REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 13/12

In the matter between:

CASSIM ZOOBAIR LAVANGEE **Appellant**

and

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY **First Respondent**

N. MASEKO N.O. **Second Respondent**

ENGEN PETROLEUM LIMITED **Third Respondent**

Heard: **17 September 2013**

Delivered: **30 May 2014**

Summary: Rescission of an arbitration award in terms of section 144 of the LRA- Established principle that good cause is an element for consideration in such applications-- commissioner ought to consider the reasonableness of the explanation and whether applicant had a *prima facie* defence. Commissioner narrowly interpreting section 144 and failing to consider good cause- Labour Court upholding rescission ruling- Appeal upheld- Labour Court judgment set aside- Arbitration award rescinded.

CORAM: **Tlaletsi DJP, Dlodlo et Mokgoatlheng AJJA**

JUDGMENT

TLALETSI DJP

Introduction

[1] This is an appeal against the judgment and order of the Labour Court (Gush J) in which the appellant's application to review and set aside a rescission ruling by the second respondent was dismissed with costs. The appellant is in this Court with leave obtained pursuant to a petition to the Judge President having failed to obtain leave from the Labour Court.

Background

[2] The appellant was dismissed by the third respondent on allegations of misconduct on 2 August 2010. He referred a dispute of unfair dismissal to the first respondent (the Bargaining Council). A conciliation hearing was scheduled for 21 September 2010. The third respondent did not attend. The reason for the third respondent's failure to attend was, strangely, that it was not interested in the conciliation of the dispute. Since the dispute could not be conciliated because of the attitude adopted by the third respondent, it remained unresolved.

[3] The dispute was referred to arbitration on behalf of the appellant by his attorneys on 22 September 2010. During October 2010, appellant enquired from his attorneys on the progress of the matter. He was advised that they were still waiting for a date from the Bargaining Council. On 4 November 2010, the appellant received a telephone call from his attorneys informing him that *"there was a mishap with regards to the notice of set down*".

[4] What happened, which is not disputed, is that the notice of set down was transmitted by telefax to appellant's attorneys of record on 1 October 2010. The fax machine to which the notice was sent is used by about 10 staff members. At the time, there were renovations taking place at the appellant's attorneys' offices. In the process of moving the furniture, files and other documents around, the notice of set down was mistakenly misplaced by one of the staff members. The said notice was only placed on the incoming post box of the attorney handling the matter on behalf of the appellant on 4

November 2010. Upon perusal of the document, the said attorney realised that the arbitration proceedings had been set down for 25 October 2010.

[5] Appellant's attorney telephoned the Bargaining Council and ascertained that the appellant's referral of his dispute was dismissed by the arbitrator on 25 October 2010 due to non-appearance of the appellant.

[6] The appellant brought an application to rescind the ruling dismissing his referral on 9 November 2010. The application was opposed by the third respondent. In the application, the appellant contended that his failure to attend the arbitration proceedings was not due to wilful conduct on his part since he was not informed by his attorneys that the hearing was scheduled for that day. His attorneys as well were not aware of the date of set down because of the fact that the notice of set down from the Bargaining Council was misplaced and never brought timeously to the attorney handling the matter on behalf of the appellant. He contended further that he would suffer prejudice should his application not be granted.

[7] The third respondent contended that the appellant did not raise any of the grounds listed in section 144 of the Act[1] as the basis of his application. It was further contended that the appellant's failure to attend was through the gross negligence of his attorneys and that he has recourse against them through a civil action. It is important to state that the deponent did not deal with, or dispute any of the factual averments made by the appellant in the founding affidavit.

[8] The nub of the commissioner's reasoning in dismissing the application is to be found in the following paragraphs of the award.

> Analysis of Submissions
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> 'The applicant has been duly notified to attend the arbitration hearing. This is not in dispute. It is also common cause that he did not attend the arbitration hearing, and attributes this to his attorney of record. It must therefore be accepted that there was proper notice on the part of the Council. The

[1] Labour Relations Act 66 of 1995.

applicant must therefore show that the ruling was erroneously sought or obtained in *absentia.* I am inclined to agree with the respondent that the applicant cannot be heard to claim that the ruling was erroneously obtained. The Commissioner based his decision on what he had before him. Negligence on the part of his attorney of record is the sole reason for non-attendance.

