DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

30/6/2020
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1950/14

In the matter between:

DEPARTMENT OF HOME AFFAIRS **Applicant**

and

PUBLIC SERVICE ASSOCIATION OF SA
OBO AMANDA VAN DER MERWE **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL **Second Respondent**

COMMISSIONER LAWRENCE NOWOSENETZ *N.O* **Third Respondents**

Enrolled: **26 May 2020**

Decided on the papers

In chambers

Delivered: **In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 30 June 2020.**

Summary: **Rescission application – non-appearance in court by the legal representatives – review application is decided on the record of papers before court – order is final and *res judicata*.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this application, the applicant, Department of Home Affairs (DHA), the third respondent in the main application, seeks an order rescinding the default order granted by this Court per Saloojee AJ on 7 June 2017 which reviewed and set aside the arbitration award issued by the third respondent (arbitrator), the second respondent in the main application, and under the auspices of the second respondent, General Public Service Sectoral Bargaining Council (GPSSBC), the first respondent in the main application, under case number GPBC 2285/2013 dated July 2014. The impugned order substituted the award with the order declaring the dismissal of Ms Amanda Van der Merwe (Ms Van der Merwe), member of the first respondent (PSA), the applicant in the main application; substantively unfair and reinstating her with retrospective effect, on terms not less favourable than those prior to her dismissal on 13 August 2013. DHA was ordered to pay costs on an unopposed scale.

[2] This application is only opposed by PSA. Despite its failure to file an answering affidavit, it has filed comprehensive heads of argument.

[3] Ms S Manitshana (Ms Manitshana), the deponent to DHA's founding affidavit and its legal representative, asserts that she incorrectly diarised the date of the hearing of the matter as 8 June 2017 as opposed to 7 June 2017. The erroneous date was also communicated to DHA's counsel. The practice note filed by counsel for DHA evidently refers to the date of set down as 8 June 2017. The error was only discovered on 8 June 2017 when counsel attended court.

[4] It is trite that in order to succeed with an applicant for rescission of a judgment taken against it by default must show good cause,[1] which is generally accepted as (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospects of success.[2]

[5] I have no reason to doubt the explanation proffered for non-appearance in court by DHA's legal representatives when the impugned order was granted. Ms Manitshana was in court when the matter was allocated by Van Niekerk J on 9 February 2017.

[6] Turning to the second leg of the enquiry, PSA contends that DHA had no *prima facie* defence on the merits simply because it conceded to the order being granted in terms of payers one and three of the Notice of Motion to effectively review and set aside the award and remit it back to the GPSSBC for a hearing *de novo*. Furthermore, that since it has not filed any opposing papers, its challenge is only limited to points of law.

[7] On the other hand, DHA contends that the arbitrator correctly exercised his discretion in terms of section 193(3)(b) of the Labour Relations Act[3] (LRA) by not ordering reinstatement in the light of the evidence that a continued employment relationship would be intolerable. As such, DHA has reasonable prospects in defending the decision of the arbitrator to reinstate Ms Van der Merwe.

[8] The difficulty with DHA's contention is that it assumes that Saloojee AJ did not consider the record before him when he granted the impugned order. Conversely, this Court is enjoined to consider the entire record of the proceedings before the arbitrator in order to ascertain whether the outcome arrived at by the arbitrator was reasonable. In *Anglo Platinum*

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[1] See: *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 F- 1043 C.
[2] See: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA) at para 11; *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and* Others (2007) 28 ILJ 2246 (LAC); *Northern Training Trust v Maake and Others* (2006) 27 ILJ 828 (LC).
[3] Act 66 of 1996 as amended.

(Pty) Ltd (Bafokeng Rasimone Mine) v De Beer and Others,[4] the Labour Appeal Court (LAC) stated that:

> '...this Court in *Goldfields*, subsequently rejected the fragmented or piecemeal approach to reviews by highlighting that the Labour Court should not engage in a piecemeal analysis of each of the arbitrator's findings, because this will "assume the form of an appeal" as opposed to a review. Instead, the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[9] Furthermore, even though DHA did not filed an answering affidavit, its counsel's written submissions were duly part of the record before the Court despite the non-appearance. It is possible that DHA's counsel could have swayed Saloojee AJ to make a different order had she appeared in court. But in the end, Saloojee AJ had to satisfy himself that reinstatement is an appropriate remedy on the basis of the evidence on record before him *in toto*.

[10] The actual enquiry maybe should be whether can it be truly said that the impugned order was granted in the absence of DHA when it is not its case that it seeks to file an answering affidavit and its written submissions were duly before the Court. In my view, since the reviewing court is enjoined to consider the record of the arbitration *in toto* and satisfy itself that the award passes muster outlined in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] and underscored in several decisions of the Supreme Court of Appeal (SCA) and the LAC,[6] the impugned order is consequently final and *res judicata*.

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[4] [2015] 4 BLLR 394 (LAC); (2015) 36 ILJ 1453 (LAC) at para 12; See also: *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[5] [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).
[6] See: *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

Conclusion

[11] In the circumstances, the application for rescission stands to be dismissed.

Costs

[12] It is trite that costs do not follow the result in this Court. In the circumstances of the present case, it accords with principles of fairness and equity that each pays its own costs.

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

Order

1. The application for rescission is dismissed.

2. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa