

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2438/16

In the matter between:

NATIONAL UNION OF MINeworkERS

First Applicant

FRIDAY KUMBIRAI MADAMOMBE

Second Applicant

SURPRISE MATHEBULA

Third Applicant

THULANI DUGUNYE

Fourth Applicant

and

JOSIAS SELLO MAAKE N.O

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

**EQSTRA NH EQUIPMENT (PTY) LTD t/a
EQSTRA CONSTRUCTION EQUIPMENT**

Third Respondent

Heard: 26 FEBRUARY 2019

Delivered: 04 FEBRUARY 2020

**Summary: Labour Relations Act, 66 of 1995 and Rules of Court:
Rescission of default order in terms of section 165(a) and
Rules of Court 16A**

JUDGMENT

RAPHULU, AJ

Introduction

- [1] This is an application for the rescission and setting aside of the default Court Order granted by Snyman, AJ dated 20 June 2017. The application is opposed.

Background

- [2] The Third Respondent launched an application to review and set aside an award made against it by the First Respondent.
- [3] The Registrar of this Court sent a notice of set down enrolling the application for hearing on the unopposed motion roll on 20 June 2017 at 10:00. The Notice of Set down appears to have been faxed to the First Applicant and the Third Respondent's attorneys, Kramer Villion Norris Incorporated.
- [4] On 20 June 2017, the matter proceeded before the court in the absence of the Applicants and the following order was issued in default against the Applicants:
1. "The applicant's review application is granted;
 2. The arbitration award of the first respondent, arbitrator JS Maake, dated 27 September 2016 and issued under case number LP3152-15, is reviewed and set aside;
 3. The arbitration award of the first respondent is substituted with an award that the dismissal of the third, fourth and fifth respondents was substantively fair;
 4. There is no order as to costs."

- [5] The Applicants' attorneys aver that on or about March 2017, the Third Respondent served a notice in terms of Rule 7A (6) of the Rules of the Labour Court on the attorneys of record for the First Applicant and its members. The Third Respondent alleges that on 9 March 2017, it obtained an acknowledgment of receipt of the notice in terms of rule 7A (8) (a) and its supplementary affidavit from the Applicants' attorneys of record. The Applicants deny that they received copies of the aforementioned documents. It is the Applicants' version that the attorneys of the Third Respondent failed to leave a copy of the documents with the Applicants' attorneys when these documents were delivered and that the Third Respondent's attorneys took all of the copies with them after obtaining an acknowledgment of receipt.
- [6] Further, it is the Applicants' case that the person who signed the acknowledgment of receipt, namely, Ms. Mary Mphepya (Ms Mphepya), is no longer in the employ of the attorneys for the Applicants and therefore the First Applicant and its members were not in possession of the documents in question and that these papers were "incorrectly delivered" by the attorneys of the Third Respondent. The Applicants therefore deny that the First Applicant and its members were in wilful default of opposing the review application and that at all relevant times, the First Applicant and its members intended to oppose the application.
- [7] The Applicants' contend further that they did not receive the notice of set down and that upon their perusal of the court file, the Registrar had sent the notice of set down on 17 May 2017 to an "unknown" fax number, being that of (011) 403 2071, despite the fact that the Applicants' filed their notice of appointment as attorneys of record, which stated that their fax number was 086 726 5217.
- [8] It is the Third Respondent's case that the aforementioned notice was served on the Applicants' attorneys by hand and that they acknowledged receipt thereof by completing the receipt block and affixing their stamp thereto. The Applicants were therefore in wilful default in opposing the review application and the judgment was not erroneously granted in their absence. The Third Respondent avers further that the Applicants also

contend that they did not receive a notice of set down and on this aspect contend that the Applicants did not file a notice of intention to defend the review application, therefore indicating their intention not to oppose the application. This, combined with their conduct in failing to file an answering affidavit after they had been properly served with a notice in terms of 7A(8)(a) of the Rules of the Labour Court with the supplementary affidavit cemented the Applicants' intent not to oppose the review application and the notice of set down therefore did not have to be served on them.

