

**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT JOHANNESBURG)**

**CASE NO: JR 14/08**

In the matter between:

**NATIONAL PROSECUTORIAL AUTHORITY**

Applicant

and

**MUZOMUHELE P XABA**

Respondent

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**JUDGMENT**

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Nyman A J

1. The applicant seeks a rescission of the default judgment that was ordered in its absence under case number JR 14/08 on 4 February 2010. The two grounds on which the relief is based are that the judgment was erroneously sought and/or granted, and that it is capable of being rescinded on the basis of good cause.
2. In the affidavit in support of the rescission application, the applicant explains that the reason for its non-appearance is because the State Attorney did not receive the notice of set down since the facsimile number to which the notice was sent, was not in proper working order. In support of the explanation, the applicant relies on an internal email that points out the problem with the photostat machine (also

used to fax documents) and an affidavit deposed to by a State Attorney in different proceedings, wherein the Registrar was advised to utilise a specific facsimile number, different from the one to which the notice of set down was sent.

3. The facsimile transmission report shows that the notice of set down was successfully sent to the State Attorney's office, but which transmission was preceded by a number of unsuccessful transmission attempts, as recorded in the error messages.
4. Rescissions of judgments are regulated by Rule 16 A of the Rules of the Labour Court. Rule 16A(1)(a)(i) empowers a court to rescind a judgment erroneously sought or granted.
5. The relevant provision in respect of the ground of good cause is rule 16A(1)(b) which stipulates that a party who is affected by a judgment granted in its absence, may make an application for rescission of judgment. Subsection 16A(2)(b) provides that a court may set aside a judgment on good cause.
6. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) the Court set out the two essential elements contained in the term "sufficient cause" (or "good cause") for rescission of a judgment by default:

5.1 The party seeking relief must present a reasonable and acceptable explanation for his or her default; and

5.2 On the merits, such party has a *bona fide* defence which, *prima facie*, carries some prospect of success.

7. The Court explains the rationale for requiring both requirements to be complied with in the following *dictum* at 765D–E:

‘It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.’

8. In *Feuilherade & others v Mthimkhulu; Enforce Security Group (Pty) Ltd & others v Mthimkhulu* [2003] 3 BLLR 213 (LAC) the Court relied on the above *dictum* to dismiss the appellant’s explanation of its default on the grounds that it was not “credible or acceptable”.
9. Even though the transmission report shows that the facsimile was sent to the State Attorney’s office, on the evidence I find that the notice was not received by the State Attorney. I therefore accept the explanation given by the applicant’s attorney in her affidavit. It is my viewpoint that she truly did not receive the notice of set down and this is the reason why the applicant failed to make an appearance at the hearing of the matter.

10. On an overview of the evidence as a whole, it is improbable that the applicant would deliberately have failed to make an appearance given its diligent opposition to the review application. The applicant has complied with all the necessary procedural steps in its defence, including the filing of heads of argument. The applicant's intention to oppose the review proceedings is also illustrated in the email sent by the applicant's Employee Relations Manager to the State Attorney wherein she requested a progress report in the proceedings. In consequence, I find that it is improbable that the applicant would have wilfully failed to attend the hearing of the matter.

11. I am of the opinion that the conduct of the State Attorney does not contain the element of wilfulness described in *Maujean T/A Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at p803 as :

‘deliberateness in the sense of knowledge of the action and of its consequences, ie its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.’

12. In respect of the merits of the case, on consideration of the record of the arbitration proceedings and the papers in the review proceedings, I find that the applicant has a *bona fide* defence which has good prospects of success.

13. In the circumstances, I find that it is not necessary to decide whether judgment was erroneously granted in terms of rule 16A(1)(a)(i). (See: *Siza Electrical Construction v Guma & Others* [1999] 4 BLLR 387 (LC))

14. There is no reason in law or in fairness why the applicant should not bear the costs of the rescission application given that the default cannot be attributed to the respondent.

15. I therefore make the following order:

- a) The judgment granted by default against the applicant under case number JR 14/08 is rescinded and set aside.
- b) The costs of the application for rescission are to be paid by the applicant.

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Nyman A J

Date of Hearing: 30 September 2010

Date of Judgment:

**Appearances:**

Appearance for the applicant: A Macau

Instructed by: State Attorney

Appearance for the respondent: E S Makinta

Instructed by: E S Makinta Attorneys