THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JS 1021/2012

In the matter between:

CALDERYS REFRACTORIES **Applicant**

and

NUMSA OBO KOALEPE & SEVEN OTHERS **First Respondent**

Heard: **25 August 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 August 2021.**

Summary: Rescission application – whether reasonable explanation tendered – whether order granted in error – error must be apparent from the record before the Court when granting the judgment or order in the absence of the one party

JUDGMENT

COETZEE AJ

[1] The applicant approaches this Court to rescind a default judgment dated 27 February 2017.

[2] The applicant launched the rescission application one day late and adequately explained the delay. The late filing of the application is not opposed and is condoned.

The legal framework

[3] Section 165 of the Labour Relations Act, 66 of 1995 (as amended) ("the LRA") permits the rescission of a Court order. The relevant part of section 165 reads as follows:

> "165. **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;
>
> (b) …."

[4] The Rules for the Conduct of Proceedings in the Labour Court[1] regulates rescission proceedings before Court.

[5] In its notice of motion, the applicant relies upon Rule 16A(1)b read with Rule 16A(2)(b) which reads:

> "Rule 16A
>
> (1) The court may, in addition to any other powers it may have-

[1] GN 1665 in GG 17495 of 14 October 1996 [with effect from 11 November 1996] as amended

(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;

(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; or…

(b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

(2) Any party desiring any relief under-

(a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.

(b) subrule 1 (b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit."

[6] The applicant in its notice of motion relies upon Rule 16A(1)(b) read with Rule 16A(2)(b). That being the case the applicant must show good cause why the order should be rescinded.

[7] The applicant in its founding affidavit deals with good cause and the absence of wilful default.

[8] In its heads of argument, the applicant also relies on section 16A(1)(a)(i) for the rescission in that the judgment was granted erroneously in the absence of the applicant, alternatively it relies upon the common law.

The facts

[9] It is common cause that the Registrar faxed a notice of set down dated 18 October 2016 on 17 November 2016 to the attorneys of record of both parties. They were informed of the trial of 27 February 2017.

[10] The applicant did not attend the trial and an order was made in its absence.

[11] The respondent's attorneys received the faxed notice.

[12] It is not disputed that the fax report shows that the fax was successfully transmitted to the applicant's attorneys at 08:36 on 17 November 2016.

[13] The Court granted default judgment against the applicant having regard to the transmission report.

[14] The respondent's attorney faxed a copy of the Court order and the Registrar's notice to the applicant's attorneys using the same fax number that the Registrar used. The applicant's attorneys received, read, and reacted to the faxed Court order.

The explanation

[15] The applicant's founding affidavit explains what occurred and the relevant parts thereof containing the full explanation in the founding affidavit read as follows:

> "(17) On 18 October 2016 a notice of set-down was served on the attorneys for the applicant and respondents by fax mail. I attach hereto marked "FA3" a copy of the notice of set-down, which the respondent's attorneys of record also forwarded to the applicant's attorneys on 27 March 2017.
>
> (18) The notice of set-down, however, did not come under the attention of the applicant's attorneys and there are numerous possible reasons as to why the notice did not come under their attention, including, but not limited to, an administrative error at the offices of the applicant's attorneys and/or mechanical or technical failure of the applicant's fax machines." (Own emphasis)

[16] The respondent took issue with the explanation saying it is insufficient for the applicant to merely allege that the notice " … *did not come under the attention of the applicant's attorneys*".

[17] The respondent further disputed the applicant's allegation in the absence of a proper explanation of what led to the alleged non-receipt. An explanation was required as the applicant received all the other pleadings and a copy of the Court order at the same fax number.

The legal position

[18] When the applicant relies upon section 16A(1)(b), the applicant must show good cause for not attending the Court proceedings.

[19] In *Bayete Security Holdings v Mokgadi and Others,*[2] Lyster AJ held that Rule 16A distinguishes between judgments erroneously granted in the absence of a party (e.g., where notice had not been received by the party) and judgments granted in the absence of a party other than erroneously (e.g. where notice had been properly given but the party was nevertheless absent). In the first situation, there is no need to show good cause and no time limit whereas, in the second situation, good cause must be shown, and the application must be brought within the prescribed time limit.

[20] In its application the applicant relies upon the second scenario of receiving notification, but not attending Court.

[21] In the matter of *Griekwaland Wes Koöperatief v Sheriff, Hartswater and Others: In re Sheriff, Hartswater and Others v Monanda Landbou Dienste*[3], the Court held that:

> 'The requirements for filing an application under any of these rules are different. In terms of rule 16 A(1)(b) read with rule 16A(2)(b), an application to rescind or vary an order or a judgment must be brought within 15 days. The 15-day requirement does not apply to both rule 16A(1)(a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others* (2006) 27 ILJ 2356 (LC). The other difference between the two rules is that, whilst

[2] [2000] 9 BLLR 1020 (LC) at 1025E-I
[3] (2010) 31 ILJ 632 (LC)

> rule 16A(1)(b) requires an applicant to provide a reasonable explanation for his or her default, this requirement does not apply to an application in terms of rule 16 A(1)(a)

[22] In *SA Democratic Teachers Union v Commission For Conciliation, Mediation & Arbitration and Others*,[4] this Court quoted with approval what was held in *Sizabantu Electrical Construction v Guma and Others*[5]

> 'In short, good cause is not required to be shown if a judgment or order was erroneously granted in the absence of a party'.

