INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case No: DA05/15

In the matter between:-

PACK N STACK **Appellant**

(Applicant in the Court *a quo)*

and

COMMISSIONER KHAWULA, N.O **First Respondent**

(First Respondent in the Court *a quo*)

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

(Second Respondent in the Court *a quo*)

PATRICK SIMPHIWE MDLETSHE &

ANOTHER **Third Respondents**

(Third Respondent in the Court *a quo*)

Heard: **25 February 2016**

Delivered: **28 June 2016**

Summary: Review of a rescission ruling - employer and its witnesses attending arbitration proceedings – commissioner finding that the person representing employer not having *locus standi* to do so – commissioner

proceeding with arbitration in employer's absence – employer applying for rescission of award – commissioner dismissing rescission application. Commissioner ought to have found explanation for the default *bona fides* – that presence of employer's witnesses indicative that the defence was not abandoned – employer having intention to defend the matter but not for the incompetence of its representative. Employer not in wilful default. Appeal upheld – rescission ruling set aside and arbitration award rescinded.

Coram: Ndlovu, CJ Musi *et* Sutherland JJJA

JUDGMENT

CJ MUSI JA

[1] This is an appeal against the judgment of the Labour Court (Naidoo AJ) wherein it refused to set aside a rescission ruling made by the first respondent (the commissioner).

[2] The facts of this matter are not seriously in dispute. The appellant places merchandisers at the sites of its clients on a contract basis. The third respondents were employed by the appellant but placed at one of the appellant's clients, Simba in Port Shepstone. As part of the terms of their employment contracts, the third respondents were obliged not to transgress the client's workplace rules and to adhere to its instructions.

[3] Simba alleged that third respondents refused to adhere to a lawful instruction which was issued on 20 September 2010. They were charged with insubordination and bringing the company's name into disrepute. The appellant utilised the services of Labournet – a labour consulting company - to appoint an independent chairperson. Ms Roopram was appointed and Mr Vasan Govender, a manager at Simba was the initiator of the disciplinary proceedings. Both third respondents were found guilty and dismissed.

[4] The third respondents referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration

(CCMA). Conciliation failed and the matter was referred for arbitration. The matter was properly set down for hearing on 19 January 2011.

[5] The appellant's Human Resources Manager Ms Reddy, who was responsible for this matter, experienced complications with her pregnancy and had to undergo an emergency procedure and was still on maternity leave on 19 January 2011. Due to the holiday season, the appellant realised at a late stage that Reddy would not be able to attend to the matter on 19 January 2011.

[6] The appellant arranged that all the witnesses, including Govender and Roopram, attend the hearing on 19 January 2011 and that Govender should testify during the arbitration but also represent the appellant if the need arose. All the witnesses duly attended the hearing.

[7] During the proceedings, it came to the commissioner's attention that Govender was not employed by the appellant. The commissioner correctly ruled that Govender had no right to represent the appellant. There being no-one competent to appear on behalf of the appellant, the commissioner ruled that the proceedings should continue in its absence. He thereafter heard the testimonies of the third respondents and found that their respective dismissals were unfair and ordered the appellant to reinstate them and pay them back pay retrospectively from the date of their dismissal.

[8] The appellant approached the CCMA with an application for the rescission of the above award. In amplification of its application, it filed an affidavit by Ms Busi Nyathikazi, its regional human resources assistant. Ms Nyathikazi stated that the appellant's HR functions are managed from its Durban office. The disciplinary inquiries were therefore initiated by Govender but the appellant utilised labournet because of the distance between Durban and Port Shepstone. She stated that the appellant has an excellent and reasonable explanation that would illustrate that it was not in wilful default and that the appellant took all reasonable steps to defend the matter. She set out the facts on which the dismissals were based in order to show its prospects of success and *inter alia* pointed out that the third respondents' version during the default

proceedings differed from the appellant's version. She said that if the appellant's version is correct then it must succeed.

