THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 555/14

In the matter between:

NUM OBO M MAGAGULA **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER MONDE BOYCE N.O **Second Respondent**

HARMONY GOLD MINING **Third Respondent**

Heard: **04 May 2016**

Delivered: **26 August 2016**

Summary: Application to rescind the order remitting the matter to the CCMA. The matter determined in chambers in terms of clause 12.1.4. of the Practice Manual.

The transcript replete with inaudible. The respondent was not served with notice that the matter was to be determined in chambers. The parties disagreed about remitting the matter to the CCMA and disagreed about the approach to adopt in resolving the problem of transcript.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application for the rescission of the order made by Rabkin-Naiker J on 28 October 2014 which reads as follows:

> "1. Due to the incomplete record, the dispute under case no GAJB 28219-13 is remitted to the first respondent for a new arbitration hearing before a Commissioner other than the second respondent."

[2] The arbitration award was made in favour of the third respondent, Harmony Gold Mining (the respondent). The applicants being unhappy with the outcome of the arbitration award instituted the review proceedings before this court. It turned out after the institution of the review application that there were problems with the transcript of the arbitration proceedings.

[3] The above order was made pursuant to the provisions of the Practice Manual of the Labour Court and specifically clause 12.1.4 which empowers the court to issue directives on the further proceeding of a review applications in circumstances where the record of the arbitration proceedings is lost or where the recordings are of poor quality such that the tapes are inaudible. In terms of this clause a Judge seized with a request for a directive may direct the *"remission of the matter to the persons or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed."*

The history of the matter

[4] The applicants filed the review application in terms of s 145 of the Labour Relations Act, (LRA)[1] on 23 April 2014. The applicant filed an incomplete record of the arbitration proceedings. The parties then engaged in correspondence regarding the problem of the record. The suggested approach to address the problem of the transcript by the applicants was that the matter should be remitted to the CCMA for a rehearing.

[5] In response to the proposal that the matter be remitted to the CCMA, the respondent's attorneys indicated that the approach was premature and that an attempt should be made to reconstruct the record. The respondent's attorneys suggested that an attempt should be made to locate the digital recording of the proceedings and the handwritten notes of the Commissioner.

[6] The applicants then filed another rule 7A (6) notice of the Rules Governing the Proceedings of the Labour Court (the Rules). That notice consisted of a partial record of the transcript which was replete with inaudible. The respondent, in response indicated to the applicants that it would not be able to respond until such time that the record was reconstructed.

[7] The attempt at reconstruction of the record was unsuccessful because some of the individuals who had been involved in the proceedings had poor recollection of what happened during the arbitration hearing. The Commissioner then suggested that the recording be given to a different transcription company. The parties seem to have agreed with this proposal but however the following day the applicant's attorney proposed that the matter be remitted to the CCMA for a rehearing.

[1] Act no 66 of 1995.

[8] The respondent rejected the proposal that the matter be remitted to the CCMA for a rehearing. Another proposal made by the respondent was that the missing portions of the court be supplemented. It would appear that the applicants did not agree to this proposal because thereafter they filed an affidavit requesting a direction from the Judge President in terms of clause 11.2.4 of the Practice Manual. [2]

[9] On 18 November 2014, the respondent filed an affidavit opposing the request by the applicants to have the matter remitted to the CCMA. At that stage the order remitting the matter to the CCMA was already made, namely on 28 October 2014. This means that the court order was made without considering the respondent's submissions. The respondent became aware of the court order on 27 January 2015, through the fax from the applicant.

The grounds for rescission

[10] The applicant's rescission application is based on the following grounds:

(a) order was erroneously made in its absence.
(b) the court lacks the power to review and set aside the arbitration award on the basis of an incomplete record.
(c) It is not possible to remit a matter to the CCMA for a rehearing without first reviewing and setting aside the arbitration award on any of the grounds envisaged in terms of s145 of the LRA.
(d) Clause 11.2.4 of the Practice Manual, is *ultra vires* to the extent that it grants the power to the court to remit a matter to the CCMA on the ground of an incomplete record.

[2] Clause 11.2.4 of the Practice Manual reads as follows: "If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

(e) That good cause had been shown to exist.

Legal principles: rescission

[11] In my view this matter turns around the issue of whether the order was erroneously made in the absence of the applicants.. I therefore do not intend dealing with other legal issues that the respondent has raised. In this respect the applicants indicates in the founding affidavit that it seeks the rescission in terms of Rule 16A of the Rules of the Labour Court on the basis that the order was erroneously made in its absence.[3] In terms of Rule 16A of the Rules:

'(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

(b) on application of any party affected, rescind or vary any order or judgment granted in the absence of that party.

