

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO. J 3226/98

In the matter between:

KOLOBE, NDUNUSO ANDREW

Applicant

and

PROXENOS, NICKOLAS (SOPHIA'S RESTAURANT)

Respondent

JUDGMENT

TIP AJ

The applicant was employed by the respondent as a barman until he was dismissed in the course of March 1998. He disputed the fairness thereof and referred the matter to the CCMA. That resulted in an arbitration being conducted by a CCMA commissioner on 16 October 1998. The arbitration

proceeded in the absence of the respondent. The commissioner determined the dismissal to have been unfair, both substantively and procedurally, and ordered the respondent to pay compensation in the sum of R6 600,00, being equivalent to six months' pay.

The respondent has not made the payment ordered in terms of this award, resulting in the applicant bringing proceedings in this Court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the Act"). An order in terms of that section was made by this Court, in default of the respondent, on 26 May 1999. The respondent now seeks to have that order rescinded.

It is necessary first to remark that some confusion attends the application in terms of section 158(1)(c). The papers contained in the Court file bear the date of 3 May 1999. However, it would at the same time appear that the application had in fact been issued out of this Court and that it had somehow reached the respondent in the course of 1998. That emerges not only from the case number allocated to it (which reflects that this was done in 1998), but also from a notice of intention to oppose, which was filed on behalf of the respondent. That notice was signed by Mr S Snyman, an attorney of the firm Snyman Van der Heever Heyns Inc, on 14 December 1998. A faxed copy of that notice was received by this Court on 17 December 1998 and the original was filed on 4 January 1999.

Subsequent to the hearing of this matter on 11 November 1999, the parties were requested to file further written submissions dealing with the apparent anomaly concerning these dates. The respondent filed such submission, but was unable positively to clarify the position. Although the applicant (or a representative) apparently came to the Court in response to my request, no written submission has been received on his behalf. Ultimately, on the view that I take of this matter, the date anomaly does not play a decisive role.

) The application for rescission is based on two contentions: firstly, the respondent was unaware of the proceedings in the CCMA; in the second place, it is contended that the respondent was "abandoned" by its legal representative in relation to the events in this Court on 26 May 1999. I should make it clear that for the purpose of this application for rescission, the respondent has engaged different representation. It is convenient to first set out the circumstances surrounding the order of 26 May 1999.

The Order by Default on 26 May 1999

) I turn to the sequence of events leading to the default order. Since no response to the application in terms of section 158(1)(c) had been lodged on behalf of the respondent, the matter was set down for hearing on the unopposed roll on 26 May 1999. A notice to that effect was issued by the Registrar of this Court on 12 May 1999. It was faxed to the respondent's attorneys of record on the same day and the faxed notice was marked for the attention of Mr S Snyman. The Court file indicates that the notice was successfully transmitted.

) Notwithstanding that, when the matter was called on 26 May 1999, there was no appearance for the respondent. Revelas J, who was hearing the matter, stood it down with a direction to the Registrar that the respondent 's attorneys were to be telephoned, to be asked why they were not present in court, and to be informed that they had one hour to present themselves. Mr Phophi of the

Registrar's office carried out this direction and the Court file contains the following note made by him:

"Mr Snyman says he don't know anything about this case. The court may proceed in default. He will apply for rescission if the need arises."

It may be assumed that this response was duly conveyed to Revelas J, who then made the order that is the subject-matter of this application for rescission.

Given that he was the respondent's attorney of record, Mr Snyman's response to Mr Phophi, thus recorded, *prima facie* suggests that there may be substance to the far-reaching complaints made in the respondent's affidavit. They raise a possible shortcoming in respect of the duty owed by an attorney not only to his client, but also to this Court. In view of the gravity of the respondent's contentions, Mr Snyman was afforded an opportunity to respond to the circumstances outlined above, immediately before the hearing of this application on 11 November 1999.

The explanation hence furnished by Mr Snyman may be summarised as follows:-

The respondent had come to him with the section 158(1)(c) application, but with no additional documents.

The respondent was to come back to him with all the documents and he, Mr Snyman, "never took any instruction in the matter" at that stage.

