



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS173/14

DR TSHEBO MPHAHLELE

First Applicant

KHATHU PHUNGU

Second Applicant

and

ROFHIWA MUSWEDE

Respondent

Heard: 4 April 2016

Delivered: 25 January 2017

Summary: Rescission of judgment or order in terms of Rule 16A of the Labour Court Rules – application for default judgment – failure to record condonation having been granted in the order (in respect of the late filing of the statement of claim) – failure does not amount to an erroneously granted order in terms of Rule 16A(1)(a)(i).

Service of statement of claim and application for default judgment by registered mail – Applicants denying receipt of all documents – proof of collection of documents – absence of a *bona fide* explanation and failure to show good cause – application dismissed with costs.

JUDGMENT

HOWES, AJ

Introduction

- [1] This is an application for the rescission and setting aside of the Court Order (the order) granted in chambers by Molahlehi, J on 8 August 2014, wherein the dismissal of the Respondent was held to be automatically unfair in terms of s187(1) of the Labour Relations Act¹ and the Applicants were ordered to compensate the Respondent in the amount equivalent to 24 (twenty-four) months' salary, calculated at the Respondent's salary as at the date of her dismissal (R3000.00 per month). There was no order as to costs.
- [2] The application is opposed by the Respondent.

Background facts

- [3] The Respondent commenced employment with the First Applicant, a medical practitioner, and the Second Applicant, a pharmacist on 1 July 2012. She rendered services in the capacity as a cleaner/assistant/general worker at Shop 11 Hertford Junction Centre, Malibongwe Drive, Lanseria, which is the location of the First and Second Applicants' practice.
- [4] The facts surrounding the termination of the Respondent's services are in dispute.
- [5] The Respondent's version is that in late October/early November 2012 she advised the First and Second Applicants that she was pregnant. In mid-February 2013, the Applicants advised the Respondent not to continue any

¹ 66 of 1995 (the LRA).

further services as a result of her pregnancy and that she should return to work on 1 August 2013, after the birth of her baby. The Respondent's baby was born on 13 April 2013. The Respondent sent both the First and Second Applicant a sms message to let them know that she had given birth to her baby. A congratulatory sms was sent to her from the Second Applicant. The Respondent reported to work on 1 August 2013 following her maternity leave. Upon her arrival, she was advised by the First and Second Applicants that they had in fact employed someone else in her position.

- [6] The version of the First and Second Applicant is that the Respondent absconded from the workplace in mid-February 2013 and only returned on 1 August 2013. They in fact attempted to contact the Respondent telephonically to ascertain her whereabouts, however, they were unsuccessful in doing so and as such, they employed someone else. They deny that they unfairly terminated the Respondent's services.
- [7] On 17 October 2013, the Respondent referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). Her referral was accompanied by an application for condonation in respect of the late filing of her referral. The condonation hearing was set down for 7 November 2013 and both parties were present at the CCMA.
- [8] On 19 November 2013, the CCMA handed down the condonation ruling issued by Commissioner JSC Nkosi. Paragraph 4.2 of the condonation ruling² records:

"It is submitted by the respondent [the Applicants in the rescission application] that the applicant [the Respondent in the rescission application] was employed as a casual appointed on a need basis. It is further submitted that they indeed told her to stop working and go to maternity. It is agreed that upon her return there was someone else employed."

² Rescission application bundle at page 26.

- [9] The ruling further records that: *'The applicant has strong prospects of success as the respondent makes concessions.'*³ Condonation was accordingly granted and Commissioner JSC Nkosi ruled that a certificate of non-resolution should be issued by the CCMA and further that the matter may be referred to the Labour Court.
- [10] It appears that the Respondent was unaware of the fact that she was required to refer the matter to the Labour Court for adjudication and erroneously referred the matter to the CCMA for arbitration. The CCMA processed the referral forms and the arbitration was set down for 28 January 2014.
- [11] Both of the Applicants failed to attend at the CCMA for arbitration. Commissioner Bongani Khumalo of the CCMA issued a jurisdictional ruling on or about 3 February 2014 finding *inter alia* that the CCMA grossly erred when it set down the matter for arbitration despite the previous Commissioner's ruling that the dispute was to be referred to the Labour Court.⁴
- [12] On or about 5 March 2014, the Respondent served a copy of her statement of case together with her application for condonation on the First and Second Applicants per registered mail and thereafter filed the original documents together with proof of service with the Honourable Court.
- [13] The Applicants failed to file a reply to the Respondent's statement of case within the ten-day period provided for by Rule 6 of the Labour Court Rules. The Respondent accordingly brought an application for default judgment on or about 1 April 2014. The Respondent served the application for default judgment on the Applicants per registered mail and thereafter she filed the application together with proof of service with the Labour Court.
- [14] The Applicants failed to file any opposition to the application for default judgment and on 8 August 2014, the Molahlehi, J issued an order in

