Sneller Verbatim/idm

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS58/01

2002-06-27

In the matter between

SHABANGU INVESTIGATIVE SERVICES Applicant

and

UNITED INTERNATIONAL Respondent

J U D G M E N T

NTSEBEZA AJ: This is an application in terms of rule 16(a) of the Labour Relations Act, where the applicant seeks to rescind a default judgment that was granted in favour of the respondents on 30 October 2001, as well as that this court should condone the late filing of the rescission application. The application is governed by rule 16(a) of the rules of this court.

Rule 16(a) reads as follows:

"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 ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(iii)granted as a 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."

The rule goes on to state that any party that seeks this relief must, on notice to all the parties whose interests may be affected, upon good cause shown, seek to have the order or judgment set aside, and this court would then determine whether there is a case that has been made.

The applicant contends that it seeks this relief by way of application in terms of section 165 of the Labour Relations Act 66 of 1995 (the Act). Section 165 merely states that variations in decisions of orders of the Labour Court are possible, because the Labour Court, acting of its own accord or on the application of any other affected party, may vary or rescind a

decision, judgment or order which was erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. In fact, section 165 of the Act is a rehash of the rule 16(a) which I have referred to hereinabove, in terms of which this application is brought. That much seems to be in any event common cause between the parties.

There is also the application for condonation, which I need to deal with first. It is common cause that this application was never opposed on affidavit by the respondent in these proceedings. Some opposition has been raised in the heads, the heads being a proper motivation for why the condonation application should be granted. It has been argued that the period for which condonation is sought is not excessive. Mr Malan submitted that, even taken at its worst, namely 25 days, it should not be regarded as being excessive. Indeed he submits that the period to be taken into account is 10 days, that being the period during which it could be said the attorneys acting for the applicant were remiss to the degree that they could be held to have been remiss. He submits, however, that even the attorneys cannot be held liable, given the circumstances that he has described in the background to the application for condonation.

I do not propose to deal with the evidence that gives the background, save only to say where it is uncontested and where the representative of the respondent in these proceedings, Mr Hlongwa, has indicated that he leaves it to the court to determine whether there has been a compliance with the requirements condonation, I am persuaded by Mr Malan's submission that in the circumstances the application for condonation should be dealt with on the only evidence and on the averments of the applicant.

I, however, have to, in the exercise of my discretion, satisfy myself that good cause exists, and where I have to decide whether good cause exists, I have to take into account the degree of lateness, the explanation given for the lateness, the prospects of success, prejudice, and the importance of the case. Indeed, it is so, and reference has been made to these considerations by Mr Malan in his heads of argument as well as in his address, that our courts have taken these into account when they have to determine whether condonation ought or ought not to be granted. See *Melane v Santam Insurance Company Ltd* 1962 4 SA 531 (A). See also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* 1997 11 BLLR 1475 (LC).

I am satisfied on the evidence before me that there is an adequate explanation, a explanation that is not controverted by the respondent. It is true that the condonation application did not accompany the application for rescission. Nothing really should turn on that, because as was submitted by Mr Malan, I am not persuaded that a condonation application is subject to any time limits as such, as far as that goes.

In the circumstances, and in the exercise of my discretion, I am satisfied that a case has been made for the granting of condonation for the late filing of the application for rescission, and I so order.

The next consideration is whether a case has been made for the rescission application. As I have indicated, both in terms of the Act, and in terms of the rules promulgated in terms thereof, rule 16(a), I have to be satisfied that the court that granted the judgment or order in the absence of any of the parties affected by the judgment or order, erroneously did so, and in order for me to be satisfied that this is so, I have to evaluate all the facts. One of the principal considerations that I must take into account is whether the default by the applicant was wilful or negligent, or as was submitted by Mr Hlongwa, whether it shows a complete disregard of the rules of this

court, and amounts to the adoption of a cavalier attitude by the applicant as to its fate with regard to the judgment or order that was given against it. Not really much was said about whether the applicant needs to show good cause on the basis of the order that was granted erroneously, although Mr Malan referred me in his heads to a number of authorities in this regard. He particularly referred me to the case of *Topple and Others v Ellis Group Management Services (Pty) Ltd* 1988 1 SA 639 (W), and he quoted copiously from that judgment.

