22/8/17.

HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 92504/2015

Not reportable

Not of interest to other Judges

In the matter between:

THE COMPENSATION FUND Applicant

and

HEADLINE CONSULTING (PTY) LTD T/A TSHWANE Respondent

Heard: 20 June 2017

Order: 18 August 2017

Reasons: 22 August 2017

Coram: Makgoka J

Summary: Rescission of an order - rule 42 of the Uniform Rules of Court- what constitutes 'erroneously' sought and granted order – once established that the order was sought or granted erroneously, the order ought to be rescinded without consideration of 'good cause'.

JUDGMENT

MAKGOKA, J

Introduction

[1] On Friday, 18 August 2017 I granted an order rescinding an order granted in this court on 12 January 2016. Ancillary to that order, the respondent was ordered to pay the costs of the application. These are the reasons for that order.

[2] This is an application by the applicant, the Compensation Fund, for rescission of an order granted by this court on 12 January 2016 against it in favour of the respondent, Headline Consulting (Pty) Ltd. In terms of that order, an arbitration award issued by an arbitrator in favour of the respondent against the applicant on 11 September 2015, was made an order of this court. The relief sought by the applicant is opposed by the respondent.

The parties

[3] The applicant is a statutory body established in terms the Compensation for Occupational Injuries and Diseases Act 130 of 1993.The respondent, which trades as Tshwane Air, is company with limited liability whose business involve, among other others, the supply, installation and maintenance of air conditioning systems. It was placed under business rescue on 16 October 2013 by a special resolution in terms of s 129(1) of the Companies Act 71 of 2008.

Background facts

[4] The factual background giving rise to the application is simple. Pursuant to a tender process, the parties concluded a written agreement on 12 May 2012 for the installation of new air conditioning units at the offices of the applicant, including the provision of 12 months' maintenance and repair services for the newly installed air conditioning units. The agreement was for a total price of R3 327 573.11. The agreement was to commence on 1 May 2012 and would have been effective for 3 years unless terminated in terms of the provisions of thereof.

[5] When the respondent delivered and attempted to install the air conditioning units on 26 October 2012, the applicant indicated that it was not ready for the installation as the building on which the air conditioning was to be effected needed to be renovated, and that such renovations needed to precede the installation of the air conditioning units. Under the circumstances, the applicant suggested to the respondent to suspend its obligations under the agreement until the renovations to the building had been completed. The respondent did not accede to the suggestion, and instead, regarded it as a repudiation of the agreement, which it did not accept. It sought to hold the applicant to the agreement.

The arbitration

[6] The parties agreed to refer their dispute to arbitration. The respondent filed its request for arbitration and its statement of claim in the arbitration on 14 May 2015. The applicant's conduct was characterised by inaction. It failed to: deliver its statement of defence; pay its portion of arbitration fees, and to attend a pre-arbitration meeting. The pre-arbitration meeting was held by the arbitrator on 31 July 2015 in the presence only of the respondent. A pre-arbitration minute was issued and signed by the arbitrator.

[7] As the applicant was still in default of delivery of a statement of defence, a default hearing was arranged to be held on 2 September 2015. A notification in this regard was served on the applicant on 14 August 2015. Between 28 August and 1 September 2015 there was correspondence between the parties' legal representatives, in which the applicant sought the postponement of the arbitration scheduled for 2 September 2015. Nothing came out of this as the respondent was not inclined to grant the postponement.

The arbitration award

[8] The arbitration, as stated earlier, was set down for 2 September 2015. On that day, the respondent was represented by counsel. The applicant was not legally represented. Two functionaries of the applicant, one of them a legal officer, appeared and sought a postponement of the arbitration proceedings,

citing several grounds in support of the application. Counsel for the respondent opposed the application. The arbitrator refused the application for postponement and proceeded to deal with the matter on an unopposed basis.

[9] On 11 September 2015 the arbitrator furnished his final award, in terms of which the applicant was to pay the respondent an amount of R2 077 977.42. The arbitrator also made ancillary orders regarding costs, his fees and related expenses.

Application to make award an order of court

[10] On 17 November 2015 the respondent issued an application in this court seeking an order making the arbitration award an order of court. The application was served on the applicant on 20 November 2015. The notice of motion stated that the matter would be heard in the unopposed motion court on 12 January 2016, in the event it was not opposed. The applicant's notice of intention to oppose was not delivered timeously, but was transmitted by email to the respondent's attorneys by State Attorney only on 11 January 2016, a day before the hearing.

[11] Upon receipt of the notice, the respondent's attorney telephoned the State Attorney, and pointed to minor errors in the notice, and that the application would proceed the following day, despite the transmission of the notice of

intention to oppose. Further, that there should be representation for the applicant at the hearing. A rectified notice of intention to oppose was transmitted by email later that day.

The proceedings on 12 January 2016

[12] On 12 January 2016 the application came before court (Bam J). The respondent was represented by counsel. There was no appearance on behalf of the applicant, although it seems common cause that a representative of the State Attorney arrived later when counsel for the respondent had already mentioned the matter and was addressing the court.

[13] The transcribed record of the proceedings reveals the following. Counsel appearing for the respondent conveyed to the court that a notice of intention to oppose was emailed to the respondent's attorneys the previous day. Despite that, counsel indicated his intention to proceed with the application. The learned judge pointed out that the email transmitting the notice of intention to oppose was 'late', and enquired whether there was an explanation for the lateness, to which counsel answered in the negative.

