



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

CASE NO: JR120/2017

In the matter between:

MANGAUNG METROPOLITAN MUNICIPALITY

Applicant

and

IMATU obo KEVIN DOLPHIN

First Respondent

SELLO MOPAKE NO

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

Heard: 09 January 2019

Delivered: 22 May 2019

JUDGMENT

NTSHEBE, AJ

Introduction

- [1] This is an application for rescission of an order dated 31 October 2017 granted against the applicant by Mahosi, J wherein she dismissed the applicant's review application and made the arbitration award issued by the second respondent an order of Court.
- [2] The application is accompanied by a condonation application by the applicant in respect of the late service and filing thereof.

Brief background facts

- [3] The first respondent referred a dispute to the third respondent regarding the payment of an acting allowance. The parties could not resolve the dispute at conciliation and the matter was set down for arbitration. At the arbitration proceedings, the parties agreed that the matter will be decided based on their closing arguments. However, the applicant failed to submit its heads of argument. The arbitrator proceeded and issued an award in which he found in favour of the first respondent and ordered the applicant to pay to the first respondent an amount of R107, 994. 42 (one hundred and seven thousand nine hundred and ninety-four rands and forty two cents). The award is dated 6 November 2016. It is not clear when the award was received by the applicant,

but in its condonation application for the review application, it is stated that in November presumably, 2016, the applicant instructed its attorneys to assist it with the filing of a review application. The Notice of Motion dated 24 January 2017, was served on the union on 25 January 2017 and filed with the Labour Court on 6 February 2017.

- [4] Nothing much was done by the applicant in pursuing the review application. This is so because on its own version, from 6 February 2017 to September 2017, the applicant's attorneys wrote only two letters to the Bargaining Council enquiring about the record. These letters are dated 27 September 2017 and 3 October 2017. Before the said dates, no action was taken in pursuing the review application.
- [5] As a result, on 1 August 2017, the first respondent instituted an application in terms of Rule 11 of the Labour Court Rules for an order dismissing the review application and that the award be made an order of Court. It is important to note that the said application was served on the applicant's attorneys by telefax on 1 August 2017 and by hand on 2 August 2017.
- [6] The applicant had 10 (ten) Court days within which to serve and file its answering affidavit. This it did not do. Not surprising, the first respondent proceeded with its application in terms of Rule 11 which was set down for 31 October 2017 wherein the order dismissing the review application and making the arbitration award an order of Court was granted. It is alleged by the applicant that the answering affidavit was subsequently filed with this Court on 13 November 2017. This was two weeks after the order had been granted by Mahosi, J.
- [7] The applicant states that he became aware of the order dismissing the review application on 26 November 2017 whilst the first respondent disputes that and states that the applicant became aware of the order on 14 November 2017.
- [8] The applicant contends that despite being made aware of the order on 26 November 2017, it received the actual order on 18 December 2017. It was

submitted by the applicant's counsel that 18 December 2018 is the date upon which the applicant acquired knowledge of the order. In its explanation regarding the reasons for lateness, the applicant states that because the order was sent 1 (one) day before the recess period of the Court, its counsel was unavailable to deal with the matter as he was already on holiday. The offices of the attorneys thereafter closed for the December holidays, two days after receiving the order and they reopened around 12 January 2018.

[9] Another reason alleged to have occasioned the delay was that the attorney in the firm who had been handling the matter resigned from its employ and was unavailable to assist on the finalization of the application. As a result, another attorney took over the matter on or about 25 January 2018 and instructed a different Counsel to draft the papers. Consultation with the new counsel was held on 3 February 2018.

[10] The law dealing with condonation applications is quite settled. In the case of *Melane v Santam Insurance Company Ltd*¹, the court had this to say:

“(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

[11] The attorneys were made aware of the order on their own version in November 2017 and received the actual Court order on 18 December 2017. The reason that they decide to wait to be in receipt of a typed Court order instead of making their own attempts such as getting a correspondent attorney to obtain the same Court order is not acceptable.

[12] After receiving the Court order on 18 December 2017, the applicant through its attorneys did not act immediately. The fact that by the time they received the

¹ 1962 (4) SA 531

Court order, the Court was on recess, did not preclude them from proceeding with the rescission application. If the applicant's explanation were to be accepted, it would mean that every time this Court is on recess there will be no need for parties to exchange pleadings. Furthermore, I believe that the attorneys would have in the absence of their counsel and due to the urgency of the matter, secured an alternative counsel available at that time. This they did not do.

[13] Even after reopening their offices on 12 January 2018, bearing in mind that they are aware of the Court order against the applicant, they did not show any urgency in dealing with the matter. This is so because after 12 January 2018 the rescission application was only filed on 22 February 2018.

[14] Therefore, having regard to the above and the principles applied by the courts in dealing with condonation applications in respect of the applicant's explanation and the period of delay which is excessive, the applicant has not made out a case for condonation to be granted. On the explanation alone, I am not persuaded that the applicant has furnished a reasonable explanation for its delay in bringing the rescission application.

[15] Even if my conclusion regarding the condonation is wrong, the problems of the applicant do not end there. There is no reasonable explanation as to what it did to pursue the review application between January 2017 to August 2017. At best, the applicant's attorneys only wrote two letters to the third respondent enquiring about the record only in September 2017. Other than that, the applicant's attorneys were content in not taking any action to pursue the review application.

[16] Furthermore, the explanation of the applicant's attorneys regarding its actions or lack thereof after being served with the Rule 11 application is not a reasonable explanation. I say so because the notice of motion clearly stated that the applicant had to serve and file its answering affidavit after being served with the Rule 11 application. The applicant did not even seek an indulgence from the first respondent to serve and file its answering affidavit at a later date or explain the situation to the first respondent.

[17] Even with the rescission application, the applicant has not satisfactorily explained its failure to pursue the review application. For a period of more than five months, the applicant did not take action in pursuing the review application. The only few things that it did was to write to the Bargaining Council six months after it had instituted the application, enquiring about the record. This obviously was in reaction of the third respondent's Rule 11 application. Other than that, the applicant was content with doing nothing or not taking any action in pursuing the review application. Therefore, regardless of the Bargaining Council's explanation to the applicant's attorneys as to why it did not file the record, the applicant's attorneys should have acted earlier in pursuing the matter. The fact that they waited for the Rule 11 application to be launched before they contacted the Bargaining Council clearly demonstrates that it did not intend pursuing the matter any further. Therefore, I am again not persuaded that even in respect of the rescission application the applicant has prospects of success.

[18] In the premises I make the following order.

Order

1. The application for condonation in respect of the rescission application is dismissed;
2. There is no order as to costs

T. Ntshebe

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv TJ Matshaba

Instructed by: Moroka Attorneys

For the Respondent: S Van Windvogel, Union Official

LABOUR COURT