



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA9/16

In the matter between:

ADVANCE WAREHOUSING (PTY) LIMITED

Appellant

and

ANNAH PRUDENCE MASHIGO

Respondent

Heard: 05 September 2017

Delivered: 18 October 2017

Summary: Rescission application - principle that applicant for rescission must show good cause restated – applicant must give a full and reasonable explanation for its default, disclose a *bona fide* defence with good prospects of success. Appeal dismissed with costs.

Coram: Coppin, Sutherland JJA and Savage AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against an order of the Labour Court (Mothibi AJ), dismissing, with costs, an application brought by the appellant to rescind an order granted by the Labour Court on 8 June 2012, in the absence of the appellant, and making an arbitration award, granted in favour of the respondent, an order of court in terms of section 158(1)(c) of the Labour

Relations Act¹ (LRA). The court *a quo* granted the appellant leave to appeal to this Court.

- [2] Besides averring that it had not been aware of the application to make the award an order of court, which aspect I will deal with later, the appellant rather faintly implied that the award had prescribed at the time of that application. The respondent contended that the Prescription Act² was not applicable and that the award had not prescribed.
- [3] The court *a quo* did not find it necessary to deal in detail with that “defence” because, according to the court *a quo*, the appellant had failed to give a reasonable explanation for its default. By the time the appeal was directed to this Court, the issue of the prescription of an award, made in terms the LRA, was contested in other proceedings before this Court.
- [4] In December 2016 in *Myathaza v Johannesburg Metropolitan Bus Services (SCO) Limited t/a Metro Bus and Others*,³ four justices of the Constitutional Court, out of a quorum of eight justices, held in two judgments, *inter alia*, that the Prescription Act did not apply to awards made in terms of the LRA. The four other justices held in a third judgment that the Prescription Act was applicable, but prescription would have been interrupted by applications for the review of those awards and would have remained interrupted pending the finalisation of all proceedings between the parties.
- [5] Although there is no clear *ratio decidendi* to be discerned from the three judgments in *Myathaza*, prescription was rightly considered by the parties no longer to be an issue in this matter in the light of either of the main conclusions arrived at in those judgments and on the approach adopted by the Constitutional Court⁴ and this Court⁵ after those judgments.

¹ Labour Relations Act 66 of 1995.

² Prescription Act 68 of 1969.

³ *Myathaza v Johannesburg Metropolitan Bus Services (SCO) Limited t/a Metro Bus and Others* (2017) 38 ILJ 527 (CC).

⁴ *Mogaila v Coca Cola Fortune (Pty) Ltd* [2017] 5 BLLR 439 (CC).

⁵ *Van Tonder v Compass Group (Pty) Ltd and Others* [JA 58/ 16] Unreported decision of the LAC (1 June 2017).

[6] In light of those developments, the appellant's counsel was constrained to make submissions solely in respect of the remainder of the averments made by the appellant in support of its rescission application.

[7] I now proceed to a synopsis and discussion of those averments.

Synopsis and Discussion

[8] The respondent was employed by the appellant as a general assistant at its Daveyton store in about November 1998 and was dismissed on 19 February 2007, having been found guilty of insubordination at an internal disciplinary enquiry.

[9] In response, the respondent had referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), and the dispute went to arbitration on or about 4 May 2007.

[10] On 16 May 2007, the Commissioner issued an award in terms of which the appellant's dismissal was found to be procedurally fair, but substantively unfair. In terms of the award, the appellant was to reinstate the respondent retrospectively from the date of her dismissal, i.e. 19 February 2007, on the same terms and conditions that applied before dismissal; the respondent was to report for work within seven days of receipt of the award; and the appellant was to pay to the respondent within 14 days of receipt of the award an amount of R4 393,05, being three months' salary, as back pay ('the award'). No costs order was made

[11] On 7 June 2007, the appellant brought an application in the Labour Court to review and set aside the award. It was opposed by the respondent and was eventually dismissed on 16 December 2011. On 12 March 2012, the respondent launched the application to make the award an order of court and on 8 June 2012 the award was made an order in the absence of the appellant.

