IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 297/12

In the matter between:

KHAFETSA J TLALI **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER THEMBA R HLATSWAYO **Second Respondent**

ABSA BANK LIMITED **Third Respondent**

Heard: **12 July 2016**

Delivered: **24 MAY 2017**

JUDGMENT

LANDMAN AJ

Introduction

[1] The applicant, formerly a market risk manager in the employ of the third respondent (ABSA), seeks *inter alia* rescission of an order of court issued by Malan AJ on 17 July 2013, under case number JR 297/12, together

with ancillary relief, including that the dispute be re-enrolled for hearing and/or adjudication before another Judge; declaring the applicant's suspension unfair and unlawful; declaring the applicant's dismissal not only automatically unfair but also procedurally and substantively unfair; reinstating the applicant in ABSA's employ. ABSA opposes the application.

[2] The parties' representatives agree that the only issue for adjudication in this application is whether Malan AJ's order, granted in the applicant's absence, ought to be rescinded.

The background

[3] On 27 November 2008, ABSA appointed the applicant to the position of market risk manager, supervising four subordinates (the team). He reported to Ms Christine Clark (Ms Clark), ABSA's Head of Market Risk.

[4] The applicant claims that he found ABSA's market risk system to be "a complete mess", faulty and broke down frequently. The team was "lowly ranked" largely because of the nature of the work they did, and, applicant claims, because the members of his team were Africans. Realising that the team was generating inaccurate reports owing to the faulty system, the applicant approached Ms Clark for an explanation. She explained that it was the result of years of neglect, including lack of maintenance and technical support.

[5] The applicant considered that Ms Clark subjected him and his team to racial bullying; hostility; exclusion and exploitation; the issuing of unreasonable and unlawful instructions and that she falsified market risk reports sent to the South African Reserve Bank, Barclays and other entities. Matters between the applicant and Ms Clark deteriorated from then on.

[6] In early February 2009, Ms Clark and ABSA's human resources department insisted that the applicant summarily dismissed one of his

subordinates for unfair reasons. When he refused, ABSA, without notice to the applicant, issued the team member with a final warning. The applicant considered Ms Clark's actions consistent with her view that the team consisted of lazy, useless people.

[7] Ms Clark and HR attempted to coerce the applicant into signing documents pertaining to key performance objectives (KPOs) and a performance accelerator programme (PAP). Feeling that Ms Clark was leading him into a "trap", the applicant refused to sign the documents.

[8] On 16 February 2009, the applicant requested leave to lodge a formal grievance in response to Ms Clark conduct, and to make a protected disclosure against Ms Clark. He asked for HR's assistance, as he was unfamiliar with ABSA's procedures. Much to the applicant's surprise, his grievance was logged and Ms Clark and HR undertook to provide him with feedback. Yet, only a day later, Ms Clark summonsed the applicant to her office where she issued him with a letter of suspension. Security personnel escorted him out of ABSA's premises. The applicant felt shocked and traumatised as he expected Ms Clark and HR to revert on his grievance and protected disclosure.

[9] The applicant contends that the reason provided for his suspension, namely to allow HR to investigate allegations of irregularities, are false. The true reason for his suspension was that he had lodged an oral grievance against Ms Clark, and a protected disclosure against Ms Clark, arising from her subjecting the applicant's team to racial bullying, hostility, exclusion, oppression, and exploitation; her falsification of market reports and her unreasonable and unlawful instruction that the applicant's team do the same (the complaint). This was unfair, says the applicant, as ABSA ought to have investigated Ms Clark while protecting him. Nonetheless, the applicant did not challenge his suspension in the CCMA.

[10] On 24 February 2009, ABSA delivered a charge sheet to the applicant. The charges, which the applicant characterises as malicious, trumped up and false, were that the applicant disregarded a reasonable and lawful instruction from a competent authority; insubordination; bringing the company's name into disrepute and gross negligence of duties as conditions of employment. The applicant viewed the charges as an attempt to suppress the complaint.

[11] On 29 March 2009, ABSA summonsed the applicant to a meeting. He avers that ABSA instructed him to agree to a separation package or face a disciplinary hearing where ABSA would dismiss him. The applicant presented ABSA with a counterproposal. ABSA rejected his counterproposal and convened a disciplinary hearing on 6 May 2009.

