REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, AT JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2742/07

In the matter between:-

SAVILLE ROW (PTY) LTD t/a

WEBBERS CLOTHING AND FOOTWEAR **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISIONER JACOBUS BREYTENBACH **Second Respondent**

SACCAWU obo GEORGE MATHYE **Third Respondent**

Heard : **14 February 2013**

Delivered: **08 March 2013**

Summary: **Review of the rescission application filed outside 14 day period no application for condonation – purported reliance on dies non during 16 December to 7 January. Interpretation of CCMA Rule 3(2) compared to Rule 19 (1) of the Uniform Rules. Application dismissed.**

JUDGMENT

CHETTY AJ

[1] The applicant in this matter brought an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 ('the LRA'), seeking to set aside a ruling handed down by the second respondent, in which the latter dismissed an application for rescission. The brief background to the dispute is that the third

respondent was employed by the applicant in January 2000 and eventually was appointed as manager of its store in Bloemfontein.

[2] On 15 January 2005, the third respondent was given a notice to attend a disciplinary enquiry to answer charges of gross insubordination and gross negligence. He was found guilty of the charges and dismissed. He then referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration ('CCMA') in February 2005, and a conciliation proceeding was set down for 14 March 2005. This conciliation failed to resolve the dispute and the matter was then referred to arbitration.

[3] According to the applicant, as a result of the set down notice for the arbitration having been sent to an incorrect facsimile address, it was unaware of the date for the arbitration, which proceeded in its absence on 22 June 2005. The arbitrator found that the applicant had been duly notified but failed to appear. An award in favour of the third respondent was handed down on 17 October 2005. The arbitrator found the dismissal of the third respondent to be procedurally and substantively unfair and awarded him compensation in the amount of R19 572,00. During all of this time, the applicant remained unaware as to how the matter was unfolding or of its status before the CCMA.

[4] According to the applicant's founding affidavit, it only received knowledge of the award when the document was transmitted via facsimile to its head office on 28 December 2005 by the union. The applicant's industrial relations officer, Mr De Lange, deposed to the founding affidavit in the review application that he was on leave at the time when the award was received. His affidavit then sets out the manner in which he thereafter dealt with the matter.

> 'Seeing as this period falls within the dies non period stipulated to by law and seeing as the award was not forwarded to our offices by the CCMA as stipulated in the Labour Relations Act and further seeing as our representatives, (SA)UEO was closed up until 5 January 2006 for the December holidays, I was under the

impression that we had more than ample time to lodge the application and at worst had 14 days from the 7th January in order to bring the application.'[1]

[5] It is not in dispute that the applicant then filed an application for rescission of the arbitration award in terms of section 144 of the LRA. This rescission application was filed on 19 January 2006. In the supporting affidavit, DeLange confirmed that the applicant had only acquired knowledge of the award on 28 December 2005 and that since the conciliation-arbitration proceedings in March 2005, neither the applicant nor its representatives, SA-UEO, heard anything further about the matter.

[6] The applicant further contended that the arbitration award was fatally defective as the applicant had not been given notice of the proceedings and consequently was denied an opportunity to state its case. On this basis, the applicant asked for the award to be set aside. The grounds for rescission appeared entirely plausible as a perusal of the various notices from the CCMA appeared to be sent to incorrect facsimile numbers or to the respondent's store in Bloemfontein, which is located in shopping mall, and I am informed, does not receive mail.

[7] There is nothing to gainsay the version of the applicant that the first time it acquired knowledge of a judgment against it, was on 28 December 2005. That however is not the end of the matter. The deponent then proceeds to state the following:

'The applicant <u>does not ask for condonation</u> for the late filing of this application for rescission due to the fact that the applicant was only informed of this award by the representative of the Respondent on the 28th December 2005, therefore cannot be held accountable for the lack of conduct or negligence on its part.'
(*my underlining)*

It is this decision of the applicant not to apply for condonation at the time when it applied for rescission, that has resulted in the matter coming before this Court.

