



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not reportable

Of interest to other Judges

Case no: JS747/11

In the matter between:

**ROYAL SECURITY CC**

**Applicant**

and

**SOUTH AFRICAN TRANSPORT AND**

**ALLIED WORKERS UNION**

**First Respondent**

**KUMALO AND 34 OTHERS**

**Second Respondent**

**Heard: 16 January 2014 and 21 February 2014**

**Delivered: 15 October 2014**

**Summary:** Practice and procedure - rescission of default judgment - parties description not cited in the rescission application but apparent from contents of the

applicant's founding affidavit who they are and statement of case on which respondents obtained default judgment also contains a description of who they are as well as respondents have not disputed that the applicant was their employer and pleaded to the merits of rescission application - no basis for refusing rescission application.

Practice and procedure – rescission of default judgment – interlocutory in nature and thus not final in effect – court entitled to take into account description of parties already contained in statement of case on which default judgment was obtained.

Powers of the labour court – court entitled to adopt any procedure to bring about the effective resolution of labour disputes.

Powers of the labour court – court entitled to act in any manner that it considers expedient in circumstances to achieve the objects of the Act.

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## JUDGMENT

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RAM AJ

### Introduction

[1] This is an application for rescission in terms of rule 16A of the rules of this Court of a default judgment granted by Acting Justice Whitcher on 16 May 2012.

### Background

[2] On 16 September 2011, the respondents instituted unfair dismissal proceedings by way of statement of case in this Court in which they claimed that their dismissals based on operational requirements was unfair.

- [3] On 16 May 2012, Acting Justice Witcher granted the respondents a default judgment against the applicant in terms whereof the second and other respondents' dismissals were declared both substantially and procedurally unfair, reinstating them and ordering the applicant to pay each of them the amount of R20 540.00.
- [4] On 6 September 2012, the applicant lodged its rescission application. The applicant's application was deposed to by its Labour Relations Officer, namely, Molife Stephen Ramokhali ("the applicant's Labour Relations Officer"). He sought an order opposing the default judgment and not an order rescinding the default judgment. I summarise the applicant's grounds of rescission as follows:
- 4.1 Certain documents were transmitted by telefax to the applicant but that it was not received by its office.
- 4.1 The notice of set down was transmitted to a telefax number which was not that of the applicant.
- 4.2 The second and other respondents were dismissed when a fixed term contract between the applicant and Telkom ("the Telkom contract") came to an end on 30 June 2011. Insofar as the actual dismissal of the second and other respondents were concerned, it was contended that their employment was dependant on Telkom terminating or extending the contract.
- 5 The respondents opposed the rescission application. They raised the following points *in limine*:
- 5.1 The names, description and the addresses of the parties were not set out therein.
- 5.2 The founding affidavit of the applicant was not signed.

5.3 The application was brought in terms of section 159(3) of the Labour Relations Act No.66 of 1995 (“the Act”) which has nothing to do with rescission applications.

5.4 The order sought was to oppose the default judgment (instead of rescinding it).

[6] In so far as the merits of the rescission application was concerned, the respondents contended that their attorneys of record, namely, Mitti attorneys (“the respondents attorneys”) called the applicant and a person by the name of ‘*Merriam*’ confirmed receipt of the statement of case. They doubted that the notice of set down was faxed to the incorrect number. They also contended that the Telkom contract expired on 1 September 2010 and that the second and other respondents worked until the end of July 2011 when it was terminated due to the loss of the Telkom contract.

[7] On 15 January 2014, being one day before this matter was set down for hearing, the applicant filed a substantive application for a postponement. It sought a postponement on the grounds, *inter alia*, that it was not assisted by ‘any legal representative’ when the rescission application was drafted and sought to amend its papers so as to address certain pertinent issues which were lacking therein.

[8] On 16 January 2014, and at the hearing of this matter, the respondents’ attorney, namely, Ms Malope handed up their answering affidavit to the applicant’s application for a postponement. Their main opposition was that the applicant had more than twelve months to amend its rescission application. She relied on the notice of appointment of the applicant’s attorneys of record, namely, Rajen V. Naidoo Incorporated Attorneys (“the applicant’s attorneys”) who placed themselves on record on 19 November 2012.