[12] On 18 June 2009, the applicant lodged a formal grievance and made a protected disclosure pertaining to Ms Clark to Mr John Vitalo, the CEO of ABSA Capital. The applicant felt he had no choice as he had waited more than 130 days since lodging the complaint. During the intervening period, Ms Clark's behaviour had worsened in that she had *inter alia* suspended and charged him. When Mr Vitalo ignored the applicant's grievance and disclosure, the applicant perceived that to be a form of victimisation in retaliation for the steps he took against Ms Clark.

[13] In July 2009, ABSA again proposed that the applicant accept a separation package or face dismissal. ABSA rejected the applicant's counterproposal, in which the applicant requested that ABSA provide him with a reference. ABSA countered that it would rather provide a reference on a confidential basis when requested by prospective employers.

[14] On 12 November 2009, the applicant noted that ABSA failed to deposit his monthly salary into his bank account. In response to a letter demanding payment, ABSA informed the applicant that he was dismissed with effect from 31 August 2009.

[15] The applicant contends that the motive behind informing him that he was dismissed on 31 August 2009 was to prejudice him and in retaliation for raising the complaint.

[16] On 23 November 2009, the applicant lodged a formal grievance regarding Ms Clark's conduct with ABSA Group CEO, Ms Ramos. Ms Ramos failed to respond.

[17] On 1 December 2009, the applicant lodged a grievance and protected disclosure against Ms Clark with the ABSA Group Interim Chairperson, Mr Dave Brink. Once again, the applicant received no response save for an acknowledgement that Mr Brink was in receipt of his grievance.

[18] The applicant contends that both Ms Ramos and Mr Brink approached his grievance in an unnecessarily formalistic manner.

[19] Finally, on 8 December 2009, the applicant referred an unfair dismissal dispute to the CCMA, having exhausted all internal remedies.

[20] The applicant accuses ABSA of acting with malice, to cause confusion, complicate the dispute and hide the true date of dismissal by informing him that he was dismissed with effect from 31 August 2009.

[21] On the applicant's version, the true reason for his dismissal was not his guilt on the charges of misconduct but that he raised the complaint.

[22] Returning to the applicant's referral of the unfair dismissal dispute, the applicant simultaneously filed an application to condone the lateness of the referral. An official of the CCMA had advised him that he should do so as the referral was some 92 days late, based on the assumption that the date of dismissal was 31 August 2009. The applicant later recognised that it was an error to state in his Form 7.11 that his date of dismissal was 31 August 2009. Indeed, the applicant contends that he was not obliged or required to apply for condonation.

[23] ABSA opposed the condonation application and filed an affidavit in support of its opposition.

[24] The CCMA set down the condonation application for hearing on 12 November 2009. The applicant failed to attend as neither he nor his attorney (whose fax number and address he used as an address for service) received the notice of set down. ABSA, on the other hand, having received the notice of set down, dispatched two employees to attend the hearing. In the absence of the applicant, ABSA's representatives submitted to the Commissioner that the application lacked prospects of success and requested the Commissioner to dismiss the application for condonation.

[25] On 18 January 2009, the Commissioner issued a ruling dismissing the condonation application. The Commissioner ruled that the applicant had no prospects of success and that the applicant received poor advice.

[26] The applicant now contends that had the Commissioner been aware that the date of dismissal per ABSA's communication was false; that the applicant was notified of his dismissal on 19 November 2009; and that the dismissal was for the "true" reasons recorded above, the Commissioner would not have issued the ruling. In fact, the Commissioner would not have issued a ruling at all – save to strike the condonation ruling off the roll as being unnecessary.

[27] ABSA contends that the true date of dismissal was 31 August 2009; that the applicant was aware that was the date of his dismissal; ABSA notified the applicant accordingly at that time of his dismissal and that his dismissal was due to acts of misconduct recorded in the charge sheet. In brief, ABSA contends that the applicant was obliged to seek condonation for the lateness of the referral and that the Commissioner corrected refused to grant condonation as the applicant had no prospects of success.

[28] The applicant contends that he became aware of the Commissioner's ruling on 18 February 2010 upon enquiring from the CCMA about progress in setting down the condonation application. Although ABSA expressed doubts about the veracity of the applicant's version, ABSA was not in a positon to dispute that the applicant's contention that he became aware of the ruling on 18 February 2010.

[29] The applicant served an application to rescind the ruling on ABSA on 1 March 2010 and filed same with the CCMA on 4 March 2010. The applicant contends that he filed the rescission application timeously. ABSA opposed the rescission application on the grounds set out in its answering affidavit.

