REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C34/2014

In the matter between:

HEIN VENTER	Applicant
And	
THE CONCILIATION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COLIN RANI N.O.	Second Respondent
CEB MAINTENANCE AFRICA (PTY) LTD	Third Respondent

Date heard: 7 October 2014

Delivered: 5 February 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review a rescission ruling made by the second respondent (the Commissioner) in which an application for rescission in terms of section 144 of the LRA was refused.

[2] The arbitrator issued a dismissal ruling on 18 October 2013 due to the non-attendance of the applicant at arbitration proceedings. On 31 October 2013, the applicant brought an application in terms of section

144 (a) of the LRA and such application was decided on the basis of a founding affidavit by the applicant and an opposing affidavit on behalf of the third respondent (the company).

[3] The arbitrator records as follows in respect of the rescission application:

"5. The applicant applied for postponement of the arbitration hearing on 14 October 2013. The reason for the request for postponement was that he had recently obtained a new job, and he had to attend training in order to be eligible for an employment contract.

6. The CCMA refused the application for the postponement on the ground that obtaining a new job was not an exceptional reason for granting postponement. The applicant was advised to attend the arbitration as scheduled on 18 October 2013.

7. The applicant did not attend the hearing on 18 October 2013. His representative, Mr. Zaheer Parker reported that the applicant obtained a new job, and he had to attend training. Mr. Zaheer reported that the applicant did not give him a mandate to settle the case. He asked for postponement."

[4] The reasons given for the refusal to rescind the ruling are set out by the Commissioner. He records that because the applicant had been informed by the CCMA that it did not regard the reason for the request for postponement as "exceptional", and that on the 18 October 2013 the same reasons forwarded to the CCMA on 14 October 2013 were repeated by applicant's legal representative: "The postponement was denied for the same reason i.e. obtaining a new job and attending a training was not an exceptional reason to for granting postponement." (sic)

[5] On the question as to whether the applicant was in wilful default of the arbitration proceedings, the Commissioner stated that:

"His representative also alerted him that the CCMA grant postponement on exceptional circumstances. Even though the CCMA made him aware that his reason for asking for postponement was not

exceptional, the applicant decided not to attend the arbitration proceedings. I find the applicant was in willful default of the arbitration proceedings. ”

[5] In respect of the prospects of success should the arbitration proceedings be allowed to proceed, the arbitrator records that:

“28. The applicant submitted that he has good prospects of success because he was charged with fourteen counts of misconduct and found guilty on seven counts. He said that there was no valid reason for his dismissal. The respondent disputed this. The respondent submitted that the applicant’s dismissal was procedurally and substantively fair. The applicant failed to show a prime facie case in the sense that he has a winnable case. The mere denial of charges is not enough. I find that the applicant has no prospects of success. The applicant is currently employed. Therefore, he will not be prejudiced. The CCMA gave him an opportunity to present his case, but he elected not to do so.”

[6] The applicant submits in his founding affidavit that the arbitrator’s findings in relation to his willful default are irrational and unjustifiable in relation to the material properly before him. Further, that the Commissioner exceeded his powers and committed a gross irregularity by taking irrelevant considerations into account and ignored relevant ones. In particular, in that he concluded that the application for rescission was not merited because the new employment and training was not an exceptional circumstance. A further issue raised by the applicant is that the arbitrator failed to grasp the contents of the applicant’s affidavit in the rescission application. According to the applicant, the Commissioner also erred in finding that the applicant would not be prejudiced because he had found alternative employment.

[7] In his supplementary affidavit, applicant submits that the Commissioner made an error of law by not properly applying section 144 of the LRA. The contents of the supplementary affidavit are in fact merely a

repetition of the review grounds in the founding papers and although they cover some 15 pages, take the applicant's case no further.

[8] In **Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**[1], a case referred to by the Commissioner, the LAC held that:

" [35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a prima facie defence. In Northern Province Local Government Association v CCMA & other (2001) 22 ILJ 1173 (LC); [2001] 5 BLLR 539 (LC) at 545 para 16 it was stated:

> 'An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims.'
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> [36] In MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others (1994) 15 ILJ 1310 (LAC) at 1311I-1312A Nugent J had this to say:
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> 'These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.'"

[9] A look at the record shows that the notice of set down for the arbitration was dated 26 September 2013. The Acting Senior Commissioner of the CCMA Western Cape informed the applicant on the 15 October 2013 that he was duty-bound to attend the hearing. This was in reply to a letter from the applicant's attorney, dated 14 October 2013, which stated that:

[1] (2007) 28 ILJ 2246 (LAC)

> "Our client advises that he has recently obtained another source of employment and it requires him to be sent on training, failing which he will not be eligible for the contract. Commencement date was 11 October 2013 and thus he apologizes for the lateness of his request, but he was attending to finalizing the details of his employment. The training has in fact already commenced and will conclude in three weeks' time on the 1 November 2013. Client cannot take leave during the training period as it would jeopardize his chances of securing the contract."

[10] In **Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd**[2] King J (as he then was) considered the meaning of the word 'wilful' in the context of a default judgment, and held that it connoted deliberateness in the sense of knowledge of the action and of its legal consequences, and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.[3] In this matter, the applicant was guided by legal advice and must have known the legal consequence of his non-appearance. The arbitrator's finding that the default was willful was correct, based on the facts of the matter and on the law. In addition he was mindful of the principle that exceptional circumstances should be present when a Commissioner grants a postponement[4].

[11] The applicant elected not to attend the arbitration rather than ask for leave from his training to do so. The outcome of the ruling certainly does not fall into the category of one which a reasonable decision-maker could not make. In the result the application must fail. I make the following order, bearing in mind that the applicant is an individual litigant and I do not consider a costs order appropriate:

Order

1. The review application is dismissed.

[2] 1994 (3) SA 801 (C)
[3] @ 803H-I

[4] Carephone (Pty) Ltd v Marcus NO & others [1998] 8 BLLR 872 (LC)

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H. Rabkin-Naicker

Judge of the Labour Court

Applicant: Zaheer Parker Attorneys

Third Respondent: Snyman Attorneys