IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1966/08

Not reportable

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First Respondent
DOLLIE M N.O	Second Respondent
TOLI S N.O	Third Respondent
MOILOA, PUMEZA SIBULELE	Fourth Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA"), for the review and setting aside of a ruling of the third respondent ("the rescission ruling") dated 20 August 2008 in which he refused to rescind the default arbitration award made by the second respondent.

Background facts

[2] The fourth respondent ("the employee") alleged that she had been dismissed on 6 June 2006 and referred a dispute to the first respondent. Following an arbitration held on 10 October 2006 the second respondent issued a default

arbitration award in favour of the employee. The applicant applied for rescission of the award on 26 October 2006, which application was two days' late and the applicant also filed an application for condonation.

[3] The grounds for rescission were that the applicant had good prospects of success on the merits, was not in wilful default and would suffer prejudice should the award stand in that :

a) The fourth respondent had not been dismissed but had been employed in terms of a fixed term contract which expired;

She had been offered a further fixed term contract, which she refused to accept; and
She had misled the second respondent at the arbitration by alleging that she earned R25 000.00 per month (on the basis of the rejected offer of a new fixed term contract) when she was earning about R10 000.00 per month.

[4] The rescission ruling was issued on 20 August 2008 but apparently only came to the applicant's attention when the Deputy Sheriff arrived to execute it on or about 1 September 2008.

Merits of the review

[5] The grounds for the review are that the third respondent committed misconduct in relation to his duties as a commissioner; committed a gross irregularity in the proceedings; and exceeded his powers as a commissioner.

[6] In amplification of these grounds the applicant submitted that :

a) The third respondent committed misconduct in relation to his duties in finding that the non-attendance of the applicant was caused by an administrative problem and that the applicant's personnel should have acted on the notice of set down. The applicant alleged that the notice of set down had never been received. The employee did not oppose the application for rescission and there was no evidence or submissions to the contrary to support the third respondent's conclusion that the applicant had received the notice of set down and should have acted on it.

The third respondent committed misconduct in relation to his duties by finding that the

personnel in the Executive Mayor's office did not pass the notice of set down to the relevant office. The evidence before the third respondent was that the Executive Mayor's office also did not receive any notice of set down.
There was no evidence to support the conclusion of the third respondent that *"someone was sloppy in attending to the legal documents*" relating to the claim.
The ruling is ambiguous in that in paragraph [11] the third respondent grants condonation for the late filing of the rescission application, but in paragraph [12] of his ruling (the paragraph numbering is duplicated) he states that the late filing cannot be condoned.
The third respondent committed misconduct in relation to his duties as a commissioner by not considering the applicant's prospects of success on the merits and the prejudice it would suffer were the award to stand.

[7] Accordingly, the applicant submitted that, the third respondent failed to have regard to the material facts and confused the condonation and rescission applications. In the light of the test in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC), his ruling was one that could not have been made by a reasonable commissioner in the circumstances.

[8] Mr Lebea, for the employee, submitted that the award was justifiable on the facts before the third respondent and is not reviewable. He submitted that the third respondent applied his mind to the fact that it was not disputed that the notice of set down had been sent to the applicant at its correct telefax number, but it had elected not to attend the arbitration. The second respondent had satisfied himself to this effect when he decided to proceed with the arbitration and issue a default award. The applicant simply denied receipt of the set down but failed to explain this. The third respondent further applied his mind to both issues before him, i.e. the condonation and the rescission applications. It is apparent from the ruling that he granted condonation and dismissed the application for rescission. He clearly made two separate rulings and neither of them are reviewable. Moreover the third respondent's acceptance of the employee's evidence that she earned R25000.00 per month was not challenged by the applicant and in finding in her favour on the probabilities the second respondent made a competent award. The employee's failure to oppose the rescission application does not imply that she consents to the review.

[9] The applicant's Counsel, Ms Liebenberg, submitted that service by telefax is only *prima facie* proof that the notice of set down was sent and does not prove

receipt. The applicant stated in its founding affidavit that it had not been received. The award of the second respondent is moreover patently erroneous in that the new offer which the employee had rejected was nevertheless accepted as proof of her current remuneration. The applicant has a good defence on the merits and the quantum and should not be denied the opportunity to present its defence.

Analysis and conclusion

[10] I am in agreement with the submissions made by the applicant. It would appear from the ruling that the third respondent failed to apply his mind to the facts before him. He referred to the affidavit of the secretary of the Executive Mayor's office, in which she confirmed that the notice of set down, faxed to the Executive Mayor's office, had not been received in that office. However, in his analysis he focused exclusively on whether the fax number used was correct and completely disregards the affidavit. He then inexplicably concluded that: "*the applicant failed to show why the personnel in the Executive Mayor's office did not pass the notice of set down to the relevant office".* He makes certain conclusions about administrative problems, and it is unclear what evidentiary basis he is relying on. Furthermore, having granted condonation for the late filing of the rescission application, he concludes by stating that: *"Documentary proof in a form of the Founding Affidavit of Daniel also confirmed that not only was the applicant's personnel unaware of the statutory time limit to lodge some applications but also that someone was sloppy in attending to legal documents related to this case. Matters cannot be delayed to accommodate internal administrative problems of Municipalities which have huge resources to ensure efficient service in all departments".*

[11] In my view it is apparent that the third respondent made a ruling that was contradictory and confusing and that disregarded the evidence presented to him. This demonstrates a patent failure to apply his mind properly and resulted in a ruling that on the facts could simply not have been made by a reasonable decision maker.

[12] Accordingly, the rescission ruling is reviewed and set aside. Given the delay in this matter and the fact that the full facts were placed before me, there would appear to be no merit in remitting the matter for reconsideration. The rescission

ruling is accordingly substituted with an order granting condonation for late filing of the rescission application as well as rescinding the award of the second respondent. I do not consider it to be in the interests of law or fairness to order costs given that this order is in itself punitive towards the employee.

_____

BHOOLA J

JUDGE OF THE LABOUR COURT

Date of hearing: 20 August 2010

Date of judgment: 1 October 2010

Appearances

For the applicant: Adv E Liebenberg instructed by Smith Van Der Watt Attorneys
For the fourth respondent: Mr M C Lebea (Union Official)