



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J 1976/17

In the matter between:

GIWUSA obo MBONA AND 3 OTHERS

Applicant

and

**FOURIE'S POULTRY FARM (PTY) LTD
t/a CHUBBY CHICK**

First Respondent

BRUNHILDE FROHNAPFEL N.O

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 12 March 2025

Delivered: 18 March 2025

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 18 March 2025.

JUDGMENT

PRINSLOO JBackground facts

[1] A brief exposition of the litigation history is necessary to give context to the current application.

[2] The individual applicants were employees of the First Respondent (Respondent), and after their dismissal, they referred an unfair dismissal dispute to the CCMA. On 11 October 2019, an arbitration award was issued wherein the Second Respondent found that their dismissal was fair, and their case was dismissed.

[3] On 12 November 2019, the Applicant filed a review application, seeking the review and setting aside of the said arbitration award. The CCMA filed a Rule 7A(3)¹ notice on 28 November 2019.

[4] On 3 March 2020, the Respondent's attorney of record, Mr Wissing, addressed correspondence to GIWUSA and the Applicant was put on terms and informed that no further steps were taken to prosecute the review application. The Applicant was requested to indicate if the review application was abandoned within 14 days of the date of the correspondence, failing which a Rule 11 application would be brought to dismiss the review application for lack of prosecution. No response was received.

[5] In February 2021, the Respondent filed an application to dismiss the Applicant's review application for lack of prosecution, alternatively, the Respondent sought an order declaring that the review application had lapsed and that it was deemed to have been withdrawn. The Rule 11 application was brought because the Applicant was not diligently prosecuting the matter and had taken no further steps to pursue the review application.

¹ Rule 7A of GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed).

[6] In a service affidavit filed by the Respondent, it was confirmed that the Rule 11 application was served on the Applicant on 12 February 2021 and that GIWUSA's Mr Josaiah Mogase acknowledged receipt thereof.

[7] No notice of opposition or any opposing affidavit was filed in the Rule 11 application, and on 4 March 2021, the Respondent's attorney filed a notice in terms of Rule 22B, requesting that the matter be enrolled for hearing on the unopposed roll. It is evident from the Court file that the notice of set down for hearing of the Rule 11 application was sent to the parties (also GIWUSA) on 27 May 2021, indicating that the matter was set down for hearing on 12 August 2021. It was set down for hearing as an unopposed application.

[8] On 12 August 2021, the Rule 11 application was heard, as per the notice of set down of 27 May 2021, and the Court ordered that the review application filed under case number JR 2581/19 was dismissed for not being prosecuted, and GIWUSA was ordered to pay the Respondent's costs.

[9] In November 2021, the Applicant filed a rescission application, seeking to rescind the order of 12 August 2021. The Respondent opposed the application.

[10] The Applicant's case is that the order was erroneously sought and/or granted in its absence. Before I deal with the merits of the matter, it is necessary to set out the legal principles.

The applicable legal principles

[11] The rescission of court orders is provided for section 165 of the Labour Relations Act² (LRA) and was provided for in Rule 16A of the now-repealed Rules of the Labour Court. In the new Rules, rescission is provided for in Rule 46.

[12] Section 165 of the LRA provides as follows:

² Act 66 of 1995, as amended.

‘165. 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;
- (c) granted as a result of a mistake common to the parties to the proceedings.’

[13] The wording of Rule 16A(1)(a)(i) – (iii) (and now Rule 46(1)(a)) was identical to section 165 of the LRA, and there is no need to set out both.

[14] In *Construction & Allied Workers Union and Another v Federale Stene*³ (*Federale Stene*), it was held that:

‘Section 165(a) of the LRA is similar in its terms to rule 42(1)(a) of the Uniform Rules of the High Court. Commenting on the High Court rule Erasmus Superior Court Practice (Juta original service 1994) at B1-308 states the following:

“An order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or 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 he had been aware of it, not to grant the judgment... The courts have ... consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney.”