³ Rescission application bundle at para 5, page 26.

⁴ Jurisdictional ruling at para 8 and 9.

chambers finding *inter alia* that the dismissal of the Respondent amounted to an automatically unfair dismissal in terms of s187(1) of the LRA and that the First and Second Applicants were to pay the Respondent an amount equivalent to twenty-four months' compensation.

- [15] On or about 3 October 2014, the Respondent personally hand delivered a copy of the order to the Applicants at their premises. In response thereto, on or about 24 October 2014 the Applicants filed an application for the rescission and setting aside of the the order, which the Respondent opposed.
- [16] The Applicants application for rescission was set down for hearing on 15 February 2016 however the Applicants' representative, Advocate Makhubele sought a postponement and tendered costs in favour of the Respondent. Advocate Makhubele submitted that he had not received necessary instructions to argue the matter on the merits due to a partnership dispute between the First and Second Applicants. The Respondent's representative, Mr Frahm-Arp consented to the application for postponement with costs. Both parties confirmed their availability to argue the said application on 4 April 2016 and Advocate Makhubele was cautioned to advise his clients that further postponements would not be entertained.
- [17] The Applicants together with their legal representative failed to make an appearance in court on the agreed set down date, that being 4 April 2016. Despite the absence of the Applicant's, the court heard legal argument from the Respondent's representative, Mr Frahm-Arp and judgment was reserved.

The Applicants application for rescission

- [18] The Applicants record that their rescission application is brought in terms of Rule 16A. The exact subsection or subsections of Rule 16A upon which they rely are not referred to. Despite this failure, it appears that the first ground of rescission relied upon by the Applicants is an application in terms of Rule 16A(1)(a)(i).

[19] The Applicants record that they—

“... seek the rescission of the judgment on the basis that it was erroneously granted in the absence of the applicants and that there as [sic] an obvious error as contemplated in Rule 16A of the Rules for the conduct of proceedings in the labour court.”⁵

They further submit that—

“...the order was erroneously sought, alternatively, erroneously granted as it is clear from the order that the employees condonation application for the late filing of the statement of case was not granted.”⁶

[20] Furthermore, the Applicants appear to rely on Rule 16A(1)(b) as they submit that—

“the court order was granted in the absence of the applicants as they were not aware that the employee had referred an automatically unfair dismissal dispute to this honourable court and further that we [the Applicants] did not receive any documents/pleadings from the registrar of the labour court. I further submit that we did not receive the notice of set down in this matter.”⁷

The Applicants submit that—

“a case has been made out for the rescission of judgment and that the applicants should not be prejudiced as they were not in wilful default and there are reasonable prospects of successfully opposing the employee’s claim of automatic unfair dismissal in that the employee was not dismissed but she absconded or went awol.”⁸

[21] Accordingly, this rescission is brought in terms of Rule 16A(1)(a)(i) and in the alternative, Rule 16A(1)(b).

⁵ Applicants’ founding affidavit in the Rescission application bundle at para 8.

⁶ Id at para 23.

⁷ Applicants’ founding affidavit at para 22.

⁸ Id at para 25.

The applicable legal principles

[22] Section 165 of the LRA read together with Rule 16A of the Labour Court Rules governs the variation and rescission of judgments and orders of the Labour Court. An affected party may apply for the variation or rescission of an order or judgment of the Labour Court, which was granted in the absence of any party affected.

[23] Rule 16A of the Labour Court Rules states:

- “(1) The court may, in addition to any other powers it may have—
- (a) of its own motion or on application of any party affected, rescind or vary any order or judgment—
 - (i) erroneously sought or erroneously granted in the absence of any party affected by it;
 - (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (iii) granted as the result of a mistake common to the parties, or
 - (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.
- (2) Any party desiring any relief under—
- (a) subrule 1 (a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
 - (b) subrule 1 (b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.”

