

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 394/15

In the matter between:

FREE STATE GAMBLING AND LIQUOR AUTHORITY

Applicant

And

MAJORO MARVIN MOFOKENG

Respondent

Heard: 29 November 2018

Delivered: 17 May 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant approached this Court in terms of the provisions of section 165 of the Labour Relations Act (LRA)¹ read with rule 16A² of the Rules of this

¹ Act 66 of 1995 (as amended)

² Rule 16A:

(1) The court may, in addition to any other powers it may have-
(a) of its own motion or on application of any party affected, rescind or vary any order or judgment-

Court for an order rescinding and setting aside the order of this Court issued on 19 August 2016 in its absence.

- [2] The respondent (Mr Majoro Mofokeng), opposed the application, further contending that the rescission application was filed some 30 days outside the time-frames provided in terms of rule 16A(2)(b)³ of the Rules of this Court. In those circumstances, it was submitted that the application for rescission ought be dismissed owing to the failure to seek condonation for its late filing.

Background:

- [3] Following his dismissal on 17 December 2013, Mofokeng referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) which resulted in favourable award on 14 February 2015 in terms of which he was reinstated in the employ of the applicant with back-pay.
- [4] On 9 March 2015, the applicant filed its application to review and set aside the arbitration award. On 12 March 2015, the CCMA notified the parties that the record of arbitration proceedings was ready to be uplifted from the Registrar of this Court.
- [5] On 19 March 2015, Mofokeng filed his notice of intention to oppose the review application. On 19 March 2015 and 16 April 2015 the applicant uplifted the record of arbitration proceedings.
- [6] During May 2015, the applicant instituted urgent stay of proceedings which culminated in a judgement and order dated 19 May 2015, staying the enforcement of the arbitration award pending the final determination of the

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- (i) erroneously sought or erroneously granted in the absence of any party affected by it;
 - (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (iii) granted as the result of a mistake common to the parties, or
 - (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

³ Sub-rule 16A(2): Any party desiring any relief under-

- (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
- (b) subrule 1 (b) may within 15 days after 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.

review application. The Judgment of Rabkin-Naicker J in that regard was delivered on 26 June 2015. The applicant lodged an appeal against the order of costs granted against it. As at the time of the hearing of this application, the appeal (and cross-appeal) was still pending before the Labour Appeal Court.

- [7] In correspondence dated 25 September 2015, Mofokeng through his attorneys of record placed the applicant on terms, indicating that the latter had failed to file a record of arbitration proceedings in terms of the provisions of rule 7A(6) of the rules of this Court, and that the requirements of rule 7A(8) of the Rules of this Court had not been complied with.
- [8] On 9 November 2015, Mofokeng filed an application in terms of the provisions of Rule 11 of the Rules of this Court to dismiss the review application on account of the failure of the applicant to comply with the provisions of section 145(5) of the LRA. The applicant on 8 March 2016 filed its notice of intention to oppose the Rule 11 application.
- [9] The Rule 11 application was to be heard on 8 March 2016. On the same date, the applicant sought a postponement of the Rule 11 proceedings. In its averments in support of the postponement, it was conceded that it had failed to act in compliance with the Rules, in particular the provisions of rule 7A of the Rules of this Court. The applicant further averred that its failure to oppose the Rule 11 application was due to its mistaken belief that the record of arbitration proceedings and the notice in terms of Rule 7A(8) would be served and filed prior to the sitting of the Rule 11 proceedings. The proceedings in regard to the Rule 11 application were postponed *sine die*, and the applicant was ordered to pay the wasted costs on a punitive scale.
- [10] The Rule 11 application was again re-enrolled for 12 August 2016, and was postponed to 29 August 2016. On 29 August 2016, the Court (Per Whitcher J), and in the absence of the applicant, dismissed the application to review and set aside the arbitration award on account of lack of timely prosecution.
- [11] On 31 August 2016, Mofokeng's attorneys of record wrote to the applicant seeking to enforce the arbitration award in view of the concluded proceedings. On 5 September 2016, Mofokeng's attorneys of record advised the applicant

that he would resume his duties on 7 September 2016. On 6 September 2016, the applicant indicated its' intentions to institute the current rescission proceedings.

