

REPUBLIC OF NAMIBIA



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no.: HC-MD-LAB-APP-AAA-2023/00017

In the matter between:

MARTHA ANGERMUND

APPELLANT

and

NAMIB POULTRY

FIRST RESPONDENT

MARTHA NICANOR

SECOND RESPONDENT

Neutral citation: *Angermund v Namib Poultry* (HC-MD-LAB-APP-AAA-2023/00017)
[2023] NALCMD 34 (11 August 2023)

Coram: CLAASEN J

Heard: 16 June 2020

Delivered: 11 August 2020

Flynote: Labour law – Arbitrator’s award – Appeal – Practice and Procedure of rescission of arbitrators ruling – Section 88 of Labour Act 11 of 2007 gives an arbitrator the power to rescind an arbitration award under certain circumstances – Procedure for rescission in rule 32 of the Rules relating to the Conduct of Conciliation and Arbitration.

Summary: The appellant was absent at the arbitration hearing, whereafter the arbitrator dismissed the claim of unlawful dismissal in terms of s 85(2)(b) of the Labour Act 11 of 2007 and Rule 27(2)(c) of the rules relating to the Conduct of Conciliation and Arbitration. The appellant's application to rescind the arbitrator's decision failed, hence the present appeal. The court examines the requirements for rescission of an arbitration award or ruling.

Held that s 88 of Labour Act 11 of 2007 gives an arbitrator the power to rescind an arbitration award under certain circumstances and the procedure for that is contained in r 32 of the Rules relating to the Conduct of Conciliation and Arbitration.

Held further that a party seeking to apply for rescission of an arbitrator's award or ruling, has to establish good cause.

Held further that rescission involves consideration of at least two factors, namely the explanation for the default and secondly whether the appellant has good prospects of success in the main claim.

Held further that it was not required of the appellant to have ventured deeply into the merits of the matter, but in the context of proving prospects of success a litigant has to show by way of evidence that there exist a chance of succeeding in the main claim. That was not done by the appellant in this rescission application before the arbitrator.

ORDER

1. The appeal fails and is dismissed.
2. No order as to cost.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

CLAASEN J

Background

[1] This is an appeal against a ruling made by the second respondent (the arbitrator) on 17 January 2023 under case number CRWK675-22, after she refused to rescind a default arbitration award wherein she earlier dismissed the appellant's case.

[2] The appeal was opposed by the first respondent only.

[3] It is common cause that the appellant referred a claim of unfair dismissal to the Office of the Labour Commissioner. An arbitrator was subsequently assigned and the matter was set down for hearing on 16 September 2022. It is not in dispute that the appellant did not attend the hearing on the date of set down and that the hearing did not proceed as a result.

[4] Subsequent to that, the matter was set down for 27 October 2022. On that date the appellant was absent at the hearing, whereafter the arbitrator dismissed the case in accordance with s 85(2)(b) of the Labour Act 11 of 2007 and r 27(2)(c) of the Rules relating to the Conduct of Conciliation and Arbitration (the CONARB rules).

[5] On 16 November 2022, the appellant filed an application for rescission of the dismissal of her claim, which application was dismissed by the arbitrator on 17 January 2023. That constitutes the backdrop of the appeal before me.

Grounds of appeal

[6] The notice of appeal contains two grounds of appeal. Briefly the alleged faults were firstly, that the arbitrator erred in law when she found that she was not obliged to call the appellant on 27 October 2022, if the record shows that she was notified. Secondly, that the arbitrator erred in law by not exercising her discretion judicially in concluding that the appellant did not proffer a valid reason for her absence. No reasonable arbitrator would have reached such a decision and hence the award should be set aside in its totality.

[7] The issue for determination is, to assess whether the arbitrator has considered the relevant test for rescission and whether her decision to refuse to rescind the default judgment, is a finding that any reasonable arbitrator would have made in the circumstances.

Submissions by the parties

[8] Mr Coetzee who appeared for the appellant, referred to the appellant's explanation as deposed to in her founding affidavit for the rescission application. The appellant had injured her ankle on 09 September 2022 and had surgery on 11 September 2022 whereafter she was booked off. That is the reason why she was unable to travel to the hearing on the 16 September 2022.

[9] She sent her representative, one Mr Kock, to ask for a postponement at the arbitration hearing, but was informed by Mr Kock that the arbitrator took issue with his appearance and that there was no formal application for a postponement. Mr Kock also informed the appellant that the arbitrator would either dismiss the matter or reschedule it and inform the appellant. Thereafter Mr Kock drafted a representation agreement and forwarded it on 27 October 2022.

[10] The appellant deposed that she and Mr Kock did not know that the matter was set down again for hearing on 27 October 2022. According to her, she discovered only on 1 November 2022 when she checked her e-mail, that one Ms Van Rooy of the Labour Commissioner's Office sent an e-mail on 29 September 2022, regarding the matter. The e-mail referred to a notice of set down that was attached, but the said notice was not attached.

