IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J3707/98

In the matter between:

MICHAEL WITNESS CHADI Applicant

and

K O INTERIOR DESIGN Respondent

JUDGMENT

MARCUS A J:

1. This is an application for an arbitration award to be made an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the Act"). The application bears the Registrar's stamp of 11 December 1998, the notice of motion having been dated 4 December 1998.

2. The arbitration award was handed down on 14 October

1998. I propose to quote the award in full. It states the following:

"Arbitration Award

The process itself was a non-complex exercise in that only the applicant attended and presented his side of the matter. The respondent failed to attend.

Analysis of Evidence:

The information submitted by the applicant indicates that he was dismissed because he was suspected of having been involved in a robbery which took place in the shop. During the said robbery the lady by the name of Anna Motsepe was killed. According to the applicant's testimony he was on leave when the robbery took place. In fact, on that specific day he was shopping in town. The applicant showed purchase slips to the respondent to that effect. Apparently the applicant was taken to Bryanston for a lie detector test where he testified. The police put him behind bars for three days and released him after realising that nothing connected him to the robbery. After the release he phoned the respondent and was told by Mr Willy Creviano that he should not be seen at the company any more. Labour legislation provides that a dismissal can be considered to be fair if an employee is dismissed on the basis of misconduct, incapacity and

operational requirements. In all the said circumstances, however, there are certain requirements with regard to procedure and substance which should be complied with if the dismissal is to be regarded as fair. In this case none of the above was proven to be the case. I therefore make the following award:

Award:

1. The dismissal of Michael W Chadi was unfair procedurally and substantively.

2. I hereby order the respondent to:

2.1 reinstate the applicant with immediate effect with no lesser benefits and conditions than the ones that were applicable at the time of the dismissal;

2.2 pay the applicant compensation to the value of four months at the rate of the applicant when he was dismissed."

3. The respondent's notice of intention to oppose the relief sought is dated 11 January 1999. The answering affidavit, however, is only dated 24 May 1999. Mr Nel, who appeared on behalf of the respondent, sought condonation for the late filing of the answering affidavit. In the result nothing turns on this and I shall deal with the matter as if condonation has been

granted.

4. The respondent seeks a stay of the present application on the grounds that it has launched a separate application in terms of section 144 of the Act for rescission of the arbitration award ('the rescission application'). The notice of motion in the rescission application was signed on 13 January 1999, i.e. two days after the filing of the notice of intention to oppose the present application. It seems that nothing has yet transpired in relation to the rescission application. I was informed by Mr Nel that the matter had not yet been resolved.

5. It appears to be common cause that the award was received by the respondent in November 1998. The affidavit of service states that the applicant personally delivered the award to the respondent on 1 November 1998. By that date, therefore, it is clear that the respondent was in possession of the award. As indicated above the award required immediate reinstatement of the applicant.

6. In considering whether I should grant a stay of the present application, it is necessary for me to consider

the factual basis advanced for the stay. Two contentions are advanced: first, that the award was handed down in the absence of the respondent and second, that there are good prospects that the application for rescission will succeed.

7. Mr Nel accepted that the approach adopted by the Appellate Division in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) ought to be followed. That case concerned rescission at common law. Miller JA observed at 764J–765E:

"The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31(2)(b) or Rule 42(1) but must be considered in terms of the common law which empowers the court to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown (See De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition for many and various factors are required to be considered (see Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA) but it is clear that in principle and in the long standing practice of our

courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which prima facie carries some prospect of success (De Wet's case (supra) at 1042; P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357-8).

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the rules, was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

8. As to the explanation for the absence from the

arbitration hearing, Ms Criveano, who describes herself as the owner of the respondent, states the following:

"6.1 I submit that the employer party is not in default in this matter and has a good and reasonable explanation for not attending at the CCMA hearing of the matter of which hearing date the employer at the time and even to date still has no knowledge. It appears from the arbitration award that the hearing was held on 7 October 1998.

