**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

CASE NO: JR922/2012

In the matter between:

**HAIR HEALTH AND BEAUTY (PTY) LTD** Applicant

and

**DOROTHY DE BEER** First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION** Second Respondent

**Heard:** **12 July 2013**

**Delivered:** **24 January 2014**

**Summary: Application for review in terms of s. 145 of the LRA; applicant seeking to set aside default arbitration award and ruling refusing an**

**application to rescind the default award; application materially defective in that the commissioner was not joined as a party; application as against the default award brought outside the prescribed six (6) weeks and no condonation application launched; application for review destitute of merit and dismissed with costs.**

---

**JUDGMENT**

---

VOYI AJ

Introduction

[1] This is an application to review and set aside both the default arbitration award issued by Commissioner Lungile Matshaka ("*the Commissioner*") on 30 January 2012 under case number GAJB22994-11 as well as the rescission ruling issued by the Commissioner on 22 March 2012 under the same case number.

[2] The application is launched in terms of s. 145 of the Labour Relations Act, No. 66 of 1995 ("*the LRA*"). It is opposed by the first respondent. A peculiar aspect of the matter is the failure, by the applicant, to join the Commissioner as a party to the review application. I deal with this aspect later in the judgment.

Background

[3] The applicant employed the first respondent (Ms Dorothy de Beer) on 4 August 2009 as its Sales Consultant. The first respondent was remunerated for services rendered by way of basic salary as well as commission. There were also other benefits such as car allowance, etc.

[4] Being in the sales environment, the first respondent had sales targets to meet. On 11 August 2011, the first respondent's services were terminated with immediate effect. The reasons for the immediate termination centred around an alleged poor sales performance.

[5] Following her dismissal, the first respondent lodged a dispute with the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The dispute was eventually enrolled for arbitration by the CCMA. The arbitration was enrolled for hearing on 18 January 2012. A notice of set down in this regard was issued on 18 November 2011.

[6] On 18 November 2011 at approximately 17:17, the issued notice of set down was received by the applicant. On receipt of the notification, it is said that the applicant's principal directors knew they would not be able to attend the arbitration proceedings as they had plans to be out of the country on business.

[7] Earlier and on 17 November 2011, the applicant had dispatched an electronic mail to Paarl Media (described as '…a very large and busy printing company…') advising that the printing of the applicant's annual trade catalogue should begin on 18 January 2012.

[8] On 7 December 2011, the applicant instructed its attorneys of record to arrange for a postponement of the arbitration proceedings and suggested an alternative date.

[9] Regarding postponements, the notice of set down issued by the CCMA *inter alia* stated (on page 2 thereof) that a formal application for a postponement must be made if the parties cannot agree on the postponement or where the request for a postponement is made within seven (7) calendar days of the scheduled date of the arbitration. The notice of set down further recorded that the CCMA may decide whether

to grant the request for a postponement on the written documents presented or whether to convene a formal hearing.

[10] On 10 January 2012, a formal application for a postponement was filed by the applicant. The application was simply by way of notice and was not accompanied by any supporting affidavit/s.

[11] On 12 January 2012, the CCMA's Commissioner Nokanyo Madyibi issued a ruling stating that the application for postponement is not granted. The ruling on the application for a postponement was not challenged by the applicant. Instead, the applicant launched a second application for a postponement when the dispute came up for hearing on 18 January 2012.

[12] The further application for a postponement was refused by the Commissioner on 18 January 2012. It was refused on two broad bases. The first was the fact that the CCMA's Commissioner Nokanyo Madyibi had already made a ruling refusing the postponement. The second ground for refusing the postponement was the absence of information (such as visa, etc) to confirm or corroborate what the applicant's representative was advancing in support of the request for a postponement of the matter.

[13] After the application for a postponement was declined, the applicant's legal representative requested to be excused as he only had instructions to apply for a postponement of the matter. The arbitration hearing therefore proceeded in the absence of the applicant as the employer party. Following the arbitration proceedings and on 30 January 2012, the Commissioner handed down the default arbitration award under review.

