REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D573/11

In the matter between:

PACK N STACK (PTY) LTD **Applicant**

and

MANDLAKHE KHAWULA N.O. **First Respondent**

THE COMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

PATRICK SIMPHIWE MDLETSHE AND ANOTHER **Third Respondent**

Heard: 20 December 2013

Delivered: 7 October 2014

Summary: Application to review and set aside a rescission ruling- Absence of a reasonable and *bona fide* explanation for default. No grounds demonstrated to interfere with the ruling declining rescission based on the material before the Commissioner. Application dismissed with costs.

JUDGMENT

NAIDOO, AJ

Introduction

[1] This is an application to review a rescission ruling issued by the first respondent in terms of which the applicant's rescission application was refused.

Background

[2] The applicant received notification that the arbitration hearing was scheduled for 19 January 2011.

[3] The applicant requested Vasen Govender (Govender) to appear at the arbitration as a witness and to represent the applicant if the need arose.

[4] Govender was the initiator of the disciplinary hearings that gave rise to the dismissal disputes.

[5] Sunisha Roopram (Roopram) attended the arbitration hearing with Govender. Roopram is an employee of Labour Net, a labour consultancy. The applicant utilises Labour Net to provide independent chairperson services. Roopram was the chairperson of the disciplinary hearings that led to the dismissals.

[6] At the arbitration hearing, Govender introduced himself as a manager for the respondent but later admitted that he was actually employed by the applicant's client, Simba. The third and fourth respondents performed their services at the site of the applicant's client Simba, in Port Shepstone.

[7] The first respondent made a ruling that Govender had no right to represent the applicant as he was neither an employee of the applicant nor an official from an employer's organisation or an admitted attorney.

Roopram and Govender left the hearing. The first respondent proceeded with the arbitration hearing.

[8] The first respondent issued an award in terms of which the third and fourth respondents were to be retrospectively reinstated.

Grounds for review

[9] The applicant's grounds for review are summarised below.

9.1 The first respondent did not exercise his discretion properly, rationally and justifiably by proceeding with the arbitration hearing;

9.2 The first respondent ought to have taken time to consider the circumstances before proceeding with the arbitration;

9.3 The first respondent failed to apply the basic tests applicable to rescission applications;

9.4 The first respondent made a ruling that no reasonable decision maker could have reached.

[10] The third and fourth respondents' main grounds for opposition were:

10.1 The applicant failed to provide a reasonable explanation for default. The applicant had chosen not to send a representative who was lawfully entitled to represent it at the arbitration and instead asked the witnesses at the disciplinary hearing to attend and requested one of the them, who was not employed by the employer party, to represent it at the CCMA;

10.2 During the opening address, when the person in question had misrepresented initially that he was a manager, employed by the employer party disclosed that he was not so employed, the first respondent ruled that he could not represent the employer party in the further conduct of the proceedings. The consultant who was present similarly had no right to represent the employer party.

There is no challenge to the correctness of these findings or as to the fact that the applicant knew of the date of the hearing and chose to deal with it as it did.

10.3 The first respondent referred to facts contained in the founding affidavit to the rescission application and obviously read and considered it. It follows that he must have borne that in mind in applying the good cause test but due to the wholly unsatisfactory explanation for the default, he found that the application had to fail notwithstanding what had been said as to the strength of the defence. The explanation was so unsatisfactory that it, in itself, was sufficient reason to refuse the application but that does not mean that the first respondent did not consider the impact of the defence that is raised in the papers in ameliorating the fact that there was no adequate explanation.

10.4 If there is no adequate explanation or no prospects of success then in either of those instances, a rescission application will usually fail.

<u>The legal principles</u>

[11] It is trite that a party must demonstrate good cause before an application for rescission may be granted.

[12] The Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v CCMA and Others*[1] set out the test for good cause as follows:

> '[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 and Others* [2001] 5 BLLR 539 (LC) at 545, paragraph [16], it was stated:

[1] [2007] 10 BLLR 917 (LAC) at paras 35 and 36.

> "An application 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.

[36] In *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others* (1994) 15 ILJ 1310 (LAC) at 1311J-1312A, Nugent J had this to say:

> "Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. Whilst 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."'

Analysis

[13] It is common cause that:

13.1 the applicant was aware of the date of the arbitration hearing;

13.2 there is no challenge to the correctness of the first respondent's ruling that Govender was not entitled to represent the applicant at the arbitration hearing;

13.3 no application for postponement was made by the applicant prior to the arbitration hearing; and

13.4 no application for postponement was made at the arbitration hearing.

