REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 1250/09

In the matter between

POWERTECHTRANSFORMERS (PTY) LTD

(FORMERLY ABB POWERTECH

TRANSFORMERS (PTY) LTD) **Applicant**

and

THE METAL AND ENGINEERING INDUSTRIAL **First Respondent**

BARGAINING COUNCIL

COMMISIONER ZODWA NDLADLA **Second Respondent**

NUMSA obo JORASIAH MOTUBATSE **Third Respondent**

Heard: **09 January 2013**

Delivered: **12 February 2013**

Summary: Application for rescission of an order granted by default. Consideration of the question whether the judgment was erroneously granted in terms of rule 16(1)(a) and was good cause established pursuant to rule 16A(1)(b).

JUDGMENT

SEEDAT, AJ

Background

[1] Consequent to his dismissal by the applicant, the employee assisted by the third respondent referred an unfair dismissal dispute to the first respondent. On 16 July 2009, an arbitration award was issued by the first respondent under the hand of the second respondent finding the dismissal of the employee to be unfair and reinstating him with full back pay.

[2] On 2 September 2009, the applicant filed an application to review the award.

[3] In the interim, the applicant and the third respondent attempted to settle the matter but these talks fell through and, on 7 April 2010, the third respondent launched an application to dismiss the review application for not complying with the rules of this court.

[4] The applicant, in the meanwhile, continued with its attempts to obtain the transcript of the arbitration proceedings necessary for the review application.

[5] The dismissal application was set down for hearing on the unopposed role for 25 January 2012. The parties were notified of this date on 28 November 2011.

[6] On 25 January 2012, Lagrange J, in an unopposed motion, dismissed the review application for non-compliance with the court's rules and made the arbitration award an order of court.

The arguments

[7] The first that it heard of the judgment against it, avers the applicant, was when it received a letter from the third respondent saying that the employee would be resuming his duties with the applicant on 5 March 2012 in accordance with the order of the Labour Court. The applicant then immediately contacted its attorneys. On perusing the court file, the attorneys found, among the

documents, the index to the application to dismiss which was filed on 4 May 2011. The index was not served on the applicant and made no reference to the applicant's answering affidavit in the application to dismiss.

[8] The third respondent counters that because there was no answering affidavit it was under no obligation to serve the index on the applicant. It is common cause that the answering affidavit though served on the registrar was not in the court file. The third respondent denied receiving the answering affidavit despite the fact that there was proof that it was served on the third respondent.

[9] The applicant now wants to rescind this order of Lagrange J in terms of s 165 of the Labour Relations Act 66 of 1995 or rule 16A(1) of the Rules for the Conduct of Proceedings in the Labour Court (the Labour Court Rules).

The application for rescission

[10] The applicant argues that the learned judge was not aware that the application by the third respondent to dismiss the review application was opposed by the applicant and the ensuing order was erroneously granted in terms of s 165 or rule 16A(1)(a)(i). In the alternative, the applicant submits, there is good cause to grant the rescission within the contemplation of s 165 or rule 16A(1)(b).

[11] The applicant states that consequent to the launch of its application to review the award of the second respondent, the parties entered into discussions with a view to possible settlement of the dispute. When no agreement could be reached the third respondent filed, on 7 April 2010, an application to dismiss the review application because the applicant had not delivered the record of the arbitration proceedings and therefore 'dismally failed to prosecute their [sic] review application'. On 21 April 2010, the applicant served its answering affidavit to the application to dismiss on all the respondents.

[12] The applicant then contends that there followed 'a series of delays associated with the applicant's attempts to secure a complete transcript and, in this context, a number of letters were exchanged between NUMSA [the third

respondent] and the applicant's attorneys of record. For present purposes it suffices to record that NUMSA was kept fully abreast of the applicants' [sic] difficulties and, importantly, that the record as filed by the first respondent (the MEIBC') was materially deficient'.

[13] The applicant's attorneys practised from the Regus office complex and it would seem that Regus also managed its administrative function. The notice of set down for the dismissal application hearing was addressed to the third respondent and at the bottom of the notice were added the words 'and to: Powertech Transformers (Pty) Ltd'. Because the notice of set down was not addressed to the applicant's attorneys, the staff at Regus did not identify it as mail for the applicant's attorneys.

