



**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Not reportable

Case No: J986/2022

In the matter between:

BOSCH UNIFORM SUPPLIES CC

Applicant

And

**SACTWU OBO TENYEKO THELMA MARIMA AND
1 OTHER**

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER THANDILE KONA NO

Third Respondent

Date heard: 14 August 2024

Date of judgment: 04 November 2024

Summary: review of arbitration award – arbitrator ignoring application for rescission of a prior ruling and proceeding to hear the matter on its merits – decision to proceed in the circumstances constituting misconduct in relation to his duties as arbitrator, and unreasonable. Award set aside and remitted.

JUDGMENT

HARVEY AJ

- [1] This is an application for the review and setting aside of the arbitration award issued by the third respondent arbitrator, acting under the auspices of the second respondent CCMA.
- [2] The application is opposed by the first respondent, the South African Clothing and Textile Workers Union representing two members – hereinafter ‘the employees’.

Background facts

- [3] The employees referred an unfair dismissal dispute to the CCMA which was not successfully conciliated within the prescribed 30 days. The employees referred the matter for arbitration, and simultaneously applied for condonation for making such referral outside of the prescribed 90 days. The condonation application was granted on an unopposed basis by Commissioner Nhliziyo on 30 May 2022.
- [4] The dispute was set down for arbitration before the third respondent arbitrator on 12 July 2022. When the matter was convened, the parties consented to revert to conciliation. The employer’s representative told the arbitrator that he lacked jurisdiction to proceed with the arbitration because the employer had been unaware of the condonation application, and had accordingly applied for rescission of the condonation ruling. The employer also told the arbitrator that, because the referral of the unfair dismissal dispute was served on the employer by the CCMA (instead of by the employees) it was ‘defective’.
- [5] The arbitrator was initially unaware of the existence of a rescission application, as it was not in the file. It is not in dispute between the parties, however, that the rescission application was subsequently located in a different or duplicate file.
- [6] The arbitrator then ruled that the arbitration hearing would proceed.
- [7] The employer’s representative refused to participate in the arbitration hearing, and left the venue.

- [8] The first minute and 45 seconds of the arbitration hearing was transcribed and placed before the court by the applicant employer. After introductions, the arbitrator places on record that:

' ... the respondent has abandoned the ... proceedings ... they were here, Mr Johan Louw of CTL Management Forum, however, they have abandoned the proceedings after raising a point in limine... that they were not served with the condonation application and the referral to arbitration, however in the file there is proof that they were served and therefore I conclude that I will proceed with the ... matter to arbitrate...'

The award

- [9] The hearing proceeded and the arbitrator issued an award on 20 July 2022. In the award the arbitrator accurately records the employer's two preliminary objections, and the award continues:

9. The contents of the case file contain an email trail and indicates that the email address to which the condonation was served is active and in use. Further, a file that the respondent's representative had in his possession showed that there was communication between him [and] the respondent, using the same email address that was used to serve the condonation application. Therefore, it is probable that the condonation application was properly served on the respondent. The respondent's representative could also not provide proof of a rescission application, nor was such a rescission application contained in the case file.

10. The applicants earn below the earnings threshold of R224,080.30 per annum and that puts them in the low income category of employees that, in the interest of social justice, the CCMA assists, when they refer a dispute, in effecting service to their employers. However, in this matter, the proof of service that is in the case file indicate[s] that the applicants' trade union served the respondent with the referral on 04 November 2021. Therefore, the respondent was served correctly.

11. An ex tempore ruling was made for the arbitration process to proceed as scheduled.

- [10] The award proceeds to summarise the employees' evidence and to find that their dismissals were substantively unfair. The arbitrator ordered the employer to pay compensation to the employees.

The review application

- [11] In the affidavits in support of the application for review the employer admits to having received the employees' unfair dismissal dispute referral in early November 2021, but states that it heard nothing further about the matter for more than 7 months, until the condonation ruling was sent to it on 30 May 2022. The employer sent a representative to the CCMA on 2 June 2022 to look at the file. Being of the view that the reason it had not received the condonation application was that its email address had been typed between apostrophes, it delivered a rescission application on 14 June 2022.
- [12] When the matter came before the arbitrator on 12 July 2022, the employer's representative told the arbitrator that the arbitration could not proceed before the rescission application had been determined. Although the rescission application was not in the arbitrator's file, it was in fact located before the impugned ruling was made.¹
- [13] The founding papers covered a great many issues, but Mr Coetzer, who appeared for the applicant, confirmed that the impugned decision - that is, the decision which is the subject of the review - is the arbitrator's decision (in paragraph 11 of the award) to proceed with the hearing.
- [14] The employer's principal contention is that the arbitrator could not proceed with the hearing before deciding the application for rescission.² In doing so, the arbitrator is said to have breached his duty in terms of the Guidelines on Misconduct Arbitrations³ to '*decide any preliminary point before proceeding*

¹ This is conceded by the respondents in the answering affidavit at par 15.

² The complaint about the allegedly 'defective' service of the initial referral was, wisely, abandoned, as the employer conceded having in fact received it. See *Winnie Mabaso Foundation v CCMA* (unreported case number J293/21, date of judgment 24 March 2021) at par 3.