[9] The commissioner, after dealing with the fact that the appellant was properly notified about the date of the hearing, concluded as follows:

> '8. In order to succeed with the application for the rescission, the Respondent must furnish reasons why she did not attend the hearing (good cause must be shown). The reasons submitted by Nyathikazi in her affidavit are unacceptable an unreasonable. One of the reasons is that the HR Manager who was responsible for this case was hospitalised on 07 December 2010 and thereafter was on maternity leave. I am of the view that the Respondent had enough time to replace the HR Manager Alice Reddy, or apply for postponement as the hearing was scheduled for 19 January 2011. I also reject the submission that the Respondent's witnesses were refused the right to testify. The Respondent was not present at arbitration. Roopram is an HR Consultant. She is reasonably expected to understand the labour laws. If she was going to be a witness as stated in Nyathikazi affidavit, she should not have asked to remain in the arbitration room as an observer. In the light of the aforementioned reasons, make the following ruling:
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> 9. The application is not granted and the award dated 31 January 2011 is not rescinded."

[10] The appellant took the refusal of its rescission application on review to the Labour Court. The Labour Court found that:

10.1 There were no precise details of what was done by whom in respect of the contingency plan;

10.2 There was no explanation why Nyathikazi could not attend to the matter;

10.3 No evidence was put up to support the contention that witnesses (other than Roopram) were present;

10.4 There is no explanation why an application for postponement was not made before 19 January 2011;

10.5 The explanation that the appellant is a lay person is neither *bona fide* nor reasonable because on the day of the hearing, the "applicant" (sic) was accompanied by a labour consultant who was *au fait* with the rules regulating representation;

10.6 There was no evidence as to who paginated the bundles that the appellant prepared. This according to the court *a quo*, is an indication that someone with knowledge about preparing for arbitration proceedings was involved in the preparations prior to the hearing;

10.7 The fact that the commissioner did not specifically deal with an analysis of the applicant's defence and provide reasons in that regard, does not necessarily mean that he did not consider it at all.

[11] Although the application for rescission was dealt with before the amendment of section 144 of the Labour Relations Act 66 of 1995, the requirement of good cause was already part of our labour law when dealing with rescission applications.[1] In *Shoprite Checkers (Pty) Ltd v Commissioner for Conciliation Mediation and Arbitration and Others,*[2] it was said that:

> '[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and secondly whether the applicant has a *prima facie* defence. In *Northern Province Local Government Association v CCMA and Others* [2001] 5 BLLR 539 (LC) at 545, paragraph [16], it was stated:
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> "An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made *bona fide* and he must show that he has a *bona fide* defence to the plaintiff's claims."'[3]

[1] In terms of section 144 (d) which was added by section 21 of Act 6 of 2014 a ruling may be rescinded or varied if it was made in the absence of any party, on good cause shown.
[2] (2007) 28 ILJ 2246 (LAC).
[3] At paras 35 and 36.

[12] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and Others*,[4] it was said that:

> 'Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. Whilst the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.'[5]

[13] In *Harris v ABSA Bank Ltd t/a Volkskas,*[6] Moseneke J set out the principles that ought to guide a court in the determination whether a party was in wilful default. He said the following:

> 'Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which avoid the default and must appreciate the legal consequences of his or her actions.'[7]

[14] The one overriding fact in this matter is that the appellant might have been negligent in requesting an incompetent person to represent it but that is a far cry from *mala fide* or wilful default. It is clear that the appellant had every intention to defend the matter.

[15] The court *a quo*'s reasons for dismissing the review are individually and cumulatively unconvincing. There was no need to state chapter and verse how the contingency plan was conceived where and by whom. The fact of the matter is that Govender was at the CCMA on 19 January 2011 to represent the appellant if the need arose. When the need arose he was found wanting.

[16] There was no need for Nyathikazi to drive all the way from Durban to Port Shepstone because the contingency plan was in place and all those who attended the hearing *bona fide,* though erroneously, believed that Govender

[4] (1994) 15 ILJ 1310 (LAC).
[5] At 1311J – 1312A.
[6] 2006 (4) SA 527 (T).
[7] At para 8.

was competent to represent the appellant. The allegation that all the witnesses were present on 19 January 2011 was never disputed. The appellant mentioned all the witnesses that were present by name. There was, from the appellant's perspective, therefore, no need to apply for a postponement.