[8] The rescission ruling, which is the subject matter of this review application, was handed down on 21 April 2006. In the ruling, the second respondent states the following

'On 17 October 2005 an award was made in favour of the Applicants of the original referral by the above said Commissioner [Mvumbi]. The Applicant now (employer)

[1]Para 4.24 of the Founding Affidavit.

applied to set aside this ruling. It is required in terms of Rule 32 of the CCMA Rules that any party to the dispute may apply within 14 days of the date on which the applicant became aware of the arbitration award or ruling to bring an application for rescission.

If [an] application is not done within this period, an application for condonation, in accordance with the provisions of Rule 9 read with Rule 31 will have to be made simultaneously with the application for rescission or variation. In the applicant's affidavit the applicant stated that the ruling came to its attention on 28 December 2005. The applicant decided only to apply for rescission on 19 January 2006. This application is clearly outside the 14-day period. I have not received any application for condonation for this late filing.

I therefor decided to dismiss this application for rescission in the absence of any condonation application.'

[9] The applicant was not informed of the outcome of its application for rescission, which one must assume was sent to the incorrect facsimile address, as the CCMA had done before. The applicant states that it only acquired knowledge that the rescission application was dismissed when the Sherriff of the Court attempted to serve a warrant of execution at its Bloemfontein store on 9 October 2007. The warrant of execution included a copy of the arbitration award as well as a copy of the second respondent's rescission ruling. The applicant proceeded to file a review against the rescission ruling of the second respondent in this Court on 14 November 2007.

[10] Ms Duvenage who appeared for the applicant, informed me that despite the applicant having been represented at by the South African United and Allied Employers Organisation (SA-UEO) at the conciliation proceedings and thereafter, and despite the CCMA being aware of the address and contact details of SA-UEO, the first respondent had chosen to communicate with the applicants by way of facsimile correspondence to an incorrect number. The transmission of documents from the CCMA via facsimile appears to lie at the heart of the problems that have plagued the applicant.

[11] The first respondent dispatched a notice of set down of the arbitration, which was sent to an incorrect facsimile number, purporting to be the number of the applicant's store at Central Park, Bloemfontein. At the time when this notice was dispatched, the applicant was in any event being represented by SA-UEO, who appeared on its behalf at the conciliation process on 14 March 2005. One would assume that the CCMA would address all further notices in the matter to SA-UEO, but instead appears to have sent correspondence to the applicant's retail store, where the third respondent had been employed. On these grounds alone, I am reasonably certain that the applicant would have been able to establish good cause for the setting aside of the arbitration award made in its absence on 17 October 2005.

[12] The crux of the issue before me is not whether the applicant could have succeeded on the merits with regard to the rescission application, but whether the second applicant committed a reviewable or gross irregularity in dismissing the application for rescission, as it was filed outside the time periods and without an application for condonation. It is clear from his ruling that the second respondent did not have any regard for the reasons why the applicant was not at the arbitration proceedings. The applicant contends that the commissioner committed a gross irregularity in this regard. That argument, in my view, misses the point. The sole basis for his ruling is that the application was filed outside the 14 day time period set out in Rule 9 of the CCMA Rules and was not accompanied by an application for condonation.

[13] The applicant in its founding affidavit in the review proceedings, attempts to overcome the reasoning of the Commissioner by contending that as the rescission ruling was brought to its attention by the Sheriff of the Court, there had not been compliance with section 138(7)(b) of the LRA which requires that within 14 days of the conclusion of the arbitration proceedings, once the award has been issued and signed by the commissioner, the 'commission must serve a copy of that award on each party to the dispute'. I am not persuaded by this argument as it pertains in any event to the service of an arbitration *award* and not any other ruling by the first respondent.

[14] It is clear from the founding affidavit in the review application, that the applicant held the view that the time periods for the doing of any act in the CCMA are

suspended during the period 16 December to 7 January, and despite it having knowledge of the award on 28 December 2005, the 14 day period must be calculated from 8 January 2006, unless that day would have been on a weekend or public holiday. In other words, the applicant's case is that there is *dies non* during 16 December to 7 January.

[15] Rule 3(2) of the CCMA Rules ("the Rules") provide that

> 'The last day of any period must be excluded if it falls on a Saturday, Sunday, public holiday or on a day during the period between 16 December to 7 January.'

