



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C388/2019

In the matter between:

RONALD JOHN FEBRUARY

Applicant

and

DIGITAL OUTSOURCE SERVICES

First Respondent

GRANT MERWITZ

Second Respondent

CLAYTON SCIOCATTI

Third Respondent

JANICE PAULSON

Fourth Respondent

DESIREE DIPPENAAR

Fifth Respondent

VICTOR FEBRUARY

Sixth Respondent

DAVID STEVENSON

Seventh Respondent

FATIMA DODDS

Eighth Respondent

ASSER DOLAMO

Ninth Respondent

Heard: 20 June 2023

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 21 June 2023

Summary: application for rescission of judgment – no good cause shown for rescission – application for rescission dismissed – matter to be set down for a pre-trial conference before a Judge

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by the applicant ('February') for the rescission of an order issued by the Honourable Justice Nkutha-Nkontwana, on 11 February 2020, wherein it was ordered that the application to compel was dismissed with costs. The application for rescission was opposed by the Respondents.
- [2] The application for rescission was previously set down and to be heard on 22 April 2021. The application however did not proceed given that the Honourable Justice Rabkin-Naicker ordered that the rescission application be postponed *sine die*; that the court will endeavour to obtain *pro bono* representation for February; that the parties will be advised regarding the appointment of *pro bono* representation for February; that should February proceed with the rescission application the Registrar is directed to enrol it on an expedited basis; and that costs were to stand over for future determination.
- [3] I do not intend to refer to the events between the date on which the order was granted, i.e., 22 April 2021 and the date that the application came before me. The application for rescission and the opposition thereto were duly served and filed and the application was therefore properly before me.

- [4] Ms J Vlok (“Vlok”), an attorney appearing on behalf of the Respondents, moved an application for a further affidavit to be allowed as part of the consideration of the application for rescission. I disallowed the further affidavit due to the lateness of delivering same and based on February not having been given a proper opportunity to respond to the further affidavit, save to advise that he would object to the further affidavit being submitted. The contents of the further affidavit were therefore not considered in my consideration of the application for rescission.

LEGAL FRAMEWORK OF APPLICATIONS FOR RESCISSION

- [5] Applications for rescission of an order of the Labour Court must be brought in terms of section 165 of the Labour Relations Act No. 66 of 1995 (“LRA”). The relevant section in the application before me is section 165 (a), which provides that the Labour Court may rescind an order erroneously sought or erroneously granted in the absence of any party affected by that order. Rule 16A (1)(a)(i) of the Labour Court Rules also deals with this ground of rescission. It is common cause that February did not attend the application to compel, an application brought by himself, despite having been aware of the date on which the application to compel was to be heard. I will return hereunder to the reasons advanced by February for not having attended court on 11 February 2020.
- [6] It is trite that an applicant who wishes to have an order rescinded must show good cause. In this regard Rule 16A (2)(b), which provides for the setting aside of an order or judgment upon good cause shown. This entails having a reasonable explanation for failing to attend and showing that he/she has good prospects of success. In this matter before me, February must show that he has a reasonable explanation for not attending court on 11 February 2020 and that he has reasonable prospects of succeeding in the application to compel.

EXPLANATION FOR FAILURE TO ATTEND

- [7] February states in his founding affidavit, filed in support of the application for rescission, that he was arrested on 7 February 2020 and released on 8 February 2020. He was summonsed to appear again on 11 February 2020, the same day that the application for rescission was set down and to be heard in the Labour Court.
- [8] Although February has provided a reasonable explanation as to where he was on 11 February 2020 and why he was not able to attend to the application for rescission at 10h00am at the Labour Court, the Respondents take issue with the fact that he failed to advise the Respondents' attorney and/or the Registrar of the Labour Court as to his situation. Vlok argued that there is no reason why February did not do so and could not do so, resulting in the application for rescission proceeding in the absence of February and in the issuing of the order in which the application to compel was dismissed with costs.
- [9] February also submitted during arguments before me that he was booked off sick from 8 to 11 February 2020 and that no consideration was given to this fact. The same difficulty however applies in this regard, as not only was the issue of the medical certificate not dealt with in February's affidavit, but this was also not brought to the attention of the Respondents' attorney or to the attention of the Registrar of the Labour Court before the application was heard, in his absence, on 11 February 2020.
- [10] Although I have sympathy with the predicament faced by February on 11 February 2020, I cannot overlook the fact that February made no effort whatsoever to advise the Respondents' attorney and/or the Registrar of his inability to attend the application to compel. I also agree with Vlok

that there appears to be no reasonable explanation advanced why this was not done, especially given the fact that February has frequently before the 11th communicated with Vlok and the Registrar regarding his matter.

