



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR1873/09

**SHARON LETSOALO**

**Applicant**

and

**TIMOTHY BOYCE NO**

**First Respondent**

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**Second Respondent**

**MASTER CURRENCY (PTY) LTD**

**Third Respondent**

**BIDVEST BANK**

**Fourth Respondent**

**Heard: 12 February 2015**

**Delivered: 11 March 2015**

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**JUDGMENT**

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**EUIJEN, AJ**

**Introduction**

[1] This is a rescission application brought in terms of section 165(a) of the provisions of the Labour Relations Act, no. 66 of 1995 (the LRA) read with

Rule 16A of the Rules of the Labour Court. The order sought to be rescinded was made by this Court on 15 July 2010 (van Niekerk J), in the absence of the applicant. The order which was granted, dismissed the present applicant's review application brought, in its turn, against an award of the first respondent, sitting as a commissioner of the second respondent (the CCMA). There is also an application for condonation of the late filing of the rescission application. Both applications are strenuously opposed by the third and fourth respondents.

- [2] The applicant's attorney states that she first became aware of this Court's order on 22 December 2011, during a routine inspection of the court file to establish why the matter was taking so long to be set down. Despite this, the rescission application, incorporating the condonation application, was only launched on 4 April 2013. The intervening period was taken up by the pursuit of reasons for this Court's order and a fruitless application brought in terms of Rule 15 of the Rules of the Labour Court. That application was withdrawn shortly before the rescission application was launched.
- [3] As far as the rescission application itself is concerned, the principal ground advanced in support of the application is that this Court's order was "erroneously sought" within the meaning of section 165(a) of the LRA, read with Rule 16A(1)(a)(i), in that van Niekerk J was under the erroneous impression that the notice of set down had been received by the applicant's attorneys, whereas in fact it had not. That, on the authority of this Court in *CAWU v Federale Stene*<sup>1</sup>, and the cases which have followed it, is sufficient alone to grant rescission of judgment. In addition and in the event that the first ground is not upheld, the applicant contends that she has made out a case for "good cause" to rescind the order in terms of Rule 16A(1)(b), in that she was not in wilful default and her review application has good prospects of success on the merits.

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<sup>1</sup> (1991)(Pty) Ltd [1998] 4 BLLR 374 (LC)

## Condonation

- [4] As stated earlier, the order of this Court is dated 15 July 2010; the applicant's attorneys became aware of its existence on 22 December 2011; and thereafter the rescission and accompanying condonation applications were launched on 4 April 2013.
- [5] The period from 22 December 2011 and the next concrete step which the applicant's attorneys took in the proceedings, which was on 28<sup>th</sup> of September 2012 when an application in terms of Rule 15 for the re-enrolment of the matter was launched, is largely explained in the founding affidavit by their pursuit of this Court's reasons for the dismissal of the review application. On 3 August 2012, the applicant's attorney was advised by the judge's associate that the matter had been dismissed due to the absence of the applicant. Further investigation regarding the service of the notice of set down revealed that it had been faxed to a dedicated number used by an attorney who had left the applicant's attorneys employ. Thereafter the fax number was discontinued, although a system is in place for the re-routing of telefaxes sent to the discontinued number.
- [6] Acting apparently on advice received from a member of the Registrar's office, an application in terms of Rule 15 for the re-enrolment of the matter was made on 28 September 2012. Answering and replying affidavits were exchanged in that matter and it was persisted with until shortly before the launch of the rescission application when it was withdrawn on or about 27 March 2013.
- [7] Hence, as far as the period required by Rule 16A(1)(b) is concerned, which prescribes a period of 15 days after acquiring knowledge of the order within which to bring the rescission application, the delay is inordinate and amounts to almost 15 months. Rule 16A(1)(a) does not contain any time limit within which applications on its terms may be brought, but it is well established that such applications must be brought within a reasonable time.

- [8] Since the renowned decision in *Melane v Santam Insurance Co Ltd*<sup>2</sup>, it has been repeatedly decided that in an application for condonation, the factors to be taken into account are (a) an acceptable explanation for the failure to meet the requirements of the Rule; one of the most important aspects in that regard is that the applicant for condonation must show a determined effort to lay her case before the Court and not an intention to abandon it; and (b) good prospects of success in the matter.
- [9] Counsel who appeared for the third and fourth respondents has reminded me with reference to the decisions of the Labour Appeal Court in *NEHAWU v Nyembezi*<sup>3</sup> and *Moila v Shai NO & others*<sup>4</sup>, and this Court in *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home*<sup>5</sup>, that in order to succeed in a condonation application such as the present, the applicant is required to establish both that she has a reasonable explanation for the delay and, secondly, that she has prospects of success in the rescission application. Should she fail on either one of these legs, it becomes unnecessary to consider the other. In the submission of the third and fourth respondents' counsel, the applicant fails at the first hurdle, since there is no acceptable explanation for the delay.
- [10] A glance at the facts of the cases to which I have been referred by the third and fourth respondents' counsel reveals them to be egregious and not at all on a par with the present matter. In those cases there were lengthy periods of inactivity which were unexplained (as in *Nyembezi*) or the explanation tendered so outrageous as to be unworthy of consideration (as in *Moila*). *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home*<sup>6</sup> was overruled on this very point by the Labour Appeal Court because the merits involved a constitutional right, namely the right not to be discriminated against on the grounds of race. A similar allegation is made by the applicant in the present matter with regard to her HIV status.

