IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J653/15

In the matter between:

ST MICHAELS SPAR	**First Applicant**
ANDREW CHRISTODOULOU	**Second Applicant**
SOPHIA CHARALAMOUS	**Third Applicant**
VASILIOS MICHAELIDES	**Fourth Applicant**
SOTIRIS MICHAELIDES	**Fifth Applicant**
CHRISTODOULOUS MICHAELIDES	**Sixth Applicant**

and

SACCAWU obo NYAPHOLI THANDI	**Respondent**

Heard: **19 May 2017**

Delivered: **06 July 2017**

Summary: **Rescission application-section 165(a) read with Rule 16A(a)(i)of the Rules- Time frames to deliver rescission application-Rule**

42(1)(a) of the Uniform Rules-Rule 16A(b) of the Rules-Section 3 of the LRA-Reasonable time under LRA.

JUDGMENT

MABASO, AJ

Introduction and the parties

[1] The following remarks are germane to this application. Van der Westhuizen J, writing for the Court in *Gcaba*,[1] whereby the exclusive jurisdiction of the Labour Court in employment related matters had to be determined, made these opening remarks:

> "One of the purposes of law is to regulate and guide relations in a society. One of the ways it does so is by providing remedies and facilitating access to courts and other fora for the settlement of disputes. **As supreme law, the Constitution protects basic rights. These include the rights to fair labour practices and to just administrative action.** Legislation based on the Constitution is supposed to concretise and enhance the protection of these rights, amongst others, by **providing for the speedy resolution of disputes in the workplace and by regulating administrative conduct to ensure fairness**. (Emphasis added.)

More recently, in *Toyota (Pty) Ltd v CCMA*[2] Nkabinde J emphasised the importance of time frames in the speedy resolution of labour disputes, as well as the detrimental effects any delays may have on employers and employees held thus:

> "**Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes**. The dispute resolution

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[1] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 1.

[2] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (CCT 228/14); [2015] ZACC 557 at para 1.

> dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years." (Emphasis added and footnotes omitted.)

[2] According to the affidavits, the applicants state the following: The first applicant is St Michael Supermarket CC t/a Michaels Spar (the employer), the second applicant is Andrew Christodoulou (Mr Christodoulou) who is the manager of the employer. The third, fourth, fifth and sixth applicants are Sophia Charalamous, Vasilios Michaelides, Sotiris Michaelides, Michaelides Christodoulous respectively and will be collectively referred to as the Members. The respondent is the South African Catering and Allied Workers Union (the Union) which is cited in these proceedings in its representative capacity, in terms of section 200 of the LRA, on behalf of its member Ms Nyapholi Thandi (the employee).

[3] This is an application to rescind and set aside a court order issued on 14 July 2016 by Thlothlalemaje J, which had made an arbitration award (the award) issued on 10 November 2014 an order of this Court.

Relevant background

[4] Dismissal of the employee took place on 1 July 2014, more than 3 years ago, but she still has not been reinstated. Despite having the award in her favour, her unfair dismissal dispute is still pending, although there being processes available in the Labour Relations Act[3] which have time frames to facilitate the speedy resolutions of employment related disputes. The third, fourth, fifth, and

[3] 66 of 1995, as amended. (LRA).

sixth applicants have now approached this Court in terms of section 165(a)[4] of the LRA (read the same as sub-rule 16A (1)(a)), and sub-rule 16A(1)(b)[5] of the Rules of this Court seeking a rescission of the said court order. The application was delivered by the applicants on 25 April 2017. In it, they further ask that any party opposing this application be ordered to pay costs. The respondent is opposing this application.

[5] Before this Court, there were three applications, namely: an application for consolidation, an application for contempt against the Members, and a rescission application. It was agreed between the parties,that the rescission application would be dealt with first — taking into account that the rescission application relates to the same court order which the Members are said to be in contempt of and the legal implications of a rescission application thereof.[6]

[6] Resulting in the dismissal of the employee, on 1 July 2014, an unfair dismissal dispute was declared at the CCMA against the employer. Subsequent to the hearing of the dismissal dispute by Commissioner Makama, the award was issued directing the employer to reinstate the employee. Thereafter, in November 2014 the employee reported for duty in terms of the award, however, the employer did not reinstate her. She was advised by

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[4] Section 165(a) is entitled "*Variation and rescission of orders of Labour Court*" and provides:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order—
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> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order". (Emphasis added.)

[5] Rule 16A(1)(b) states:

> "(1) The court may in addition to any other powers it may have—
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> . . .
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> (b) on application of any party affected, rescind any order or judgement granted in the absence of that party."

This subrule has to be read with subrule (2)(b), which provides that an application under subrule (1)(b) must be done ***"within 15 days after acquiring knowledge of an order or judgment"*** concern. And a court may grant such relief ***"upon good cause shown"***. (Emphasis added.)

