



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: J2319/15

In the matter between:

MOQHAKA LOCAL MUNICIPLALITY

Applicant

and

SAMWU obo MONTSITSI, NJ

Respondent

Heard: 13 July 2017

Delivered: 29 August 2017

JUDGMENT

BARRABLE AJ

Introduction

- [1] This is an application for the rescission and setting side of the Court Order (the order) granted in chambers by Van Niekerk J on 15 March 2016 in terms whereof the arbitration award issued by the South African Local Govern Bargaining Council (Bargaining Council) in favour of the respondent on 14 June 2010 under case number: FSD120706, was made an order in terms of Section 158 (1) (c) of the Labour Relations Act¹ (LRA).
- [2] According to the applicant's founding affidavit, this application is being brought in terms of Section 165 (a) of the LRA read together with Rule 16 A of the Labour Court Rules. The application is opposed.

Background facts

- [3] The respondent was dismissed by the applicant on 6 September 2007 following a disciplinary enquiry in which she was found guilty of misconduct. The respondent referred a dispute to the Bargaining Council and the arbitration was eventually finalised on 28 May 2010.
- [4] On 14 June 2010, the commissioner found that the dismissal of the respondent was substantively unfair and issued an arbitration award in favour of the respondent in the following terms *inter alia*:

4.1 The respondent be reinstated on the same terms and conditions that existed before termination of her services.

4.2 The respondent to report for duty on 15 September 2010;

¹ Act 66 of 1995.

4.3 The applicant to pay compensation to the respondent in the amount of R50 169.26 being the equivalent of 12 months' remuneration which had to be paid by 14 September 2010. Interest accrued on the compensation amount with effect from 14 September 2010.

- [5] A copy of the arbitration award was sent to the parties on 1 September 2010. To date the applicant has not challenged the award by way of a review application.
- [6] On 26 February 2014, the respondent through her legal representatives launched an application in terms of Section 158 (1) (c) of the LRA (Section 158 (1) (c)) under case number JR369/14 to have the arbitration award made an order of Court. The application is supported by a founding affidavit by SAMWU, a confirmatory affidavit by the respondent together with annexures consisting of copies of the arbitration award and an application to certify the Bargaining Council's award. A service affidavit is also attached which states that the application was served via fax on the respondent on 25 February 2014 and the deponent confirms that on the same day he contacted the respondent, spoke to Mr Jantjies Nthimkhulu, a personal assistant to the municipal manager, who confirmed receipt of the fax.
- [7] The applicant does not deny receiving the respondent's application in terms of Section 158 (1) (c) but submits that: *"it laboured on an impression that the application bearing case number: JR369/2014, which was served on it by the respondent, was in fact a review*

application"². The applicant did not oppose the application.

- [8] A year later, under the same case number (JR369/2014), on 24 February 2015, the respondent's attorneys served a document titled "notice of motion" on the Bargaining Council and the commissioner calling on them to: "*deliver the record of the proceedings to be reviewed and set aside*". This document was also served on the applicant on 24 February 2015. The applicant did not respond to this notice of motion.
- [9] On 19 March 2015, the Bargaining Council delivered the mechanical records of the arbitration proceedings and the documents used at the proceedings together with a notice of filing under case number: JR369/2014 which was served on the applicant and the respondent.
- [10] Upon following up on the status of the Section 158 (1) (c) application, the respondent's attorneys were informed by the Registrar that the "JR" case number that had been allocated to the matter normally applied to review applications and since there was no opposition the Registrar advised the representative to apply for a "J" case number. They were requested to prepare an explanatory letter which would be placed in the Court file. The respondent's attorneys duly applied for another case number and were allocated case number: J2319-15. A letter was prepared to the Registrar by the respondent's attorneys explaining the reason for the two case numbers and requesting that the matter be set down on the unopposed roll. The letter was addressed only to the Registrar and despite assertions to the contrary by the deponent to the respondent's answering affidavit, there is no proof that this letter was

² Founding affidavit – para 5.1 page 6 of the bundle

sent to the applicant. The letter is dated 10 December 2015 and is in the Court file.

