



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J 1327/2011

In the matter between:

THE DEPARTMENT OF SOCIAL

DEVELOPMENT: GAUTENG

Applicant

and

SELAELO KENNETH EDWARD MATSHA

Respondent

Heard: 10 July 2014

Delivered: 14 October 2014

Summary:

JUDGMENT

LEPPAN AJ

Introduction

- [1] This is an application to rescind the order granted by this Court on 8 June 2012 ("the Court Order") which made the default arbitration award dated 29 November 2010 an order of court in terms of section 158 (1)(c) of the Labour Relations Act 66 of 1995 ("the LRA").

- [2] The Applicant also seeks condonation for the late filing of its rescission application.

Factual Background

- [3] The Respondents are currently in the employ of the Applicant as either care workers or child care workers (the exact capacity in which they are employed is in dispute).
- [4] The Respondents referred an unfair labour practice dispute to the Public Health and Social Development Sectoral Bargaining Council ("Bargaining Council"). The dispute was about the alleged demotion of the Respondents from Senior auxiliary workers to care workers or child care workers.
- [5] An arbitration award in favour of the Respondents was issued on 29 November 2010 ("the Award"). The award indicates that the matter was heard in the absence of the Applicant on 30 April 2010.
- [6] The Applicant contends that it filed an application for the rescission of the Award with the Bargaining Council ("the rescission application"). The rescission application was filed with the Bargaining Council on 14 February 2011. However, there is no proof of service of the rescission application on the Respondents at that time. The rescission application was subsequently served on the Applicants on 13 September 2012. (i.e after the award was made an order of this Court).
- [7] On 4 August 2011, the Respondent brought an application to the Labour Court in terms of section 158(1)(c) of the LRA to have the award made an order of Court. ("the section 158(1)(c) application").
- [8] Although the section 158(1)(c) application appears to have been served on the Applicant on 03 November 2011, the Applicant averred that it was unaware of this application. Whereafter, the Respondents' attorneys dispatched a copy of the said application to the Applicant on 04 May 2012.

- [9] On 23 May 2012, the Applicant indicated to the Respondents' Attorneys that it was investigating the matter and that it would advise the Respondents on the way forward by 15 June 2012.
- [10] On 20 June 2012, the Applicant wrote to the Respondents' attorneys and advised them that due to the seriousness of the matter it had referred the matter to the State Attorney.
- [11] The Respondents' attorneys acknowledged the said letter on 21 June 2012 and informed the Applicant that it was awaiting a set down date for the matter on the unopposed motion roll.
- [12] On 10 July 2012, the Applicant filed its notice to oppose the section 158(1)(c) application.
- [13] The Respondents' attorneys wrote to the Applicant on 24 July 2012 and informed that the court order had already been granted on 08 June 2012.

Labour Court Rescission

- [14] On 17 September 2012, the Applicant filed its application to rescind the Court Order ("the Labour Court Rescission Application").
- [15] The Labour Court Rescission application is in terms of Rule 16A(1)(a) alternatively Rule 16A(1)(b) of the Labour Court Rules. For the reasons set out herein below, it is not necessary to determine which of these subsections is applicable at this stage of these proceedings.
- [16] The court order was granted on 08 June 2012. The Applicant became aware of the court order on 23 July 2012.
- [17] The Applicant filed the Labour Court rescission application on 17 September 2012 some 39 days after it became aware of the Court Order. The Applicant seeks condonation for the late filing of the Labour Court rescission application.

Grounds for Rescission

- [18] The Applicant contends that it was misled by the Respondents' attorneys concerning the status of the matter. In summary, the Applicant contends

that the Respondents or their attorneys should have disclosed that the section 158(1)(c) application was set down on 08 June 2012 but failed to do despite an exchange of correspondence between the parties during June 2012. The high water mark of this deception is a letter from the Respondents' attorneys dated 21 June 2012 in which they state that 'we are awaiting a date of hearing from the Labour Court on an unopposed roll'. This was conveyed to the applicant under circumstances in which the court order had already been granted on 08 June 2012.

