



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 801-12

Not Reportable

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

IMATU obo NJ BOTHA, Z MATLAILA

AND K KGOMO and 2 others Respondent

Heard: 20 March 2018

Delivered: 3 October 2018

JUDGMENT

WHITCHER J

- [1] The applicant seeks, in terms of section 165 of the Labour Relations Act, 1995 read with Rule 16A of Rules of this Court, to rescind and set aside a Court Order issued by this Court on 23 August 2013.
- [2] In terms of the said Order the arbitration award granted by the SALGBC in favour of the respondent on behalf of K Kgomo and 2 others [Amos K Kgomo, S.Z. Nkadimeng and N.M. Hlalethoa] was made an Order of Court in terms of

section 158(1)(c) of the Labour Relations Act, 1995. It was further ordered that a related Court Order issued on 27 March 2012 does not prevent any execution proceedings instituted by the respondent on behalf of K Kgomo and 2 others.¹

- [3] The applicant also prays for condonation of the late filing of the rescission application, which was filed 5 days late.
- [4] The matter has a long history.
- [5] Nokeng Tsa Taermane Local Municipality was incorporated in the applicant in terms of the Local Government: Municipal Structures Act, 1998. The applicant became the successor-in-law of Nokeng with effect from **19 May 2011**.
- [6] In the case of Kgomo and 2 others an arbitration award was issued by the SALGBC under case number GPD 050708 on **12 January 2009** in which it was held that the 3 employees had been dismissed by Nokeng and that their dismissals were substantively and procedurally unfair. Nokeng, who did not attend the arbitration, was ordered to reinstate the 3 employees and to pay to each seven month's remuneration [approximately R32 578.00 each] within 14 days of receipt of the award.
- [7] In or about **October 2011**, the applicant instructed a firm of attorneys, Moima & Associates, to file for the rescission of the award.
- [8] It would appear that such an application was drafted in or about **8 November 2011** but there is nothing in the papers before me which demonstrate that the application was served and filed.
- [9] The respondents claim they never received such an application and in any event the purported application was brought in the wrong forum (CCMA).
- [10] I note that the deponent to the founding affidavit, Mr Ngolele, is also the deponent to the rescission application before me and in both he is cited as the Chief Legal Administration Officer of the respective municipalities.
- [11] I further note the following from both founding affidavits:

¹ The Court was informed that the matters in respect of NJ Botha and Z Matlaila and the applicant are withdrawn as they have been settled by the parties.

- (i) Despite having received proper notice of the conciliation and arbitration sittings, Nokeng failed to attend both sittings. Ngolele provides no real explanation for same, despite the fact that he was the Legal Officer of Nokeng at the time.
- (ii) In theory Nokeng had a compelling and effortless case of fraudulent conduct² against the 3 employees so Nokeng had had a duty to take the matter seriously and attend the arbitration.
- (iii) Soon after the award was issued *and* before it was certified, the award was brought to the attention of Ngolele and the Municipal Manager of Nokeng.³ In other words, at least 1 to 2 years prior to the first aborted rescission application in November 2011.
- (iv) It appears that this rescission application was drafted *only after* the applicant was served with writs of execution in **October 2011**.

[12] On the day of the sale in execution, the applicant brought an urgent application to suspend the sale in execution. On **27 March 2012** Bhoola J suspended the sale in execution *pending the finalisation of the rescission application at the CCMA*.

[13] On **23 August 2013** IMATU on behalf of Kgomo and 2 others obtained Court Orders to the effect that: (i) the Court Order made on 27 March 2012 does not prohibit any execution proceedings *as no rescission application was brought by the applicant*; (ii) the arbitration award in the case of Kgomo and 2 others issued by the SALGBC under case number GPD 050708 on **12 January 2009** is made an Order of Court; and (3) the applicant is liable to pay interest on the legally prescribed rate from due date of payment as prescribed in the arbitration award until date of actual payment/agreement.

[14] The rescission application before me [to rescind the Court Order of 23 August 2013] was filed on **8 October 2013**.

[15] On the same day, **8 October 2013**, the applicant filed a rescission application, this time in the SALGBC, against the arbitration award in the case of Kgomo

² On the applicant's averments they fraudulently secured employment with Nokeng.

³ See in particular paragraphs 8.1 and 8.7.

and 2 others issued by the SALGBC under case number GPD 050708 on **12 January 2009**.

[16] It follows that the rescission application filed in the SALGBC was brought more than 4 years out of time.

[17] I turn now to the rescission application before me [to rescind the Court Order of 23 August 2013]. It is common cause that the Order was granted in the applicant's absence.

[18] In their application, the applicant contended that the Order was erroneously granted in its absence; alternatively it has good cause why the Order should be rescinded.

[19] When the matter was argued before me, counsel for the applicant contended that the applicant is not required to show good cause because, he further submitted, the applicant did not receive the application and set down notice which gave rise to the Court Order. Accordingly, the Order was granted *in error*. I gathered from this submission that the applicant is relying on Rule 16A(1)(a)(i), and not Rule 16A(1)(b) of the Rules of the Labour Court.

[20] The respondents contended otherwise, particularly that the issue of good cause is applicable since, in their submission, there is no averment or evidence from the applicant that both notices were not correctly sent out and served.

[21] As correctly set out in *Washington v AMT Placement Services*:⁴

There is a distinction between an application brought in terms of Rule 16A(1)(a)(i) and Rule 16A(1)(b) of the Labour Court Rules. The requirements for the two sub-sections are also different. In terms of Rule 16A(1)(a)(i), applicants are not expected to show good cause for them to succeed. They only need to show that the judgment or order was erroneously issued in their absence. Rule 16A(1)(b), on the other hand, requires the applicants to show good cause in order to succeed.