[30] The rescission application was finally set down and argued on 25 January 2011. The applicant explained the delay saying that he took various steps, including complaining to the Commissioner of the CCMA as well as the Public Protector, when the CCMA failed to set the application down for hearing. Apparently, the CCMA, at some stage, was adamant that the applicant had not filed a rescission application.

[31] On 25 January 2011, the parties appeared before the Commissioner. The applicant believed that he was there to advance reasons why the ruling should be rescinded. Instead, the Commissioner informed the parties that both he and the CCMA was *functus officio* as in January 2010 he had dismissed the applicant's application for condonation "on the merits". As I understand it, the Commissioner's reasoning was that the CCMA lacks jurisdiction to review or rescind rulings decided on the merits, for example, as in this instance, having found that the application lacks prospects of success. The Commissioner advised the applicant that the only option was to review the ruling in the Labour Court.

[32] The applicant accepted the Commissioner's advice and lodged a review application – in terms of section 145 of the Labour Relations Act[1] – on 16 March 2012. The applicant sough to review and set aside the condonation ruling dated 18 January 2010 and the rescission directive/ruling dated 25 January 2011.

[33] The applicant filed the review application approximately 13 months after the rescission ruling/directive and, self-evidently, even longer after the condonation ruling. The applicant once again applied for condonation.

[34] I must point out that ABSA contends that the review application was filed some two years late. ABSA computes the delay from the time that the Commissioner issued his condonation ruling to the time that the condonation application was filed in this Court.

[35] Conceding that the delay was a "lengthy one", the applicant stated that he had good explanation for the delay, namely that he did not have funds to instruct an attorney to assist him to draft the review application. The applicant recorded the steps he took to secure the services of a legal representative. The applicant also addressed the prospects of success.

[36] ABSA opposed the review application as well as the condonation application.

[37] On 17 July 2013, when the application was called before Malan AJ, the learned Judge dismissed the condonation application in the applicant's absence.

[38] On 24 July 2013, when making enquiries at the Registrar's Office, the applicant became aware of Malan AJ's order.

[39] The applicant immediately uplifted the order together with the notice of set down and a fax transmission slip. The applicant noticed that the notice of set down was faxed to two numbers, none of which was the

[1] 66 of 1995, as amended. (LRA)

applicant's number, being 011 562 1607 and 011 562 1111, (one of which is that of ABSA's attorneys of record).

[40] The applicant noted that the notice of set down records his fax number as "UNIT 23 IRELAND GARDENS", and ABSA's legal representative as "011 562 1607". The applicant pointed out, correctly, that "UNIT 23 IRELAND GARDENS" is not and cannot be a fax number, and that he did not consent to address to be used as his fax number. The second fax number, to which the notice of set down was sent, namely "011 562 1111", is unknown to the applicant.

[41] The applicant accordingly established that his physical address was recorded (albeit incorrectly in part) on the notice of set down but that the fax numbers show that the notice of set down was purportedly sent to him as applicant at one of the two fax numbers. As stated before none of them is his fax number.

[42] I should point out that ABSA accepts that the fax numbers on the notice of set down, and in the fax transmission report, are not the applicant's fax numbers. Thus, based on the only proof of service that was before Malan AJ at the time of his order, the notice of set down was neither sent to nor received by the applicant albeit that the inscriptions made on notice of set down might have been, at best, ambiguous.

[43] ABSA contended that the notice of set down was sent to the applicant's physical address – Unit 23 Ireland Gardens. ABSA's attorneys pointed out that they served documents on the applicant at that address. I shall revert to this issue later.

[44] The applicant concedes that he gave the Registrar his physical residential address as his address for service, namely Unit 23 Ireland Gardens.

[45] The applicant contends that he has good prospects of success in his unfair dismissal dispute as well as in his review application before this Court.

[46] As to his claim for unfair dismissal, the applicant contends that his referral to the CCMA was timeous for the reasons stated above.

