IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J1281/98

In the matter between:

SIZABANTU ELECTRICAL CONSTRUCTION **APPLICANT**

and

GUMA AND THREE OTHERS **RESPONDENTS**

JUDGEMENT

SEADY A J

[1] This is an application for rescission of a judgement given by default on 17 August 1998. In terms of the judgement the applicant's dismissal of Messrs A. Nhlapo and A. Guma was found to be substantively and procedurally unfair and the applicant was

ordered to reinstate Nhlapo and Guma on the same terms and conditions that existed at the time of their dismissal. In addition the applicant was ordered to pay to Nhlapo and Guma eight months compensation calculated at their rate of renumeration at the time of their dismissal. Messrs Nhlapo and Guma opposed the application. Despite the citation of the respondent as "Guma and three others" this application concerns a judgement only in respect of Guma and Nhlapo ("the respondents").

[2] The application for rescission is brought in terms of rule 16A(1)(b) of the rules of this court. Rule 16A came into effect on 4 September 1998 and subsection(1)(b) provides for a rescission of a judgement or order made in the absence of a party and requires that party to show good cause. This is similar to rule 31(2)(b) of the Uniform Rules of the High Court.

[3] The applicant was not present in court when judgement was given in favour of the respondents. The matter had been enrolled for default judgement. The background to this enrolment is

mostly common cause. It is set out below.

[4] The respondents were dismissed by the applicant on 5 March 1998. They were dismissed for reasons relating to the applicant's operational requirements. They referred a dispute concerning their alleged unfair dismissal to the CCMA. Conciliation failed to resolve the dispute and a certificate indicating that the dispute was unresolved was issued on 21 May 1998. The respondents referred their dispute to this court. They applied for and were allocated a case number and delivered a statement of claim in terms of rule 6. The applicant did not file a statement of defence within the period contemplated by rule 6 or at all. The matter was set down for default judgement on 14 July 1998. On that day the applicant was represented by Mr James Botha, the Project Manager of the Esekele contract on which the respondents were employed. The matter was postponed to 17 August 1998 for the hearing of oral evidence and the applicant was given until 30 July 1998 to file its statement of defence. On 17 August 1998 the applicant was not in court; neither had it filed a statement of defence. The matter was heard in its absence and an order as set out

above was made.

[5] The applicant contends that it has satisfied the three requirements for a rescission in terms of rule 16A(1)(b). These are

- a *bona fide* application;
- a reasonable and acceptable explanation for the default;
- a *bona fide* defence on the merits.

A judgement of this court made by default may be rescinded in terms of

- the common law;
- Section 165 of the Labour Relations Act ("the Act") ; or
- rule 16A[See POLICE AND PRISONS CIVIL RIGHTS UNION v SAMUEL NTOPA SEKHU, unreported judgement of the Labour Court, Case No J1653/98, 10 September 1998]

[6] For this court's approach to what must be shown to succeed with an application for rescission brought in terms of Section 165(a) of the ActSee CAWU v FEDERALE STENE(PTY) LTD(1998) 19 ILJ 642 (LC). In short, good cause is not required to be

shown if the judgement or order was erroneously granted in the absence of a party.

[7] The application before me is brought in terms of rule 16A(1)(b) of the Labour Court Rules. So I confine myself to a consideration of whether the applicant has shown good cause for the rescission as required by that rule. Rule 16A(1)(b) is similar to rule 31(2)(b) of the Uniform Rules of the High Court. The requirements of good cause as contemplated by rule 31(2)(b) have been stated as follows

- The applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance;

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

- The applicant must show that he 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 him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. [See Erasmus *Superior Court Practice*, Juta at B1-201 and 202]

[8] The applicant's version is that its absence on 17 August 1998 was not wilful. It says it was not in court because it did not know the matter had been set down on that day. If it had known, it would have sent a representative to oppose the granting of judgement by default. The reason it didn't know that the matter had been set down is that James Botha, the project manager who had dealt with the dispute from its inception had left the employ of the applicant (his contract of employment terminated on 30 July 1998) and had failed to pass on the information to anyone. The registrar had not notified the applicant (or the respondent) of the set down, presumably because both parties were in court on 14 July 1998 when the matter was postponed to 17 August 1998. Accordingly, the applicant was not alerted to the set down of the matter through the registrar's office. The applicant says the first it heard of the set down was on 3 September

1998 when it received a copy of the court order dated 17 August 1998. The applicant moved quickly to rescind the order, launching these proceedings without undue delay.