There seem to be a dispute of fact on whether the applicant has good prospects of success. Be that as it may, I am not persuaded that the applicant will suffer severe prejudice as compared to what the respondent is likely to grapple with. The latter in my view has made attempts to have the matter finalized by attending the compulsory arbitration hearing. He therefore stands to suffer severe prejudice. The applicant on the other hand has a remedy to deal with his attorney of record.'

The review

[9] The appellant sought to review the award on the grounds that the commissioner misconstrued the evidence before him, failed to apply his mind properly to the evidence, exceeded his powers and displayed a sense of biasness.

[10] The appellant's founding affidavit was accompanied by a confirmatory affidavit of Pragasen Yerriah, a candidate attorney at the appellant's attorneys of record. The deponent stated that he is currently responsible for the handling of the file in connection with the matter "*more specifically the administrative issues pertaining to bringing the matter before court*." He confirmed having read the founding affidavit of the appellant and confirmed the contents in so far as it relates to him.

The appellant in the replying affidavit responded to the legal arguments raised by the third respondent in its affidavit opposing the application and mentioned further that he was denied his right to a fair hearing by the third respondent; that his disciplinary hearing was held on a day when his witness was not available and was refused an adjournment in order to call his witness to testify on his behalf; that the evidence of his witness will prove that he was not guilty of the misconduct he was charged for; in the alternative should it be found

that he is guilty, he intends to show that in the circumstances the sanction of dismissal was very harsh compared to other employees found guilty of similar misconduct.

[11] In considering the appellant's application, the court below noted that the application was incorrectly brought in terms of section 145 instead of section 158(g) of the Act. The court however found it appropriate in the circumstances of the matter to consider whether the appellant's application for review of the rescission ruling had any merit. The Labour Court noted that on the previous occasion the application to review the rescission ruling was set down for hearing in the Labour Court and same was dismissed due to the failure of the appellant's attorneys to appear to argue the matter. The appellant thereafter filed an application to rescind the said order. However the parties agreed that the rescission application be granted so that the merits of the review application could be adjudicated. The Labour Court remarked that it is noteworthy that the circumstances surrounding the failure of the attorney to appear at the arbitration are to a large extent mirrored by the reasons why the appellant's attorneys did not appear when the matter was enrolled in the Labour Court. In both cases, the court below remarked, the attorneys do not deny having received the notice of set down by telefax, but in both cases they aver for a variety of reasons that the fax did not come to the attention of the attorney who was dealing with the matter.

[12] The court below considered section 144 of the Act and what constitutes a judgment that is erroneously granted and concluded that since the notice of set down was properly served and that the dismissal of the referral was not erroneously made, the ruling was therefore correctly made and is not reviewable. The court held further that in so far as it was necessary to take into account the applicant's prospects of success, it was incumbent upon the appellant to do more than simply aver in his rescission application that he has a good case and reasonable prospects of success. The application for review was in the result dismissed with costs.

The Appeal

[13] In this Court, Mr Allen who appeared on behalf of the appellant contended *inter alia,* that the court *a quo* erred in finding that the decision taken by the commissioner was not one which a reasonable decision-maker could not reach. He submitted that the court *a quo* should have found that the appellant had made out a case for the rescission of the Default Award since the commissioner failed to apply the law relating to rescission applications correctly.

[14] On the other hand, Mr Matyolo who appeared on behalf of the third respondent, contended that the commissioner's finding that the non-attendance of the appellant and his attorney could not be said to have been within the meaning of section 144 of the Act, was a correct finding and is supported by the decision of the Supreme Court of Appeal in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[2] and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[3]*).* Counsel contended further that the argument by the appellant that the court *a quo* did not consider the principle of good cause is fatal to the appellant's case because he failed to make a case either on the provisions of sec 144 of the Act or the principle of (good) just cause.

[15] Section 144 of the Act dealing with variation and rescission of arbitration awards and rulings provides:

> '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; or

[2] 2007 (6) SA 87 (SCA).
[3] 2003 (6) SA 1 (SCA).

(c) granted as a result of a mistake common to the parties to the proceedings.'

[16] It is indeed correct that on the narrow interpretation of sec 144 of the Act, it cannot be said that the commissioner was wrong in finding that the appellant's application for rescission of its ruling fell within the provisions of rule 144 of the Act. I mention this aspect because it cannot be said, on the facts of this case, that the dismissal of the appellant's referral when there was no appearance either by himself or his legal representative was erroneously sought or made. Neither can it be said that the award was granted as a result of a mistake common to the parties to the proceedings.