[14] Counsel proceeded to make submissions, pointing out that the arbitration award had been published as far back as September 2015 and the application to make the award an order of court had been served in November 2015. Counsel

concluded his submissions by stating that it was 'improper for the respondent [the applicant] upon the [eleventh hour] to want to oppose the application' and that the applicant [respondent] would 'suffer prejudice' were the arbitration award not be made an order of court that day. Without any comment or any reasons, the learned judge granted the prayers contained in the respondent's notice of motion.

The rescission application

Default at arbitration

[15] The applicant, aggrieved by that order, on 8 February 2016, launched this application, seeking to rescind it. The founding affidavit on behalf of the applicant was deposed to by Mr Vuyo Mafata, its acting Compensation Commissioner. He explains the applicant's failure to attend the arbitration proceedings as follows. The legal officer who was assigned the matter was, on the same day of the hearing, attending to a case affecting him in his personal capacity at a bargaining council. He had not succeeded in his endeavours to have either of the matters postponed. He then arranged with another legal officer to appear at the arbitration, who as stated earlier, sought in vain to have the arbitration postponed. At that stage the matter had not been brought to the attention of the State Attorney.

Failure to timeously oppose the main application

[16] With regard to the failure by the applicant to timeously oppose the respondent's application to make the arbitration award an order of court, Mr Mafata explains that there was a 'communication breakdown' between the legal office of the applicant, the State Attorney and the advocate briefed in the matter. That led to the late service of the notice of intention to oppose and the failure to attend court on 12 January 2016.

[17] On the other hand, the respondent opposes the application, essentially on two bases. First, that the order was not erroneously granted as the judge was informed of all the relevant facts, including that the notice of intention to oppose had been received late. The judge had considered the application on the basis that the notice of intention to oppose had been filed, and granted the order. Second, that the applicant has failed to demonstrate good cause. In particular, it is pointed out that the applicant has not explained why: the State Attorney was not briefed timeously; the notice of intention to oppose was not filed timeously; an answering affidavit was not filed timeously; the State attorney arrived late at court; the counsel briefed for the matter never arrived at court; the representative of the State Attorney, who was present when the order was made, did not intervene when the matter was called.

Basis for rescission

[18] It is not explicit from the notice of motion or the founding affidavit as to which of the three alternatives (common law, rule 32(1)(b) and rule 42) the applicant relies on. At common law 'good cause' is required to rescind the order). In terms of rule 31(2)(b) of the Uniform Rules of Court, a defendant may within twenty days after he or she has knowledge of a judgment granted in his or her absence, apply to court to set aside such judgment upon showing good cause. Lastly, rule 42(1)(a) provides that the court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[19] The applicant contends that the order was 'granted in error'. In my view, the facts of the case are eminently tailor-made for rule 42. I shall accordingly, first consider the application in terms of that rule.

Was the order erroneously granted?

[20] The law as to whether a judgment has been erroneously sought or erroneously granted within the meaning of rule 42 is well-settled. It is stated by the Supreme Court of Appeal in two judgments: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) 1 (SCA) and *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA). As explained in *Lodhi*:

'[27] A court which grants judgment by default ... does not grant the judgment on the basis that the defendant does not have a defence: it grants judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought...'

See also Harms, *Civil Procedure*, para B42.3.

[21] It is accepted that an order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for a court to make that order. See *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) and *Stander v Absa Bank* 1997 (4) SA 873 (E); *Lezimin 2557 t/a BG Construction and Sheriff of the High Court and Another* (J1469/07) [2008] ZALC 95 (16 July 2008) at para 23; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C; Cilliers, Loots and Nel *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed (2009) Juta: Cape Town at 933.

[22] In the present case, it is clear that the applicant intended to oppose the application, albeit its notice to that effect was transmitted late. It seems that the learned judge was of the view that because of its lateness, the notice could simply be ignored. This is an erroneous premise. In *Pugin v Pugin* 1963 (1) SA 791 (W) it was aptly remarked at 794F-G that 'a person who has entered an appearance to defend cannot be condemned without being heard.' See also

Mthanthi v Pepler 1993 (4) SA 368 (D & CLD) at 372 A-J; *Trustees Indertyd van M & L Trust v Jason Lucas* [1996] 4 All SA 237 (E).

[23] Although the decisions referred to above concerned defects in appearances to defend unlike the present case, I am of the view that they confirm a salutary principle: a late or defective notice of intention to defend or to oppose does not entitle a plaintiff or applicant to obtain default judgment. It is therefore clear that the respondent was procedurally not entitled to judgment. By granting it under the circumstances, the judge committed an irregularity. It was in the premises erroneously sought and granted.

[24] It is significant that in terms of rule 42(1) an applicant does not have to show 'good cause'. Once the court holds that an order or judgment was erroneously granted it should without further enquiry rescind it. See *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576(W) at 578F-G; *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30C-D; *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D-J; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417I.

Conclusion

[25] The sum total of the above is that given the conclusion I have arrived at that the order was erroneously sought and granted, it is unnecessary to consider

the residual arguments in respect of the reason for the default or the bona fide defence in the main application. The application must be granted. With regard to costs, the general principle should apply. The applicant as the successful party is entitled to costs.

Order

[26] For all of these reasons, I made the order referred to in para 1 above, which, for completeness' sake, I repeat below:

1. The default judgment granted against the applicant on 12 January 2016 is rescinded;

2. The applicant is ordered to file its answering affidavit to the respondent's application within 20 (twenty) days of the granting of this order;

3. The respondent is ordered to pay the costs of this application.

TM Makgoka
Judge of the High Court

APPEARANCES:

For the Applicant:	M Makhubele Instructed by: State Attorney, Pretoria
For Respondent:	SD Wagener SC Instructed by: Weavind & Weavind, Pretoria