I do not consider that it is necessary for me to determine whether good cause has been shown here. I need only to apply my mind as to whether, on a balance of probabilities, a case has been made as to why the applicant in these proceedings was in default on 31 October 2001 when Landman J gave his purported judgment. The explanation has been given, not very strongly controverted on the papers, that the applicant became aware for the first time after the judgment had been given that in fact on 31 October the respondent was in court seeking to make the award of the CCMA commissioner an order of this court.

Mr Hlongwa strongly argued that proof of service was indicated for the judge sitting on 31 October by the fact that a

registered slip did indicate that service had been effected thereby on the applicant in these proceedings. I do not necessarily take the view that that is not so. However, I have to take into account that that service by its very nature is contestable; contestable in the sense that it is not one of the best forms of service, though it is a most efficacious way of service and has been accepted by the rules of this court to be proper service. However, I take judicial notice of the fact that sometimes it is so that that service does not in fact indicate in sufficient and conclusive terms that service was effected, as is proved by the slips that show that a registered item was sent. Where, as now, under oath you have a litigant who swears both in his founding affidavit as well as in his reply that he was not in wilful default, it is a difficult situation for me, sitting to consider the issues only on the papers to arrive at the conclusion that because there is an averment that a registered slip was sent or is proof of the fact that service was effected, that necessarily that service was indeed effected. It seems to me that it would not be in accordance with fairness to all the parties if I were to take an attitude that there is no basis for me to accept evidence on oath which says that the applicant in these proceedings was not aware that on the day on which

judgment was taken against it, the proceedings in this court were on.

It has been submitted by Mr Hlongwa that the whole purpose of this court is to try and resolve issues, as speedily as possible, and with the minimum of delay. I agree. I, however, want to qualify that and say, these courts ought to be placed in a position where they can be satisfied that justice has been done to all the parties that seek relief from it. The applicant here has stated that had it been aware on 31 October 2001 that the respondent was in court seeking to have the award made an order of court, it would have been at court as well to oppose that. Everything else that it has done since then seems to me to indicate that it is seeking to be put on an equal footing, so that it can have this matter determined in circumstances where it also has been able to put its side of the story.

In any event, that my main consideration should be whether it was in wilful default. I am not able to hold that it was, given what the applicant has said in its affidavit which, as I indicated, remains largely uncontradicted.

In order for me also to be able to exercise my discretion, I have been urged to view submissions that have been made

that the applicant has a *bona fide* defence against respondent's claim, and that it has excellent prospects of success in reviewing the application award and in defending the claim. I do not intend to go that route, save only to say, on the face of it, it does appear that there is an arguable case, sufficient for me to be persuaded to grant the applicant the relief that he seeks today.

What remains for me to deal with is the question of costs. Mr Malan has made the submission that this application is of a vexatious nature, or rather the opposition thereto is of a vexatious nature, the nature of which I should saddle the respondent with an appropriate order as to costs. Mr Hlongwa, on the other hand, has urged me to grant costs in favour of the respondent. That would be in the event that the application for rescission is dismissed. In the view that I take of this matter, I am not necessarily persuaded that the opposition was vexatious. It may have been couched in inelegant terms, which speaks not so much to the vexatious character of the opposition, but to the less than sophisticated manner of presenting the case. Given that we deal, on the one hand, with an admitted attorney, and on the other hand with a union official, I do not consider that I would have to saddle the

respondent with an order of costs on the basis only that the opposition to the application for rescission was allegedly vexatious.

In the circumstances I make the order as follows: The order granted by this honourable court on or about 30 October 2001 is hereby rescinded. There will be no order as to costs.

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DB NTSEBEZA

Acting Judge of the Labour Court of South Africa

Appearance:

e Applicants: Mr G.F. Malan

cted by: Webber Wentzel Bowens

e Respondents: Mr N. Hlongwa (Union Official)

cted by: The Professional Transport Workers Union of South Africa

of Hearing: 27 June 2002

Date of Judgment: