

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: JA 31/03

In the matter between

LUMKA & ASSOCIATES

Appellant

and

BONTLE MAQUBELA

Respondent

JUDGMENT

JAFTA AJA

Introduction

- [1] During September 2002 the appellant launched an application in the Labour Court for the rescission of that Court's order dated 19 January 2002 in terms of which an award issued by the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") had been made an order of that Court in terms of s 158 (1) (c) of the Labour Relations Act 66 of 1995 ("**the Act**") in an unfair dismissal dispute between the appellant and the respondent. In the application the appellant further sought condonation for instituting the rescission application out of the prescribed time. The

respondent opposed the relief sought and filed opposing papers detailing the grounds upon which her opposition was based. Having heard both sides the Labour Court declined to grant condonation and dismissed the application. It is that decision of the Court a quo from which the appellant now appeals to this Court. Leave to appeal was granted by the Court a quo

The facts

- [2] On 4 September 2000 the appellant appointed the respondent as a personal assistant to its Chief Executive Officer (“**the CEO**”). In its papers the appellant avers, which is not disputed, that the relationship between the parties was strained shortly after the appointment. In an attempt to restore good relations the respondent, through her attorneys, addressed a letter to the appellant setting out issues of concern to her. The appellant pointed out to her that such a matter should be dealt with in terms of the appellant’s internal procedures. A meeting between the respondent and the appellant’s CEO was held to consider the respondent’s complaint. It appears from the papers that the respondent was satisfied with the outcome of the meeting.
- [3] Meanwhile the appellant found the respondent’s work performance to be unsatisfactory and in order to remedy this it sent her to a training course. According to the appellant the respondent was further given assistance and guidance in her work but her performance did not improve. The appellant states that the

respondent's poor performance caused it embarrassment and resulted in the company losing potential revenue as clients terminated contracts with it. It cited the fact that the respondent failed to properly co-ordinate the business meetings of its CEO in that on occasions she would schedule a number of meetings for the same time in one day which resulted in some meetings not being honoured.

[4] As a consequence of its dissatisfaction with the respondent's performance, the appellant decided to bring disciplinary charges against the respondent. On 9 January 2001 the respondent was given a notice of a disciplinary hearing scheduled for 12 January. The respondent was charged with gross negligence and or gross incompetence or poor work performance. Before the hearing the respondent asked for further particulars to the charges preferred against her. The hearing did not take place on 12 January but on 18 January. The respondent objected to the presiding officer on the basis that he was not impartial and requested him to recuse himself. She also objected to the charges on the ground that they were vague.

[5] The presiding officer refused to recuse himself. He also dismissed the respondent's complaint that the charges were vague. He ruled that the respondent had been furnished with further particulars to the charges well before the hearing. The presiding officer held that the respondent had sufficient time to prepare for the hearing. After the ruling by the presiding officer, the respondent withdrew from

the hearing without stating her case. The hearing continued in her absence and the appellant's CEO testified in support of the charges. At the end of the hearing the presiding officer found the respondent guilty of gross negligence and gross incompetence. Following this verdict the respondent was dismissed from the appellant's employ.

- [6] The respondent did not accept her dismissal and she subsequently referred the resultant unfair dismissal dispute to the CCMA for arbitration. She contended that the dismissal was both substantively and procedurally unfair. The arbitration hearing was set down for 25 June 2001 and both parties were properly notified of the date of hearing.
- [7] On the scheduled date both parties appeared before a commissioner of the CCMA, the respondent in person and a Mr Dikwayo, an employee of the appellant, representing the appellant. At the commencement of the arbitration Mr Dikwayo applied for the postponement of the hearing on the ground that the person appointed to represent the appellant, a certain Ms Fredericks, had fallen ill and the appellant's CEO was in Cape Town on business. The respondent opposed the application for postponement on the basis that the appellant's representative had not produced proof of Ms Frederick's illness. Furthermore, she pointed out that the CEO who had direct knowledge of the matter should have been available for the hearing as the appellant was given due notice of the hearing. She further pointed out that the appellant had also failed to attend the conciliation meeting at the CCMA in regard to the dispute.