He took from the respondent a copy of the section 158(1)(c) application. His firm receives a high volume of new instructions and has a section for "potential new files". In such situations, the firm automatically files a notice of intention to oppose. Mr Snyman confirmed that he had signed the

notice of intention to oppose that was in fact lodged in this Court.

However, the respondent never reverted to him, he never took an instruction and never opened a file in the matter.

According to Mr Snyman, he also never saw the notice of set down and went on to explain that it was "quite probable" that he would not have seen such a notice. As I understood the explanation, it is the practice in his firm that a notice such as the one issued by this Court on 12 May 1999 would be directed to the person dealing with the matter only once a file has been opened.

Mr Snyman confirmed having received a telephone call from the Registrar of this Court on 26 May 1999. To the best of his recollection, the party's name given to him was Sophia's Restaurant. He checked his firm's computerised database of clients, but that name was not listed. When he conveyed to Mr Phophi that he didn't know the case and didn't know what this was all about, Mr Phophi merely said "fine they will take it further" and that was that.

In the affidavit lodged in support of the application for rescission, a somewhat different account is set out in relation to the process of instructions given by the respondent to Mr Snyman. Relevant aspects of this are as follows:-

The respondent was approached by the applicant on 27 May 1999. The applicant bore the order made in this Court on the previous day.

The respondent was surprised by this as he had not received a notice of motion and supporting documents in terms of section 158(1) of the Act.

On receipt of the arbitration award (which, read in context, was on 16 October 1998), he had instructed Mr Snyman to approach this Court for relief on the basis that: there had not been a conciliation in terms of section 135 of the Act as the matter had not been referred to the bargaining council for the restaurant and catering trade; the respondent had been unaware of the fact that an arbitration had taken place and had received no notification to attend such arbitration; the applicant's supporting affidavit did not comply with rule 7(3)(a) of this Court.

The respondent had furthermore expected that his legal representatives would attend court as necessary or alternatively that the respondent would have been informed if they were unable to attend. He was unaware why he had been "abandoned" by his representatives on 26 May 1999.

The respondent had never instructed Mr Snyman to allow the matter to proceed by default. He submitted further that his non-attendance in this Court on 26 May 1999 was not due to any fault on his part and that the negligence of his then attorneys of record should not be ascribed to him.

) As is clear from the above summary, there are differences between the respondent's account of events and those placed on record by Mr Snyman. There are also differences between the contemporaneous note made by Mr Phophi and Mr Snyman's account of their conversation on 26 May 1999. It is not the purpose of this judgment to make a determination in respect of those differences. Indeed, it would be inappropriate for me to do so, since Mr Snyman's account of events does not form part of the record in this matter, in the sense that it has not been deposed to and the immediate parties have not had the opportunity to respond to it in the usual way. I have regard to his account only insofar as it arises from the respondent's affidavit and then only to the extent that it is consistent therewith.

) On any version of the events, it would appear that Mr Snyman's conduct of the matter leaves a great deal to be desired. For instance, I am unable to comprehend how a formal document such as a notice of intention to oppose, which has the important consequence of placing a firm of attorneys on record for a party, should be filed in this or any other court in circumstances where there is not a clear instruction to do so. In any event, if a would-be client thereafter furnishes no additional instructions, there is in my view a clear duty on an attorney who has filed such a notice, subsequently to file a notice of withdrawal. That was not done in the present case and that in turn left Mr Snyman and his firm with a continuing responsibility to this Court and to his client, however inchoate that relationship may have been.

) It is also incomprehensible to me that there should be a system that has the result that a notice of set down from this Court - that clearly stipulates a particular legal practitioner as the one who is dealing with the matter - should not reach its intended destination.

) At the very least, these considerations lend support to the respondent's contention that there had been negligence on the part of his then legal representatives.

) On the probabilities, it is clear that the respondent himself was unaware of the set down of this matter on 26 May 1999. The notice issued by this Court had been directed to Snyman Van der Heever Heyns Inc. Furthermore, it appears that the application papers dated 3 May 1999 had been faxed by the applicant to a number that was unconnected with the respondent.