[14] On receipt of the default award and on 13 February 2012, the applicant launched an application for rescission in terms of s. 144 of the LRA. The

application for rescission asserted that the Commissioner's refusal to entertain the application for a postponement was "erroneous". In the final analysis, the applicant contended that the default award was erroneously sought and granted.

[15] On 22 March 2012, the Commissioner issued a ruling refusing the applicant's application for rescission. The Commissioner took the view that his refusal to entertain the second application for a postponement was not erroneous.

[16] The Commissioner found that the facts of the two applications for postponement remained the same. He, therefore, concluded that the arbitration award issued on 30 January 2012 was not erroneously made in the absence of the applicant.

[17] On 7 May 2012, the applicant launched the present review application in which it seeks to set aside both the arbitration award of 30 January 2012 and the rescission ruling of 22 March 2012. The first respondent opposed the review and her opposing affidavit was delivered on 15 June 2012.

[18] Before delving into the merits of the review, two aspects of the case warrant attention. They are the late delivery of the application for review of the default arbitration award and the failure to join the Commissioner who handed down the decisions under review as a party to the proceedings before this court. I deal with these in turn.

Late delivery of the review application re: the default award

[19] As stated herein before, the default arbitration award was issued on 30 January 2012. In terms of s. 145(1)(a) of the LRA, an application for an

order setting aside an arbitration award has to be launched within six (6) weeks of the date that the award was served on the applicant.

[20] In the present matter, the applicant was served with the default arbitration award on or shortly after 30 January 2012. As at 8 February 2012, the application was aware of the default arbitration award. I say so as the applicant was, at that time, considering an application to stay the award. All of this emanates from an electronic mail from one of the directors of the applicant dated 8 February 2012.[1]

[21] The application to review and set aside the default arbitration award, in particular, was only delivered on 7 May 2012. That was over three (3) months after the award was issued. The date when the applicant was served with the default award is not stated in the applicant's papers.

[22] In her application to certify the default award, as contemplated by s. 143 of the LRA, the first respondent states that the award was served on the applicant on 30 January 2012. As at 8 February 2012, the applicant was contemplating an application to stay the default award. One therefore concludes that by 8 February 2012 the applicant had been served with the default award.

[23] The date by which it can be stated, with certainty, that the applicant had already been served with the award is 13 February 2012, this being the date the applicant launched the application for rescission mentioned herein before.



[1] This electronic mail forms part of the record at p. 62 and is annexed as "D12" to the founding affidavit in support of the review application.

[24] Counting the prescribed six (6) weeks from 13 February 2012, the application to review and set aside the default award ought to have been launched by no later than 26 March 2012. Such review was, however, filed over a month later.

[25] When the lateness of the review application as against the default award was raised in court at the hearing of the matter, Counsel for the applicant asserted that the application was inevitably delayed by the rescission application.

[26] In this connection, the following passage from *Health and Hygiene (Pty) Ltd v Yawa NO and Others*[2] is of significant relevance:

> 'That brings me to the alternative ground upon which this application is based. It is an endeavour at this stage to review the original award. That immediately gives rise to the problem that considerably more than the statutory period of six weeks in terms of section 145(1)(a) of the Labour Relations Act had elapsed prior to the commencement of these proceedings since the original award was made. In those circumstances an application for condonation was essential. No such application was, however, made'. [own underling]

[27] Equally in the present matter, the applicant did not apply for condonation of the late delivery of the review application as against the default award. In terms of s. 145(1A) of the LRA, this court may on good cause shown condone the late filing of an application for review.

[28] As it was the case in *Zululand Anthracite Colliery v CCMA and Another*[3] , the applicant decided not to bring the requisite application for

---

[2] [2000] 12 BLLR 1434 (LC) at para 32.

condonation and it must accordingly stand or fall by its decision. As matters stand and absent an application for condonation, there is no good cause shown by virtue of which this court would condone the late delivery of the review application as against the default award.

