

IN THE LABOUR COURT OF SOUTH AFRICA

**HELD AT BRAAMFONTEIN
J3263/99**

CASE NO.

In the matter between:

FULLER, LESLEY

APPLICANT

And

Megacor Holdings

RESPONDENT

JUDGMENT

ZILWA AJ

INTRODUCTION

1. This is an application for the rescission of judgment granted in the absence of the applicant by this court on the 27th August 2001. This application is brought in terms of section 165 (a) of the Labour Relations Act no. 66 of 1995 as amended (“the Act”), and alternatively in terms of the common law powers vested in this court.
2. The respondent opposes the application.

BACKGROUND FACTS

3. The applicant's application in the main case was dismissed by this court on the 27th August 2001. The main application was based on an alleged the unfair retrenchment of the applicant resulting in the termination of his services with the respondent with effect from the 1st October 1999. The respondent denies this and contend that the applicant was dismissed on the 10th December 1999 due to misconduct after a disciplinary enquiry. I will deal with this issue later in this judgment.
4. Neither the applicant nor his attorney were present in court at the appointed date and time and it was on this basis that the main application was dismissed.
5. The applicant's explanation for his failure to appear in court is simply that he had not received the notice of setdown and he had no idea that the matter had been setdown for hearing on that date. He places the blame entirely on the negligence of his attorney by not informing him of the said setdown date. He found out later, in September 2001 that his attorney had been suspended from practice by the Law Society. When he subsequently contacted his attorney, she stated that the matter was not yet ripe for hearing. He further obtained his file from this attorney in September 2001.

According to applicant he had received a letter from his attorney dated the 8th February 2001 informing him that the trial date could be anticipated in May or June 2001 and that applicant would in any event be advised by his attorney immediately a trial date was received.

On the 18th April 2001 the applicant addressed a letter to his attorney asking whether a trial date had been obtained for the matter. Subsequently to this letter the applicant made several attempts, which have not been detailed by the applicant, to

contact his attorney without success. The applicant had earlier noticed that her attorney was dragging her heels in this matter.

8. The applicant only came to know about the dismissal of his application on the 3rd September 2001, by chance in a conversation between him and Peter Barable. Upon gaining such knowledge he immediately contacted his present attorneys of record in order to establish how to deal with the matter which has resulted in the launching of these proceedings on the 19th September 2001.

PROVISIONS OF SECTION 165 (a) OF THE ACT

9. Section 165 (a) of the Act provides as follows :

“ The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgement or order –

- (a) erroneously sought or erroneously granted in the absence of party affected by that judgement or order;.....”

10. It is apparent from the reading of the section that its provisions relate to instances where there has been an apparent error in the granting of the relevant judgement or order by the Court. It is not a catalyst for the rescission of all judgements or order that may be granted in the absence of an affected party.
11. Rule 16 A (1) (b) of the Rules of this Court has been devised specifically to deal with situations where a judgement or order has been granted in the absence of an affected party, then that party may within 15 days after acquiring knowledge of such judgement or order apply on notice to all the interested parties to set it aside, as it deems fit. The Court when takes into consideration the principles of common law to determine good cause which is an essential ingredient of the application.

12. The applicant has not canvassed any facts to demonstrate an apparent error in the granting of the order of this Court on the 27th August 2001.

13. Although the applicant has not referred to the requisite Rule 16 A (1) of the Rules of this Court I will now deal with this application in terms of that Rule on the basis that it was made within the time limit of 15 days from the date of gaining knowledge of its existence and the common law referred to in the application.

COMMON LAW RESCISSION CONSIDERATIONS

14. It is settled law that in application for rescission of a court judgement or order the applicant is required to show good cause, including reasonable prospects of success. See KOLOBE V. PROXEWOS (SOPHIA'S RESTAURANT) (2000) 11 BLLR 1118 (LC); ENZO PANEL BEATERS CC V CCMA & OTHERS (1999) 11 BLLR 1147 (LC); SA EAGLE INSURANCE LTD V SEREBO 1985 (4) SA 50 (W); PROMEDIA DRUKKERS & UITGEWERS (EDMS) BPK V KAIMOWITZ 1996 (4) SA 411 (C); CHETTY V LAW SOCIETY OF TRANSVAAL 1985 (2) SA 756 (A)

15. The court exercises its discretionary powers when determining whether to grant a rescission or not. The court's discretionary power is influenced by the considerations of fairness and justice having due regard to all the facts and circumstances of that particular case. The onus of showing the existence of sufficient cause is on the applicant in each case, and he has to satisfy the court, inter alia, that there was some reasonable satisfactory explanation why the judgment was allowed to be granted by default, see DE WET & OTHERS V WESTERN BANK LTD 1979 (2) SA 1031 (A) at 1042 F- 1043 A.

EXPLANATION FOR ABSENCE

16. The applicant contends that his absence in court on the 27th August 2001 was caused solely by the negligence of his attorney and he considers it to be a sufficient explanation in the circumstances.
17. Our courts have pronounced on numerous occasions that the negligence of the applicant's attorney or representative per se is not sufficient to discharge the onus resting on the applicant to show good cause, see KOLOBE and ELECTROCOM P cases supra. See also SALOOJEE & ANOTHER NNO V MINISTER OF COMMUNITY DEVELOPMENT 1965 (2) SA 135 at 140 and ATHMARAM V SINGH 1989 (3) SA (D).
18. In circumstances where the applicant's representative is said to be negligent, the applicant must demonstrate the reasonable steps that he has taken to ensure that the default does not occur, and these would depend upon the circumstances of each case. A jurisprudence has evolved from the abovementioned cases that the applicant:
 - a. Should not show disinterest in the conduct of his own case;
 - b. Must maintain close contact with his attorneys;
 - c. Must have no reason to distrust his attorneys' competence to look after his affairs.

