THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case No: D1685/17

In the matter between**:**

SPECIAL INVESTIGATING UNIT **Applicant**

and

NEHAWU obo D GRUBB & 1 OTHER **First Respondent**

THE COMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

LISA WILLIAMS-DE BEER N.O. **Third Respondent**

Heard: 23 October 2019

Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down the written judgment is deemed to be 05 on March 2021.

Summary: Rescission application in terms of Rule 16A (1) (a) (i) read with section 165 of the LRA – Legal principles governing rescission applications restated – meaning of "erroneously granted" considered. In this case it was found that there was no procedural irregularity, therefore the order was not erroneously granted.

JUDGMENT

MGAGA, AJ

Introduction

[1] In this opposed application which came before me on 23 October 2019, in the main, the applicant seeks the following substantive orders:

> "1. That the Judgment and Orders granted by the Honourable Justice Cele, J on the 14 June 2019 be and is hereby rescinded and set aside in terms of Section 165 read with Rule 16A (1) (a);
>
> 2. That the non-compliance with the Rules of this Court in respect of the late prosecution of the review application, the late delivery of the record in the arbitration, the late delivery of Rule 7A (8) Notice and the reinstatement alternatively reinstitution of the review be and is hereby condoned;
>
> 3. That the review under case number D369/17, is reinstated, alternatively reinstituted; …"[1]

[2] This application was prompted by an order made by Cele J on 14 June 2019 at the instance of the first respondent in terms of which the arbitration award of the third respondent dated 10 November 2016 was made an order of court in accordance with section 158 (1) (c) of the Labour Relations Act[2] ("LRA").

---

[1] Pleadings, page 2
[2] Act 66 of 1995

[3] The order of Cele J was issued on 14 June 2019 in the absence of the applicant in the sense that by then the applicant had not yet filed opposing papers, and its application to have the matter postponed so that it could file opposing papers was effectively dismissed by Cele J.

Relevant background facts

[4] The genesis of this application is the arbitration award issued by the third respondent on 10 November 2016 in favour of the two employees represented by the first respondent. For the sake of convenience, I will refer to the two employees (Messrs. D. Grubb and V. Govender) as the first respondents.

[5] The first respondents had referred an unfair labour practice dispute to the second respondent contending that the applicant's failure to promote them to the posts of Assistant Project Managers constituted an unfair labour practice as envisaged in section 186 (2) (a) of the LRA. In the arbitration award the third respondent concluded that the non-promotion of the first respondents was substantively fair but procedurally unfair because of the undue delay in the finalization of the recruitment process and the applicant's failure to inform and explain to the first respondents the reasons for the delay. The third respondent ordered the applicant to pay compensation to the first respondents in the sum of R 61 347.26 each within 14 days of receipt of the award.

[6] Unhappy with the award, the applicant launched a review application under case number D369/17 seeking to review and set aside the award. Since the review application was filed outside of the prescribed 6-week period, it was duly accompanied by a condonation application. The applicant was represented by Macgregor Erasmus attorneys ("ME Attorneys").

[7] The applicant failed to file the review record timeously[3]. When the record was eventually filed, the applicant failed to file the Rule 7A (8) notice. This prompted the first respondents to bring an application in terms of Rule 11 to

[3] Paragraph 11.2.2 of the Practice Manual prescribes that the record must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

have the review application dismissed and to make the arbitration award an order of court in terms of section 158 (1) (c) of the LRA.

[8] The Rule 11 application was filed on 30 November 2017. Although the Rule 11 application was brought under a case number different to the review application's case number, it was served on ME Attorneys who were the applicant's attorneys of record in the review application. It appears that ME Attorneys duly accepted service of the Rule 11 application on behalf of the applicant. This is so because when ME Attorneys later filed a notice of withdrawal in the review application they also filed a notice of withdrawal in the Rule 11 application. The applicant has also not suggested that service of the Rule 11 application on ME Attorneys was improper.

[9] The Rule 11 application was to be heard on 14 June 2019. The notice of set down was duly served on the parties on 27 May 2019. It is undisputed that ME Attorneys duly received the notice of set down on behalf of the applicant.

[10] On 13 June 2019, just a day before the hearing of the Rule 11 application, ME Attorneys filed notices of withdrawal as attorneys of record for the applicant in the review application and the Rule 11 application[4]. At that stage the applicant had not yet filed any papers in opposition to the Rule 11 application.