6.2 I state that after a complete and thorough investigation by me I could find no documentation setting this matter down for arbitration. The employer party had no knowledge that this matter had been set down for hearing on 7 October 1998.

6.3 Had the employer party known of this matter we would most certainly have attended at the hearing to oppose this matter. According to the employer party, as will be addressed below, the employee absconded without valid reason thus terminating his own services."

9. No information is furnished as to what the investigation comprised. Mr Nel submitted that the respondent had done as much as could be expected to

explain the default. However, I do not know what steps were taken, when they were taken or by whom they were taken. I do not know if any effort was made to contact the CCMA or whether the file presumably kept at the CCMA was inspected. I do not know whether employees of the company, assuming there to be employees, were questioned as to whether they had perhaps received service on behalf of the respondent. In short, I am in no position to assess the claims made by Ms Criveano. I am of the view that the explanation is inadequate.

10. In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A), a matter dealing with the rescission of a default judgment in the Magistrate's Court, Schreiner JA stated at 353A:

"It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives."

Applying this standard it seems to me that Ms Criveano has simply not furnished an explanation sufficient to explain the default in such manner as to enable me to understand how it really came about and to place me in a position to assess her conduct and motives. Mr Nel

argued that this observation by Schreiner JA must be understood in the context of the methods of service which pertained at the time that that judgment was given. In my view, however, this submission is of no real assistance. This is particularly so because the rules of the Labour Court have attempted to keep pace with modern developments. Thus it seems that the obligation to furnish an explanation is perhaps even greater today than it was at the time that Silber's case (supra) was decided. In my view, therefore, the requisite standard to explain the default has not been met.

11. As to the existence of the prospects of success, Ms Criveano states the following in the affidavit:

"7.2.2 The employee party took leave for the period 21 December 1997 to 4 January 1998 and was due to return to work on 5 January 1998. The employee only returned to work on 8 January 1998 and at about midday he was arrested by the South African Police.

7.2.3 The employer party receive (sic) no word from the employee party on his absence from work. The employer then wrote a letter dated 19 January 1998 marked Annexure MWC2 requesting information why employee party did not return to work."

The letter in question dated 19 January 1998 reads as follows:

"Michael

You took your Christmas leave as agreed from 21/12/97 until 4/1/98. You were expected back at work on Monday 5/1/98, 08.30 a.m. You only returned on Wednesday 7/1/98. On Thursday, 8/1/98 at midday you were taken to the Linden Police by Inspector Opperman for interrogation (Inspector Opperman waited for you on Monday 5/1/98 08/30 a.m. but you failed to arrive). The police told me that you were released during the weekend and you were expected to be back at work on Monday 12/1/98. After I did not hear from you till today I understood it to be an act of resignation which I have to accept since I do not have much of a choice."

12. Mr Nel conceded that no enquiry was made as to the reasons for the absence of the applicant. The reasons for such absence could be many and varied ranging from a genuine explanation like sickness or family tragedy to a spurious explanation. It is idle to speculate on what that reason might have been. Some enquiry, however elementary, was required by the employer.

13. Ms Criveano states further in her affidavit the following:

"7.2.4 On 22 January 1998 the employee party contacted the employer by phone and said the following words: 'What is happening?' and the employer party replied by asking 'you tell me what is happening' and the employee party said he cannot come back to work as he was beaten by the police. I understood from the conversation that the employee party's intention was not to return. I heard nothing further from employee party and only after I received documentation that a dispute was referred to the commission, I wrote the following letter to the employee party marked MWC3 stating that the employee was not dismissed but absconded."

The letter annexed to the affidavit as MWC3 reads as follows

"Michael

With reference to your dispute which you have posted to me I would like to point out the following: I have sent you a letter dated 19/1/98 (see copy attached). I have not seen you or spoken to you from 9/1/98 till 22/1/98. On 22/1/98 you phoned and asked 'what is happening', instead of telling me what is happening. I wish to point out that there was never an act of dismissal from my side, you dismissed yourself by disappearing without notice. I therefore do not accept your argument of an unfair dismissal dispute when the

fact was a resignation without notice from your side."
Once again the employer merely inferred the worst without so much as an elementary enquiry. This much, Mr Nel conceded.

