REPUBLIC OF SOUTH AFRICA

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# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 161/12

In the matter between:

**BHP BILLITON HOTAZEL MANGANESE MINES (PTY) LTD** **Applicant**

and

**CCMA** **First Respondent**

**ANTONY OSLER N.O.** **Second Respondent**

**D SHUPING** **Third Respondent**

**Heard**: **19 February 2013**

**Delivered**: **15 March 2013**

**Summary:** Review of condonation ruling in rescission application before the CCMA. Interpretation of LRA s 144 considered.

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**JUDGMENT**

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STEENKAMP J

Introduction

[1] If a party does not file written submissions in proceedings where it had been agreed that no evidence would be led, and a CCMA commissioner makes a default award, was that award "erroneously made in the absence" of the defaulting party within the meaning of s 144 of the LRA[1] and thus open to rescission?

[2] The third respondent, Mr D Shuping ("the employee") was reinstated in the applicant's employ following a default arbitration award issued by Commissioner Shiraz Mohamed Osman[2]. The applicant (BHP) brought a rescission application and an application for condonation for its late filing before the CCMA. The second respondent, Commissioner Antony Osler ("the Commissioner") dismissed both on the basis that the applicant had not made out a case for condonation and that the award on the merits was not "erroneously made in the absence" of the applicant from the proceedings. The applicant seeks to review that rescission ruling and the ruling on condonation[3] in terms of s 158(1)(g) of the LRA.

[3] The employee has also brought an application in terms of s 158(1)(c) of the LRA[4] to have the initial arbitration award[5] made an order of court. The parties were *ad idem* that the two applications should be heard together. Should I rule in favour of BHP, the employee's application would be moot. Should I rule in favour of the employee, the Osman arbitration award must be made an order of court.

Background facts

[4] The employee was dismissed after having committed a safety offence in that he failed to carry out safety rules and procedures. He was employed as an electrician and disregarded certain isolation lockout procedures.

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[1] Labour Relations Act 66 of 1995.

[2] i.e. the award of commissioner Osman dated 7 February 2012 under case number NC 1755-11.

[3] i.e. the award of Commissioner Osler dated 18 May 2012 under the same case number.

[4] Under case number C 630/12.

[5] That is the default award on the merits, made by Commissioner Osman under case number NC 1755-11 on 7 February 2012 ("the Osman award").

[5] The employee referred an unfair dismissal dispute to the CCMA. Conciliation failed and he referred the dispute to arbitration. On the second day of arbitration the parties agreed that no evidence would be led and that they would only submit written arguments dealing with two crisp issues – inconsistency and double jeopardy -- by 3 February 2012.

[6] It is common cause that the applicant did not do so. The person who attended to the matter on behalf of the applicant was its employee relations supervisor, Mr L Markus. He was present at the arbitration proceedings when the agreement about written arguments was reached on 27 January 2012. Markus left the employ of the applicant on 31 January 2012, having resigned on one month's notice at the beginning of January. He informed his successor, Mr Onkokame Moses Masiga, on 2 February 2012 that he had to file written arguments. Masiga alleges in his founding affidavit that Markus did not provide him with any further detail; he did not realise that he had to submit full submissions (including BHP's defence and argument) by 3 February 2012; and thus the Commissioner made his award with reference to the employee's case only.

[7] An arbitration award was handed down by Commissioner S Osman on 7 February 2012. The applicant received it on 16 February 2012. It is common cause, as recorded by Commissioner Osman, that BHP "failed to file an opposition and the matter was considered in default". He found the dismissal to have been unfair and ordered BHP to reinstate the employee retrospectively.

[8] After having taken legal advice, the applicant applied for rescission in terms of section 144 of the LRA. The application was filed 21 days outside the prescribed time period. The second respondent, Commissioner Osler, dismissed the application for condonation (and thus the application for rescission) on 18 May 2012.

[9] The applicant seeks to have that ruling reviewed and set aside.

Evaluation / Analysis

[10] The rulings on condonation and rescission are intertwined. In order to consider the condonation application, the Commissioner obviously had to consider the prospects of success in the rescission application. In this application for review, I shall do likewise.

*The condonation application*

[11] Although the Commissioner did not expressly refer to *Melane v Santam Insurance Co Ltd*[6] when considering the application for condonation, he appears to have applied the well-known principles set out in that case. I will consider those principles in evaluating the ruling on condonation in the context of this review application.

[12] The rescission application was filed 21 days late. The Commissioner found that "this is clearly late but whether it is excessive or not really depends on the validity of the explanation for the delay".

[13] That finding, in itself, is not unreasonable. As the court pointed out in *Melane*, the factors to be taken into account are interrelated and not individually decisive.

