



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J2921/12

Not Reportable

In the matter between:

BMG HYDRAULICS T/A GOLDQUEST INTERNATIONAL

Applicant

And

ELLIOT THEMBA RADEBE

Respondent

In re:

ELLIOT THEMBA RADEBE

Applicant

And

BMG HYDRAULICS T/A GOLDQUEST INTERNATIONAL

Respondent

Heard: 08 July 2015

Delivered: 10 July 2015

Summary: Rescission of Court Order

JUDGMENT

LEPPAN, AJ

Introduction

- [1] An Application was instituted by the Respondent in terms of Section 158(1)(c) of the Labour Relations Act, 66 of 1995, as amended ("the LRA") to have an arbitration awarded, handed down by a commissioner of the CCMA, made an Order of Court. The Applicant seeks a rescission of such Order which was handed down by this Court on 18 December 2013.
- [2] The Respondent was employed by the Applicant on 11 May 2011 as a semi-skilled artisan.
- [3] On 6 March 2012 the Respondent was suspended on pay for driving a vehicle without a license.
- [4] The Respondent referred a dispute about an unfair suspension to the CCMA where he received an award in his favour which provided:
- "[20] The suspension of the applicant by the respondent was substantively unfair.*
- [21] The respondent is ordered to lift the suspension and allow the applicant to resume his normal duties on the same terms and conditions existed (sic) prior to his suspension on 6 March 2012. The respondent is further ordered to pay the applicant back payment for the period not at work totalling R20 484.40*
- [22] The [applicant] must report for duty on 04 June 2012 at BMG Hydraulics (Sasol premises).*
- [23] The amount mentioned in paragraph 22 must be paid by the respondent no later than 22 June 2012..."¹*
- [5] Reference to "applicant" in the above quotation is to the Respondent in these rescission proceedings before this Court and reference to "the respondent" is to the Applicant herein.

¹ The Arbitration Award Page 5.

Summary of the Arguments

[6] The Order of the Labour Court is dated 18 December 2013 ("**the Order**").

6.1 The Order provides that -

"1. The arbitration award dated 20 May 2012, issued under case number MP2888-12 is made an order of Court in terms of Section 158 (1) (c) of the Labour Relations Act 66 of 1995.

2. There is no order as to costs."

[7] The Applicant contends that it only became aware of the Order on 1 April 2014 when the Respondent's attorney sent same annexed to a letter demanding action on it the same day.

[8] The Applicant contends that at all times it intended to oppose the above application upon learning that the Respondent had apparently initiated that step. However, the Applicant had received no notices nor a copy of the application from the Respondent despite correspondence requesting same and dated -

8.1 22 October 2013; and

8.2 24 October 2013;

8.3 25 October 2013.

[9] The Respondent's attorney did not see fit to reply to this correspondence apparently on the basis that his client had pursued the matter further and the Court file was already before a Judge in Chambers. The Respondent's attorney said he had no access to the file and that he did not have a copy of his client's section 158(1)(c) application, this despite the fact that he had placed himself on record in the matter on 7 October 2013. None of these developments were brought to the attention of this Court before the Order was granted.

[10] In spite of this, the matter proceeded on the unopposed role but was not heard in open Court but in Chambers before the Honourable Judge E. Molahleni.

[11] In the Applicant's heads of argument reference is made to the legal test for a rescission application and to the case of *Superb Meat Supplies CC v Maritz (2004) 25 ILJ 96 (LAC)*², which sets out the following requirements regarding the rescission an Order -

11.1 the Applicant must give a reasonable explanation for its default;

11.2 the application must be *bona fide*; and

11.3 it must be shown on a *prima facie* basis that the Applicant has reasonable prospects of success in the main application, in that there must have been a defence which existed at the time.

[12] This latter requirement is essential in light of the most recent decision of the Labour Appeal Court in *Professional Transport Workers' Union v Malema and Others (JA67/12 [2014] ZALAC 53: dated 7 October 2014)*.

[13] In providing an explanation for its default, the Applicant argues that it had not received notice of the application, despite having requested same on three separate occasions (as listed above). The Applicant further attempted to locate the court file, but was unable to do so, and that despite the request for the notices. The Respondent did not dispute that the Applicant was unaware of the application.

[14] The Applicant further argues that: "*Where a fact exists which would have precluded the granting of the order or a fact which would have induced a Judge not to grant the order exists, and that fact was unknown to the Judge at*

² This decision was later followed in the case of *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metal Box t/a MB Glass (2005) 26 ILJ 92 (LC)*.