[15] Rule 16A(1)(b) (and now Rule 46(1)(b)) provided that the Labour Court may, on application of any party affected, rescind any order or judgment granted in the absence of that party, upon good cause shown. An application in terms of Rule 16A(1)(b) had to be made within 15 days after acquiring knowledge of the order or judgment granted in the absence of the applicant party.

³ (1998) 19 ILJ 642 (LC) at para 4.

[16] The essence of the difference between these two provisions is that in applications in terms of Rule 16A(1)(a)(i), where an order was erroneously granted in the absence of a party, the applicant was not required to show good cause, whereas that was required if the application is brought in terms of Rule 16A(1)(b).

[17] In *Advance Warehousing (Pty) Ltd v Mashigo*⁴, the Labour Appeal Court (LAC) restated the principles applicable to an application for rescission and good cause and held that:

‘It is now trite that an applicant for rescission must show good cause.⁵ This entails not only giving a full and reasonable explanation for its default, but disclosing a *bona fide* defence with good prospects of success in respect of the relief sought by the claimant, i.e., the order sought to be rescinded.’

[18] In *Herbstein & Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, it is explained that:⁶

‘An applicant for the rescission of a default judgment must show good cause and prove that at no time did he renounced his defence, and has a serious intention of proceeding with the case. In order to show good cause, an applicant must give a reasonable explanation for the default, the application must be made *bona fide* and must show that a *bona fide* defence to the plaintiff’s claim...

When a defendant appears in order to have the judgment set aside he must, in addition to explaining the failure to deliver notice of intention to defend, place before the court sufficient evidence from which it can be inferred that there is a *bona fide* defence to the action. It is not sufficient for the applicant to state that there is a *bona fide* defence. In order to establish a *bona fide* defence, the defendant must set out averments which, if established at the trial, would entitle him to the relief he asked for; it is not necessary to deal with

⁴ (JA9/16) [2017] ZALAC 57 (18 October 2017) at para 14.

⁵ See *inter alia* *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *Edcon (Pty) Ltd v Commission for Conciliation, Mediation Arbitration and Others; In re: Thulare and Others v Edcon (Pty) Ltd* (2016) 37 ILJ 434 (LAC).

⁶ A C Cilliers, C Loots, ‘Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of South Africa’, 5th ed., Juta at pp 715 - 716.

the merits of the case or produce evidence that the probabilities are actually in his favour.'

[19] However, regardless of which legislative rubric the application is brought under, the explanation for default to be tendered does not change.

The rescission application

[20] *In casu*, the Applicant approached this Court in terms of the provisions of section 165(a) of the LRA, averring that the order of 12 August 2021 was erroneously sought and/or granted in its absence.

[21] The Applicant must provide a reasonable explanation for its default and must show that the order was erroneously granted in its absence.

[22] The questions this Court has to consider are: was the order erroneously sought or granted and whether it was in the absence of the Applicant.

Explanation for the default

[23] It is undisputed that the Applicant was aware of the Respondent's Rule 11 application, that the Applicant filed no opposing papers and that the parties were notified that the matter was set down as an unopposed motion for hearing on 12 August 2021.

[24] It is evident that GIWUSA knew, since 12 February 2021, that the Respondent had filed a Rule 11 application and that it was notified in the notice of motion, that if it intended to oppose the granting of the relief sought by the Respondent, it had to deliver a notice of opposition and an answering affidavit within 10 days, failing which the matter be heard in the Applicant's absence.

[25] The Applicant did not file a notice to oppose or an answering affidavit and did not appear at Court on 12 August 2021. In my view, the Applicant's absence must be explained.

[26] The Applicant tendered no explanation whatsoever for its failure to oppose the Rule 11 application, notwithstanding the fact that it was aware of the application and the need to oppose it, failing which it could be heard on an unopposed basis. Instead, the position adopted by the Applicant was that there was absolutely no need to explain its default. In fact, the Applicant's argument was that whether it was present at Court and whether or not it opposed the Rule 11 application are irrelevant considerations as the only consideration is whether the Court order was granted in its absence. The Applicant submitted that *"there is no need to give any reasons whatsoever, the point is if the order is obtained in our absence this rescission application should be granted"*.