[14] There is no record or pleaded submissions of precisely when the notification of set down was received by the applicant. The applicant did

not raise short or defective notice as an issue in its application for rescission before the second respondent.

[15] The applicant contended that it made an attempt, as best it could, to proceed with the arbitration and provided a proper explanation for the applicant not attending.

[16] The first respondent found that the explanation furnished was unacceptable and unreasonable.

[17] In my view, there are no grounds to interfere with the second respondent's ruling based on the material properly available to the second respondent when determining the rescission application.

[18] The explanations furnished were lacking in particularity and omitted material explanations that were required to provide a reasonable and *bona fide* explanation for default. An assessment of the material explanations relied on by the applicant is dealt with below.

The contingency plan

[19] The founding affidavit does not deal in sufficient detail about precisely what was done, when and by whom. No dates are disclosed. It is unknown who made arrangements on behalf of the applicant. There is no disclosure of whether there were any other Human Resources personnel or managers employed by the applicant that could have attended on behalf of the company.

[20] The deponent to the founding affidavit to the application for rescission identifies herself as the Regional Human Resources Assistant duly authorised to depose to the affidavit on behalf of the applicant. There is no explanation as to why the deponent was not in a position to represent the applicant at the arbitration hearing.

[21] The applicant contended that it arranged for all its witnesses to be present, prepared a paginated bundle of documents for the hearing and

arranged for Govender to appear on its behalf, if the need arose. In the application for rescission, the applicant does not state when the bundle of documents was prepared when the arrangements with the witnesses were made nor about who made the arrangements. No evidence was put up to support the contention that witnesses (other than Roopram) were present.

Application for postponement

[22] There is no explanation at all as to why an application for postponement could not have been made prior to the hearing date given the fact that the applicant's Human Resources Manager was incapacitated from 7 December 2010, being over a month preceding the date of the arbitration hearing. This, in my view, was material to explain for the purpose of providing a reasonable and *bona fide* explanation for default. There is no explanation from the deponent to the founding affidavit as to why she could not have attended to an application for postponement in her capacity as the Regional Human Resources Assistant of the applicant or have attended on the day of the arbitration to apply for a postponement or to represent the applicant.

The applicant is a lay person

[23] The argument that the applicant is a lay person relating to the rules of the second respondent is not a reasonable and *bona fide* explanation given the fact that, on the day of the hearing, the applicant was accompanied by a labour consultant who was *au fait* with the rules regulating representation. It is common cause that the applicant employs a Human Resources Manager and a Human Resources Assistant. There is no suggestion in the rescission application that neither of these employees were unaware about the rules regulating representation before the second respondent.

[24] In addition to the above, Govender was accompanied by Roopram, who is a Labour Consultant and who, based on the material available, was

aware that she was not entitled to represent the applicant as a consultant. There is a dispute of fact on the papers in regard to whether Roopram was allowed to remain in the hearing as an observer with Govender or whether she remained outside the room.

[25] The applicant contends that Roopram was not inside the hearing room when the issue of representation was discussed.[2] The third and fourth respondents contend that Roopram requested to stay as an observer and that she knew that she was not allowed to represent the applicant as she was a labour consultant.

[26] The first respondent recorded the following in the rescission ruling:

> '[6] On the day of the arbitration being 19 January 2011 Ms S Roopram a labour consultant and Mr Varsen Govender who introduced himself as a manager for the respondent and later admitted that he was not actually employed by the respondent appeared before me. Ms Roopram requested me to allow her to be in the arbitration room as an observer as she was fully aware that she was legally not allowed to represent the respondent. Her request was accepted and she remained in the arbitration room. Govender continued as the representative of the respondent.
>
> [7] During the opening statements, it was brought to my attention that Govender was employed by the client of the respondent, Simba. Govender confirmed that he was not the employee of the respondent. I advised Govender that representation at the CCMA is regulated by the Labour Relations Act. In order to represent the respondent he should either he should be an employee of the respondent or an official from an employer's organisation or an admitted attorney. In the circumstances, both Roopram and Govender left the room and the matter proceeded in the absence of the respondent as I was satisfied that the

[2] Pleadings, page 13, founding affidavit, paragraph 15.4.1

respondent was notified of the date, time and venue of the hearing and was aware of same.'