[24] As the Applicants appear to bring this application in terms of Rule 16A(1)(a)(i) and in the alternative Rule 16A(1)(b), it is necessary to record that there are distinctions between the two sub-sections and the requirements for the two sub-sections are also different.

- [25] In terms of Rule 16A(1)(a)(i), where the Applicants successfully show that the order was granted in error in their absence, they are not required to show good cause. Whereas Rule 16A(1)(b) requires the Applicants to show good cause, in order to succeed.
- [26] In *Bayete Security Holdings v Mokgadi & Others*,⁹ the Labour Court distinguished between Rule 16A(1)(a) and Rule 16A(1)(b). According to the Court, Rule 16A distinguishes between judgments erroneously granted in the absence of a party (e.g. where notice was not given to a party) and judgments granted in the absence of a party other than erroneously (e.g. where notice had been properly given but the party was nevertheless absent). In the first situation, there is no need to show good cause and there are no time limits, whereas, in the second situation, good cause must be shown and the application must be brought within the prescribed time limit.¹⁰
- [27] In dealing with the distinctions between Rule 16A(1)(a) and Rule 16A(1)(b) Gush, J in *SA Revenue Services v Mhlongo: In re: Mhlongo v SA Revenue Services*¹¹ referred to the case of *Griekwaland Wes Koöperatief v Sheriff, Hartswater and Others: In re Sheriff, Hartswater and Others v Monanda Landbou Dienste*¹², and held that:

“The requirements for filing an application under any of these rules are different. In terms of rule 16 A(1)(b) read with rule 16A(2)(b), an application to rescind or vary an order or a judgment must be brought within 15 days. The 15-day requirement does not apply to both rule 16A(1)(a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others* (2006) 27 ILJ 2356 (LC). The other difference between the two rules is that, whilst rule 16A(1)(b) requires an applicant to provide a reasonable explanation for his or her default, this requirement does not apply to an application in terms of rule 16 A(1)(a).” (Footnotes omitted)

⁹ [2000] 9 BLLR 1020 (LC).

¹⁰ [2000] 9 BLLR 1020 (LC) 1025 para 6.1 - 6.3.

¹¹ [2012] ZALCD 4 at para 14.

¹² [2010] 31 ILJ 632 (LC) at para 9 G-I.

Rescission in terms of Rule 16A(1)(a)(i) – erroneously granted court order

- [28] The essence of the Applicants' argument is that the Honourable Court erroneously granted the order in the Applicants absence as Molahlehi, J failed to deal with the Respondent's condonation application (in respect of the late filing of the statement of claim) and in doing so, he erroneously granted the order in the Applicants' absence.
- [29] The Applicants further complain that the Labour Court failed to issue a set down notice for the hearing of the default judgment.
- [30] In the event that the Applicants successfully convince this Court that the order was erroneously granted in terms of Rule 16A(1)(a), this Court must grant the rescission application. The Applicants do not have to show good cause nor do they have to provide a reasonable explanation for the delay.
- [31] The provisions of Rule 16A(1)(a) of the Rules of the Labour Court are similar to Rule 42(1)(a) of the High Court Rules.
- [32] The High Court, in dealing with the application for rescission under Rule 42(1) of the Rules of the High Court in *Transport and General Workers Union and Others v Kempton City Syndicate and Another*¹³ held that—
- “If a court holds that an order or judgment was erroneously granted in the absence of any party affected thereby it should, in terms of rule 42(1)(a), without further enquiry, rescind or vary the order.”
- [33] Accordingly, the fundamental question before this Court is whether the order was in fact erroneously granted as a result of Molahlehi, J's failure to specifically record in the order that he had granted condonation prior to granting default judgment and awarding compensation.

¹³ [2001] 22 ILJ 104 (W) at para 108C.

