IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J3221/2001

In the matter between:

B D O SPENCER STUART(JOHANNESBURG)
Applicant

and

Respondent

J U D G M E N T

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1 This case illustrates how bizarre practice in the Labour Court can become. The application before me is to rescind an order made by Landman J on 16 October 2001 in terms of Section 158 (1) (c) of the Labour Relations Act, making an award of a commissioner of the CCMA an order of Court.

2 The Respondent employee referred a dispute concerning his dismissal by the Applicant to the CCMA which was eventually arbitrated. An award in the Respondent's favour was handed down on 3 July 2001. The award was thereafter served on the Applicant. On 23 July 2001 the Applicant wrote to the Respondent

to state that a review would be brought to set aside the award. However, by 30 July the Applicant had neither brought the review nor complied with the order in the award. On 30 July the Respondent faxed to the Applicant an application in terms of Section 158 (1) (c) to make the award an order of Court. Some of these documents were not properly transmitted and an attempt was made to fax the balance of the relevant documents on 31 July 2001. Two returns of service were drawn up to that effect.

3 The Applicant received papers from the Respondent. According to one Shaw, who deposed to an affidavit on behalf of the Applicant, the founding affidavit to the application was omitted from the documents actually received. As a result, the Applicant, in opposing the Section 158 (1) (c) application, took the point that the papers were fatally defective. A notice of opposition and affidavits were filed with the Labour Court on 16 August. This event occurred two days after the ten day period for filing such opposition had expired on 14 August 2001.

4 There is no reason to conclude that the Applicant's affidavit stating that the founding affidavit was not received by them is untruthful. For the purposes of the adjudication in this matter I accept that as a fact, the conduct of the Applicant in taking this point on 16 August 2001, adequately corroborating the veracity of its stance.

5 The Registrar of the Labour Court is the only person authorised in terms of Rule 7 of the Rules of Court to set down matters on the roll. On 16 August 2001 the Registrar, acting on the returns of service dated 30 and 31 July 2001, prepared a notice of set down for default judgment and nominated 16 October 2001 upon which date it would be heard. The date of preparation of the Notice of set down is significant. At the time when the set down was prepared by the Registrar, ought it be assumed that the opposing documents filed by the Applicant on that same day had not yet found their way into the file? It is clear that at some time on 16 August 2001 they were indeed received by the Registrar. This question is not addressed in the papers.

6 On 23 August 2001 the Registrar telefaxed the notice of set down to the Respondent alone. No notice of set down was sent to the Applicant. If it is assumed that the preparation of the notice of set down occurred at a moment on 16 August 2001 before the opposing affidavits were actually placed into the file, and thus the Registrar was ignorant of their existence, the same cannot be said of the circumstances on 23 August 2001, four court days later, when the notice of set down was sent. Either the Registrar did not deem it necessary to check for developments in the file since the time of preparing the notice of set down, or a deliberate decision was made to ignore the fact that a notice of opposition, albeit late and uncondoned had been filed. If this is what happened it follows that the registrar served a notice of set down on the Respondent alone, well knowing that

the Applicant would be ignorant of the set down and could not conceivably learn that a judgment would be taken behind his back. Why he might have done so is addressed later in this judgment.

7 Ultimately on 16 October 2001 the matter came before Landman J. In the Court file on that day, I am invited to assume that there were two returns of service which innocently misrepresented the true state of the service of documents upon the Applicant. Also in the Court file, I am invited to assume, was the affidavit of opposition which had been filed by the Applicant.

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8 The representative of the Respondent appeared and sought an order in terms of Section 158 (1) (c). When the Respondent's representative moved for the order, he must have been aware that there was an affidavit of opposition which had been filed, albeit two days late. Furthermore, the representative definitely knew that on the 23 July 2001, a review had been threatened, which nevertheless, had not yet been launched by 16 October 2001. At that time, some 14 weeks after the date of the award, the six week period within which a review should have been brought, was well exceeded. The order was granted.

9 When the Applicant was served with the award, it thereupon launched an application on 1 November 2001 to rescind the default judgment of 16 October 2001.

10 The application for rescission is based on the contention that the order was erroneously granted and stands principally on two legs. First, there is the contention that the Section 158 (1) (c) application is fatally defective because of incomplete service on the Applicant on 30 and 31 July 2001. Secondly,there is the contention that the failure to serve a notice of set down of the default judgment on the Applicant constitutes an irregularity. I omit reference to other ancillary contentions.

11 An application for rescission of an order of this Court is governed by the provisions of Section 165 of the Labour Relations Act which provides as follows:

"*The Labour Court acting on its own accord or on the application of any affected party may vary or rescind the decision, judgment or order -*

(a) *erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;*

(b) ...

(c) ..."

12 The Applicant contends that incomplete service constitutes an irregularity which brings the issue within the scope of an order "*erroneously sought or erroneously granted.*". In support of that characterisation, reliance is placed on the commentary in **Erasmus, <u>Supreme Court Practice</u>, p D1-308**. In that

commentary a similar phrase in Rule 42 (1) of the High Court Rules is considered. The notion is articulated that an irregularity is a circumstance encapsulated by the concept of "*erroneously*" sought or granted. Also in that commentary, is the articulation of the notion that where a fact which would have precluded the granting of the order or a fact which would have induced a judge not to grant the order exists, and that fact was unknown to the judge at the time of the granting of the order, any order granted is "*erroneously*" granted. This approach has been endorsed in the Labour Court. (See **Enzo Panelbeaters CC v CCMA and Others (1999) 20 ILJ 2620 (LC)** and **Sherwood Strategic Advertising CC v Scott (2001) 22 ILJ 2046 (LC)**).