[9] I heard argument on the merits of the applicant’s application for

postponement and postponed the hearing until 21 February 2014 affording it the opportunity to supplement its rescission application by 21 January 2014 and the respondents to answer thereto by 24 January 2014. In addition, the applicant was allowed to file heads of argument by 31 January 2014 and the Respondents by 3 February 2014. The applicant was ordered to pay the costs thereof on an attorney and client scale.

- [10] On 21 and 23 January 2014, the applicant filed its supplementary affidavit and the respondents their answer thereto, respectively. I refer to applicant's supplementary affidavit as the first supplementary affidavit for reasons which will become obvious below.
- [11] On 10 February 2014, the applicant filed a second supplementary affidavit to which it attached a third supplementary affidavit. In the second supplementary affidavit, it requested that its first supplementary affidavit which was filed on 21 January 2014 be disregarded and the third supplementary affidavit be considered in its place.
- [12] At the hearing of this matter on 21 February 2014, Counsel for the applicant attempted to convince me to admit its third supplementary affidavit in place of its first one. In the alternative, he argued that should I be disinclined to do so, then the first supplementary affidavit should be considered. This was accepted by the respondent's attorneys who were at this time represented by Ms Mitti.
- [13] I decided not to admit the third supplementary affidavit as it would not only be prejudicial to the respondents requiring them to file a further affidavit in response thereto but would also have the effect of this matter being further delayed. This would also no doubt amount to an abuse of the process of the court.
- [14] In the applicant's first supplementary affidavit, this time assisted by its attorneys and counsel, it still did not address some of the defects which were

raised as points *in limine* by the respondents. In particular, the description of the parties were not set out with the required particularity and it was left for the court to decipher who they are from the contents of their affidavits, also no explanation was tendered why it served an unsigned copy of the rescission application on the respondents and save to address this Court on rule 16A of the court rules, it did not file an amended notice of motion.

- [15] I take into account that defects which the respondents raised as points *in limine* were committed by the applicant's Labour Relations Officer who is a lay person who was at that time unassisted by its attorneys and counsel. I can only attribute the failure to correct those defects to its attorneys and counsel and hold that same can be cured by an appropriate cost order.
- [16] I have reached this conclusion on the basis that the names of the parties are apparent from their affidavits, a description of the applicant and the second and other respondents' is apparent from the contents of paragraph 11 of the applicant's founding affidavit. The applicant's address is cited in paragraph 2 of its founding affidavit, the rescission application was served on the respondents' attorneys who were also their attorneys of record when default judgment was obtained and when they accepted service thereof, they did not dispute that they are the respondents' attorneys of record. The default judgment order was attached to the application and the parties names are cited thereon. Also the description of the parties' are set out in the respondents' statement of case on which they obtained default judgment. Further, the respondents pleaded to the contents of the applicant's rescission application which they alleged was unsigned and in doing so have not denied that the applicant was their employer and pleaded to the merits thereof. I take special note that the respondents indexed and paginated the papers in the court's file which included a signed original copy of the applicant's rescission application. The applicant has also made it clear in its first supplementary affidavit that it relies on rule 16A of this court's rules to rescind the default judgment requesting that I to do so *mero motu* or in the

alternative on the grounds that it was erroneously sought or granted in its absence or on good cause shown.

