THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: J2606/08

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED TRADE

UNION obo J ERASMUS AND A B J CRAUKAMP **Applicant**

and

CITY OF JOHANNESBURG **First Respondent**

THE MUNICIPAL MANAGER OF THE CITY

OF JOHANNESBURG **Second Respondent**

Heard: 24 March 2017

Delivered: 13 June 2017

Summary: Rescission application brought under the common law on grounds of fraud. What factors to be alleged and considered.

JUDGMENT

PRINSLOO J.

Introduction

[1] There are two applications before this Court. In the one application (the compel application) the Applicant (IMATU) seeks and order to compel the First

Respondent (the City) to comply with an arbitration award that was issued on 6 September 2005 and that was made an order of Court on 7 March 2007 under case number JS 2505/06. The compel application was filed on 13 March 2009 and is opposed.

[2] The other application is a counter application (the rescission application) filed by the City to rescind the Court order of 7 March 2007. The counter application was filed on 3 August 2011.

Background facts

[3] This matter has an unfortunate and protracted history spanning over more than a decade. Briefly the history of this matter is as follows:

[4] The individual Applicants (Erasmus and Craukamp or the employees) were employed by the City as firefighters. They subsequently qualified as basic ambulance attendants, also referred to as medical technicians. They were registered with the Health Professions Council of South Africa (HPCSA) as basic ambulance attendants and as such they fell under the jurisdiction of the 'Professional Board for Emergency Care Personnel' (the Board) which functions as a body under the statutory umbrella of the HPCSA.

[5] Erasmus and Craukamp were dismissed on 17 February 2005 after they were found guilty of misconduct relating to an incident on 21 September 2004 when they allegedly refused to treat or arrange hospitalisation for an individual who became ill on the street and passed away the following day. The Applicant subsequently referred an unfair dismissal dispute to the South African Local Government Bargaining Council and in September 2005 and following an arbitration, Erasmus and Craukamp were reinstated retrospectively.

[6] On 2 February 2006 Erasmus and Craukamp were found guilty by the HPCSA on a charge relating to unprofessional conduct, related to the incident for which they were dismissed and their names were removed from the Board's register. Erasmus and Craukamp appealed to the HPCSA appeals committee and the sanction of removal from the Board's register was substituted with a sanction suspending them from practice for a period of two years and eight months, effective from 2 February 2006, which sanction was suspended on condition that they undergo a BAA course within four months of the date of the

decision. Effectively this means that Craukamp and Erasmus were suspended from practice for a period of more than two years from February 2006, unless they went for the BAA course within four months, in which event their suspension would be suspended. Erasmus and Craukamp were reinstated on the Board's register with effect from 1 September 2008.

[7] The City never filed an application for review in respect of the arbitration award. In December 2006 IMATU filed an application in terms of the provisions of section 158(1)(c) of the Labour Relations Act[1] (the Act) to make the arbitration award issued on 6 September 2005 an order of Court. The City did not oppose the application and on 7 March 2007 the arbitration award was made an order of Court.

[8] The City complied with the award insofar as it ordered compensation to be paid, but did not reinstate Erasmus and Craukamp. The City's view was that it was not able to comply with the Court order unless Erasmus and Craukamp illustrated by 26 March 2007 that they met the minimum requirements to practice in their jobs.

[9] On 12 September 2008 the Applicant addressed correspondence to the City and attached the outcome of the HPCSA appeal and indicated that Erasmus and Craukamp were reinstated on the Board's register with effect from 1 September 2008 and since they met the minimum requirements, they were entitled to be reinstated. The City, instead of dealing with the issue as it presented itself in September 2008, responded by repeating that IMATU was requested to provide proof of registration with the HPCSA by 26 March 2007, which it failed to do, and therefore Erasmus and Craukamp repudiated their contracts of employment with the City and as such the City was no longer obliged to comply with the order of the Labour Court.

[10] The response received from the City led to the filing of the compel application in March 2009.

[11] The City opposed the compel application and filed the rescission application as a counter application in August 2011.

[1] Act 66 of 1995.

[12] The compel and rescission applications were enrolled for hearing on 12 October 2012 and judgment was handed down on 13 December 2012, dismissing IMATU's application.

[13] The judgment was taken on appeal and the City filed a cross-appeal. On 3 June 2014 the Labour Appeal Court upheld the appeal and the cross-appeal and referred the main and counter application back to the Labour Court for determination *de novo.* The Labour Appeal Court directed that the rescission application should be determined prior to the compel application.

