IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not Reportable

CASE NO: JR810/01

In the matter between:

BP SOUTH AFRICA (PTY) LTD	APPLICANT
AND	
PULE, TEBALO ANDREW	**1ST RESPONDENT**
COMMISSIONER A MATHEBULA N.O COMMISSION FOR CONCILIATION,	**2ND R ESPONDENT**
MEDIATIONAND ARBITRATION	**3RD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction 1

[1] This is an application to rescind the order dismissing the applicant's application to review and set aside the arbitration award which had been granted in favour of the first respondent (the employee).

[2] It is common cause that a day after the applicant filed his review application the employee also filed his review application. In the light of this the parties attorneys engaged in discussion about the possible consolidation of the two review applications

[3] The problem that arose there after and which seems to have frustrated the plan to consolidate the two matters is the transcript of the record of the arbitration proceedings. The transcripts were incomplete and inaudible in several areas. The applicant then approached the employee's attorneys and required from them if there had hand written notes of the commissioner's for the purposes of the reconstructing the record. Nothing seems to have come out of this enquiry but what is apparent is that both review applications reached a stalemate.

[4] The papers before this court reveals that for a considerable period of time nothing was done to progress of both the review applications. There is some suggestions from the applicant that the employee abandoned his review application.

[5] The other development in this matter which is important and has some significance in understanding the circumstances and the contexts within which the rescission is considered is that the employee terminated the mandate of his attorneys who were responsible for processing his review application including opposing the applicant's review.

[6] After withdrawing his instruction from his attorneys the applicant filed with this court what he referred to as *"application to strike out"* it is apparent that the court treated this as an application to dismiss the applicants review for reasons of delay in prosecuting the same. The picture which emerges from the employee's application to dismiss which had a significant influence on the courts decision to grant the order as

prayed for emerges from paragraphs 4.9, to 4.21. where the applicant says the following:

"4.9 On the 18th day of June 2001 my representative received by fax mail transmission, the companies review application. But it has to be noted that it was delivered without a case number.

4.10 On the 25th day of June 2001, I received several confirmatory affidavit in this matter without that company applies (sic) for condonation.

4.11 By the beginning of September 2001, I received a Rule 7 A (3) notice from the CCMA that was dated 27th day of August 2001, indicating that the records were dispatched to the Labour Court….

4.12 The Companies attorney collected the records from the Labour Court. They sent a note to my est while attorneys of record in case no: JR810-01 Messers Hlatswayo du Plessiss van de Merwe, that they have collected the records for the transcription.

4.13 On the 29th day January 2002, I received another letter from the companies attorneys of record which was dated the 24th day January 2002 and indicated that they had send the tape cassettes to be transcribed....

4.14 The above letter was a response to a query made by my legal representative as to the progress in this matter. The court's file indicates that the last movement to occur in this file is around 2002.

4.15 Since that I have appointed lawyers to review case no JR 810-01 who were not attorneys of record of this case, Deneys Rietz the company lawyers adopted a strange attitude towards me. Despite mu protests they refused to talk to me.

4.16 As result of such an attitude I could not do anything on my own and I thus left everything into the hands of my lawyers.

4.17 On the 3rd day of December 200, I went to Hlatswayo du Plessiss van de Merwe attorneys to get clarity on the delay. I was amazed when they informed me that they have misplaced my file and that they were withdrawing as my lawyers.

4.18 I accepted the withdrawal and requested them to deliver such a notice. Though they promised to do so I was surprised to have noted that up to the 4th day of January 2007, they have not yet done so! I faxed to them a notice requesting them to do so. .....

4.19 On the same day I faxed to the Company's attorneys of record a notice requesting them to come up with a manner in which to settle this belated matter. This was because they have failed to prosecute the matter within a reasonable period. ……

4.20 A few days thereafter they sent me a notice of withdrawal as my attorneys.

4.21 Up to the day I signed this affidavit, the Company had not yet responded to my reasonable and humble request. The delay the company has caused in this matter has prejudiced me greatly."

The legal principles governing rescission

[7] There are three grounds upon which an application for rescission of a judgment or an order of a court can be made. An application can be brought under the common law, s165 of the Labour Relations Act 66 of 1995 and Rule 16A of the Rules of the Labour Court case ***Griweland Vescoporative v Sheriff Hards Waters and Others in: Re-Sherrif Hard Wasters and Others v Molander 2010 (31)ILJ 632 (LC).***

The explanation for the default

[8] The applicant did not place in issue the averment of the employee that he served his application to dismiss on them via a registered mail. The applicant specifically placed in issue as to whether or not any of the documents in the "application to struck out" were indeed served by registered post to Denez Rietz; any of the documents were indeed send, what those documents were; whether any of the documents were faxed to Denez Rietz as indicated as an alternative form of deliver in the "notice to struck out"; whether any of the documents were simply posted to Denez Rietz post box as indicated on the filling sheet. The applicant also contends in its founding affidavit that it never receive a notice of application to dismiss. The applicant emphasises in their heads of argument that nothing in the documents referred to indicate that the were specifically addressed to a particular attorney who was dealing with the matter.

[9] The essential part of the explanation for the default on the part of the applicant is set out at paragraph 52 which reads as follows:

"[52]….. It is noted that this application is alleged to have been served on Denetz Rietz by registered post. The copy of this letter is annexed to Marked "BGP31."Whilst I cannot dispute this, I have not been able trace such application in my office. I have no idea whether it was in fact received. I do, however, state categorically that I did not receive the copy of such application and that I was entirely unaware of this application was to be brought and heard on the 1st August 2007. Moreover, arising from the above I was not in a possession to advice BP of this application not to address the relief sought in the application prior to the hearing of the matter."

[10] In essence what the applicant say in the above paragraph is that neither itself nor its attorneys received the respondent's application to dismiss their review. The applicant further argued that had it received the application to dismiss it would have opposed the application vigorously.

Evaluation

[11] In my view had the court being aware of the background facts and circumstances relating to the causes of the delay in prosecuting the applicant's review it would not have granted the first respondent the relief he sought in that application. The court would also not have granted the relief sought had the first respondent taken the court into its confidence and disclose fully the background and the circumstances relating to the delay in the prosecution of the review. I agree with the applicant that the material

facts which may have swayed the court otherwise which the first respondent failed to disclose one of the following: (1) that the respondent had instituted his own review application a day after the applicant had brought its review application. (2) That there was an attempt by the respective parties attorneys to consolidate the two reviews,(3) that the attorneys had a common understanding of working towards producing the record of the arbitration proceedings before the CCMA, (4) that the first respondent also contributed to the delay towards the finalisation of the prosecution of the review application and (5) that the withdrawal of the respondent's review application was not done with the consent or knowledge of the applicant.

[12] In the light of the above it is my view that the default order was erroneously made and should accordingly be rescinded in terms of s 165 of the LRA. I do not belief that a cost order should in the circumstances of this case be made.

[13] In the premises the order granted by the court on the 1st August 2007 is rescinded, with no order as to costs.

Molahlehi J

Date of Hearing : 28th August 2010
Date of Judgment : 8th December 2010

Appearances

For the Applicant : Mr A. I. S. Redding

Instructed by : Evershed
For the Respondent: Mr Dan Gobile of Karabo Labour Organisation