Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 490/12

In the matter between:

SEGOE MARTIN NCHI **First Applicant**

and

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

COMMISSIONER P S MAKGOPELA (*N.O.*) **Second Respondent**

LONMIN PLATINUM **Third Respondent**

Heard: 23 March 2016

Delivered: 24 March 2016

Summary: (Review – rescission ruling – prima facie evidence of timeous referral – misconduct and misdirection not to make inquiry)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant seeks to review and set aside a rescission ruling of the second respondent ('the arbitrator') in which he found that the rescission application was fatally defective because the applicant failed to prove that he had complied with rule 31 (2) of the CCMA rules and that he had not complied with a request from the CCMA contained in a letter dated 16 February 2012 in which he was advised to apply for condonation for the late service of the rescission application on the third respondent and furnish proof of service thereof.

[2] The notice of set down of the arbitration hearing had been sent to the fax number identified on the applicant's referral form and he claimed he did not receive it because he had limited access to the fax machine in question which was not clarified. Nonetheless, there was evidence that his attorneys of record had contacted the CCMA about the set down of the matter and were advised that the arbitration would take place at 09H30 on 9 January 2012. Although there was no confirmatory affidavit from the CCMA contact person whom the attorney had spoken to, she was identified by her first name and there was no evidence to gainsay the attorney's confirmatory affidavit on this issue, which was supported by a file note entry. As it is, the notice of set down was for 08H30 on the same day. The applicant claims that when he arrived with his attorneys of record for the arbitration hearing at 09H30 they were advised that his case had already been dismissed. In his rescission ruling the arbitrator said that nobody brought anything to his attention about the matter at that time.

[3] The applicant raises a number of grounds of review but for present purposes it is only necessary to deal with a couple of them.

[4] In the bundle of documents before the arbitrator was a letter from the applicant's attorneys responding to the CCMA direction that a condonation application had to be filed because the original rescission application had been transmitted to the incorrect fax number of the respondent. In the letter from the applicant's attorneys dated 16 February 2012, they admit that the application for rescission was sent to the wrong fax number of the respondent on 19 January 2012 and state:

> "Upon realising its error, the Applicant accordingly sought to correct that and went on to hand deliver the application at the Respondent's offices. This was done on the 23 January 2012 and the signature acknowledging receipt was attached to the documents (S Scheepers signed on behalf of the Respondent). The documents were duly filed with the CCMA on the same day.
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> The above-mentioned steps were all taken within the prescribed 14 day period as captured in rule 32. We hope this clarifies the matter and the commission will continue to issue a ruling for the application or have it set down for hearing if it is opposed."

[5] Although this letter was part of the bundle of documents before the Commissioner, it appears that the proof of the hand delivery of the rescission application was not part of the documents in front of the Commissioner. At the hearing of the matter, the applicant handed up the proof of receipt referred to, which the third respondent understandably objected to because that had not been placed before the Commissioner.

[6] One of the grounds of review the applicant raised was that it had specifically requested the rescission application be set down for a hearing if it was opposed. I am satisfied that the arbitrator was entitled to proceed on the papers before him in terms of rule 31 (10) of the CCMA rules which allows arbitrators to determine an application in the manner they see fit notwithstanding the other provisions providing for hearings of applications.

[7] However, when faced with the letter quoted above, it ought to have been apparent to the arbitrator that the applicant's attorneys of record were clearly under the impression that proof of service within the 14 day period for filing review is had been provided and that a condonation application was not necessary. The fact that the letter also specifically referred to the receipt of the referral being signed by an identified individual should also have alerted the arbitrator to the fact that it was possible such a document existed but for some unknown reason had not been included in the bundle before him. In those circumstances, the Commissioner ought to have at least made an enquiry about the proof of service of the document, even if he did not consider it necessary to convene a full hearing, especially when

he was to base his entire decision on the defective nature of the application for rescission.

[8] As to the reason for the applicant failing to attend at the appointed time, there is nothing to gainsay his evidence that he did attend the CCMA on that day. This is not a case where he simply did not go to the CCMA because he did not get the notice of set down.

[9] Had the arbitrator made an enquiry about the missing proof of service, there is every reason to believe he would have obtained the document in question confirming that the referral was not out of time. The letter also made clear why the applicant did not believe that a condonation application was necessary as set out in the CCMA letter. There was also no evidence before him to gainsay the applicant's version that he had attempted to attend the arbitration hearing, *albeit* that they arrived late.

[10] It is true that the applicant does not deal with his prospects of success relating to his claim of constructive dismissal because of ill treatment by the company affecting his health. However in rescission applications it is not necessary to determine the applicant's prospects of success but simply that if he is ultimately able to prove his case he might succeed. Although his claim may ultimately be difficult to prove, as constructive dismissal claims generally are, it is coherent enough to constitute a claim that might succeed.

[11] In the circumstances, I am satisfied that the arbitrator misdirected himself and committed misconduct in relation to his duties by not making any further enquiry about the service of the rescission application, even if he was not obliged to convene an oral hearing as such. Further, there was insufficient evidence to support a conclusion that he had no reasonable justification for not attending the hearing.

Order

[12] The rescission ruling of the second respondent under case number NWRB 3269-11 dated 28 February 2012 is reviewed and set aside and substituted with a ruling that the dismissal ruling of 9 January 2012 in the same matter is set aside.

[13] The first respondent is ordered to set the applicants unfair dismissal claim down before an arbitrator other than the second respondent for a hearing as soon as practicable.

[14] The third respondent must pay the applicant's costs of the review application.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Makamu of Kgokong Nameng Tumagole Inc
THIRD RESPONDENT:	O Mamabolo of Mamabolo Phajane Attorneys