



RESCISSION RULING

Panellist/s: Mohau Ntaopane _____
Case No.: GPBC2145/2019 _____
Date of Ruling: 01 April 2022 _____

In the RESCISSION PROCEEDINGS between:

DEPARTMENT OF MILITARY VETERANS

(Applicant)

and

PSA OBO THINDISA, LP

(Respondent)

RESCISSION RULING

DETAILS OF APPLICATION:

- [1] This is the rescission ruling in the application for which the Applicant is Department of Military Veterans, and the Respondent is PSA obo LP Thindisa.

- [2] The rescission application was determined on the papers under the auspices of the General Public Service Sector Bargaining Council (GPSSBC) in terms of Rule 32(10) of the Rules for the Conduct of Proceedings before the GPSSBC and the ruling is issued in terms of Rule 33(2).
- [3] Rule 33(1) provides that an application for the variation or rescission of an arbitration award or ruling must be made within fourteen (14) days of the date on which the applicant became aware of the arbitration award or ruling; or a mistake common to the parties to the proceedings. The default award was issued on 02 February 2021.
- [4] The Applicant submitted that the default award became known on 10 May 2021 when the Respondent applied for a variation of the default award. The rescission application, supported by the affidavit made by Nosiphiwo Maqana having been involved with the matter from the start, was filed on 11 May 2021 and it was opposed by the Respondent, supported by the affidavit made by Lebogang Portia Thindisa, on 13 May 2021. No replying affidavit was filed by the Applicant.
- [5] It is noted that the Respondent in this application had also filed, as the Applicant, an application for Variation of the default award and that it was submitted on 10 May 2021. However, I considered it appropriate to deal with the Rescission application first, because the outcome of this application will either be that the Rescission is not granted or that the Default Award is rescinded, the latter outcome obviously having the effect that the award cannot be varied.

ISSUE TO BE DECIDED:

- [6] I am required to determine whether or not the Applicant has shown good cause for rescission of the default award.

SURVEY OF THE RELEVANT SUBMISSIONS

- [7] The relevant factors for consideration in rescission applications include the reason for default; the party's prospects of succeeding with the claim and obtaining the relief sought; and any prejudice that may be suffered should rescission be granted/refused.

The reason for default

Applicant's submissions

- [8] The Applicant confirmed that the notice to attend the arbitration was received on 10 December 2020 and that on 19 January 2021 Mr. Rakau Malau, DD: Labour Relations, and Ms. Nosiphiwo Maqana (Acting AD: Labour Relations Practitioner) attended to an arbitration in Cape Town. While preparing to return to Pretoria, Mr. Malau fell ill and showed symptoms of COVID-19. They both consulted the nearest Doctor and were both requested to quarantine for a period of ten (10) days. On 20 January 2021 an email to which certificates from the health practitioner were attached was forwarded to referrals@gpssbc.org.za, polletm@gpssbc.org.za and gensec@gpssbc.org.za, with the subject line "Request for postponement for Cases Nr. GPBC2145/2019 and GPBC1199/2020" (Annexure E).
- [9] Since there was no response from the council, follow ups were made in terms of telephonic enquiries on 25 and 26 January 2021 with no success. Mr. Rakau unfortunately succumbed to COVID-19 on 25 January 2021 and it was only on 10 May 2021 that it was discovered that his email address was the only correct one that was used to issue the award on 22 February 2021, whereas Ms. Maqana's email address was missing an "a" (Nossy.Maqana@dmv.gov.z). There were also numerous errors that occurred on the council's side that resulted in the panellist not being informed of the Applicant's whereabouts on 22 January 2021 regardless of numerous attempts to reach out to the council.

Respondent's submissions

- [10] The Respondent's view was that the application should have been accompanied by a condonation application since the default award was issued on 22 February 2021. The Respondent also considered the application defective in that she was not notified to exercise her right to agree or oppose it. The Respondent held the view that the Applicant opted not to make an appearance at the arbitration since arrangements could have been made for someone to appear in order to make an application for postponement. Reference was made to the pre-arbitration meeting held on 20 January 2021 during which the Respondent was informed by the Acting Director Human Resource Management (Mr. Attewell Kwankwa) that both Mr. Rakau and Ms. Maqana were not available, but that arrangements will be made for a representative of the Applicant to attend the arbitration on 22 January 2021.
- [11] The Respondent also considered the reasons provided by the Applicant unconvincing on account of the Applicant's failure to make a follow up on the arbitration award, which it was assumed had been served on both parties as required by the rules of the council. It is also submitted that it is untrue that the Applicant was unaware of the default arbitration award since it was tabled in the Departmental Bargaining Chamber (DBC) meeting held on 13 April 2021. The submissions made by the union had been that the position was contested and that an award had been issued, while the Applicant claimed

to not be privy to the award, but made no follow ups about this arbitration award, demonstrating its disinterest in the matter. The Applicant also considered the application for postponement by the Applicant to have been not in compliance with Rule 28(1)(b) of the Rules of the GPSSBC.

