IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 4078/2002

In the matter between:

THE AGENCY	Applicant/(Respondent in the main application)
and	
DIGBY WESSON	First Respondent/(Applicant in the main application)
EUGENE COETZEE N.O. **(THE DEPUTY SHERIFF, SANDTON)**	Second Respondent

---

JUDGMENT

CORAM : A VAN NIEKERK AJ

[1] On 14 May 2003 I granted an order, with costs, rescinding the order made by this Court on 22 April 2003 in terms of which an arbitration award in favour of the First Respondent was made an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the LRA"). These are the reasons for the order made on 14 May 2003.

[2] The First Respondent was employed by the Applicant until his resignation. He claimed that he had been constructively dismissed and in the arbitration proceedings conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), the Commissioner ruled on 12 July 2002 that the Applicant was to pay the Respondent the sum of R449 221.95.

[3] On 15 October 2002, the First Respondent applied in terms of section 158(1)(c) to have the arbitration award made an order of this Court. The Applicant filed a notice of opposition and an answering affidavit, both of which were dated 15 October 2002 but filed in the Labour Court on 18 October 2002. During the same month, the Respondent in these proceedings filed a replying affidavit. In addition to opposing the proceedings initiated in this Court, the Applicant applied in the CCMA to have the arbitration award rescinded.

[4] On 28 January 2003, the Registrar of this Court addressed a notice of set down to the First Respondent's attorneys advising them that the matter had been set down for hearing on the unopposed roll on 22 April 2003. There is no explanation apparent from the court file as to the Registrar's decision to address the notice of set down only to the First Respondent's attorneys although it may be reasonably assumed that the Registrar considered that in the absence of the notice of opposition and answering affidavit from the court file, the matter was unopposed. The consequences of the Registrar's actions are dealt with hereunder.

[5] On 22 April 2003 the Applicant's attorney, De Klerk, was telephoned by Möhr, the attorney representing the First Respondent. Möhr advised De Klerk that he was attending Court in the matter between the parties that had been set down on the unopposed roll. There is a dispute as to whether Möhr referred to a failure by the Applicant to file a "replying affidavit" but that dispute is not material to this application. De Klerk avers that he was in Pietersburg at the time that Möhr telephoned him, and that he had assumed that Möhr was referring to proceedings in the CCMA in which the Applicant sought the rescission of the arbitration award.

[6] On 24 April 2003, De Klerk was advised that the Deputy Sheriff, the Second Respondent in these proceedings, was attaching the Applicant's bank account pursuant to an order of this Court in terms of which the arbitration award had been made an order in terms of section 158(1)(c) .

[7] De Klerk uplifted the court file it became apparent that the Applicant's notice of opposition and answering affidavit were not in the court file. It is not disputed that these documents were, for reasons that remain a mystery, missing from the court file when the matter proceeded on 22 April 2003 on an unopposed basis. There is also no dispute that the First Respondent was aware of the Applicant's opposition to this application. The First Respondent had received the notice of opposition and answering affidavit that were transmitted by telefax to the First Respondent's attorney in October 2002. The First Respondent had filed a replying affidavit on 22 October 2003. In the reply, the First Respondent took the point that the Applicant had failed to comply with the rules of this Court in a number of respects, and avers that for this reason, the application should be dismissed. The replying affidavit further deals at length with each of the allegations that were the subject of the Applicant's answering affidavit.

[8] Möhr does not deny that the notice of opposition and answering affidavit were faxed to his office on 15 October 2002. He contends however that the opposing papers were not properly delivered since they were filed with the Registrar of this court only on 18 October 2002, 3 days outside the time limit prescribed by the rules of this Court. The reason for the late filing is apparent from Möhr's averments. He states that on 15 October 2002, the notice was

faxed to the CCMA and not to the Labour Court and that he was aware for this reason that the Labour Court would not have received the notice on 15 October 2002.

[9] In respect of the hearing of the application on 22 April 2003 Möhr states the following:

> *"14.1 I personally appeared before His Lordship Mr Justice Coppin on 22 April 2003.*
>
> *14.2 His Lordship enquired from me why it should be that the First Respondent filed a replying affidavit in the s 158(1)(c) application if there was no opposition. I pointed out to the Court that the Applicant in fact opposed the application but neglected to deliver its notice of opposition and answering affidavit in accordance with Rule 5(3) and 7(4)(b) of the Rules of this Honourable Court. I further pointed out to his Lordship that I had been in telephonic contact with De Klerk and that I had advised him to attend court to put the Applicant's version.*
>
> *14.3 His Lordship thereupon heard the matter on an unopposed basis and granted the order sought by the First Respondent."*

[10] On Möhr's own version, he was at all times aware of the Applicant's intention to oppose the application. He was in possession of the Applicant's answering affidavit and the replying affidavit filed on his client's behalf. That notwithstanding, he was content to allow the matter to proceed on an unopposed basis ostensibly for the reason that the Court was obliged to disregard the fact of opposition to the application only by virtue of the fact that the papers were filed 3 days late. The only courtesy by Möhr to De Klerk was a telephone call earlier the same morning to De Klerk to advise him that the matter was proceeding on an unopposed basis.