[11] The affidavit also referred to the reasons for the rescission application. It focused on r 27(3) of the CONARB rules and that the arbitrator did not contact her, as was required before the arbitrator exercised her authority to dismiss the matter.

[12] Mr Coetzee argued that, in these circumstances the arbitrator could not reasonably have held the view that the appellant was duly informed of the hearing on 27 October 2022. He also submitted that the error is compounded by the fact that r 27(3) of the CONARB rules is peremptory and the arbitrator has not called or made any telephonic contact with the appellant before exercising her discretion to dismiss the claim on 27 October 2022. He submitted that it was not an instance of willful default wherein the appellant merely ignored the hearing. Thus, the arbitrator should have granted the rescission application. Furthermore the rescission was not opposed by the first respondent. In the premises, the appellant seeks an order that the appeal succeeds and the matter be referred back to the Labour Commissioner's Office for hearing.

[13] Ms Mushore, who argued for the first respondent, had a different stance. Her view was that the appellant was duly notified about the hearing date of 27 October 2022, as it was the same e-mail that was forwarded simultaneously to all the parties and included the attachment with the details of the hearing. She argued that the appellant had no proof that there was no attachment and said the appellant at minimum, could have submitted a screenshot of the e-mail. Additionally she argued, that it was strange not to check one's e-mails whilst the appellant knew the previous hearing date was communicated through e-mail correspondence, since the appellant was waiting for the new hearing date. She also questioned the contention that the appellant's purported

representative was not aware of the hearing date, as he sent an unsigned representation agreement to the first respondent on that same date of 27 October 2023. Neither did the representative timeously apply for a postponement.

[14] As for the rescission application she stated that the said application, was not served on the first respondent. Although the notice was sent by registered mail, the first respondent never received the document. She stated that, had the first respondent received it, the rescission application would have been opposed. She furthermore states that even if the arbitrator called, it would have made no difference as the arbitrator would have reached the same conclusion of not being able to grant rescission. That is because the appellant has not addressed the aspect of good cause insofar as it relates to the prospects of success on the main claim. On account of that, the appeal ought to be dismissed.

Principles governing rescissions of an arbitrator's award or ruling

[15] Section 88 of Labour Act 11 of 2007 gives an arbitrator the power to rescind an arbitration award under certain circumstances. It reads as follows:

'Variation and rescission of awards

An arbitrator who has made an award in terms of section 86(15) may vary or rescind the award, at the arbitrator's instance, within 30 days after service of the award, or on the application of any party made within 30 days after service of the award, if -

(a) it was erroneously sought or erroneously made in the absence of any party affected by that award;

(b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) it was made as a result of a mistake common to the parties to the proceedings.'

[16] Rule 32 of the CONARB rules explains the procedure for the institution of a rescission application of an arbitration award or ruling in the following terms:

'(1) An application for the variation or rescission of an arbitration award or ruling must be made on Form LC 38 within 30 days after service of the award or within 30 days after the applicant became aware of a mistake common to the parties to the proceedings.

(2) A ruling made by an arbitrator which has the effect of a final order, will be regarded as a ruling for the purpose of this rule.'

[17] This court had to ask itself whether the aforementioned rule requires an applicant for rescission to also show 'good cause' for the rescission of decisions by an arbitrator, as contended by the first respondent. In this regard, the South African Labour Appeal Court held in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation and Arbitration and Others*¹ that good cause should be read into s 144 of the Labour Relations Act No 66 of 1995, and that when applying the said provision it appears that a commissioner is in the same position as a judicial officer who is considering an application for rescission. It has to be said that s 144 of the Labour Relations Act 66 of 1995 of South Africa is comparable to our s 88 of the Labour Act 11 of 2007. Hence, the *Shoprite Checkers*² case reiterated that:

'The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, firstly, the explanation for the default and secondly whether the applicant has a *prima facie* defence.'

[18] In further explication of that test, the court in *Northern Training Trust v Maake & Others*³ had this to say:

'The enquiry in an application for the rescission of arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set down was sent (for instance by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend arbitration proceedings. Such applicant needs to prove that he or she was not wilful in

¹ *Shoprite Checkers(Pty)Ltd v Commission for Conciliation and Arbitration and Others* (2007) 28 ILJ 2246 (LAC).

² *Ibid* para 35.

³ *Northern Training Trust v Maake & Others* (2006) 27 ILJ 828 (LC).

defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessary deal fully with the merits of the case.'