I interpret this rule as stating no more than if the last day for the filing of any application or doing of anything in relation to the CCMA Rules, falls within the period 16 December to 7 January, then such filing of an application must take place on 8 January, unless that date falls on a Saturday, Sunday or a public holiday. The applicant, in my view attempted to equate Rule 3(2) with Rule 19(1) of the Uniform Rules of Court which states that the days between 16 December and 15 January both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.

[16] During the course of argument, I enquired from Ms Duvenage whether the applicant was persisting with this argument. To the extent that this leg of its argument was not abandoned, I conclude that Rule 3(2) does not assist the applicant in the late filing of its application for rescission. Rule 3(2) did not interrupt the running of the 14 day period within which the applicant had to lodge its application for rescission. To the extent that the applicant relied on this provision, I have no doubt that it acted on incorrect advice.

[17] In light of that conclusion, the next enquiry is whether the second respondent had any jurisdiction to hear the application for rescission in the absence of an application for condonation. CCMA Rule 32 is clear that an application for rescission or variation must be made within 14 days of the date when the applicant became aware of the award or ruling. If an application is lodged outside that time period, the commissioner simply has no jurisdiction to consider the application. To

do so would be to act *ultra vires*. It is a well-established principle that a decision maker cannot confer jurisdiction on himself or herself.

[18] Ms Duvenage further submitted that the second respondent adopted too narrow an approach and was obliged to consider the circumstances in terms of which the arbitration award was granted. It was submitted further that the conduct of the second respondent is at odds with the test set out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*.[2] I am not persuaded that the decision of the commissioner is one that a reasonable decision maker could not reach. His conduct in approaching the rescission application was entirely in order. As there was no application for condonation, he could not consider the matter and was obliged to dismiss it.

[19] Furthermore, the conclusion reached by the second respondent is justifiable in relation to the reasons given for the decision. He simply concludes that the applicant has not brought an application for condonation in circumstances where its application for rescission was out of time. It was not necessary for the commissioner to have considered the merits of the matter or why the applicant did not appear at the arbitration. The employer simply did not have knowledge of the proceedings. All of these factors would have been taken into account in assessing the merits of the application. Against this background, the applicant in the rescission had taken a conscious decision not to apply for condonation. This much is evident from the approach adopted in the affidavit of DeLange. Having taken the stance that the 14 day period was interrupted during 16 December to 7 January 2005, the applicant cannot now be seen to argue that the commissioner committed a gross irregularity in dismissing the application. Without an application for condonation, the commissioner was incapable of dealing with the substantive merits of the application for rescission.

[20] Ms Duvenage submitted that the reasoning behind Rule 3(2) was to probably accommodate the large number of employers and employees during the period of annual shutdown of businesses. That explanation is probably correct, but it merely affords a ground for condonation as to why the application could not have been

[2] (2007) 28 ILJ 2405 (CC).

brought sooner. It is no excuse not to bring an application for condonation where a delay has arisen over this period. In *Transport & General Workers Union & others v Hiemstra NO & another*[3] Sutherland AJ took into account the delay occasioned by failure to prosecute a review application during this period. He notes that it

> '. . . would be unduly short sighted to fail to acknowledge that it is a norm of South African society that during the period mid-December to early January the nation slouches to a near halt. This customary annual shutdown may not have excused the appropriate degree of expedition in a matter which was truly urgent but it can hardly be said that the nature of this matter was one in which it was inexcusable not to disturb our collective slumber'.

[21] The principle difference between the matter before me and that before Sutherland AJ, is that he was dealing with an application for condonation for the late filing of a review. The absence of an application for condonation is what informed the conclusion of the second respondent to dismiss the application for rescission. I can find no basis to conclude that the decision of the second respondent was one that a reasonable decision maker could not reach. For those reasons, there is no basis to conclude that he committed an irregularity is arriving at the decision he did.

]23] I accordingly make the following order:

1. The application is dismissed;
2. No order as to costs.

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Chetty, AJ

Judge of the Labour Court

[3] (1998) 19 ILJ 1598 (LC), at 1601J-1602A.

Appearances:

For the Applicant: Ms ME Duvenage.

Instructed by Duvenage Attorneys, Pretoria