[11] When the Rule 11 application came before Cele J on 14 June 2019, the applicant, represented by Mr *Beemchund* (instructed by State Attorney, Pretoria), moved a substantive application for the postponement of the matter so as to enable the applicant to file opposing papers. The postponement application was supported by an affidavit setting out the reasons why the applicant needed a postponement. The main reason advanced was that there had been a delay in the payment of ME Attorneys' fees which led to ME Attorneys placing a hold on all work to be done, and this culminated in ME Attorneys withdrawing at the eleventh hour without timeously informing the applicant about the Rule 11 application.

[12] After hearing arguments for and against the postponement application Cele J proceeded to make the following order:

[4] The withdrawal notices were served on the applicant on 12 June 2019.

"1. The review application remains deemed to have been withdrawn in terms of Practice Directive 11.2.3.

2. The arbitration award in this matter is made an order of court in terms of S 158 (1) of the Labour Relations Act.

3. No costs order is made."

Although nothing is specifically recorded in the order above about the fate of the postponement application, it is clear that that application was dismissed by Cele J. The applicant's contention that Cele J did not pronounce on the postponement application[5] is of no moment.

[13] In anticipation of the first respondents proceeding to enforce the order of Cele J through execution proceedings, the applicant brought an urgent application to stay that order pending determination of this rescission application and ancillary reliefs set out in paragraph 1 above. That urgent application came before Whitcher J on 28 June 2019, and it was adjourned to the opposed roll of 23 October 2019 to be dealt with together with the rescission application. The first respondents undertook to stay the execution proceedings pending the determination of the rescission application before this court.

Rescission application

[14] It is appropriate to deal with the rescission application first as its fate will determine whether it is necessary to consider the condonation applications in respect of the review application processes and the application to stay the execution proceedings. If the rescission application is dismissed it would mean that the arbitration award remains an order of this court and, consequently, the review and stay applications fall away.

[15] The rescission application is based on the applicant's contention that the order issued by Cele J on 14 June 2019 in the absence of the applicant, was erroneously sought and erroneously granted. The applicant submits that there were facts that existed at the time of issuing the order that Cele J was not

[5] Applicant's founding affidavit, Pleadings page 15 para 17

aware of. Had Cele J been aware of those facts he would not have issued the order, so the applicant's submission goes.

[16] Presumably, in an attempt to set out the facts that Cele J was unaware of at the time of issuing the order of 14 June 2019, the applicant proceeds to aver that it has a *bona fide* defence to the Rule 11 application; it was never in willful default and has good explanation for why the Rule 11 application was not timeously opposed; and it has excellent prospects of success in the review application. Then, at paragraph 16 of the founding affidavit[6] the applicant goes to town in explaining the fee dispute it had with ME Attorneys which culminated in the latter withdrawing as attorneys of record without opposing the Rule 11 application and without timeously informing the applicant of the existence thereof. The applicant further contends that by the time it became aware of the Rule 11 application (i.e. on 12 June 2019 when it received ME Attorneys' notices of withdrawal and notice of set down of the Rule 11 application) it was too late to instruct new attorneys and to investigate the facts regarding the Rule 11 application and file its opposition. The blame is laid squarely at the door of ME Attorneys.

Evaluation and analysis

[17] This rescission application is regulated by section 165 (a) of the LRA read with Rule 16A (1) (a) (i).

[18] Section 165 (a) of the LRA provides that:

> "The Labour Court, acting on 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;…"

[19] Rule 16A (1) (a) (i) provides that:

> "(1) The Court may, in addition to any other powers it may have –

[6] Pleadings pages 12 to 15

(a) of its own motion or on application of any party affected, rescind or vary any order or judgment –

(i) erroneously sought or erroneously granted in the absence of any party affected by it;…"

[20] Contrary to the first respondent's submission[7], I am satisfied that the order granted by Cele J on 14 June 2019 was granted in the absence of the applicant although its counsel was present in court and appeared on behalf of the applicant. The reality is that no opposing papers had been filed by the applicant, and the purpose of Mr *Beemchand's* appearance was to move the postponement application only. In considering the Rule 11 application the court did not have regard to the applicant's defence as it was not before it. For all intents and purposes, in respect of the Rule 11 application, the applicant was absent and the order was granted in its absence.