[8] After hearing both parties the commissioner refused to postpone the hearing whereupon the appellant's representative indicated that he was withdrawing from the hearing and he left. After his departure the commissioner proceeded to hear the respondent's testimony and she decided the matter on the basis of such evidence only. The commissioner came to the conclusion that the respondent was dismissed without a fair reason. Regarding procedural fairness the commissioner found that, in spite the onus of proving the charges having been on the appellant, by requiring the respondent to testify in support of her defence before the appellant led its evidence the presiding officer committed a procedural irregularity which rendered the hearing unfair. Consequently the commissioner concluded that the dismissal was substantively and procedurally unfair. As a result the commissioner awarded the respondent compensation in the sum of R63000-00 which was an equivalent of seven months' salary for the respondent. The award is dated 11 July 2001.

[9] The award was served upon the appellant in November 2001 but in the appellant's rescission application its CEO said that it was brought to her attention on 7 January 2002. The appellant then launched an application for the rescission of the award in the CCMA. The application was brought under s144 of the Act. The respondent opposed the application.

Sec 144 of the Act reads thus:-

“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.”**

[10] Meanwhile the respondent instituted an application during December 2001 in the Labour Court seeking that the award be made an order of that Court. It appears from the papers in that application that service of the papers was effected upon the appellant by means of a telefax. The appellant's CEO disputes receipt of the telefaxed papers and alleges that the appellant became aware that the award had been made an order of the Labour Court when the appellant was served with a writ of execution on 21 August 2002. The Court record pertaining to the respondent's application revealed that the order making the award an order of Court was granted on 19 January 2002 which was only a day after the appellant had launched the application for its rescission at the CCMA.

[11] Upon receipt of the writ of execution in August 2002 the appellant instructed its previous attorneys to investigate the status of the application for rescission in the CCMA. It was informed by those attorneys that the application was still pending as the date of the hearing had not been fixed. According to the appellant it was later advised by the present attorneys that the rescission application at the CCMA could not proceed because the award had been made an order of Court already.

The hearing in the Labour Court

[12] Following the advice from its current attorneys, the appellant instituted the application for rescission of the Court a quo's order. An application for the rescission of an order of the Labour Court by that Court can be made in terms of either s 165 of the Act or Rule

16A of the Labour Court Rules. Section 165 of the Act reads thus:-

“ 165. Variation and rescission orders of Labour Court – The Labour Court, acting on its own accord or on the application of any affected party may vary or rescind a decision, judgment or order-

- a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;**
- b) in which there is 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.”**

Rule 16 A of the Rules of the Labour Court deals with rescission and variation of orders or judgments of that Court. It reads thus:-

“(1) The Court may, in addition to any other powers it may have-

- a) of its own motion or on application of any party affected, rescind or vary order or judgment-**
 - i) erroneously sought or erroneously granted in the absence of any affected by it;**
 - ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity,**

error or omission;

iii) granted as a result of a mistake common to the parties; or

b) on application of any affected party, rescind any order or judgment granted in the absence of that party.

(2) And party desiring any relief under-

(c) subrule 1 (a) must apply for it on notice to all parties whose interest may be affected by the relief sought.

(d) subrule 1 (b) may within 15 days after acquiring knowledge of an order or judgment in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.”

[13] The wording of Rule 16A (1) (a) is identical to the language used in s 165 and both apply to rescission of orders on the basis of specific grounds listed therein. However Rule 16A (1) (b) also permits a party affected by an order granted in its absence to apply for rescission of such order upon proof of good cause. Different tests apply to applications brought under Rule 16A (1) (a) or s165 and those which are instituted under Rule 16A (1) (b). The appellant did not specify in its rescission application whether the rescission application was being made under sec 165 or Rule 16A(1)(a) or Rule 16A(1)(b).

[14] In the rescission application before the Court a quo the appellant contended that the order making the award an order of that Court was **“erroneously granted as it should not have been granted**

while an application for rescission of judgment was pending”.

This contention was based on the fact that the respondent had been served with the application for the rescission of the CCMA award a day before the Labour Court made the award an order of Court. In those circumstances the appellant contended that the respondent was obliged to draw the Court’s attention to the rescission application then pending in the CCMA, prior to the granting of the order making the award an order of Court. Although the appellant’s notice of motion before the Court a quo did not specify under which section of the Act or Rule of Court the application for rescission was brought, this contention by the appellant seems to indicate that the appellant sought rescission in terms of either sec 165(1)(a) or Rule 16A(1)(a) because **“erroneously granted”** in its absence appears under Rule 16A (1) (a) and s165(a).