- [9] The Third Respondent contends that the Applicants have failed to indicate under which provision(s) of the Rules of the Labour Court and/or the LRA that they have instituted this rescission application. Their averments support both an application in accordance with Rule 16(1)(a)(i) of the Rules of the Labour Court, as read with section 165(a) of the LRA (rescission of a judgment / order that was erroneously sought or granted in the absence of a party) as well as Rule 16A(1)(b) of the Rules of the Labour Court (where the court may on application by any party affected, rescind any order or judgment granted in the absence of that party).

Application for rescission

- [10] I agree with the contention by the Third Respondent that the Applicants did not clearly set out in their application whether they were relying on 16(1)(a)(i) of the Rules of the Labour Court, as read with section 165(a) of the LRA or Rule 16A(1)(b) of the Rules of the Labour Court. It seems that the application has been brought in respect of both the aforementioned sections.

- [11] As further demonstrated below, there is a distinction between an application brought in terms of Rule 16A(1)(a)(i) and Rule 16A(1)(b). The requirements for the two sub-sections are also different.

The applicable legal principles

- [12] 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.

- [13] The above principle was applied in the case of *Bayete Security Holdings v Mokgadi and Others*¹ where the Labour Court distinguished between Rule 16A(1)(a)(i) and Rule 16A(1)(b). According to the court, Rule 16A 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 limits. This was quoted in approval in the case of *Mphahlele v Muswede*².
- [14] In the case of *Sizabantu Electrical Construction v Gama and Others*³, the court held that good cause is not required to be shown if the judgment or order was erroneously granted in the absence of a party. However, in terms of Rule 16A(1)(b), it is similar to rule 31(2)(b) of the Uniform Rules of the High Court. The requirements of good cause as contemplated by Rule 31(2)(b) have been stated as follows: the applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance; the application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim; and the applicant must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if it makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

¹ [2000] 9 BLLR 1020 (LC).

² (JS 173/14(2017) ZALCJHB 20 (25 January 2017).

³ [1999] 4 BLLR 387 (LC).

- [15] Below, I deal with the Applicants' application for rescission both in terms of Rule 16A(1)(a)(i) and Rule 16A(1)(b)

The rescission in terms of Rule 16A(1)(a)(i) of the Rules of the Labour Court.

- [16] It is the Applicants' contention that firstly, they did not receive the Third Respondent's notice in terms of Rule 7A(8)(a) with the supplementary affidavit and secondly, that they did not receive the notice of set down from the Labour Court due to the fact that it was sent to an incorrect fax number.
- [17] The crisp questions that arise for adjudication are whether or not there was incomplete service of the Rule 7A(8)(a) notice and if so, whether this incomplete services constitutes an irregularity, and whether or not the judge's ignorance of that incomplete service constitutes a fact which, had he been aware of, would not have granted the order.
- [18] It seems to be common cause between the parties that the attorneys of the First Applicant, being Mothobi attorneys, signed an acknowledgment of receipt of the Rule 7A(8)(a) notice with the supplementary affidavit on 9 March 2017 and that same was signed by a former employee of Mathobi attorneys, Ms. Mphepya and that the stamp of Mathobi attorneys is affixed to the Rule 7A(8)(a) notice. I have also perused the Rule 7A(8)(a) notice and have seen that the stamp of the attorneys of the Applicants has indeed been affixed to the notice and is dated 9 March 2017.
- [19] It is the Applicants' version that their attorneys of record did not receive a copy of the Rule 7A (8)(a) notice and that it was likely because the attorneys of the Third Respondent failed to leave a copy with the Applicants' attorneys after it received the acknowledgment of receipt. The Third Respondent denies this proposition and submits that the acknowledgment of receipt block was completed by Ms. Mphepya on 9 March 2017 and that she affixed the stamp of the attorneys to the aforementioned notice, which is a clear acknowledgment of receipt of a copy of the notice with the supplementary affidavit. The Third Respondent contends that the stamp is *prima facie* proof that the notice

together with the supplementary affidavit was properly served on the Applicants' attorney, that they kept a copy of it and received it. The Third Respondent has also submitted a confirmatory affidavit deposed to by their messenger who was tasked with delivery of the pleading and who confirmed that he did in fact leave a copy of the notice together with the supplementary affidavit at the offices of the Applicants' attorneys on 9 March 2017.

