

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR 333/06

In the matter between:

RAYMOND LUCKY MKHIZE

APPLICANT

AND

E L E MYHILL N.O.

1ST RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2ND RESPONDENT

DATONA CRANE SERVICES CC

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the ruling of the first respondent (the commissioner) under case number GAJB871-04 and dated 23rd September 2005. The ruling refusing the rescission was consequent to another ruling which had been issued under case number JB871-04 and issued on the 25th May 2005. In terms of the ruling under case number JB871-04 the applicant's dispute was dismissed because despite having been properly notified of the date of the hearing he did not appear.

Background facts

- [2] The applicant claims that he was employed by the third respondent in November 2002 as a workshop assistant and was later promoted to the position of telesales and at the time of his dismissal on the 30th July 2005 he was already a sales man.
- [3] According to the applicant, during June 2003, his employer entered into an agreement with one Perry who apparently founded the third respondent being Datona Crane Services CC. It would appear that the employer of the applicant on his version prior to the creation of Datona Crane Services CC was Datona Crane Supplies. He contends that although he remained a member at the Datona Crane Supplies CC, he continued to work at the third respondent until the date of his dismissal.
- [4] The applicant states that the reason for not arriving at the CCMA on the 25th May 2005 for his case, on time was due traffic related problems.
- [5] The applicant has set out the grounds for the review of the ruling of the commissioner in his founding affidavit and they read as follows:

“14. GROUNDS FOR REVIEW”

I respectfully submit that the ruling by the 1st Respondent should be reviewed and set aside on one more or all the following grounds:-

14.1 The First Respondent failed to apply his mind on the evidence, which was presented before him.

14.2 The First Respondent’s decision was grossly irregular.

14.3 The First Respondent's reasons for dismissal at my application are not justifiable."

[6] In considering the application for rescission the commissioner found that the applicant in making his application did not comply with the 14 days requirement for filing such an application. The applicant was in this respect some 26 (twenty six) days late. The commissioner dismissed the application because there was no application for condonation and found that even if condonation was granted the applicant's prospects of success seem to him to be non existence as the evidence pointed to the fact that the applicant was not employed by the third respondent but by some other entity.

[7] The issue of whether or not the third respondent was the employer of the applicant was heard on the 2nd November 2004 where the respondent raised the point *in limine* concerning the true employer of the applicant.

[8] Applicants for rescission of awards or rulings in the CCMA are governed by section 144 of the Labour Relations Act 66 of 1995, which reads as follows:

"144. Variation and rescission of arbitration awards and rulings. – 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

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(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*
- (c) *granted as a results of a mistake common to the parties to the proceedings.”*

[9] In *Shoprite Checkers Pty Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 2246 (LAC), the Court held that the word “*good cause shown*” should be read into section 144 of the LRA. This means that in order to succeed in a rescission application one of the requirements is that the applicant must provide an acceptable and reasonable explanation for the default.

[10] The Court in the *Shoprite Checkers* supra, further held that the test for good cause in an application for rescission involves the considerations of the explanation for the default and whether there are prospects of success in the main case. See *Northern Province Local Government Association v CCMA and Others* (2001) 22 ILJ 1173 (LC). In the present matter the applicant has firstly failed to make out a case for reviewing the ruling of the commissioner. The applicant has also failed to make out a case that shows that he has good prospects of succeeding in the main case.

[11] In my view the applicant’s application to review and set aside the ruling of the commissioner refusing to rescind the dismissal of his case stand to be dismissed. I do not believe that it would be fair to order that costs should follow the results.

[12] In the premises I make the following order.

(i) The applicant's application is dismissed.

(ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 23rd October 2009

Date of Judgment : 22nd December 2009

Appearances

For the Applicant : Mr B L Mzamo of Mzamo Attorneys

For the Respondent: Mr C A Balie (human resource officer)