- [15] The appellant’s papers also purported to make out a case for rescission under Rule 16A (1) (b) which requires good cause to be established before a rescission can be granted. This subrule requires that an application for rescission should be made within 15 days of acquiring knowledge of the order sought to be rescinded. That the appellant also sought to rely on Rule 16A(1)(b) is discernible from the fact that the appellant also sought condonation for the late launching of the application for rescission and contended that the appellant has a bona fide defence in addition to a satisfactory explanation given for the delay. In fact the appellant alleged in its founding affidavit that, had it not been for the incorrect legal advice it had received, it would have instituted the

present application within 15 days of it becoming aware that the award had been made an order of Court. It concludes by stating that **“good grounds exist for condoning [appellant’s] failure to launch this application timeously insofar as the application falls within the provisions of Rule 16A (2) (b)”**.

[16] The Court a quo dealt with the matter on the basis that the appellant sought rescission in terms of subrule (1)(b) of Rule 16A and it appears that the complaint relating to the order of 19 January having been erroneously granted was not pursued in the Court a quo nor does the notice of appeal refer thereto. In the light of this it seems that the application must be taken to have been made in terms of Rule 16A (2)(b) which refers to subrule (1)(b). Accordingly, the appellant was obliged to first apply for the condonation of its delivery of the rescission application after a period of 15 days had lapsed from the date that the appellant had come to know about the order.

[17] Although the condonation application was included in the rescission application before the Court a quo, it constituted a distinct request for leave to apply for rescission. For the appellant to succeed in obtaining the necessary leave, it had to prove that the requirements for condonation were met. The Court a quo then identified the requirements for condonation as a reasonable explanation for the appellant’s default on 19 January 2002, proof of a bona fide defence and some prospects of success in the application before the CCMA for rescission of the award.

[18] Having considered the language of s144 of the Act under which the CCMA application had been made, the Court a quo found that such language was identical to the language employed in Rule 42 (1) of the Uniform Rules of the High Courts. The Court a quo then proceeded to seek guidance for the interpretation of s 144 from decisions dealing with Rule 42 (1) of the Uniform Rules. The Court impressively collected such decisions in its judgment in the process of determining the meaning attached to Rule 42 (1) (a).

[19] After transposing the meaning of Rule 42 (1) (a) to s 144 (a), the Court a quo came to the conclusion that the CCMA does not have the authority to rescind the award in the present matter. As a result the Court

held that the appellant had failed to show that it had a bona fide defence. The Court found it unnecessary to determine whether or not the explanation given for the delay was satisfactory. As the requirements for condonation overlap with the requirements for rescission in regard to as the issue of a bona fide defence, the Labour Court further dealt with the application for rescission on the same basis and came to the conclusion that it could not succeed.

The appeal

[20] In challenging the judgment of the Court a quo the appellant confined itself to attacking the finding of the Court a quo that, when s 144(a) is properly construed, the appellant had failed to prove that it had a bona fide defence in the sense that it could succeed in its rescission application in the CCMA. In its grounds of appeal the appellant contended, among other things that, the Court a quo misdirected itself in the interpretation of s 144 (a) by failing to hold that the section can reasonably be construed to include a meaning that recognises the CCMA's authority to rescind its awards in circumstances similar to the rescission of orders by the High Court under the common law. In essence Mr Vivian, who appeared for the appellant, argued that it is wrong to give s 144 (a) the narrow interpretation attached to Rule 42 (1) (a) simply because that rule was construed against the background of other bases upon which a Court order can be rescinded such as the common law and Rule 31 of the Uniform Rules. Therefore there was no need for the Courts, Mr Vivian argued, to give Rule 42 (1) (a) an expanded meaning when they interpreted it. He contended that a narrow interpretation of s144 would, in some cases, lead to an injustice as the affected party might find itself without a remedy. Mr Vivian

vigorously contended for a meaning that incorporates the rescission of the CCMA awards upon proof of sufficient or good cause in the same manner as the High Courts rescind their orders under the common law. If so interpreted, he argued, the appellant would have shown strong prospects of success in the application for rescission at the CCMA and thereby satisfied the requirement for both condonation and rescission at the Labour Court.

Requirements of condonation and rescission

[21] In the Labour Court applications for condonation in relation to breaches of that Court's Rules are governed by Rule 12 of the Labour Court Rules which provides that the Court may extend or abridge any period prescribed by the rules on application and on good cause shown. The rescission of the Labour Court's orders is regulated by s 165 of the Act and Rule 16A. The latter Rule also requires proof of good cause for rescission of an order granted in the absence of the applicant.