[27] The transcript or the record of the arbitration proceedings was not made available as part of the record of proceedings, save for two pages of the first respondent's hand written notes.[3] There is, accordingly, no material available to support the allegation that Roopram was not inside the hearing room or that Govender did not introduce himself as a manager of the respondent. Based on this, there is no material to support the contention that the applicant, Govender and Roopram were not aware of the rules regulating representation before the CCMA. In fact, to the contrary, it appears that Govender and Roopram were aware of the rules regulating representation before the second respondent. This is reflected by Govender's attempt to introduce himself as a manager of the applicant but by later admitting that he was not employed by the applicant.

[28] The presence of a consultant, who was *au fait* with the rules of the second respondent and the attempt by Govender to represent himself as a manager of the applicant when he was not, indicates that there was awareness that Govender was not entitled to represent the applicant at the hearing.

Paginated bundles

[29] The applicant submitted that it prepared/paginated bundles of documents in preparation, to proceed with the arbitration. The founding affidavit does not disclose who prepared the paginated bundle. There is no material to support this, however, even if the applicant prepared bundles, this contradicts the argument made that the applicant is a lay person and was unaware of what was required of it at arbitration. This indicates that someone with knowledge about preparing for arbitration was involved in the preparations prior to the hearing.

[3] Record, pages 36 and 37

[30] This again raises the question of timing and supports the argument made by the third and fourth respondents that the applicant made an election about the manner in which it intended to deal with the arbitration. That is, not to seek for a postponement at any stage but to arrange for Roopram and Govender to attend.

[31] In my view, the applicant made a clear choice to deal with the matter in the manner it did; that is to send a representative who was not entitled to represent it.

[32] The applicant did not provide reasonable and *bona fide* explanations for electing to deal with the matter as it did.

Bona fide defence

[33] The applicant contends that the third respondent committed a reviewable irregularity because the third respondent did not consider, at all, the applicant's defence which was *bona fide* and demonstrated good prospects of success.

[34] The fact that the third respondent did not specifically deal with an analysis of the applicant's defence and provide reasons in that regard, does not necessarily mean that the third respondent did not consider this at all. In my view, the wholly unsatisfactory explanation for default was fatal to the application for rescission.

[35] It is apparent from the submissions made in support of the applicant's prospects of success that there were clearly disputes of fact raised in relation to whether the third and fourth respondents were given an instruction to load certain goods prior to leaving. It is not clear whether they were charged for not following this instruction or the instruction to return to work after they had left or both. The versions are consistent on the fact that the third and fourth respondents were telephoned and given an instruction to return to work. On the third and fourth respondents' version, this instruction was not complied with because it was given at

20h00 after they had left work. The outcome of the disciplinary hearing does not contain the versions of the third and fourth respondents at all.

[36] Accordingly and in light of explanation for default being so unsatisfactory, the impact of the defence raised in the papers could not be said to have resulted in the application for rescission being granted under the circumstances of this matter.

The grounds for review based on the Commissioners conduct during the arbitration

[37] The applicant contends that the third respondent was duty bound to have exercised his discretion to postpone the arbitration because witnesses attended and the applicant prepared a bundle of documents. What was lacking was a representative that had capacity to represent it.

[38] The difficulty with the grounds of review challenging the discretion exercised by the first respondent to proceed with the arbitration hearing after making the ruling on representation is that the applicant has not sought relief to review the conduct of the arbitrator or the ruling made in the arbitration proceedings. In addition, the record of the arbitration proceedings has not been put up to support the grounds of review seeking to interfere with the discretion applied by the third respondent during the arbitration hearing.

[39] The applicant concedes that the third respondent was only appraised of the circumstances of Govender's appearance on behalf of the applicant instead of the Human Resources manager in the rescission application papers. Therefore, these considerations could not have been material placed before the third respondent at the arbitration hearing.

[40] Accordingly, the challenges based on the third respondent not exercising his discretion to postpone the arbitration or to consider the circumstances before proceeding with the arbitration fails because:

a) no relief is sought in the application to review the award issued by the third respondent at the arbitration hearing;

b) no record of those proceedings have been made available to support the grounds of review based on the first respondent's conduct or exercising of discretion in proceeding with the arbitration hearing;

c) the correctness of the third respondent's ruling disallowing Govender as a representative is not challenged.

Order

1 The application to review and set aside the rescission ruling issued under case number KNPS672-10 is dismissed with costs.

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Naidoo, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: H Lee
Snyman Attorneys

For the Third Respondent: Adv M Pillimer SC
Instructed by Jafta Inc