IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 103/15

In the matter between:

LUVHOMBA GROUP (PTY) LTD t/a

LUVHOMBA GROUP **Applicant**

and

SOLIDARITY OBO TSHILI S **Respondent**

Delivered: 20 March 2019

JUDGMENT

MAHOSI. J

[1] This is an application in terms of which the applicant seeks an order to rescind the order granted by Voyi AJ under the case number JS 103/15 dated 31 July 2015. Coupled with this application is the condonation application for the late filing of the rescission application.

[2] On 27 February 2015, the respondent served and filed a statement of claim on behalf of Ms Tsili. The applicant had until 13 March 2015 to file its opposing papers. In the absence of a response from the applicant, the respondent directed correspondence to the applicant granting it further indulgence until 18 March 2015 to file its opposing papers. However, the applicant did not file the opposing papers.

[3] In the absence of the opposing papers, the respondent proceeded to file an application for default judgment on 23 March 2015. On 30 March 2015, the applicant's erstwhile attorney of record filed a notice of intention to oppose and addressed correspondence to the respondent in terms of which it requested that the default application be withdrawn. In response, the respondent directed correspondence to the applicant on 1 April 2015 indicating that the application for default judgment would not be withdrawn until the statement of response and the condonation application were filed. The applicant only filed the opposing affidavit to the application for default judgment during November 2015

[4] On 11 November 2015, the respondent addressed correspondence to the applicant in terms of which it brought the existence of the default judgment which was granted on 31 July 2015 to its attention. In his order, Voyi AJ found that the dismissal of Ms Tsili was automatically unfair and ordered the applicant to pay her compensation equivalent to her 12 months salary amounting to R72 000.00. It is this order that the applicant seeks to rescind.

[5] The court order that the applicant seeks to rescind was delivered to the applicant on 11 November 2015 and the rescission application was only filed on 21 June 2016. Although in the notice of motion, the applicant prayed for the condonation of the late filing of the rescission application, no submissions were made in the affidavit in support of such an application. The principles relating to condonation applications were restated by the Labour Appeal Court (LAC) in *Bloem Water Board v Abraham Nthako NO and Others*[1] as follows:

> 'The test whether to grant or refuse an application for condonation is well known. It was expressed by this Court in *Grootboom v National Prosecuting Authority and Another*, this way:
>
> > "In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. . .
> >
> > The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive

[1] (2017) 38 ILJ 2470 (LAC); [2017] 11 BLLR 1073 (LAC) at para 19.

> but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[6] In the current matter, although the delay in filing the rescission application is over six months and there is no explanation thereof, my view is that it is in the interest of justice that I consider the applicant's prospect of success in the rescission application.

[7] The applicant's basis for the rescission application rests on two points *in limine*. The first point was that it was wrongly cited in that as a legal entity it could not have employed, nor had any relationship with Ms Tsili. There is no legal basis to support this point and it would, therefore, not be taken any further.

[8] The second point, which was the issue forming the main basis of the alleged irregularity is whether the statement of claim was properly served on the applicant. The respondent opposed this application on the basis that the applicant was properly served with the statement of claim, there was no reasonable and acceptable reason for its failure to file the statement of response within the prescribed period and further that it had no prospect of success in the main application.

[9] It is clear from the correspondence between the parties that the statement of claim was indeed served on the applicant. However, it would seem that the order that the applicant seeks to review was issued in chambers. This was done despite the fact that the applicant had filed a notice of intention to defend. A

similar matter was dealt with in *NUM obo Magagula v CCMA and Others*[2] where this Court granted the rescission application on the basis of the following principles:

'[12] In order to succeed under Rule 16A (1) (b) a party affected by a judgment granted in his or her absence has to show good cause for the default. The principle provided for in that rule is substantially a replica of that which is provided for Rule 42(1) (a) of the Uniform Rules of the Court. It is generally accepted by the courts that where 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 further enquiry. This means that there is no need to enquire further into whether good cause has been shown.

[13] In dealing with the rescission involving the order which was alleged to have been erroneously made in the absence of the affected party the court in *Transport and General Workers Union and Others v Kempton City Syndicate and Another*,[5] 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.*"

[14] The concept of "erroneously granted" is defined by Cilliers, Loots and Nel, in the following terms:

"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 judgment."

[2] Unreported case: JR555/14 handed down on 26 August 2016.

[15] The consequences of an erroneously made order or judgment are set out in *Sizabantu Electrical Construction v Guma & Others,*[7] in the following terms:

> *"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."*

[19] It is common practice in this court for the Registrar not to serve notice on the parties when a matter is considered in chambers by a judge. In default judgment applications (those to be heard in court) and unopposed review application the respondents are normally issued with the notice of set down. This approach is based on the decision of the Labour Appeal Court (LAC) decision of *Eberspächer v National Union of Metal Workers of SA obo Skade and Others*, where the LAC held that the notice of application for a default judgment ought not to have been given to the respondent as a pre-requisite to the granting of a default judgment were not satisfied. This decision was upheld by the Constitutional Court in *Zwane and Others v Alert Fencing Contractors*. In this respect, the LAC had the following to say:

> "[23] This matter should also not have been set down for default judgment without notice to the appellant nor should judgment have been granted in the absence of such notice."'

[10] I align myself with the above sentiments. In light thereof, I am of the view that the applicant's rescission application should succeed. I have had regard to the issue

of costs. In terms of section 162 of the Labour Relations Act (LRA),[3] the Court has wide discretion in awarding costs. The Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[4] that in labour matters, costs orders should be made in accordance with the requirements of law and fairness. In this matter, I am of the view that the requirements of law and fairness dictate that there should be no order as to costs.

[11] In the premise, I make the following order:

Order

1. The condonation application for late filing of the rescission application is granted.

2. The Court order issued by Voyi AJ under the case number JS 103/15 dated 31 July 2015 is rescinded.

3. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa

[3] Act 66 of 1995, as amended.
[4] (2018) 39 ILJ 523 (CC) at para 24.

Appearances:

For the Applicant:	Mr M Mulaudzi, in his capacity as director of Luvhomba Group (Pty) Ltd.
For the Third Respondent:	Mr S Ras, legal officer of Solidarity.