

SOUTH AFRICA / JUDGMENT

Vaal Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR 2664/16) [2020] ZALCJHB 160 (18 August 2020)

[2020] ZALCJHB 160**COURT**

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2664/16

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Source record**The****Labour Court of South Africa****(Held at Johannesburg)****(JUDGMENT)****Not reportable****CASE NO: JR 2664/16****In****the matter between:**

VAAL
ENGINEERING (PTY) LTD
Applicant
and
THE
COMMISSION FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First
Respondent
LANDELA
S.P N.O
Second Respondent
FOUCHE
A.J.H
Third Respondent
MODIPA
S. N.O
Fourth Respondent

Date

enrolled: 30 July 2020 (In Chambers)

Date

of judgment: 18 August 2020. Judgment distributed by email at 16:00

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent on 28 August 2016. In his award, the second respondent found that the applicant had unfairly dismissed the third respondent, and awarded compensation equivalent to three months' remuneration. The applicant applied to rescind the award. In a ruling issued on 7 October 2016, the fourth respondent refused to rescind the arbitration award.
- [2] I deal first with the application to review the rescission ruling made by the fourth respondent. The affidavit that served before the fourth respondent in support of the application for rescission was completed on a pro forma document provided by the first respondent, the CCMA. In the affidavit, the deponent states that the applicant did not receive the telefax advising it of the arbitration hearing. The deponent states further that it was because the applicant did not receive the telefax, that it was not in attendance at the hearing. In the space provided on the pro forma to address the prospects of success, the applicant avers that the third respondent was on probation, and that he was dismissed consequent on complaints from co-workers and a failure to meet the required performance standards.
- [3] The ruling under review is terse. The fourth respondent records that, in his view, the applicant failed to explain why it did not receive the notice of the arbitration proceedings and further, that the deponent "did not even explain how he received the default which prompted him to apply for rescission of the default award". In regard to the applicant's prospects of success, the fourth respondent found that at face value, the prospects of success did not seem good. The fourth respondent accordingly refused to rescind the award.
- [4] Section 144 of the LRA regulates the granting of rescission in the CCMA. A commissioner may rescind an arbitration award or ruling erroneously sought or erroneously made in the absence of any party affected by the award, or in which there is an ambiguity, or where the ruling or award is granted as a result of a mistake common to the parties, or where the award or ruling is made in the absence of any party, on good cause shown. The first ground, on which it would appear the applicant relied, is that there existed a fact at the time of the ruling of which the commissioner was unaware and which would have otherwise precluded the granting of the default ruling. This provision has been applied in circumstances where a commissioner believes that there has been proper service in terms of rules but there had not been, and the award was made in the absence of a party who did not receive service. In

this instance, unlike a rescission sought on the basis of s 144 (d), it is not necessary for the applicant in any application to rescind the award to show good cause.

- [5] In respect of the application of s 165 (which contains wording identical to the relevant CCMA rule) this court has consistently held that a default judgment is granted erroneously, even if there is proof of fax transmission of the set down, in circumstances where the applicant states that the notice of set down was not received. (An exception is the case where the applicant has clearly attempted to evade service.) In *Roux v City of Cape Town*

[2004] 8 BLLR 836 (LC) the court held that proof of a fax transmission of the set down date was no more than prima facie proof that the notice had come to the parties attention.

- [6] In the present instance, the arbitration award sought to be rescinded records that the applicant was sent notice of hearing by telefax on 6 July 2016. The applicant's telephone number was recorded on the referral form that served before the second respondent (as was a cell phone number), but no attempt appears to have been made to contact the applicant. There is also nothing in the record filed by the CCMA in the present proceedings to indicate that the notice of set down was in fact successfully transmitted. The undisputed averment in the founding affidavit before the fourth respondent was that the set down notice had not been received. It follows that it was not open to the fourth respondent to find that the notice had in fact been received and that the applicant had been aware of the date of the set down of the arbitration hearing. He ought to have appreciated that even if papers are properly served in terms of CCMA rules, when a party is able to show that in fact it did not receive notice of set down, then any order made or ruling issued in its absence must be considered to be erroneously granted for the purposes of any application for rescission.

- [7] It follows that the fourth respondent's ruling stands to be reviewed and set aside. There is no purpose in remitting the matter for reconsideration - the court is in as good a position as any commissioner would be to make a ruling. I intend therefore to substitute the fourth respondent's ruling with a ruling to the effect that the arbitration award issued by default is rescinded.

- [8] In the circumstances, it is not necessary for me to consider the application to review and set aside the second respondents arbitration award.

- [9] In so far as costs are concerned, the court has a broad discretion in terms of s 162 of the LRA to make an order for costs according to the requirements of the law and fairness. In my view, those interests are best satisfied by each party bearing its own costs.

I make the following order:

1. The rescission ruling issued by the fourth respondent on 7 October 2016 is reviewed and set aside.
2. The ruling is substituted by the following:

- a. 'the arbitration award issued on 28 August 2016 under case number NWKD 2146-16 is rescinded.'

André van Niekerk

Judge of the Labour Court of South Africa

PARTIES' REPRESENTATIVES

For the applicant: Manong Badenhorst Inc fax 0866009623 ref CJSD/LC0518/ub021/rnv

For the third respondent: Legal Aid South Africa Fax 018 462 8607 ref R Botha/X689494017

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