- [17] In my view, a rescission application of a default judgment is interlocutory in nature<sup>1</sup> and in terms of rules 11(3) of this Court's rules, I am vested with a discretion to adopt any procedure that I deem appropriate in the circumstances and in terms of rule 11(4) thereof, I may exercise powers and functions that I consider expedient in the circumstances to achieve the objects of the Act. Also in terms of section 158(1) (a)(iii) of the Act, I may make any appropriate order to remedy a wrong and give effect to the primary objects of the Act. Further, in terms of section 158(1)(j) of the Act, this Court may deal with all matters necessary or incidental to performing its functions in terms of the Act or any other law and section 1(d)(iv) thereof, it is enjoined to promote the effective resolution of disputes.
- [18] I have decided to exercise these powers given to me in determining the applicant's rescission application for more compelling reasons which I discuss below.
- [19] In terms of rule 16A(1)(a) and (2)(a) of this court's rules, this Court may in addition to any other powers it may have; of its own motion or on application of any party affected, rescind or vary any order or judgment, *inter alia*, erroneously sought or granted in the absence of any party affected by it.
- [20] The applicant stated in its founding affidavit that it had not received the respondents' statement of case and in its first supplementary affidavit that if it was transmitted by telefax, it had not received a complete copy thereof. It also stated in its first supplementary affidavit that it's Labour Relations Officer is charged with such matters and that none of the documents were addressed to him or its Manager or General Manager or received by them. I find merit in these allegations. This Court has previously granted rescission

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<sup>1</sup> *Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA)*.

applications on these grounds alone holding that it was erroneously sought and granted in absence of a party.<sup>2</sup>

[21] In terms of rule 16A (1) (b) and (2)(b) read together, this Court may on application by any party affected, rescind any order or judgment granted in the absence of that party on good cause shown. The requirements of good cause that the applicant must satisfy are that it must give a reasonable and acceptable explanation for the default and show a *bona fide* defence.<sup>3</sup>

[22] The applicant has given a reasonable and acceptable explanation for the default on the grounds set out in paragraph 20 above. Insofar as the applicant's defence in its rescission application is concerned, the respondents in their answering affidavit thereto have not denied that they were employed on a fixed term contract which was dependant on the continuation of the Telkom contract. They merely noted such allegations and alleged that 'the documented fixed-term contract in fact expired on 1 September 2010' and they continued to work until 1 July 2011 when their fixed term contracts were terminated due to loss of the Telkom contract. This they reiterated in their answer to the applicant's first supplementary affidavit. However, on this occasion they go on further to allege that the applicant 'cannot then just simply terminate the contract on the basis that Telkom terminated its contract' and that they dispute that the Telkom contract with the applicant was terminated having previously admitted that to be the case. On the basis of the test enunciated in *Plascon- Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,<sup>4</sup> I conclude that the applicant has shown a *bona fide* defence.

[23] In the circumstances, I find that on the information before me that the

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<sup>2</sup> *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA and Others* [2001] 8 BLLR 911 (LC), *MTN SA v Van Jaarsveld and Others* [2002] 10 BLLR 990 (LC), *Northern Province Local Government Association v CCMA and Others* [2001] 5 BLLR 539 (LC) and *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1917 (LC).

<sup>3</sup> *Sizabantu Electirical Construction v Guma and Others* [1999] 4 BLLR 387 (LC).

<sup>4</sup> 1984 (3) SA 623 (A).



applicant has made out a case for the rescission of the default judgment granted by Acting Justice Witcher on the grounds that it was erroneously sought and granted in its absence as well as on good cause shown.

[24] Insofar as costs is concerned, I take into account that the applicant's attorneys and counsel had failed in their duty to properly assist the applicant and as such they should pay the respondents cost *de bonis propriis* on the scale between attorney and client, the one paying the other to be absolved.<sup>5</sup>

### Conclusion

[25] I make the following orders:

- 25.1 The default judgment of Acting Justice Witcher is rescinded and set aside.
- 25.2 The applicant is to file its response to the Respondents statement of claim within 10 days of delivery of this judgment in terms of rule 6(3) of the Labour Court Rules.
- 25.3 The applicant's attorneys and counsel are to pay the respondents cost *de bonis propriis* on the scale between attorney and client, the one paying the other to be absolved.

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Ram AJ

Acting Judge of the Labour Court of South Africa.

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<sup>5</sup> It should be noted that this court had already granted an order that the applicant pay the cost for the postponement of 16 January 2014 on an attorney and client scale.

APPEARANCES:

For the Applicant: Advocate Raath

Instructed by: Rajan V. Naidoo Inc. Attorneys

For the First Respondent: Mesdames Malope and Mitti of Mitti Attorneys

Labour Court