[14] The applicant claims that the order was erroneously granted in terms of s 165 or rule 16A(1)(a)(i) on the grounds that the learned Judge had accepted that the application was unopposed. The learned Judge was obviously not aware that an answering affidavit to the application to dismiss had been filed or of the events that transpired after the delivery of the answering affidavit. The third respondent's answer was simply that the notice of set down was properly served on the applicant and it had elected not to attend court.

[15] In the alternative, the applicant argued that pursuant to rule 16A(1)(b)(ii) read with rule 16A(2)(b) it has good cause to sustain the rescission. There is a reasonable explanation for the delay in prosecuting the review application and it has a *bona fide* defence on the merits.

[16] Explaining its failure to attend the rescission hearing, the applicant asserts that the notice of set down 'miscarried' within the Regus office complex and was not brought to the attention of the applicant's attorneys - an occurrence which cannot be attributed to the negligence of the applicant or its attorneys. Its failure to pursue the review application expeditiously, continued the applicant, was the result of the failure of the first respondent to furnish the transcript of the arbitration hearing.

The law applicable to rescission

[17] The application for rescission may be brought in terms of s 165, rule 16A(1)(a) or rule 16A(1)(b) or the common law.

[18] Pursuant to s 165 of the LRA, this court may of its own motion or on application by any of the parties, rescind an order or judgment erroneously sought or granted in the absence of the party affected by such order or judgment.

[19] Rule 16A of the Labour Court Rules states:

> ‘(1) The court may, in addition to any other powers it may have-
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> (a) of its own motion or on application of any party affected, rescind or vary any order or judgment-
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> (i) erroneously sought or erroneously granted in the absence of any party affected by it;
>
> (ii) in which there is an ambiguity or a 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
>
> (b) on application of any party affected, rescind or vary any order or judgment granted in the absence of that party.
>
> (2) Any party desiring any relief under-
>
> (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
>
> (b) subrule 1(b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.’

[20] The requirements for moving an application under the two rules are different. While rule 16A(1)(a) permits a rescission of a judgment granted in error in the absence of a party, rule 16A(1)(b) assists a party affected by a judgment granted in its absence to apply for rescission of such a judgment on good cause shown. However, unlike rule 16A(1)(a) which imposes no time limits, an application to rescind under rule 16A(1)(b) must be made within 15 days.

[21] Rule 16A(1)(a) substantially replicates the provisions of s 165(a) which is in turn modelled on rule 42(1)(a) of the High Court Rules. In this respect, our courts have held that if an order was erroneously made in the absence of any affected party, the court should on the application of that party rescind the order without further enquiry.[1]

[22] Joubert AJ in *Transport and General Workers Union and Others v Kempton City Syndicate and Another*[2] remarked:

> 'If a court holds that an order or judgment was erroneously granted in the absence of any party affected thereby it should, in terms of rule 42(1)(a), without further enquiry, rescind or vary the order.'

[23] Nicholson JA in *Superb Meat Supplies CC v Maritz*[3] accepted that 'when the court considers whether a judgment has been granted erroneously, it does not investigate whether good cause has been established or whether there has been wilful default'.

[24] In *Lumka and Associates v Maqubela*[4] Jafta AJA held 'where rescission is sought on the basis that an order was erroneously granted, the applicant is not required, over and above that, to show good cause'.

[25] Relying on *Sizabantu Electrical Construction v Guma and Others,*[5] Molahlehi J in *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and*

[1] Cilliers, Loots and Nel *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed (2009) Juta: Cape Town at 933.
[2] (2001) 22 ILJ 104 (W) at 108C.
[3] (2004) 25 ILJ 96 (LAC) at para 15.
[4] (2004) 25 ILJ 2326 (LAC) at para 26.
[5] (1999) 20 ILJ 673 (LC).

Others[6] and in *SA Democratic Teachers Union v CCMA and Others*[7] confirmed that a party seeking rescission on the basis that a judgment was erroneously granted does not have to show good cause.

The application in terms of rule 16A(1)(a)(i)

[26] The question I have to answer is whether the order of Lagrange J in this matter was erroneously granted.

[27] Cilliers, Loots and Nel write:

> 'It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.'[8]

[28] In simple terms, in *Gay Transport (Pty) Ltd*, the court said that 'the finding that the order or judgment was erroneously made, means that the affected party has been denied a hearing in terms of the rules of natural justice'.[9] But more importantly, in considering the error, I would say that the fact that the court was inveigled into giving a judgment because material facts were either omitted or misrepresented to the judge is decisive.

