

SOUTH AFRICA / JUDGMENT

Mofokeng and Another v South African Municipal Workers Union and Another (C300/2022) [2025] ZALCCT 46 (7 July 2025)

[2025] ZALCCT 46

COURT
Labour Court Cape Town

BEFORE
C de Kock

CASE / FILE NUMBER
C300/2022

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THE
LABOUR COURT OF SOUTH AFRICA,
HELD
AT CAPE TOWN
Case no: C300/2022
Not
reportable
In

the matter between:

MABOI SHADRACK
MOFOKENG
First Applicant
MAFUBE ST VINCENT
MOFOKENG
Second Applicant
And
SOUTH
AFRICAN MUNICIPAL WORKERS UNION
First Respondent
DIHLABENG
LOCAL MUNICIPALITY
Second Respondent
In

re: SOUTH
AFRICAN MUNICIPAL WORKERS UNION
Applicant
DIHLABENG
LOCAL MUNICIPALITY
First Respondent
SHADRACK
MOFOKENG NAPAKADI
Second Respondent
MAFUBE
MOFOKENG BIYO
Third Respondent

Heard: 1 July 2025

Delivered: 7 July 2025

Summary: application for rescission of judgment – no proper service of pleadings on applicants in main application – judgment rescinded.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by the applicants (second and third respondents in the main application) for rescission of the judgment issued by the Labour Court on 20 August 2024 and date stamped by the Registrar on 30 August 2024. The applicants did not oppose the main application and an order was granted, in their absence, that the contracts of employment of the applicants are declared unlawful and set aside. The first respondent (SAMWU), the applicant in the main application, opposed the application for rescission.
- [2] The applicants rely on essentially two issues in seeking to have the judgment rescinded; (i) that SAMWU lacked the necessary authority to institute legal proceedings, which was argued as a mistake common to the parties in terms of Rule 46(1)(a)(iii) of the Labour Court Rules, and (ii) that the judgment was erroneously granted in their absence in terms of Rule 46(1)(a)(i).
- [3] Rule 46(1)(a)(iii) provides that the court may rescind any order or judgment granted as the result of a mistake common to the parties. It is abundantly clear from the pleadings, and even from the applicants' own heads of argument, that the reference to the lack of authority being a mistake common to the parties is in fact not a common mistake at all. SAMWU denies the allegation that the deponent and/or the attorneys had no authority. This denial, rightly or wrongly, contradicts the applicants' allegation that the alleged lack of authority was a mistake "common to both parties". The applicants are therefore not entitled to a

rescission of the judgment in terms of Rule 46(1)(a)(iii). The issue of “lack of authority” may be raised by the applicants in due course given this court’s finding hereunder.

- [4] The court is further not satisfied that the judgment can be rescinded in terms of Rule 46(1)(a)(i) insofar as the applicants rely on the alleged lack of authority. A decision as to the alleged lack of authority cannot be determined at this stage of the proceedings given that this issue has not been properly addressed by both parties in the application for rescission. It cannot be said that the court erroneously granted judgment in the applicants’ absence in relation to the alleged lack of authority. This however leaves the issue whether judgment was erroneously granted in the absence of the applicants with reference to the alleged failure by SAMWU to serve the application on the applicants.
- [5] SAMWU was required, in terms of Rule 9, to serve the pleadings on the applicants when they launched the initial application. The notice of motion, accompanied by the founding affidavit and annexures, were served by the sheriff at two different addresses. The pleadings were served on “Mafube Mofokengv Biyo”, by the sheriff, on 22 July 2022 by handing a copy thereof to Tsietsi Ramelale. The return from the sheriff states that the pleadings were handed to Ramelale at the place of “Mafube’s” employment, who was temporarily absent.
- [6] The notice of motion, accompanied by the founding affidavit and annexures, were served by the sheriff on “Shadrack Mofokengb Nakapadi” on 22 July 2022 by handing a copy thereof to Nkosana Sithole. The return from the sheriff states that the pleadings were handed to Sithole at the place of “Nakapadi’s” employment, who was temporarily absent.
- [7] What is concerning first and foremost is that the names of the two applicants, as per the notice of motion, do not refer to the correct names of the applicants. Maboi Shadrack Mofokeng was cited as Shadrack Mofokengb Nakapadi, and Mafube St Vincent Mofokeng was cited as Mafube Mofokengv Biyo.
- [8] It is unfortunate that the applicants’ names were not cited correctly. It might be so, as was argued, that it was a mere typographical error. However, what is unclear at this stage is whether the incorrect names could possibly have played a role in the applicants not having received the application.
- [9] The applicants denied receiving the application, hence their failure to oppose the application. This denial is referred to in the founding affidavit delivered in the application for rescission and in response, SAMWU states that the application was served in terms of the Rules. SAMWU’s argument is that since the application was served in terms of the Rules, SAMWU was procedurally entitled to the relief that was sought and granted. SAMWU’s case is further that the applicants made no attempt to obtain affidavits from the employees on who the application was served to confirm that the application was never handed to them.