[17] However, this Court had an opportunity to interpret the provisions of sec 144 within the context of the Constitution of the Republic of South Africa 108 of 1996 and the labour relations regime in our country. *In Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[4] the Court held *inter alia,* that sec 144 must be interpreted so as to include good cause as a ground for the rescission of a default arbitration award. In particular, the Court had the following to say:

> 'As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to in s 144 of the Act, in such cases both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief. It follows, that if one was to hold that s 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by the wording of the section it could lead to unfairness and injustice. In my view this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret s 144 of the Act so as to include 'good cause' as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in s 34 of the Constitution because, if s 144 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise

[4] (2007) 28 ILJ 2246 (LAC).

> his right provided for in s 34 of the Constitution despite the fact that he may not have been at fault for his default. This could be a grave injustice.'[5]

[18] It is clear from the award of the commissioner that the binding authority in the above quoted case was not followed. The commissioner after finding that the appellant's application did not fall within any of the circumstances listed in sec 144, did not take the enquiry any further except to note that there seemed to be a dispute of fact on whether the appellant had good prospects of success. This dispute of fact was neither investigated nor resolved by the commissioner. Instead, the commissioner concluded that the appellant was not going to suffer severe prejudice as compared to what the third respondent was likely to grapple with, should rescission of the ruling granted in the absence of the appellant be rescinded.

[19] The commissioner was obliged to consider whether the appellant had shown good cause for the granting of the order. In doing so, the commissioner ought to have considered at least two factors, namely, the explanation for the default (whether the explanation is reasonable and *bona fide*) and whether the appellant had a *prima facie* defence. In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and Others,*[6] it was held that while the absence of one of the two essential elements would usually be fatal, they are not to be considered mechanically and in isolation but they are to be weighed together with other relevant factors in determining whether it should be fair and just to grant the indulgence.

[20] In *casu*, there is no doubt that the appellant was not aware of the date of set down of the arbitration hearing. Furthermore, the averment that the notice issued by the Bargaining Council and sent to the appellant's attorneys did not come to the attention of his attorney is not challenged and must be accepted. The fact that in subsequent review proceedings in the Labour Court the review application was dismissed due to the default of the appellant and his attorney is not relevant to the application for rescission of the default dismissal of the referral, since it is not a factor that served before the commissioner. I

[5] At para 33.
[6] (1994) 15 ILJ 1310 (LAC) at IB131I -1312A.

am not persuaded that had the commissioner considered whether the appellant had shown good cause he would in any case have found the appellant and his attorney's non-appearance to be unreasonable and not *bona fide*. The remark that the appellant had a remedy to deal with his attorney of record was in my view made under the misconception by the commissioner of the interpretation of sec 144 and not on the reasonableness and *bona fide* of the default. Put differently, this remark was based on the understanding that the door was closed for the appellant as he did not meet the requirements set out in sec 144 which understanding was based on a narrow interpretation of sec 144 contrary to the binding precedent of this Court. In my view, this is not a case where it could be found that the appellant should be made to suffer because of the negligence of his attorney.

[21] The second leg of the enquiry is whether the appellant had established that he had a *bona fide* defence to the allegations against him. It is only so that when the appellant's referral was dismissed, the commissioner acted in terms of Rule 30(1)(a) of the Rules for the Conduct of Proceedings before the CCMA. No evidence was presented by the third respondent in an attempt to prove misconduct. In fact, from the Outcome Report of the Arbitration Proceedings dated 25 October 2010, it is noted that :

> '1. both parties did not attend;
>
> 2. the applicant (appellant) properly notified by fax of the date, time and venue of the hearing;
>
> 3. the matter was dismissed.'

It is therefore clear from the record of the proceedings that both parties did not attend the proceedings before the arbitrator and the outcome affected the appellant adversely only because he is the party who referred the dispute. In my view, it was also open to the commissioner to act in terms of Rule 30(b)(ii) by adjourning the proceedings to a later date. Commissioners should in my view, avoid a rigid approach in the adjudication of disputes in deserving cases. What is regrettable in my view is that the third respondent has decided to capitalise on the default of the appellant by opposing the rescission

application when it was also in default. It is the same party who elected not to attend the conciliation proceedings only because it was not interested in the conciliation of the matter much against the purpose and the spirit of effective resolutions of labour dispute provided in the Act.