[9] The respondents oppose the application to rescind the court order of 17 August 1998. They have filed what purports to be an affidavit, but the document does not satisfy all the formal requirements for an affidavit. There is no indication of who the deponent is and it is not signed by the deponent. The applicant raised its objection to the statement in their replying affidavit, but the respondents have not put up any explanation for the form of their answering papers. The applicant argued that this court should disregard the respondent's answering statement. Rule 16A does not indicate what form the papers should take. The applicant therefore argues that rule 7 applies and a proper affidavit is required.

[10] It is not necessary for me to decided whether or not I should condone this failure or treat the respondent's statement as being in substantial compliance with the rules. I say so because this

matter can be decided by reference to whether the applicant has shown that it has a *bona fide* defence on the merits. This question can be decided on the applicant's papers without reference to the respondent's answering statement. That statement is relevant to the other aspect of good cause to be shown by the applicant, namely whether there is an acceptable explanation to the applicant's default. The applicant says that it did not know about the set down because James Botha had been handling the dispute and had left their employ, telling no-one about the set down. The applicant concedes, correctly in my view, that whilst Botha was employed he acted as their internal agent and they cannot rely on his errors or failures to substantiate an application for rescission. Otherwise a corporate entity could always seek rescission on the basis that one of its agents acted negligently.

[See POPCRU v SAMUEL SEKHU (supra)]

[11] The applicant failed to file any answering statement of defence to the respondent's statement of claim. This failure took place at the time of Botha's employment with the applicant and when he was tasked with dealing with the dispute on their behalf. The applicant's

failure to file a statement of defence between 14 and 30 July also took place when Botha was employed by the applicant and acting as their internal agent. The applicant accepts responsibility for these failures, but argues that once Botha left their employ they should not be penalised for his failures. On their version there is an acceptable explanation for their default on 17 August 1998. The respondents deny that the applicant was not informed of the hearing on 17 August 1998. They say that Botha must have reported to the applicant after his appearance in court on 14 July and that the applicants failure to attend on 17 August is indicative of its high-handed approach to labour disputes and their resolution. As indicated above I do not find it necessary to decide the probabilities in this regard because I am not persuaded that applicant has shown it has a *bona fide* defence.

[12] The applicant must show that it has a *bona fide* defence on the merits. Although it need not deal fully with the merits of the case or produce evidence to show that the probabilities are in its favour, it must demonstrate it has a defence which *prima facie*

carries some prospects of success. The applicant has failed to set out a defence of this nature. It admits that the respondents were employees and that they were dismissed for reasons relating to the applicant's operational requirements. It provides no basis to show, even *prima facie,* that the dismissal was substantively fair and procedurally fair. All it says is

" Seeing that this particular project's duration was only short term the respondents were informed, prior to completion of the contract that due to operational requirements some of the employees had to be dismissed. It was specifically stated that as soon as a new project was available these employees would be the first persons to be re- employed. All the wages and other monies due and owing to the respondents under this contract were paid to them prior to their dismissal" [para 14.1 p.10 of bundle].

and

"I confirm that the respondents' dismissal was based on operational requirements and that the applicant complied with the provisions of Section 189 of the Labour Relations Act,

1995." [para 14.5, p.11]

[13] Section 189 is detailed in the obligations placed on an employer to ensure that an employee is not unfairly dismissed. The applicant has fallen far short of showing compliance with its provisions. I am not satisfied that their defence, as set out above, has any prospects of success at trial.

[14] The applicant goes on to say that the respondents were employed for two weeks in terms of the aforesaid undertaking. This takes the matter no further in regard to the fairness of the dismissal. Additional averments concerning payment of monies due are also not relevant.[para 14.1 - 14.4, p.10-11 of bundle] Although the respondents may have complained of non payment the court order of 17 August 1998 does not deal with this issue. The Act makes it clear that any compensation ordered in terms of Chapter VIII is in addition to any amount to which the employee is entitled in terms of law.

[15] In my view, the applicant has not set out averments which, if established at the trial, would entitle it to the dismissal of the respondent's claim that they had been unfairly dismissed. It has not made out a *prima facie* defence. In the circumstances it has failed to prove one of the necessary requirements for rescission in terms of rule 16A(1)(b) and the application must fail. I find no reason in law or fairness why the applicant should not be ordered to pay the respondents costs..

[16] In conclusion the application is dismissed. The applicant must pay the respondents costs.

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SEADY A J

Date of hearing : 28 October 1998

Date of judgement: 5 November 1998

For the applicant: Advocate Brandford, instructed by Adolf Malan and Vanmeulen.

For the respondents: Mr A. Guma and Mr A. Nhlapo, personally.