[22] The phrase "good cause" is not defined in the Labour Court Rules. However, it is well-known that the phrase consists of two requirements, namely, a reasonable explanation for the delay in the case of condonation or a reasonable explanation for the default in the case of rescission and, on the merits, a bona fide defence which, prima facie, carries some prospect of success. The existence of both requirements must be met before the application can succeed. In **Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) Miller JA** stressed that under common law compliance with both requirements is necessary. He said at 765 D-E:

"It is not sufficient if only one of these requirements is

met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of the default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

- [23] The approach in **Chetty** was followed by the Labour Court and endorsed by this Court in **Feuilhenrade & others v Mthimkhulu; Enforce Security Group (Pty) Ltd & Others v Mthimkhulu** [2003] 3 BLLR 213 (LAC) at para [11]. It was in that context that the Court a quo came to the conclusion that, since the appellant had failed to prove the existence of a bona fide defence, it was not necessary for it consider whether a reasonable explanation had been furnished.

Has the appellant established a bona fide defence?

- [24] The answer to the above question depends on whether s 144 (a) can reasonably be said to carry the expanded meaning contended for by the appellant and if so whether on the application of the expanded meaning to the facts of the present matter, it can be found that the appellant has reasonable prospects of succeeding in the application for rescission at the CCMA. Section 144(a) provides:

“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.”

[25] The section authorises commissioners to rescind awards either on their own accord or upon application by an affected party provided such award was erroneously sought or made in the absence of a party affected by the award. So, the essential requirements for exercising the power of rescission conferred upon commissioners by s 144 (a) are: (a) an error committed either in seeking or making the award; (b) in the absence of a party affected thereby.

[26] In the view I take of the matter I consider it unnecessary to express a definitive opinion on whether it is reasonably capable for s144 (a) to carry the expanded meaning contended for by the appellant. However, I must mention that conflating the two procedures which are applied separately at both the Labour Court and High Courts may create practical difficulties when implemented. For example, where the rescission is sought on the basis that an order was erroneously granted, the applicant is not required, over and the above that, to show good cause. Proof of the fact that the order was erroneously granted suffices for having rescission provided that such an order was granted in the absence of the applicant. It is not clear to me whether in the context of the meaning contended for proof of good cause is intended to be additional to proof of erroneously sought or erroneously made. If the collective compliance with the requirements of erroneously made and good cause would be required, it is difficult to imagine an instance where a commissioner would act on his own accord to rescind an award as he cannot himself establish essential

elements of good cause.

[27] It seems, however, to be clear to me that irrespective of the meaning attached to s144 (a), the basic requirements of the section such as erroneously sought or made must be retained when applying it. This presented an insurmountable hurdle to the appellant's counsel during the hearing of the appeal. Counsel was unable to point out, despite an invitation to do so from the Court, an error that was committed in the procedure followed in making the award after the appellant's representative had left the arbitration. Indeed once the application for postponement was refused, the commissioner was obliged to continue with the arbitration hearing.

[28] If there was an error committed it could only have been at the stage when the application for a postponement was heard and a ruling thereon was made. However, I doubt that an error committed at that stage can be regarded as the one envisaged in s144 (a) because both parties were represented before the commissioner and only a postponement request was dealt with at that moment. Nonetheless, I refrain from expressing a definitive view on the point.

[29] It must be emphasized that in the present matter the commissioner's refusal to postpone the arbitration hearing was not challenged. With that ruling not challenged, it is clear that procedurally the commissioner acted correctly when he granted the order. In essence, the source of the appellant's complaint is the commissioner's decision refusing a postponement since all that occurred thereafter was procedurally correct. Therefore, that ruling should have been the appellant's focal point in his attempt to have the award set aside.

[30] As a result, I come to the conclusion that even if the interpretation contended for is adopted, the appellant would still have no prospects of success in its application for rescission at the CCMA because it cannot establish that the award was erroneously made so as to activate the provisions of s144 (a). Any rescission of an award by a commissioner where there is no proof of it having been erroneously sought or made would effectively amount to an amendment of s 144(a) and that is not permissible. In the circumstances I find that the conclusion of the Court a quo to the effect that the appellant failed to prove that it has a bona fide defence was correct.

