IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case No: PS7/15

In the matter between:

DIMAKATSO GRACE NTHEJANE **Applicant**

and

THE DEPARTMENT OF HEALTH, FREE STATE **Respondent**

Heard: 20 June 2019

Delivered: 18 July 2019

JUDGMENT

NIEUWOUDT, AJ

[1] The respondent prays for the rescission of the default judgment granted against it on 23 November 2018. Therefore, for the sake of convenience, the parties will be referred to as in the main application.

[2] The rescission application was brought late and the respondent has applied

for condonation of this fact. This application was not strenuously opposed by the applicant and the Court granted it.

[3] Both parties went into the history of the matter in great detail in the pleadings and in oral argument. This was unnecessary as the facts that are relevant to a rescission application are limited.

[4] The respondent relied on both rule 16A (1)(a)[1] and rule 16A (1)(b)[2] of the rules of the Labour Court (the Rules) and the Court shall deal with both grounds of the application after setting out the salient facts.

The facts

[5] The matter has a long and convoluted history. During February 2015 the applicant referred "*a dispute in terms of section 197 read with 191*" of the Labour Relations Act[3] (the LRA).

[6] The applicant's case, as set out in a founding affidavit, in essence is:

6.1 That she was employed by a local authority as a professional nurse on 1 October 1998 and that, during or about December 2004, the local authority transferred the service, in which she was employed, to the respondent as a going concern.

6.2 Her employment transferred to the respondent in terms of section 197 of the LRA. The respondent erroneously registered her commencement date as 1 January 2005, which error was corrected in 2009.

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[1] *"(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…"

[2] "*(1)(b) on application of any party affected, rescind any order or judgment granted in the absence of that party",* to be read in conjunction with Rule 16A (2)(b) which reads: *"(2)(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."*

[3] Act 66 of 1995, as amended.

6.3 On 29 July 2014, the applicant lodged a grievance which she described as *"I request to be promoted to PNB2 which was supposed to be done 2007 (sic) when other professional nurses were promoted to be PNB3*".

These facts are not in dispute.

[7] What is in dispute is whether the applicant ought to have been placed on a level, PNB3, which has certain remuneration and benefits attached to it, instead of PNB1, on which she was placed and which is a lower level.

[8] The respondent delivered an answering affidavit during April 2015. The content thereof is not material save to the extent that it pleaded that:

8.1 The applicant was not, by virtue of qualifications alone, entitled to be placed on the level of PNB3.

8.2 The applicant's claim had prescribed.

[9] The next event of relevance occurred on 14 August 2015 when this Court made an order which, amongst other things, ordered:

9.1 the applicant to plead the specifics of her claim with sufficient particularity to enable the respondent to reply thereto, within 10 days of the order;

9.2 the respondent to respond to the pleading within 10 days;

9.3 the parties to conduct a pre-trial conference upon the close of pleadings; and

9.4 that the respondent's prescription point should stand over to be dealt with at the outset of the trial.

[10] On 7 September 2015 the applicant delivered a pleading styled "*applicant's pleadings*". The respondent was of the opinion that this pleading did not comply with the order. This notwithstanding, the parties conducted a pre-trial conference and signed a pre-trial minute on 18 November 2016.

[11] The matter was enrolled for hearing on 4 June 2018 but, on 29 May 2018 the registrar directed the applicant to comply with the paragraph of the order dated

14 August 2015 which directed her to file a supplementary pleading. This led to the matter being removed from the roll and the parties agreeing to a new date of set down of 29 October 2018.

[12] On 24 August 2018 the applicant filed a supplementary pleading. There is no explanation why this only occurred 3 years after the August 2015 order and more than 2 months after the directive. However, there was still ample time for the respondent to respond thereto if it wished to do so. The respondent delivered a notice of irregular step and an exception on 9 October 2018. It was out of time and there is no explanation for this fact; nor did the respondent apply for condonation.

[13] The matter proceeded on 29 October 2018 in the absence of the respondent and the default judgment was granted against it on 23 November 2018. The respondent did not file the transcript of the proceedings, but it is apparent from the judgment that the Court was aware of the facts set out earlier in this judgment, in particular:

13.1 of the contents of the court order dated 14 August 2015;

13.2 that the applicant had delivered supplementary pleadings; and

13.3 that the respondent had delivered a notice of irregular step and an exception.

[14] The applicant prayed that the notice of irregular step and exception should be set aside due to the fact that it was filed late. In the absence of opposition this prayer was granted. The Court then proceeded to consider the pleadings filed by the applicant in terms of the order dated 14 August 2015 (although the date thereof is recorded as 13 August 2015), the answering affidavit, the replying affidavit and the oral evidence led by the applicant. The applicant testified why she was entitled to be placed on level PNB3 and, in the absence of any countervailing evidence, the Court found in favour of the applicant and made the order that is the subject of the rescission application.

[15] The respondent took a conscious decision not to attend the hearing due to the fact that it held the view that the matter would not proceed as the pleadings had not closed.

[16] The applicant did not in the papers dispute the averment by the respondent that, had it been informed that the matter would proceed, it would have attended court.

