

SOUTH AFRICA / JUDGMENT

Mothbi and Others v Brand Line Packaging (Pty) Ltd (JS971/2020) [2024] ZALCJHB 440 (6 November 2024) [2024] ZALCJHB 440

COURT

Labour Court Johannesburg

BEFORE

RN Daniels

CASE / FILE NUMBER

JS971/2020

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JS971/2020

In

the matter between:

SELLO
DAVID MOTHIBI
First
Applicant
PETROS
MOEKETSI LEGODI
Second
Applicant
NOMSA
JANE NGOBESA
Third
Applicant
ALBERT
MAILE
Fourth
Applicant
ERIC
VELAPHI TSHABALALA
Fifth
Applicant
and
BRAND

LINE PACKAGING (PTY) LTD
Respondent

Heard: 5 November 2024

Delivered: 6 November 2024

Summary: Application to rescind order taken by default. Application dismissed with costs de bonis propriis.

JUDGMENT

DANIELS J

Introduction

- [1] The applicants seek to rescind the order handed down by my brother Van Niekerk J (as he then was) in which the learned judge dismissed the dispute initiated by the applicants.
- [2] The application is brought in terms of section 165(a) of the Labour Relations Act No. 66 of 1995 as amended (hereafter “the LRA”) read with Rule 16A(1)(a)(i) of the erstwhile Rules of the Labour Court. The Rules of the Labour Court (hereafter “the Rules”) applicable to this matter are those published during 1996 in GG17495 GN1665.

Material

facts

- [3] The applicants alleged that they were unfairly dismissed by the respondent, for reasons related to its operational requirements. The respondent denied that the applicants were dismissed, and instead alleged that they resigned, taking a voluntary severance package.
- [4] Following exchange of pleadings, and the conclusion of a pre-trial minute, the dispute was enrolled for trial on Monday 20th February 2023. The notice of set down, sent to both parties, advised that roll call would be held at 09h45 and failure to attend at roll call may lead to the matter being struck off.
- [5] Van Niekerk J (as he then was) conducted roll call on the morning of Monday 20th February 2023. Neither the applicants’ counsel nor the instructing attorneys were in court when the matter was called, though the respondent’s representative was in attendance. The court heard the respondent’s representatives and resolved to dismiss the matter.
- [6] The applicants allege that their counsel arrived at court at 09h50 and, upon making enquiries with the Registrar, he was informed that the dispute had been struck from the roll. The applicants’ representatives returned to the Registrar at approximately 12h45 and was then informed that the matter had been dismissed “with costs”. The applicants did not seek reasons for the order but instead filed an application to rescind the order. The notice of

motion stated that the application is brought in terms of section 165(a) read with Rule 16A. However, in the founding affidavit, somewhat confusingly, the applicant stated that the application is brought in “terms of S16A(1)(b) of the Labour Court Rules”. There is no “S16A(1)(b)” in the Rules.

- [7] Given the context and content of the application, I accept that the application is made in terms of section 165(a) read with Rule 16A(1)(a)(i) of the Rules. The applicants’ statement of claim is attached to its founding affidavit, but no reference is made to the contents of the statement of claim, nor is any part of the statement of claim incorporated into the founding affidavit.[1]
- [8] The founding affidavit failed to explain the failure of the applicants’ representatives to attend court on time.[2] In addition, the founding affidavit set out no facts relating to the applicant’s prospects of success.[3] In these circumstances, even if the application had been brought under Rule 16A(1)(b) read with Rule 16A(2)(b), the applicants would have failed to show good cause.
- [9] The applicants’ representative conceded that the replying affidavit was filed late and there is no condonation application,

despite objection by the respondent. In the circumstances, the applicants’ representative conceded that their replying affidavit was not properly before the court.

- [10] The applicants contended that the court had erroneously dismissed the matter because the notice of set down only warned that failure to attend roll call may result in the dispute being struck from the roll. The notice of set down made no mention that the dispute could be dismissed. The applicants’ representative argued that the notice of set down contained directives issued by the court, and therefore was binding.

Legal principles and analysis

- [11] Section 165(a) of the LRA provides as follows:

“The Labour Court acting of its own accord or on application of any affected party may vary or rescind a decision, judgment or order – (a) erroneously sought or granted in the absence of any party affected by that judgment or order”

- [12] Rule 16A of the Rules provided as follows:

“(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-
- (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.
- (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.” (Own emphasis)

[13] In *Diplopoint (Pty) Ltd v Twala*[4] the Labour Appeal Court held that:

“It is generally essential that the party against whom legal proceedings are instituted must be given notice of the process in accordance with the law, or applicable practice or rules. A judgment or order may be ‘erroneously sought or erroneously granted’ in the absence of a party affected thereby, if, for example, the process concerned (such as a summons, or a statement of claim, as is in this case) had not been served on the party. In such instances, it only has to be shown that the process concerned was not served on the affected party and that would be sufficient to oblige the court to grant the rescission. It was not necessary for the appellant to show any further good cause.” (Own emphasis)

