



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P399/2014

SOUTH AFRICAN MUNICIPALITY WORKERS UNION

OBO ZUKO S DYWILI

Applicants

and

INKWANCA MUNICIPALITY

Respondent

Heard: 04 March 2016

Delivered: 31 January 2017

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The Respondent (Municipality), brought this application to rescind a default judgment granted by Euijen AJ on 26 February 2015 in favour of the Applicant (Dywili). The default judgment followed upon the statement of claim filed by the Applicants on 11 November 2014. Upon the expiry of giving of notice to oppose on 25 November 2014, the Applicants had then filed an application for default judgment on 21 January 2015. The application for rescission is opposed. For the sake of convenience, the parties will be referred to as they appear in the main claim.

[2] In seeking rescission of the default judgment, the Municipality relied upon the founding affidavit deposed to by its Acting Corporate Services Manager/Acting Municipal Manager, Mr Themba Mnguni (Mnguni). He made the following averment;

- 2.1 The statement of claim was received by the Municipality on 11 November 2014. Dywili had claimed an adjustment to his salary grade from that of task grade 6 to grade 11 retrospective from 2 January 2007. He also sought payment in respect of the difference in salary between the two grades calculated retrospectively from 2 January 2007.
- 2.2 At the time that the statement of claim was filed, the Municipality was going through turmoil emanating from its dissolution and after its affairs were taken over by the Department of Cooperative Governance and Traditional Affairs in terms of the provisions of section 139 (1) (c) of the Constitution due to its instability. At the same time, the Municipality was experiencing industrial action by its employees who were in solidarity with local community members who were displeased with the intervention and relocation of the Municipality's main offices from Sterkstroom to Molteno.
- 2.3 As a result of this turmoil, the Municipality's offices were deserted by its staff and were manned solely by one the Administrator, Mr. Ngamela Pakade, who had to perform both strategic and administrative duties. These tasks also included having to hold meetings with the Provincial MEC, the SAPS and attorneys representing the Municipality in various matters including interdicting employees and members of the community from destroying or damaging property.
- 2.4 Due to the overwhelming nature of the tasks he had to perform and the pressure he was under, Pakade did not recall having received the statement of claim, or at most, he might have received it and completely forgot about it. Pakade in his confirmatory affidavit stated that the statement of case might have arrived at the time that he was busy sorting out the day to day crisis that he had found, and that due to the 'chaos that prevailed at the time, it (statement of case) fell through his fingers' or it was 'deliberately taken from his incoming tray'.

2.5 He was aware of the default judgment, having received it on 19 March 2015, and denied that the Municipality was in wilful default in failing to file a notice of opposition and the statement of defence.

- [3] In his answering affidavit, Dywili questioned how Pakade could admit having personally received the statement of case and then losing it, without providing any reasonable explanation as to how that was possible, save to state that someone might have removed it from his in-tray. He averred that the Municipality had not advanced any reasonable explanation for its default, and was indeed in wilful default. He disputed that the failure to attend to the matter could have been due to circumstances beyond the Municipality's control.
- [4] It was submitted by Mr. Grogan on behalf of the Applicants that in the absence of a reasonable explanation for the default, there was no need to consider whether the Municipality had a *bona fide* defence to the Applicants' claim. In this regard, it was submitted that the Municipality had failed to proffer a reasonable explanation for its default; that its tardiness had resulted in the matter being set down on the unopposed roll despite the default judgment being preceded by a properly motivated application, and after the statement of case was filed on 11 November 2014 without a response as anticipated on 20 November 2014.
- [5] Rule 16A¹ of the Rules of this Court makes provision for rescission of its own orders. Section 165 of the Labour Relations Act² makes similar provisions in respect of rescissions or variations of court orders. The Municipality contended that the explanation for its default was reasonable, and that it had a good defence in the main application. The principles regarding rescission applications can be said to be

¹ Which reads;

(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 **'Variation and rescission of orders of Labour Court**

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order –

a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;

b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

c) granted as a result of a mistake common to the parties to the proceedings'.

fairly trite. Where the provisions of section 165 (a) of the LRA are relied upon, a judgment or order is erroneously granted if there existed at the time of its issue, a fact of which the judge was unaware of which would have precluded the granting of the judgment, and which would have induced the judge (if aware of it) not to grant the judgment³. Furthermore, whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause (i.e. reasonable explanation for the default and a reasonable defence to the claim). It is enough if the order was erroneously sought or granted in the absence of that party.⁴

- [6] The difficulty with the Municipality's case is that it is not clear on which provisions under section 165 of the LRA it had relied upon. These provisions are wide insofar as they outline the circumstances under which rescission might be granted. On its papers however, one can safely assume that to the extent that its case is based solely on the grounds that it had proffered a reasonable explanation for its default, and had a *bona fide* defence to the Applicants' claim, it relies on the provisions of section 165 (a) of the LRA or Rule 16A (1) (a) (i) of the Rules of this Court. The question that arises therefore in the light of the cited authorities is whether at the time that the default judgment was granted, there existed a fact of which Euijen AJ was unaware of, which would have precluded him from granting the judgment, and which would have induced him (if aware of it) not to grant the judgment.
- [7] To recap, the Municipality conceded having received the statement of case on 11 November 2014. Ten days had passed without a notice of intention to oppose or a statement of response being filed. On 25 November 2014, the Applicants then filed an application for default judgment. The default judgment was granted in chambers on 26 February 2015, and there is nothing contained in the Municipality's pleadings

³ South African Revenue Services v Mhlongo (JA 115/2013) (12 March 2015) at para 5

⁴ F & J Electrical CC v MEWUSA obo E Mashatola and Others (2015) 36 ILJ 1189 (CC) at para 27, where it was held that; *'A party may have an order of the Labour Court rescinded under section 165(a) if it is shown that the order was erroneously sought or granted in the absence of that party. Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party. That is also the position under Rule 42 (1)(a) of the Uniform Rules of Court. In respect of Rule 42(1)(a) this was held to be the position by a Full Bench in Tshabalala and Another v Peer. Both the Supreme Court of Appeal and this Court have also made this point. The Court may even rescind or vary its order on its own accord under this provision.'*

See also Superb Meat Supplies CC v Maritz (2004) 25 ILJ 96 (LAC) at para 15 where it was held 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'

before this court that indicates that there were factors which could have dissuaded Euijen AJ from granting the application.

- [8] The Municipality's excuse in not attending to the matter, if brought to the attention of Euijen AJ would in all probability, not have persuaded him to grant the application. The explanation or excuse proffered in essence boils down to its neglect, especially on the part of Pakade, irrespective of whatever difficulties, if any, the Municipality may have experienced at the time. It is inexplicable that amidst all the issues that Pakade had to deal with, including taking legal steps against striking workers and members of the community, it would have skipped his mind to attend to similar court papers that on his own version, had come to his personal attention. In the light of these conclusions, it would not be necessary to deal with issues surrounding whether good cause was shown. Further having had regard to the issue of costs, and having taken into account requirements of law and fairness as dictated in section 162 of the LRA, I am of the view that a cost order is not warranted in this case.

Order

- [9] In the premises, I make following order:
1. The application to rescind the default judgment granted by this Court on 26 February 2016 is dismissed.
 2. There is no order as to costs

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Respondent:	Adv. Simoyi
Instructed by:	Nginda Vuba Attorneys
On behalf of the Applicant:	Adv. JG Grogan
Instructed by:	Wheeldon Rushmere & Cole

LABOUR COURT