[47] The applicant says that he was subjected to occupational detriment in order to prevent him from lodging the complaint, for refusing to accept ABSA's two offers of financial settlement, and for putting forward two counter proposals. In substantiation, the applicant points to ABSA's decision on 17 February 2009 to finally suspend him without good grounds and without affording him an opportunity to be heard; ABSA's decision to bring what the applicant describes as "malicious, trumped up and false charges" against him; ABSA's decision to revive those charges after the applicant declined its settlement proposal; ABSA's decision on 27 March 2009 to reject the applicant's first counter proposal and his request for a formal reference; ABSA's actions in subjecting him to a sham disciplinary hearing on 6 May 2009; ABSA's rejection of the applicant's second counter proposal on July 2009; ABSA's decision to again refuse to give the applicant a formal reference in July 2009; ABSA's failure to pay the applicant's salary in October 2009; ABSA's decision on 19 November 2009 to dismiss the applicant for unfair reasons; ABSA's failure to pay the applicant's salary for the days in November 2009 preceding his dismissal on 19 November 2009.

[48] The applicant addresses the charges in the charge sheet. The applicant contended that he has good prospects of success in showing that the charges were unsubstantiated. As to the charge of refusing to obey reasonable and lawful instructions, the applicant denies that he was issued with instructions to attend meetings and that he failed to attend a meeting on 30 January 2009 without tendering an apology. The applicant denies that he was requested to agree to the contract performance objectives at meetings held on 9, 12 and 16 February 2009; the applicant

denies that the team missing deadlines, that there were errors in the team's reports, or that the applicant's attitude hampered efforts in the department. The applicant denies that he refused to sign off the performance objectives.

[49] The applicant addressed his prospects of success in the review application. The applicant explained that the review application was not filed late. According to his explanation, he uplifted the Commissioner's ruling only on 18 February 2010. Before then he was not aware of the ruling and thus the six-week period without which to lodge a review application commenced on 18 February 2010. Accordingly, it is argued, the applicant filed review application timeously.

[50] The applicant also addressed the grounds for review of the Commissioner's condonation ruling. The applicant contends that the Commissioner was at the time unaware of a fact that, if known to him, would have precluded him from making the condonation ruling. This fact, the applicant contends, is that he incorrectly recorded his date of dismissal on Form 7.11 as 30 August 2009 whereas the true date of his dismissal was 19 November 2009.

[51] The applicant also addressed the grounds of review of the Commissioner's rescission directive/ruling. The applicant contends that the Commissioner committed a serious error in law by finding that he and the CCMA was *functus officio.* The applicant contends that on a proper reading of section 144 of the LRA, the Commissioner was empowered to revisit and rescind his condonation ruling.

[52] The applicant contends that his dismissal was not only automatically unfair but also procedurally and substantively unfair. The applicant advances the reasons described above.

[53] Finally, the applicant contends that Malan AJ's order was issued erroneously in his absence, and that the applicant is entitled to rescission of that order as he has shown good cause.

[54] ABSA responded to the applicant's allegations in an answering affidavit deposed to by one Verna Douman.

[55] Absa contends that the rescission application was brought some 2 years late (taking the ruling dismissing the applicant's condonation application as the starting point). ABSA points to applicant's habit of late filing as indicative of the applicant's lack of respect for court rules and time periods. In essence, ABSA argues that the applicant abused the processes of the Court.

[56] As to the applicant's explanation for his failure to attend on the date that Malan AJ issued his order, ABSA contends that the notice of set down shows, at least *prima facie*, that the Registrar sent the notice of set down to the applicant's residential address, namely Unit 23 Ireland Gardens. Absa points out that that is a physical address and not a fax number. The Registrar obviously recorded the address to which the Registrar sent the notice of set down on the notice of set down albeit in the space where a fax number should be recorded. Moreover, that is the same address where ABSA's attorneys had successfully served its heads of argument on the applicant. ABSA contends that the applicant has not proven that his failure to attend Court was not due to his negligence. Accordingly, ABSA argues that he has failed to show that his non-attendance was not wilful.

[57] ABSA argues that the applicant's prospects of success in both the condonation and the review applications are weak. The applicant changed tack on the condonation ruling. Whereas he originally objected to the Commissioner not granting condonation, the applicant now argues that condonation was unnecessary as he referred the dispute timeously. Absa contends that the Commissioner's refusal of the condonation application was reasonable and not reviewable. The condonation hearing was set down for hearing on 18 January 2012. Absa's representatives attended. The applicant was absent. In the applicant's absence, ABSA argued that the referral was 99 days late; the applicant did not provide a

reasonable explanation for the lateness of the referral; the applicant had no prospects of success in his unfair dismissal referral and ABSA will be prejudiced should condonation be granted as it had complied with its legal obligations before dismissing the applicant. After hearing argument, the Commissioner dismissed the condonation application.