[21] That the applicant was absent despite the presence of its counsel in court finds support in *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*[8] where the following was stated:

"[2] The question to be decided is twofold, namely:

2.1. Whether the Appellant was in default despite the attendance of its Counsel in Court when judgment was granted; and…

[3] The judgment sought to be rescinded was granted on 2 August 2016 when M G Phatudi J refused an adjournment sought by the Appellant's Counsel and granted judgment in the absence of any answering affidavits by the Appellant and on the Respondent's version alone.

[4] …

[7] This submission is advanced at paragraph 13.2 of the first respondent's heads of argument.
[8] (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017), a decision of the full bench of the Limpopo High Court.

[10] The Court *a quo* decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court *a quo* erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD); First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD)**.

[12] The question of what is meant by "default" was considered in **Katritsis v De Macedo 1966 (1) SA 613 (A)**. In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. *In casu* the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party." (my underlining)

[22] The next inquiry, to which I now turn, is whether the order of Cele J was erroneously sought or erroneously granted.

[23] It is trite that an order may be rescinded if an applicant is able to show that at the time of granting the impugned order the court was not aware of certain facts which would have prevented the court from granting the order. However, those facts must demonstrate that there was some procedural irregularity which would have prevented the court from granting the impugned order. For example, in circumstances where a party had to be given notice of proceedings and the new facts show that such notice was not given properly and the order was granted in the absence of that party. Another example would be where the new facts show that the court did not have competency or jurisdiction to grant the impugned order[9]. The new facts which simply disclose the applicant's defence on the merits or that the applicant was not in willful default are not sufficient to meet the requirements of Rule 16A (a) (i). Those facts do not necessarily show that the impugned order was erroneously sought or erroneously granted.

[24] In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[10] , to the extent relevant, the following was stated:

> "[13] The submission in regard to the second alleged error amounts to saying that the applicants have a defence, which, if it had come to the knowledge of the Judge who granted the default judgments, would have precluded him from granting the default judgments.
>
> …
>
> [24] …Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That

[9] *Department of Correctional Services v Abel Montgomery Baloyi* (2016) 37 ILJ 22852 (LC) para [13]
[10] 2007 (6) SA 87 (SCA)

would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.

…

[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. 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 nonexistence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment." (my underlining)

In *Lodhi* the SCA was concerned with the meaning of Uniform Rule 42 (1) (a). However, since the wording of Rule 16A (1) (a) (i) is the same as that of Uniform Rule 42 (1) (a) the interpretation advanced in *Lodhi* is equally applicable to Rule 16A (a) (i).

[25] In the case before this court the facts the applicant claims Cele J was not aware of when he granted the order do not disclose any procedural irregularity or incompetency of the Court which would have prevented that Court from granting the order. It is not disputed that the notice of set down for the Rule 11 application was properly served on ME Attorneys who were the applicant's attorneys of record at the time. The facts which show that there was a fee dispute between the applicant and ME Attorneys which led to the

latter not attending to the opposition of the Rule 11 application and withdrawing a day before the hearing date do not constitute a procedural irregularity. Regardless of those facts, the first respondents were procedurally entitled to an order in the absence of the applicant's defence.

[26] The applicant's situation is exacerbated by the fact that, from the postponement application moved by the applicant on 14 June 2019, Cele J became aware of the fee dispute between ME Attorneys and the applicant, as well as the last minute withdrawal by ME Attorneys. Those details are set out in the affidavit in support of the postponement application.

Conclusion

[27] In the circumstances I conclude that the order granted by Cele J on 14 June 2019 was not erroneously sought or erroneously granted. It follows that the rescission application stands to be dismissed. As alluded to above, the dismissal of the rescission application means that the arbitration award remains the order of this court and the review application falls away. Therefore, it is not necessary to consider the condonation applications in respect of the review proceedings and the application to reinstate the review. The stay application also dies a natural death.

[28] What remains for consideration is the question of costs. At least two factors militate against a costs order in this case. There is an ongoing employment relationship between the first respondents and the applicant. Most of the legal work in respect of the rescission application, including the first respondent's heads of argument, was done by the NEHAWU official, Mr Malose Phoko. In the circumstances it is in accordance with the requirements of law and fairness that no costs order be made in this case.

[29] Lastly, I sincerely apologise to the parties for the undue delay in preparing and finalizing this judgment. The delay was mainly caused by unforeseen personal circumstances.

Order

[30] In the result, I make the following order:

1. The rescission application is dismissed.

2. There is no order as to costs.

_____

S.B. Mgaga AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Mr K. Beemchand

Instructed by: State Attorney, Pretoria

For the first respondent: Mr A. Moodley of Derik Jafta Attorneys