- [11] The respondent's Section 158 (1) (c) application was considered by Van Niekerk J in chambers. On 15 March 2016, Van Niekerk J granted an order that the arbitration award issued by the Bargaining Council under case number: FSD120706 be made an order of Court. At the time of granting this order the application in terms of Section 158 (1) (c) bore case number JR369/14 and the index to the application bore case number J2319/15.
- [12] The applicant became aware of the aforesaid Court order on 22 April 2016 when the respondent delivered a copy to the applicant and tendered her services.
- [13] The applicant's application for rescission was launched on 18 April 2016 and the applicant has simultaneously applied for condonation for the late filing of the application.

Application for rescission

- [14] According to the applicant's founding affidavit, this application is based on the contention that the order was erroneously sought or erroneously granted in the absence of the applicant. Although the Applicant does not refer to the exact sub sections of Rule 16 A upon which it relies on, in light of the assertions and arguments made by the applicant in its founding papers, this application clearly falls under Rule 16 A (1) (a) (i) of the Rules of the Labour Court.
- [15] The applicant submits that the error was caused by the confusion

that had been created by the respondent's attorneys in the use of the two case numbers and the subsequent documents that were filed in the proceedings. The applicant contends that as a result of the confusion caused, it did not deliver opposing papers and had the Court been aware of these facts it would not have granted the enforcement order. Secondly, the applicant submits that the order granted by this Court was erroneously sought or erroneously granted in the absence of the applicant due to the fact that essentially at the time the order was granted the arbitration award had prescribed.

Legal principles

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

“(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 or vary any order or judgment granted in the absence of that party”.

- [17] The timing requirements for moving an application under Rule 16 A (1) (a) and Rule 16 A (1) (b) are different. Under Rule 16 A (1) (b) a rescission application must be brought within fifteen days of the applicant acquiring knowledge of the order or judgment whereas no time limit is imposed under Rule 16 A (1) (a)³. As the applicant has brought this application on the basis of an order being erroneously granted or sought (in terms of Rule 16 A (1) (a)), there is no need for me to consider the application for condonation. I am satisfied that the application has been brought within a reasonable time and is therefore properly before me.
- [18] Our Courts have held that if an order was erroneously made in the absence of any affected party, the Court should on the application of that party rescind the order without any further enquiry⁴.
- [19] In *Superb Meat Supplies CC v Maritz*⁵, the Labour Appeal Court accepted that
- “when the Court considers whether a judgment has been granted erroneously it does not investigate whether good cause has been established or whether there has been wilful default”.⁶
- [20] Relying on *Sizabantu Electrical Construction v Guma and others*⁷, Molahlehi J in *Gay Transport (Pty) Ltd v S A Transport and Allied*

³ *Powertech Transformers (Pty) Ltd (Formerly ABB Powertech Transformers (Pty) Ltd) v Metal and Engineering Industrial Bargaining Council and others* (2013) ZALCJHB 18

⁴ Cilliers, Loots and Nel *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed (2009) Juta: Cape Town at 933

⁵ (2004) 25 ILJ 96 (LAC) at para 15

⁶ *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC) at para 26

⁷ (1999) 20 ILJ 673 (LC)

*Workers Union and Others*⁸ and in *SA Democratic Teachers Union v CCMA and others*⁹ confirmed that a party seeking rescission on the basis that a judgment was erroneously granted does not have to show good cause.

[21] The concept of “erroneously granted” is defined by *Cilliers, Loots and Nel*¹⁰, as follows:

“It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgement”.

[22] In *Gay Transport (Pty) Ltd*, the Court said that:

“the finding that the order or judgment was erroneously made, means that the affected party has been denied a hearing in terms of the rules of natural justice. But more importantly, in considering the error, I would say that the fact that the Court was inveigled into giving a judgment because material facts were either omitted or misrepresented to the judge is decisive”¹¹.