[27] Mr Mogase, for the Applicant, relied on paragraph [27] of *F&J Electrical CC v Metal & Electrical Workers Union of South Africa on behalf of Mashatola and Others*⁷ to support the aforesaid submission. The Constitutional Court held in paragraph [27] that:

'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. Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party. That is also the position under Rule 42 (1)(a) of the Uniform Rules of Court....'

[28] The Applicant's understanding of the aforesaid paragraph [27] is incorrect. It is not authority for the argument that there is no need to explain the Applicant's default or the reason why a rescission application is necessary and that the only consideration is that the order was granted in the Applicant's absence. What the Constitutional Court confirmed is that in a rescission application brought under section 165(a) of the LRA, there is no need to show good cause. Good cause, as already alluded to, relates to the disclosing of a *bona fide* defence, with good prospects of success in respect of the relief sought by the applicant and that the application must be made *bona fide*.

⁷ [2015] ZACC 3; (2015) 36 ILJ 1189 (CC) at para 27.

[29] In *Diplopoint (Pty) Ltd v Twala*⁸, the LAC held that:

‘It is generally essential that the party against whom legal proceedings are instituted must be given notice of the process in accordance with the law, or applicable practice or rules. A judgment or order may be ‘erroneously sought or erroneously granted’ in the absence of a party affected thereby, if, for example, the process concerned (such as a summons, or a statement of claim, as is in this case) had not been served on the party. In such instances, it only has to be shown that the process concerned was not served on the affected party and that would be sufficient to oblige the court to grant the rescission. It was not necessary for the appellant to show any further good cause.’

[30] Put differently, the reason or the cause for the rescission must be evident from the application. The applicant must explain that the reason why an order or judgment was granted in his or her absence was, for example, because the papers were never served on them or there was a *bona fide* belief that the matter was removed from the roll.

[31] *In casu*, the Applicant tendered no explanation as to why the order was granted in its absence because Mr Mogase took the view that such an explanation was not necessary.

Analysis

[32] Be that as it may, the Applicant seeks rescission on the ground that the Court order was erroneously sought or granted in its absence. The Applicant must show that the order was granted in its absence and that it was granted erroneously.

Was the order granted in the absence of the Applicant

⁸ [2022] ZALAC 97; (2022) 43 ILJ 1990 (LAC) at para 21.

[33] It is common cause that the Applicant was not present when the Court order was granted on 12 August 2021.

[34] The question which arises *in casu* is whether a Court order can be rescinded where the Applicant was aware of the Rule 11 application and was notified of the set down, but failed to file opposing papers or to appear in Court. In other words, can it be said that an order was granted in the absence of a party where the party was aware of the proceedings?

[35] In *Sherwood Strategic Advertising CC v Scott*⁹(*Sherwood*), the applicant also sought rescission of a Court order in terms of section 165(a) of the LRA. The applicant was aware of the litigation but failed to file any opposing papers, and the Court dismissed the rescission application after it found that “*significantly, the applicant does not dispute that the s 158(1)(c) application was served on him. There is proof of such service. Yet the applicant tenders no explanation at all as to why it did not file a notice of opposition or file any opposing affidavits. Taking either of these steps would have ensured that it had the opportunity to oppose by being served with a notice of set down.*” The Court held that:

‘[20] The absence of an explanation for not filing its notice to oppose and its affidavits leads to the inference that the applicant in this case either deliberately or negligently did not use the opportunity afforded to it to oppose the application. Consequently, its failure is due to its own fault. The history of this matter suggests that such failure was due rather to a deliberate decision to ignore the application rather than negligence.’

[36] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (Council for the Advancement of the South African Constitution and Another as amici curiae)*¹⁰ (*Zuma*), the Constitutional Court considered that where a litigant was a party to the proceedings and served with the papers, but elected not to participate in the proceedings, cannot mean that the order was granted in his or her absence. Rescission is aimed at protecting a litigant who was unaware of

⁹ (2001) 22 ILJ 2046 (LC).

¹⁰ [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 54.

proceedings affecting them, not a litigant who deliberately chose not to oppose. The Constitutional Court held that:

‘Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant’s right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist.’