[29] The fact that there was an application for rescission which was launched cannot automatically excuse the application from launching its review within the prescribed six (6) weeks. It was, in any event, incumbent on the application to launch an application for condonation and therein make reference to the application for rescission in explaining the cause of the delay in launching the review application. That did not occur and the application for review as against the default award must accordingly fail.

Non-joinder of the Commissioner

[30] The two decisions under review, being the default award of 30 January 2012 and the recession ruling of 22 March 2012, were both handed down by Commissioner Lungile Matshaka.

[31] Quite peculiar, the Commissioner is not joined as a party in the review proceedings. The respondents are only the dismissed employee, as the first respondent, and the CCMA, as the second respondent.

[32] I do not hesitate to come to a considered finding that the non-joinder of the commissioner is fatal to the applicant's application for review. The decisions the applicant assails were made by the Commissioner and he ought to have been joined as a respondent in the review. It is

---

[3] (2001) 22 *ILJ* 1213 (LC)

incontrovertible that the Commissioner had a direct interest in the matter.

[33] In *MEC for the Department of Education, Eastern Cape Province v Gqebe*[4] , the Labour Appeal Court held as follows:

> 'It is settled law that where a person or entity has a direct and substantial interest in the outcome of the proceedings such a person and/or entity should be joined in the proceedings. … In review applications, it is necessary to cite the arbitrator and/or CCMA or the relevant Bargaining Council….'[5]

[34] In *Mabombo v Shoprite Checkers Holdings (Pty) Ltd and Others*[6] , this court held thus:

> 'The application for review initially cited the first respondent as the sole respondent. Though the application seems to have been served on the Commission the application was defective as the Commission and Van der Walt would not be able to oppose same if they so wished as they were not cited as respondents. In the normal course they should have been cited as respondents as it is Van der Walt's award which is sought to be reviewed, therefore he and the Commission had a direct interest in the matter…'[7]

[35] In my judgment, the possibility that the Commissioner may not have opposed the review application does not alleviate the applicant from its

---

[4] [2009] 9 BLLR 896 (LC)

[5] At para 33.

**[6]** [1998] 12 BLLR 1307 (LC)

[7] At para 3.

obligation to join the Commissioner as a party. In *PSA v Department of Justice and Others*[8], the Labour Appeal Court also stated as follows:

> 'With regard to the issue of non-joinder it is trite that a third party should be joined in proceedings if he is shown to have a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgment that may be given in the matter.'[9] [own underlining]

[36] There is no indication that the Commissioner consented or undertook to be bound by the judgment that may be given. It was therefore necessary that he be joined as a party to the review application.

[37] The need to join a commissioner as a party in review proceedings becomes apparent from the following apposite passage extracted in *De Beers Consolidated Mines Ltd v CCMA and Others*[10] :

> 'Had the commissioner known that the court might decide the case on the basis of such a ground, she may well have decided to either oppose the application in the court below or the appeal in this Court or she might have decided that she needed to place before the court a quo some affidavit. Indeed, the CCMA or its director might have considered that the matter was of much greater significance than she might have otherwise thought. In that event she might have decided that the CCMA should be represented by counsel in these proceedings to argue the point of what the statutory powers of commissioners are when they arbitrate disputes'.

---

**8** [2004] 2 BLLR 118 (LAC)

9 At para 25.

10 [2000] 9 BLLR 995 (LAC) at para 15:

[38] In this matter, the Commissioner was not afforded the opportunity to react to the applicant's application for review as he was not cited as a party to the proceedings. In *PSA v Department of Justice and Others* (*supra*), it was held thus:

> 'Where a third party who has a direct and substantial interest in a matter is not joined in proceedings, it is not a defence to a point of non-joinder to say that such party had knowledge of the proceedings but did not intervene. His mere non-intervention, despite having knowledge of the proceedings, does not make the judgment emanating from those proceedings binding on such party…'[11]

[39] In the circumstances, the applicant's application for the review of the default award and the rescission ruling is materially defective on account of the applicant's failure to join the Commissioner as a respondent party. For this reason, the application cannot succeed as the defect in contention is not something this court can simply overlook.