The rescission application

[14] On 14 December 2006 the Applicant filed an application to make the arbitration award dated 6 September 2005 an order of Court. The application was served on the Respondent but was not opposed.

[15] In the section 158(1)(c) application the Applicant stated that the City has partially complied with the arbitration award in that Erasmus and Craukamp were paid the amounts ordered in terms of the arbitration award but has failed to comply with the award in respect of their reinstatement.

[16] On 7 March 2007 this Court issued an order making paragraph 7.3 of the arbitration award, which reinstated Erasmus and Craukamp, an order of Court.

[17] Upon having been served with the Court order, the City requested Erasmus and Craukamp to furnish proof of registration on or before 26 March 2007, failing which the City would not be in a position to comply with the Court order by virtue of impossibility of performance. For a period of 18 months after the date of the Court order Erasmus and Craukamp were precluded from lawfully tendering their services as a consequence of them having been struck off the roll and during this period they did not tender their services.

[18] The City submitted that it has cancelled their contracts of employment as a result of an inability to comply with the Court order.

[19] On 3 August 2011 the City filed a counter application seeking to declare the Court order of 7 March 2007 void, alternatively set aside on the basis of the Applicant's fraudulent misrepresentation, alternatively fraudulent omission in failing to disclose to the Court at the time of the hearing of the section

158(1)(c) application that Erasmus and Craukamp were not in a position to lawfully tender their services as a consequence of them having been struck off the roll by the HPCSA with effect from 2 February 2006.

[20] Erasmus and Craukamp were employed as firefighters and medical technicians with the City and when they were struck off the roll by the HPCSA in February 2006, they could no longer practice in the emergency services unit.

[21] The City's case is that at the time the Applicant obtained the Court order, they were well aware of the fact that they could not lawfully tender their services and they were patently dishonest by not disclosing this material fact to the Court at the time they sought the order.

[22] The rescission application is brought in terms of the common law.

The common law position

[23] At common law a judgment may be set aside on grounds of fraud.

[24] In terms of the common law the court has the power to rescind a judgment obtained on default of appearance provided that sufficient cause for rescission has been shown. Sufficient cause entails two essential elements namely that the party seeking the relief must present a reasonable and acceptable explanation for default and that it has a *bona fide* defence which, *prima facie*, carries some prospect of success[2].

[25] In order to succeed on a claim that a judgment be set aside on the ground of fraud, it is necessary for the applicant to allege and prove the following[3]:

1. That the successful litigant was party to the fraud;

2. that the evidence was in fact incorrect;

3. that it was made fraudulently and with the intent to mislead and

[2] Herbstein and Van Winsen 'The Civil Practice of the High Courts of South Africa' Fifth edition, Volume 1, page 938.
[3] Erasmus 'Superior Court Practice' Rule 42 discussion. Also *Swart v Wessels* 1924 OPD 187 at 189 – 190.

4. that it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give[4].

[26] It must also be shown that the party seeking rescission was unaware of the fraud until after judgment was delivered. It is not sufficient for the applicant for rescission to prove merely that a fraud was practiced on the court, which resulted in a wrong judgment. The party seeking rescission must be able to show that because of the fraud, the court was misled into pronouncing a judgment which, but for the fraud, it would not have done. There has to be a *nexus* between the fraud and the judgment to be set aside.

[27] Fraud can consist not only in the wilful making of incorrect statements but also in the withholding of material information with a fraudulent intent. The mere circumstances that certain material facts were not disclosed does not in itself establish that there has been wilful concealment. A fraudulent intent must be affirmatively proved and when charges of fraud are made, it should not only be made expressly but should be formulated with the precision and fullness demanded in a criminal case[5].

[28] It is within this context that the Respondents' rescission application should be considered.

Evaluation of the rescission application

[29] The City seeks the setting aside of the Court order of 7 March 2007 on the basis of the Applicant's fraudulent misrepresentation, alternatively fraudulent omission in failing to disclose to the Court at the time of the hearing of the section 158(1)(c) application that Erasmus and Craukamp were not in a position to lawfully tender their services as a consequence of them having been struck off the roll by the HPCSA with effect from 2 February 2006.

Good cause

[4] *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166 I.
[5] Herbstein and Van Winsen p 939 – 941, *Schierhout v Union Government* 1927 AD 94 at 98.