[19] With that in mind, I return to the case before me and the reasons for the arbitrator's decision. The arbitrator's reasons for the dismissal, indicates that the arbitrator was satisfied that the appellant was properly notified about the date, time and venue of the hearing to be held on 27 October 2022, which information was given in an e-mail on 29 September 2022. The appellant was absent and had not applied for a postponement of the hearing. The arbitrator also referred to the appellant's previous hearing date of 16 September 2022, at which time the appellant was also absent, and merely sent a Labour Consultant who was not authorized to represent the appellant.⁴

[20] The ruling on the application for the rescission⁵ repeats her stance that the appellant was notified and was absent at the hearing, without having applied for postponement as contemplated by the CONARB rules. The arbitrator states that it was not a mistake on the part of the Office of the Labour Commissioner that the appellant did not timeously check her e-mail messages, nor has she attached any proof that there was no attachment to the said e-mail. She also indicated that there was no representation agreement submitted at the hearing by Mr Kock and that the appellant only, after the fact, attached a sick note for the injury, to the rescission application during November 2022.

[21] The arbitrator reasoned that she only has a responsibility to check and satisfy herself whether the parties were notified timeously which she has done before dismissing the case and that she was not obliged to make a telephone call to the appellant if the record shows that due notice was given. She concluded that the award in question was not erroneously sought or erroneously made in the absence of a party and it was not made as a result of a mistake common to the parties which led her to refuse to rescind her earlier dismissal of the claim.

⁴ Page 18 of appeal record.

⁵ Page 39 of appeal record.

[22] In gauging the approach of the arbitrator in that she did not need to call the appellant prior to proceeding with the hearing in the absence of the appellant, it is a mistaken notion. In reading r 27(3) of the CONARB rules it is clear that the requirement to call is preceded by the conjunction 'and:'

'A consolidator or arbitrator must be satisfied that the party has been properly notified of the date, time and venue of the proceedings, and should attempt to contact the absent party telephonically, if possible, before making any decision in terms of this rule.' (My emphasis).

[23] The matter of *Fedics Food Services Namibia (Pty) Ltd v Amutenya & 2 Others*⁶ dealt with the same CONARB rule and stated at para 16, that the second respondent had a further duty, to make an attempt to call the appellant and find out why they are not attending the arbitration hearing. The record does not indicate that such call or attempted call took place, before taking his decision in terms of r 27 (2)(b), which error was one of the problems in the said matter. I agree with the sentiments of the court in the *Fedics Food Services* case that there was an additional duty on the arbitrator to have at least attempted to call the absent party.

[24] Having said that, it is necessary to consider the appellant's explanation for her absence at the hearing. Given that the unsigned agreement in the appeal record to appoint Mr Kock as the representative for the appellant, I accept that the appellant's representative was not properly before the arbitrator on the first hearing date. Notwithstanding the matter did not proceed as the appellant send a text message to the respondent's representative that she injured her knee and was unable to attend that day.

[25] The appellant's explanation, stripped from its frills, is that she did not check her e-mails for four weeks and only did so on 01 November 2022, whilst the hearing was 27

⁶ *Fedics Food Services Namibia (Pty) Ltd v Amutenya & 2 Others* (LCA 20 /2015) [2016] NAHCMD 18 (20 May 2016).

October 2022. Whilst it is probable, it is difficult to reconcile that with the behavior of a person who was anticipating to be informed of the new date by the Office of the Labour Commissioner, especially given that the hearing date of 16 September 2022 was communicated by e-mail. As for the allegation that there was no attachment to the said e-mail, it was not disputed that it was the same e-mail notice that was simultaneously sent to all parties and that the first respondent obtained notice of the set down date of 27 October 2022 in that fashion. Even if the court accepts her word that the attachment was not included in the e-mail, it does not change the fact that, by the time she opened the e-mail the hearing date and its consequences had passed. Furthermore, this court did not come across a confirmatory affidavit by Mr Kock in regard to the rescission application by the appellant.

[26] In my view, it constitutes a borderline explanation and a somewhat careless mental attitude towards the consequences that was on the cards for the appellant. However, the court could be swayed, if it turns out that there is cogency in the second component for rescission, as the two requirements ought not to be assessed in isolation.

[27] In coming to the prospects of success in the claim of unlawful dismissal, the appellant's founding affidavit for the rescission application did not utter a single word about that aspect. The onus of showing the existence of sufficient cause before the arbitrator for the relief prayed for rested on the appellant. The fact that there was no opposition to the rescission application, does not obviate the need for the arbitrator to consider the test for rescission. Whilst it was not required of the appellant to have ventured deeply into the merits of the matter, in the context of proving prospects of success, a litigant has to show by way of evidence that there exist a chance of succeeding in the main claim. That was not done by the appellant in the rescission application.

[28] In light of the above, the error by the arbitrator not to have called the appellant prior to the dismissal, does not assist the appellant herein. All things considered, the

appellant did not meet the requirements for rescission of a judgment. Therefore, it cannot be said that the arbitrator erred in refusing to grant the rescission of the dismissal for the claim.

[29] In the result the following order is made:

1. The appeal fails and is dismissed.
2. No order as to cost.
3. The matter is removed from the roll and regarded as finalised.

C CLAASEN

Judge

APPEARANCES

APPELLANT:

E COETZEE

Of Tjitemisa & Associates, Windhoek

FIRST RESPONDENT:

K MUSHORE

Of Etzold-Duvenhage, Windhoek