The merits of the review

[40] Despite the material findings I have reached on the two issues stated above, I am prepared to entertain the merits of the applicant's application for review. The application for review assails two decisions, namely the default award as well as the rescission ruling.

[41] With regard to the default award, the applicant is aggrieved by the Commissioner's refusal of the further application for a postponement of the arbitration proceedings. This application was made on the date of the arbitration itself, it being 18 January 2012.

---

[11] At para 29.

[42] It is common cause that an earlier application for a postponement of the very same arbitration proceedings had been refused by Commissioner Madyibi. The very same formal application which had been filed with the CCMA on 10 February 2012 was also tabled before the Commissioner on 18 January 2012. The grounds upon which the application for a postponement was based was similar in both the application launched on 10 February 2012 and the one made at the arbitration proceedings on 18 January 2012.

[43] Had the Commissioner granted the second application for a postponement, he would have effectively overruled and set aside Commissioner Madyibi's ruling of 12 January 2012. The Commissioner clearly had no powers or authority to do so. In *Ruijgrok v Foschini (Pty) Ltd and Another*[12], the following was held:

> 'The CCMA has no competence to set aside decisions taken by its commissioners. Such decision could only be reviewed by the Labour Court in terms of the provisions of s 158(1)(g) of the Act…'

[44] Equally applicable in the present matter, the Commissioner had no competence to set aside another commissioner's decision. It was for the applicant to challenge the postponement ruling issued by Commissioner Madyibi by way of review. The applicant, however, did not bring any application for review to challenge such ruling in particular.

[45] It is, therefore, my judgment that there is no merit to the challenge, on review, against the default award handed down by the Commissioner on 30 January 2012.

---

[12] (1999) 20 *ILJ* 635 (LC) at para 20.

[46] Turning to the challenge as against the rescission ruling, I equally hold that the application for review is destitute of any merit. Without any hesitation, I point out that the application for rescission failed to address the reason for the applicant's default at the arbitration proceedings of 18 January 2012.

[47] In the initial application for a postponement which was launched on 10 January 2012, it was stated that both the applicant's directors will be in California in the Unites States of America ("the USA") on 18 January 2012, attending a trade fair and holding meetings with certain of the applicant's suppliers.

[48] However, the applicant's directors did not travel to California in the USA as it was envisaged. In the electronic mail dated 8 February 2012, it is stated that the applicant's directors decided not to travel to the USA as planned. Instead, they were in the office '…painstakingly checking each of [the 292 page 'play-outs'] for accuracy and correctness and signing them of for printing….'

[49] The applicant's principal director, being Mr Lars Erich Johan Fisher stated in the electronic mail dated 8 February 2012 that '[t]here was no was [they] could have cancelled or postponed this printing process.'.

[50] The reality of the matter is that the applicant was in default at the arbitration proceedings of 18 January 2012 as its principal directors were busy with a very important printing process. They were not in California as the attorney that appeared for the applicant informed the Commissioner when moving the second application for a postponement. That attorney is recorded in the transcript as having stated the following:

> '*MR LALOCK :* So I am instructed that the – they did – attempts were made to get hold of the other side, but unfortunately they were

> unsuccessful. At this state the directors of the Respondent, which is – are currently – the directors of the Respondent are currently overseas in the USA on business, hence there was no – they could not – there was no application – there was not an affidavit filed of record because there were overseas and they could not get hold of the – the attorney could not get hold of the Respondents because they are overseas, they were only communicating through e-mail'.

[51] Based on what is stated in the electronic mail of 8 February 2012, what the attorney representing the applicant told the Commissioner was not correct. The applicant's directors were not overseas on business. They were at the applicant's offices attending to the printing process which could not be cancelled or postponed.

