



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J631/12

In the matter between:

ADVANCE WAREHOUSING LTD

Applicant

And

ANNAH PRUDENCE MASHIGO

Respondent

Heard: 3 July 2014

Delivered: 22 January 2015

JUDGMENT

MOTHIBI, AJ

Introduction:

- [1] This is an application for the rescission of an order of this Court granted in the absence of the Applicant on 8 June 2012 in terms of which an arbitration award issued by the Commission for Conciliation, Mediation and Arbitration under case number GAJB5830/07 was made an order of this Court (“the award”). The award was made an order of this Court pursuant to an application brought by the Respondent in terms of section 158(1) of the Labour Relations Act 66 of 1995 (“the LRA”).

[2] The application for rescission has been opposed by the Respondent.

Analysis:

[3] In terms of the award issued on 16 May 2007, the Applicant was found to have unfairly dismissed the Respondent and was ordered to reinstate her.

[4] On or about 7 June 2007, the Applicant instituted review proceedings in this Court (which I have not had sight of). The Applicant's review application was dismissed by this Court in terms of a court order of 6 September 2011.

[5] On or about 12 March 2012, the Respondent instituted an application in terms of section 158(1) (c) of the LRA to make the award an order of court. The award was subsequently made an order of court on 8 June 2012. As I said above, it is the order of 8 June 2012 that is the subject matter of this application with the Applicant seeking to rescind it in circumstances where it was granted in its absence. The Applicant asks that the order be rescinded because "... there has never been proper notice served on the Applicant..."

[6] The issue to be determined is whether the Applicant has made out a sufficient case having regard to the applicable legal principles for an order rescinding the judgment of 8 June 2012. It is trite that a party in a rescission application must show good cause before rescission can be granted. In this regard the courts have interpreted good cause to mean that an applicant must provide it with:

- a. A reasonable explanation for its default;
- b. It must show a *bona fide* defence which evidences *prima facie* prospects of success.

[7] It is trite that the existence of both requirements must be met before an application for rescission can succeed. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), the court stressed that compliance with both requirements was necessary. It stated at page 765 D to E in respect of the interplay between both requirements:

‘It is not sufficient if only one of these requirement’s is met, for obvious reasons a party showing no prospects 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 one hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits...’.

- [8] The latter approach has been followed and endorsed by this Court in a number of cases. See *Feuilhenrade and Others v Mthimkhulu, Enforce Security Group (Pty) Limited v Mthimkhulu* (2003) 3 BLLR 213 (LAC) and by the *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC).
- [9] Accordingly, the Applicant’s application for rescission can only succeed if it has shown on its papers good cause by satisfying both requirements.
- [10] The Applicant has further sought in its notice of motion an order dismissing the Respondent’s main application, in the event of rescission being granted. It seeks the dismissal of the main application because of “undue delay” in the prosecution of the 158(1) (c) application which was brought five years after the award was issued. Furthermore, it seeks an order dismissing the Respondent’s main application because it alleges that the Respondent failed to comply with the terms of the arbitration award as ordered in that the Respondent failed to report for duty as ordered in the arbitration award. In this regard the Respondent was ordered to report for duty within seven days of the award being issued being on or before 26 May 2007 and, on the Applicant’s version, failed to do so.
- [11] In support of the above order, the Applicant has filed a supporting affidavit signed by its Operational Manager.
- [12] The Applicant alleges that it was not served with the section 158 application and that the only time it became aware of the application was when it received notification by way of a letter from the Respondent’s attorneys Ndumiso Voyi Incorporated on or about 12 May 2013 bringing the default court order to its attention and demanding compliance with it.