Analysis

The application in terms of Section 16A(1)(b)

[23] It is clear that the applicant must show good cause to succeed. That means providing a reasonable explanation for its default and the absence of wilful default. The applicant must also show a *bona fides* defence.

[24] In *KBC Health and Safety v Solidarity*[6] the Labour Court set the following requirements that must be met:

24.1 The applicant must give a reasonable explanation for the default.

24.2 The explanation must be *bona fides*.

24.3 The applicant has a *bona fides* defence to the claim.

24.4 The applicant must prove that at no time the applicant renounced its defence.

24.5 That the applicant has a serious intention to proceed with the case.

[25] As regards a reasonable explanation the Labour Court In *Duarte v Carrim NO*[7] considered an explanation much along the lines of the current one when reviewing an award:

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[4] 4 (2007) 28 ILJ 1124 (LC) at para 17.
[5] 5 (1999) 20 ILJ 673 (LC); [1999] 4 BLLR 387 (LC).
[6] JA 81/16 2017 ZALAC 53 at par 14
[7] [1998] 9 BLLR 935 (LC)

"[21] The commissioner was of the view that a telefax had been sent. If one is to go further and conclude that notwithstanding the sending of the telefax there was an explicable and non-blameworthy reason for the non-receipt of the telefax, then it seems to me that the applicant should have done much more than it did in this matter. If the transmission (and to the extent that there is in documentary form an indication that the transmission took place) is to be challenged, it seems to me that it must be challenged on a proper footing. The applicant in this matter did no more than simply say “I didn’t get it” and to suggest as a probability for not getting it that he gets many faxes and therefore there was no reason why he would not have got this one.

[22] That seems to me to be insufficient. More particularly, one must bear in mind that I am not at liberty to substitute the view that I might have taken had I been sitting as a commissioner of the CCMA. I have to evaluate whether or not there is a reviewable irregularity in terms of the discretion which was vested in the commissioner himself. I am of the view that I cannot fault the commissioner’s conclusion, having regard to the *prima facie* indication of a transmission having been sent, that proper service had been effected, that the applicant was properly in default and that no satisfactory explanation had been tendered."

[26] It is the applicant that must provide a reasonable explanation for not attending the hearing. The applicant says the fax arrived but did not come to the attention of the applicant's attorneys. The applicant goes no further and as in *Duarte* that seems insufficient. There is no explanation as to whether any investigation was carried out as to the functioning of the fax machine or machines, the system how faxes are received and collected from the fax machine(s). There is no explanation at all as to how faxes are received at the office of the attorney.

[27] The respondent countered the applicant's explanation by pointing out the absence of any explanation and the fact that all the faxes relating to the pleadings and the Court order were sent and received.

[28] The applicant did not dispute that the fax was sent and delivered. The applicant's explanation is that it did not come to the attention of the relevant person in the office.

[29] In my view the applicant has simply not discharged the onus to provide a reasonable explanation for not dealing with the fax. The applicant itself speculates as to what might have happened. It does not proffer a reasonable explanation.

[30] In the absence of a reasonable explanation the applicant has also not shown its *bona fides*.

[31] In the absence of a *bona fides* reasonable explanation the application for rescission in terms of this section and the common law, must fail and the other elements need not further be considered.

[32] The applicant has not shown good cause for not attending the hearing.

[33] The second basis for the application, although not pleaded by the applicant, will also be considered, and that is that the order was granted erroneously.

<u>The application in terms of Section 16A(1)(a)(i)</u>

[34] While no mention was made in the application itself that the order was granted erroneously, the applicant in its heads advanced this submission. For that reason, the submission is considered.

[35] To succeed the applicant must show that the judgment was granted erroneously.

[36] The applicant relied upon Electrocomp (Pty) Ltd v Novak[8] for the proposition that if there was a fact unknown to the Court when judgment was granted, and if the Court were to be aware of the fact it would not have granted the judgment, that it constitutes a judgment granted in error. The position is, however, not as uncomplicated as that.

[37] The Labour Court in *South African Revenue Services v Charlotte Connie Mhlongo*[9] considered (in length) whether the granting of an order was in error when the notification of the hearing was not received. The respondent

[8] (2001) 22 ILJ 2015 (LC)
[9] J1915/09 ZALC

provided the wrong fax number to which the notice was sent. The respondent did not receive the fax and the Court granted an order against the respondent.