Prospects of success

Applicant's submissions

- [12] The Applicant submits that there are good prospects of succeeding with proving that no unfair labour practice related to promotion was committed and that the arbitration proceeded erroneously thereby precluding it from advancing facts to prove its case.

Respondent's submissions

- [13] No submissions were made by the Respondent in this regard.

Prejudice

Applicant's submissions

- [14] No submissions were made on prejudice that would be suffered should rescission be declined.

Respondent's submissions

- [15] The Respondent submitted that since this is an unfair labour practice matter, any further unnecessary delay will continue to cause harm and prejudice for no valid reason except the lack of appetite on the part of the Applicant.

ANALYSIS OF SUBMISSIONS:

- [16] Section 144 of the LRA stipulates as follows:

"Any Commissioner who has issued an arbitration award or ruling..., may on that Commissioner's own accord or, on the application of any affected party, rescind an arbitration award or ruling -

- (a) erroneously sought or erroneously made in the absence of any party affected by that ruling;
- (b) ...;
- (c) ...;
- (d) made in the absence of any affected party, on good cause shown".

- [17] In **Northern Province Government Association v CCMA and Others** (2001) 5 BLLR 539 (LC) the court held the applicant in a rescission application must show good cause and prove that he at no time renounced his defence, and that he had a serious intention to proceed with the case. To show good cause, the applicant must provide a reasonable explanation for his default, and must show that he has a bona fide defense. In **Professional Transport Workers Union v Malema and Others** (JA67/12) [2014] ZALAC 53, the Labour Appeal Court set aside the rescission ruling where the commissioner did not consider good cause. The Court held good cause to be an independent ground for rescission in addition to grounds in Section 144 of the LRA.
- [18] The delay in the delivery of this ruling was occasioned by my enquiries into whether the Applicant had been served with the opposing affidavit and whether they had not filed a replying affidavit in response. In the absence of a replying affidavit from the Applicant party, I am compelled to accept submissions made by the Respondent in its opposing affidavit in as far as they may have warranted a response and remain uncontested. While it seems plausible that the default arbitration award was not received by the Respondent when forwarded by case management to the parties on 22 February 2021 in that one of the representative had passed away and the other's email address was incorrect, there may have been a need to follow up on the award mentioned in the meeting held on 13 April 2021. This does not necessarily mean, however, that the Applicant was fully aware of the default arbitration award prior to 10 May 2021. It is therefore my view that there was no need for a condonation application since the rescission application was made within 14 days of becoming aware of the award. The Applicant's rescission application also informs the Respondent to deliver an answering affidavit within 14 days of having been served with the application, hence the opposing affidavit was filed by the Respondent.
- [19] It appears that the Applicant's "Annexure E" was not brought to my attention on the day of the arbitration, which date had been agreed by both parties, hence the decision to proceed in the absence of the Applicant. In my view there had not been an application for postponement, and had the request to have the matter rescheduled on account of the representatives' exposure to Covid-19 as substantiated by medical certificates, notwithstanding the Respondent's view that this did not comply with the council's rules for postponement, the matter may not have proceeded in the Applicant's absence if such guidance was provided to me by the council. It also appears from the submissions of the Applicant that attempts were made after the date of the arbitration with the council to find out what the status of the matter was. While there may have been undertakings made by the Applicant on the day of the pre-arbitration that arrangements would be made for someone to present themselves at the arbitration, and the Applicant did fail to secure a confirmation from the council that the matter will

indeed be postponed, the explanation for default may amount to a reasonable one if prospects of success are also considered.

[20] However, as illustrated through decided case law above, good cause for rescission is not only dependent on the reasonable explanation for default or an intention that has always existed to proceed with the case. The Applicant's view is that it has good prospects of success, however, makes no averments for consideration as to its bona fide defence to the Respondent's allegations, stating only that a chance to advance evidence in this regard was not provided. In **Production Institute of Southern Africa (Pty) Ltd v CCMA and others**¹ it was stated at [para 12] that "*...It is not good enough for the applicant to make a broad and sweeping statement that he or she has good prospects of success. An averment that there are prospects of success or bona fide defense must be substantiated and backed by facts*". In **MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and others**² it was held that the absence of one of the two essential elements would usually be fatal and that where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence. The failure by the Applicant to indicate how it intends to challenge or rebut the evidence led by the Respondent in the arbitration as to how it did not commit an unfair labour practice in this matter is in my view fatal to its rescission application.

RULING:

[21] The rescission of the default award issued on 02 February 2021 is hereby not granted.



Name: Mohau Ntaopane

GPSSBC Arbitrator

¹ (JR1974/2009) [2011] ZALCJHB 1 (13 January 2011)

² (1994) 15 ILJ 1310 (LAC)