) However, it is by no means so that a collateral omission on the part of a legal representative to attend court will *ipso facto* bring relief to the party itself. See for instance: *Bristow v Hill* 1975 (2) SA 505

(N); *De Wet v Western Bank Limited* 1979 (2) SA 1031 (A) at 1043B – 1044D; *Tshabalala v Peer* 1979 (4) SA 27 (T); *Bakoven Limited v G J Howes (Pty) Ltd* 1992 (2) SA 437 (E); *Enzo Panelbeaters CC v CCMA & others* [1999] 11 BLLR 1147 (LC).

) An allied consideration is whether or not a party in the position of the respondent in the circumstances of the present matter is required to demonstrate "good cause", or whether it is sufficient for it merely to advance an acceptable explanation for its failure to be present in court on the required day, in this case being 26 May 1999.

) The power of this Court to vary or rescind its own orders is governed, at least principally, by section 165 of the Act:-

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

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (c) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings."

) Those provisions are in the same terms as Rule 42(1) of the High Court Rules. It is generally so that Rule 42(1)(a), which corresponds with section 165(a) of the Act, will come to the assistance of an applicant in an appropriate case, without such applicant having to demonstrate "good cause". Thus, where a respondent is in default and an order is made in the erroneous belief that there has been proper service on that respondent, such order will be set aside without the respondent being put to the demonstration of the merits of its defence. See for instance *Theron N.O. v United Democratic*

Front (Western Cape Region) 1984 (2) SA 532 (C); *Promedia Drukkers en Uitgewers (Edms) Beperk v Kaimowitz* 1996 (4) SA 411 (C) at 417G-I; *De Souza v Kerr* 1978 (3) SA 635 (WLD) at 638A-B; *Topol & others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (WLD) at 650D-J. That approach has been applied in this Court. See *CAWU & another v Federale Stene* (1991) (Pty) Limited [1998] 4 BLLR 374 (LC) at 375G-H and 376C. See also *Deutsch v Pinto & another* (1997) 18 ILJ 1008 (LC) at 1015H-I.

However, particular considerations arise in the context of an order made by default pursuant to an application in terms of section 158(1)(c) of the Act. In my view, those considerations are distinguishable from the circumstances that typically present themselves within the field of operation of Rule 42(1)(a). Section 158(1)(c) is intended to achieve little more than to bring to bear the power of enforcement vested in this Court, as a superior court, which the CCMA does not itself enjoy in relation to the awards made under its auspices. An order made by this Court in terms of section 158(1)(c) does not involve an *ab initio* determination of the merits of the dispute between the parties. That has already been done through the arbitration process. In addition, the award flowing from that process is one that is already "final and binding", as set out in section 143(1) of the Act. It is also implicit in the very fact that an application is sought in terms of section 158(1)(c) that there has been non-compliance on the part of the respondent party with the terms of that award.

In such circumstances, it seems to me that a party that is already in default of performance ought not to enjoy the relative advantage of having no obligation to demonstrate "good cause", when an order made by default in this Court pursuant to an application in terms of section 158(1)(c) is sought to be rescinded.

) Further support for the view that an applicant for rescission in the context of a case such as this one should demonstrate "good cause" is to be found in the concern of the Act with effective dispute resolution. See section 1(d) of the Act. To a significant extent, "effective" is to be equated with "speedy". See *NUMSA v Precious Metal Chains (Pty) Limited* (1997) 18 ILJ 1346 (LC) at 1357J; *Edgars Stores (Pty) Limited v Director, CCMA & others* (1998) 19 ILJ 350 (LC) at 359C.

The Issue of Good Cause

) As already indicated, the respondent contends that he was unaware of the arbitration proceedings in the CCMA that led to the award against him of 16 October 1998. The respondent alleges in support of this submission that he does not maintain his own fax number and makes use of the fax facilities of other enterprises. Assuming that to be correct and assuming further, in favour of the respondent, that no such notification was received, it is nevertheless clear that the respondent was in possession of the award on the very day that it was made.

