

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no:JS1035/13

In the matter between

TIRELO EMERGENCY MEDICAL SERVICES

Applicant

and

MASHALANE, ROBERT TLAU

First Respondent

PHALANE, PAULINA MANLOKWANE

Second Respondent

Heard: 18 July 2019

Delivered: 25 October 2019

Summary: Rescission application – Labour Relations Act 66 of 1995 as amended – Section 165 read with Labour Court Rule 16A - The Labour Court granted default judgment against the applicant - the applicant was unaware of that the respondents had served their statement of claim on it. Applicant applied for rescission of judgment but did not state the basis for its application. The basis could be read into the application – Rule 16A(2)(b) on the basis that the applicant dealt with why it was not in wilful default, it had a *bona fide* defence and the application was made within 15 days of the applicant becoming aware of the judgment against it. Applicant's explanation for the default is weak but it showed a defence which *prima facie* carries some prospects of success on the merits. Application granted.

JUDGMENT

SWARTZ, AJIntroduction

- [1] This is an application to rescind and set aside a default judgment which was granted by Voji AJ in chambers on 27 March 2015.
- [2] The dismissal of the respondents was held to be both procedurally and substantively unfair in terms of section 189 of the Labour Relations Act¹ (LRA). The applicant was ordered to compensate the respondents in the amount equivalent to 12 (twelve) months' salary (R7000.00 x 12) each plus R1 627.91 each in respect of severance pay.
- [3] The application is opposed.
- [4] The respondents also seek condonation for the late filing of their answering affidavit.

Factual background

- [5] Both respondents concluded employment contracts with the applicant in May 2012. In terms of the respondents' employment contracts, their jobs are described *inter alia* as patient assessment, treatment, management and transportation in case of medical or trauma emergencies.
- [6] On 12 March 2013, the applicant consulted with the respondents in respect of the "*Status of company finances and reduction of work (cancelled contract) and possible retrenchment.*" A copy of this minute is attached to the applicant's founding affidavit dated 13 March 2013.²

¹ Act 66 of 1995 as amended

² Annexure "C" p 46

- [7] A further meeting was held by the applicant and the identified employees that may be retrenched on 16 April 2013 and a copy of this minute is also attached to the applicant's founding affidavit dated 17 April 2013.³ The first respondent was not present at this meeting.
- [8] On 18 June 2013, the respondents were issued with a letter headed "SECTION 189A. DISMISSAL BASED ON OPERATIONAL REQUIREMENT BY THE EMPLOYER (RETRENCHMENT)".⁴ On 1 July 2013 both respondents were issued with a "NOTICE OF TERMINATION OF EMPLOYMENT – BASED ON OPERATIONAL REQUIREMENT (RETRENCHMENT) SECTION 189a OF THE LABOUR RELATIONS NO 66 OF 1995 AS AMENDED".⁵
- [9] On 26 August 2013, the matter was conciliated by the Commission for Conciliation Mediation and Arbitration (CCMA). The applicant attended the conciliation, but no settlement was reached and a certificate of outcome referring the dispute to the Labour Court was issued by the CCMA.⁶
- [10] On 8 November 2013, the respondents issued their statement of claim in which they sought *inter alia*, reinstatement / re-employment, 12 month's salary each and severance pay. The statement of claim was served on the applicant on 31 October 2013 by registered post. The applicant did not defend the matter.
- [11] Default judgment was granted against the applicant on 27 March 2015 and a writ of execution was issued and served on the applicant's premises on 29 February 2016.

³ Annexure "D" p 48

⁴ Annexure "E" p 50

⁵ Annexure "F" p 52

⁶ Annexure "M" p 67

- [12] Following the serving of the writ of execution, the applicant launched a rescission application on 16 March 2016 which the respondents have opposed.
- [13] On 3 May 2016, the matter was removed from the unopposed motion roll by Coetzee AJ as the matter had become opposed.

