



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 505/15

In the matter between:

KAVITA RAMPERSAD

Applicant

and

COMMISSIONER RICHARD BYRNE N.O.

First Respondent

COMMISSION FOR CONCILIATION,

MEDICATION AND ARBITRATION

Second Respondent

FIRST RAND STI ADMINISTRATION (PTY) LTD

Third Respondent

Heard: 21 February 2017

Delivered: 6 July 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The applicant seeks a rescission of an order granted by this Court (Per Van Niekerk J) at a pre-enrolment hearing held on 17 August 2016, in terms of which her application to review an award issued by the first respondent under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) was dismissed in her absence. The application for rescission is opposed.

[2] In the founding ('Explanatory') affidavit deposed to by Mr Khoza, a RAWU official and applicant's representative in these proceedings, the following averments were made;

- 2.1 Khoza represented the applicant at the arbitration proceedings before the CCMA. Upon the award being issued, RAWU instructed its erstwhile attorneys, Carrim Attorneys to launch the review application, and this was done on 1 April 2015.
- 2.2 Upon the pleadings having closed and the matter being set down, RAWU could however not afford further legal costs for Counsel to appear on the set-down date, and Carrim Attorneys had withdrawn as attorneys of record. RAWU subsequently handled the matter on its own.
- 2.3 Subsequent to the withdrawal of Carrim Attorneys, on 26 July 2016, RAWU got to know of the dismissal of the review application on 27 September 2016 only after it had made enquiries about a set-down date. It is alleged that a set-down date was not received.
- 2.4 The court file was perused and it was discovered that the notice of set-down was sent on 4 August 2016 via telefax to a fax number that appears to be of Carrim Attorneys' rather than RAWU's.
- 2.5 Khoza attributed the applicant's or RAWU's non-appearance in court on 17 August 2016 mainly due to not having been served with a notice of set-down.
- 2.6 In regards to prospects of success, it was submitted that these appeared to be 'average as summarised in the papers', and that the third respondent would not suffer any prejudice should rescission be granted.

[3] The rescission application is opposed on a variety of grounds including that;

- 3.1 It was filed out of time by some 15 days as the third respondent only became aware of it on 31 January 2017, whilst Khoza became aware

of the order sought to be rescinded on 27 September 2016. Despite the delay, condonation had not been sought.

- 3.2 There is no live review application that the applicant was entitled to revive by virtue of a rescission application. This was due to the reason that at the time that the matter was dismissed even on 17 August 2016, it had been deemed to have been withdrawn on account of lack of timeous prosecution.
- 3.3 The applicant failed to comply with the provisions of the Practice Manual pertaining to the filing of records in that the Rule 7A (3) Notice was filed on 10 April 2015, and the record ought to have been filed by the applicant on or about 11 June 2015.
- 3.4 The applicant however filed her Rule 7A (8) Notice on 27 January 2016, which was outside of the prescribed 60-day time period. To the extent that no consent and/or extension was sought from the third respondent in view of the non-compliance with these time periods, it was contended that the application ought to be deemed to have been withdrawn.
- 3.5 The Notice of withdrawal of Carrim Attorneys and substitution by RAWU never reached the third respondent.
- 3.6 In regards to the notice of set down allegedly sent to RAWU's erstwhile attorneys of record's fax number, it was submitted that no proof in confirmation of these allegations was furnished, and that the applicant should stand and fall by her choice of representatives.
- 3.7 The applicant has not established any basis for prospects of success, which was fatal to this application, and a perusal of the award indicated that it was reasonable and not reviewable.

The legal principles and evaluation:

- [4] An application for rescission of a court order may be brought in terms of the provisions of Rule 16A(1)(a)(i)¹ of the Rules of this Court, read together with those of section 165 of the Labour Relations Act (LRA)². 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.
- [5] Whether the court will grant a rescission application under section 165 (a) of the LRA does not depend upon the applicant showing good or sufficient cause. The Court in the exercise of its discretion may find that it was simply enough if the order was erroneously sought or granted in the absence of that party³.
- [6] The difficulty however with the application before the Court is that it is not clear under which provision it is brought, which might ultimately prove to be fatal. The applicant simply attempts to explain the reasons for the default and makes scant reference to 'average prospects of success'. One can only assume that the application is brought under section 165 (b) of the LRA read with Rule 16 (1) (a) (2) as the other grounds for rescission would clearly not be applicable.
- [7] An order or judgment will be deemed to be erroneously granted or sought 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. It is further accepted that that a judgment is erroneously granted if at the time, there existed

¹ Rule 16 A

(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 ...

