



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J120/13

In the matter between:

THE DEPARTMENT OF CORRECTIONAL

SERVICES

Applicant

and

ABEL MONTGOMERY BALOYI

Respondent

Heard: 15 June 2016

Delivered: 23 June 2016

Summary: Rescission application. Order erroneously made because Judge not aware of notice to oppose. Registrar to notify all parties when matter considered in chambers and defendant filed notice to opposed

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to rescind the order made by Lagrange, J on 2 August 2013 in terms of which applicant was ordered to reinstate the respondent.
- [2] The respondent has raised a preliminary objection to the applicant's rescission application on the basis that it does not comply with the Regulations promulgated in terms of the Justice of Peace and Commissioner of Oaths Act 16 of 1963 (the Act). The objection is that the affidavit in support of the rescission application is not signed by a person appointed or designated to do so in terms of the Regulations. It is for this reason that it was contended on behalf of the respondent that the application should be dismissed because there was in a sense no affidavit to support the application.
- [3] In order to satisfy the status of an affidavit, the founding affidavit has to comply with the requirements set out in Regulation 4 of the Regulations. Regulation 4 (1) reads as follows:
- '(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration.'
- [4] Regulation 4(2) of the Regulations reads as follows:
- '(2) The commissioner of oaths shall—
- (a) sign the declaration and print his full name and business address below his signature; and
- (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.'
- [5] The appointment or designation of a Commissioner of Oaths is done by the Minister in terms section 6 of the Act. The designation is done on the basis of the office which a person occupies, such as an attorney a police officer.

- [6] The person who signed the affidavit as Commissioner of Oaths in the present matter is Ms Portia Monkwe, a 'Senior Admin' at the office of the Director of Public Prosecution: North Gauteng Pretoria. The respondents contend that Ms Monkwe has not been designated as a Commissioner of Oaths in terms of the Act.
- [7] In terms of the National Prosecuting Authority of 1998 (NPA), the personnel in the NPA can be divided into two categories members (this is the directors and the prosecutors) and the administrative staff. In terms of s 37 of the NPA, the administrative staff are employees appointed in terms of the Public Service Act of 1994.
- [8] In the amendment to the Regulations promulgated in 1998 (GN 903 of 10 July 1998), the Minister designated certain employees employed in term of the PSA as Commissioners of Oaths. Regulation 49 reads as follows:
- '9. Public Service
 - (a) Officers in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service occupying a post with a salary scale the minimum notch of which is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service.
 - (b) Employees held against posts in the Administrative, Professional, Clerical, Technical or General A and General B Divisions of the Public Service if the minimum notch of the salary scale applicable to such posts is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service.'
- [9] It seems to me that there can be no doubt that Ms Monkwe falls within the category of those employed in the 'Administrative' post within the NPA. It follows therefore that she qualifies as a Commissioner of Oaths, and thus the founding affidavit in the present matter meets the requirements of an affidavit as envisaged in the Regulations.
- [10] In light of the above, I am of the view that the respondent's point *in limine* stands to fail.

[11] I turn now to deal with the merits of the rescission application. The applicant contends in relation to its application that the arbitration award was erroneously made an order of court on the following grounds:

‘5.1 that there is a review application pending and the review cannot be prosecuted due to the fact that the record of the arbitration proceedings is lost.

5.2 that the applicant was never served with the notice of set down.’

[12] The key issue in this matter is whether the order making the arbitration award was erroneously sought or erroneously made in the absence of the applicant. The issue is not, as counsel for the respondent sought to persuade the court, whether the applicant was aware of the default application. The delay in the prosecution, which Counsel for the respondent made reference also requires a different consideration.

[13] It is now well established in our law that a litigant affected by a judgment/or order granted in default can have such an judgment/or order rescinded on the basis of showing that it was granted erroneously or by showing good cause for the default. In this respect the court has a discretion to rescind a judgment/or order erroneously granted or sought in the absence of an affected party. 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.¹ 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.

[14] In *Lodhi 2 Properties Investment CC v Bondev Development (Pty) Ltd*² Streicher. JA held that:

‘[24] I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words ‘erroneously granted’. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously.

¹ Erasmus in the Superior Court Practice at Page D1-568 (Second Edition).

² 2007 (6) SA 87 (SCA) at para 24.

That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously.¹⁴ See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.'

[15] In *Eberspacher v National Union of Metal Workers obo Skade and Others*,³ the Labour Appeal Court found that it was not proper for the court *a quo* to have entered judgment in favour of the employee in circumstances where the notice to oppose was filed and the affected party was not served with the notice of set down of default judgment application. This approach was upheld by the Constitutional Court in *Zwane and Others v Alert Fencing Contractors*.⁴ In this respect, the Labour Appeal Court had the following to say:

[23] This matter should also not have been set down for default judgment without notice to the appellant nor should judgment have been granted in the absence of such notice.⁵

[16] It is apparent in the present matter that the respondents did file notice of intention to oppose. It has not been disputed that notice to oppose was not in the file when the matter served before Lagrange, J in chambers. This means that at the time of making the order, the Learned Judge was not aware that the matter was in fact

³ (2009) 30 ILJ 880 (LAC).

⁴ (2010) 31 ILJ 2825 (CC) at para 5.

⁵ *Eberspacher* above n 3 at para 23.

opposed. Had the Learned Judge been aware of the fact, I believe he would not have made the order that he did.

[17] In my view, the above principle applied in both the instance where the default judgment is set down for hearing in Court and where it is considered in chambers. This means that the Registrar, when placing a matter before a Judge in chambers for consideration of a default judgment, ought to notify both parties where the respondent has filed notice to oppose.

[18] It is for the above reason that I find that the order made in favour of the respondent was erroneously made in the absence of the applicant. Accordingly, the respondent's application to rescind the order made by the court on 2 August 2013 stands to succeed. I do not, however, believe that it would be proper to allow the costs to follow the results.

Order

[19] In the premises, I make the following order:

1. The *point in limine* raised by the respondent is dismissed.
2. The order made by this court on 2 August 2013 is rescinded with no order as to costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: The State Attorney - Pretoria

For the Respondent: Rudolf Khun of Rudolf Kuhn Attorneys

LABOUR COURT