IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO.: J1045/98**

In the matter between

A C VAN DER MERWE **Applicant**

and

HESTER DU PLESSIS **Respondent**

[1] On 19 August 1998 Mlambo J issued an order that the respondent pay the applicant compensation for the latter's unfair dismissal. The application that led to that order was filed on 14 May 1998. The respondent did not file a response, and the application was first set down for hearing on the unopposed roll on 23 June 1998. On that day, the applicant was instructed by Basson J to redraft her papers to comply with the Rules of this Court, and the matter was set down again for 19 August 1998, when Mlambo J issued the order referred to above.

[2] On 22 October 1998 the respondent filed an application for the rescission of the order granted by Mlambo J. For reasons that appear below, I granted that application on 18 December 1998, rescinded the order of 19 August 1998, and instructed the Registrar to set the matter down for hearing on 1 February 1999 or as soon thereafter as the matter could be heard.

[3] The applicant has now filed a document headed "Application for leave to appeal to the Labour Court in terms of Rule 30(2)". The relief sought is that this Court "reinstate the Court order dated

19th of August 1998 & the resultant writ of execution". It is apparent that the applicant seeks, not leave to appeal, but rescission of the order of 18 December 1998.

[4] Leave to appeal is granted only if this Court is satisfied that another Court might reasonably reach a conclusion different from that appealed against. An application to rescind an award can only be granted on the grounds mentioned in section 165 of the Labour Relations Act 66 of 1995 ("the Act"), which provides:

> 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 -
>
> erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
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> in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
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> granted as a result of a mistake common to the parties to the proceedings.

[5] It was on the first of the above grounds that I granted the order rescinding that of 19 August 1998. The reason for my decision was that the papers indicated that the Registrar's notification to

the respondent of the set down for 19 August 1998 was sent to the incorrect telefacsimile number, which is given as (011) 805 2438 on the applicant's statement of claim. The proof of transmission attached to the file indicates that the respondent's copy of the notification was sent to (011) 805 2538. While it is so that the respondent refers in her affidavit filed with the rescission application to "die redes waarom ek nie verskyn het by die verhoor van die 29ste Junie", this is clearly a mistake.

[6] The material fact that emerged from the papers before me was that there was no proof that the respondent had received notification that the application was to be heard on the date on which it was in fact heard – namely, 19 August 1998. This, coupled with my conclusion that the respondent had indicated that she had a bona fide defence to the application, convinced me that the order granted by Mlambo J was erroneously granted in her absence.

[7] There is in my view no basis for rescinding the order made on 18 December 1998. In any event, this certainly could not be done on the basis of written submissions in terms of Rule 30(3A). I therefore treat this application as one for leave to appeal in terms of section 166(1).

[8] The only question for consideration in this application is accordingly whether there is a reasonable prospect of another court reaching a conclusion different from that reached by the Court in the rescission application on 18 December 1998.

[9] With this in mind, I have reconsidered the respondent's submissions and the facts of the case. With regard to her failure to defend the matter, the respondent submitted the following:

> "Nadat my prokureur van rekord die hofleer in hierdie aangeleentheid nagegaan het wil dit voorkom asof die kennisgewing van plasing wat op die 31ste Julie 1998 gestuur is na 'n ander nommer as die nommer wat ek opgegee gefax is....

Indien ek die kennisgewing ontvang het sou ek op daardie stadium regsadvies ingewin het om te adviseer hoe om hierdie situasie te hanteer.

> Die nie-verskyning is met respek nie deur my eie toedoen veroorsaak nie, maar deur die feit dat ek nie kennis gedra het van die hofdatum nie.
>
> Ek bevestig dat ek hierdie aangeleentheid wil verdedig op die basis wat ek hierin vantevore uiteengesit het...."

[10] In addition to those mentioned above, the following facts are pertinent.

[11] The telefax transmission slip attached to the original statement of claim filed on 14 May 1998 does not indicate the number to which it was transmitted and indicates that there were errors in respect of all five pages transmitted. A copy of the same slip is attached to the application to enroll the matter for hearing in the respondent's

absence, dated 2 June 1998.

[12] Nothing turns on the fact that the applicant may have received notification of the hearing of 23 June 1998 because those proceedings merely led to an instruction to the applicant to correct her papers.

[13] The redrafted statement of claim, filed with the Court on 1 July 1998, was correctly faxed to the respondent's number on 29 June 1998.

[14] The second application to have the matter heard by default was lodged on 17 July 1998.

[15] Steps were taken to secure a writ of execution for attachment of the respondent's property in August 1998, and a notice of attachment of the respondent's emoluments was served on her employer on 30 September 1998.

[16] The respondent's attorneys served notice on the applicant of its intention to apply for rescission of the order on 14 October 1998, and filed its notice of motion on 22 October 1998.

[17] The respondent was clearly dilatory in not replying to the applicant's amended statement of claim, which she received on 29 June 1998. The matter was therefore properly set down for hearing by default on 19 August 1998. However, had the respondent been informed of the date of the hearing, the respondent could still have filed her answer before then and sought condonation for the late filing thereof. Failing that, she could have appeared, or instructed a representative to appear, to challenge the applicant's version by cross-examining her. It may well be that had a condonation application been made, the Court would have refused it. It may also be that, had the respondent appeared, it would have made no difference to the outcome. I do not know. Given that the date of the hearing was not known to the respondent (which on the papers I must accept), her failure to do so on 19 August 1998 cannot be held against her.

[18] My view after hearing this matter was that justice required that the respondent should be given the opportunity to explain her default and take the steps that were available to her on 19 August 1998 to defend the matter.

[19] Having considered the reasons advanced by the applicant for leave to appeal, I have concluded that there is no prospect of another court reaching a different conclusion. There is therefore no basis on which I can grant the present application.

[20] Even if the above conclusion is wrong, I am of the opinion that leave to appeal must be refused on another basis. This is that the order granted on 18 December 1998 is not final in effect. Section 166 of the Act gives any party to proceedings before the Labour Court the right to apply for leave to appeal against “any final judgment or final order”. There is no direct authority of which I am aware that deals with the issue whether an order rescinding an earlier order given by default and directing that the matter be heard on an opposed basis can be the subject of appeal. I assume, however, that the normal test applies – that is, whether the order in question finally disposes of the proceedings between the parties, bearing in mind the tendency of the court to apply this test in a pragmatic manner: see *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC).

[21] I am of the view that the order granted on 18 December 1998 does not finally dispose of the principal issues between the parties in this matter – namely, whether the respondent was unfairly dismissed and, if so, whether she was entitled to compensation. Had I refused the application for rescission, the order would have been final in effect. However, the practical effect of the order issued on 18 December 1998 was that the matter will be re-heard after proper notification to the respondent. In my opinion that order was interlocutory and therefore may not be appealed.

[22] Leave to appeal against the order of 18 December 1998 is therefore refused.

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GROGAN AJ

ACTING JUDGE OF THE LABOUR COURT

Date of judgment: