



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 2726/16

In the matter between:

DRIFT REACTIONS CC

Applicant

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MAMISILE EKWESWA N.O

Second Respondent

COMMISSIONER LANTHIS TAYLOR N.O

Third Respondent

LUFUNO NORMAN MULAUDZI

Fourth Respondent

Heard: 9 July 2019

Delivered: 19 July 2019

JUDGMENT

OLIVIER AJ

Introduction

[1] This is an application to review and set aside a default arbitration award issued by the First Respondent on 6 July 2016 and which default award was made by the Second Respondent. Alternatively the Applicant applies to review and set aside a rescission ruling issued by the Third Respondent on 30 September 2016 under the same case number.

Background facts

[5] The Applicant employed the Fourth Respondent as a security officer on 1 January 2013. The Applicant dismissed the Fourth Respondent on 30 September 2015 following a disciplinary hearing. The Fourth Respondent was dismissed for absence without leave during the period 15 to 19 October 2015.

[6] The Fourth Respondent referred a dispute to the First Respondent on 3 November 2015. An arbitration was held on 24 November 2015 and because the Applicant did not attend a default arbitration award dated 8 December 2015 was issued ("the first default award"). The Fourth Respondent thereafter instructed the sheriff to attend at the Applicant's premises in order to enforce the award. .

[7] The Applicant then applied to the Second Respondent to have the first default award rescinded. The Applicant's representative contended that the incorrect fax number had been used and it was not aware of the referral nor the set down of the matter by the First Respondent. On 31 May 2016 the first default award was rescinded.

[8] It appears from the pleadings that during the course of the application to have the first default award rescinded, the Applicant was represented by an employees' organisation, the South African United Employers Organisation ("SAUEO"). The Applicant had mandated such employer's organisation and more particularly its representative Mr. Pierre Anton Govea to represent it in respect of the rescission proceedings. At all relevant times the aforesaid SAUEO and Mr. Govea indicated that it will accept service of any documents at the following fax no: (011) 954-3803.

- [9] The First Respondent thereafter set the matter down for a hearing on 5 July 2016. The Applicant was informed of this set down by a notice of set down sent to the fax number provided by SAUEO and Mr. Govea, however, the Applicant failed to attend the hearing. Pursuant thereto a second default arbitration award was issued on 8 July 2016 ("the second default award").
- [10] On 5 August 2016 the sheriff again attended at the Applicant's premises to enforce the second default award. SAUEO through Mr. Govea then represented the Applicant in launching a rescission application in relation to the second default award. This application was made on 6 July 2016. In the application the Applicant contended that the First Respondent used the incorrect fax number to notify it of the arbitration. The fax number provided by Mr. Govea was used by the First Respondent. The Applicant contended that such number was no longer in use and that it had not received the notice of set down.
- [11] On 30 September 2016 the Third Respondent issued a ruling dismissing the application to rescind the second default award ("the second rescission ruling").
- [12] The Applicant was then advised by SAUEO and Mr. Govea to bring an application to rescind the second rescission ruling. This ill-advised step also had an unfortunate ending in that on 3 November 2016 Commissioner Gcobisa Gosa ruled that the First Respondent lacked jurisdiction to entertain the Applicant's rescission application.

The review application and the application for condonation

- [13] This review application was launched by the Applicant on 13 December 2016. Section 145 of the Labour Relations Act¹ (LRA), provides that any party who brings a review application in relation to an arbitration award must do so within six weeks of a date that the award was served on the Applicant. Section 145(1A) provides that this Court may in good course shown condone the late filing of such an application.

¹ No. 66 of 1995, as amended.

In the founding affidavit to the review application the Applicant acknowledges that it must overcome the hurdle to apply for condonation in respect of the late filing of the review application. As correctly pointed out by the Third Respondent's counsel, assuming that the second default award and the second rescission ruling were received on the dates that appear on them, the review application in respect of the second default award is just short of four months late and in respect of the second rescission ruling is four weeks late.

[15] The Applicant fails to deal with the aforesaid substantial delays and settles for an explanation where it blames SAUEO and more particularly the firm of attorneys SAUEO instructed for the delay. What the Applicant furthermore fails to explain entirely, after its' alleged resignation of its membership from SAUEO on 3 November 2016, is what steps it had taken before or after this date to expedite its review application. Should one have regard to the date of the second rescission ruling i.e. 30 September 2016 the review application should have been filed by at least 15 November 2016. The review application is only served and filed by 13 December 2016. A further four weeks later.

[16] No explanation whatsoever is provided for the aforesaid delay. At all relevant times the Applicant chose to be represented by SAUEO and it was also Mr. Govea of SAUEO that provided the telefax number to the First Respondent to which the different set down notices had been sent.

[17] The Fourth Respondent is a person with no substantial means and had to rely on the assistance of a pro-bono attorney provided by SASLAW. He had to endure three rescission applications, two arbitrations and now this late review application. His prejudice is self-evident.

[18] The law on condonation is trite and has been codified in *Melane vs Santam Insurance Company Ltd*². Various courts have expanded further on the factors identified in *Melane* or alternatively elaborated on the principles set out therein. In *NUM vs Council for Mineral Technology*³, the Labour Appeal Court (LAC)

² 1962 (4) SA 531 (A).

³ [1999] 3 BLLR 209 (LAC).

held⁴ "...that without a reasonable and acceptable explanation for the delay the prospects of success are immaterial and without prospects of success no matter how good the explanation for the delay, an application for condonation should be refused".

[19] Furthermore, it must be noted that in *SA Post Office Ltd vs Commission for Conciliation Mediation and Arbitration and others*⁵ the LAC held that where the matter deals with an individual dismissal the Court must be cautious before exercising its discretion in favour of the indulgence sought, because there is an imperative placed on the speedy and expeditious resolution of such disputes.

[20] The Applicant has failed to provide an explanation that is sufficient to enable the court to understand how it really came about that it failed to file and serve its review application in time and to assess the Applicant's conduct and motives.

[21] The LAC in *Superb Meat Supplies CC vs Maritz*⁶ held the following to say in relation to the litigants duties:

"In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorneys' lack of diligence or the inefficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourages laxity on the part of practitioners".

[22] Furthermore the Court is of the view that the Applicant itself cannot be absolved from blame as it appears to have shown a complete disinterest in the conduct of the case and offered no acceptable explanation for taking reasonable steps to bring this matter to completion.

[23] In the premises, I make the following order:

⁴ Ibid at p. 211 at paragraphs G to H.

⁵ [2012] 1 BLLR 30 (LAC).

⁶ (2004) 25 ILJ 96 (LAC).

Order

1. The application for review is dismissed with costs;
2. The Applicant is ordered to comply with the arbitration award dated 6 July 2016.

G. J. P. OLIVIER

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D.J Coetsee of Coetsee Attorneys

For the Respondents: V Reddy of Norton Ros