IN THE LABOUR COURT OF SOUTH AFRICA

Before Landman **Case Number: J1653/98**

In the matter between:

POLICE & PRISONS CIVIL RIGHTS UNION **Applicant**

and

SAMUEL NTOPA SEKHU **Respondent**

PRESIDING JUDGE:

Landman J

ON BEHALF OF APPLICANT:

Advocate W Le Grange *instructed by* **Von Klemperer Davis & Harrison**

ON BEHALF OF RESPONDENT:

Adv P M Mtshaulana *instructed by* **F R Pandelani Attorneys**

DATE OF HEARING:

8 September 1998

PLACE OF HEARING:

Johannesburg

DATE OF JUDGMENT:

10 September 1998

JUDGMENT

[1] Samuel Sekhu, a legal advisor, (to whom I shall refer as the applicant) proposed to the Police and Prisons Civil Rights Union (POPCRU) that his contract of employment make provision for a provident fund and a car scheme. He alleges that POPCRU agreed to this. A dispute arose about this. He raised it with the union, referred it to the CCMA for conciliation and thereafter requested arbitration. The commissioner found that he had made out a case and found that POPCRU had committed an unfair labour practice in terms of item 2(1)(b) of the Labour Relations Act 66 of 1995 and ordered compliance with the agreement.

[2] POPCRU's National Executive Committee (NEC) assigned Detective Inspector Tsumane, the acting assistant general secretary, to attend to the matter. He monitored the matter but, as he states in an affidavit, he believed that his organisation had committed an unfair labour practice and did not oppose the relief at any stage. After the award had been made the applicant wrote to POPCRU demanding compliance with the award. Mr Tsumane, who has filed affidavits in support of the applicant, handed the letter dated 20 March 1998 to the national office bearers in a formal meeting. He says, in his affidavit of 13 July 1998, that they decided not to comply with the award. In his affidavit of 5 August 1998 he says that he presented the applicant's letter for discussion in two meetings during April and May 1998 but it was dismissed for later discussion. Major Nxele, of POPCRU, in a replying affidavit in matter J1653/98 deals with this affidavit and denies dismissing the letter for later discussion.

[3] The applicant applied to this court to make the award an order of court in terms of s 158(1)(c) of the Act. POPCRU was in default and the Sutherland AJ granted the order. POPCRU has now applied to rescind the default judgment making the award and order of court.

[4] A judgment of the Labour Court, even by default, is final and binding save where the law allows it to rescind the order. See **West Rands Estate Ltd v New Zealand Co Ltd** 196 AD 173. A judgment made by default may be rescinded in terms of -

- the common law;
- section 165 of the Act; or
- Rule 16A which came into force on 4 September 1998.

[5] I leave aside the controversial question whether, in addition, the court has an inherent jurisdiction to rescind its own judgments in appropriate circumstances not covered by the common law. See **De Wet v Western Bank Ltd** 1977 (2) SA 1033 (W) at 103C.

The common law

[6] In **CAWU v Federale Steene (Pty) Ltd** (1998) 19 ILJ 642 (LC) at 643B Pretorius AJ did not find it necessary to consider whether this court has the power under the common law or the rules of the court to rescind a judgment granted by default. Since

then the position has changed and rule 16A has been introduced. Moreover I am of the opinion that this court, being a superior court, has the power under the common law to ensure that justice is done and to rescind it own judgments in terms of the rules which have been developed at common law.

[7] The common law grounds, for instance, extend to the case of a litigant or his or her representative whose default is due to unforseen circumstances beyond his or her control and where "both logic and common sense would dictate that a defaulting party should as a matter of justice and fairness be afforded relief". See **De Wet and others v Western Bank Ltd** 1979 (2) SA 1031 (A) at 1042H. See also s 43 of the Constitution of the Republic of South Africa of 1996 which grants a right to a fair public hearing.