The above principle was applied in the case of *Bayete Security Holdings v Mokgadi and Others*⁵ where the Labour Court distinguished between Rule 16A(1)(a)(i) and Rule 16A(1)(b). According to the court, Rule 16A

⁴ JR 1395/15 dated 25/10/17

⁵ (2000) 9 BLLR 1020 (LC)

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. This was quoted in approval in the case of *Mphahlele v Muswede*⁶.

Where an applicant launches their application in terms of Rule 16A(1)(a)(i) they only have to prove that the order was issued erroneously in their absence. How this question has to be answered is to determine 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. Such was enunciated in *Beverly Investment T/A KFC v Fraser and Another*⁷ where the court said:

“..the enquiry which the court has to conduct in determining whether the order of 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”.

This enquiry was further also supported in the *Department of Correctional Services v Abel Montgomery Baloyi*⁸ where the court 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 judgment / or order rescinded on the basis of showing that the 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 of 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

⁶ (JS 173/14(2017) ZALCJHB 20 (25 January 2017).

⁷(2015) ZALCJHB 17 at para. 10.

⁸ (2016) 37 ILJ 22852 (LC) at para. 13.

competency to grant the order or judgment. The authorities are in agreement that there is no need to show good cause 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 and that had it been aware, it would not have granted the judgment or the order”.

- [22] The applicant's excuse for not attending court on 23 August 2013 may be summarised as follows.
- [23] After they instructed attorneys Moima & Associates in **November 2011** to file the rescission application against the arbitration award and in **March 2012** to secure the Order of **27 March 2012**, “nothing further was heard on the matters” from Mr Moima and it was only on **5 September 2013** that the applicant received a letter from the Law Society of the Northern Provinces indicating that Mr Moima had been struck from the roll of attorneys in 2012 and that they must collect their files from the offices of the Law Society.
- [24] IMATU's application which resulted in the Court Order of 23 August 2013 was served on the offices of Moima and Associates on 17 August 2012 but he did not inform the applicant about the application. I however note that in terms of a service affidavit and the fax transmission slips attached thereto that the respondent also faxed the application to the office of the applicant's Municipal Manager. The deponent to the service affidavit states therein that she followed this up with a call to his office and a clerk confirmed receipt of the application.
- [25] Significantly, the applicant in the founding affidavit did not directly address the issue of the notice of set down from the Court Registrar in respect of the Court hearing on 23 August 2013. There is no averment that the Registrar did not send out a proper notice to the addresses placed on record by both parties as the addresses for service of processes.
- [26] If one examines the pertinent dates in the case before me [November 2011, March 2012 and 5 September 2013], what the applicant is essentially indicating in its explanation for not being at court on 23 August 2013 is that for more than

two years, alternatively one and half years, they failed to communicate with their attorney to follow up on the status and progress of the matters he was handling for them.

- [27] To my mind, it would not be unreasonable to infer that if they had not acted in such a grossly negligent manner, they would have come timeously to know about the application and hearing that led to the Court Order issued on 23 August 2013.
- [28] There is also evidence that the applicant directly received the application which led to the Order of 23 August 2013 and received same one year in advance. In that year nothing with regard to instructions on the matter and contact with their legal representative is offered.
- [29] There is a history of negligent conduct on the part of the applicant. Only when the sale in execution was imminent did the applicant act, despite having knowledge of the award for over three years and clearly they did not keep abreast of matters to ensure the rescission application against the arbitration award was duly done.
- [30] They have thus failed to demonstrate that their non-attendance at court on 23 August 2013 was not due to their own gross negligence in not communicating with and following up with their legal representatives.
- [31] This is not a case where there was no set down notice served or a case that it was incorrectly served on the wrong entity or service address. Accordingly, there was no irregularity in the proceedings of 23 August 2013.
- [32] The principle that a litigant cannot be absolved from the negligence, ineptness and tardiness of his or her chosen legal representative is also applicable to this case⁹. The Labour Appeal Court stated in *Superb Meat Supplies cc v Maritz*¹⁰

⁹ See *Saloojee v Minister of Community Development* 1964 (2) SA 135 (AD) at 141 B-H, where it was held that; *"In Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (AD) ... *this court came to the conclusion that the delay was due entirely to neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the result is of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and*

It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise would have a disastrous effect on the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners."

- [33] Significantly, considering the terms of the Court Order of 12 March 2012, there is no evidence before me that a proper rescission application against the arbitration award had been served and filed by the time the Court Order of 23 August 2013 was made. One appears to have been filed on 8 October 2013, more than a month after the Order of 23 August 2013.
- [34] It was moreover filed 4 years after the arbitration award was issued and the excuse therefor mirrors that set out in the application before me. Clearly, in light thereof, the prospects of success in that rescission application are weak.
- [35] In all these circumstances it cannot be said that there existed a fact, at the time the Order was made on 23 August 2013, which the Court was not aware of and that had it been aware, it would not have made the Order as it did. The Order made on 23 August 2013 was thus not erroneously made.
- [36] While this finding is lamentable, considering my observations regarding the circumstances in which the 3 employees were dismissed, it is the only appropriate finding considering the long history of the matter and the applicant's negligent conduct throughout.

increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.... A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney... and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success."

¹⁰ (2004) 25 ILJ 96 (LAC)

Order

[37] I make the following orders:

- (1) The rescission application is dismissed.
- (2) The condonation application thereto is dismissed.
- (3) There is no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:

Adv X Mofokeng, instructed by Gildenhuys
Malatji Attorneys

For the Respondents

IMATU official – L Burns - Coetzee