- [13] It alleges that attempts at settling the dispute between the parties pursuant to the letter from Ndumiso Voyi Incorporated failed to bear any fruit subsequent to which it investigated the circumstances around the default order being granted in its absence and discovered that the application had been served upon it purportedly on 12 March 2012 by way of telefax. The number used to effect service was (012) 666 7514. The Applicant does not deny that at all material times the fax number used to effect service belonged to it. It only states that the Respondent previously used a different fax number when it served the arbitration award on it, being (011) 331 2752. Later on, and by way of a replying affidavit, the Applicant states that fax number (012) 666 7514 was its “initial fax number used at its former premises”, but it did not receive “the said papers”.
- [14] The Applicant contends that in any event it has a *prima facie* defence to the Respondent’s application in circumstances where the award had, in terms of the Prescription Act, prescribed when the Respondent brought the section 158 application on 12 March 2012. It will be remembered that the award was issued on or about 16 May 2007 and, in accordance with submissions made by the Applicant, it prescribed in May 2010.
- [15] The Respondent has opposed the application for rescission. In the main, the Respondent contends that the Applicant has failed to proffer a reasonable explanation for its failure to oppose the section 158 application. The Respondent correctly points out that the Applicant does not deny in its affidavits that the fax number used to serve the section 158 application being fax number (012) 666 7514 belonged to it. I agree with the Respondent that the Applicant has failed to give this Court a reasonable explanation for its default.
- [16] The Applicant has failed to put sufficient facts before me to enable me to understand how it really came about that the default order was issued in its absence. In its founding affidavit, the Applicant simply states that the reason for its failure to oppose the application was because the application was served on fax number (012) 666 7514 without asserting that the fax number was incorrect alternatively that it did not belong to it. The Applicant merely makes the glib statement in its founding affidavit that the Respondent has

previously used a different fax number being the (011) 331 2752 when it served the arbitration award. This is not an explanation. The fact that the Respondent in serving the section 158 application used a fax number different to the one that it used when it served the arbitration award does not establish lack of “proper” service on the Applicant. It does not follow that by using a different fax number (012) 666 7514 that there has not been “proper service and notice” on the Applicant. If, as was deposed to by the Respondent in her affidavit of service accompanying the section 158 application, the court is satisfied that service was made on the Applicant by use of a correct fax number then, unless this assertion is pertinently denied the court must accept as a fact that fax number (012) 666 7514 belonged at all relevant times to the Applicant. The Applicant alleges at paragraph 17 of its supporting affidavit that ‘... there has never been proper notice served on it’. This is patently false based on the common cause facts that the fax number used belonged to the Applicant.

- [17] The fact that the Applicant does not dispute that the fax number used to serve the 158 application was correct was highlighted by the Respondent in its replying affidavit. It is only upon the Respondent pointing out that the Applicant did not deny that the fax number used was correct that the Applicant belatedly sought to expand on its explanation that there has been no proper service. Such an explanation is contained in the Applicant’s replying affidavit (paragraph 17 and 18). I find such an explanation insufficient and unreasonable to establish on a balance of probabilities that there had been no proper service of the section 158 application upon the Applicant, as it alleges.
- [18] It is clear that the fax number used at one point belonged to the Applicant. The Applicant only tells this Court that whilst the fax number at some point belonged to it, that it was at some later stage changed. The Applicant does not inform the court when this change took place which is an issue that is material to determining whether at the time that the Respondent alleges in her affidavit of service that she served the section 158 application on the Applicant that the fax number no longer belonged to the Applicant. There are no facts to second guess the Respondent’s affidavits of service stating that the notice of motion and affidavit in the section 158 application were served

on the Applicant by telefaxing to (012) 666 7514 on 12 March 2012 at 12h30. Furthermore, and pertinently there is no denial by the Respondent to this allegation.

[19] In the absence of any other facts to the contrary I accept that proper service was effected upon the Applicant in respect of the Respondent's section 158 application and reject the Applicant's allegation that '... there has never been proper notice served...'

[20] It was incumbent upon the Applicant to provide this Court with a sufficient and reasonable explanation to explain its failure to oppose the application giving rise to the order that it seeks to rescind. It has failed to do so. In the absence of a sufficient explanation, I am unable to come to the assistance of the Applicant by granting it rescission. The application is accordingly dismissed on this basis.

Costs:

[21] I see no reason why costs should not follow the results in this matter, in the circumstances, I order the Applicant to pay the costs of this application.

Order:

[22] WHEREFORE it is ordered as follows:

- i. The Applicant's application for rescission of the order granted by this Court on 8 June 2012 is dismissed.
- ii. The Applicant is ordered to pay the costs of this application.

Mothibi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Advocate K Maleka

Instructed by: Carrim Attorneys

On behalf of the Respondent: Advocate N Mbelle

Instructed by: Voyi Attorneys