[30] In *Marathon Earthmovers v Commission for Conciliation Mediation and Arbitration and others*[6] it was held that:

> "Where, however, rescission is sought in terms of the common law, not only must the party seeking relief 'present a reasonable and acceptable explanation for his default' but in addition such party must show that on the merits he or she 'has a *bona fide* defence which *prima facie* carries some prospect of success' - per Miller MA in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C. The court went on to observe at 765D-E:
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> '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 prospect of success on the merits."

[31] It is evident from the papers before this Court that the City was served with the section 158(1)(c) application, but failed to oppose the application. There is no explanation tendered why the City failed to oppose the application and there is no reasonable and acceptable explanation for the City's default. The City has failed to show good cause.

[32] Insofar as it may not be necessary to show good cause for the rescission of a judgment on the grounds of fraud, the City still has the onus to prove the other factors in relation to fraud set out *supra.*

Fraud

[33] The City's case is that at the time the Applicant obtained the Court order, they were well aware of the fact that Erasmus and Craukamp could not lawfully tender their services and they were patently dishonest by not disclosing this material fact to the Court at the time they sought the order.

[34] In my view this is not a case where a fraudulent misrepresentation was made, as a misrepresentation is a false statement of facts. This is rather a case where the Applicant failed to disclose that Erasmus and Craukamp were

[6] (1999) 20 ILJ 2393 (LC).

struck off the roll by the HPCSA with effect from 2 February 2006. The question is whether their failure to disclose this fact constituted a fraudulent omission.

[35] I have already alluded to the principle that the mere circumstances that certain material facts were not disclosed does not in itself establish that there has been wilful concealment. The City has to prove a fraudulent intent[7].

[36] In the application before this Court it is a matter of utmost difficulty to ascertain the exact charges of fraud against IMATU, Erasmus and Craukamp.

[37] The only allegation made by the City in the rescission application is that Erasmus and Craukamp were patently dishonest by not disclosing a material fact at the time they sought an order in terms of section 158(1)(c) of the Act. As the charge of withholding information appears to imply deliberately doing so, there is no foundation laid for that or that they intended to mislead this Court.

[38] Patent dishonesty cannot be equated to fraud, as fraud requires a false representation by means of a statement or conduct or omission made knowingly in order to gain a material advantage. The City has not made any averments, apart from a statement of patent dishonesty, to prove that the Applicant acted with a fraudulent intent and with an intent to mislead.

[39] The City further has to prove that the facts placed before Court in the section 158(1)(c) application diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give.

[40] The Court (Pillay J) granted an order wherein the portion of the arbitration award that reinstated Erasmus and Craukamp was made an order of Court. The City's case is that Erasmus and Craukamp were not in a position to lawfully tender their services as a consequence of them having been struck off the roll by the HPCSA with effect from 2 February 2006.

[41] The City's argument is that Erasmus and Craukamp were employed as firefighters and medical technicians and as they were struck off the roll, they

[7] Herbstein and Van Winsen p 939 – 941, *Schierhout v Union Government* 1927 AD 94 at 98.

could not perform basic ambulance services. In seeking reinstatement, they must be in a position to tender services fully as a partial tender of services is insufficient when seeking specific performance.

[42] In their opposing papers Erasmus and Craukamp explained that they were initially employed as firefighters and their employment subsequently changed to that of firefighter/EMT, but the bulk of the services they rendered (80%) was in the capacity of firefighters. Firefighters do not need to be registered with the HPCSA and nothing precluded or prevented the City from reinstating them.

[43] The question then should be whether the Court would have granted the order on 7 March 2007 had it been aware that Erasmus and Craukamp were not in a position to tender their services fully as medical technicians but only partially as firefighters.

[44] Paragraph 7.3 of the arbitration award that was made an order of Court provided that the City should reinstate Erasmus and Craukamp. There is no specification into which position and the Court merely made that an order of Court. It is not specified that Erasmus and Craukamp should be reinstated as medical technicians and firefighters and in my view, even if the Court was aware of the fact that they were struck off the roll by the HPCSA, the Court could still order their reinstatement.

[45] The Court is not to act as an employer's human resources manager and anticipate problems an employer may experience when it is ordered to reinstate employees. In the event that an employee is reinstated and he or she is unable to perform his or her functions, an employer is not without remedy and can explore any of the appropriate remedies available which may include a transfer, demotion, disciplinary action or retrenchment, to list but a few.