13 The crisp questions that arise for adjudication are whether or not the incomplete service constitutes an irregularity, and whether or not the judge's ignorance of that incomplete service constitutes a fact which, had he been aware of it, he would not have granted the order.

14 Precisely what was before the judge and precisely what was drawn to his attention are not matters that have received attention in the papers. It is problematical that any sensible evaluation of what the judge gave consideration to, can, at this time, be made. If he did not have regard to the late and uncondoned affidavit of opposition by the Applicant in the file, then it may be assumed that the judge relied on the returns of service alone. The returns of service were accurate to the

extent that it was true, and therefore wholly uncontroversial, for the judge to believe, that the Applicant had notice of the application for default judgment. It is not known whether or not the Respondent's representative drew the attention of the judge to the late uncondoned opposing affidavit in the Court file. However, even if the judge had read the late uncondoned opposing affidavit what he would have learnt from that document is confirmation of the fact of receipt of the application for an order in terms of Section 158 (1) (c). He would also have learnt that there was a threat to take the matter on review, but on the papers before him, there was no basis to conclude that a review would be launched. In point of fact, on 16 October 2001 no review had been launched, nor has a review been launched at the time this matter was argued before me in June 2002. The judge would also have learnt that the attack on the alleged fatal irregularity of the Section 158 (1) (c) application rested on the idea that the omission of the founding affidavit rendered it nul and void. Perhaps the judge took a sceptical view that if this was the sole basis which stood between the grant and the refusal of the relief that, in the circumstances, an order was warranted. After all, the pertinent content of an affidavit to support a section 158(1)(c) application requires the deponent merely to state that an award was made, that the party who must comply is aware of the award, and that compliance has not occurred. The idea of a 'fatal' irregularity seem a trifle artificial.

1 15 In my view it is by no means obvious that had the judge been as informed as I am today, he would not have granted the order. Even if incomplete service, in the

circumstances illustrated in this case, may be regarded, strictly, as an 'irregularity', it is not in my view, an irregularity within the contemplation of an "*erroneously sought or granted*" order contemplated by Section 165 of the Labour Relations Act. The reason for that conclusion is that it is manifestly clear that the Applicant was indeed aware of the application, and had been put on it's guard. The fact that it filed its opposing papers late, and then did nothing further in regard to protecting its interest, constitute difficulties which must lie at its own door. In my view, an "*irregularity*" which results in an erroneous order being sought or granted, ought to be a fact which, in a material sense, subverts procedure or the rights of a party. I am not satisfied that the incomplete service, in these circumstances, can be characterised as such.

16 The second leg of the Applicant's case relates to the failure to serve upon it a notice of set down of the hearing scheduled for 16 October 2001. The argument was based on a judgment of Landman J in **Mthembu Unique Air and Another v CCMA and Others (2001) 11 BLLR 1246 (LC)**. This judgment was delivered on 31 July 2001. It dealt with a practice directive issued by the Judge President of the Labour Court. The practice directive, in contradiction of the Rules of the Labour Court as they then stood, directed the Registrar of the Court not to give notice to the a respondent of the set down of an application for a default judgment. The judgment held that a practice directive of the Judge President could not

overrule the Rules of Court. The judge thereupon directed the Registrar to ignore the directive and continue, in accordance with the Rules as they then stood, to serve a notice of set down on respondents in default judgment applications. However iIn Proclamation R766 in Government Regulation Gazette No 22587 (Vol 438, 17 August 2001) the Rules were amended to require the Registrar not to deliver a notice to the party in default. The relevant portions read as follows:

"*Rule 7 (b)*

The Registrar must notify the parties of the date, time and place for the hearing of the application, but need not notify a respondent who has not delivered an answering affidavit in support of its opposition of the application."

Rule 16(1)

' If no response has been delivered within the prescribed time period or any extended period granted by the court within which to deliver a response, the Registrar must on notice to the Applicant(s) enrol a matter for judgment by default.'

It is plain that the very intention of the Rule amendment was to render the judgment in **Mthembu** nugatory.

17 It is appropriate to observe that, as alluded to earlier, the notice of set down for default judgment in this matter was prepared on 16 August 2001. At the date the notice of set down was prepared **Mthembu**'s case was still good law. The Rule

amendment came into force on 20 August 2001. The copy of the telefax slip in the Court file, reflects that the Registrar waited from 16 August when he prepared the set down, until 23 August when at 14h25 he telefaxed the notice to the Applicant. Axiomatically, on 23 August no obligation existed in terms of Rule7(b) upon the Registrar to give notice to the Applicant in this matter. Rule 16(1) seems to suggest that the Registrar is directed to ignore an uncondoned late notice of opposition. Why the Registrar delayed sending the notice of set down is self-evident. In my view it is a questionable practice that the registrar may ignore the plain evidence of opposition, albeit out of time, and facilitate a hearing without notice to such a party, yet that seems to be precisely what these rules prescribe. In my view these rules warrant revision.

18 The implications of these circumstances are that if the date of the notification is the date upon which it is sent, it follows that any reliance on **Mthembu**'s case must fail. Had the notice of set down been sent by the Registrar, on the day he prepared it, or perhaps on the day following, the contention of the Applicant that the set down was irregular, relying on **Mthembu**'s case would have succeeded. By a choice of the registrar the difference in outcome was determined. It is difficult to imagine a more byzantine regime under which those who dare to practice in the Labour Court are required to submit themselves.

19 It is plain that on these papers able no circumstance exists which contaminates

the order sought and granted.

20 Accordingly, the application is dismissed with costs.

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ROLAND SUTHERLAND

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA
4 July 2002