



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

~~Reportable~~/Not Reportable

Case no: JR 2351/2013

In the matter between:

WEPU obo PILLAY, GEEVANAYAGI

Applicant

and

JOINT AID MANAGEMENT (JAM) INTERNATIONAL

Respondent

Heard: 2 July 2015

Delivered: 13 November 2015

Summary: Rescission – default judgment – condonation for late filing thereof. Unacceptable explanation for inordinately long delay in bringing rescission. Reliance on negligence of attorneys and labour consultants: principles restated. Very little prospects of success on review. Application dismissed.

JUDGMENT

Bank AJ;

- [1] The respondent in this matter, Joint Aid Management International (“JAM”) seeks an order of rescission of a default judgment granted on 18 December 2013 by the Honourable Justice Molahlehi, in which he made the arbitration award dated 8 October 2013 under case number GAJB10590-13 an Order of Court.
- [2] Although the notice of motion in the rescission application does not state so explicitly, it is alleged in the founding affidavit that the rescission application has been brought in terms of section 165 of the LRA, read with Rule 16A(1)(b) of the Labour Court Rules. In terms of this section, such an application is brought where it is alleged that a default judgment was erroneously sought or erroneously granted in the absence of an applicant affected by that judgment, or a judgment in which there is an ambiguity, obvious error or omission or where such judgment has been granted as the result of a common mistake.
- [3] Rule 16A(1)(b) allows a court, in addition to any other powers it may have, and on the application of any affected party, to rescind any order or judgment granted in the absence of that party. An application under Rule 16A(1)(b) must be brought within 15 days after acquiring knowledge of the order or judgment granted in the absence of that party. Once this has been done, the court may, upon good cause shown, set aside the order or the judgment on such terms as it deems fit (Rule 16A (2)(b)).
- [4] It is by now trite that in order to show good cause for rescission an applicant must provide a reasonable explanation for its default. Before doing so, however, it is appropriate that I briefly set out the factual background to the arbitration award and subsequent default judgment.

The arbitration award

- [5] The arbitration award was issued by Commissioner Francois van der Merwe (“the Commissioner”) who found that the applicant in this matter, Pillay, had been dismissed in a substantively unfair manner. He ordered that Pillay was to be reinstated into JAM’s service with effect from the date of dismissal, being 15 April 2013, with no loss of service, on terms and conditions no less favourable than those which applied at the time of her dismissal and ordered back pay in an amount of three months’ remuneration calculated at R70 000,00 per month.
- [6] It appears that Pillay was previously employed by JAM as its general manager until her dismissal after a disciplinary enquiry into her misconduct, on 15 April 2013. According to the arbitration award, the matter had been set down for hearing on 30 September 2013 at the Johannesburg Offices of the CCMA. Pillay was represented by Mr M Dawson, a union official, and JAM by Mr P Bekker (“Bekker”), an employers’ organisation official.
- [7] The award records that JAM had requested a postponement of the matter because its representative, Bekker, had to attend another arbitration at the same date and time. It appears that application in writing for such postponement had been made quite some time prior to the hearing date, as well as a number of telephonic contacts with the CCMA, all to no avail. Pillay, for her part, opposed the postponement.
- [8] On the date of the hearing and after hearing both parties, the Commissioner dismissed the application for postponement and provided his reasons for so ruling. He stated that he was unconvinced that JAM had done enough to attempt to obtain Pillay’s agreement to the postponement. He was, furthermore, unconvinced that JAM could not have obtained another representative from its employers’ organisation (other than Bekker) to represent it at the arbitration. He noted that there had also been other delays and a consolidation procedure. Finding that the reasons advanced for

postponement were insufficient and that Pillay's prejudice was growing, the Commissioner, citing the interests of justice, ruled against the postponement.