[52] No mention of the trip to the USA having been cancelled on account of the printing process is made in the applicant's application for rescission. The applicant was simply not candid in its rescission application. The Commissioner was, therefore, justified in refusing to rescind the default award.

[53] In its application for rescission, the applicant simply did not give any explanation for its default at the arbitration hearing of 18 January 2012. An explanation for the default is one of the factors for consideration in an application for rescission. That much was stated in *Shoprite Checkers (Pty) Ltd v CCMA and Others*[13].

[54] The applicant, in the application for rescission, baldly contended that the default award '…was erroneously sought and granted." As to exactly in

---

**13** [2007] 10 BLLR 917 (LAC) at para 35

what respect/s the default award was erroneously sought and granted, the applicant did not spell out.

[55] The applicant simply alleged that the '…*refusal by the Commissioner to entertain an application for a postponement of the arbitration was erroneous'*. The following passage from *Health & Hygiene (Pty) Ltd v Yawa NO and others* (*supra*) is instructive on this score:

> '[28] On that approach the problem confronting the applicant is to identify the error which gave rise to the commissioner granting his original award. There was no error of fact. He was aware, because he had been apprised of the fact, that the applicant contended that it had been unaware until that morning of the fact that the arbitration proceedings were due to proceed that day. He was aware of that because it was he who had conveyed that information to the applicant at approximately 10 o'clock in the morning. He was aware that the applicant's representative was in Johannesburg and manifestly was not available to appear at the arbitration that day. There is no fact which he is said to have overlooked. There is no matter which, had he known it, would have caused him to act any differently. In those circumstances I am unable to see on what basis it can be contended that the original award was erroneously sought or erroneously made.
>
> [29] Mr Snyman submitted that the error lay in the decision which the commissioner made in regard to the question of postponement. That is not, however, an error of the type contemplated by section 144. If the arbitrator's approach was erroneous in that regard, then it was an erroneous decision in the conduct of the proceedings. If it was to be challenged it had to be challenged in terms of the provisions of section 145 of the Labour Relations Act on the grounds that the arbitrator either misconducted himself or perpetrated a gross irregularity in the conduct of the proceedings. Neither of those courses was followed'.

[56] In the present matter, the applicant takes issue with the Commissioner's refusal to entertain the second application for a postponement. In the rescission application, the applicant was simply aggrieved by the Commissioner's refusal of the application for a postponement. It can, therefore, not be said that the default award that ensued was 'erroneously sought and granted' as alleged by the applicant. The Commissioner was, therefore, justified in concluding as follows:

> 'In the present case I am not convinced that the [applicant] has given a reasonable explanation for its default. On the balance of probabilities I can only come to one conclusion that the Award issued on 30 January 2012 … was not erroneously made in the absence of the party …affected by it.'

[57] For all of the above reasons, the applicant's application for review cannot succeed. It, accordingly, stands to be dismissed.

Costs

[58] In the exercise of the discretion conferred by s. 162 of the LRA, it is my view that costs should follow the results. From the onset, there were numerous shortcomings on the manner in which the applicant prosecuted its case.

[59] To mention but a few: The applicant deliberately failed to attend the arbitration proceedings as its directors had other important matters to attend to. It sought an application for a postponement at the hearing of 18 January 2012 on false grounds. After the default award was issued, the applicant elected to launch an application for rescission notwithstanding the absence of an 'error' contemplated by s. 144 of the LRA. The applicant failed to join the Commissioner as a party to the present application. It equally failed to bring an application for

condonation of the late delivery of the review application as against the default award of 30 January 2012. An order for costs is warranted under such circumstances.

Order

[60] I, accordingly, make the following order:

(i) The application for review is dismissed.

(ii) The applicant is ordered to pay the first respondent's costs.

_____

Voyi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate O.J. La Grange

Instructed by Frank Biccari Attorneys

For the First Respondent: Advocate JNW Botha

Instructed by MD Swanepoel Attorneys