

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable

Case NO: JR 129/2010

In the matter between

AARD MINING EQUIPMENT (PTY) LTD

Applicant

and

PETRUS LOURENS JOHANNES SWANEPOEL

Respondent

Date of hearing: 25 August 2011

Date of Judgment: 31 August 2011

JUDGMENT

CELE J

Introduction

- [1] The applicant seeks to have a decision of this Court dated 27 August 2010 rescinded in terms of section 165 of the Labour Relations Act (the LRA),¹ or in the alternative in terms of rule 16 A of the rules of this Court. In that decision, an arbitration award dated 6 December 2009 under case number GAJB15378-09, issued by Commissioner Tsatsimpe of the Commission for Conciliation, Mediation and Arbitration (the CCMA) was reviewed and set aside in favour of Mr Swanepoel who was an employee of the present applicant. The dismissal of Mr Swanepoel by the applicant was found to have been substantively unfair and the applicant was ordered by this Court to re-instate him with retrospective effect. The applicant did

¹ 66 of 1995.

not oppose the review application. When the review application was scheduled for hearing, the registrar did not issue a notice of set down to the applicant. Mr Swanepoel opposed the rescission application but he also sought condonation for the late delivery of his answering affidavit, which application was not opposed by the applicant.

The Condonation application

- [2] Mr Swanepoel received the rescission application on 17 September 2010 but filled the answering affidavit on 13 October 2010 and was therefore 6 days late. His explanation is that his attorney was engaged in an attempt to have the rescission and the review applications heard simultaneously, which offer was declined by an attorney of the applicant. It remains unclear how the discussion contributed to the delay. The short period of the delay however mitigates the poor explanation proffered. The applicant has conceded that it received the review application and annexures. The review application was considered by this Court and it made its findings and this factor augurs well for the prospects of success in the condonation application.
- [3] The condonation application was considered together with the rescission application, thus avoiding prejudice that any party might suffer by the matter being delayed. In the absence of any other factors that militated against the granting of condonation, Court exercises its discretion in favour of condoning the late filing of the answering affidavit. No costs order follows the granting of condonation. The rescission application accordingly stands opposed by the respondent.

*The rescission application**Factual background*

- [4] Mr Swanepoel was in the employ of the applicant as a Field Service Technician. He commenced his employment with the applicant in 1995. His services were utilised mainly in servicing the clients of the applicant. He was therefore expected to be ready and available as and when the clients have called for such interventions. The applicant granted him a cellular telephone allowance and instructed him to always keep his telephone on and to activate the voicemail system in case he was not available to answer the telephone.
- [5] On 16 and 17 April 2009, South Deep Mines, a client of the applicant, scheduled work which was to be carried out by the applicant. Mr Swanepoel was tasked by the applicant to carry out that job. He never turned up for duty. The applicant then charged him with two acts of misconduct of being absent from work and failed to timeously report and bringing the company's name to disrepute. He was found to have committed the misconduct and was dismissed. Commissioner Tsatsimpe confirmed the fairness of the dismissal. As already indicated, Mr Swanepoel successfully applied for the review of the award, which order is the subject of the present application.

The explanation for rescission.

- [6] The applicant admitted the receipt of the initial review application papers and later the transcribed record of the arbitration hearing. The applicant reflected on the matter by engaging in some consultancy and a decision was taken to oppose the review application. In January 2010, attorneys Johannes de Beer were instructed.

The attorneys were to file a notice of opposition and a Mrs van der Merwe of de Beer Incorporate was tasked to attend to it. All documents served to the applicant were to be handed over to the attorneys, who were henceforth supposed to monitor progress in the review application. Applicant's attorneys then waited for Mr Swanepoel to comply with rule 7 A (8) so that they could thereafter deliver the answering affidavit. However, as the applicant and its attorneys were waiting, they were engaged in preparatory acts in which the applicant consulted with its attorneys and counsel involved in the matter. To this extent, on 27 August 2010, a letter was issued by its attorneys to Mr Swanepoel's attorneys inviting them to serve the rule 7 A (8) notice. At that stage, it came to light that the notice of opposition had never been issued and served to E S Makinta Attorneys, acting for Mr Swanepoel. Still on 27 August 2010, Mr Makinta issued a letter notifying applicant's attorneys that this Court had on that day, considered and granted the review application in this matter on unopposed basis.

- [7] All along, the applicant had operated its business from 9 Pilans Street, Chamdor, Krugersdorp. In October 2009, it then relocated to 44 Jacobs Street, Chamdor, Krugersdorp. In so doing it also changed its telefax number from 011 762 5834 to 011 279 5392.
- [8] Unbeknown to the applicant the address of its attorneys, through which it had sent the review papers, had changed. Mrs van der Merwe was tasked with having to communicate the information of such address change to the applicant but she did not. Attorneys of the respondent were similarly uninformed of the change and they used the old address to serve court papers. The result was that no opposing papers were filed against the review application.