Preliminary issues:

Postponement:

- [12] At the commencement of these proceedings, Mr Narian for the applicant requested that the matter be stood down whilst the parties engaged in settlement discussions. When the matter resumed, Mr Narian informed the Court that the negotiations had broken down in view of the fact that the applicant had not budgeted for the settlement amount discussed.
- [13] Mr Narian then sought a postponement from the bar, in order for him to properly prepare for the rescission proceedings. The application for a postponement was opposed on a number grounds including that the litigation has been unduly delayed at the instance of the applicant, and further that the applicant in general terms had been delinquent in the prosecution of the review application, which had prejudiced Mofokeng.
- [14] In the light the consideration of the submissions on behalf of the parties and the facts of the matter, the Court refused the application for postponement on the following basis:
- 14.1. The Court accepted that the settlement negotiations had been ongoing for an extended period and further that even if there was an expectation from the applicant's attorneys of record that the settlement negotiations would culminate in an agreement to be made an order of Court, it was inconceivable that the applicant could only discover at the eleventh hour of the proceedings that there were budgetary constraints that hindered its ability to satisfy any settlement outcome. The Court formed the view that the alleged unforeseen budgetary constraints were indicative of negotiations in bad faith and/or of *mala fides* on the part of the applicant.

- 14.2. Furthermore, even if the anticipation of the settlement of the application by the applicant's attorneys of record was genuine, there was nothing which precluded the representatives from preparing for the application in the event (like in this case) that the settlement negotiations broke down.
- 14.3. The Court in the light of a consideration of various factors, including the prolonged history of the dispute; the undue delay at the instance of the applicant in prosecuting the review application; the overall principles surrounding the expeditious resolution of labour dispute as contemplated by the LRA; the prejudice the parties would suffer and the overall interests of justice, came to a conclusion that the postponement of the application was not justified.

The rescission application:

- [15] The rescission application was launched on 8 November 2016, when the order sought to be rescinded was granted on 29 August 2016. In the founding affidavit, the applicant conceded that the application for rescission was filed out of time.
- [16] Mofokeng in his answering affidavit averred that the rescission application was launched outside the timeframes contemplated in terms of rule 16A(2)(b) of the Rule of this Court, and in the circumstances, the applicant ought to have filed an application for condonation in that respect, and further that its failure to do so was fatal to the rescission application. The respondent elected not to file a replying affidavit, nor was an application for condonation filed in respect of the late filing of the rescission application.
- [17] It is clearly shocking that a party could simply acknowledge that its application before the Court is out of time and yet not make any attempts at addressing the delay. In circumstances such as these, it should be the end of the matter as far as this application is concerned, as it is not properly before the Court.
- [18] In conclusion, something needs to be said about the manner with which the applicant had prosecuted this matter, which in my view leaves a lot to be

desired. These concerns are raised in regards to the awarding of costs, which I am of the view that the considerations of law and fairness calls for such an order.

- [19] The protracted history of this matter is set out in the background as summarised somewhere in this judgment. It needs to be stated that since the dismissal of Mofokeng on 17 December 2013 and the favourable award he obtained on 14 February 2015, this matter has been beset by every dilatoriness conceivable on the part of the applicant. The review application having been delivered on 9 March 2015, not much progress had been made in bringing the matter to finality, hence the Rule 11 application that was delivered on 26 October 2015.
- [20] When the Rule 11 application was to be heard five months later on 8 March 2016, the applicant had still not filed an opposition to that application, and had sought to have proceedings postponed in order to deliver its answering affidavit. It was only at that stage that the record of proceedings and the supplementary affidavit was filed, some one year since the parties were notified of the availability of that record and since the record was uplifted.
- [21] The Rule 11 application set down for 8 March 2016 was postponed with an order of punitive costs. Pending the hearing of the Rule 11 application on 29 August 2016, Mofokeng delivered an answering affidavit, further indicating that the review application was deemed to have been withdrawn in terms of the provisions of paragraph 11.2.3 of this Court's Practice Manual.
- [22] On 29 August 2016, despite being granted a postponement to deliver an answer to the Rule 11 application, this was still not done. The applicant failed to make an appearance at all, resulting in the order being granted in its absence. As if that was not enough, the applicant again failed to observe the rules of this Court in approaching it with this belated application for rescission. Despite concerns raised by Mofokeng, the applicant hardly bothered to file an application for condonation.

[23] Taking into account all the delays and failures to comply with the rules of this Court and its Practice Manual, and further taking into account that the rescission application is not properly before the Court, it is doubted that any court, even if inclined to consider the rescission application, would have granted it. Other than these flagrant and egregious failures to comply with the rules of this Court throughout the prosecution of the review and rescission applications, the applicant, for good measure, did not even bother to attend to the indexing and pagination of the Court's bundle, which responsibility Mofokeng's attorneys had to take over. In the light of these factors, I see no reason either on the basis of law or fairness, why Mofokeng should be burdened with the costs of this application. Mofokeng only sought that the application be dismissed with costs. Had a punitive costs order been sought, I would not have hesitated in awarding such an order.

[24] Accordingly, the following order is made.

Order:

1. The application to rescind the order of this Court dated 29 August 2016 is dismissed with costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

S. Narian of Sunil Narian Incorporated

For the Respondents:

S. Collet, instructed by Kramer Weihmann & Joubert Incorporated