[6] *Khoza & Others v Body Incorporate Ella Court* 2014 (2) SA 112(GSJ) at para 25. Peniel Development (Pty) Ltd and Another v Pietersen and Others 2014 (2) SA 503 (GSJ); Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another 2016 (6) SA 466 (GJ). I am alive to the different views expressed in these two judgments.

Mr Christodoulou that she should come the next day as the employer intended to bring a review application against the award.

[7] In May 2015, the Union brought an application in terms of section 158(1) (c) of the LRA, to make the award an order of this Court. The employer was the only respondent in that application[taking into account that the award was issued against it and is the one which has been directed to reinstate the employee]. That application was heard on 14 July 2016, which led to the order being issued.

[8] Subsequent to the issuing of the order, the Union brought an application for contempt of court against Mr Christodoulou, and on 28 October 2016 LaGrange J issued an order calling upon Mr Christodoulou to appear before the Court on 2 December 2016 to give reasons why he should not be held in contempt of Court. On this date, Mr Christodoulou appeared before Prinsloo J, and he delivered an affidavit in opposing the contempt application. Prinsloo J varied the court order and further made a directive that the contempt application should be heard on 17 February 2017.

[9] On 15 February 2017, both the Union and Mr Christodoulou agreed to a postponement of that scheduled hearing to allow the parties to exchange further documents. Indeed on 17 February 2017, the matter was adjourned to 01 March 2017 for an application for joinder of the Members, which had been brought by the Union. On 01 March 2017, the application for joinder was heard and granted, and the contempt hearing was then set down for 18 May 2017 for the Members to give reasons why they should not be found in contempt of court, for failing to comply with the section 158(1) (c) order. On 27 April 2017, this rescission application was served on the Union via email.

[10] The Members contend that they have considered the history of the matter and the papers that have been filed in various proceedings herein, before the date of this application and they have been advised that they may apply for a rescission of the order which was made in *“their absence”.*

[11] The issue in this matter is whether or not, the application in terms of section 158(1) (c), was served on the employer-the party that has not complied with the terms of the award. According to the Members, the employer neither received that application, nor the notice of set down. Therefore, according to them, if the employer had been served with that application, it would have proceeded to oppose it because there was a pending review application that had been delivered against the award.

Applicable principles and application thereof

[12] Mr Venter on behalf of the applicants, submitted that their case is premised on (a) the fact that there was no proper service, of the section 158(1)(c) application as there was no service affidavit as required by the rules of this Court—despite the fax transmission report indicating that there were documents served on the employer by the Union, (b) the employer did not receive the application; and (c) the respondent did not file the original papers on time, within five days as it was filed “on 25 February 2016”, following the alleged service on 5 May 2015.The latter point is found in the answering affidavit of the respondent, meaning, it is not pleaded by the applicants.

[13] Therefore, according to him, based on that, this application should be granted. When I asked Mr Venter, as to whether this rescission application was not supposed to have been delivered within 15 days - from 02 December 2016; when the employer and/or Mr Christodoulou appeared in Court; instead of April 2017; his answer was that it was not required because the Members have only been joined in March 2017.I disagree with this, based on what is contained below, in paragraphs 18 and 19 .And, according to him, it has been brought within *a reasonable time*, as the Members reliance is not only on rule 16A(1)(b), but section 165(a) (read with rule 16A(1)(a)) which are not specific about the time to bring a rescission application.

[14] The provision that the Members rely on is section 165(a) of the LRA which reads as follows:

> "Variation and rescission of orders of Labour Court.—The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order—
>
> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;"

[15] The Constitutional Court, in emphasising what is required from an applicant bringing a rescission application relying on the provisions of this section, signposted that it mirrors the provisions of 42(1)(a) of the Uniform Rules and reasoned thus:

> "A party may have an order of the Labour Court rescinded under section 165(a) if it is shown that the order was erroneously sought or granted in the absence of that party. **Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party**. That is also the position under rule 42(1)(a) of the Uniform Rules of Court. In respect of rule 42(1)(a) this was held to be the position by a Full Bench in *Tshabalala and Another v Peer*. Both the Supreme Court of Appeal and this Court have also made this point. The Court may even rescind or vary its order on its own accord under this provision"[7] (Emphasis added and footnotes omitted.)

[16] In terms of this section, the phrase "erroneously sought or erroneously granted" is not defined in the LRA or in the rules of this Court and/or Uniform Rules. For example to clarification of this phrase, the South Gauteng High Court in the matter of *Pretoria Society of Advocates v Salimane & Others*,[8] the full bench, faced with a case whereby an applicant who had approached a

[7] *F & J Electrical CC v MEWUSA obo E Mashatola and Other* [2015] ZACC 3; 2015 (4) BCLR 377 (CC); (2015) 36 ILJ 1189 (CC); [2015] 5 BLLR 453 (CC) at para 27.See also Ferris and Firstrand Bank Ltd and another 2014 (3) BCLR 321 (CC) at para 13.