- [11] On the strength of the aforesaid, I cannot find that February provided a reasonable explanation for his failure to attend to his matter at the Labour Court on 11 February 2020 with emphasis on his failure to communicate his predicament. I have no doubts that, had he done so, Vlok would have agreed to remove the matter from the roll and/or that the Registrar would have duly informed the presiding Judge and that the matter would have been removed from the roll and would not have proceeded in his absence.

PROSPECTS OF SUCCESS

- [12] Vlok argued that February has not addressed the issue of prospects of success in his affidavit. Vlok further argued that February does not have any prospects of success in the application to compel, as in the *ex tempore* judgment it was found that February does not have a right to seek an order to compel prior to the conclusion of a pre-trial minute. I have expressed my concern to Vlok that the *ex tempore* judgment was never transcribed and never formed part of the Respondents' opposition. Be that as it may, I am willing to accept, for purposes of deciding this application for rescission, that this did form part of the *ex tempore* judgment.

- [13] I am not entirely convinced that February did not have such a right before conclusion of a pre-trial minute, on condition that a proper application to compel was delivered. The various notices to compel, in my view, do not constitute a proper application to compel, which could have been favourably considered. The notices needed to be accompanied by a

supporting affidavit and details of what was sought to be provided. The fact that February is a layperson almost certainly contributed to the manner in which the various applications, or notices, were drafted.

[14] I am as such not convinced that, on the notices currently before the Labour Court, February's prospects of success are good should the order be rescinded. In rescinding the order, the applications would have to be redone and this will result in yet a further delay in the finalisation of the matter.

[15] I am therefore not convinced that good cause was shown for the order to be rescinded. This however is not the end of the road for February insofar as he seeks to be provided with what is contained in the said notices. I advised February in court what the purpose of the pre-trial minute is and that the pre-trial minute will be based on the pleadings already served and filed, that is the Statement of Claim and the Response thereto. I also advised February that, included in the pre-trial minute, will be a heading dealing with discovery of documents and the date on which documents must be discovered. I also advised February that he will still have the right, after conclusion of a pre-trial minute and whilst waiting for a trial date, or even if a date has in the meantime been allocated, to request discovery of evidence that will be relevant to the preparation of his case. I also advised February that he will still be able to file an application to compel such discovery, if refused by the Respondent and/or to have a subpoena issued in respect of the evidence that he may require.

[16] Given that February will still have this right despite the application for rescission being refused, February will not be prejudiced in any way in the further conduct of the matter. I am of the view that this matter has dragged on for far too long and that active steps must now be taken to ensure that the pre-trial minutes are finalised and that a date for trial be allocated by the Registrar.

COSTS

[17] I have considered Vlok's submissions that February must pay the costs of the application. I have appreciation for what the Respondents' attorney has done thus far and I also have appreciation that the Respondents have incurred costs in various instances where they were required to defend actions instituted against them by February. In those matters where the applications were dismissed with no order as to costs, it is not for this Court to consider these other applications in whether to award costs or not.

[18] What I should consider in respect of costs are the facts relevant to the rescission application that is before me. In considering same, I cannot find that the filing of an application for rescission by itself is frivolous and vexatious and that fairness requires that February, as a layperson, must be saddled with costs for pursuing the application for rescission to its conclusion.

ORDER

[19] I therefore make the following order in respect of the application for rescission, as well as in respect of the finalisation of a pre-trial minute:

1. The application for rescission is dismissed.
2. No order is made as to costs.
3. The Registrar is instructed to set the matter down, on an expedited basis, for a *pre-trial* conference to be held before a Judge of the Labour Court. The parties are encouraged in the meantime to

exchange draft *pre-trial* minutes to assist the Court in the process of ensuring that a pre-trial minute is concluded and to ensure that the matter can be set down for trial once the pre-trial minutes have been finalised.



C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

In Person

For the Respondents:

Jeanette Vlok (Bradley Conradie
Halton Cheadle)