IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J1469/07

In the matter between:

LEZIMIN 2557 t/a BG CONSTRUCTION **Applicant**

And

THE SHERIFF OF THE HIGH COURT **1ST Respondent**

JOHAN JACOBS **2nd Respondent**

JUDGMENT

MOLAHLEHI J
Introduction

1] This is an application to rescind the order issued by this court on the 5th September 2007, in terms of which the arbitration award issued by the Commission for Conciliation Mediation and Arbitration (the CCMA) on the 28th May 2007 was made an order in terms of section 158 (1) of the Labour Relations Act 65 of 1995

(the Act).

2] In the award the commissioner of the CCMA, found that the second respondent, Mr Jacobs, referred herein after as "*the employee*" was dismissed and that his dismissal was unfair. The commissioner then ordered the reinstatement of the employee with backpay in the amount of R54000.00 including cost of the arbitration hearing to be paid by the applicant on the attorney and own client scale.

Background facts

3] The employee was employed as an electrician by the applicant. He is alleged to have verbally resigned when confronted with the issue of being drunk at work and having pawned the property of the applicant.

4] The version of the applicant during the arbitration hearing was that the employee was not dismissed. In this regard the first witness of the applicant Mr Beukman (Beukman) testified that when he visited the site where the employee was working on the 17th December 2005, he found him drunk. He then instructed

someone to take him home as it was dangerous for him to work in the state in which he was.

5] Beukman testified further that the employee arrived drunk again at work the following Monday. He instructed him to go home and to come back when he was sober.

6] On the 3rd January 2006, Beukman and others held a meeting where they discussed the outstanding work of the employee and the possible disciplinary action they wished to take against him. The two issues which were discussed regarding the disciplinary hearing concerned the conduct of being drunk at work and selling one of the tools of the applicant at a pawn shop. Apparently during the cause of the day the applicant received a telephone call from the department of labour stating that the applicant had dismissed the employee. Thereafter, the employee attended at the work place where he was issued with a cheque in the amount of R3000.00. It was written on the cheque that this was in full and final settlement as a result of a discussion between the parties.

7] The version of the employee is that he was dismissed for no valid reason and in support of his case called his wife as a witness. He testified that on the 17th December 2005, Beukman enquired from him if he could work on a particular Saturday. He agreed but indicated that he could do so only up to 11H00 as he had already made other commitments in the afternoon. He reported for work on that particular day and worked until 11H15 after which he drove home where he parked the applicant's vehicle and proceeded to attended a braai which was the prior arrangement he had referred to when he agreed with Beukman that he would work on that particular Saturday. The employee testified that he was surprised to learn on his return from the braai that Beukman was at his house demanding the car keys. He then proceeded to the work site where Beukman told him to hand over his car keys. He was then dropped at his house.

8] The employee further testified that after some enquiry including the one done by his wife regarding payment of his salary, he approached the department of labour for assistance. It was after a telephone call by an official of the department of labour that the

applicant paid the outstanding salary in the amount of R3000.00.

9] As indicated earlier the commissioner found in favour of the employee and directed that he be reinstated with back pay. After obtaining the arbitration award and the applicant having failed to comply with its terms, the employee filed an application on the 4th July 2007, to have the arbitration award made an order of court in terms of section158 (1) (c) of the Act.

10]On the 16th July 2007, the applicant filed notice of opposition under case number JR1469/07. The heading of the notice of opposition reads as follows:

> "*The respondent's Opposing Statement to the Applicant's Application to Certify CCMA Award and Writ of Execution".*

The notice itself read as follows:

> "1. PLEASE TAKE NOTICE THAT, the Respondent (Applicant in Review Application) filed a Review Application attached as Annexure "SS2" in terms of S144 of the Labour Relations Act 66 of 1995 herein

referred to as the Act.

2. *You are hereby requested to stay the Section 143 Application until finalisation of the Review Application and I referrer to* ***Tony Gois t/a Shakespeare's Pub v Johannes Jacobus Van Zyl & Other CW 3/2/203".***

11]It would appear the application to oppose being defective the registrar placed the matter on an unopposed motion roll. On the 27th October 2007 and further to the court order making the arbitration award an order of court, the registrar of this court issued a writ of execution which resulted in the attachment of the applicant's property on the 21st November 2007.

12]Thereafter on the 22nd November 2007, the applicant filed the present application to have the order issued by this court making the arbitration award an order of court rescinded.

The rescission application

13]The applicant brought its application to rescind the court order in terms of section 165 (c) of the Act read with rule 16A of the rules

of the Labour Court. In its founding affidavit in support of the rescission application the applicant contended that it had prior to the arbitration award been made an order of court, filed an application to have the award reviewed and set aside. The review application included a prayer to have the enforcement of the award stayed pending the outcome of the review application.

14] The review application was according to the applicant erroneously sent to the applicants' postal address being PO BOX 6681, Bailie Park, Portchefstroom 2526 and not to the respondent's postal address or that of his attorneys of record, Mr Jacques Jansen of Jansen's Attorney.

15] The applicant contended that it did not wilfully default in not attending at court when the application in terms of section 158 (1) (c) of the Act was heard. The reason for the matter having been set down on the unopposed motion roll was according to the applicant because of the incorrect case number it placed on its notice of opposition.

16]Whilst the case number for the section 158 (1) (c) application was J1469/07, the applicant wrote on its notice of opposition the case

number as being JR/7. It seems to me this could not have been the cause for placing the matter on the unopposed roll, because all the documents were in the same file.

17]The applicant's legal representative argued that the order was issued erroneously due to the error committed by SAUEO, the employer's organisation which assisted the applicant in filing the application. SAUEO committed an error by serving the review application at the wrong address. The other cause of the matter being placed on the unopposed motion roll was according to the applicant because of the incorrect case number.