[46] The City is expecting the Court in considering an unopposed section 158(1)(c) application to anticipate difficulties that may arise in respect of reinstatement, when the employer itself failed to place those facts before the Court.

[47] Be that as it may, in my view the fact that Erasmus and Craukamp were struck off the Board's roll in March 2007, could not have been a bar to their reinstatement, given the fact that the striking off the roll was temporary and

they could still perform firefighting functions and possibly other functions that could be allocated to them.

[48] The City must also show that it was unaware of the fraud until after judgment was delivered, as it is not sufficient for the applicant for rescission to prove merely that a fraud was practiced on the Court. Even this hurdle the City is unable to cross as it was aware in December 2006 when the section 158(1)(c) application was filed that Erasmus and Craukamp were struck off the roll by the HPCSA in February 2006. The City simply did nothing to oppose the said application.

Delay

[49] This brings me to another important factor to be considered namely the delay in filing the rescission application. The City filed a rescission application in August 2011 in respect of a Court order that was granted in March 2007, thus more than four years after the Court order was granted and that the City was aware of such order.

[50] The City's argument is that the rescission application is brought in terms of the common law on grounds of fraud and therefore there is no time period prescribed within which the rescission application should be brought.

[51] Unlike a rescission application brought in terms of section 165 of the Act or Rule 16A of the Rules of the Labour Court which prescribes that such application should be brought within 15 days of acquiring knowledge of the order or the judgment or within a reasonable time, there is no time period prescribed for a common law rescission application.

[52] This, however does not mean that the period within which a rescission application in terms of the common law is to be filed is indefinite and open ended. The application of the common law in the context of labour disputes cannot be divorced from the purpose and the application of the Act.

[53] The maxim *vigilantibus non dormientibus lex subvenit* has found application in the Labour Court in a number of judgments dealing with undue delays in prosecuting applications. The elimination of unjustified and undue delays is imperative when it comes to employment law disputes, considering the

fundamental principle and purpose of the Act that such disputes must be expeditiously resolved. In *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*[8] the Constitutional Court said: *'The importance of resolving labour disputes in good time is thus central to the LRA framework.'* Further authorities in this regard are *Aviation Union of SA and another v SA Airways (Pty) Ltd and others*[9] where it was held: *'Speedy resolution is a distinctive feature of adjudication in labour relations disputes…"* and *National Education Health and Allied Workers Union v University of Cape Town and others*[10] where it was held: *'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily ... .'*

[54] It is in this context that the question should be asked whether an application for rescission in terms of the common law could be filed more than four years after the judgment sought to be set aside was issued.

[55] The Labour Court has not shied away from disposing of applications on the basis of a failure diligently to prosecute the same. In *Bezuidenhout v Johnston NO and others*[11] the court said: *'If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with.'* Similarly, and in *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and others*[12] it was held: "*The rule that the court has the power to dismiss proceedings due to a delay in the prosecution thereof lies in the court's inherent power to prevent an abuse of its own process.*"

[8] (2014) 35 *ILJ* 613 (CC) at para 42.
[9] (2011) 32 *ILJ* 2861 (CC) at para 76.

[10] 2003 (3) SA 1 (CC); (2003) 24 *ILJ* 95 (CC) at para 31.
[11] (2006) 27 *ILJ* 2337 (LC) at para 31.
[12] (2006) 27 *ILJ* 2574 (LC) at para 14.

[56] From a policy perspective there are two principal reasons to dismiss a claim where there is an unreasonable delay. In *Radebe v Government of the Republic of SA*[13] , the court held that:

> "The first is that unreasonable delay may cause prejudice to the other parties. ... The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial administrative decisions. ..."

[57] In *Bernstein v Bernstein* [14]it was held that "it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time".

[58] I see no reason why these same considerations and principles should not apply to rescission applications brought in terms of the common law. *In casu* a period exceeding four years for filing an application for rescission cannot be said to be a reasonable period. In fact, the period is excessive with no explanation for the delay. Considerations of justice (or injustice for that matter) and prejudice also play an important role.

[59] The City explained the late filing of the answering affidavit in the compel application, but took the view that there is no need to apply for condonation for the rescission application brought in terms of the common law. Once fraud is demonstrated, the judgment cannot stand.