- [9] In his award the Commissioner goes on to state that, prior to dismissing the postponement application, he granted an opportunity for the parties to conduct discussions to attempt to resolve the matter and for JAM to call its witnesses or arrange another representative. Ultimately, Bekker indicated that he was not in a position to present JAM's case and then left the proceedings. The arbitration then continued in his (and JAM's) absence and the Commissioner proceeded to hear Pillay's evidence.
- [10] Testifying on her own behalf, the award records that Pillay had stated that she had been employed as JAM's general manager for South Africa with a gross monthly remuneration of R70 000.00. After being served with a notice to attend a disciplinary enquiry on 11 March 2013, Bekker had come to see her and offered her a 3-month severance settlement, giving her 30 minutes to think about it. Although she had asked for a copy of the proposed agreement Bekker was not prepared to give this to her. After consulting with her union, Bekker handed her a letter of suspension dated 13 March 2013.
- [11] On the same day, Pillay attended her disciplinary enquiry but her union representative was excluded therefrom. Pillay refused to plead and a plea of not guilty was entered on her behalf. According to her, no witnesses were brought in to testify against her. It appears from the arbitration award that Pillay chose not to participate any further in the proceedings. It is not clear whether she remained in the hearing or simply chose not to participate as evidence against her was led.
- [12] On 19 March 2013, she received a report from the chairman of the enquiry and a sanction of dismissal was issued to her on 14 April 2013, with her last day of work being 15 April 2013. She referred both an unfair suspension and unfair dismissal dispute to the CCMA.

- [13] The award records that Pillay informed the Commissioner that she had been an above average performer and received bonuses. She vehemently denied the allegations against her. The papers in this matter are silent as to what these allegations might have been. I have trawled the record and am unable to find so much as a charge sheet against Pillay. Be that as it may, Pillay believed that there had been an ulterior motive in dismissing her and stated that the dismissal had damaged her career. She, however, believed that reinstatement was appropriate because any issues between her and JAM could be resolved professionally.
- [14] The Commissioner found that Pillay's suspension was not unlawful and that it is generally not improper for even senior employees to be suspended if there is reason to believe that they might tamper with or influence an investigation. He found that the period of suspension had not been unduly long and had been on full remuneration. To this extent he dismissed her unfair suspension dispute.
- [15] With regard to the procedural fairness of her dismissal, the Commissioner found that Pillay had not been prejudiced in that she had sufficient information of the allegations against her and that the general gist of these allegations was reasonably clear, especially for someone at her level of seniority. Moreover, the Commissioner was not convinced that Pillay had been unduly prejudiced by the exclusion of her union representative at the disciplinary enquiry, finding that she was quite capable of defending herself. He stated that Pillay had freely and voluntarily chosen not to participate further in the internal hearing after her union representative had been excluded. He therefore found there to be no procedural unfairness.
- [16] With regard to substantive fairness, he found, on Pillay's unchallenged evidence, that there was no evidence of misconduct presented against her and that her dismissal had been substantively unfair. The Commissioner considered the appropriateness of reinstatement and accepted Pillay's version that any points of disagreement between her and the managing director were

“not insurmountable and could well be resolved on a professional basis”. He exercised his discretion against ordering full back pay, stating that this was not warranted in view of Pillay’s decision not to participate in the disciplinary hearing *“which arguably may have turned out differently had she stayed on and presented her side of the story”*. He therefore ordered reinstatement with three months’ back pay.

The enforcement application and order

[17] Pursuant to the arbitration award in her favour, Pillay then launched an application in terms of section 158(1) (c) of the Labour Relations Act, 66 of 1995 (“the LRA”) seeking that this arbitration be made an order of court (“the enforcement application”). As part of this application, Pillay deposed to an affidavit in support of proof of service on JAM, stating that she had served the notice of motion, affidavits and annexures on JAM at 08h56 on 18 October 2013 by telefaxing these documents to fax number (011) 548 3948 and telephonically confirming receipt of the entire fax transmission with one Lebo Tumelo on telephone number (011) 548 3914 on the same date. She attaches a fax transmission report showing successful transmission of 12 pages taking some five minutes and 37 seconds at this time. The arbitration award is attached to this application as annexure “X”.