Condonation in this Court

[31] At the commencement of the hearing of this appeal it transpired that no application for condonation of the late filing of the record was made. This was the position despite a promise made by the appellant's counsel in the heads of argument filed on 31 October 2003. After an unsuccessful attempt to make an application for condonation orally from the Bar, the appellant's counsel asked that the matter be stood down for a while. On resumption of the hearing a copy of an affidavit for condonation was presented to the Court. However, such affidavit omitted to explain why condonation was not sought timeously. After considering the affidavit the Court directed that the hearing proceed subject to the directive that the appellant's attorneys file a further affidavit explaining the reason for the delay in lodging the condonation application and a proper application for condonation.

[32] The required affidavit was filed on 12 May 2004 by the appellant's attorney. The explanation furnished for the delay is that it was due to an oversight on the part of the attorney. He states that on 28 October 2003 he sent instructions to the appellant's counsel for the preparation of the condonation application. He states further that, due to time constraints, counsel was unable to prepare such application until heads of argument were filed. After the filing of heads of argument neither counsel nor the attorney attended to the drafting of the application. He says they simply forgot about it and focused on the merits of the appeal.

[33] According to the appellant's attorney the record of the appeal should have been lodged on 4 July 2003 but it was lodged on 14 July. The explanation given therefor was that the transcribing company delayed in preparing the record until the 14th of July.

[34] Rule 5 (8) of the Labour Appeal Court Rules requires that an appeal record be lodged within 60 days from the date of the order granting leave to appeal and subrule (17) regulates the procedure to be followed by an appellant who has been unable to lodge a record timeously. That subrule provides that such an appellant should first ask the respondent to consent to an extension of time. If consent is refused an application on notice of motion supported by an affidavit should be made to the Judge President, in chambers, for an extension. Such application must also be served on the other parties to the appeal.

[35] In the present case the Rule was not complied with in two respects. Firstly the record was filed out of time, without first seeking and obtaining leave to do so. Secondly, the procedure prescribed in the Rule for applying for condonation was not followed. The appellant's attorney does not furnish any explanation for not requesting the respondent's consent when it became clear to him that the record could not be lodged within the prescribed time. It is possible that consent could have been given as the respondents did not oppose the present application for condonation. Had he asked for consent and consent was granted, the need for a formal application would have fallen away. Instead he decided to wait for the record and lodged it at the time when he had no right to do so as then the appellant was deemed, in terms of subrule (17), to have withdrawn the appeal. Assuming that the appellant's attorney acquainted himself with the requirements of the Rules of the Court, as is the duty of every attorney instructed to prosecute an appeal, it should have been clear to him that at the stage he lodged the record the appeal was deemed to have been withdrawn.

[36] The manner in which the appellant's attorney dealt with the matter is totally unacceptable. It was not open to him to ignore the deeming provision of the subrule and act as if nothing had happened. It is also unacceptable that the appellant's attorney took steps towards making an application for condonation only on 28 October, more than three months after he had become aware that Rule 5 had not been complied with. The conduct of the appellant's attorney is further compounded by the fact that the application for condonation was not filed even after October 2003 until the hearing of the matter on 11 May 2004. Even then an improper application was made without any explanation for the delay in seeking condonation. The attorney had to be compelled to furnish the requisite explanation.

[37] In cases where the rules of Court have not been complied with and condonation is necessary, a proper application for condonation should be made immediately the guilty party becomes aware of non-compliance.

[38] In the present matter while the explanation given for not filing the record timeously is satisfactory, the explanation given for the delay in seeking condonation is not only unacceptable but it fails also to cover the entire period during which the delay occurred. It is unfortunate that now and again applications for condonation are made to this Court which indicate a tendency by certain practitioners not to comply with its Rules. Such a tendency should be disapproved in unambiguous terms. The administration of justice should be maintained at a proper and acceptable level. In displaying the Court's displeasure with the conduct of the appellant's attorney I am inclined to disallow the fee for the application for condonation including supplementary heads of argument filed on 14 May 2004.

[39] Accordingly the following order is made:

1. Condonation for the late lodging of the record is granted.
2. The appeal is dismissed with costs.
3. The appellant's attorney shall not charge any fee for the condonation application and supplementary heads of argument.

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JAFTA AJA

I agree.

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ZONDO JP

I agree.

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DAVIS AJA

Appearance

For the appellant : Advocate S. C. Vivian

Instructed by : Giuseppe Fizzotti

For the respondent : Advocate F. A. Boda

Instructed by : Zehir Omar Attorneys

Date of Hearing : 11 May 2004

Date of Judgment : 9 July 2004