IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: JR623/06

In the matter between:

SOUTH AFRICAN AIRWAYS (PTY) LTD Applicant

and

TOGETHERNESS AMALGAMATED UNION OF SOUTH AFRICA (TAWUSA) obo LEBATI T.J. First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

COMMISSIONER SIPHO RADEBE N.O. Third Respondent

JUDGMENT

LE ROUX, AJ:

1 This application has its origins in the dismissal by South African Airways (the applicant in this application) of a Mr T J Lebati on the grounds of misconduct. He had been employed by the applicant as a check in officer. He challenged the fairness of his dismissal in the CCMA. The CCMA upheld the fairness of his dismissal.

2 His union, TAWUSA, then launched an application for the review and setting aside of the CCMA award on his behalf.

3 The applicant in this application did not oppose the review application and it was placed on the unopposed role on 29 April 2008. An order was

granted by Basson J in the applicant's absence to the effect that the arbitration award was set aside. Basson J did not remit the matter back to the CCMA but issued an order to the effect that the dismissal had been unfair. The reinstatement of the third respondent was ordered.

4 The applicant seeks to have this judgment rescinded in terms of rule 16A(1) (a), alternatively Rule 16A(1)(b) of this Court. Rule 16A(1)(a) provides that this Court may rescind an order erroneously sought or erroneously granted in the absence of a party affected by it. Rule 16A(1)(b) simply states that a judgment or order can be rescinded in the absence of any party.

5 The circumstances in which the applicant failed to appear at Court on 29 April 2008 are set out in the founding affidavit and replying affidavit attested to by Ms Quick, a legal advisor to the applicant. She states that:

5.1 From the documents on the Court file it appears that the notice of motion in the review application was served on the applicant by facsimile. The number utilised for the purposes of the transmission of the facsimile was 011 978 6066. This is the facsimile number allocated to the General Manager: Operations.

5.2 When the applicant was made aware if this Court's judgment, enquiries were made at the General Manager: Operations' office. Nobody at this office had any recollection of receiving the notice of motion and no relevant documents could be found in this office.

5.3 The Applicant is a large organisation with almost 11000 employees. Labour disputes are handled by its Employee Relations Department. The dismissal form provided to employees when their employment is terminated states that any correspondence, referrals and notices must be sent to this Department at 0119786889.

5.4 On or about 18 of 19 December 2007, ie prior to gaining knowledge of the judgment by Basson J, Ms Quick received a thick

lever-arch file. This file had come to her via a junior legal secretary who had received it from the Employee Relations Manager who, in turn, had found it on a desk in his department. She scanned the file and found that it was in disarray. It contained pages from various documents, draft affidavits, notices of motion as well as correspondence addressed to and from TAWUSA. She came to the conclusion that the file did not belong to the applicant and that she need not take any immediate action in this regard. A check was made to ascertain whether the matter had been recorded on the Applicant's "system" but there was no record of it on the system. She left the file on her desk for further consideration. She then went on leave. When she returned from leave the file had been removed from her desk and filed in a filing cabinet.

5.5 When she became aware of the court order on 5 May 2008 she again inspected the file and found that it contained a range of documents, including personal correspondence, closing arguments for the CCMA arbitration and copies of various court documents. These included four draft copies of the notice of motion and the founding affidavit in the review application. She also found the final notice of motion and a founding affidavit with a court stamp in respect of the review application.

5.6 She had been appointed in her position a few weeks prior to the lever-arch file coming to her attention. Her legal secretary at that time has left the employment of the applicant and Ms Quick does not know where to get hold of her. The employee in the Employee Relations Department who dealt with the matter passed away in April 2008. He cannot therefore be approached to shed light on how the lever-arch file came to be placed on her desk.

5.7 From the documentation on the file it appears that it must have been left at the applicant's offices, or have been handed to

someone at the applicant's offices by no earlier than 14 November 2008.

5.8 There may be a number of reasons why there may be a successful facsimile transmission report on TAWUSA's side but no facsimile actually received on the applicant's side. The essential point is that the applicant was not aware of the application.

5.9 The disciplinary charges bought against Mr Lebati were extremely serious involving airline safety and dishonest conduct.

5.10 Based on information on the Court file it is argued that the application for review was brought 1 week too late and there is no application for condonation for the late filing of the application.

5.11 The applicant does not appear to have received any other document relating to the review application.

5.12 An official of TAWUSA, Mr Marwani, vigorously opposed the relief sought. The following points of relevance were raised by him:

5.12.1 the fax number utilised by the first respondent for the filing of the notice of motion was used to serve all other documents relevant to the arbitration without problems;

5.12.2 the applicant has been utilising delaying tactics;

5.12.3 Ms Quick, as a legal advisor, should have realised the importance of the documents in the lever arch file and should have taken reasonable steps to clarify what the position was.