[18] It appears that there is no dispute that JAM indeed received this application as the deponent to the affidavit in support of the rescission application, Hanlie Joubert (“Joubert”), JAM’s Human Resources “Generalist” (whatever that might mean) states that she forwarded the application to Merri Wilson of Labouraide, JAM’s labour consultants. Joubert attaches a copy of the relevant email as evidence of this. It appears that Bekker is also an employee of Labouraide and he in turn confirms that he forwarded this application to Sean Simpson of Simpson Attorneys, who had by then also been instructed to launch an application for the review of the default arbitration award. It then appears that a review application under case number JR 2472/2013 was indeed launched by JAM on or about 21 November 2013.

[19] It does not appear that there was any application to stay the enforcement of the arbitration award, nor was any opposition to the enforcement application itself noted prior to its being set down for hearing before Molahlehi J on 18 December 2013. Accordingly, on 18 December 2013, the learned judge, in chambers, made the arbitration award an order of court.

[20] JAM was obviously unaware that such an order had been granted because, early in the New Year and on 10 January 2014, it served its answering affidavit opposing the enforcement application. This affidavit was deposed to by the aforesaid Bekker, who states that the grounds of opposition are that it would be a miscarriage of justice should JAM be compelled to reinstate Pillay "in light of the serious nature of the misconduct engaged in by her which gave rise to her dismissal" but gives no details of this alleged serious misconduct. Furthermore, he states that the arbitrator's decision to refuse the postponement sought, as well as the order of reinstatement made by the Commissioner, caused the balance of convenience to favour JAM and that the application ought to have been dismissed with costs, alternatively, stayed pending the determination of the review.

Condonation application

[21] JAM then brought an application for condonation for the late bringing of the rescission application. In a supporting affidavit filed on behalf of JAM by its previous attorney, David Morgan ("Morgan") it is stated that JAM only became aware of the order that had been granted against it in terms of section 158(1)(c) on or about 15 October 2014. I note in passing that this is some 10 months after the granting of the order by Judge Molahlehi. He goes on to state that the application for rescission was duly prepared after consultation with Joubert and filed with the registrar on 30 October 2014. However, and owing to difficulties in serving the application on Pillay (which are detailed in this affidavit) and further difficulties with Pillay's union when it was attempted to fax a copy of the rescission application to them, Morgan's offices resorted to the services of the Sheriff: Johannesburg East in order to attempt to serve a copy

of this application on Pillay. It was only when Pillay finally agreed to meet Morgan at Eastgate Shopping Centre on 11 November 2014 that he was able to personally serve a copy of the rescission application upon her.

[22] It is therefore clear that JAM relies upon the inattentiveness of its first set of attorneys, Simpson Attorneys, in timeously opposing the application in terms of section 158(1)(c). Indeed, Joubert states (para 31 p 8 of the founding affidavit) that "Simpson's apparent lack of diligence has resulted in the need for the current application".

[23] I pause to note that what appears to be missing from the rescission application (read together with the application for condonation) is a full and proper explanation of the period between the granting of the default judgment on 18 December 2013 and 15 October 2014, the date on which knowledge of this order supposedly came to JAM. This is an inordinately lengthy period and, despite Morgan's affidavit which I believe adequately explains the period between 15 October 2014 and the service of the rescission application upon Pillay, the events of the preceding 10 months clearly do not fall within his knowledge and he quite correctly cannot say anything about this. This does not, however, absolve JAM and its labour consultants of explaining this lengthy delay.

[24] In considering the above affidavit in conjunction with that deposed to by Joubert in the rescission application, I am not satisfied with Joubert's explanation for the fact that JAM delegated all responsibility for the matter to Labouraide who, in turn, delegated responsibility for both the opposition to the section 158(1) (c) application as well as the review application to Simpson Attorneys. The courts have consistently refused to grant rescission where the alleged negligence of one's attorney is responsible for the default (see *Enzo Panelbeaters CC v CCMA and Others* (1999) 20 ILJ 2620 (LC) per De Villiers AJ). Furthermore, Steenkamp J has also held that this Court generally accepts those judgments to the effect that if an attorney displays "gross ineptitude" a

court cannot extend any indulgence to the applicant (see *Silplat (Pty) Ltd v CCMA and Others* (2011) 32 ILJ 1739 (LC) at para 58).