14. The arbitrator's award draws specific attention to the procedural requirements which must attend upon a fair dismissal. It appears to be common cause that no proper hearing occurred prior to the termination of the applicant's services. Given the standpoint adopted by the respondent in this case and particularly the somewhat curious concept that the applicant dismissed himself, it is appropriate that I reiterate what today ought to be regarded as elementary principles of labour law. In Administrator Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A) Hoexter JA stated at 37C-F:

"It is trite furthermore that the fact that an errant employee may have little or nothing to urge in his own defence, is a factor alien to the enquiry whether he is entitled to a prior hearing. Wade, Administrative Law, 6th ed. puts the matter thus at 533-4:

'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could

have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart since otherwise the merits may be prejudiced unfairly'.

The learned author goes on to cite the well-known dictum of Megarry J in John v Rees [1970] Ch 345 at 402:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that by discussion suffered a change.'

In my view, therefore, there are no reasonable prospects of successfully having the arbitration award rescinded.

15.It remains for me to consider certain points in limine which were advanced by the respondent. Under the heading "Preliminary Objection", the respondent states the following:-

"2.1 The application of the applicant is not supported by an affidavit which complies with the regulations contained in the Government Gazette R1258 dated 21 July

1997, as amended by Government Notice No. 1648 dated 19 August 1997 in the following manner:

2.1.1 Every page of the affidavit is not initialled by the commissioner of oaths;

2.1.2 the commissioner does not certify that the affidavit was signed and sworn to before him;

2.2 The applicant failed to attach a copy of the arbitration award to its application despite referring to it and it forming the basis of his application.

2.3 The applicant failed to specify a schedule of documentation relevant to the application as required by Labour Court Rule 7(2)(f) despite the fact that the award made is indeed a relevant document to the dispute."

15. It is appropriate that I say something about technical objections of this sort. While not for one moment decrying the importance of the observance of procedural requirements which are after all necessary for the orderly resolution of litigation, it seems to me that an overly technical approach scarcely serves the ends of expeditious and effective dispute resolution. The objections taken in the present matter are of a highly technical sort and are ones which ordinarily one would hope would not find their way into

litigation. Ironically the reliance by the respondent on the Gazettes referred to above is itself an error. This much was conceded by Mr Nel. While the Gazette numbers are correct, they find no application whatsoever in relation to the dates. In fact, the correct Gazette numbers are Government Notice R1258 in Government Gazette Extraordinary of 21 July 1972 and Government Notice R1648 in Government Gazette Extraordinary of 19 August 1977. It has been held in Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk 1979 (3) SA 391 (T) that provided it appears with reasonable clarity how a declaration was stated to be the truth, namely either on oath or by affirmation, the relevant part of the regulations governing the attestation of affidavits is thereby complied with. It is further stated that the court enjoys a discretion in this regard.

16. In the present matter the affidavit to which objection has been taken is essentially a standard form which has been designed to assist lay people with the relevant court procedures. Mr Nel did not suggest that any prejudice was occasioned by the non-compliance with some of the procedural formalities which are laid down.

17. With regard to the second preliminary objection concerning the failure to attach a copy of the arbitration award, again Mr Nel, quite correctly, in my view, did not urge upon me that this was a serious objection. Indeed, a copy of the arbitration award was in the respondent's possession and once again this is not a matter which ought to detain the court. Likewise the third objection was not pressed by Mr Nel.

1.

19. In the circumstances I make the following order:

1. The arbitration award dated 14 October 1998 and issued by Commissioner A R Mudau is made an order of court in terms of section 158(1)(c) of the Act.

2. The application for a stay of the application to make the award an order of court is dismissed.

3. The respondent is ordered to pay the applicant's costs.

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G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA .

DATE OF HEARING: 1 JUNE 1999

DATE OF JUDGMENT: 1 JUNE 1999