[12] The appellant does not dispute that the respondent gave notice of the application to make the award an order of court by way of a facsimile to number (012) 666 7514, but avers that it did not receive notice of that

application. It also does not dispute that facsimile number (012) 666 7514 was one of its numbers but vaguely contends that the number had been changed, without stating when the change occurred. The appellant avers that it only became aware of that application and that the award was made an order of court, after it received a letter of demand from the respondent's attorneys on 12 May 2013. The appellant further contends that the respondent never reported for duty as per the award and that, due to the time-lapse since the award had been issued, it had concluded that the respondent had elected not to pursue the matter any further.

- [13] Other than for vague averments alluding to the time that had passed between the making of the award and the application making it an order of court, the appellant's affidavit, in support of its rescission application, is threadbare and lacking in essential detail.
- [14] It is now trite that an applicant for rescission must show good cause.⁶ This entails not only giving a full and reasonable explanation for its default, but disclosing a *bona fide* defence with good prospects of success in respect of the relief sought by the claimant, i.e., the order sought to be rescinded.
- [15] Notwithstanding the threadbare application for rescission, counsel for the appellant sought to persuade us that the appellant has made out a compelling case for that relief. Counsel, essentially, capitalised on the appellant's averment that the respondent had not reported for duty "as ordered" in the award and, in an effort to bolster the appellant's case, (imprudently) referred to a settlement proposal the appellant had conveyed to the respondent's attorneys after receiving their letter of demand.
- [16] The court *a quo* did not misdirect itself in finding that the explanation tendered by the appellant was inadequate. It obviously lacks essential details. And the failure to give a proper explanation for the default was enough to justify dismissal of the rescission application.

⁶ See *inter alia* *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *Edcon (Pty) Ltd v Commission for Conciliation, Mediation Arbitration and Others; In re: Thulare and Others v Edcon (Pty) Ltd* (2016) 37 ILJ 434 (LAC).

- [17] The other defences raised amount to no more than “a grasping at straws”. Prescription, which cannot redound in its favour for the reasons mentioned at the outset of this judgment, was not mentioned expressly in the appellant’s papers in the court *a quo*, but was derived in argument from vague allusions in those papers to the lateness of the application to make the award an order of court, albeit without disclosing voluntarily that it had brought a review application shortly after the award was issued, and that the review was dismissed on 6 September 2011.
- [18] As for its defence that the respondent did not report for duty as per the award - the award itself does not make the respondent’s reinstatement conditional upon her reporting for duty within seven days of receipt of the award. In any event, the respondent placed in issue the appellant’s averments on that matter. She points out, *inter alia*, that the appellant had launched an application to review and set aside the award shortly after it was issued and that, as a result, she was not able to report for duty. The respondent also goes on to explain extensively why she was only able to bring her application to make the award an order of court, at the time when she did.
- [19] By failing to disclose in its founding papers for the rescission that it brought a review and that the review was dismissed on 6 September 2011, the appellant gives a false impression there that the respondent did not report for duty due to laxity or disinterest, or that she adopted a lackadaisical attitude, until the launch of her application to make the award an order of court. But the contrary is apparent from a proper reading of the papers. The respondent evidently diligently pursued the matter, making use of the necessary resources available to her as a layperson, to enforce the award. Before us she was assisted by an attorney appointed by the Legal Aid Board. The appellant, on the other hand, appears to have done much to frustrate the respondent and to have resorted to technicality to avoid complying with the award which was made an order of court. The court *a quo* cannot be criticised for its handling of the matter. The appellant failed to show good cause for its default.
- [20] In the result, the appeal is dismissed with costs.

P Coppin – Judge of Appeal

Sutherland JA and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Mr K J Maleka

Instructed by Carrim Attorneys Inc

FOR THE RESPONDENT:

Mr M P Voyi

Instructed by Ndumiso Voyi Inc