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<sup>2</sup> 1962 (4) SA 531 (AD)

<sup>3</sup> [1999] 5 BLLR 463 (LAC)

<sup>4</sup> [2007] 5 BLLR 432 (LAC)

<sup>5</sup> [2003] 8 BLLR 781 (LC)

<sup>6</sup> [2004] 10 BLLR 979 (LAC) at 984 paras [24-25]

- [11] In the present matter, although the courses of action adopted by the applicant's attorney, in persisting with a request for reasons for the order and embarking on the Rule 15 application are to be criticised, it does not amount to the type of egregious inactivity displayed in the cases to which I was referred. Neither can it be said to amount to a non-explanation. I should also add that the applicant's attorney who dealt with this matter and whose conduct is the subject of much of this judgment is not the same attorney, although from the same firm, as the attorney who appeared for the applicant, Ms Thakor, who submitted helpful and able argument in support of her case.
- [12] Third and fourth respondents' counsel, Mr Mphahlan, embarked upon a distasteful criticism of the applicant's attorney's conduct, as well as that of her firm, going so far as to cast doubt on the veracity of the explanation given by the attorney on affidavit. There are no grounds, in my judgment, to doubt the veracity of the applicant's attorney's affidavit and I have no hesitation in rejecting those submissions out of hand. Third and fourth respondent's counsel is reminded that it is both unprofessional conduct to accuse a fellow officer of the Court of such serious misconduct without good grounds to do so and also that in the course of his career, the boot may well be on the other foot someday. He has already, in this unseemly attack on a colleague, displayed the same lack of judgment that he accuses the applicant's attorney of.
- [13] That the applicant's attorney's conduct of the matter is open to serious criticism is clear. In the first instance, it ought to have been immediately apparent to even a junior attorney on reading this Court's order, that if an application is dismissed in the absence of the applicant, then the appropriate remedy is rescission. The pursuit of reasons for the order ought not to have delayed such an application. In the event, the application was launched without any substantive reasons provided. The Rule 15 application was obviously pointless, since it applies only to matters struck off the roll. Its purpose is to achieve re-enrolment which was not possible in this matter since an order on the merits had been made. Finally, the applicant's attorney did not

(until a late stage) seek the guidance of more senior and experienced practitioners at her well-resourced firm, but instead followed the advice of an employee in the Registrar's office. All of this displays a lamentable lack of knowledge of the Rules of this Court, civil procedure in general, as well as a lack of professional judgment.

- [14] Third and fourth respondent's counsel submitted with reference to a plethora of pre-1994 High Court authority, that an attorney's ignorance of the Rules of Court constitutes an unacceptable explanation and stands to be rejected on this ground alone. The correct position is that where litigants themselves are blameless, the courts are reluctant to penalise them by refusing condonation on account of the conduct of their representative.<sup>7</sup> The leading case in this regard is still *Saloojee and Another NNO v Minister of Community Development*<sup>8</sup>. If one has regard to the whole of that judgment, rather than just the oft-quoted passage, it reinforces this principle, although it also sets an outer limit to its applicability. I have therefore set out a slightly longer version of the famous passage, to include some of what went before (at 141):

"This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney. A striking example thereof is to be found in *R v Chetty*, 1943 AD 321. In that case there was an even longer delay than here, and the excuses offered by the attorney concerned were clearly unsatisfactory, but the Court nevertheless granted condonation. FEETHAM, J.A., remarked (at p. 323):

'So far, however, as appeared from the papers before us, the applicant himself was not responsible for the delays which have occurred, save in so far as he continued to allow his case to remain in the hands of an attorney who had shown himself unworthy of his confidence, and, in view of the serious nature of the conviction recorded against the applicant, and of the fact that he was given leave to appeal by the Transvaal Provincial Division, the application for condonation is now granted.'

<sup>7</sup> *Rose v Alpha Secretaries Ltd* 1947 (4) SA 511 (AD) at 519; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para [10]

<sup>8</sup> 1965 (2) SA 135 (A)

"In *Regal v African Superslate (Pty.) Ltd.*, 1962 (3) SA 18 (AD) at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd.*, *supra* at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are

strong prospects of success (*Melane v Santam Insurance Co. Ltd.*, 1962 (4) SA 531 (AD) at p. 532)."

[15] In the present matter, I do not consider that the ineptitude of the applicant's attorney can be imputed to the applicant herself. The applicant would have been assured that her matter was receiving the necessary attention and she could have been provided with considerable documentary evidence that this was the case, both in the form of recorded attendances at the Registrar's office in the (fruitless) pursuit of reasons and the Rule 15 application itself. Consequently, the applicant would not have known how misguided the steps taken on her behalf were.