) This is evident from a letter faxed on 16 October 1998 by the respondent to the commissioner who had conducted the arbitration. It records *inter alia* an objection to the award on the ground that the respondent never received notification of the hearing. For the purpose of this judgment, that objection may be accepted as well founded. It may also be accepted that the applicant thereafter presented himself for payment in terms of the award and that the respondent gave him no satisfaction. Albeit in a *pro forma* fashion, that is precisely what is alleged in the application in terms of section 158(1)(c).

) The determination of good cause involves *inter alia* consideration of the conduct of the party seeking relief. In the context of section 158(1)(c) proceedings, a signal moment for such consideration arises

when that party acquires knowledge of the award. Given that the respondent knew of the award on the day of its issue, the question arises what he has done since then. The answer is short. He wrote a letter to the commissioner on 16 October 1998 and he instructed a firm of attorneys, apparently early in December 1998. Beyond that, there has been no effort at all on the part of the respondent to cure the complaints that he has about the award.

) Plainly, a step immediately available to the respondent would have been to launch rescission proceedings in the CCMA as provided for in section 144 of the Act. Equally plainly, the respondent has done nothing towards that end. Mr Roode, who appeared for the respondent, submitted that I should conclude that the respondent had received advice from Mr Snyman that he should simply ignore the award until such time as there might be an application to enforce it. That submission is an entirely speculative one. The respondent's affidavit contains no averment to that effect. Indeed, it is a striking feature of the affidavit that it makes no attempt to deal with the period between 16 October 1998 and 27 May 1999, save for one paragraph in which the respondent declares that he instructed Snyman Van der Heever Heyns Inc "to approach this Court" on the basis of various grounds of complaint concerning the award. Other than that single instruction to Mr Snyman, the respondent took no steps whatsoever in relation to the further conduct of the matter.

) One of the grounds of complaint listed by the respondent, as having formed part of his instruction to Mr Snyman, is that the applicant's supporting affidavit was technically deficient, in that it did not comply with Rule 7(3)(a). That is a reference to the affidavit filed by the applicant in support of the application brought by him in terms of section 158(1)(c). Clearly, such ground could have presented itself only if the respondent had at that stage received the section 158(1)(c) application. However, elsewhere in the affidavit deposed to by him, the respondent squarely denies receipt of that

application. That the respondent has seen fit to depose to these mutually inconsistent statements points, in my view, not only to an absence of good cause, but also to an absence of good faith. Cf *MM Steel Construction CC v Steel Engineering & Allied Workers Union of South Africa & others* (1994) 15 ILJ 1310 (LAC) at 1315D-I

) The Act does not countenance that awards of the CCMA should languish because of the calculated indifference of parties affected thereby. To the contrary, it is the purpose of the Act that such awards should have the effect of bringing a swift end to disputes. A party who treats CCMA awards in the kind of "wait-and-see" manner adopted by the respondent in the present case does not thereby advance his prospect of demonstrating good cause.

) An examination of good cause involves also some assessment of the merits of the dispute in relation to the determination made by the commissioner. Cf *Tekwini Security Services CC v Mavana* (1999) 20 ILJ 2721 (LC) at para [18] and [19]. In the present matter, the respondent's affidavit is completely silent on the aspect of substantive fairness. In respect of procedural fairness, the respondent merely submitted that the dismissal of the applicant had been effected in accordance with the procedural standards contained in the Code of Good Practice. No facts were alleged in support of this submission. Hence, as far as the merits are concerned, no factual considerations have been demonstrated by the respondent that might weigh in favour of granting rescission.

) The respondent has failed to show that there is good cause for the rescission sought by him. That conclusion is not outweighed by the circumstances attending the failure of his then attorneys of record to represent his interests in this Court when the default order was granted on 26 May 1999. The application for rescission is dismissed with costs.

ACTING JUDGE _____ **K S TIP**

DATE OF HEARING: 11 November 1999

DATE OF JUDGMENT: 6 March 2000

FOR APPLICANT: In person

FOR RESPONDENT: Mr W Roode