[17] The court *a quo* found that the labour consultant was an expert with knowledge of the rules regulating representation in the CCMA when there is not a scintilla of evidence to substantiate that finding. The mere fact that Roopram accompanied Govender under the wrong impression that he would represent the appellant is indicative of the fact that she did not know the rules regulating representation in the CCMA or she was indifferent because she was there as a witness to testify about the manner in which she conducted the disciplinary inquiry and not as a legal advisor.

[18] The issue of the pagination of the documents is neither here nor there. Govender is the Disciplinary Committee Manager of Simba. There is no evidence that he did not know how to paginate and index documents. The appellant's case was that but for Govender's incompetence to represent it, it was fully ready to proceed with the matter.

[19] In *Maepa v CCMA and Another,*[8] it was said that:

> '[8] … Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'[9]

[8] (2008) 29 ILJ 2189 (LAC)
[9] At para 8.

[20] It is clear that the commissioner only dealt with the reason for the default. He did not deal with the defence of the appellant which is an integral part of the inquiry in determining whether good cause was shown. It is good and well to say that because something was not mentioned does not mean that it was not considered. Although this is true it must however be clear from the totality of the facts of the case. That inference cannot and should not be made when it is not borne out by the facts or where an important and vital issue was clearly not mentioned in the commissioner's reasons. The most important tool to determine whether a commissioner's decision is one which a reasonable decision maker could make is the reasons for the decision. Although the reasons must be brief they must deal with the important issues; that shows that he/she understood what he/she was supposed to consider. In this matter, the omission is too glaring. In my view, the court *a quo's* reasoning is flawed.

[21] My view relating to the court *a quo's* judgment largely also applies to the reasoning of the commissioner. What the commissioner failed to understand was that the appellant had put a contingency plan in place when it realised that Ms Reddy would not be able to attend the hearing. All the witnesses attended the offices of the CCMA Port Shepstone, *bona fide* but wrongly thinking that Govender would be able to represent the appellant. The appellant indeed had enough time to replace Reddy and it utilised the time for that purpose. Unfortunately it chose the wrong person to do so. That is the nub of this matter.

[22] The commissioner saw the wood for the trees. A reasonable decision–maker would have applied his mind carefully to the explanation for the default. After considering and weighing all the facts he/she would have come to the conclusion that the mere presence of Roopram, Govender and the other witnesses was indicative of the fact that the defence was not abandoned. The explanation has *bona fides* written all over it – otherwise why would they have attended on 19 January 2011 if the explanation was not *bona fide.*

[23] Although the exercise of the commissioner's discretion against the appellant during the default proceedings was not taken on review, a word or two about the manner in which that matter was handled need to be said.

[24] When the commissioner realised that Govender did not have the right to represent the appellant the most prudent thing that he could have done was to ask Govender why he and not a proper representative of the appellant attended the proceedings. After hearing such explanation, he should have asked the third respondents what their views were and after considering all the circumstances he would then have been in a position to exercise his discretion properly with the necessary reasons why he chose a particular path.

[25] Section 138 (5)(b)(ii) of the Act reads as follows:

> 'If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party had not referred the dispute to the commission, the commissioner may adjourn the arbitration proceedings to a later date.[10] "

[26] The commissioner did not give any reasons why he decided to proceed with the matter instead of exercising his discretion in favour of the appellant.

[27] In my view, the order of the court *a quo* ought to be set aside.

[28] I accordingly make the following order

(a) The appeal is upheld with no order as to costs.

(b) The order of the cost *a quo* is set aside and replaced with the following:

'(1) The rescission ruling issued by the first respondent, commissioner Khawula, under case number KNPS672 – 10 dated 25 April 2011 is set aside and replaced with the following:

(2) The rescission application is granted.'

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[10] See also rule 30 of the CCMA rules. Government Gazette No 38572 dated 17 March 2015.

C J Musi JA

Ndlovu and Sutherland JJA agreed with CJ Musi JA

APPEARANCES:

FOR THE APPELLANT:	Mr R Orton
	Instructed by Snyman Attorneys
	HOUGHTON
FOR THE THIRD RESPONDENTS:	No appearance