[29] The applicant does not deny that the notice of set down was faxed to its attorneys and was received by Regus, its office administrator. Because the notice was addressed to 'NUMSA' and the name of the applicant appended at the bottom of the page, an employee of Regus marked it as unidentified. It therefore did not reach the offices of the attorneys and the applicant consequently remained unaware of the notice.

[30] The facts in *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA*[10] were not dissimilar to the present case. Baraza did not have its own fax machine but used the fax facility of a neighbouring restaurant. It is to this fax that the notice for an

[6] (2011) 32 ILJ 1917 (LC) at paras 11–12.
[7] (2007) 28 ILJ 1124 (LC) at para 17.
[8] Above n 1 at 931.
[9] *Gay Transport (Pty) Ltd* at para 13.
[10] [2001] 8 BLLR 911 (LC).

arbitration hearing had been faxed. Baraza claimed that it had not received notice. Faber AJ held at para 14 that a telefax transmission slip is 'only *prima facie* proof that a document has come to the knowledge of the party on whom it has been served'.

[31] In *Roux v City of Cape Town,*[11] a notice to attend a pre-trial conference was sent to the applicant's attorney by fax. But the attorney claimed that the notice had not come to his attention. The court found that the failure of the applicant and his attorney to attend the pre-trial conference was not wilful and it was 'satisfied that the notice was transmitted to the applicant's attorneys but for reasons that cannot be explained the notice did not come to the attention of the attorney handling the matter'.[12]

[32] Sutherland AJ (as he then was) in *Northern Province Local Government Association v CCMA*[13] stated:

> 'Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of receipt… [there has to be] a fairminded enquiry into whether or not as a fact the notice did not come to the attention of the party'.

[33] Molahlehi J in *Gay Transport (Pty) Ltd* confirmed that 'the fax slip creates a presumption of receipt but does not constitute conclusive proof of receipt'.[14]

[34] The applicant does not deny that the notice of set down was received by its office administrator. Unlike *Roux,* in the present matter there is a reasonable explanation that because the notice was addressed to NUMSA and the name of the applicant was written at the bottom of the page it did not alert the staff of the office administrator that this could be for the applicant's attorney. The reference 'Mr PG Bam/bc' is inconsequential. I am satisfied that the notice of set down did not come to the attention of the applicant or its attorneys.

[11] [2004] 8 BLLR 836 (LC).
[12] Id at para 23.
[13] (2001) 22 ILJ 1173 (LC) at para 46.
[14] *Gay Transport (Pty) Ltd* (*supra*) confirmed at para 19.

[35] Ms Craven, the deponent to the opposing affidavit in this rescission application does not elaborate on what was placed before the judge. Critical to the finding is the applicant's affidavit opposing the application to dismiss the applicant's review application.

[36] The question is whether the learned Judge's ignorance of the answering affidavit constitutes a fact which, had he been aware of it, he would not have granted the order. It can be accepted that for some reason, despite proper service on the registrar, the answering affidavit to the application to dismiss was not in the court file. There was service on the third respondent too. However, Ms Craven, in her answering affidavit to the application for rescission, persists with her denial that the answering affidavit was in the file held at the third respondent's office. Mr Cartwright, representing the third respondent is adamant that this affidavit was not filed. But the confirmation by all the respondents on the filing page accompanying the answering affidavit that a copy was received is incontrovertible proof that it was served. I have no reason to doubt that if the learned judge had been aware of the answering affidavit, he would not have made an order by default.

[37] The application for rescission of the default award in terms of rule 16A(1)(a)(i) must succeed.

<u>The application in terms of rule 16A(1)(b)</u>

[38] The applicant also founded its application for rescission in rule 16A(1)(b). Rule 16A(2)(b) requires that an application in terms of rule 16A(1)(b) must be made within 15 days from the date on which it came to know of the order. In terms of rule 12(3) of the Labour Court Rules, this court may on good cause shown condone any non-compliance with the time limits prescribed in the rules. At the hearing, Mr Cartwright withdrew his opposition to the application for condonation.

[39] This court has a discretion when considering an application for condonation for the filing of any pleading or document.[15] In exercising this discretion the

[15] *SA Post Office Ltd v CCMA* (2011) 32 ILJ 2442 (LAC) at para 17.

court is guided by the established principles of the degree of lateness, the reasons for the delay, the prospects of the party seeking condonation succeeding in its claim or defence, the prejudice the parties will suffer if condonation is granted or refused and whether it is in the interest of justice to grant the condonation sought.

