



Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2988/14

In the matter between:

AIM INVESTMENTS (PTY) LTD T/A

PONGOLA HOSPITAL

DR M PRAMCHAND

and

SOLIDARITY obo STEENKAMP & 3 OTHERS

FIRST APPLICANT

SECOND APPLICANT

RESPONDENT

Heard: 5 November 2015

Judgment delivered: 11 November 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to rescind an order made by this court on 25 May 2015 when settlement agreements entered into between the first applicant and the persons on whose behalf the respondent (the union) acts were made orders of court in terms of s 158 (1) (c) of the LRA. The rescission application was preceded by an application to stay the enforcement of the order dated 25 May 2014. On 1 September 2015, the court granted an order in terms of which the application to stay and the rescission application were to be heard simultaneously.

Factual background

- [2] The material facts are a matter of common cause. During February 2012, the business that comprised the Pongola Hospital was transferred to the first applicant as a going concern in terms of s 197 of the LRA. During June 2014, the hospital entered into negotiations with its employees regarding voluntary severance packages. The three persons on whose behalf the union acts (the employees) volunteered to leave the applicant's employ. On 26 June 2014, the first applicant, with the second applicant signing as surety, entered into settlement agreements with the employees in terms of which the latter confirmed their applications for voluntary severance packages and agreement to certain payments in consideration therefor.
- [3] In essence, the settlement agreements make provision for the payment of severance pay, leave pay, notice pay, and confirm the date on which employment will terminate. The significance of this, of course, is that these are all

statutory payments which the first applicant is obliged to make in terms of the Basic Conditions of Employment Act (BCEA). It is not disputed that the applicants have failed and/or refused to make payment to the employees in terms of the settlement agreements.

Condonation

- [4] The application to rescind was filed on 28 August 2015. The applicants became aware of the court order on 1 July 2015. In terms of the Rule, they were obliged to file the rescission application within 15 days, i.e. by 22 July. The application was filed a month late; the applicants have applied for condonation.
- [5] In support of the application for condonation, filed only on 5 November 2015, the deponent to the founding affidavit contends that condonation is unnecessary, since the application for rescission was served by email on the respondent on 14 July 2015.
- [6] There is no merit in this submission. The Rules of this court do not permit service by email. In any event, what the Rules require is delivery of the application in the form of service on the respondent party and filing with the registrar of this court. Even if it can be said that the application was served by email, it was not delivered in sense of service on the respondent in compliance with the Rules and filing in this court until 28 August 2015.
- [7] It is incumbent on the applicants to satisfy the court that they should be extended the indulgence of condonation for the late filing of the application for rescission. This requires the applicants to provide a satisfactory explanation for the delay (having regard to the extent of the delay) and to persuade the court of their prospects of success in the main action. As the Constitutional Court said in *Grootboom v National Prosecuting Authority & another* 2014 31 ILJ 121 (CC):

[23] It is now trite that condonation cannot be had for the mere asking. A seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for

the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

An applicant that relies on the negligence of his or her attorney should not assume that condonation is there for the taking – it is incumbent on the applicant to make out a case for condonation on that basis of the above principles. Further, the application for condonation must be filed as possible after the applicant becomes aware of the failure to comply with the Rules. Both these principles were affirmed in *Darries v Sheriff, Magistrate's Court, Wynberg and another* 1998 (3) SA 34 (SCA) where Plewman JA held:

Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realizes that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.

- [8] The delay in the present instance is not inordinate. Insofar as the explanation for that delay is concerned, the only explanation proffered by applicants is that they gave instructions to their former attorneys of record, Mnqobi Mkhize & Associates, to oppose the rescission application and were advised that this had been done. It later transpired that the application had not been opposed and that the respondent had obtained an order by default against the applicant. The applicants contend that this was through no fault of their own and that their intention had always been to oppose the application.
- [9] In my view, this is an insufficient explanation for the delay. It is precisely the same reason proffered by the applicants in relation to the rescission application, where they explain that they were not in willful default because their attorney