[8] (2016) JOL 35095 (GJ) at para 25.

court *a quo* to be admitted as an advocate, did not disclose certain relevant information to that court *a quo*, it was held that:

> "from the effects of this matter, it is more than plain that had the two judges who commanded the first respondent admission application been aware of the fact that the first respondent does not possess the LLB degree, **there would not have granted the order**…"

[17] The question that has to be answered is whether this Court can rescind the order. Put simply, does this Court have jurisdiction to rescind the order? In answering this question, during argument, I asked Mr Venter if this matter is properly before me taking into account the provisions of rule16(A)(2)(b).[9] He provided the answer as set out above, paragraph 13.

[18] The Members, in describing their involvement with the employer confirmed their association with it, as follows:

> "15. … Although we are members of the close corporation which owns the supermarket, ***we are not involved in the running of the business of the supermarket and has no knowledge of the day to day operational issues***
> 17. [Mr Christodoulou] ***is the manager of the supermarket***, and he has a number of support staff to run the business". (Own emphasis)

This clearly indicates that the only person who would be in a position to receive documents for the employer and/or the Members would be Mr Christodoulou. I, therefore, am of the view that it would be appropriate to establish as to when Mr Christodoulou received and / or probably became aware of the court order, as he is a representative of the employer and Members, taking into account these assertions by the Members.

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[9] Rule 16A(2)(b) provides:

> "(2) Any party desiring any relief under—
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> . . .
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> (b) subrule (1) (b) may within 15 days *after acquiring knowledge* of an order or judgement granted in the absence of that party apply on notice to all interested parties to set aside the order or judgement and the court may, upon *good cause shown*, set aside the order or judgement on such terms as it deems fit." (Emphasis added.)

[19] The court order was issued against the employer, and the applications for joinder and contempt followed thereof. Mr Christodoulou, by 2 December 2016, knew about the court order as he had been ordered to appear before the Court to answer the contempt allegations. He submitted an affidavit in response to the contempt proceedings. As the representative of the employer, he was the one who should have advised them, the Members, about the court order as they have indicated that their involvement is "limited". Therefore, in my view, the employer has not complied with the 15-day period as required by sub-rules 16A (1) (b) read with (2)(b).

[20] In respect of sub-rule 16A(1)(a)(i), I am aware that there is no overt timeframe to deliver the application for rescission under this provision, however, taking into account what the Constitutional Court said in *Gcaba*—[10] *"providing for the speedy resolution of disputes in the workplace and by regulating administrative conduct to ensure fairness"*, as Mr Venter indicated that the application has been delivered within a reasonable time, it is important to look at what could be the reasonable time under the facts and circumstances of this matter , in line with the provisions of the LRA.

[21] In deciding this, the following time frames are critical to mention: If a person is claiming unfair dismissal he/she has to refer a dispute to the appropriate forum within 30 days;[11] if the claim is one of challenging a ruling or an award of a commissioner such challenge should be done within six (6) weeks upon served with it.[12]Time periods in the rules of this Court-sub-rules 6(1)(a)(iv)

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[10] *Gcaba* above n 1.

[11] Section 191(1)(b)(i) of the LRA.

[12] See section 145(1)(a) of the LRA which provides:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
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> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004"

(a);7A(2)(b),(9); 9 (2)-*"…the notice of appeal must be filed within 10 days of the date on which the person filing the notice of appeal is notified of the decision that is the subject of the appeal.";* and 30 (2)- *"…an application for leave must be made and the grounds for appeal furnished within 15 days of the judgment or order against which leave to appeal is sought"*

[22] In the matter of *Bakoven Ltd v GJ Homes (Pty) (Ltd),*[13] it was held that rescission application "*Rule 42(1)(a)…it seems to me, is a procedural step designed to correct* ***expeditiously*** *an obviously wrong judgment or order*". In my view, a period of more than four months cannot be said to be a reasonable time, therefore, a reasonable time, based on the facts and circumstances of this matter, in line with the purpose of the LRA, as found in the section 3 thereof, and the Rules of this Court would be 15 days from 02 December 2016, the date Mr Christodoulou become aware of the order which is a subject of this rescission application.

[23] Therefore, as the Applicants have not delivered a condonation application, this application cannot succeed.

Order

[24] In the event, the following order is made:

1. The rescission application is dismissed .
2. There is no order as to costs.
3. The Registrar to enrol the contempt hearing against the applicants, before any Justice of this Court.

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Mabaso AJ

Acting Judge of the Labour Court of South Africa

[13] 1992(2) SA 466(E), at para 471E-F. See also *FNB v Van Rensburg NO & Others* 1994(1) SA 677 (T)

Appearances

For the Applicant: Mr Venter

Instructed by: Jassat Mitchell Inc.

For the Respondents: Mr Ngoato -Union Official