[11] As I have noted above, the notice of set down in response to the application in terms of section 158(1)(c) was addressed by the Registrar to the First Respondent's attorneys. The notice of set down was not sent to the Applicant.

[12] In terms of Rules 7(6)(b) and 16(1), a respondent who fails to deliver a response to a document initiating any proceedings in this Court is generally not entitled to notice of the set down of those proceedings. The two rules, read as follows:

Rule 6

"(6)(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

"*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 applicants(s), enrol a matter for judgment by default."*

[13] There are obvious differences between the two rules. First, the provisions of section 16(1) entitle the Registrar to enrol a matter for judgment by default if no response has been delivered *within any prescribed time period or any extended period granted by the Court within which to deliver a response*. Rule 7(6)(b) simply refers to a "respondent who has not delivered an answering affidavit" and makes no reference to a notice of intention to oppose nor to any prescribed time limits. Rule 7 specifically regulates applications and in particular, applications such as that brought by the First Respondent in terms of section 158(1)(c). (See footnote 2 to Rule 7). In the face of the specific regulation of applications brought in terms of section 158(1)(c) by Rule 7, I do not consider that the more general provisions of Rule 16 is of any relevance in that regard.

[14] In terms of Rule 7(6)(b), the fact that the notice of opposition and answering affidavit had not been timeously filed did not on the face of it disentitle the Applicant from receiving notice of the set down of the proceedings. The Rule refers to a party "who has not delivered an answering affidavit". It is not qualified, as Rule 16 is, by a reference to a response filed within the prescribed time periods. In argument, the Court was referred to *B D O Spencer Stuart (Johannesburg) Incorporated v Otto* (2002) 23 ILJ 1374 (LC). In that matter, Sutherland AJ lamented the Byzantine regime under which practitioners in this Court are required to subject themselves and in particular, made reference to the provisions of Rule 7(6)(b) and Rule 16(1). The Court held that no obligation existed in terms of Rule 7 upon the Registrar to give notice of set down to an applicant that had failed to file an answering affidavit within the prescribed time limits. The Court stated further that "Rule 16(1) seems to suggest that the Registrar is directed to ignore an uncondoned late notice of opposition".

[15] If the *ratio* of *B D O Spencer Stuart (Johannesburg) v Otto* is that Rule 7(6)(b) entitles the Registrar to ignore the fact of any opposition noted prior to the date on which the notice of opposition is despatched, then I respectfully disagree with that conclusion. The submission on behalf of the First Respondent that this matter was properly set down and heard

on an unopposed basis overlooks the fact that the First Respondent was aware that a notice of opposition and answering affidavit had been served and filed, but that for reasons not apparent to the parties, these documents do not appear ever to have been placed in the Court file. Reliance on the fact that the notice and affidavit were filed 3 days late is misplaced. The Applicant could have sought condonation for the late filing of the affidavit at the hearing or prior to it and given the circumstances, that condonation would in all probability have been granted. To the extent that it is submitted that the Registrar is entitled to adopt the view that in the event of any notice of intention to oppose and/or answering affidavit or other response being filed outside of the prescribed time limits, there is no obligation to advise a respondent of the set down of the proceedings, that submission is equally misconceived. It often happens that parties who conduct their litigation in a more collegiate fashion than in the current proceedings agree to extensions of time within which to file papers. The Registrar may not be aware of such arrangements. But it is for this Court ultimately to condone the late filing of any papers and to decide on the consequences. It is not for the Registrar effectively to refuse to condone late filing by withholding a notice of set down to a respondent who has clearly indicated opposition to the proceedings by filing an answering affidavit before the notice of set down is sent. Even less is it for a party's legal representative to rely on late filing as a basis to contend that a matter

is unopposed, and proceed on that basis particularly when that representative is in possession of both a notice of opposition and answering affidavit.

[16] In summary, in the face of the Applicant's clear opposition to the application in terms of section 158(1) c), evidenced by the notice of opposition and answering affidavit filed 3 days late but well before the despatch of the notice of set down, the Applicant was entitled to notice of the set down of the proceedings and the matter ought to have proceeded on an opposed basis. To the extent that the matter was set down on the unopposed roll simply by virtue of the notice of opposition and answering affidavit never having found their way into the Court file, the Applicant should not be prejudiced by being denied notice of the date on which the proceedings have been set down. To the extent that the application was dealt with on an unopposed basis, the order granted by this Court on 22 April 2003 was erroneously granted. In my view, this is sufficient basis on which the Court was entitled to exercise the discretion conferred on it by section 165(a) and to rescind that order. For these reasons, the Court made the order it did on 14 May 2003.

_____

ANDRE VAN NIEKERK,
Acting Judge of the Labour

Date of hearing:	13 May 2003
Date of order :	14 May 2003
Date of reasons for judgment:	26 May 2003
Applicant's Counsel:	Advocate M Van As
Applicant's Attorneys:	H J P de Klerk Mandelstam
First Respondent's Counsel:	Advocate H M Viljoen
First Respondent's Attorneys:	De Villiers Möhr
Second Respondent:	No appearance