failed to execute their instructions by failing to oppose the application in terms of s 158 (1) (c). A reasonable litigant in these circumstances would have been sufficiently diligent to ensure that the application for rescission was timeously filed. In the absence of a satisfactory explanation for the delay in filing the application for rescission, condonation stands to be refused. In so far as the applicants seek to rely on correspondence between their erstwhile attorney of record and the respondent that postdates the order sought to be rescinded and which indicates that the latter recorded that it was awaiting the applicants' reply to the respondent's statement of claim, it is manifestly clear that this correspondence related to another matter and had no bearing on the s 158 (1) (c) application. This is no more than a further indication of the lackadaisical attitude adopted by the applicants to their business affairs. Further, the applicants do not explain why they filed the application for condonation on 5 November 2015, the day of the hearing. The applicants were represented in court by their current attorney of record on 1 September 2015 when the present application was postponed. They ought to have appreciated at least by then that the application to rescind had been filed late and that condonation was necessary. In short, the explanation for the delay in filing the application to rescind is unsatisfactory.

- [10] Even if I am wrong in coming to that conclusion, in my view, the applicants have failed to establish a *prima facie* case in the main application. The application to rescind is brought in terms of Rule 16A (1) (b). That provision requires an applicant to show good cause, in the form of the absence of any wilful default on the part of the applicant and the existence of a bona fide defence. In regard to the former, a party seeking rescission must present a reasonable and acceptable explanation for the default; in regard to the latter, the applicant must establish a bona fide defence which carry some prospects of success. Both of these requirements must be met – a party showing no prospects of success on the merits will fail in an application to rescind no matter how reasonable and convincing explanation of the default (see *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)).

- [11] The consequences of an attorney's neglect or ineptitude may serve to exculpate an applicant an application for rescission, but it is incumbent on the applicant to explain why neglect or ineptitude ought not to be imputed to him or herself. This the applicants have failed to do. In relation to the second leg of the enquiry, the applicants contend that certain misrepresentations were made by the employees concerning unpaid leave days due to them. The severance package agreements, they contend, were entered into in consequence of these misrepresentations and that the agreement is invalid. In my view, this defence has no merit, and fails even to meet the threshold of a bona fide defence. In terms of the BCEA, it is incumbent on an employer, on termination of employment of an employee, to pay the employee the value of annual leave accrued but not taken. It is not for the employee to make representations regarding the leave that he or she is owed. This is a matter most often the subject of records kept by the employer. In any event, if any discrepancy is established, the value of accrued leave is a matter that is capable of easy resolution. An employer is not permitted, as the applicants have, to withhold all of the statutory payments due on termination simply because after making payment of one of them, it contends that the employee made misrepresentations in respect of one of them.
- [12] In so far as the relative prejudice to the parties is concerned, while it is correct that the applicants will be debarred from pursuing their application to rescind the s 158 (1) (c) order, they have themselves and their failure to attend with due diligence to the litigation that they initiated to blame. The respondent and its members on the other hand, have an interest in certainty and in the expeditious resolution of their dispute. In my view, the latter trumps. In *Makuse v CCMA & others* (JR 2795/2011, unreported, Myburgh AJ said the following:

Labour law litigation is unique in that it takes place within a system designed to ensure the effective (and thus expeditious) resolution of labour disputes – this being one of the primary objects of the LRA. The need for this, and the implications of delays, were explained as follows by Ngcobo J in *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC):

The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. *These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years.* (Emphasis added.)

- [13] What this judgment emphasizes in the policy consideration that underlies the statutory purpose of expeditious dispute resolution. The employees volunteered for severance packages. Those were agreed with the first applicant. The grounds on which the applicants now seek to withhold payment are tenuous, if not spurious. The applicants have lost their employment and the delay in payment of their agreed severance packages, on which they no doubt depended when agreeing to terminate their employment with the first applicant, has been inordinate. This is not a matter that should be further delayed by the applicants' ineptitude.
- [13] For the above reasons, in my view, the application for condonation stands to be dismissed. There is no reason why the respondent ought not to be entitled to its costs.

In the result, I make the following order:

1. The application to condone the late filing of the application to rescind the order made by this court on 25 May 2015 is dismissed.
2. The application to stay the writ of execution issued on 28 July 2014 is dismissed.
3. The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the reasonable costs incurred by the respondent in opposing the application for condonation, the application for rescission and

the application to stay the writ of execution issued by the Registrar on 28 July 2015.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Mr H Pretorius, Macgregor Erasmus Attorneys

For the respondent: Union official