[14] Turning, then, to the explanation for the delay, the Commissioner found that it was poor. It boiled down to the applicant initially pursuing a review of the arbitration award before realising – on advice from its attorneys, once they had started drafting the review papers -- that an application for rescission was the correct option. That delay was exacerbated by BHP being a large organisation with various levels of management. The Commissioner considered that BHP had access to legal advice at all times and would or should have been aware of the relevant time limits.

[15] I agree with the Commissioner that the explanation for the delay is a poor one, especially considering that BHP was represented by attorneys.

[6] 1962 (4) SA 532 (A).

[16] As Lagrange J pointed out in *Nehawu v Vanderbilpark Society for the Aged*[7]:

> "The LRA has been in existence for more than fifteen years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interest of its members and would adapt their internal procedures to accommodate these time limits, not *vice versa*. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organisations, be that trade unions or businesses, ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time limits in the LRA."

[17] The main thrust of the applicant's condonation application rested on its prospects of success in the rescission application. The importance of the issue and strong prospects of success may tend to compensate for a long delay; but without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.

[18] As Myburgh JP reiterated in *NUM v Council for Mineral Technology:*[8]

> "The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is 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 (cf *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765A–C; *National Union of Mineworkers & others v Western Holdings Gold Mine*

[7] [2011] 7 BLLR 690 (LC) para [9].

[8] [1999] 3 BLLR 209 (LAC) para [10].

> (1994) 15 *ILJ* 610 (LAC) at 613E). The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative's lack of diligence or the insufficiency of the explanation tendered (*Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 140H–141D; *Buthelezi & others v Eclipse Foundries Ltd* (1997) 18 *ILJ* 633 (A) at 638I–639A)."

[19] The Commissioner found BHP's arguments regarding its prospects of success in the rescission application "ingenious but unconvincing". I turn, then, to the merits of the rescission application.

*The rescission application and the commissioner's findings*

[20] The Commissioner did not consider himself bound by the statements in his colleague's award that it was made on a default basis. Considering whether section 144 (a) of the LRA applied, he found that the fact that BHP failed to make written submissions "does not mean that it was absent from the proceedings in the sense intended in the section."

[21] On that basis, the Commissioner expressed the opinion that it was not necessary for him to consider the reason for the applicant's failure to provide written submissions. Nevertheless, he found that the reasons provided by BHP support the conclusion that "this was no mere absence but an internal error on the part of [BHP] in the handover of representation from the previous representative to his successor. Thus, the failure to present important evidence at arbitration or the failure to submit argument when no evidence has been led, does not mean that the award was issued in the absence of that party. And if we consider whether the award was made erroneously – a consideration that is again not strictly necessary – I remain unpersuaded that there was any such error; [BHP]'s argument here, that the Commissioner would have reached a different conclusion had he known the true nature of its case, can apply in any case badly presented and cannot be the basis for rescission."

[22] In addition, the Commissioner disagreed with the applicant's submission that the term "erroneous" in section 144 relates to the content of an award;

he found that this term applies, rather, to the very act of making an award in circumstances that render it unfair, such as where an absent party did not receive proper notice of the proceedings. He therefore found that the prospects of success in the rescission application were weak.

Legal principles : rescission

[23] Section 144(a) of the LRA reads:

> "**Variation and rescission of arbitration awards and rulings**.—Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—
>
> (a) erroneously sought or erroneously made in the absence of any party affected by that award;".

[24] I agree with the Commissioner's reasoning with regard to the interpretation of the word 'erroneous'. As the court pointed out in *Halcyon Hotels*[9]*,*

> "Section 144(a) of the Act is similar to rule 42(l)(a) of the Uniform Rules of the High Court. In the High Court, an order or judgment will be held to be erroneously granted if there was an irregularity in the proceedings, or if it is not legally competent for the court to have made the order or judgment, or there existed at the time of issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment."

[25] An error cannot refer to the merits; it must refer to process of making the award, as the Commissioner had found.[10] For example, in *Day & Night Investigators CC v Ngoasheng*[11] the court considered the meaning of an "error" as contemplated in s 144 (b). The court held:

> "As regards section 144(b), the applicant argued that the first respondent had alleged he did not know the reason for his dismissal. Yet, he had a charge sheet which had told him why he was to be disciplined.

[9] *Halcyon Hotels t/a Baraza v CCMA & others* [2001] 8 BLLR 911 (LC) para [10].

[10] See *Lumka & Associates v Maqubela* (2004) 25 *ILJ* 2326 (LAC) para [27].

[11] [2000] 4 BLLR 398 (LC) at 401.

