insubordination, after a duly constituted disciplinary hearing chaired by an independent chairperson. Vermaak attached the charge sheet and the hearing outcome to the founding affidavit and noted that the default award did not mention or deal with the charges against the third respondent. Orical adhered to its internal policies and labour laws when dismissing the third respondent; the dismissal was a fair sanction and the third respondent did not have a long service record. The third respondent's conduct was serious and impacted on the trust relationship.

3.8 The prejudice to Orical that would be suffered if the award was not rescinded was significant as it would be indebted to the third respondent for the equivalent of 5 months' salary, despite an explanation being advanced for its non-attendance and good prospects of success in the dismissal claim.

- [4] Orical did not set out which ground under s 144 (a) to (e) it relied on for the rescission, pertinently, whether it was in terms of s 144 (a): (the award was erroneously sought or erroneously made in the absence of any party affected by that award) or s 144 (d): (the award was made in the absence of any party, on good cause shown). However, Orical does mention that the purpose of the application for rescission was to show good cause as to why the default award was granted in its absence.

The rescission ruling

- [5] The rescission application was not opposed by the third respondent.
- [6] In his rescission ruling the commissioner recorded the following in paragraph 11:

‘In relation to the matter being heard in Default, The CCMA called the applicant to remind him of his case on the day of the hearing, I was informed that Labour Net was handling the matter, I then called back few minutes later, was still told that they are still discussing the matter with Labour Net, I then proceeded hearing the matter in default.’

- [7] The commissioner concluded that Orical was properly notified and did not tender a reasonable and acceptable explanation for the default award being issued. Orical abandoned its case entirely to LabourNet, this showed disinterest which amounted to wilful default. Having regard to cases dealing with the failure to prosecute one's matter, the commissioner concluded that there is a limit beyond which one can escape the results of their attorney's lack of diligence or the insufficiency of the explanation tendered.

- [8] The commissioner recorded in paragraph 15 as follows:

‘Concerning prospects of success the applicant indicated that there was a procedure followed prior to the dismissal. I am of the view that as a result it would be inappropriate to allow this matter to be rescinded as the Applicant failed to attend the CCMA hearing despite being properly notified and called before the commencement of the hearing from the numbers provided on the 7:11 referral before the matter can proceed.’

- [9] The commissioner accordingly refused the rescission application.

The grounds of review

- [10] Orical seeks to review and set aside the rescission ruling. Its grounds of review include that: (a) the commissioner did not apply his mind to the submissions on the reasons for Orical's non-attendance at the arbitration and (b) the commissioner did not consider Orical's prospects of success at all.

Test for review

[11] What is being sought in the present matter is the review of a rescission ruling. A rescission ruling involves the exercise of a commissioner's powers under s 144 of the LRA. It is not an arbitration award within the meaning of s 145. As such a rescission ruling is susceptible to review under s 158(1)(g) of the LRA.[1] There is no question that Oricol's papers disclose a cause of action – the review of a rescission ruling. The fact that s 158(1)(g) is not expressly referred to is not a bar to the matter being disposed of on the correct basis.

The merits of the review application

[12] As set out above, the arbitration proceeded in Oricol's absence.

[13] There is no dispute that Oricol received the notice of set down. The explanation for non-attendance was that it sent the set down notice to LabourNet, the person to whom it was sent did not receive it as they were ill and a follow-up was made by Vermaak which inadvertently attached the incorrect set down. There is a confirmatory affidavit filed by LabourNet. It does appear from the rescission application that Oricol demonstrated that it had the intention of attending the CCMA proceedings and dealing with the dispute.

[14] The commissioner records in the default award that he phoned Oricol a few minutes later and they informed him that they were discussing the matter with LabourNet. He records nothing further about the telephonic conversation but simply that he proceeded with the dispute in Oricol's absence. The sole basis for the commissioner's rescission ruling was that he was not satisfied that there was an acceptable explanation for Oricol's default.

[15] Oricol set out submissions on its prospects of success in defending the unfair dismissal claim. The commissioner did not assess or make any determination on Oricol's prospects of success in the main dispute. This was a material misdirection. Under s 144(d) of the LRA an award is to be rescinded on good cause shown. Good cause indicates not only an assessment of the explanation for default but also whether there is a bona fide defence to the claim.

[16] In *Shoprite Checkers (Pty) Ltd v CCMA and 7 others*[2], the Labour Appeal Court (LAC) considered a matter where the CCMA commissioner refused a rescission application on the sole basis that proper notice had been received. The LAC held, in these circumstances, that the ruling fell to be reviewed, reasoning as follows:[3]

'In considering good cause, the second respondent took into account only one aspect of the test. That is to say he only considered the fact that Booysen had misdiarised the date of the arbitration hearing. 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, therefore, 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.'

[17] Similarly, here, the commissioner considered only one aspect of the test for good cause. He completely failed to have regard to Orical's prospects of success in defending the unfair dismissal claim.[4] Orical was required to show that it had a bona fide defence to the claim in the sense of setting out averments which, if established at the arbitration, would entitle it to succeed.[5] Without making any pronouncements on the merits, suffice it to say that had the commissioner made any assessment of Orical's

prospects of success he certainly would have regarded this as significant. This coupled with a demonstrated intention to defend the dispute indicates that had a reasonable commissioner weighed all these factors as part of the rescission enquiry, there can be little doubt that rescission would have been granted. Put differently, no reasonable decision maker would have refused condonation having regard to the full conspectus of relevant factors.

[18] In the premises, the rescission ruling falls to be reviewed and set aside. Since this court is apprised of the full record, there is no reason why the ruling should not be substituted with a ruling granting rescission. It would merely delay the resolution of the dispute to remit the rescission application to be determined by another CCMA commissioner.

Order

1. The first respondent's rescission ruling dated 26 September 2023 under CCMA case number GATW 10782-23 (the ruling) is hereby reviewed and set aside.

2. The ruling is substituted with the following ruling:

'The default arbitration award issued by commissioner Morgan Maimane on 8 August 2023 under CCMA case number GATW 10782-23 is rescinded.'

3. The second respondent, the Commission for Conciliation, Mediation and Arbitration, is directed to enrol the unfair dismissal dispute under case number GATW 10782-23 for arbitration.

4. There is no order as to costs.

P. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: AJ Posthuma

For the respondent: No appearance

[1] This empowers the Labour Court to review the performance of any function provided for in the LRA on any grounds that are permissible

in law. See *SACCAWU v CCMA & others*

- (2000) 21 ILJ 2098 (LC); Urban Africa Security CC v Hlatshwayo & others
- [2011] ZALCJHB 63. A ruling, like any act other than an award, must be reviewed in terms of section 158(1)(g) of the LRA: Carephone (Pty) Ltd v Marcus N.O. & others
- (1998) 19 ILJ 1425 (LAC); KwaZulu Transport (Pty) Ltd v Mnguni & others
- [2001] 7 BLLR 770 (LC); Els Transport v Du Plessis & others
- [2001] 6 BLLR 599 (LC) and Mould v Roopa NO & others
- (2002) 23 ILJ 2076 (LC).
- [2]
- [2007] 10 BLLR 917 (LAC).
- [3] Ibid at para 37.
- [4] See also Melomed Hospital Holdings (Pty) Ltd v Denosa obo Fourie and Others
- [2023] ZALCCT 31.
- [5] Grant v Plumbers (Pty) Ltd [1949] 2 All SA 341 (O) at 476-7.

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