

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)

CASE NUMBER: JR1480/01 (Review Application)
J5358/01 (Rescission Application)

In the matter between:

TEBA BANK

APPLICANT

AND

COMMISSIONER A MATOBANE

FIRST RESPONDENT

**THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

SECOND RESPONDENT

R MMOPE

THIRD RESPONDENT

JUDGMENT

AC BASSON, J

NATURE OF THE PROCEEDINGS

[1] There are two applications before this Court. The first is an application for a rescission brought in terms of section 165(a) of the Labour Relations Act 66 of 1995 (hereinafter referred to as “the LRA”) under case number J5358/01 in respect of an order obtained on 19 November 2003 in terms of section 158(1)(c) of the LRA. The second is an application for an order that the review application in terms of section 145 of the LRA under case number J1480/01 be heard and determined by this Court. The Applicant also seeks condonation for the late filing of the rescission application.

BACGROUND FACTS

[2] On 7 September 2001, the First Respondent (hereinafter referred to as “the Commissioner”) issued an award in terms of which it was found that the dismissal of the Third Respondent (hereinafter referred to as Mmope”) was procedurally unfair but substantively fair. The Commissioner then ordered the Applicant - Teba Bank (hereinafter referred to as “the Bank”) - to pay compensation to Mmope in the

amount of R 42 816.50 which is equivalent to 10 months' and 1 week's salary. Mmope was dismissed during September 2000.

[3] The application for review of the award was filed on 2 November 2001.

[4] On *19 November 2003* the arbitration award was made an order of Court in terms of section 158(1)(c) of the LRA. On *5 December 2003* the Labour Court granted Teba Bank a stay of the writ of execution and ordered that any steps in the execution of the award be stayed pending the determination of the review of the arbitration award. The said writ of execution was issued at the instance of Mmope pursuant to the arbitration award that was made an order of Court on 19 November 2003.

[5] On *9 June 2005*, the learned AJ Leeuw made an order dismissing the review application on the basis that there was no award to be reviewed in view of the fact that the said award was already made an order of Court in terms of section 158(1)(c) of the LRA. The learned Judge ordered each party to pay its own costs. In her judgment AJ Leeuw referred to section 173(1)(a) of the LRA which states that the Labour Appeal Court has exclusive jurisdiction to hear and determine all appeals against the final judgments and final orders of the Labour Court. The learned Judge only gave her written reasons for her order

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dismissing the review application after Teba Bank had requested reasons. In the notice which requested the reasons it is stated that the Applicant (Teba Bank) intended to apply for leave to appeal to the Labour Appeal Court against the whole of the judgment granted by AJ Leeuw on 9 June 2005.

[6] On *20 January 2006* Teba Bank filed an Application for Leave to Appeal. On 23 March 2006 Teba Bank sought and obtained a legal opinion in respect of its prospects of success. As a result of this opinion, Teba Bank withdrew the Application for Leave to Appeal.

[7] Subsequent to these events and notwithstanding the fact that there is an order of this Court dismissing the review application under case number JR1480/01 and notwithstanding the fact that Teba Bank withdrew the Application for Leave to Appeal against this judgment, Teba Bank brought an application to rescind the order granted in terms of section 158(1)(c) of the LRA.

The Rescission Application

[8] On behalf of Teba Bank it was argued that the order in terms of section 158(1)(c) of the LRA was erroneously granted in its absence and submitted that it should be rescinded because it was not in willful default. It was further submitted that this Court would not, under

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normal circumstances have made an award an order of Court in terms of section 158(1)(c) of the LRA if it was aware of the fact that there was a review pending. It was thus submitted that the *status quo* should be restored so that the review (although *de facto* already dismissed) can be properly ventilated.

[9] On behalf of the Mmope it was very crisply argued that the decision of AJ Leeuw dated 9 June 2005 dismissing the review application stands and that this Court therefore has no jurisdiction to hear the review. The Court's attention was drawn to the fact that AJ Leeuw specifically ordered that the "*application is dismissed*". As such, it was submitted, the review was disposed of with the effect that this Court cannot firstly rescind the section 158(1)(c) order and, secondly, cannot review an award that has already been dismissed by this Court on 9 June 2005. It was further submitted that this whole process is one whereby Teba Bank is delaying and frustrating compliance with an arbitration award that was rendered in the favour of Mmope as far back as 2001.

[10] On behalf of Teba Bank it was conceded that AJ Leeuw had dismissed the review application but submitted that regard must be had to the reason for her order.

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[11] What the Applicant in these proceedings is effectively requesting this Court to do is to rescind an order in terms of section 158(1)(c) of the LRA in terms of which an award of an arbitrator was made an order of Court on the basis that that order was granted erroneously in the absence of the Applicant in the review proceedings. The effect of such a rescission would then presumably be, if I understand the submissions on behalf of Teba Bank correctly, that the review application will then be proper before this Court and that this Court will then be able to hear the review application.

[12] There is one fundamental flaw with this argument and that is that this Court cannot set aside a final order by this Court in the circumstances contemplated by the Applicant. Whether or not the learned AJ Leeuw was correct in her judgment which resulted in the dismissal of the review application under case number JR1480/01 is irrelevant. If the Applicant was dissatisfied with that order, it should have reviewed that order. The Applicant has elected not to do so. As a result the order stands. Even if this Court was inclined (which it is not) to grant the rescission of the section 158(1)(c) order, this will not result in the setting aside of another Court order that disposed of the main dispute (the review application).

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[13] In so far as it was necessary to consider the rescission application, it is dismissed for the following reasons: Firstly, the rescission application was brought approximately two and a half years after the award was made an order of court: The order was granted on 19 November 2003. The application for rescission was only filed on 10 April 2006. No explanation for the delay is tendered in the founding affidavit nor is condonation applied for. On this basis alone the rescission application is dismissed.

[14] I am of the view that the Applicant should pay the costs. Both applications before me are ill-founded and should never have been before this Court. This matter has furthermore been dragging on for years and Mmope has been unfairly deprived of the results of an arbitration award.

[15] In the event the following order is made:

1. The rescission application under case number J5358/01 is dismissed.
2. The application to consider the review application under case number JR1400/01 is dismissed.
3. The Applicant to pay the Third Respondent's costs.

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AC BASSON, J

DATE OF PROCEEDINGS: 5 June 2007

DATE OF JUDGEMENT: 18 April 2008

FOR THE APPLICANT: Thompson Attorneys

FOR THE RESPONDENT: Rammutla-at-law inc