

IN THE LABOUR COURT OF SOUTH AFRICA

[Held in Johannesburg]

CASE NO J 1063/97

In the matter between:

BKH MINING SERVICES CC
t/a DANCARL DIAMOND MINE

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

E HAMBIDGE N.O.

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

OUPA MOSITO

Fourth Respondent

J U D G M E N T

ZONDO J:

[1]This is a review application in which the applicant asks this Court to review and

set aside a decision of the second respondent, a commissioner of the CCMA, in terms of which she dismissed an application which the applicant had brought to rescind an arbitration award which she had handed down against the applicant in favour of the third and fourth respondents.

[2] Briefly the facts are that:

- (a) the fourth respondent, who had been employed by the applicant, was dismissed by the applicant. He referred an unfair dismissal dispute to the CCMA. After conciliation had failed, the second respondent arbitrated the dispute. The second respondent refused one Mr Holiday and one Mr Bartholomew the right to represent the applicant in the arbitration and thereafter proceeded with the arbitration without the applicant being present or represented in the arbitration proceedings.
- (b) the second respondent's reason for refusing Messrs Holiday and Bartholomew the right to represent the applicant was that, according to the second respondent, both of them were labour relations consultants and, as such, fell outside the category of persons who have a right to represent a party in such proceedings in terms of the Act.
- (c) the arbitration award was issued on the 3rd July 1997.

- (d) On the 10th July 1997 the fourth respondent presented himself to the applicant for work pursuant to the arbitration award but was not allowed to resume work.
- (e) apparently the applicant received the award on the 14th July 1997.
- (f) the applicant did not comply with the award.
- (g) In October 1997 the third and fourth respondents launched an application in this Court to make the award an order of Court.
- (h) On the 13th March 1998 the applicant filed an opposing affidavit in respect of the application to make the arbitration award an order of Court.
- (i) On the 13th March 1998 the applicant launched in the CCMA an application for the rescission of the arbitration award; the third and fourth respondents opposed the rescission application. The second respondent heard the rescission application. Both parties were represented at the hearing of the rescission application before the second respondent.
- (j) On the 8th June 1998 the second respondent dismissed the rescission application and gave reasons for her decision in this regard.
- (k) On the 30th June 1998 the third and fourth respondents' application to make the arbitration award an order of Court came before BASSON J but was postponed at the applicant's request to enable the applicant to bring an application to review the second respondent's decision dismissing the rescission application.

(1) On the 9th July 1998 the applicant launched the review application which is now before me. In this review application the applicant seeks to review the decision dismissing the rescission application. In addition the applicant is also asking this Court to itself rescind the arbitration award of the second respondent or alternatively to refer the rescission application back to the first respondent to be heard by a commissioner other than the second respondent.

[3]Two grounds are advanced by the applicant in its founding affidavit why the rescission application should be reviewed and set aside. The one ground is that by hearing and deciding the rescission application herself when the award which was sought to be rescinded had been issued by her, the second respondent **"contravened the principles of natural justice"** and especially the **"nemo iudex in re sua"** rule. This submission has no merit whatsoever because sec 144 of the Labour Relations Act, 1995 (Act 66 of 1995) (**"the Act"**) gives the power to rescind an award to the commissioner who issued the arbitration award which is sought to be rescinded.

[4]The other ground of review is that the second respondent **"adopted a bias and unreasonable attitude"** towards the applicant during the course of the rescission

application. In par. 18.1, 18.2 and 18.3 of the founding affidavit the applicant purports to amplify this ground. However, the contents of these paragraphs fall far short of showing either bias or any reasonable perception of bias.

[5]This Court is not sitting as an Appeal Court to the CCMA and therefore must not seek to substitute its decision for that of the second respondent. The Court must constantly remind itself that its role in relation to the CCMA is of a supervisory nature and that, when hearing review applications arising out of the CCMA awards, it should not seek to take over the functions which the Act gives to CCMA commissioners to perform.

[6]In this matter this Court is satisfied that no grounds exist to review the decision dismissing the application for rescission unless the Court is to deal with the matter as if it is an appeal which, in my view, it is not permissible for the Court to do.

[7]In reaching this conclusion I have assumed that the applicant's rescission application had been brought within a reasonable time and that the applicant did not have to seek condonation for bringing that application late and that also the applicant did not have to show prospects of success in the main case. However,

should any of these assumptions be erroneous, the applicant's case gets worse because, as to the prospects on the main case, those were not dealt with at all in the rescission application.

[8]As to the delay in bringing the rescission application, although the application was launched about nine (9) months after the applicant had known about the award, the applicant did not bring an application for the condonation of its delay in launching the rescission application so long after the award had been handed down. Even though sec 144 of the Act does not specify any "**exact**" period within which such application must be brought, there is obviously an obligation that such an application must be brought within a reasonable time after the handing down of the award. In the absence of such condonation application, the applicant would ordinarily be faced with great difficulty in securing a rescission of such award. However, I have assumed, without deciding, that the applicant did not have to apply for condonation. In the premises the applicant's application is dismissed with costs.

[9]With regard to the third and fourth respondent's application to make the arbitration award an order of this Court, the only basis on which that application

was opposed by the applicant has fallen away in the light of the above outcome of the review application. Accordingly there is no basis now why that award should not be made an order of this Court. Accordingly the award issued by the second respondent against the applicant under the CCMA on the 3rd July 1997 is hereby made an order of this Court. The respondent in that application is to pay the costs of the applicants in that application.

R M M ZONDO
JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF ARGUMENT: 23 September 1998.

DATE OF JUDGMENT: 11 November 1998.

FOR THE APPLICANT: Mr Van As
instructed by
Leppan Beech Attorneys.

FOR THE FIRST AND
SECOND RESPONDENTS: No appearance.

FOR THE THIRD AND
FOURTH RESPONDENTS: Mr Malatjie
instructed by
Nomali Tshabalala Attorneys.

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