These factors weigh more heavily on an applicant or plaintiff in a matter.

19. Other than the letter which the applicant addressed to his attorney on the 18th April 2001 there is no other elaborate conduct displayed by the applicant to show that he had an interest in the conduct of his case and that he maintained close contact with his attorney. He merely avers that he made several attempts to contact his attorney without success, a mere ipse dixit. It seems to me that the applicant had a reason to distrust his attorneys'

competence to look after his affairs as he avers that he had felt that his attorney was dragging her heels in this matter. This state of affairs must have required the applicant to be more proactive in contacting his attorney or otherwise to withdraw his mandate from her and seek the services of a competent attorney. The applicant has failed to mention the steps that he took in the conduct of his case between April 2001 and September 2001. Surprising he seemed not to find much difficulty in communicating with his attorney after the 3rd September 2001.

PROSPECTS OF SUCCESS

20. The applicant contend that he was summarily dismissed by the respondent without any proper procedure being followed with effect from the 1st October 2001 as per letter by the respondent dated 1st October 2001. He further contends that subsequent to his dismissal “trumped up” disciplinary charges were brought against him by the respondent in an attempt to legitimise his unfair dismissal. He was found guilty in a disciplinary enquiry and dismissed for misconduct on the 10th December 1999 in his absence. He did not attend the said disciplinary as he was, in his view, already dismissed on the 1st October 1999.
21. The respondent, however, contends that it merely gave the applicant a three months’ notice, in terms of his contract of employment, to terminated his services with effect from 1st October 1999 expiring on the 31st December 1999. It further informed the applicant that his services were not needed by the respondent and that he was not to attend work. The notice was delivered to the applicant on the 5th October 1999.
22. It seems to me that the crux of the matter in the main application hinges on the interpretation of the contents of the aforesaid letter dated 1st October 1999.

The letter reads as follows:

“RE: NOTICE OF TERMINATION OF SERVICE

I refer to the verbal discussion between yourself and Stephan Nieuwoudt regarding the termination of your services.

With reference to your service agreement with “Megacor Holdings Limited” signed on 11th November 1998, as referred to by yourself, we herewith give you written notice of the termination of your services effective the 1st October 1999.

The reasons for your termination have been explained to you.

The details of the benefits due to you will be discussed in due course.

Kind Regards

Signed

S, NIEUWOUDT

10 October 1999

Signed

L. FULLER

10 October 1999”

23. This letter was received and signed by the applicant on the 5th October 1999 at 7H30.

24. The relevant clause in the applicant’s service agreement signed by

the applicant on the 11th November 1998 reads:

“TERMINATION OF EMPLOYMENT

This agreement may be terminated by either party on three calendar months written notice on the first working day of any month.

On termination of service for whatever reason, you will return to your immediate superior all company property issued to you whilst in service of Megafurn. All documents in respect of the company systems, plans, clients, lists etc must also be returned to the company.”

25. On the 25th October 1999 the respondent wrote the following letter to the applicant:

“RE: TERMINATION OF SERVICE

As per our telephonic discussion I confirm the following:

- ❑ You will not have to render your services to the company at this stage.
- ❑ Due to an investigation in claims etc. made by you retrenchment negotiations have been suspended.
- ❑ As soon as the investigation is completed I will refer back as to the course of action that the company will be taking.

Kind Regards

Signed

S. NIEUWOUDT

26. I hasten to mention that only on receipt of this letter, the applicant lodged a dispute of his unfair retrenchment on the 26th October

1999 to the CCMA referring to the 1st October 1999 as the date of dispute.

27. It is common cause that the applicant received his normal salary for October and November 1999.

28. Paragraphs 17 and 18 of the Applicant's Statement of case in the main application read as follows:

"17 On or about the 6th October 1999 the Applicant discussed the issue of the notice period with Nieuwoudt, who confirmed that he did not have to work his notice period and that he would have an answer on the settlement negotiations on Monday the 11th October 1999.

18 By the 15th October 1999, the Applicant had heard nothing further from the respondent and once again contacted Nieuwoudt who advised him that he could not make an offer to the applicant, as the applicant was under investigation."

29. The applicant was subsequently summoned to attend a disciplinary enquiry on the 24th November 1999 to face charges of:

- a. Dishonesty during the course of employment claiming more than paying on insurance premium.
- b. Dishonesty during course of employment claiming tracker device for car under false pretences.

30. The applicant did not attend the said disciplinary enquiry and he was found guilty and dismissed on the 10th December 1999.

31. In my view all the above facts, in the applicant's own case, demonstrate that the applicant's services were not terminated by

respondent forthwith on the 1st October 1999 but he was given a three months notice, in terms of his contract of employment, to terminate his services on the expiry of the said three months period with effect from the 1st October 1999. It is clear that up to at least the 16th October 1999 the applicant had not considered himself to have been dismissed. He considered himself as the employee of the respondent who was willing to negotiate settlement proposals by the respondent for the termination of his services in due course. It is trite that an employee who is serving a notice period remains an employee and is subject to be disciplined by the employer.

32. In my view the applicant was still an employee of the respondent until he was dismissed on the 10th December 1999. In view of the foregoing the applicant has not shown that he has a *prima facie* good case against the respondent.

33. In view of my above findings I make the following order:

1. The application is dismissed
2. The applicant is ordered to pay costs

—

ZILWA A J

DATE OF JUDGMENT : 28 MAY 2003

FOR APPLICANT : A. N. SNIDER instructed by
BRIAN KAHN INC.

FOR RESPONDENT : D. WOODHOUSE of
PERROT, VAN NIEKERK &
WOODHOUSE INC.