[17] However, it is a mystery why the respondent's attorney did not contact either the attorney of the applicant or the registrar to ascertain whether the matter would proceed, especially in view of the fact that paragraph 10.7.5 of the practice manual reads *"[o]nce a matter has been set down for hearing, it may be removed from the trial roll only with the consent of the Judge President or in the case of matters subject to case management, the appointed judge.*" (Although the Court accepts that this provision is not rigorously applied.)

The legal principles

[18] There is a distinction between rescission applications brought in terms of rule 16A(1)(a) and rule 16A(1)(b).

[19] As far as rule 16A(1)(a) is concerned, the respondent submitted that the default judgment was erroneously sought and granted in its absence on the basis that the applicant had not complied with the order granted by this Court on 14 August 2015 and that the matter was not ripe for hearing as the pleadings had not closed.

[20] As far as rule 16A(1)(b) is concerned, the respondent's case was that it was able to show good cause.

[21] The applicant contended that the respondent had only relied on rule 16A(1)(a) in its founding affidavit. It is thus necessary to determine the grounds on which the respondent based the application. In paragraph 5 of the founding affidavit the respondent avers that the default judgment was erroneously sought and granted in its absence and in paragraph 5.11, the respondent pleads that *"[I]n*

the premises the default judgment was erroneously sought and granted. Alternatively, the default judgment was granted by mistake common to both parties." These averments relate to rule 16A(1)(a).

[22] There is no express reference to good cause in the founding affidavit. The high watermark of a case in this regard is the averment in paragraph 8.1 that the respondent had good prospects of success and, in paragraph 9.1, that the reasons for its absence were *bone fide.*

[23] The question that falls to be decided is whether the respondent sufficiently pleaded a case founded on rule 16A(1)(b) in order to rely on it. The law in this matter is clear; a party is confined to the case made out in its founding affidavit. In *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others*[4] the court dealt with this issue. The respondent had complained that the applicant had failed to make out a case in its founding affidavit and had attempted to do so in reply. The Court referred with approval to the decision of the Constitutional Court in *Betlane v Shelly Court CC* where it was held that:[5]

> 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time.'

[24] Despite the lack of clarity in the pleadings, the Court is prepared to consider the matter on the basis that the respondent has laid a sufficient foundation for a rescission application based on rule 16A(1)(b) in its founding affidavit. It was significantly fleshed out in its heads of argument.

Rule 16A(1)(a)

[25] In *SA Municipal Workers Union and another v SA Local Government Bargaining Council and others*[6] the applicant applied for an order varying an order that the dismissal of an employee was unfair, in order to expand the

[4] (2018) 39 ILJ 609 (LC) at para 11.
[5] 2011 (1) SA 388 (CC) para 29.
[6] (2014) 35 ILJ 2528 (LC).

order to include reinstatement. The Court referred to *Bakoven Ltd v G J Howes (Pty) Ltd*[7], with approval. In that matter the Court interpreted the concept "erroneously" in the following terms:

> 'An order or judgment is "erroneously granted" when the Court commits an "error" in the sense of "a mistake in a matter of law (or fact) appearing on the proceedings of a Court of record" (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was "erroneously granted" is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show "good cause" in the sense of an explanation for his default and a bona fide defence …….. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.'

[26] The Court held[8] that the applicant, in order to be successful, has to show that, at the time the judgment or the order was granted, there existed a fact which the Court was unaware of and which, had the Court been aware of, may have caused it to adopt a different approach in making the order.

[27] In later judgments, doubt is cast on the fact of whether the Court is confined to the record in considering a rescission application but it is not necessary to deal with that aspect in this matter.

[28] In *Martin v Commission for Conciliation, Mediation and Arbitration and others*[9] the Court, although dealing with the issue of the powers of a commissioner to rescind or vary an award, held that the provisions of s144 of the LRA was similar to the provisions of rule 42(1) of the Uniform Rules of Court (which in turn is similar to the provisions of rule 16A(1)(a)). The Court continued to hold that:

> '… an order or judgment will be held to be erroneously granted if there was an irregularity in the proceedings, or if it is not legally competent for the court to have made the order which the judge was unaware, which would have

[7] 1992 (2) SA 466 at 471E-G.
[8] Ibid at para 8.
[9] (2008) 29 ILJ 2254 (LC).

precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment.'

[29] The same test was postulated in *Cash Paymaster Services (Pty) Ltd v Mogwe and others*[10].

[30] It would be convenient to dispose first of the contention that the order was granted as a result of a mistake common to the parties. This is clearly not the case. The applicant consciously and deliberately sought default judgment and obtained it.

[31] As recorded above, the respondent did not transcribe the proceedings on 29 October 2018 and the Court is accordingly not in a position to determine exactly what transpired on that date. It is confined to the facts recorded in the judgment.

[32] Was the order dated 14 August 2015 complied with, and if not, what are the consequences thereof? The applicant did not comply with the 10-day period laid down for the delivery of a properly detailed pleading but that issue was moot on 29 October 2018. The Court held that the applicant's supplementary pleading sufficed and dismissed the respondent's notice of irregular step and exception; thus, these points were addressed.