- [10] The parties' respective versions regarding service requires a determination as to whether the onus to ensure that there was proper service rested on SAMWU, who provided the court and the applicants with proof of service in terms of Rule 9, or whether the onus rests with the applicants, as argued on behalf of SAMWU, to obtain affidavits from the employees on who the application was served to confirm that the application was never handed to them.
- [11] The court notes that it is common cause that the application was served in terms of Rule 9(1)(a)(iii) of the Labour Court Rules. However, when the person on who service was required brings an application for rescission of judgment and states that they did not receive a copy of the application, the question must be asked whether it is sufficient to merely make the allegation and do nothing else such as obtaining affidavits, as argued by SAMWU.
- [12] When SAMWU delivered its answering affidavit to the application for rescission, knowing that the applicants denied receiving the application, was it sufficient for SAMWU to rely on service in terms of Rule 9(1)(a)(iii) and to place the onus on the applicants to prove that they never received the application from the employees on who the sheriff served the application.
- [13] It is clear to the court that no matter where the onus lies, on the pleadings before this court it cannot be found that the applicants personally received the applications. The applicants' actions after it became known to them that a judgment was issued, i.e., to approach Dihlabeng and to request a copy of the judgment, the pleadings and proof of service is strengthening this court's finding that the applicants never received the application, hence their failure to oppose the application.
- [14] Returning to the onus, it is normally accepted that if service was done in accordance with Rule 9, the court will accept that such service is *prima facie* proof that there was proper service. However, when it is denied, as is the case in this application for rescission, that the persons on who the application was served handed the application to the ultimate recipients, the court is of the view that there was an onus on SAMWU to prove that the applications were handed to the applicants. When faced with a denial of receipt of the application, it was not sufficient for SAMWU to continue to rely on the service of the applications on two employees employed at the premises where the two applicants were working from.
- [15] The fundamental rule with regards to service is that the court must be satisfied that the defendant or respondent has received these documents and is therefore aware that legal proceedings are being brought against them. Erasmus stated in his book, *Superior Court Practice*: "It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against him". The ideal would be that the service of legal documents should be done via personal service. The reason why the application was served on the two employees at the respective offices is that the applicants were temporarily absent from the office. The court is of the view that more should have been done even by the sheriff to effect personal service. There is no allegation that the applicants were evasive to avoid personal service. It is

also not clear that the two employees on who the application was served, were apparently in authority.

[16] The court therefore finds that SAMWU failed to show that the applicants were handed copies of the application and in the absence of such proof, the court accepts the applicants' version that, despite the return of service, the application was never handed to the applicants. The applicants, not being made aware of the application, and not being served with the application, was not in wilful default in not opposing the application. Simply put, the applicants were not aware of the application, and this explains their failure to oppose the application.

[17] In the absence of the applicants having been served with the application, and being made aware of the court proceedings, the judgment dated 30 August 2024 wherein their contracts of employment were declared unlawful and were set aside, must be rescinded. The judgment was clearly erroneously granted in the absence of the applicants. The applicants were not afforded an opportunity to defend the application given the absence of proper and effective service. The court is of the further view that the applicants'

explanation for the late filing of the application for rescission is reasonable, and that the delay is not severe. In respect of prospects of success, it may be correct that the applicants based their prospects of success primarily on the "lack of authority"

and did not specifically address the merits insofar as their appointments are concerned. The court however finds that, given that

the applicants were never aware of the application until such time that they got to know about the judgment by alternative means, it is in the interests of justice and in line with the applicants' constitutional right to fair labour practices, and in accordance with the *audi alterem partem*-principle that the judgment be rescinded.

Costs

[18] In terms of the provisions of section 162(1) of the LRA, this court has a wide discretion when it comes to the issue of costs. The court is mindful of the dictum of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[1] when it comes to the issue of costs in employment disputes. In this matter, the dispute does not concern as employment dispute between an employer and an employee. SAMWU approached the court to seek a declarator that the contracts of employment of the applicants be declared unlawful and be set aside.

[19] It is however appropriate for this court not to make an order for costs at this stage and to order that the costs of the rescission application become costs in the main application.

[20] In the premises, the court makes the following order:

Order

1. The application to rescind the judgment dated 20 August 2024, and date stamped by the registrar on 30 August 2024, is granted. Dihlabeng, who decided not to oppose the application for rescission, is ordered to place the applicants back in the positions that they held prior to 20 August 2024 pending the outcome of the main application.
2. The costs of this application to be costs in the main application.
3. The applicants are directed to deliver an answering affidavit in the main application within 30 days from receipt of this judgment, whereafter the normal rules will apply in respect of motion proceedings. If no answering affidavit is delivered within the 30 days, the Registrar is directed to set the matter down on the unopposed motion roll.
4. The applicants are entitled to challenge the authority of the deponent of the founding affidavit and / or the authority of the attorney who is on record for SAMWU by complying with the Labour Court Rules.

C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Adv. K Felix

Instructed by: Jooste and Semer Attorneys

For the Respondents: Adv. A Jansen

Instructed by: Kramer Weihm

[1]

(2018) 39 ILJ 523 (CC).

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Prepared on 11 October 2026 · Esheria