[16] In short, this is not, in my judgment, a matter which can be rejected on the explanation tendered for the delay alone. I should also consider the prospects of success. A reminder of the ordinary approach taken from the judgment in *Melane v Santam Insurance Co.* (at 532) is apposite in this regard:

"Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay."

[17] This Court has in the past condoned substantial delays in circumstances of attorney neglect and ineptitude, where it was held to be outweighed by strong prospects of success<sup>9</sup>. Similarly, as appears below, the applicant has very strong prospects of success in respect of her section 165(a) or Rule 16A(1)(a) application, which accordingly compensates for the deficiencies in the attorney's conduct, which, in any event, I have already held, cannot be

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<sup>9</sup> See *NUMSA & others v Eberspächer SA (Pty) Ltd* [2003] 8 BLLR 804 (LC)

imputed to the applicant. Condonation is therefor to be granted for the late filing of the rescission application.

## Rescission

- [18] As stated earlier, the principal ground advanced in support of the rescission application is that this Court's order was "erroneously sought" within the meaning of section 165(a) and Rule 16A(1)(a)(i), in that van Niekerk J was under the erroneous impression that the notice of set down had been received by the applicant's attorneys, whereas in fact it had not. That, on the authority of this Court in *CAWU v Federale Stene*<sup>10</sup>, and the cases which have followed it<sup>11</sup>, is sufficient alone to grant rescission of judgment<sup>12</sup>.
- [19] Third and fourth respondent's counsel submitted that as there was proper service of the notice of set-down in terms of the Rules, this is determinative of the matter. It isn't. A fax transmission report is no more than *prima facie* proof that the transmission has been sent. It can be rebutted by other evidence to show that the transmission was not received<sup>13</sup>. This has been convincingly demonstrated in this case and I find that third and fourth respondent's counsel's contentions to the contrary to be without foundation.
- [20] I accordingly find that the applicant has made out a case for the order of this Court to be rescinded on the grounds that it was "erroneously sought" within the meaning of section 165(a) read with Rule 16A(1)(a) of the Rules. This conclusion renders it unnecessary for me to consider whether the applicant has shown "good cause" in terms of Rule 16A(1)(b) of the Rules of this Court.

<sup>10</sup> (1991)(Pty) Ltd [1998] 4 BLLR 374 (LC)

<sup>11</sup> *Bayete Security Holdings v Mokgadi & others* [2000] 9 BLLR 1020 (LC); *Romani Plant Hire CC & Another v SASTWU & Others* [2001] 8 BLLR 961 (LC); *Electrocomp (Pty) Ltd v Novak* [2001] 10 BLLR 1118 (LC); *Roux v City of Cape Town* [2004] 8 BLLR 836 (LC)

<sup>12</sup> See *F & J Electrical CC v MEWUSA obo E Mashatola and Others* [2015] ZACC 3 (CC)

<sup>13</sup> *Halycon Hotels (Pty) Ltd t/a Baraza v CCMA & others* [2001] 8 BLLR 911 (LC); *Roux v City of Cape Town* [2004] 8 BLLR 836 (LC)

[21] Finally, third and fourth respondent's counsel submitted with reference to *Lumka & Associates v Maqubela*<sup>14</sup>, that the Labour Appeal Court has already held that where there has been proper service in terms of the Rules, it cannot be said that there is an acceptable explanation for the default. That case was decided in terms of Rule 16A(1)(b) and does not affect the conclusion which this Court has reached in regard to the interpretation of Rule 16A(1)(a).

## Conclusion

[22] It follows from the reasons given in this judgment, that the rescission application must succeed. Ordinarily, as the applicant has sought indulgences from this Court on two fronts, I would be reluctant to award her any costs. However, in the present matter, there has been vigorous opposition by the third and fourth respondents, which has been of the shotgun variety, replete with unfounded, unseemly and intemperate accusations directed at a fellow officer of this Court and her firm. Had the opposition been more discerning, focused and principled, my order as to costs would have been different. In the event, the respondents have not hit the mark with any of their missiles. In these circumstances, it seems to me equitable and just that costs should follow the result and I intend to grant the applicant her costs.

## Order:

The order of this Court is:

- I. Condonation for the late filing of the rescission application is granted.
- II. The order of this Court dated 15 July 2010 under the above case no. is rescinded in terms of section 165(a) of the Labour Relations Act, no. 66 of 1995, read with Rule 16A(1)(a).

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<sup>14</sup> (2004) 25 ILJ 2326 (LAC)

- III. The Registrar is directed to re-enrol the review application for hearing on notice to all parties on record.
- IV. The third and fourth respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of both applications.

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Euijen, AJ

Acting Judge of the Labour Court of South Africa

**APPEARANCES:**

On behalf of the Applicant: Ms A Thakor of Webber Wentzel Attorneys

On behalf of the Respondent: Adv JS Mphahlani

Instructed by: \_\_\_\_\_

LABOUR COURT