IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J3107/00**

In the matter between:

RODGERS MABUNDA Applicant

and

PEROS ENGINEERING CC Respondent

JUDGMENT

JAMMY AJ

This is an application for the rescission of a default judgment of this Court granted on 12 September 2000 in an application in terms of Section 158(1)(c) of the Labour Relations Act 1995 ("the Act") and in which a Settlement Agreement between the Applicant and the Respondent dated 4 July 2000 was made an Order of Court. For the sake of convenience I shall henceforth refer to the parties as cited in the main case, that is to say, to the Applicant in this application as the Respondent and to the Respondent as the Applicant.

It is common cause that the notice of motion in that application was addressed to the Respondent by registered post as provided for in terms of the Rules of Court, proof of service in that manner being substantiated by an affidavit in proper form, which was before the Court at the time.

It is further not disputed that, this notwithstanding, that notice of motion never reached the Respondent by which, as a consequence, no opposing papers were served and filed.

The Applicant then applied in terms of Section 158(1)(c) to have the Settlement Agreement made an Order of Court, alleging in his founding affidavit that the Respondent had failed or refused to discharge its obligations thereunder by reinstating the Applicant against his undertaking to comply with his conditions of employment.

That application came before this Court on 29 August 2000 on which date, in the absence of the Respondent and in order to enable the Applicant to file a supplementary affidavit detailing his earnings, the matter was postponed until 12 September 2000. On that date default judgment, making the Settlement Agreement an Order of Court, was duly granted.

Pursuant to that Order, the Applicant then procured the issue of a writ of execution with which the Respondent was confronted by the Sheriff of the Court on 6 November 2000.

It is on that date, the Respondent now submits, that the existence of the Order of Court of 12 September 2000 came for the first time to its notice. Had it been aware of the application under Section 158(1)(c) of the Act and of the subsequent set down of that application for hearing, it would have taken all necessary steps to oppose it on the grounds, now once again advanced in support of this application, that its obligations under the Settlement Agreement in question had been fully discharged by it.

The procedures followed by the Applicant in pursuing that application are not open to question. Its notice of motion was sent by registered post to the address formally on record on the papers as that of the Respondent. The despatch of that notice was substantiated, as I have said, by an affidavit of service in required form. That, in terms of the Rules of Court, is all that was required of the Applicant in that context.

The Respondent now applies to have the Order of Court in terms of Section 158(1)(c)

rescinded on the basis, as provided for in Section 165(a) of the Act, that it was erroneously granted in its absence. It submits, quoting authorities to support that contention, that such an Order may further be rescinded at common law against a reasonable and acceptable explanation of default and the presentation of a *prima facie bona fide* defence carrying some prospect of success.

The Court was referred, inter alia, to

CAWU and another v Federale Stene (1998) 4 BLLR 374(LC)

in which the Court, in a similar application for rescission of a default judgment, held that it would not have made an award an order of court by default if it had not been under the impression that the Respondent had deliberately declined to attend the hearing. Where the defaulting party was genuinely unaware of the date of set down, it was held, granting judgment by default would be erroneous. In the circumstances, it was not necessary for the party applying for rescission to prove good cause.

. In this matter, the fact that the notice of motion did not reach the Respondent is, in my view not open to question. It is common cause that it was eventually returned to the Applicant by the postal authorities undelivered and bearing the endorsement **"gone away"**. The authenticity of that endorsement is not seriously challenged by the Applicant who merely alleges, in his replying affidavit, that his representative and he telephoned the Respondent **"who confirmed that he still operates business at the same address"**. It is nowhere submitted or suggested however that the Respondent sought in any way deliberately or wilfully to avoid delivery of the registered letter in question.

. The circumstances obtaining in this matter seem to me therefore to be on all fours with those considered by the Court in **Federale Stene** and, fully conscious of the frustration inevitably felt by the Applicant in circumstances wholly beyond his control, I can reach no other conclusion than that the judgment granted by default in his favour was erroneously granted within the meaning of Section 165(a) of the Act and that, although

comprehensive submissions on the merits were made by both parties in these proceedings, there was no need for the Respondent in addition to show good cause for rescission.

. In all of these circumstances I accordingly make the following order –

The judgment granted by default against the Respondent on 12 September 2000 under Case Number J3107/00 is rescinded and set aside.

The Applicant's application in terms of Section 158(1)(c) is to be enrolled on the opposed Motion Roll on notice to both parties, the Respondent's founding affidavit in this rescission application to stand as its opposing affidavit in that application.

In all the circumstances of this matter, no award of costs is deemed appropriate and none is made.

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B M JAMMY

Acting Judge of the Labour Court

5 July 2001

Date of hearing: 22 June 2001

Representation:

ant: (Respondent in the Main Case) Attorney R Anderson

ndent: (Applicant in the Main Case) Advocate J Malema