



THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Case no: JS45/13

Not Reportable

In the matter between:

RAUL NORIEGA

Applicant

and

SONY SOUTH AFRICA (PTY) LTD

Respondent

Heard: 1 December 2016

Delivered: 8 May 2017

JUDGMENT

GOLDEN, AJ

Introduction

- [1] This is an application for rescission of a judgment granted on 20 March 2015.

Background facts

- [2] The applicant was employed by the respondent as a sales person. He earned commission on sales, paid monthly in arrears. He resigned on or about 15 January 2010 and had commission outstanding, which he queried. According to the applicant he approached various employees of the respondent to request information necessary for him to determine if a bonus was owing to him and how this bonus was to be calculated. According to him, it was only on 23 July 2010 that the respondent provided him with the revised reconciliation of the applicable budget and sale figures, including revised commissions and bonuses payable.
- [3] Having received the information from the respondent he on 23 August 2013 was able to determine that a bonus was owing to him and was able to quantify the amount in the sum of R887 460.53.
- [4] The applicant instituted action against the respondent in early 2013 for payment of commissions he alleged was due to him. The matter was postponed in mid 2014 and eventually came to trial in early 2015. The applicant's attorney sought a postponement shortly before the trial, which was granted.

- [5] There was no appearance for the applicant at trial roll call on 12 February 2015, either by the applicant's attorney or his counsel. The presiding judge stood the matter down for the applicant's attorney to be called to court. The matter was then postponed *sine die*. The matter was then enrolled for hearing on the opposed motion roll for 20 March 2015. On 20 March 2015, the respondent's representatives and witness was present, but the applicant and his legal representatives were absent. Upon hearing legal argument, the judge upheld the prescription point which had been taken by the respondent, and dismissed the applicant's claim.
- [6] The applicant's attorney learned of the default judgment on 23 March 2015. According to the applicant's attorney, who deposed to the founding affidavit in support of the rescission application, he was mistaken as to the set down date and thought that the date was 30 March instead of 20 March. It was only when he spoke to the respondent's attorney that he was advised that the matter had been heard on 20 March 2015 and that judgment had been granted in the respondent's favour in respect of the prescription issue.
- [7] The applicant's attorney avers that it was a *bona fide* mistake on his part which should not be visited on the applicant and prevent him from having his day in court. He submits that he has provided a reasonable explanation, albeit of a peculiar circumstance. He submits in his founding affidavit that the applicant has a reasonable prospect of succeeding in his

defence to the special pleas which were raised by the respondent in the action.

[8] The applicant's attorney however does not deal with the prospects of success in his affidavit and merely states that in order to avoid prolixity he has not dealt with the merits of the matter in great detail and that they are fully ventilated in the papers before the Court in the main matter.

[9] Rule 16A permits the Court to rescind a judgment or Order granted in the absence of a party, on good cause shown.

[10] Rule 16A(1)(b) provides that this Court may on application by any party affected, rescind any order or judgment granted in the absence of that party.

[11] Rule 16A(2)(b) provides that

'Any party desiring any relief under-

(b) Subrule (1)(b) may, within 15 days of 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.'

[12] In order to demonstrate good cause, an applicant for rescission must satisfy two main requirements: a reasonable explanation for the default, and a bona fide defence which carries some prospect of success. (Vermisani Security Services CC v Mmusi & Another: In re: Mmusi &

Another v Vermisani Security Services CC (2013) 34 ILJ 440 (LC) at para [11]). The Court ultimately exercises a discretion based on policy and fairness when deciding to grant a rescission application.

[13] This Court must accordingly consider both the explanation for the default and the prospects of success in the main action.

[14] The applicant's attorney was not present at trial roll call on 12 February 2015. The matter was then postponed *sine die*, and had to be placed on the motion roll for evidence and argument in respect of the prescription point. The matter was then enrolled for 20 March 2015. The applicant's attorney does not dispute that he had received the necessary notice of set down. He avers that he was mistaken as to the date. He then learned of the default judgment on 23 March 2015.

[15] The jurisprudence of this Court is clear that where a notice of set down does, genuinely, not come to a party's attention, any judgment by default would be granted erroneously. (*Gay Transport (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 ILJ 1917 (LC) and *Roux v City of Cape Town* [2004] 8 BLLR 836 (LC)).

[16] The applicant's attorney however received the notice of set down. His explanation was that he was mistaken as to the enrolment date.

[17] It took the applicant's attorney a further 15 days to bring the rescission application. There is no explanation provided for this delay.