- [34] Factually, the Applicants are correct. The order itself does not reflect the specific wording that condonation was granted.
- [35] It is my view however that the failure by Molahlehi, J to specifically record the granting of condonation, does not amount to the order being “erroneously granted in the absence of any party”.
- [36] The rationale for my finding stems from the test or enquiry that the Court is required to undertake when assessing whether an order or judgment was erroneously made or granted. The test or enquiry to be undertaken is reflected in *Beveral Investment T/A KFC v Fraser and Another*,¹⁴

“The enquiry which the Court has to conduct in determining whether the order or judgment which is the subject of the rescission application was erroneously made, essentially entails investigating whether there existed a fact, at the time the order or judgment was made, which the Court was not aware of and that had it been aware it would not have made the order as it did.”

- [37] This enquiry was further also supported in *The Department of Correctional Services v Abel Montgomery Baloyi*¹⁵ In this matter, Molahlehi, J found:

“It is now well established in our law that a litigant affected by a judgment/or order granted in default can have such an [sic] judgment/or order rescinded on the basis of showing that it was granted erroneously or by showing good cause for the default. In this respect the court has a discretion [to] rescind a judgment/or order erroneously granted or sought in the absence of an affected party. The order or judgment will also be erroneously granted if it is shown that there was an irregularity in the proceedings or that the court did not have the competency to grant the order or judgment. The authorities are in agreement that there is no need to show good case [sic] where it has been shown that the default judgment was erroneously sought or granted. It has also generally been accepted that a judgment is erroneously granted if, at the time of granting it, there existed facts which the Court had not been aware of

¹⁴ [2015] ZALCJHB 17 at para 10.

¹⁵ [2016] 37 ILJ 2852 (LC) at para 13.

and that had it been aware, it would not have granted the judgment or the order." [Emphasis added and footnote omitted].

- [38] As such, when investigating whether there existed a fact, at the time that the order was made, which the Court was not aware of and that had it been aware of, it would not have made the order as it did, I do not arrive at a different outcome to that of Molahlehi J.
- [39] In this case, the 'fact' alleged to not have been considered resulting in the 'erroneous' granting of the order, is the failure to specifically record that condonation had been granted. It is submitted by the Applicants that had the Labour Court been aware of this 'fact' (i.e. the condonation application) at the time that it was considering the matter, it would not have granted the order.
- [40] Having considered the condonation application and the merits thereof, and having weighed the facts and submissions against the test for condonation, in my opinion, there is no doubt that the Labour Court would have granted condonation. The Respondent provided a substantive explanation for her delay, and the CCMA took substantial accountability for the Respondent's referral having been delayed as a result of the CCMA entertaining the same. Commissioner Bongani Khumalo of the CCMA found *inter alia* that the CCMA grossly erred when it set down the Respondent's matter for arbitration as the dispute was to be referred to the Labour Court.
- [41] Furthermore, the Respondent timeously referred her dispute to the CCMA for arbitration. Had the Respondent been aware that she was required to refer the matter to the Labour Court, it is unlikely that she would have been required to apply for condonation at all.
- [42] In addition, the Respondent's prospects of success and the considerations relating to prejudice, weigh heavily in the Respondent's favour. The delay in referring this matter to the Labour Court was not excessive when considering the reason for the delay.

- [43] The Respondent's statement of claim was not opposed and her application for condonation was not opposed. Proof of service on the Applicants via registered mail together with proof of the collection receipt from the South African Post Office was attached to this application by the Respondent.
- [44] In addition, despite the order not specifically recording that condonation had been granted, from the wording of the order, namely that— "*Having read the documents and considered the matter*", such wording may be interpreted positively to include the understanding that Molahlehi, J did in fact read and consider all of the documents filed by the Respondent, (as opposed to just the statement of claim argued by the Respondents) and in doing so, proceeded to deal with the merits, particularly since the matter was unopposed.
- [45] In so far as the Applicants complain that the Labour Court failed to serve a notice of set down on them prior to the hearing of the default judgment, there is no merit to this argument. The Labour Court is not required to serve a notice of set down on the Applicants recording the date and time for the hearing of a default judgment.
- [46] When the facts are assessed against the test for the erroneous granting of the order, had the Court been aware of the existence of the condonation application, I do believe that it would have granted the order. Further, it is my view that given the obvious finding that condonation would have been granted (when assessed against the test for condonation) and the fact that the matter was unopposed, there was no need to specifically record the granting of condonation in the order.
- [47] I am of the view that the Labour Court would have granted condonation and accordingly, default judgment would have been granted. The Applicants therefore fail to succeed with their application for rescission on the basis of Rule 16A(1)(i).