[25] Moreover, I cannot gloss over the inordinately long period between the granting of default judgment on 18 December 2013 and the complete lack of explanation on the part of JAM and its labour consultants for its failure to make any enquiries regarding the fate of the section 158(1) (c) application. It is not enough to simply state that they relied upon the attorneys to take care of matters, particularly where the enforcement of an award is at stake. They ought to have been aware that, in order to successfully oppose such an application, an answering affidavit would have to be deposed to and that, because none of the relevant personnel (either Joubert or Bekker) had as yet deposed to such an affidavit, this had not been done. This negligence is of a type that is not excusable or understandable in the circumstances. Although there is nothing to suggest that JAM or its consultants had any knowledge of the default judgment granted in favour of Pillay until 15 October 2014, this automatically begs the question as to why it took so long for such knowledge to come to their attention. This is also not explained in the papers.

[26] Finally, although repeated references are made to the serious misconduct of which Pillay is accused, I am, quite surprisingly, unable to find any details of this supposed serious misconduct of which she was accused.

[27] I therefore have before me an application for rescission of a default judgment which provides an unacceptable explanation in respect of an inordinately long delay, with many large gaps in the timeline that are simply unaccounted for. What is more, this is accompanied by no inkling of the merits of the applicant's case such that it may be said that it carries a reasonable prospect of success. In *National Union of Mineworkers v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at para 10, the Labour Appeal Court held:

‘...A slight delay and a good explanation may help compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for

a long delay. There is a further principle which is applied and that is that without a reasonable and explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused'.

- [28] No explanation was tendered by Bekker as to why he filed the affidavit opposing the enforcement award without first ascertaining the status of this application which had been launched by Pillay. One assumes that when this affidavit was indeed filed at court, a representative of either JAM, Labouraide or Simpson Attorneys would have easily been able to ascertain, from a quick perusal of the cover of the court file, that judgment had indeed been granted several weeks beforehand. The failure to explain this is notable.
- [29] There can be no doubt that had JAM sent another representative to the arbitration on the day in question it would have been in a position to challenge Pillay's case for unfair dismissal and also lead evidence on its own behalf. No explanation has been tendered as to why Joubert or some other official of JAM could not have attended owing to the unavailability of Bekker. No explanation is given as to why some other representative of Labouraide could not have come to his assistance.
- [30] In light of the reasons given by the Commissioner for refusing the postponement and proceeding to hear the matter after Jam's representative deliberately absented himself from the proceedings, I find very little prospects of success of the review application. The Commissioner clearly exercised his discretion to refuse a postponement in light of all the arguments presented for and against such postponement and, as mentioned before, JAM has failed to take this Court into its confidence by disclosing the alleged dire nature of Pillay's supposed serious misconduct.
- [31] As was argued on behalf of Pillay, Jam knew as early as 6 September 2013 that the arbitration hearing had been postponed to 30 September 2013 and

therefore had ample opportunity to obtain legal or other representation and to properly prepare for the arbitration proceedings.

[32] With regard to the question of costs, I see no reason why costs should not follow the result in this matter and that JAM be ordered to pay the costs of having launched this application.

[33] In the result, I make the following order:

1. The application to condone the late filing of the application for rescission of judgment is dismissed.
2. The application for rescission of the default award granted by Judge Molahlehi on 18 December 2013 is dismissed.
3. The respondent in the main proceedings, Joint Aid Management International (JAM), is to pay the costs.

Bank AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr C Higgs

Instructed by: Higgs Attorney

For the First Respondent: Mr J Gwebu

Instructed by: Madela Gwebu Mashamba inc

LABOUR COURT