[60] In his heads of argument Mr Boda for the Respondents submitted that if fraud was committed, condonation for the late filing of the rescission application should be granted because it would be in the interest of justice to do so as the enforcement of a Court order obtained fraudulently would bring the administration of justice into disrepute. I agree with the submission.

[61] The relevant and crucial finding however is that fraud was indeed committed, which I have found was not the case *in casu*. There is no risk that the administration of justice would be brought into disrepute if the Court order of 7 March 2007 is enforced.

[62] The City's argument that the late filing of the rescission application should be condoned cannot be entertained.

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[13] 1995 (3) SA 787 (N).
[14] 1948 (2) SA 205 (W).

[63] The City's failure to prosecute its rescission application for a period of more than four years cannot be condoned and must have the effect that the application must fail for this reason alone, based on the maxim *vigilantibus non dormientibus lex subvenit.*

[64] In *Pathescope (Union) of South Africa Ltd v Mallinick* It was held that:

> "That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in English law and adopted in our own Courts. It is an application of the maxim. "*Vigilantibus non dormientibus lex subvenit*." The very nature of the doctrine necessitates its being stated in general terms. I take the following apt extract from the judgment in *Lindsay Petroleum Company v. Hurd* (L.R. 5 P.C. 239) quoted in the court below: — "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

[65] In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[15] the Constitutional Court held that:

> "Excessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable. This is so all the more in labour disputes. Mr Makhotla was entitled to approach the Labour Court for the relief he sought in D order to have closure and get on with his life."

[66] In my view the application for rescission has to fail for two reasons. Firstly, because the City failed to make out a case that the Court order obtained on 7 March 2007 was obtained by some fraudulent conduct. Secondly, the City waited for more than four years to approach this Court for the rescission of a

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[1] [15] (2016) 37 ILJ 313 (CC)

Court order, with no detailed explanation or application for condonation for such delay. The City explained the late filing of the answering affidavit in the compel application in detail and throughout took the view that it was not necessary to apply for condonation for the late filing of the rescission application.

[67] The City had to apply for condonation. Apart from the fact that no proper case was made out for condonation for the late filing of the rescission application, the delay of more than four years is excessive.

[68] Erasmus and Craukamp were entitled to accept that the Court order became unassailable and they are entitled to closure on this matter. It would, ten years after the Court order was granted, not only undermine the object of the Act regarding the expeditious and effective resolution of labour disputes, but would also not be in the interests of justice to set aside the Court order of 7 March 2007.

The compel application

[69] What remains is to consider IMATU's application to compel the City to comply with the Court order of 7 March 2007. The application to compel was filed in March 2009, more than two years before the City filed its rescission application.

[70] Section 165(5) of the Constitution reads:" An order or decision issued by a court binds all persons to whom and organs of State to which it applies."

[71] It is trite that it is not for a party to litigation unilaterally to elect whether or not to comply with orders of court. In the absence of an application for rescission or appeal, court orders must be complied with.

[72] The City's application for rescission failed and it is therefore compelled to comply with the order of this Court issued on 7 March 2007.

[73] In the event of non-compliance, IMATU's remedy is an application for contempt of Court. The Practice Manual for the Labour Court prescribes the process to be followed in an application for contempt.

[74] The interest of justice was severely compromised where Erasmus and Craukamp were reinstated more than 10 years ago and to this date such order had not been complied with. It is of grave concern that matters that require a speedy resolution remained unresolved for a decade.

[75] I can only express the hope that the parties would now have finality and that they would close this matter and start to engage in a meaningful manner on the way forward.

Costs

[76] Costs should be considered against the requirements of the law and fairness.

[77] The requirement of law has been interpreted to mean that the costs would follow the result. Both Mr Boda and Mr Glendinning argued for a cost order to be made and I can see no reason to deviate from the general rule that cost should follow the result.

[78] In view of the history of this matter, such a cost order is also fair.

[79] In the premises I make the following order:

Order

1. The Respondents' rescission application is dismissed;

2. The Respondents are ordered to comply with the Court order issued on 7 March 2007 under case number J 2505/06;

3. The First Respondent is to pay the costs.

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Connie Prinsloo

Judge of the Labour Court

Appearances:

Applicant:	Advocate A Glendinning
Instructed by:	Otto Krause Inc Attorneys
Third Respondent:	Advocate F Boda SC
Instructed by:	Norton Rose Fulbright Attorneys