- [14] As is apparent, an application brought in terms of Rule 16A(1)(a)(i) does not require the applicant to show good cause for the rescission. The applicant need only prove that the order was erroneously granted in its absence. By contrast, when an application is brought under Rule 16A(1)(b) the applicant must show good cause. The concept of good cause requires a reasonable explanation for the default, and at least some prospects of success.[5]
- [15] In *Department of Correctional Services v Baloyi*[6] Molahlehi J (as he then was) stated: “The order or judgment will also be erroneously granted if it is shown that there was an irregularity in the proceedings or that the court did not have the competency to grant the order or judgment. The authorities are in agreement that there is no need to show good cause where it has been shown that the default judgment was erroneously sought or granted. It has also been generally accepted that a judgment is erroneously granted if at the time of granting it, there existed facts which the court had not been aware of and that had it been aware, it would not have granted the judgment or the order.”
- [16] Rule 42(1) of the Uniform Rules mirrors Rule 16A(1)(a)(i) of the Labour Court. An order “erroneously granted” as contemplated by Rule 42(1) excludes circumstances where an order is granted to a party that is procedurally entitled to it.[7]
- [17] In this matter, in my view, the order was not erroneously granted. The applicants have failed to prove that the court did not have the competency to grant the order, or was unaware of certain facts which would have led it not grant the order if it had been aware of such facts.

First, the notice was properly served and the applicants (and their representatives) were aware that they were required in court, on time. Second, the notice of set down did not and cannot operate to limit the discretion of the judge. The notice is not a directive from the judge, as the applicants contend. Third, the applicants do not state which facts existed which would have led the judge to not make the order – if he had been aware of such facts. If the judge had been aware that the applicants' representatives was delayed by loadshedding, and could arrive at any time, this would not have

prevented him from making the order. Even if the judge was aware that the applicant's representatives were close to the court, and that the notice of set down made no mention that the claim could be dismissed, this would not have prevented him from making the order which he did. Plainly, there is no error as contemplated in Rule 16A(1)(a)(i).

Costs

- [18] The respondent submitted that it should be awarded the costs of the application. Costs are governed by section 162 of the LRA which requires this court to consider the criteria of law and fairness. While the general rule is that costs follow the result, fairness may dictate otherwise. In the context of this matter, it would be unfair to saddle the applicants with costs arising directly from the negligence of their representatives. However, it would also be unfair for the respondent to have to bear its own costs given the extremely weak nature of the application. The respondent was dragged to court and compelled to defend an application with zero merit.
- [19] The manner in which the application was brought, and how it was presented, left much to be desired. The applicants presented no case law or support for its central, and rather startling, proposition – that the notice of set down somehow limited the power of the court to dismiss the matter. The applicants' heads of argument sought to present reasons for the representatives' failure to arrive at court on time, when this was not foreshadowed in the papers. Prospects of success were addressed, for the first time, in the heads of argument. The applicants' representative made no attempt to draw the court's attention to the fact that the replying affidavit was late and, for reasons not explained, condonation was not sought. The founding papers lacked transparency precisely where transparency was required, and in other instances made no sense at all. All of this demonstrated, in my view, extreme negligence (on the part of the applicants' representatives) and their callous disregard for the rights of their clients. This kind of improper behaviour can only bring the legal profession into disrepute.
- [20] While it is so that a court will only order legal representatives to pay costs in exceptional circumstances[8] it is also necessary to remember that attorneys and counsel hold themselves out as professionals, and charge accordingly. Though mala fides may not be established, the applicant's representatives have displayed an unfortunate disregard for their professional duties and responsibilities.[9] In the circumstances, it is fair that a cost order be made de bonis propriis.

Conclusion

[21] The order by Van Niekerk J was not erroneously made. The application is therefore dismissed, with the applicant's representatives to pay the costs of the application, including the costs of counsel.

RN Daniels

Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Maimela Inc Attorneys

For the Respondent:

Instructed by Barker Attorneys

[1] See *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 342 F – G

[2] In the applicants' heads of argument, the applicants allege that their counsel failed to arrive at court on time because there was loadshedding around certain parts of Johannesburg. This explanation should have been made in the founding affidavit. In the circumstances, the explanation is not given under oath and cannot be accepted.

[3] In their heads of argument, the applicants argue that they have prospects of success by making reference to the pleadings. This

should have been included in the founding affidavit. The applicants' prospects of success is therefore not dealt with under oath.

[4]

(2022) 43 ILJ 1990 (LAC) at para 21

[5] *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others*

(1994) 15 ILJ 1310 (LAC)

[6]

(2016) 37 ILJ 2852 (LC) at para 13

[7] *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)

[8] *Public Protector v SA Reserve Bank* 2019 (6) SA 253 (CC); *De Lacy v SA Post Office* 2011

(9) BCLR 905 (CC)

[9] Pheko and others v Ekurhuleni City 2015 (5) SA 600 (CC) at para 54

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