Rescission in terms of Rule 16A(1)(b)

- [48] The Applicants submit that in the event that the Labour Court is not persuaded that Rule 16A(1)(a)(i) has been satisfied, then in the alternative, they submit that the Labour Court should grant their rescission application on the basis of Rule 16A(1)(b), as the order was granted in the absence of the Applicants.
- [49] In terms of Rule 16A(1)(b), the Applicants are required to file their rescission application within a 15-day time period and in addition, the Applicants must provide a reasonable explanation for their default. While the Applicants have complied with the 15-day time period, they have not, based on the papers before me, provided a reasonable explanation for their default.
- [50] The founding affidavit deposed to by the First Applicant together with the confirmatory affidavit deposed to by the Second Applicant both record that their business address is shop 11 Hertford Junction centre, Malibongwe Drive, Lanseria.¹⁶
- [51] The Applicants deny receiving either the Respondents statement of claim (and condonation application) which the Respondent says she posted on 5 March 2014 and the Applicants further deny receiving the Respondent's application for default judgment which the Respondent says she posted on 1 April 2014.
- [52] The Applicants deny receipt of both sets of documents and further allege that they could not ascertain the whereabouts of the documents from the South African Post Office due to industrial action.
- [53] The Respondent records that upon receipt of the rescission application, she attended at the South African Post Office where she was handed copies of the proofs of receipt that both documents had in fact been collected. The said documents are marked as annexures "RM2" and "RM4" attached to the Respondent's answering affidavit. In addition, the Respondent attached

¹⁶ See founding affidavit at page 5, para 1 and confirmatory affidavit page 13.

copies of her affidavits in support of her proof of service for both sets of documents and provided the registered postal slips which reflect the correct address of the Applicants. These documents were attached as annexures “RM3” and “RM5” to the Respondent’s answering affidavit.

[54] The Applicants in reply, merely deny that the identity numbers reflected on the collection slip are not their identity numbers, however, they fail to take any action to investigate or enquire further with the South African Post Office as to the person/s who allegedly collected the documents. The Applicants make absolutely no effort to explain to this Court, what the ordinary practice is in relation to the collection of mail in their practice and who is usually tasked with the collection of mail. The Applicants effectively provide a bare denial of receipt of the documents and do not, in my view make any effort to show ‘good cause’. The Applicants fail to provide copies of their identity books and they fail to provide a copy of all of their employee’s identity books to demonstrate to this Court that they have not received the documents. It would be rather unlikely that the Applicants would attend to the collection of mail themselves as they have a practice to run and they have other employees employed in the workplace.

[55] There is no reasonable explanation provided to support their default and in fact, when assessing the Applicants conduct as a whole, they have been less than diligent and attentive to this dispute. They failed to attend at the CCMA on various occasions and in fact they failed to attend before this Honourable Court on agreed dates in an application that they in fact launched.

[56] Paragraph 8 of the CCMA condonation ruling records “the concessions” made by the Applicants at the CCMA—

“It is submitted by the respondent [the Applicant in the rescission application] that the applicant [the Respondent in the rescission application] was employed as a casual appointed on a need basis. It is further submitted that they indeed told her to stop working and go to maternity. It is agreed that upon her return there was someone else employed.”

[57] While the Applicants deny the accuracy of the condonation ruling in their replying affidavit, they do not provide any evidence to support the denial. On their own papers, there is an admission that save for a few 'attempts' to call the Respondent, no process was followed to discipline the Respondent for her alleged abscondment. Furthermore, they did not deny receipt of the sms communication between the Respondent in relation to the birth of her baby and as such, the version of the Applicants, is on the whole, not plausible.

[58] The Applicants have fallen short of the requirements set out in Rule 16A(1)(b).

[59] It would be a material injustice to grant the Applicants the relief sought in their application.

Order:

- 1) The First and Second Applicants' application for rescission is dismissed; and
- 2) The First and Second Applicants' are to pay the Respondent's legal costs on a party and party scale.

Howes, AJ

Acting Judge of the Labour Court of South Africa

Appearances

On behalf of the Applicants: No appearance

Instructed by: No appearance

On behalf of the Respondent: Mr Ludwig Frahm-Arp

Instructed by: Fasken Martineau

LABOUR COURT