[20] In the absence of sufficient evidence submitted by the Applicants to the contrary and based on the probabilities, I have no choice but to accept the Third Respondent's version.

[21] I now consider whether this default on part of the Applicants was wilful. In *Checkburn v Barkett*⁴ the Court followed this suggestion and the test adopted was whether the person alleged to be in wilful default knows what he is doing, intends what he is doing and is a free agent and is indifferent to what the consequences of his default may be. This latter test has been followed in a number of later cases but it has been suggested that this test too is not conclusive and that the true test is whether the default is a deliberate one, that is, whether the defendant with full knowledge of the circumstances and the risks attendant on his default freely takes the decision to refrain from taking action.

[22] All three elements must be established before the party can be said to be in wilful default. The onus of proof rests ultimately on the respondent. In some cases, he will be able to show these elements by direct evidence but if he cannot do so, they can be shown by inference. An applicant will therefore be held not to be in wilful default if he acted in the *bona fide* but mistaken belief, or where his default is due to a mistake or non-compliance with the Rules on his own part or of his attorney, or where the summons has not been properly served.

[23] In considering the above principles, based on the evidence submitted by the Third Respondent, I find that a copy of the Rule 7A notice with supplementary was properly served on the attorneys of the Applicants on

⁴ [1932] CPD 423.

9 March 2017 and that the Applicants' attorney's stamp affixed to the notice is sufficient proof of this service and that the Applicants were accordingly in wilful default in opposing the review application.

- [24] In respect of the Applicants' contention that they did not receive a notice of set down of the review application from this Court, I agree with the Third Respondent that the Applicants' failure to file a notice of intention to oppose the review application despite proper service with a notice in terms of Rule 7A(8)(a) with supplementary affidavit is enough to conclude that the Applicants had no intention to oppose the review. In any event, the matter was placed on the unopposed roll and there was no obligation on the Registrar to serve a notice of set down on the Applicants. In Proclamation R766 in Government Regulation Gazette No 22587 (Vol 438, 17 August 2001) the Rules were amended to require the Registrar not to deliver a notice to the party in default. The relevant portions read as follows:

"Rule 7(6)(b)

The Registrar must notify the parties of the date, time and place for the hearing of the application, but need not notify a respondent who has not delivered an answering affidavit in support of its opposition of the application."

"Rule 16(1)

If no response has been delivered within the prescribed time period or any extended period granted by the court within which to deliver a response, the registrar must, on notice to the applicant(s), enrol a matter for judgement by default."

- [25] However, despite this, the Registrar did send a copy of the notice to the Applicants via fax. Although the Applicants contend that the fax number was "unknown" to them, this was the same fax number of NUM as set out in the notice of motion to the review application which was not contended as "unknown" by the Applicants at the time. As such, the Applicants' argument has no merit, and I find that the notice of set down was served on them via a fax number known to them.

[26] Accordingly, the Applicants' application for rescission in terms of Rule 16A(1)(a)(i) must fail.

The rescission in terms of Rule 16A(b) of the Rules of the Labour Court

[27] As mentioned above, Rule 16A(b) states that the court may on application by any party affected, rescind any order or judgment granted in the absence of that party. This Rule requires of the applicant to show that it had good cause. However, if it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance. As I have already found the Applicants to be in wilful default in opposing the review application, I find no reason to consider the other requirements for good cause, such as whether the Applicant had a *bona fide* defence to the review application.

[28] Accordingly, I make the following order:

Order

1. The application for rescission is dismissed.
2. There is no order as to costs.

L. Raphulu

Acting Judge of the Labour Court of South Africa

Appearances:

For the First Applicant: Mothobi Attorneys

For the Third Respondent: Advocate Sumayya Tilly

Instructed by: Kramer Villion Norris Incorporated