² Which Section 165 reads:

"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."

³ See *F & J Electrical CC v MEWUSA obo E Mashatola and Other* [2015] ZACC 3; 2015 (4) BCLR 377 (CC); (2015) 36 ILJ 1189 (CC); [2015] 5 BLLR 453 (CC) at para 27; *Mutebwa v Mutebwa and Another* 2001(2) SA 193 at page 194 E-G

pertinent facts which the Court had not been aware of, and that had it been aware of, it would not have granted the judgment or the order⁴.

- [8] The issue in this case is therefore whether the applicant has demonstrated that the order dismissing her review application was erroneously sought or granted. In determining this issue, it is significant to note that the Notice of Withdrawal as attorney of record and substitution was filed by Carrim Attorneys on 26 July 2016, wherein the details of RAWU were further furnished for service in these proceedings. The notice was also served on the third respondent as appears from fax transmission confirmation dated 25 July 2016 as attached to the notice of withdrawal.
- [9] A perusal of the court's file indicates that notwithstanding the notice of withdrawal, the office of the Registrar of this Court caused the notice of set-down of the pre-enrolment hearing to be served on the Carrim Attorneys on 5 August 2016. In my view, it is clear that there was an error on the part of the office of the Registrar of this Court, as the notice of set-down was sent to attorneys that were no longer acting for the applicant or RAWU. As to what obligation the erstwhile attorneys had upon receipt of the set-down date is an issue the court was not seized with.

⁴ Erasmus in the Superior Court Practice at Page D1-568 (Second Edition). See also *Lodhi 2 Properties Investment CC v Bondev Development (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 24, where it was held that:

'I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously.

That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.¹⁴ See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.'

- [10] It follows from the above that had Van Niekerk J been aware of the fact that the notice of set-down was not properly served on RAWU, he would not in all likelihood have dismissed the matter, even more specifically since it was set-down as a pre-enrolment hearing, rather than the hearing of the merits. Flowing from the authorities referred to above, it would not be necessary for the court to enquire into whether the applicant has establish good cause, and the enquiry ends at the point where the court is satisfied that the order was erroneously obtained.
- [11] To the extent that it was argued on behalf of the third respondent that the matter was deemed to have been withdrawn in any event at the time it was before Van Niekerk J, if that was an issue that was raised before Van Niekerk J, he would in all probability have determined that the matter was deemed to be withdrawn, even in the absence of the applicant, which is a separate order from that of a dismissal of the application. Be that as it may, a claim that a matter is deemed to be withdrawn cannot be raised within the context of an opposition to a rescission application, especially in the light of the grounds upon which that rescission is determined as in this case. Even if it could be argued that nothing prevents the third respondent from raising that defence, Khoza on behalf of the applicant has adequately in his replying affidavit, outlined the circumstances that led to the delay in the filing of the record, and attached supporting affidavits to that affidavit. I accept that a case cannot be made out in the replying affidavit. The issue of the matter being deemed withdrawn was however raised in the answering affidavit. The replying affidavit in my view disposes of the argument whether the review application should be deemed to be withdrawn or not.
- [12] In regards to the issue whether the rescission application was filed some fifteen days outside of the time periods, it has already been concluded that the notice of the pre-enrolment hearing was not properly served on RAWU. In his founding affidavit, Khoza averred that he only became aware of the dismissal of the matter on 27 September 2016 upon having enquired about the set-down matter from the court. The rescission application was filed on 3 October 2016, and was according to the affidavit in respect of proof of service, served

on the third respondent on 30 September 2016. In the circumstances, I did not understand the third respondent's case to be that the order came to the attention of the applicant/RAWU earlier than 27 September 2016, and it follows that the rescission application was filed on time, and there was therefore no need to seek condonation in respect of the rescission application.

[13] I have had regard to the requirements of law and fairness, and even if the applicant is successful in this application, she is not entitled to an order of costs.

Order:

1. The order granted by this Court on 17 August 2016 in terms of which the applicant's review application was dismissed in her absence is rescinded.
2. The Registrar of the Court is directed to set the matter down for the hearing of the review application.
3. There is no order as to costs

E Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr W. Khoza, RAWU Official

For the Third Respondent: Advocate. RC Jansen Van Vuuren

Instructed by: Van Breda & Herbst Inc

LABOUR COURT