> Consequently, it was contended, there was an error in the award. In my view, this is not the type of error contemplated in section 144(b). In this connection, an 'error' means that the judgment does not reflect the intention of the judicial officer concerned. It does not refer to the correctness or otherwise of the decision (*First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 (T) at 608E–F). It follows that the second respondent rightly ruled that this was not a ground for rescission."

[26] The applicant nevertheless argued that, in the context of s 144(a) as opposed to s 144(b), the Osman award was "erroneously made in the absence of the parties".

[27] The award was made in the absence of BHP. In this regard, I disagree with the arbitrator. It is common cause that BHP did not file submissions when it should have; but the fact is that it did not. The award was clearly made "in the absence" of BHP. It is analogous to the situation where a litigant is informed of the set-down of a matter for argument but does not attend the proceedings.

[28] The further question, though, is if the award was "erroneously made". The applicant argued that the Commissioner could have reached a different conclusion, had he known the true nature of its case, i.e. that it had a valid and fair reason to dismiss the employee.

[29] In this regard, the applicant relied on the authorities in *Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz*[12] and *Nyingwa v Moolman N.O.*[13] In *Promedia,* the court held that there is an irregularity in the proceedings if –

> "...the court at the time was unaware of facts which, if known to it, would have precluded the granting of the order".

And in *Nyingwa* the court stated that –

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which could have precluded the granting of the judgement and which would have induced the judge, if he had been aware of it, not to grant the judgement."

[12] 1996 (4) SA 411 (C).

[13] [1993] 3 All SA 569 (Tk); 1993 (2) SA 508 (Tk).

[30] I agree with the principles set out in these judgements. However, it cannot be said that the Commissioner was unaware of any facts at the time that he wrote his award leading to the award having been erroneously made. The applicant's case is that the Commissioner was unaware of its argument because it had not submitted it. But that was due to the applicant's own negligence. It was not due to any error on the side of the Commissioner.

[31] As the court found on the facts of *Nyingwa:*[14]

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.
>
> *In casu* it was manifest to the presiding Judge that the defendant's attorneys had been aware of the application for summary judgment from its inception, and that the defendant had been represented by counsel at the first hearing of the application. Under these circumstances the Judge was fully justified in accepting that the defendant was a wilful defaulter, and that summary judgment should be granted. In view of the on-going efforts to defend the application by the attorneys, to whom the defendant had entrusted the defence of his case, it is difficult to envisage circumstances in which the judgment was erroneously granted. The Court would have to be satisfied that the defendant is absolved from blame for his ignorance of the application, and that the attorneys were solely to blame for not having informed him of the application and for their late withdrawal from the case. There is no evidence on the papers to substantiate such findings, but, to the contrary, the Court has found, as is set out later in this judgment, that the defendant was grossly negligent in not keeping in contact with his attorneys and also not advising them fully of the nature of his defence. In my opinion, therefore, summary judgment was not granted erroneously and the application cannot be brought under Rule 42(1)*(a)*."

[32] The facts of the case before me are analogous. BHP was fully aware of the fact that it had to file submissions at the CCMA; it is due to its own

[14] *Supra* at 510 G-J.

negligence that it did not do so. The default award was not erroneously made in those circumstances.

*Is the award reviewable?*

[33] The applicant argued that the rulings on condonation and rescission are open to review because the Commissioner committed process-related errors as discussed in *Herholdt v Nedbank*.[15] I cannot agree. The Commissioner considered the condonation application properly, applying the principles set out in *Melane v Santam.*[16] He concluded that the delay of 21 days – one third more than the prescribed 14 day time limit – needed to be considered together with the explanation for the delay. The explanation was a poor one. It boiled down to the negligence of BHP, its senior managers and its attorneys. Against this background, the prospects of success were immaterial. Nevertheless, the conclusion of the Commissioner that the arbitration award of Commissioner Osman was not "erroneously made" is a reasonable one. The applicant, therefore, did not have good prospects of success in the rescission application.

Conclusion

[34] For all these reasons, the ruling on condonation is not open to review. Both parties asked for costs to follow the result. I agree.

[35] The consequence of this judgement is that the Osman award must be made an order of court as requested by the employee under case number C630/2012.

Order

[36] I therefore make the following order:

36.1 The application for review in case number C161/2012 is dismissed.

36.2 The arbitration award under case number in C1755–11 dated 7 February 2012 is made an order of court in case number C630/2012.

[15] (2012) 33 *ILJ* 1789 (LAC) para [36].

[16] *Supra*.

36.3 The applicant (BHP) is ordered to pay the costs of the employee, D Shuping, in both applications.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

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| APPLICANT: | Greg Fourie<br>Instructed by Glyn Marais Inc. |
| THIRD RESPONDENT: | Neville Cloete attorney. |