Order erroneously sought or erroneously granted

⁸ (2011) 32 ILJ 1917 (LC) at para 11-12

⁹ (2007) 28 ILJ 1124 (LC) at para 17

¹⁰ Above n 4 at page 931

¹¹ Above n 8 at para 13

- [23] The question I have to answer is whether the order of Van Niekerk J was erroneously granted.
- [24] The applicant does not deny receiving the respondent's application in terms of Section 158 (1) (c) however, the applicant contends that it laboured under the impression that this application was in fact a review. This impression, so the applicant contends, was created by the confusion caused by the use of a "JR" case number with the result that the applicant did not file a notice to oppose.
- [25] Whilst I accept that a "JR" case number is usually allocated to reviews I fail to understand how the case number alone could have created confusion as to the nature of the application. It is absolutely clear from the wording of the Section 158 (1) (c) notice of motion and founding affidavit that the respondent was seeking to make the arbitration award an order of Court. I see no reason why a case number would cause the applicant to misconstrue the document and prevent it from filing a notice to oppose.
- [26] The applicant further states that the confusion created by the incorrect case number was fortified by the respondent issuing its notice on 24 February 2015, requesting the Bargaining Council and the commissioner to deliver the record. Whilst I accept that this document was erroneous and should not have been delivered by the respondent's attorneys, I do not agree that this materially changed the nature of the application that was initially served on the applicant. I have already noted that the content of the Section 158 (1) (c) application is unambiguous. The applicant did not respond to the notice received on 24 February 2015 nor did it make any attempt to contact the applicant's attorneys to clarify any confusion that it

may have been harbouring. I cannot accept the applicant's explanation for not opposing the application.

- [27] At the time of receiving the notice on 24 February 2015, the applicant would have been aware of the arbitration award which was favourable to the respondent. It would also have been aware that despite the inordinate lapse of time, it had taken no steps whatsoever to challenge that award. In these circumstances, in my view, the applicant could not have genuinely believed that the respondent was proceeding with a review application to set aside an award that was in her favour.
- [28] It is clear to me that at the time the enforcement order was granted, the learned judge was aware of the two case numbers in this matter. This is evident from the papers in the Court file and the Court order itself which cites both case numbers. Also, in the Court file is the letter from the respondent's attorneys dated 10 December 2015 addressed to the Registrar, explaining the two case numbers. It therefore cannot be said that at the time the order was granted, the learned judge was unaware of the relevant facts. Knowing these relevant facts, the Court correctly granted the order which was made in the context where the Section 158 (1) (c) had been received by the applicant but not opposed.
- [29] The applicant contends that it was irregular for the respondent to have sent the letter dated 10 December 2015 to the Registrar without being informed thereof and without being notified of the nature of the application. I do not agree that this letter was an irregular step as it merely clarified the case numbers and did not change the nature of the application launched by the respondent. As

the applicant had not opposed the respondent's application the respondent was entitled to request the Registrar, as it did in the letter of 10 December 2015, to set the matter down on the unopposed roll.

[30] I do not believe that the applicant has been denied a hearing in terms of the rules of natural justice as it was given an opportunity to oppose the enforcement application but it chose not to.

[31] With regard to the applicant's argument that the enforcement application should not have been made an order of Court as the arbitration award had already prescribed, I refer to Section 17 of the Prescription Act ¹²(Prescription Act) which provides as follows:

“(1) A Court shall not of its own motion take notice of prescription;

(2) A party to litigation who invokes prescription, shall do so in the relevant documents filed of record in the proceedings; Provided that a Court may allow prescription to be raised at any stage of the proceedings”.

[32] In this matter the main proceedings are the Section 158 (1) (c) application as envisaged by Section 17 (2) of the Prescription Act. The applicant did not oppose the main proceedings and at the time of making the order Van Niekerk J was precluded from *mero motu* invoking prescription in terms of Section 17 (1) of the Prescription Act.

¹² Act 68 of 1969

[33] In any event, in light of the recent conclusion of the Constitutional Court in *Mogalia v Coca Cola Fortune (Pty) Ltd*¹³ and in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/s Metrobus and others*¹⁴, the reinstatement order as contained in the arbitration award has not prescribed. As a result, it cannot be said that the order was erroneously sought or granted on the grounds of prescription.

[34] In the circumstances, the applicant has not established that the order was erroneously granted or sought in terms of Section 16 A (1) (i) of the Rules of this Court. I see no reason why in these circumstances the costs should not follow the result.

[35] I make the following order:

Order

1. The applicant's application for rescission is dismissed with costs.

G Barrable
Acting Judge of the Labour Court

¹³ (2017) 38 ILJ 1273 (CC)

¹⁴ (2017) 38 ILJ 527 (CC)

Appearances:

For the Applicant: Advocate S J Mushet

Instructed by: Lebea and associates

For the Respondent: Advocate J Eastes

Instructed by: Maenetja Attorneys