5.13 It is denied that the application was filed too late although this appears to be based on the interpretation of what constitutes a week rather than on any factual issue.

6 Rule 16A(1)(a) was considered in *Construction & Allied Workers Union v Federale Stene (1991) Pty Ltd (1998) 19 ILJ 642 (LC)*. In this decision

Pretorius AJ relied on the decision in *Topol & Others v LS Group Management Services (Pty) Ltd 1988 (1) SA G639 (W)* to come to the conclusion that a decision can be rescinded in circumstances where the applicant for rescission had at all times intended proceeding with the relevant application and the reason why it had not been represented at the application was that it had no knowledge of the set down of that application. No good cause needs to be shown.

7 Mr Pretorius, who appeared for the applicant, argued that the applicant fell within the ambit of rule 16A(1)(a). The applicant had not received the notice of motion - there had been no proper service and there was no knowledge of the application. He referred to rule 4(1)(a)(vi) of the Rules of this Court which provides that service can be effected through a facsimile number that has been chosen by the party. He argued that the applicant had chosen such a number in the dismissal letters referred to above.

8 In my view the applicant meets the test set in the *Federale Stene* decision. However, reservations have been expressed as to how this rule should be applied in practice – see, for example, *Electrocomp (Pty) Ltd v Novak (2001) 22 ILJ 2015 (LC)* and *Kolobe v Proxenos (Sophia's Restaurant) (2000) 21 ILJ 1130 (LC).* I do not propose to enter into this debate and will therefore also deal with this application under rule 16A(1)(b).

9 Rule 16A(1)(b) is similar to rule 31(2)(b) of the Uniform Rules of the High Court. It is therefore useful to see how rule 31(2)(b) has been applied by the High Court. The relevant principles are discussed in *Farlam, Fichardt and van Loggerenbrg* **Erasmus Superior Court Practice (Juta) at B1 to B204.** They are:

> "*11.1 Applicant must give a reasonable explanation for its default. If it appears that the default was wilful or that it was due to gross negligence the Court should not come to its assistance. Nevertheless, the absence of gross negligence is not an*

absolute prerequisite for the granting of relief and the courts have a discretion in deciding whether to grant relief or not.

11.2 The application must be bona fide and not have been made with the intention of merely delaying the plaintiff's claim;

11.3 The applicant must show that it has a bona fide defence to plaintiff's claim. It is sufficient if it makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle it to the relief asked for. The applicant need not deal fully with the merits of the case and produce evidence that the probabilities are actually in its favour;

11.4 The Court has a wide discretion in deciding whether to grant relief in order to ensure that justice is done."

10 The respondent, by alleging that the applicant was attempting to delay the process, is in effect arguing that there is wilfulness and *mala fides* on the side of the applicant. It is evident from the papers that this is not the case. Although it is unclear in some cases what facts as set out in the applicant's founding affidavit are admitted and denied, it seems clear that the applicant is in no position to deny the statements made in paragraphs 5.1 to 5.9 above.

11 Whether gross negligence can be imputed to the applicant is perhaps more arguable. In this case it is unclear why the notice of motion and at least the Rule 7 notifications were not received by the applicant's legal department. It is at least arguable that Ms Quick's failure to see that there was a signed notice of motion in the lever-arch file constitutes negligence. However, given the circumstances set out in her affidavit I do not think the there was gross negligence on her part.

12 It is further evident from the papers that the charges on which Mr Lebati was found guilty, and in respect of which the fairness of his dismissal was found to be fair, are of an extremely serious nature.

13 The applicant has also shown that it has a prima facie case on which basis the review application could have been opposed. The test for review and the award itself, which forms part of the bundle, were dealt with in argument as well. I should add that, on the papers at least, it seems that there was no formal application for condonation.

14 In my opinion the applicant has made out a case that it falls within the ambit of rule 16A(1)(b) and that rescission should be granted. At the very least justice will be served if the review application is granted by this Court.

ORDER

I therefore make an order to the effect that the decision of the Court dated 29 April 2009 is rescinded. No order as to costs is made.

I am also empowered to issue the above order on terms I deem fit. In order to expedite the matter I further order that:

1 If the applicant in this application proposes to oppose the review application it must deliver an answering affidavit within 14 days of this judgment being handed down.

2 Thereafter, the first respondent in this application may file a replying affidavit within 10 days.

3 The first respondent may then approach the registrar of this Court to request that the matter be placed on the role as a matter of urgency.

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LE ROUX AJ

APPEARANCES

For the applicant:	D.O Pretorius
Instructed by:	Hofmeyer Herbstein & Gihwala Inc
For the respondent:	S.S.Molwane
Instructed by:	TAWUSA
Date of judgment:	10 March 2009