[33] The respondent had not filed a supplementary response and a (further) pre-trial conference had not been held. It contended that these requirements were elevated to absolute requirements because they were contained in a court order. However, the parties had conducted the pre-trial conference in compliance with the order dated 14 August 2015. It appears that the respondent seems to be relying on its own default.

[34] Be that as it may, the court order dated 14 August 2015, was interlocutory and of a procedural nature. There is no reason why the Court was not entitled to deal with the matter some 3 years later as it deemed fit. It considered the matter and held that it was ripe for hearing. In *Bell v Bell*[11] the variation of an

[10] (1999) 20 ILJ 610 (LC).
[11] 1908 TS 887.

interlocutory order was allowed where the object of the original interlocutory order would be achieved by the variation. The headnote of the case reads: "*a purely interlocutory order, that is, one not having the effect of a final decree, may at any time before final judgment in the suit be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the same jurisdiction*." This was applied by *Brown and Others v Yebba Cc t/a Remax Tricolor*[12] and this Court intends to follow it. The objective of the order on 14 August 2015 was to ensure that the matter would be ready to proceed to be heard and the Court on 29 October 2018 held that it was ready to proceed.

[35] To the extent that the Court varied the provisions of the court order dated 14 August 2015, it was perfectly in order for it to do so. Accordingly there was no irregularity in the proceedings of Court on 29 October 2018 and the order handed down on 23 November 2018 was not erroneously sought or granted.

Rule 16A(1)(b)

[36] In *Northern Province Local Government Association v Commission for Conciliation, Mediation & Arbitration & others*[13] the Court succinctly set out the test[14] to be applied when deciding whether good cause has been shown in a rescission application. This approach was followed in a number of cases, including *Vemisani Security Services CC v Mmusi & another: In re Mmusi & another v Vemisani Security Services CC*[15] and *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[16].

[12] 2009 (1) SA 519 (D).
[13] (2001) 22 ILJ 1173 (LC).
[14] Ibid at para 16.
[15] (2013) 34 ILJ 440 (LC).
[16] (2007) 28 ILJ 2246 (LAC).

[37] The application by the High Court of the test when considering whether a default judgment should be rescinded, is also of assistance. In *Grant v Plumbers (Pty) Ltd* [17]the then Supreme Court succinctly set out the test:

> 'Having regard to the decisions above referred to, I am of opinion that an applicant who claims relief under Rule 43 [the then applicable rescission provision] should comply with the following requirements:
>
> (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.
>
> (b) the application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
>
> (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. ……'

[38] In *Maunjean t/a Audio Video Agencies v Standard Bank of SA Ltd* [18]the then Supreme Court held that:

> 'More specifically in the context of a default judgment 'wilful' connotes deliberateness in the sense of knowledge of the action and of its consequences, ie its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be. See in this connection *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O) at I 417 and authorities there cited. In other words the additional element of perverseness or obstinacy is not required.'

[39] In *Chetty v Law Society, Transvaal*[19] the then Appellate Division held that:

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[17] 1949 (2) SA 470 (O) at 476 to 477.
[18] 1994 (3) SA 801 (C) at 803 H – I.
[19] 1985 (2) SA 756 (A) at 765 D – E.

'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.'

[40] Against this background, the Court now turns to consider whether the respondent's default was wilful or due to gross negligence or whether it evinces a deliberateness as contemplated in *Maunjean* or disdain as contemplated by *Chetty.* The following facts show that this is the case:

40.1 The respondent was aware that the matter had been set down for hearing on 29 October 2018; in fact, it had agreed to that date.

40.2 It delivered its notice of irregular step and exception out of time without any indication in the papers that it had sought an indulgence from the applicant or the Court.

40.3 It did not enquire from the applicant or the registrar whether the matter would be removed from the roll without any party appearing.

40.4 In fact, it stayed away from court without notice to either the registrar or the applicant on the assumption that the matter was not ripe for hearing. There is no indication in the papers that this occurred as a result of a mix-up at the respondent or the state attorney. The case is that the respondent had deliberately decided to stay away because it held the view the matter was not ripe for hearing.

[41] In the premises, the default of the respondent was wilful and it evinces the type of deliberateness referred to in *Maunjean.* In accordance with the authorities set out earlier in this judgment, this finding means it is not necessary to consider the other requirements for showing good cause.

[42] The respondent has failed to show good cause for its default and the application falls to be dismissed.

Costs

[43] This Court had granted default judgment against the respondent with costs. The respondent was entitled to apply for the default judgment to be rescinded. In *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.*[20] the Labour Appeal Court (LAC) held that, in law and fairness, costs should only be ordered if a party was frivolous or unreasonable in bringing or conducting a suit. This is not the case in the rescission application.

[44] The Court makes the following order:

Order:

1. The application is dismissed

2. There is no order as to costs.

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H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

[20] (2008) 29 ILJ 1707 (LAC). This approach was recently endorsed by the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC).

Appearances:

For the Applicant:	Mr Khang of Mphafi Khang Inc
For the Respondent:	Advocate TL Manye
Instructed by:	The State Attorney