[37] In considering the question whether the order was granted ‘in the absence’, it was found that:

‘Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.’¹¹

[38] The facts *in casu* indicate an awareness of litigation with a deliberate decision to ignore the opportunity to oppose the application, alternatively, a deliberate election was made not to oppose the matter. Where the relief sought is granted in an application that was known to a litigant and which was deliberately not opposed, it does not constitute an irregularity in the proceedings, nor was it not competent for the court to have made the order.

[39] The question as to whether a Court order can be rescinded when the Applicant was aware of the Rule 11 application as it was properly served and it was

¹¹ *Ibid* at para 56.

notified of the set down, but failed to file opposing papers or to appear in Court, has to be answered in the negative. This is so because the Applicant's absence was a deliberate election and not 'absence' in the sense as envisaged by section 165(a) of the LRA.

[40] The Applicant is not a litigant that was excluded from proceedings, nor was it not afforded an opportunity to participate in the litigation. The Constitutional Court¹² was clear:

'Our jurisprudence is clear: where a litigant, given notice of the case against him and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted. I need say no more than this: Mr Zuma's litigious tactics cannot render him "absent" in the sense envisaged by rule 42(1)(a).'

Was the order erroneously sought or granted

[41] The Applicant has to demonstrate why the order of 12 August 2021 was erroneously granted. The Applicant must show that at the time the order was granted, a fact existed of which the presiding judge was unaware, which would have precluded the granting of the order and which would have induced him, if aware of it, not to grant the order.

[42] The Applicant failed to demonstrate why the order was erroneously granted and failed to point to any fact which would have precluded the granting of the order or which would have induced the Judge, if aware of it, not to grant the order. Instead, the Applicant did no more than persist with the submission that the order was granted in the absence of the Applicant and that its absence was sufficient to rescind the order. Mr Mogase submitted that "*it was simply enough that the Applicant was not present when the order was granted*".

[43] This argument is without merit. In *Zuma*, the Constitutional Court held that¹³:

¹² *Ibid* at para 61.

¹³ *Ibid* at para 60.

‘Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).’

[44] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*¹⁴, the Supreme Court of Appeal held that:

‘A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.’

[45] The mere fact that the Court order was granted in the absence of the Applicant does not render it erroneous. This application does not meet the requirements of section 165(a) of the LRA, and the Applicant has not brought itself within the ambit of section 165(a). The application for rescission has to fail.

¹⁴ [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 27.

Costs

[46] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[47] Mr Wissing, for the Respondent, submitted that the application should be dismissed with costs. He argued that the application was ill-considered and should have been withdrawn, but instead, the Applicant persisted with a meritless application. There is no reason why the Respondent should be out of pocket for defending a meritless application. Mr Wissing insisted that GIWUSA should be ordered to pay the Respondent's costs.

[48] I invited Mr Mogase more than once to make submissions on the issue of cost, indicating to him that the Respondent was seeking a cost order against the Applicant. Mr Mogase did not make any submissions as to why a cost order should not be made against the Applicant, but instead, he made submissions to the effect that the Applicant "*will not pay any costs as it owes the Respondent nothing*".

[49] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹⁵, the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[50] This is a case where this Court has to strike a balance.

[51] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been

¹⁵ (2018) 39 ILJ 523 (CC).

unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*¹⁶, it was emphasized that:

‘... unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

[52] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[53] In my view, this is a case where a cost order is warranted. This is more so as the Applicant is a well-established trade union that litigates in this Court on a regular basis. The Applicant has filed a rescission application which had no merit and where the basic requirements for an application such as the one pursued were not considered or met. This application compelled the Respondent to oppose it.

[54] The Applicant came to Court with a meritless application, which should not have been pursued, and fairness dictates that the Respondent cannot be expected to endure enormous costs defending meritless litigation. The Respondent is entitled to its costs.

[55] In the premises, I make the following order:

Order

1. The application for rescission is dismissed;
2. The Applicant is to pay the First Respondent's costs on the scale as between party and party.

¹⁶ [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Mogase from GIWUSA

For the First Respondent: Mr H Wissing from Henk Wissing Inc Attorneys

LABOUR COURT