[12] In order to succeed under Rule 16A (1) (b) a party affected by a judgment granted in his or her absence has to show good cause for the default. The principle provided for in that rule is substantially a replica of that which is provided for Rule 42(1) (a) of the Uniform Rules of the Court. It is generally

[3] An application for rescission in the Labour Court may be brought in terms of s 165 of the LRA, rule 16 A (1) (a) or rule 16A (1) (b) or the common law.

accepted by the courts that where an order was erroneously made in the absence of any affected party, the court should on the application of that party rescind the order without further enquiry. This means that there is no need to enquire further into whether good cause has been shown.[4]

[13] In dealing with the rescission involving the order which was alleged to have been erroneously made in the absence of the affected party the court in *Transport and General Workers Union and Others v Kempton City Syndicate and Another*,[5] held that:

> '*If a court holds that an order or judgment was erroneously granted in the absence of any party affected thereby it should, in terms of rule 42(1) (a), without further enquiry, rescind or vary the order.'*

[14] The concept of "erroneously granted" is defined by Cilliers, Loots and Nel,[6] in in the following terms:

> *'It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.'*

[15] The consequences of an erroneously made order or judgment are set out in *Sizabantu Electrical Construction v Guma & Others,*[7] in the following terms:

> *'the finding that the order or judgment was erroneously made, means that the affected party has been denied a hearing in terms of the rules of natural justice'. But more importantly, in considering the error, I would say that the fact that the court was inveigled into giving a judgment because material facts were either omitted or misrepresented to the judge is decisive."*

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[4] See *Superb Meat Supplies CC v Maritz* (J3232.00) [2002] ZALC 133 (19 April 2002) and *Lumka and Associates v Maqubela* (2004) 25 *ILJ* 2326 (LAC), where Jafta AJA (as he then was) held that: 'where rescission is sought on the basis that an order was erroneously granted, the applicant is not required, over and above that, to show good cause'.

[5] (2001) 22 *ILJ* 104 (W) at 108C

[6] The Civil Practice of the High Courts & Supreme Court (fifth edition) page 931.

[7] (1999) 20 *ILJ* 673 (LC).

[16] The respondent in the answering affidavit has raised a point *in limine* on the basis that although the applicant relies on the provisions of Rule 16A of the Rules, it does not address the legal requirements relating to that rule. I disagree. It has not been disputed that the order was made in the absence of the applicant

[17] The applicant was never served with notice that the matter would be considered by a judge in chambers. The respondent filed its opposition to the rule 12.1.4 request unaware that the matter had already been placed before a judge in chamber and that an order had already been made. It was at no fault of the respondent that its opposition to the request for a directive to have the matter remitted to the CCMA was not received prior to the issuance of the order by the learned Judge. In the context of this matter it is important to state that the Practice Manual makes no provision for the procedure to follow in a case where a party is opposed to the request to have the matter remitted to the CCMA. In the result there is no time limit within which the party opposing the request has to file his or her opposition. It could never have been the intention of the drafters of the Practice Manual that a matter would automatically be remitted to the CCMA on a mere request of one of the parties.

[18] In fact the Practice Manual speaks about a directive and not an order. It is not clear in this matter, whether the learned Judge had issued an order or the Register misunderstood the directive for an order.

[19] It is common practice in this court for the Registrar not to serve notice on the parties when a matter is considered in chambers by a judge. In default judgment applications (those to be heard in court) and unopposed review application the respondents are normally issued with the notice of set down. This approach is based on the decision of the Labour Appeal Court (LAC) decision of *Eberspächer v National Union of Metal Workers of SA obo Skade and Others*,[8] where the LAC

[8] (2009) 30 *ILJ* 880 (LAC).

held that the notice of application for a default judgment ought not to have been given to the respondent as a pre-requisite to the granting of a default judgment were not satisfied. This decision was upheld by the Constitutional Court in *Zwane and Others v Alert Fencing Contractors*.[9] In this respect, the LAC 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.'[10]

[20] It should be noted that, in the present matter, the order was made in the context where the review application was opposed. The background facts relating to the issue of the defective record and the disagreement as to what approach to adopt in dealing with that problem have not been disputed. It is apparent that the parties did not agree on the issue of remitting the matter to the CCMA and more importantly on the issue of how to deal with the problem of the record. There is no evidence that these issues were brought to the attention of the learned Judge at the time the request to remit the matter to the CCMA was placed before her in chambers. In my view, had the Registrar notified the applicant that the request to remit the matter to the CCMA was to be placed before a Judge for consideration in chambers the respondent may have one way or the other brought to the attention of the Judge the disagreement about the approach of dealing with the issue of the transcript. In fact on the background facts set out above, it appears that the issue of whether the matter should be remitted to the CCMA or that an attempt should be made at reconstruction of the transcript is a matter that required consideration by the court after hearing the parties. It seems to me that had the learned Judge been aware of the issues as set out above she would in all probability have directed that the matter be heard in court or that the parties appear before her in chambers.

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[9] *Zwane and Others v Alert Fencing Contractors* (2010) 31 *ILJ* 2825 (CC) at para 5.
[10] *Eberspächer v National Union of Metalworkers of SA on behalf of Skade and Others* above n 3 at para 23.

[21] In light of the above I am of the view that the applicant's rescission application stands to succeed. It appears to me that the parties still have a formal relationship and thus allowing the costs to follow the result would in the circumstances not be appropriate.

Order

[22] In the premises the order made by this court on the 28 October 2014, is rescinded with no order as to costs.

Molahlehi J

Judge of the Labour Court: South Africa.

Appearances

For the Applicant: Advocate M Z Makoti

Instructed by: Mothibi Attorneys

For the Respondent: Mr J Olivier of Webber- Wenzel Attorneys.