



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR2528/09

In the matter between:

MEC DEPARTMENT OF EDUCATION

(THE PROVINCE OF GAUTENG)

Applicant

and

PAULA GUMBI

Respondent

In Re:

PAULA GUMBI

Applicant

and

SANTIE OOSTHUIZEN

First Respondent

EDUCATION LABOUR RELATIONS

COUNCIL

Second Respondent

MEC DEPARTMENT OF EDUCATION

(THE PROVINCE OF GRAUTENG)

Third Respondent

Heard: 24 October 2013

Delivered: 12 May 2014

Summary: The applicant's failure to apply for condonation of the late filing of a rescission application brought in terms of Rule 16 A (2) (b) may lead to the dismissal of the application for lack of jurisdiction.

Rescission application in terms of Rule 16 A (2) (b).

JUDGMENT

LALLIE, J

[1] This is an application for the rescission of a judgment granted in the absence of the applicant, reviewing and setting aside the first respondent's arbitration award. The relevant facts are that the respondent was employed by the respondent as an educator. Subsequent to her dismissal, she referred an unfair dismissal dispute to the second respondent. It was arbitrated by the first respondent who found the respondent's dismissal fair. The respondent challenged the first respondent's award on review and on 29 June 2012, this Court handed down a judgment reviewing and setting aside the arbitration award.

[2] On 20 September 2012, the applicant filed the present application. It is opposed by the respondent who raised a point *in limine* to the effect that the application stands to be dismissed as the applicant failed to apply for condonation, having filed the application outside the 15 day period prescribed in Rule 16 A (2) (b) of the Rules of this Court ("Rules").

[3] Rule 16 A which governs rescission applications provides as follows:

- '(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 any order or judgment -

- (i) erroneously sought or erroneously granted in the absence of any party 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 the result of a mistake common to the parties; or
- (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.
- (2) Any party desiring any relief under -
 - (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
 - (b) subrule 1(b) may within 15 days after acquiring knowledge of an order or judgment granted 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.'

- [4] The reason proffered on behalf of the applicant is that the judgment was granted in the applicant's absence and without the knowledge of either the applicant or her legal representative. The deponent to the founding affidavit, Mr Selowa (Selowa), the applicant's Director in the Labour Relations Directorate, testified that this application was triggered when he realised on 10 August 2012 that the respondent had obtained the judgment which is the subject matter of this application. He was informed by Pamba who inherited this matter shortly before the judgment was obtained that he never received a copy of the notice of set down. He therefore surmised that the applicant did not have knowledge that the matter had proceeded unopposed.
- [5] In the answering affidavit, the respondent took issue with the applicant's failure to apply for condonation when her application was filed later than the 15 day period prescribed in Rule 16 A (2) (b). In the replying affidavit, Selowa

specifically denied having failed to comply with Rule 16 A (2) (b) and explained that the 15 day period stated running from the day the applicant acquired knowledge of the judgment.

- [6] A determination needs to be made whether there was a need for the applicant to file an application for condonation of the late filing of this rescission application. The starting point of my enquiry is aptly stated as follows in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others*.¹

'The law relating to the content of affidavits generally

It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.'

- [7] An application for rescission should fail when there is failure to adequately explain why it was brought late². The Court further held that the magistrate lacked jurisdiction to determine the rescission application without granting condonation in respect of its later institution.
- [8] In the founding affidavit, the legislation in terms of which the rescission application was instituted is not disclosed. The effect of the omission is that issues between the parties were not defined fully. When the point *in limine* was raised, the applicant was presented with an opportunity of further defining the issues she intended relying on. When Selowa testified in the replying that the rescission application was not defective as there was no failure to comply with Rule 16 A (2) (b), he placed the rescission application without the realm of Rule 16A (2) (b). Had that not been the case, he would have identified the reason for pleading that it was not necessary to file a condonation application.

¹ 1999 (2) 279 at 323 F-G.

² See *Wright v Westelike Provinsie Kelders BPK* 2001 (4) 1165 (C) at para 29.

[9] A litigant's case is determined on its pleadings. Arguments need to be foreshadowed in the pleadings. It is impermissible for the applicant to raise arguments which are in variance with the pleadings. Once an election to place this application within the purview of Rule 16 A (2) (b) was made, the applicant was precluded from deviating from that election and argue that the application was brought in terms of the common law which does not limit the period within which it could be brought. The attempt to effect the change very late in the day is an attempt to escape the inescapable election the applicant made in the pleadings and the need to apply for condonation. The application was filed late and the applicant was required to comply with Rule 16 A (2) (b) and apply for condonation.

[10] Non-compliance with court Rules cannot be down played. The following *dictum* in *Grootboom v National Prosecuting Authority*³ is apposite:

'The language used in both *Van Wyk* and *eThekweni* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity.'

[11] The deponents to the applicant's affidavits could not tell whether the applicant received the notice of set down, taking into account who the applicant is. Selowa got to know of the judgment on 10 August 2012 and this application was brought on 20 September 2012. It was therefore filed late by nine days from the date Selowa acquired its knowledge. The applicant was, in the circumstances, required to have applied for condonation of the late filing of the application. She failed, thus denying this court the necessary jurisdiction to determine the application.

³ [2014] 1 BCLR 65 (CC) at para 34.

[12] The respondent sought costs against the applicant. Requirements of the law and fairness militate towards the granting of a costs order against the applicant. The applicant unreasonably proceeded with this matter causing the respondent to incur costs.

[13] In the premises, the following order is made:

13.1 The point *in limine* is upheld.

13.2 The application is dismissed with costs.

Lallie, J

Judge of the Labour Court in South Africa

Appearances

For the Applicant: Advocate K Molemoeng

Instructed by: The State Attorney

For the Respondent: Advocate Magano

Instructed by: Photoane Attorneys

LABOUR COURT