³ CCMA Guidelines on Misconduct Arbitration issued in terms of s115(2)(g) of the LRA and published under GN R224 in GG 38573 of 17 March 2015 ('the Guidelines').

with the arbitration, unless evidence is required to deal with the preliminary point and it is practicable to hear evidence on the merits at the same time'.⁴

- [15] The applicant employer says that it was thus deprived of its right to a fair hearing, and that no reasonable arbitrator would have decided to proceed with the arbitration in the circumstances. Mr Coetzer asked the court to remit the matter to the CCMA for consideration of the rescission application. He did not persist in a request for costs.
- [16] Mr Gwebityala, who appeared for the employees, argued that even if the arbitrator had considered the rescission application, he would have dismissed it because the employer's explanation for not receiving the condonation application was without merit (because the presence of apostrophes in email addresses does not affect delivery of emails).
- [17] The court was referred to the decision of the LAC in *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngweletsana*⁵ and to that of this court in *Production Institute of Southern Africa (Pty) Ltd v CCMA*⁶ in support of Mr Gwebityala's further submission that the rescission application was not properly before the arbitrator in any event, as it was delivered 1 day late without an application for condonation (a fact which was conceded by the employer in its affidavits).
- [18] Counsel for the employees accordingly urged the court to dismiss the review application, with costs, which in submission were warranted because the review was a hopeless case.

Evaluation

- [19] It is undisputed that an application for the rescission of the condonation ruling had in fact been delivered by the employer on 14 June 2022 and that, although the rescission application was not in the arbitrator's file, it was subsequently found in a duplicate file.

⁴ Clause 24 of the Guidelines (note 3 above) which appears under the heading 'Preliminary issues – stage 2', see more generally clauses 22-25.

⁵ *PT Operational Services (Pty) Ltd v Retail & Allied Workers Union obo Ngweletsana* (2013) 34 ILJ 1138 (LAC) at par 37.

⁶ *Production Institute of Southern Africa (Pty) Ltd v CCMA* [2001] JOL 26809 (LC).

- [20] Given that the arbitrator was aware of the existence of the rescission application, it is regrettable that his award records that: *'The respondent's representative could also not provide proof of a rescission application, nor was such a rescission application contained in the case file.'*
- [21] The arbitrator was not entitled thus to ignore the rescission application. The Guidelines require arbitrators to deal with preliminary issues and objections before proceeding to hear evidence. The purpose of the Guidelines is to *'promote consistent decision-making in arbitrations dealing with dismissals for misconduct'*.⁷ Clause 5 thereof provides that *'an arbitrator who adopts a different approach must set out the reasons for doing so in the relevant award'*.
- [22] In paragraph 9 of his award the arbitrator engages in the wrong enquiry when he appears to consider the employer's prospects of success in the rescission application, in that he expresses a view concerning the probabilities of the employer not having received the condonation application. This question of course could not properly arise until or unless the arbitrator acknowledged the existence of the rescission application, and applied his mind to its merits.
- [23] The arbitrator did not, however, hear or determine the rescission application. Nor is it for this court to determine the rescission application, or to speculate as to its outcome.
- [24] CCMA commissioners who are appointed to arbitrate unfair dismissal disputes are encouraged to take a robust, businesslike approach to disputes in order that they be resolved expeditiously and with the minimum of legal technicalities. Nevertheless, the premium placed on expedition cannot be at the expense of parties' right to be heard. The employer, which was aggrieved that it had not been heard in the condonation application, wished to have its application for rescission determined, and it was not open to the arbitrator to ignore it.
- [25] The arbitrator's decision to proceed to hear evidence on the merits of the unfair dismissal dispute, despite being aware of the existence of the

⁷ The Guidelines (note 3 above) at clause 3.

application for rescission of the condonation ruling, amounted to misconduct in relation to his duties as arbitrator. This deprived the employer of a fair hearing and constituted a gross irregularity in the conduct of the proceedings. It was a decision that no reasonable arbitrator would have made. It accordingly falls to be reviewed and set aside.

Remedy

[26] It is regrettable that it took over two years for this review matter to be finalised. It is not possible for this court to substitute the decision which must now be set aside; the matter must be remitted for a proper consideration of the rescission application and the employees' submissions thereon (including whether it was delivered late, and if so whether this is fatal). If the rescission application does not succeed the unfair dismissal arbitration will then continue on its merits. If on the other hand the rescission application succeeds and the condonation ruling is rescinded, the commissioner to whom the matter is remitted will have to determine the condonation application afresh, the outcome of which will determine whether or not the unfair dismissal dispute is properly before the CCMA for arbitration on its merits.

[27] In light of the delay which has already occurred, I shall remit the matter with directions intended to support the expeditious finalisation of the disputes between the parties.

Costs

[28] The employer did not persist in its request for costs. There will be no order as to costs.

Order

- [1] The award issued by the third respondent under case number GATW 14276-21 given on 20 July 2022 is reviewed and set aside.
- [2] The matter is remitted to the second respondent ('the CCMA') for an arbitration hearing *de novo*.

- [3] The CCMA must appoint a commissioner other than the third respondent to arbitrate the dispute, and must set the matter down for an arbitration hearing on a date no later than 29 November 2024.
- [4] The commissioner appointed in accordance with paragraph [3] of this Order is directed to commence the arbitration proceedings by considering and determining the employer's application for the rescission of the condonation ruling, having regard also to the employees' submissions thereon, which may either be made in writing on any date before the hearing, or in-person at the hearing.
- [5] The CCMA is directed to allocate sufficient hearing dates to this matter to enable it to be finalised within 90 calendar days of the date of this Order.
- [6] There is no order as to costs.

Harvey AJ

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the applicant:

Dawie Coetzer of Coetzer de
Klerk Attorneys

On behalf of the first respondents:

Amos Gwebityala of Cheadle
Thomson & Haysom Inc