18]In relation to the incorrect reference in the notice of opposition the applicant argued that although its notice of opposition stated that it was done in terms of section 144 instead of section 158 (1) (c) of the Act, the notice did contain a prayer that the award should be stayed pending the outcome of the review application. It is further submitted in this regard that the notice made it clear that there is a review pending and that the enforcement of the award should be stayed pending the review application.

19]In addition to arguing that it had always had an intention of opposing the section 158 (1) (c) application, the applicant submitted that the court would not have granted the order had it been aware of the fact that the applicant had filed opposition to the section 158 (1) (c) application.

The legal principles

20]The Labour Court has in terms of rule of 16 A (1) (a), the power to rescind any order or judgment:

> "(i) erroneously sought or erroneously granted in the absence of any party affected by it;
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> *(ii) in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission;*

(iii) granted as the result of a mistake common to the parties, or

21]In terms of rule 16A (2) (b) an application to rescind judgment or an order of the court must be made within 15 (fifteen) days after the order or judgment came to the attention of the applicant. It follows that any application made after the 15 (fifteen) days period would have to be accompanied by or a separate condonation application being made for the late filing of such application.

22]As stated by **Landmann, Van Niekerk and Wesley in the Labour Court Practise (Juta & Company 1998) D-58,**rule 16 provides for a rescission of an order or judgment made in the absence of the party applying for rescission in two circumstances. The first instance may be where judgment or an order was erroneously sought or granted and secondly may be in the instance where the applicant can show good cause as to why he or she was in default of compliance with the rules.

23] An order or judgment is said to be erroneously granted where it is shown that there was an irregularity in the proceedings that gave rise to such an order or judgment. The irregularity in general would arise when the court granted an order or made a judgment when it was legally incompetent to do so. In this instance a court may have granted the order or made the judgment unaware of certain facts which had it been aware of, would not have granted the order or judgment. For instance this may be where the court in granting the order or judgment was unaware that the applicant had properly filed notice of opposition but the matter was enrolled without notice to the applicant resulting in the matter being heard as

unopposed and being disposed of in the absence of the applicant. In this instance the strict reading of rule 16A (1) (a) seem to suggest that the applicant need not show good cause.

24]The other instance is where the applicant seeks to rescind the order or judgment on the grounds that it was granted in his or her absence but that there is a reasonable explanation for his/ her absence. In this instance the applicant is required to show good cause for the default and that the rescission is not merely a delaying tactic to frustrate the claim of the other party. In addition, the applicant has to show that he or she has a *prima facie*case to present. However, the applicant need not deal fully with the merits of the case with the view to proving that the balance of probabilities favours his or her case. See in this regard **Sizabantu Electrical Construction v Gama & Other (1999) 20 ILJ 673 (LC) and Voster v EET SA (Pty) Ltd (2006) 26 ILJ 2439 (LC).**

25]In the present case the applicant in seeking to rely on the provisions of section 16A (1) (a) (i), argued that whilst the

respondent was aware of the application to oppose the section 158 (1) (c) of the Act the court was not. The court would not according to the applicant have granted the order had it been aware of the intention to oppose the application. In his founding affidavit the applicant states that had it been aware of the said date of set down of the respondent's application to have the award made an order of court being the 5th September 2007, it certainly would have attended the proceedings and would have brought to the attention of the court that it had in fact applied to have the award reviewed and set aside.

26]As stated earlier the applicant filed notice of opposition under case number JR1469/07 instead of J1469/07. It is also important to note that the applicant in the said notice of opposition cites at the top of the notice, case number NW1513/05 being the case number under which the award which was ultimately made an order of court was decided. I have already stated that I do not belief that this could have been the reason for setting the matter down on the unopposed roll. If this was the reason, then probably, this would have constituted good cause on the part of the applicant.

27]In terms of the rules of this court the registrar must enrol a matter on an unopposed roll if no response had been delivered by the respondent to the applicant's application. This power in my view does not extend to an instance where the respondent has filed a defective notice of opposition. It is not clear in this case as to what were the reasons for the registrar not to serve the notice of set down on the applicant. It may well be because the notice of opposition was on its face value defective.

28]Although the notice of opposition is defective in that it refers to section 143 of the Act which deals with the certification of the CCMA awards as if they were orders of the Labour Court, it is clear that the applicant wished to have the arbitration award stayed pending the outcome of the review. It cannot be disputed that in form the notice of opposition was defective. I however have doubts if the court would have held the same view in relation to the substance of the notice of opposition had the matter been placed on the opposed motion and the issue being formerly argued. In my view the power to determine whether the notice of opposition is of such a defective nature that justifies barring the applicant from appearing before the court and presenting its case, is a matter to be

determine by the court and not the registrar.

29]It is therefore my view in the circumstances of this case that the section 158 (1) (c) application was granted irregular in that the matter was heard in the absence of the applicant and this was not as a result of its wilful default, but due to the fact that the registrar never served it with the notice of set down despite the applicant having filed a notice of opposition together with its supporting affidavit. Therefore, the order granted by this court in terms of section 158 (1) (c) of the Act stand on this ground alone to be rescinded.

30]In my view it would not be fair to order cost in this mater including those of the urgent application to have a writ of execution stayed.

31]In the premises I make the following order:

1. The order granted by the Honourable Judge Mayet AJ under case number J1469/07 on the 5th September 2007 is rescinded.

2. There is no order as to costs

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Molahlehi J

Date of Hearing: 01 February 2008

Date of Judgement: 16 July 2008

APPEARANCES

For the Applicant: Adv WP Scholtz

Instructed by: JANSEN'S ATTORNEYS

For the Respondent: Adv W Bekkee

Instructed by: DUVENAGE ATTORNEYS