The applicant's case

- [14] In its founding affidavit, the applicant does not state what section of the LRA nor what Rule of the Labour Court it is relying on to bring its rescission application.
- [15] The applicant does state in its heads of argument that “...*the default judgment in casu was erroneously granted...*”⁷ however in the applicant's founding affidavit it deals with its *bona fide* defence and wilful default.
- [16] The applicant's case is that it was not in wilful default and that it has a *bona fide* defence. In respect of the wilful default, the applicant states that it never received the respondents' statement of claim but only in its replying affidavit does the applicant expand on the reasons as to why this was the case.
- [17] In the replying affidavit, the applicant details how it became aware of “*the matter...when the Sheriff of the court came to our offices to serve us with a writ of Execution...*”. Further that the statement of claim was received on 11 November 2011 on behalf of the applicant by its erstwhile employee Mr Mvundlela. Mr Mvundlela did not bring the respondents' statement of claim to the applicant's management's attention. Mr Mvundlela was retrenched during 2012 and the applicant cannot trace Mr Mvundlela.
- [18] The applicant submits that had the statement of claim come to its attention it would have “...*vigorously opposed it.*”

⁷ Applicant's heads of argument p 8 para 4.13

- [19] In respect of the applicant's *bona fide* defence, it states that the retrenchment was substantively and procedurally fair and that both respondents were paid severance packages of R6 676.00 each which was more than what was legally required of the applicant to pay.

The respondents' case

- [20] The respondents firstly seek condonation in respect of their answering affidavit in that it was nine days late.
- [21] In terms of paragraph 11.4.2 of the Labour Court's Practice Manual⁸, there is no need to apply for condonation for the late filing of an affidavit unless the party on whom the affidavit is served files a Notice of Objection. This Notice must be served and filed within 10 days of receipt of the affidavit after which the right to object shall lapse.
- [22] The applicant failed to serve a Notice of Objection however it does substantively object to the respondents' late filing of their answering affidavit in its replying affidavit which was filed five days after the answering affidavit was filed.
- [23] Despite the applicant not serving a Notice of Objection I have still considered the condonation application as it was raised in the applicant's replying affidavit.
- [24] I have considered the reasons for the delay, the degree of lateness, the prospects of success and the prejudice. I am satisfied that in order to have the merits of this matter fully ventilated, it is in the interests of justice that condonation be granted and that the respondents' answering affidavit is duly considered.

⁸ April 2013.

- [25] The respondents dispute that the applicant has shown good cause for the rescission to be granted; was not in wilful default; has a *bona fide* defence; and should be estopped from claiming that they never received the respondents' statement of claim.
- [26] The respondents' version is that default judgment was not erroneously granted because their statement of claim was duly served in terms of Rule 4(1)(a)(vii) of the Labour Court Rules.
- [27] In respect of the applicant's *bona fide* defence, the respondents contend that the applicant failed to comply with Section 189 of the LRA in that no consultations or joint consensus-seeking meetings were ever held between the respondents and the applicant.
- [28] The respondents further deny that they were paid any severance pay.
- [29] The respondents contend that the applicant's failure to oppose their unfair dismissal claim based on the applicant's operational requirements was wilful and that the judgment was not erroneously granted. Accordingly, the applicant's rescission application should fail.

The applicable legal principles and reasoning

- [30] Section 165 of the LRA read together with Rule 16A of the Labour Court Rules governs the variation and rescission of judgments and orders of the Labour Court.
- [31] Section 165 of the LRA states that:

“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.”

[32] Rule 16A(1)(a) mirrors the provisions of Section 165 of the LRA, I therefore only quote the provisions of Rule 16A(1)(b) and Rule 16A(2) of the Labour Court Rule which states that:

“(b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

(2) Any party desiring any relief under—

- (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
- (b) subrule 1(b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.
- (c) It is common cause that the respondents’ statement of claim was duly served on the applicant.”

[33] The applicant does not clearly set out in its application whether it is relying on Rule 16A(1)(a) or Rule 16A(1)(b) to rescind the judgment against it.

[34] In *Bayete Security Holdings v Mokgadi*,⁹ the Labour Court distinguished between Rule 16A(1)(a)(i) and Rule 16A(1)(b). According to the Court, Rule 16A distinguished between judgments erroneously granted in the absence of

⁹ [2000] 9 BLLR 1020 (LC).

a party (eg where notice was not given to a party) and judgments granted in the absence of a party other than erroneously (eg 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 no time limit are set whereas, in the second situation, good cause must be shown, and the application must be brought within the prescribed time limit.