[9] The further complication was that the registrar of this Court did not serve the applicant with a notice of set down of the review application, as would customarily be done even for unopposed review applications. The applicant therefore did not wilfully fail to attend Court when the review application was heard since:

- It had no knowledge of the set down date;
- It did not deliberately refrain from entering an appearance to defend;
- The applicant had an attitude insofar as the review application was concerned. At the outset there was an intention to defend the review application.

[10] In terms of showing that an applicant has substantial defence, court was urged not to look at the probability of success but to consider a *prima facie* case made by the applicant.

Legal principles applicable.

[11] This Court acting of its accord or on the application of any affected party may vary or rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order². Further, this Court may, in addition to the powers it may have, on application of any affected party, within 15 days after acquiring knowledge of such order or judgment, rescind any order or judgment granted in the absence of that party upon good cause shown³.

² Section 165 of the LRA.

³ Rule 16A (b).

[12] Various decisions have come for consideration by this Court in which a party sought to rescind a judgment or order. One such is *Chadi v K O Interior Design*,⁴ where reliance was made on the decision in the case of *Chetty v Law Society, Transvaal*⁵. The *Chetty* case concerned a rescission at common law, which law is relevant when a rescission application premised on rule 16A of this Court is considered. Miller JA, while relying on the rules of the High Court, observed:

“The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31(2)(b) or Rule 42(1) but must be considered in terms of the common law which empowers the court to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition for many and various factors are required to be considered (see *Cairn's Executors v Gaarn* 1912 AD 181 at 186 per Innes JA) but it is clear that in principle and in the long standing practice of our courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defence which prima facie carries some prospect of success (*De Wet's case supra* at 1042; *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8).

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission

⁴ (1999) 20 ILJ 2326 (LC).

⁵ 1985 (2) SA 756 (A) at 764J-765E.

of a 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."

Evaluation.

[13] A legal practitioner who changes a postal address which was communicated to other parties as an address through which legal documents were to be served has a legal obligation to notify such parties that are likely to be adversely affected by such change, of the fact of such change. A secondary obligation entails taking precautionary measures that documents which are continually dispatched through that address are timeously collected for attention. To hold otherwise would be to encourage negligent and reckless conduct in the process of servicing legal documents in compliance with the rules of this Court to satisfy the basic common law principle of *audi alteram partem rule*.

[14] There is a limit beyond which a party may not successfully rely on the mistake of its legal practitioner. In this respect, it behoved of the applicant to have shown that that limit had not been reached otherwise it may be held liable even for the mistakes of the legal representatives of its choice. What however is of more concern in this case is that there was effective communication between the applicant and its attorneys up to 27 August 2010. This can be seen from the very evidence of the applicant that its attorneys issued a letter on that day to Makinta Attorneys, following a consultation the applicant had with them. The change of address of the attorneys has therefore not been shown to have had any

contribution to them not receiving correspondent for this matter. No date of such change was given for that matter. It is noticeable that the date of change of address of the applicant was given. Again the address change of the applicant had no bearing in this matter as it took effect in October 2009. In January 2010, the applicant received the initial review application papers and later the record of the arbitration hearing.

[15] During the presentation of this matter in Court, Mr Venter appearing for the applicant submitted that the rule 7 A (8) notice was never served to the attorneys of the applicant. The contrary was proved in Court, clearly to his amazement and surprise; Another indication that there was effective service of the papers by Mr Makinta.

[16] In terms of the rules of this Court therefore, the registrar was never, at the time of the set down of this application, obliged to notify the applicant of the date of hearing. Neither the rules of this Court nor a practice directive of this Court make any provision for the registrar to issue such a notice. This ground must accordingly fail.

[17] It is clear therefore that the version of the applicant has failed to give a credible account of why it did not file an answering affidavit. The change of addresses was not shown to explain the inactivity of the applicant and its attorneys. This is not a matter in which the order of this Court sought to be rescinded because of an order that was erroneously sought and erroneously granted in the absence of a party seeking rescission.

[18] The alternative relief sought in terms of rule 16A (1) (b) is then to be considered. The review application in this matter was considered by this Court. The grounds for review identified by the respondent were the main, if not the sole basis for the application. For the applicant to succeed in a rescission application, it had to show on a *prima facie* basis that its contribution to the review application had the potential of introducing another angle to the issues that court had to deal with and that there was a likelihood that a conclusion different from the one reached by court might inure. Granting rescission would be erroneous if the same results in the review application would be attained, whether the application is opposed or not. It has to be assumed, unless good cause is shown, that court applied its mind to all relevant review considerations for this matter. The silence of the applicant in this regard is deafening. This ground also stands to fall.

[19] In the consequence, the following order will issue:

1. The rescission application is dismissed.
2. The applicant is ordered to pay the costs thereof.

Cele J

Appearances:

For the Applicant : Advocate F Venter

Instructed by : Johannes De Beer Incorporated

For the Respondent: Mr. E.S Makinta of E.S Makinta Attorneys