[38] The Court in *South African Revenue Services* dealt with the issue as follows:

> [18] "Erasmus *et al* in Superior Court Practice[10] when dealing with the equivalent rule in the High Court viz: Rule 42 “Variation and rescission of orders” say the following: ‘The court does not, however, have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs (a)–(c) of the subrule does not exist. The rule should be construed to mean that once one of the grounds are established for example that the judgment was erroneously granted in the absence of a party affected thereby, the rescission of the judgment should be granted’
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> And where the order was granted in the absence of a party:
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> ‘An order or judgment is erroneously granted if there was an irregularity in the proceedings ... Rescission was refused where the applicant had failed to notify the registrar of companies of a change of address and a summons had been served in accordance with the rules at the office properly notified to the registrar as the applicant's registered head office. The courts have also consistently refused rescission where there was no Rule 42 irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney’. [Footnote omitted]
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> [19] The respondent’s counsel in argument referred to the case of *Topol and Others v LS Group Management Services (Pty) Ltd*[11] as authority for the proposition that if the court was unaware of the fact that the respondent had not received the notice of set down it followed that the granting of the order was erroneous and that accordingly it was not necessary to show prospects of success and that the rescission should simply be granted.
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> [20] In the matter of *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA the Supreme Court of Appeal dealt with the decision in *Topol* and held the following:

[10] Supra. 9 Eramus et al Superior Court Practice at B1-306G
[11] 1988 (1) SA 639 (W)

> ‘In *Nyingwa* at 510F - G White J relying on *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C) said:
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> > 'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'

In *Topol*, an application was dismissed in the absence of the applicants on the basis that the respondent had given notice to the applicants of the setting down of the application and that the applicants despite their knowledge of the hearing were in default. The application for rescission in terms of Rule 42(1)(a) was successful. White J, in *Nyingwa*, understood the factual position in *Topol* to have been that notice of the set down of the application had not been given to the applicants and that the dismissal of the initial application was for that reason held to have been erroneous. If that had indeed been the factual position in *Topol*, the respondent in that matter would procedurally not have been entitled to a judgment in its favour, the granting of the judgment would for that reason have been erroneous and there could have been no objection in the rescission application to evidence to the effect that proper notice of set down had in fact not been given.

Frenkel was a case in which a default judgment was rescinded on the basis that it had been granted under a misapprehension. The misapprehension would seem to have been that the legal representatives wrongly assumed that the capital sum claimed had not been paid. It was, therefore, not a case of a judgment having been granted erroneously but a case of a judgment having been sought erroneously. In *Holmes*, the rescission of a default judgment was not granted on the basis of the judgment having been granted erroneously. Although not altogether clear it would appear that White J misunderstood the factual position in *Topol*. It seems to me that notice of set down had been given in that case but that the Judge who granted default judgment was held to have granted the judgment erroneously by reason of the subsequently disclosed fact that the defaulting party had not been in wilful default. Erasmus J had shortly before the judgment by White J in *Nyingwa* differed from the finding in *Topol*

and said that in light of the fact that the *Topol* matter had been properly enrolled and that all the Rules of Court had been complied with, the plaintiff was quite within its rights to press for judgment in terms of the Rules (see *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 472D). *Bakoven Ltd* contended that judgment had erroneously been granted against it in that although the matter had been properly set down for trial it did not have knowledge of such set down. Erasmus J said:

> 'An order or judgment is ''erroneously granted'' when the Court commits an ''error'' in the sense of a "mistake in a matter of law appearing on the proceedings of a Court of record'' (*The Shorter Oxford Dictionary*). It follows that a Court in deciding whether a judgment was ''erroneously granted'' is, like a Court of appeal, confined to the record of proceedings.'

He concluded that the judgment granted against *Bakoven Ltd* in its absence could not be said to have been erroneously granted 'in the sense contemplated in Rule 42(1)(a), as applicant cannot point to any error or irregularity appearing from the record of proceedings' (Lodhi 2 Properties Investments CC at pages 92 – 93 paras 18 – 21.)

[21] The Court in *Lodhi* concluded:

> [25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in *Stander*. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order (at page 94 para 25).

> [22] The question as to whether the order in this matter was made erroneously therefore must be: was the court on the papers before it justified in granting the order in the absence of the respondent or was there a procedural error which led to the order being granted? It is relevant in that regard that the respondent's failure to attend was caused by its own negligence in providing an incorrect fax number and thereafter perpetuating the mistake in the subsequent documents filed with the court. There was clearly no error in the procedure or mistake which resulted in the court granting the order and I am accordingly not persuaded that the court in the circumstances granted the order erroneously."

[39] Having regard to the *South African Revenue Services*-case and the authorities relied upon, the application cannot succeed in terms of section 16A(1)(a)(i) as nothing on the record prevented the Court from granting default judgment.

[40] The application is dismissed on this basis too.

Costs

[41] Both parties submitted that costs should follow the result. Having regard to the relevant factors it is not an appropriate matter to make a cost order.

Order

[42] I make the following order:

1. The rescission application is dismissed with no order as to costs.

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F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant:	Adv L Pretorius
Instructed by:	SST Attorneys
For the First Respondent:	T T Modisane of C N Phukubje Attorneys Inc