THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JR 2826/2019

In the matter between:

SOS PROTEC SURE	**Applicant**
and	
PSTWU obo DANCAN MABEA AND 160 OTHERS	**First Respondent**
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
N KHESWA N O	**Third Respondent**

Heard: **26 August 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 August 2021.**

Summary: Review of a rescission ruling

Costs – matter should not have been opposed.

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COETZEE AJ

[1] The applicant approaches this Court to review and set aside the refusal of the third respondent to rescind a default award.

[2] The first respondent ("the union") filed a notice to oppose the review application but failed to file an answering affidavit. The union's attorney of record has since withdrawn. The matter, however, remains opposed in view of the notice of opposition.

[3] The Commissioner of the CCMA on 8 April 2019 issued a default award that records:

> "7.1 Upon investigation, the CCMA case file showed that the Respondent was properly served and notified of the date, time and venue of the scheduled hearing. In the light of the above facts, I conducted the arbitration hearing in the absence of the Respondent, in terms of Section 138(5)(b)(i) of the Labour Relation Act, 66 of 1995, as amended ("LRA")".

[4] The applicant became aware of the default award on 6 September 2019 when the sheriff arrived to enforce the award.

[5] The applicant launched a rescission application that was dismissed in the following terms:

> "3.1 The Applicant's representatives submitted that its failure to attend the process cannot be regarded as wilful default because he only received the default award on 6 September 2019 and this was the first encounter with the default award, when it was faced with a warrant of execution.
>
> 3.2 The applicant did not receive a notice of set down for arbitration from the CCMA at any stage. It is alleged in the arbitration award that the notification was sent via e-mail. However, that e-mail address they provided in the said default arbitration award appears to be

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jacobs@sosprotec.co.za. Such e-mail does not exist even the domain itself is incorrect."

[6] The applicant maintains that the notice of set-down was sent to jacobs@ssprotec.co.za (there is no such email address and in any event the "o" in the domain was omitted) instead to chantel.jacobs@sosprotec.co.za. It was also incorrectly sent to pumim@sosprotec.co.za instead to pumi@sosprotec.co.za. On page 66 of the record both correct e-mail addresses are reflected on a document sent to the union prior to the notice of set down of the arbitration.

[7] The applicant pointed this out in the rescission application, but the Commissioner accepted the version of the union as to the correctness of the addresses.

[8] The applicant seeks to review the rescission ruling on the basis that the Commissioner failed to have regard to the evidence regarding the correct e-mail addresses.

[9] In my view the rescission ruling is to be set aside for that reason. The notification of the arbitration never came to the knowledge of the applicant. The applicant gave a reasonable explanation as to why not.

[10] The applicant argues that the award was erroneously made in the absence of the applicant. If that is the case, then the applicant did not have to show good cause to succeed with the rescission application[1]. As to whether the failure to correctly notify the applicant constitutes an error, the issue was dealt witH at length in *South African Revenue Services v Charlotte Connie Mhlongo*[2] where the Court held that it in fact is an error. The applicant did not have to show good cause to succeed with the rescission application.

[11] In view of this conclusion, it is not necessary to consider the second ground of review.

[12] The application to review and set aside the rescission ruling should succeed.

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[1] Electrocomp (Pty) Ltd v Novak (2002) 23 ILJ 1048 (LC para 20-21
[2] J1915/09 ZALC

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Costs

[13] The applicant asks that costs should follow the result. I am aware that costs in the Labour Court do not follow the result. This matter should never have been opposed as clearly on the facts the award should have been rescinded. The conduct of the union also warrants a cost order. The union, on the facts, was well aware of the correct email address, but elected to use a wrong email address to obtain a default award. The union then opposed the application without filing and answering affidavit or withdrawing its opposition to the application.

Order

[14] I make the following order:

1. The rescission ruling ("the ruling") dated 24 October 2019 under case number GAJB28832-18 is reviewed and set aside.

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

3. The ruling is substituted by the following:

" Rescission is granted"

_____

F. Coetzee

Acting Judge of the Labour Court of South Africa

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Appearances

For the applicant:	Adv A Cook
Instructed by:	Michael Krawitz & Co
For the First Respondent:	No appearance

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