[40] Contrary to the assertion by Mr Cartwright, the definition of a 'day' in the Labour Court Rules is 'any day other than a Saturday, Sunday or public holiday'. Accordingly, I accept the submission by Mr Hollander who appeared for the applicant that the application was two court days late. The reason for the delay was 'an oversight on the part of [the applicant's attorney] whose initial reading of the Rules and authorities in point was that there is no prescribed time-period in respect of all applications for rescission'. This is a reasonable and acceptable explanation for the delay. But even if it were not so, it would not constitute an absolute bar to condonation.[16] The prospects of success in the application to dismiss are good. The third respondent did not claim that it or the employee would suffer any prejudice should condonation be granted in these proceedings. In any event, the factor of prejudice becomes important only when the delay is substantial.[17] It would therefore not be in the interest of justice to disallow the application of condonation.

[41] To succeed in a rescission application in terms of rule 16A(1)(b), the applicant must show good cause which, though not defined in Labour Court Rules, is understood to consist of a *bona fide* defence on the merits of the case with some prospect of success.[18] This would, of course, pertain to the application to dismiss the review application and not the review application itself because rescission is sought in respect of an order dismissing the review application. Factually, of course, the two will overlap.

[16] See in this regard *Toyota SA Marketing v Schmeizer* [2002] 12 BLLR 1164 (LAC), implicitly approved in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC).
[17] *SA Post Office Ltd* (supra) at para 18.
[18] *Lumka and Associates* (supra) at para 22.

[42] Regarding the requirement of a *bona fide* defence, Mokgoatlheng AJ (as he then was) said in *Edgars Consolidated Stores Ltd v Dinat and Others*:[19]

> '…it is sufficient if the applicant sets out averments which, if established at the trial, would entitle the applicant to the relief sought, [and] the applicant need not deal fully with the merits of the case or produce evidence that the probabilities are in its favour.'

[43] Essential to the requirement of good cause is the absence of the element of wilfulness which can only be established by the reasons for its default.[20] For an applicant to be in wilful default it must be shown that-

(i) it was aware that action is being brought against it;

(ii) it deliberately desisted from filing a notice of opposition or an answering affidavit; and

(iii) a certain mental attitude towards the consequences of the default exists.

(See *Vorster v EET SA (Pty) Ltd* (2006) 27 ILJ 2439 (LC) at 2444B-D)

[44] In *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd*,[21] the court held that the word 'wilful' connotes deliberateness 'in the sense of knowledge of the action or consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend (or file a plea), whatever the motivation of his conduct might be'. Thus a court will not come to the assistance of an applicant whose default was wilful or due to gross negligence.[22]

[45] Despite the protestations by Mr Cartwright, it is obvious that the applicant intended to pursue its review application. It may have been somewhat tardy in procuring the record of the arbitration proceedings but it had delivered its answering affidavit to the application to dismiss to the registrar and all the

[19] (2006) 27 ILJ 2356 (LC) at para 14.
[20] (*Ndhlela v Transnet Ltd* (2004) 25 ILJ 565 (LC) at para 30; *Edgars Consolidated Stores Ltd* at para 14.
[21] 1994 (3) SA 801 (C).
[22] *Edgars Consolidated Stores Ltd (supra)* at 2366C-D.

respondents. That the notice of set down did not come to its attention was an unfortunate hiccup in its attorneys' administrative management. The applicant's conduct was neither wilful nor grossly negligent. The applicant does therefore have a *bona fide* defence. I am of the view that the applicant has shown good cause as contemplated in rule 16A(1)(b).

[46] It remains to be said that the inordinate delay in bringing this matter to finality is anathema to the expeditious dispute resolution regime envisaged in the LRA and it will be appropriate to hasten the parties to finalising the dispute.

Costs

[47] In my view, both parties must shoulder some blame for the judgment having been granted by default. In the circumstances, fairness dictates that each party must carry its own costs for this application.

The order

1. The order granted on 25 January 2012 is rescinded.

2. The third respondent may, if it so desires, serve its replying affidavit to the applicant's answering affidavit within seven days of this judgment.

3. The registrar will then set this matter down as expeditiously as practicable on the opposed role for arguments in the application to dismiss the review.

4. There is no order as to costs.

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SEEDAT AJ

Acting Judge of the Labour Court

APPEARANCES

Applicant:	Advocate L Hollander
Instructed by:	
For the Respondent:	Attorney D Cartwright