

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J5027/99

In the matter between:

ELECTROCOMP (PTY) LIMITED

Applicant

and

MILAN NOVAK

Respondent

JUDGMENT

JAMMY AJ

The Applicant seeks an order **“rescinding and/or varying”** the default judgment granted by this court against it on 25 October 2000. At the hearing of the matter application was made by it to augment the prayer for the rescission relief which it seeks by including therein an order rescinding the order of this court dated 28 September 2000 in terms of which its application for the late filing of its responding papers in the matter was dismissed.

The facts leading to this application, insofar as they relate to the Applicant’s conduct of this litigation, are in my view extraordinary. Milan Novak, the Applicant in the main case and the Respondent in this application, filed his statement of claim on 13 December 1999 and a formal response thereto was promptly filed by the employer, Electrocomp (Pty)

Limited, on 20 December 1999. It was stated in that response to be represented by an employers' organisation, of which it purported to be a member, cited as CTL Management Forum.

.On 23 March 2000 the Registrar of this court gave notice to the employee's attorneys and to the company directly, of a pre-trial conference to be held before a judge at court on 6 April 2000.

In apparent anticipation of complications arising in relation to its representation, the company procured formal legal representation in the form of a legal firm described as **"Paul Farinha Attorneys"**. A notice of their appointment as such and of the withdrawal of CTL Management Forum was filed with the court on 5 April 2000, the day before the scheduled pre-trial conference.

When the conference convened before His Lordship Mr Justice Landman on 6 April 2000, and notwithstanding the fact that the company was represented by counsel, this fact was not drawn to the judge's attention. The authority of CTL Management Forum to represent the company was rejected and the replying papers were struck out. The company was ordered to file a fresh replying statement, coupled with an application for condonation of the late filing thereof, by 30 April 2000 failing which the Applicant employee would be entitled to apply for default judgment.

That ruling and order was not challenged but was in fact, to all intents and purposes, complied with and on 28 April 2000 a new replying statement of defence, together with an application for condonation, were duly filed.

What is remarkable in that regard, is that the Applicant company's representative in those papers is reflected not as Paul Farinha Attorneys, as might have been expected, but as a new legal entity, L Shear Attorneys with an address at Office 506, 20 Anderson Street, Johannesburg.

In due course, notice of set down of the application for condonation, to be heard on 28 September 2000, was given to the parties by the Registrar, properly addressed to the Respondent employee's attorneys of record and to the Applicant company's legal representatives now on record, L .Shear Attorneys. That application was opposed by the Respondent.

When the matter was heard on 28 September 2000, neither the Applicant nor its legal representatives were present. The Respondent's representatives were however at the hearing and the application was substantively dealt with by His Lordship Mr Justice Ngcamu and, on the strength of the papers before him and submissions presumably made by the Respondent's representative, was dismissed with costs.

Pursuant thereto an application for default judgment was enrolled for 25 October 2000 on notice from the Registrar to the parties similarly given. There was no appearance by or on behalf of the employer company at that hearing and default judgment in favour of the employee, Milan Novak, was duly granted.

In seeking now to have that order, as well as the order dismissing its application for condonation rescinded, the Applicant relies on Rule 16A(1)(a)(i) which, of course, mirrors the provisions of Section 165 of the Labour Relations Act 1995. In terms of that rule, this court may rescind or vary any order or judgment **“erroneously sought or erroneously granted in the absence of any party affected by it”**. An order or judgment will have been granted erroneously either where:-

there was an irregularity in the proceedings; or

it was not legally competent for the court to have made such an order; or

if there existed at the time of the order or judgment a fact of which the judge was unaware and which would have precluded the granting of the judgment or order or would have induced the judge, if he or she had been aware of it, not to grant the judgment or

order.

Erasmus: Superior Court Practice (Juta): B1-308A

CAWU v Federale Stene (1991) (Pty) Limited: (1998) 4BLLR374(LC)

The principle laid down in **Federale Stene** and a line of preceding cases including

Topol and Others v L S Group Management Services (Pty) Limited 1988(1) SA639(W),

establishes that where a party to an application was genuinely unaware of the date of set down, the granting of judgment by default would be erroneous and it is not necessary for the party concerned to have shown or proved good cause.

That principle is however qualified by the consistent refusal of the courts to grant rescission orders where there was no irregularity in the proceedings and the default could be attributed to the negligence or incapacity of such party's legal representatives.

Erasmus: (*op cit*) B1-309 and the cases there cited

There is no suggestion in the submissions before me that any aspect of the proceedings resulting ultimately in the default judgment granted on 25 October 2000 was irregular and it is necessary, in those circumstances, to assess the reason why the Applicant was, to all intents and purposes, not aware of either the set down of the application for condonation or of the subsequent set down of the application for default judgment. It is in that context that the conduct of the matter, whether by the Applicant or by its legal representatives, warrants critical examination. The ruling by Judge Landman at the pre-trial conference must, as I have stated, have been anticipated by the formal appointment, the day before the conference, of Paul Farinha Attorneys as the Applicant's representatives in place of the employers' organisation. The Applicant was represented at that conference by counsel who, for reasons unexplained, appears not to have drawn the Judge's attention to that fact. The Judge's ruling was not challenged and was in fact

complied with but at that stage, notwithstanding the fact, emphasised by the Applicant in its papers, that Paul Farinha Attorneys had not withdrawn from the matter and were still on record, a new representative was cited – L Shear Attorneys. The reason for this, submitted by the Applicant in its Founding Affidavit in this application is, to my mind, a fatuous one. This is what is said:-

“L Shear’s name was placed on the Notice and Response due to the fact that he was utilized for the submission of the documents. This was a convenience to the Applicant given the close proximity of his offices to the CCMA and the Labour Court. It is to be noted that it was never the Applicant’s intention to terminate Paul Farinha Attorneys authority to act and thus no Notice complying with the provisions of Rule 21(2) was ever delivered”.

. How the Registrar of this court could or should have been aware of this convenient arrangement is not suggested or explained. Notice of the set down of both the condonation application and the application for default judgment was correctly and properly addressed by that official to the attorneys formally on record in those applications. The set down of the condonation application, moreover, and the necessity for the filing of heads of argument in that regard, was subsequently confirmed by telefax from the Respondent’s attorneys to the Applicant’s duly appointed attorney in those applications, L Shear.

. Whether either Shear or Farinha was aware of the involvement of the other of them through the Applicant’s fickle conduct in that context, is irrelevant. What emerges undisputably, in my opinion, from this convoluted state of affairs, is that the Applicant, in its unacceptable disregard of the basic requirements of proper procedure, is the author of its own misfortune. There is no basis upon which the consequences of its dereliction in that regard can properly be visited upon the Respondent. This is not a case, in my opinion, falling within the ambit of Section 165 of the Labour Relations Act 1995, read with Rule 16A(1).

. In its submissions to this court in these proceedings, the Applicant somewhat remarkably tendered to pay the Respondent’s costs on the scale as between attorney and client. That tender was presumably in anticipation of its realisation and acknowledgement of the

light in which its conduct of the matter to date would be viewed. I can find no reason to differ from that assessment and the order which I accordingly make in all the circumstances of this matter, is the following:

- 1 The application for the rescission of the orders of this court of 28 September 2000 and 25 October 2000 is dismissed.**
- 2 The Applicant is ordered to pay the Respondent's costs on the scale as between attorney and own client.**

B M JAMMY
Acting Judge of the Labour Court

16 July 2001

Representation:

ant: Advocate C Georgiades instructed by Paul Farinha Attorneys

ndent: Mr C Todd: Bowman Gilfillan Inc.