[22] The appellant in his founding affidavit did not do much to demonstrate that he has good prospects of success. He only alleged that he has a good case and have more than reasonable prospects of success. As already indicated, the opposing affidavit filed on behalf of the third respondent, a person whose identity is not disclosed, but only that he is '*an adult male presently employed by the [third respondent] as an Employee Relations Consultant based in Johannesburg*' does not deal with any of the factual allegations made by the appellant. They are not at all disputed. The affidavit in the main application refers to case law on rescission application, the procedures in terms of the CCMA rules and the interpretation to be ascribed to sec 144. In short, there is no averment whatsoever to say that the appellant does not have a *bona fide* defence to the allegations against him. Neither does it state what the actual allegations against the appellant are and what was proved to be misconduct against him.

[23] On the basis of this information, it would have been difficult for the commissioner to comprehend what the allegations against the appellant were and what his defence would be. In the replying affidavit, the appellant took the matter further by stating that he was denied a fair hearing by the third respondent, that the hearing was held on a day when his witness was not available and was refused adjournment in order to call his witness to testify on his behalf. He stated that he was not guilty of the misconduct he was charged for. He mentioned that he should never have been found guilty and even if found guilty, the third respondent acted inconsistently by not dismissing employees found guilty of similar misconduct.

[24] It is evident from the averment that the commissioner did not deal with the averments by the appellant. Neither were they disregarded on the basis that they were only made in reply. If the averments made by the appellant can be

proved to be correct it would mean that his prospects of success on the merits are reasonable.

[25] In my view, the court below ought to have considered the principles established by this Court in the *Shoprite Checkers* matter and considered whether the appellant had shown good cause before the commissioner for the award granted in his absence to be rescinded. The court below instead relied on the *Lodhi 2 Properties Investments CC(Pty) Ltd v Bondev Developments and Colyn v Tiger Foods* cases[7] and held that the appellant had failed to show that the dismissal of his referral was erroneously made and as such the ruling dismissing the application for rescission was correct and not reviewable. As pointed out earlier, this approach goes against the binding authority of the Court. The court below however, did also find, in so far as it was necessary to take into account the prospect of success, that it was incumbent upon the appellant to do more than simply aver in his application that he has good and reasonable prospects of success. Again this approach is not in line with the averments referred to above in determining whether good cause has been shown.

[26] In light of what has been discussed above, the court *a quo* should have set aside the ruling of the commissioner. This matter comes a long way. Up to now, the merits of the dismissal dispute have not been considered. It would serve no purpose, other than a further delay, to send the matter back to the Bargaining Council to consider the rescission application afresh. Referring the matter back would defeat the primary object of the Act which is effective and expeditious resolution of disputes. This Court is in as good a position as the court below was to decide the rescission application.

[27] The facts relating to the rescission application have been set out above and are mostly common cause. It is therefore not necessary to repeat them. I find that the explanation for the failure to appear by the appellant at the arbitration proceedings is reasonable and *bona fide*. I further find that the appellant has shown good cause for the rescission of the award granted in his and the third respondent's absence. It would also, in my view be in accordance with the

[7] Supra.

requirements of law and fairness that each party carries its costs of the review application and the appeal against the order of the Labour Court.

[28] In the result, I make the following order:

1. The appeal is upheld

2. Each party to pay its costs

3. The order of the Labour Court is set aside and replaced with the following order:

   a. The application for review succeeds.

   b. No order is made as to costs

   c. The ruling issued by the second respondent (Commissioner Nkosinathi Maseko) dismissing the rescission application is hereby set aside and is replaced with the following.

   "The arbitration award issued on 25 October 2010 by A.S. Dorasamy is hereby rescinded and the dispute can be set down for arbitration with notice to all parties."

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Tlaletsi DJP

Deputy Judge President of the
Labour Appeal Court of South Africa

Dlodlo AJA and Mokgoatlheng AJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT:	Adv K. Allen Instructed by Henwood Britter & Caney Attorneys
FOR THE THIRD RESPONDENT:	Adv X.D Matyolo Perrot, Van Niekerk, Woodhouse, Matyolo Inc