*the time of the granting of the order, any order granted is erroneously granted.*³

- [15] In arguing that the main application has good prospects of success, the Applicant states that it had fully complied with the arbitration award in having made full payment of the compensation to the Respondent but that he had failed to report for duty, whereafter the Respondent was held to have absconded.
- [16] The Respondent argues that the Applicant failed to deny receipt of the Respondent's section 158(1)(c) application and contends, in his heads of argument, that he did serve the notice of motion and founding affidavit via facsimile on the Applicant.⁴
- [17] Proof of service is contained as an annexure to the Respondent's answering affidavit, marked "RB", which is dated 5 August 2013. Reference is made to the application being served on one "Amanda" by the Respondent and his attorney. No clarity is provided as to who Amanda might be or whether she was in a position of authority in the Applicant's business.
- [18] The Respondent goes on to argue that at no point did the Applicant indicate that it wished to oppose the section 158 (1) (c) application. With respect, this is disingenuous in view of the numerous requests for documents and information made by the Applicant.
- [19] Further, the Respondent argues that the Applicant never sought to review the arbitration award and that: *"The Applicant failed to seek the review of the Award and as such there was/is no action brought by the Applicant setting out that the Award was unreasonable and as such it must comply therewith."*⁵
- [20] Argument is further made that there is no defence mentioned by the Applicant which would have prevented the Award being made an order of this Court. The Applicant has pre-empted the execution of the Award by paying the back

³ The Applicant's Heads of Argument, at para 3.8, where reference is made to the decisions of Enzo Panelbeaters CC v CCMA & Others (1999) 20 ILJ 2620 (LC) and Sherwood Strategic Advertising CC v Scott (2001) 22 ILJ 2046 (LC).

⁴ The Respondent's Heads of Argument at para 18.

⁵ The Respondent's Heads of Argument at para 23.

pay ordered. It requested the Respondent to report for work, but he decided not to as he had been "chased away" from the Applicant's premises on 4 June 2012. This is a fact disputed by the Applicant.

[21] With regard to the prospects of success in the matter the Respondent argues that the only allegation made to this effect by the Applicant is that the Respondent did not report for duty. It is argued that: *"The problem with this allegation is that same is not a defence to a section 158 (1) c) application, it is only a defence to a contempt of court application – As set out in a section 158 (1) (c) application the Court cannot look at the merits only whether or not there has been compliance with the Award/Settlement Agreement."*⁶

[22] In conclusion the Respondent submits that there is no prospects of success in the opposition of the section 158 (1) (c) application and therefore there is no need to rescind the Order.

Analysis

[23] In considering whether the application is opposed or not, the first port of call is whether there was proper and effective service of the notice of motion and founding affidavit of the section 158 (1) (c) application. As noted above it is stated in the Respondent's answering affidavit that proper service had been effected.

[24] It would not be proper to accept this evidence as proof of service in light of the three separate letters which were sent to the Respondent's attorney requesting information in connection with or service of the "notices", to which no response was forthcoming. No attempt was made by the Respondent's attorney to assist the Applicant when he knew that access to the Court file was not possible so he just abandoned and left matters pending.

[25] Further, if one accepts that proper service had been effected initially and three letters requesting service were sent, the Respondent's attorney, as an officer of this Court, would be required to investigate and at the very least assist in

⁶ The Respondent's Heads of Argument at para 32, where the Respondent refers to the decision of FAWU and Others v Cape Hospitality Services t/a Savoy Hotel (Case no: C540/08; Heard: 30 January 2014 Delivered: 2 February 2014).

locating and providing the Applicant with the pleadings and even alert the Court to that dilemma in an endeavour not to have the matter considered on the unopposed role. There appears to have been an abuse of Court process, resulting in further unnecessary litigation which further burdens this Court.

[26] I accept that the only discretion this Court has is to make the arbitration award an Order of this Court or not to do so. I refer to *SA Post Office Limited v CWU* (2013) 12 BLLR 1203 (LAC) at paragraphs 21-22.

[27] The discretion must be judiciously exercised. I am not prepared to exercise that discretion in the Respondent's favour where I am alerted to the Applicant wanting to understand the litigation against it and wanting to be afforded the opportunity to consider the Respondent's application, which it did not have in its possession, and was denied access to same. These facts were not before the Court on 18 December 2013 when Molahlehi J considered the matter in Chambers and on an unopposed basis. It points to undesirable conduct by the Respondent's attorney and for that reason the rescission application should be granted.

Order

1. The Rescission is granted.
2. No Order as to Costs

Leppan, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: A Bosch

Instructed by: Snyman Attorneys

For the Respondent: A. Goldberg

Instructed by Goldberg Attorneys

LABOUR COURT