Evaluation

[58] This application is brought in terms of section 165(a) of the provisions of the LRA read with rule 16A of the Rules of the Labour Court.

The law

[59] Section 165 of the LRA which empowers the Labour Court to vary or rescind orders, provides that:

> '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; ...'
>
> (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of the omission' or
>
> (c) granted as a result of a mistake common to the parties to the proceedings.'

Rule 16A(1)(a)[2] of the Rules of the Labour Court mirrors section 165(a) of the LRA. Our courts have held that if an order was erroneously made in

[2] Rule 16A (1)(a) provides:

> "(1) The court may in addition to any other powers it may have—
>
> (a) of its own motion or on application of any party affected, rescind or vary any order or judgment—
>
> (i) erroneously sought or erroneously granted in the absence of any party affected by it;

the absence of any affected party, the court should on the application of that party rescind the order without further enquiry.[3]

In *Lodhi 2 Properties Investments CC and Another v Bondev Developments* the Court held:[4]

> "Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously." (Footnotes omitted.)

[60] The principal ground advanced in support of the application is that this Court's order was "erroneously sought" within the meaning of section 165(a) of the LRA, read with rule 16A(1)(a)(i), in that Malan AJ was under the erroneous impression that the applicant had received the notice of set down.

[61] Snider AJ said in *Starfish Greathearts Foundation v Lekalakala*:[5]

(ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(iii) granted as the result of a mistake common to the parties."

[3] See *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at para 15 and *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC) at para 26.

[4] 2007 (6) SA 87 (SCA) at para 24.

[5] [2015] ZALCJHB 381; (2016) 37 ILJ 501 (LC) at para 25.

> 'Similarly, it would be impossible, given that it is the registrar who serves the notice of set down by fax, for a party who has attracted the onus to prove on a balance of probability that another party, who denies same, has in fact received a particular fax. The party seeking to prove such receipt would have to obtain any evidence that it could from the registrar which would inevitably prove a hindrance both to the registrar and to that party.'

[62] Where there was no proof of posting and the applicant said he did not receive the notice of set down, can it not be said that the judgment was made erroneously.

[63] Acting on the assumption that the notice of set down was indeed faxed to the numbers recorded on the notice of set down, I am constrained to find that the notice of set down would not have come to the applicant's attention as neither of the fax numbers recorded on the notice of set down are those of the applicant. As I stated earlier, one of those numbers is that of ABSA's attorneys of record. Where and how the second fax number came to be used remains a complete mystery. What is not a mystery is that that fax number is not that of the applicant.

[64] Assuming that ABSA is correct to argue that the Registrar meant to record that the notice of set down was posted to the applicant's address, I find that there are three insurmountable problems with that submission. First, there is no proof that the notice of set down was indeed posted to the address recorded on the notice of set down, second, the address is incomplete and gives one no confidence that, even had it been posted, it would necessarily have arrived at the applicant's address, being 23 Ireland Gardens, Ireland Street, Eldoraigne, in other words, "23 Ireland Gardens" may not have been enough to ensure that the post office delivered the notice of set down to 23 Ireland Gardens, Ireland Street, Eldoraigne; third, the applicant is adamant that he did not receive the notice of set down.

[65] I am alive to ABSA's point that it served documents on the applicant at the said address. I have no reason to doubt that the applicant lives at that address – the applicant admits as much. Nevertheless, I am not convinced that the fact that applicant took delivery of documents later at that address establishes that the notice of set down was similarly delivered to that address and received by the applicant.

[66] In the circumstances, I am of the view that the applicant has succeeded in establishing that Malan AJ's order was made erroneously in his absence and that the order must accordingly be rescinded. Conversely, I am satisfied that ABSA failed, in the face of applicant's denial, to prove that the notice of set down was delivered to and received by the applicant.

[67] It is not without significance that ABSA failed to obtain an explanation from the Registrar as to the anomalies appearing on the notice of set down.

[68] In the exercise of my discretion, I consider that each party should pay its own costs.

Order

[69] I accordingly make the following order:

1. The order granted by Malan AJ on 17 July 2013 under case number JR 297/12 is rescinded and set aside.

2. Each party is to pay its own costs.

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A. Landman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	In Person
For the Third Respondent:	A Patel of Cliffe Dekker Hofmeyer Inc.