- [18] The applicant's attorney undertook to provide an affidavit from counsel to confirm the alleged mix-up regarding the dates, and the default order. This was subsequently not provided.
- [19] The explanation provided by the applicant's attorney is unsatisfactory, aggravated by his previous conduct when he was not present at court on a previous occasion when the matter was on the roll. The matter had to stand down so that his whereabouts could be determined. The matter inevitably had to be postponed.
- [20] The application is problematic for another reason. The application does not at all deal with the prospects of success in the main action. This, in my view, is fatal to the rescission application.
- [21] I am of the view that the main action has poor prospects of success in any event.
- [22] The applicant seeks payment of R887 000.00 plus interest in respect of commission earned between April 2008 and December 2009. The statement of claim was served on the respondent on 22 January 2013. The respondent has raised a special plea of prescription in terms of Section 11(d) of the Prescription Act 69 of 1969. The applicant has replicated to the plea as follows:

[22.1.] The applicant only became aware of the facts necessary to support his cause of action after 22 January 2010, and prescription commenced to run after this date.

[22.2.] Prescription was interrupted by way of an acknowledgement in writing (during May, alternatively July, alternatively October 2010) by the respondent of its liability towards the applicant.

[22.3.] The debt only arose seven days after termination of the applicant's employment, by virtue of the definition of "remuneration" as contained in the Basic Conditions of Employment Act 75 of 1997.

[23] The respondent submits that each commission payment became due one month after month end in the period in which the sales took place. This, according to the respondent, is when the "debt" became due, and when prescription commenced. According to the respondent, unless delayed or interrupted, the debt therefore prescribed three years after this date which is, at the end of May, June, July and November 2011, and at the end of December 2012 in terms of Section 11(d) of the Prescription Act.

[24] According to the respondent the applicant accepted the terms of his employment letter dated 4 April 2008 and was aware of the terms thereof at all relevant times. Accordingly, the applicant was aware of the debt and the facts from which it arose. On the respondent's version, the debts prescribed between May 2011 and December 2012 and that the last of the

debts had become prescribed by the time that the statement of claim was instituted.

[25] I do not agree that the formal tender for payment of R54 011.14 made by the respondent's attorney in the course of 2010 following a formal demand by the applicant can be construed as an acknowledgement of liability for commission on the basis claimed for by the applicant.

[26] Given that the applicant has not dealt with the prospects of success in any detail as he ought to have done, I am constrained to accept the respondent's version of the facts.

[27] The applicant was aware that he was due commission when he accepted employment with the respondent and that payment of commission became due monthly in arrears. It is not disputed that the applicant had received commission payments. At some stage he questioned the calculation of the payments. Not much detail of this is provided in the rescission application. Eventually the respondent reverted with the basis of its calculation of the commission payments which the applicant did not agree with. The applicant then instituted action, a few years later, on what he believed was the correct formula for the calculation of the commission. The applicant now alleges that he only became aware of the necessary facts to support his cause of action after January 2010. He alleges that he enquired of the respondent's employees as to the correct calculation of the commission. There is nothing to support this allegation in the application. The applicant has not attached to the application any email

correspondence or letters to demonstrate these enquiries to this Court or what efforts he has made. The applicant does not at all deal with his letter of employment dated 4 April 2008 which the respondent alleges contained the terms of his employment and the basis for the calculation of commission. The respondent, in this regard, avers that the applicant was aware of the facts upon which the debt arose. The applicant does not deal with his employment letter in his replying affidavit and merely states that *“these allegations once again deal in detail with the merits of the matter”*.

[28] I do not agree that the applicant only became aware of the basis of the calculation after 22 January 2010. The fact that the basis of the calculation for the commission payments was recorded in his employment letter is in itself dispositive of this issue.

[29] I am also not persuaded that the claim for commission falls within the definition of remuneration as contemplated in the Basic Conditions of Employment Act 75 of 1997. The applicant's counsel has provided the court with no authority for this proposition as to why commission, as a special category of payment, constitutes remuneration. Counsel also did not provide the Court with legal argument as to how the interpretation of the BCEA, according to the applicant, impacts the wording and interpretation of the Prescription Act, and the interplay between the two vis-a-vis the applicant's claim.

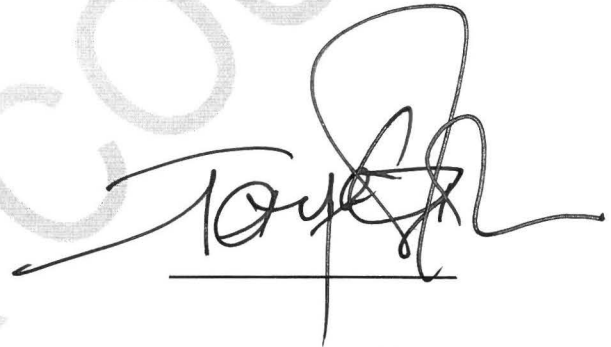
[30] On an interpretation of the relevant provisions of the Prescription Act, I accordingly find that the entire claim had prescribed by the time that the statement of claim was filed.

[31] The application for rescission is accordingly dismissed.

Conclusion

[32] I accordingly make the following order:

- (a) The application for rescission is dismissed.
- (b) There is no order as to costs.

A handwritten signature in black ink, appearing to read 'Golden', is written over a horizontal line.

GOLDEN, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant's attorneys:

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Respondent's attorneys:

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