- [35] An Order is erroneously made if there existed, at the time of granting of the Order, a fact which the Court was not aware of, and which would have precluded the Court from granting the Order had it been aware of it. In such circumstances the applicant need not show good cause in the sense of an explanation for its default and *bona fide* defence as the case is with rescission under the common law.¹⁰
- [36] The respondents are therefore correct when in their answering affidavit, they state that the “...court order was not erroneously made...”.¹¹
- [37] In its founding affidavit, the applicant does not state that its rescission application was erroneously made. Further in its founding affidavit, the applicant deals with wilful default as well as what it states as its grounds for defence. I have therefore considered the applicant’s rescission application in terms of R16A(1)(b) and R16A(2)(b). The applicant also launched its review application within 15 days of it becoming aware of the judgment against it. This also supports my view that the grounds of the rescission application are premised on Rule 16A(2)(b) of the Labour Court Rules.
- [38] The common law powers to rescind or vary Orders and judgments in terms of section 151 of the LRA read with Rule 16A of the Labour Court Rules provide that the Court can grant rescission of judgment if (1) the applicant gives a reasonable and acceptable explanation for its default and (2) the applicant

¹⁰ See: *Bakeoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) and *CAWU v Federale Stene (Pty) Ltd* (1998) 19 ILJ 642 (LC)

¹¹ Answering affidavit p 102 para 39.2.

has a *bona fide* defence which *prima facie* carries some prospects of success on the merits.¹²

[39] The Court may rescind any Order granted in the absence of any aggrieved party upon good cause shown.¹³

[40] The explanation as to why the applicant defaulted in opposing the respondents' claim is that it simply had no reason to assume the possibility that legal action had been instituted as the applicant never received the respondents' papers.

[41] It was only in its replying affidavit that the applicant explains and expands as to the reasons why it never received the respondents' papers.

[42] An applicant cannot, in law, make out its case in reply as its case must necessarily be made out in its founding papers. The applicant must stand or fall by its case as set out in its founding papers for that is the case upon which the respondent is called upon either to confirm or deny.¹⁴ The applicant is therefore weak on its explanation for rescission.

[43] In respect of prospects of success, this Court has to determine whether the application was *bona fide* and that there was a reasonable defence to the claim. This means that the applicant has to make out a *prima facie* case for the relief sought.¹⁵

Conclusion

¹²See: *Sarabande Electrical Construction v Guma* [1999] 4 BLLR 387 (LC) at 388 and *Chetty v Law Society, Transvaal* 1985 (2) SA (A) at 764J-765D

¹³ See: Rule 16A of the Labour Court Rules

¹⁴ See: *Director of Hospital Services v Mistry* 1979 (1) SA 629 (A) at 635H-636A

¹⁵ *Cqibitole v Pace Community College* [2000] 6 BLLR 673 (LC); Erasmus Superior Court Practice at B1-201 and 202.

- [44] The applicant contends that it followed the process provided for in section 189 of the LRA and that it also paid the respondents severance pay. The respondents dispute both these contentions.
- [45] The applicant has annexed to its papers, the section 189 notices as well as proof of payment. I am satisfied on the annexures attached to the applicant's papers that it has a *bona fide* defence and at the very least, it has made out a *prima facie* case.
- [46] Where an applicant has provided a poor explanation for default, a good defence may compensate.¹⁶
- [47] Annexure J1 attached to the applicant's replying affidavit depicts that the respondents were paid severance pay. However this annexure should have been attached to the founding affidavit for reasons stated above. Nevertheless, the applicant does state in its founding affidavit that the respondents "*were paid their packages*".
- [48] The applicant's version that the respondents were paid severance pay together with its version of the compliance with section 189 of the LRA, substantiates my finding that the applicant has established a *prima facie* defence and that it is equitable to grant the rescission application so that this matter can proceed to trial.

Costs

- [49] When it comes to the issue of costs, and in terms of sections 162(1) and (2) of the LRA, I have a wide discretion. Even though the applicant was successful, I do not intend to burden the respondents with a costs order. I am also mindful of the dictum of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹⁷ where it comes to the issue of costs in

¹⁶ Erasmus, Superior Court Practice, Juta, at B1-204 also *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE)

¹⁷ (2018) 39 ILJ 523 (CC)

employment disputes. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

[50] In the circumstances, the following Order is made:

Order

1. The respondents' application for condonation for the late filing of their answering affidavit is granted;
2. The default judgment granted by Voyi AJ on 27 March 2015 is rescinded.
3. There is no order as to costs.

S Swartz
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Thembeka Kumalo

For the respondents: Sipho Mahlangu

Instructed by: Wits Law Clinic