[8] An applicant who relies on the common law would have to show that "sufficient cause" or "good cause" exists for the recision of the judgment. These expressions contain two essential element which are listed in **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 765 as:

(I) that the party seeking relief must present a reasonable and acceptable explanation for his or her default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

Section 165

[9] Only section 165(a) could be applicable on the facts of this case. The Labour Court is empowered to rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. An order or judgment will be erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or if there existed at the time a fact of which the judge was unaware which would have precluded the granting of judgment and which would have induced the judge, if he or she had been aware of it, not to grant the judgment. See Erasmus **Superior Court Practice** Juta (loose leaf) B1-308. The reason for the non-appearance of a defaulting party appear to be irrelevant for an application for rescission in terms of s 165(a). Cf **Tom v Minister of Safety and Security** [1998] 1 All SA 629 (E) at 637 H dealing with rule 42(1)(a) of the Uniform Rules of Court.

Rule 16A

[10] Rule 16A provides that a judgment or order may be rescinded by the court if it granted in the absence of a party and good cause is shown. This is similar to rule 31(2)(b) of the Uniform Rules of Court. There must be an acceptable explanation for the failure of the respondent to oppose the application and a prima facie defence.

Explantion for default

[11] POPCRU submits that it was aware of the dispute with the applicant. It had entrusted the matter to Mr Tsumane. It is further submitted that there is an analogy between the situation of a client who may, in some situations, rely on attorney and the union relying on a senior official. POPCRU relied on its senior official. He was entrusted with opposing any relief sought by the applicant. This submission presumes, in the first instance, that it was decided to oppose the relief sought by the applicant. Mr Tsumane did not do so and so the union should not be prevented from applying for recision. It is submitted that the NEC only had knowledge of the judgment when a demand to comply with this court's order was received on 23 June; after an attachment of its bank account on 12 June 1998.

[12] POPCRU appointed Mr Tsumane to deal with the matter and if he did not execute his instructions it is unfortunate. A body such as POPCRU must perforce operate through a human agency. It cannot complain if its internal agent is untrustworthy or fails to fulfil a mandate. See **Fanie Coetzee v Thyssen (SA) (Pty) Ltd** (unreported LC D180/98). As pointed out in that case the situation may be different in the case of collusion between the official and a litigant. This would be so because the official would no longer be acting as the agent of the principal. In this case POPCRU has said that the applicant acted properly and no allegation of collusion between the applicant and Mr Tsumane is made. Although I note that Mr Tsumane has now filed affidavits supporting the applicant. On Mr Tsumane's version POPCRU was deliberately in default when it did not oppose the application to make the award an order of court. Was Mr Tsumane instructed to oppose the matters in all its

developments? It is submitted that at all times POPCRU intended to oppose any relief sought by the applicant and took all reasonable steps to do so. I need not decide the dispute between Mr Tsumane and the union. He was authorised to deal with the matter and did so by not opposing the arbitration nor the application in this court.

A bona fide defence

[13] It is therefore unnecessary to consider the question of a bona fide defence save to the extent that it is argued that the award was made erroneously. The submission rests on the proposition that the conversion of an award into a judgment does not change the basic nature of the award and thus, so it was submitted, if the award was erroneously granted, eg for want of jurisdiction, the order of the court is similarly tainted. No allegation is made that this court did not have the jurisdiction to make the award an order of court or that it should not have been made an order for any specific reason such as those outlined in **Deutch v Pinto and another** (1997) 18 ILJ 1008 (LC) (to which one may add novation and prescription).

[14] Instead it is contended that the dispute before the commissioner concerned remuneration and not a benefit and consequently the arbitrator was wrong in finding that POPCRU had committed an unfair labour practice contemplated in item 2(1)(b) of the Act. There may be merit in this and it may be that a review may have succeeded. That would not however be a question which Sutherland AJ need have concerned himself with when asked to make the award an order of court. Prima facie the award

was not beyond the jurisdiction of the commissioner and therefore it was not erroneously made an order by this court.

[15] I am indebted to both counsel and the attorney who drew up the respective heads of argument. They we most helpful.

[16] In the premises POPCRU has not made out a case for the recision of the judgment. The application is dismissed with costs. The registrar is directed to enrol matter J913/97, concerning an application for committal for contempt of court, on notice to the parties.

SIGNED AND DATED AT JOHANNESBURG THIS 10TH DAY OF SEPTEMBER 1998.

A A Landman

Judge of the Labour Court