



RESCISSION RULING

Case Number: GAJB2373- 19
Commissioner: Kaizer Makoela
Date of Ruling: 20 September 2019

In the matter between

Masizolo Nyanginto

(Applicant)

And

WG Wearne Ready Mix Concrete (Pty) Ltd

(Respondent)

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1. BACKGROUND TO THE ISSUE

1.1 This is an application in terms of section 144 of the Labour Relations Act 66 of 1995 “the LRA” where the Applicant who was the Applicant on the main application seeks to rescind a condonation ruling handed down by **Commissioner Boitumelo Tracy Mokoena** on the 18th March 2019. The application was launched with the supporting affidavit. This Applicant is accompanied by an application for condonation for late filing of the rescission application.

1.2 This application is opposed and is decided on papers.

2. ISSUE TO BE DECIDED

2.1 I am to determine whether to grant condonation for a late filing of the application for rescission or not. And if so;

2.2 Whether to grant the application for rescission or not.

3. SURVEY OF EVIDENCE AND ARGUMENT

3.1 Applicant's Submission:

3.1.1 The Applicant, **Mr. Masizole Nyanginto**, submitted in his affidavit that he filed the application for rescission late because of certain administrative steps that had to be followed before his legal insurer could allocate an attorney for him.

3.1.2 He became aware of the condonation ruling on the 18th March 2019. Upon receipt of the ruling, his attorney forwarded the same to his Legal Insurer in accordance with the proper administration procedures in terms of their agreement. This was to ascertain whether they would provide further cover to proceed with an application for rescission of the condonation ruling. Insurance cover was only confirmed on the 15th July 2019. The attorney proceeded to drafting the application and were only signed by him on the 12th August 2019 due to conflicting schedules.

- 3.1.3 He is advised that the application for rescission had to be filed within 14 days of becoming aware of the Ruling. The Application is therefore four (4) months and twenty five (25) days late.
- 3.1.4 The Condonation Ruling that he intent to have rescinded was given in his absence, without an opportunity to plead his case. Neither he nor his attorney received the Notice of Set Down for the Condonation hearing that was held on 22 February 2019. Accordingly there was no appearance on his behalf at the hearing and condonation was refused in his absence without any opportunity to argue his case.
- 3.1.5 The Commissioner failed to take into consideration the fact that he is a lay person and not well acquainted with the Labour Relations Act and the Rules of the CCMA. That he made use of a legal insurance service, Scorpion Legal, which entails certain administrative steps that have to be followed before an attorney is allocated.
- 3.1.6 The Commissioner further failed to consider that he was retrenched during December period and that his legal insurer only referred his claim to the attorney on 17 January 2019. The attorneys were only available for consultation on 25 January 2019 hence the initial referral was accompanied by a condonation application. The Commissioner acknowledges in her ruling that the delay was not excessive and that there is a dispute regarding fairness of the procedure followed by the Respondent and that he has reasonable prospects of succeeding with the matter.

3.2 Respondent's Submission:

- 3.2.1 The Respondent through an affidavit by **Mr. Marco Entres**, submitted that the initial application for condonation was filed with the CCMA on 29 January 2019, which was seventeen (17) days late. The applicant then failed to attend the *In Limine* hearing held on 22 February 2019. The Condonation Ruling was issued on the 18th March 2019, declining the applicant's application for condonation.
- 3.2.2 The Applicant acknowledges that in his application that his application should have been filed within 14 days. However, the applicant's application for rescission is 133 days late taking into account Rule 32 of the CCMA rules. This is application excessively late.

3.2.3 The Applicant while in the employ of the Respondent was a member a Trade Union and he is now represented by an attorney who ought to know better. There is no proof whatsoever that his attorney only received instructions on 15 July 2019 from the legal insurer. Even after receiving the instruction on the 15 July 2019, the rescission application was filed 28 days late. This meant that even after receiving instruction, they waited for 28 days to file for rescission.

3.2.4 The Applicant was part of employees who were dismissed for operational requirements. Employees affected as well as members of the Union were notified in terms of section 189 (3) of the Labour Relations Act. Consultation was held with all the affected employees as well as Union members on 30 November 2018. Procedure was followed prior the Applicant's dismissal. The Applicant does not have prospects of success.

4. ANALYSIS OF EVIDENCE

4.1 Section 144 of the Labour Relation Act 66 of 1995 state that - 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;
- b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- c) granted as a result of a mistake common to the parties to the proceedings.

4.2 On the premise of the above, Rule 32 of the CCMA Rule requires that an application for rescission of a ruling be made within fourteen (14) days of the date on which the applicant became aware of the ruling.

4.3 This application is made one hundred and thirty three (133) days late, which is excessive. This application is supported by condonation application.

4.4 The Commission has a discretion, to be exercised fairly, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and must consider all the facts.

4.5 The Labour Court in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:

“... 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.”

4.6 The Applicant submitted that he referred the rescission application late because his attorney upon receipt of the condonation ruling on the 18th March 2019, he forwarded the same to his Legal Insurer in accordance with the proper administration procedures in terms of their agreement. This was to ascertain whether they would provide further cover to proceed with an application for rescission of the condonation ruling. The confirmation of cover was only received on the 15th July 2019. Does this justify the delay? The Respondent argued to the contrary.

4.7 The courts have been hesitant to bar applicants from relief where the delay was caused by the representative of the applicant. In this case the following factors are important and must be taken in to account, one, the applicant referred the dismissal dispute to the CCMA seventeen late and argued that he was waiting for his legal insurer to confirm cover, secondly, the rescission application is one hundred and thirty three days late and the argument is this the same.

4.8 Both the applicant's legal insurer and the attorney knew that the rescission application ought to have been made within fourteen (14) days. The Applicant as well ought to have taken it up himself to either challenge the ruling within reasonable time or even address the red-tape processes of administration procedures with his legal insurer. By merely stating that his attorney was waiting for one hundred and thirty three days for an administrative procedure to be followed cannot be reason enough to justify the delay.

4.9 The above was further confirmed in the case of *Saloojee and another v Minister of Community Development 1965 (2) SA 135 (A)* at paragraph 141C-E, the court said "there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered"

4.10 The onus is on the Applicant to show good cause why he referred the matter to the CCMA late. This means that the Applicant must provide a satisfactory explanation why he referred the matter to CCMA late. As stated in the *National Union of Mineworkers v Council for Mineral Technology (Supra)*, in the absence of a satisfactory explanation for an unreasonable delay, it is not necessary to embark on an inquiry into the prospects of success.

4.11 Having regards to the above, I find the Applicant's explanation not satisfactory.

5. RULING

5.1 Condonation for the late filing of the rescission application is therefore not granted.

5.2 No order as to costs is made.



SIGNED _____

CCMA COMMISSIONER: Kaizer Makoela