[19] As a result, the Applicant submits that the court order was erroneously granted in the absence of the Applicant as contemplated in Rule 16A(1) alternatively (2) of the Labour Court Rules in that there were material facts which were not placed before this Court at the hearing of the section 158(a)(c) application.

[20] These facts are:

20.1 the award was the subject of a rescission application in the Bargaining Council which had not yet been determined to the knowledge of the Respondents; and

20.2. the Respondents were aware that the Applicant was in the process of instructing the State Attorney with regards to the way forward in the section 158(1)(c) application.

[21] The Applicant avers that had the Learned Judge been aware of these facts, she may not have granted the court order. It is on this basis that the Applicant now requests this Court to rescind the court order.

The Law on Rescission

[22] In *CAWU and Another v Federale Stene (1991) (Pty) Ltd*,¹ Pretorius AJ held that where a defaulting party is genuinely unaware of the date of set-down, granting judgment by default is erroneous and, in these circumstances, it is not necessary to prove good cause.

¹ [1998] 4 BLLR 374 (LC) at para 6.

- [23] In *Bayete Security Holdings v Mokgadi and Others*,² Lyster AJ held that Rule 16A distinguishes between judgments erroneously granted in the absence of a party (eg where notice was not given to a party) and judgments granted in the absence of a party other than erroneously (eg where notice had been properly given but the party was nevertheless absent). In the first situation, there is no need to show good cause and no time limit whereas, in the second situation, good cause must be shown and the application must be brought within the prescribed time limit.
- [24] In *Sizabantu Electrical Construction v Guma*,³ Seady AJ spelt out the requirements of good cause in the light of the similar provision in the Uniform Rules of the High Court and applied them to an application in terms of Rule 16A. She held that the applicant must give a reasonable explanation for the default (which must not be wilful or due to gross negligence) and must show that the application was *bona fide* and that there was a reasonable defence to the claim. This meant that the applicant had to make out a *prima facie* case for the relief sought.⁴

Analysis

- [25] The Applicant contends that there is a pending rescission application before the Bargaining Council. The Respondents deny the existence of that rescission application. The rescission application which is before the Bargaining Council is attached to the Applicant's founding affidavit in the Labour Court rescission application. It indicates that it was filed at the Bargaining Council on 14 February 2011. However, this takes the matter no further as there is no proof of service of the rescission application on the Respondents.
- [26] In my opinion, the Labour Court rescission application cannot be decided until there is clarity as to the status of the rescission application. If the Bargaining Council granted the rescission application albeit erroneously in the absence of the Respondents, the court order must be rescinded

² [2000] 9 BLLR 1020 (LC) at 1025E-I.

³ [1999] 4 BLLR 387 (LC) at para 7 and 8.

⁴ *Ibid.* See also Erasmus *Superior Court Practice* Juta at B1–201, B1–202.

because the award has previously been rescinded by the Bargaining Council.

[27] Conversely, if the rescission application has been dismissed, there would be no good reason to rescind the court order and therefore condonation for the late filing of the Labour Court rescission application should not be granted, alternatively, the Labour Court rescission application should be dismissed.

[28] None of these issues can be determined until there is certainty as to the status of the rescission application that is pending at the Bargaining Council.

Conclusion

[29] Accordingly, I make the following order:

- (a) The Labour Court rescission application is postponed sine die;
- (b) The Applicant is to file a supplementary affidavit within fifteen (15) days of delivery of this judgement explaining the status of the rescission application;
- (c) The Respondents may file an answering affidavit to the supplementary affidavit within ten (10) days of service of the supplementary affidavit.
- (d) The costs are reserved.

Leppan, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

Instructed by: Sefalafala Inc. Attorneys

For the Respondents: A.J Glendinning

Instructed by: Otto Krause Inc. Attorneys

LABOUR COURT