REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: J 1915/09

In the matter between:

SOUTH AFRICAN REVENUE SERVICES **Applicant**

and

CHARLOTTE CONNIE MHLONGO **Respondent**

In re

CHARLOTTE CONNIE MHLONGO **Applicant**

(Respondent in rescission application)

and

SOUTH AFRICAN REVENUE SERVICES **Respondent**

(Applicant in rescission application)

Heard: **28 January 2011**

Delivered: **02 February 2012**

Summary: Application for rescission of a default judgment: question to be decided was whether Judgment "erroneously" granted and the extent to which the respondent could establish prospects of success.

JUDGMENT

GUSH J

1] This is an application by the respondent for the rescission of a judgment granted in favour of the applicant on 9 June 2010. The parties are referred to as they appear in the main application.

2] On 14 October 2009, the applicant in this matter filed an application with this Court in which application she sought, *inter alia*, to have her suspension and dismissal declared unlawful and the restoration of the payment of her salary and benefits. The application was opposed by the respondent. After the close of pleadings, the matter was duly enrolled on the opposed roll to be heard.

3] On date on which the matter was enrolled, 9 June 2010, there was no appearance for the respondent despite the notice of set down having been apparently properly served on the respondent's attorneys by fax on the fax number appearing on the pleadings filed by the respondent's attorneys as being their fax number. The matter proceeded in absence of the respondent and the court gave judgment in favour of the applicant and granted an order in terms of prayers (a), (b), (c), (d) and (e) of the applicant's notice of motion.

4] The respondent's attorneys thereafter filed this application for rescission of the judgment on the grounds that they had not received the notice of set down and therefore were not aware that the matter had been enrolled for hearing on 9 June 2010 and accordingly were not present when the matter was heard.

5] In the application the respondent explained that the reason why the respondent had not appeared was due to the respondent's attorneys incorrectly recording their fax number as 0866736040 (as opposed to the correct number which is 0866736940) when

filing the answering affidavit. Having incorrectly cited their fax number at that stage of the pleadings, the respondent's attorneys proceeded to repeatedly reflect the incorrect fax number on all subsequent pleadings.

6] In the rescission application which was filed under the same case number and filed in the same file as the main application the respondent's attorneys gave yet another fax number as the fax number at which service could be effected.

7] The applicant opposed the application for rescission and after the pleadings in the rescission application had closed the application was enrolled to be heard on 18 August 2011 on the opposed roll.

8] On 18 August 2011 the matter came before me and yet again neither the respondent nor their attorneys were present when the matter was called. The matter stood down and applicant's attorneys having made enquiries from the respondent's attorneys as to the reason for their absence ascertained that the respondent's attorneys had not received the notice of set down for 18 August as it had been had been faxed to the same incorrect fax number as had the notice of set down in the main application.

9] In the circumstances, I adjourned the matter *sine die* and ordered that the respondent's attorneys file an affidavit explaining why they had not taken steps to ensure that the correct fax number upon which they wished to rely was specifically brought to the attention of the registrar.

10] The respondent's attorneys duly filed an affidavit explaining their failure to appear. The explanation was that when the application for rescission was filed the respondent's attorneys had under the signature on the notice of motion recorded another fax number viz 0866487795 and when the directive calling on the parties to file heads of argument had been sent to them this fax number had been used to transmit the directive. Accordingly they assumed

that the notice of set down would also be faxed to this number. It is startling that apart from this assumption the respondent's attorneys took no further steps whatsoever to ensure that the registrar's attention was specifically drawn to the fact that an incorrect fax had been provided initially and what the correct fax number was, particularly in light of the different fax numbers provided in the main and rescission application and the fact that it was the respondent's duty to index and paginate the court file in preparation for the rescission application.

11] The matter was eventually enrolled on the opposed roll on 14 September 2011 on which date both parties were present.

12] Section 165 of the Labour Relations Act (LRA) [1] deals with the power of the Labour Court to vary or rescind orders. It provides that:

'The Labour Court, acting of 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; ...'

13] Rule 16 A of the rules of the Labour Court sets out that:

'(1) The court may, in addition to any other powers it may have-

(a) of its own motion or on application of any party affected, rescind or vary any order or judgment-

(i) erroneously sought or erroneously granted in the absence of any party affected by it;

(ii) ...

(iii) ...; or

b) on application of any party affected, rescind any order or judgment granted in the absence of that party.'

1 Act 66 of 1995.

14] In the matter of *Griekwaland Wes Koöperatief v Sheriff, Hartswater and Others: In re Sheriff, Hartswater and Others v Monanda Landbou Dienste,*[2] the court held that:

> 'The requirements for filing an application under any of these rules are different. In terms of rule 16 A(1)(b) read with rule 16A(2)(b), an application to rescind or vary an order or a judgment must be brought within 15 days. The 15-day requirement does not apply to both rule 16A(1)(a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others* (2006) 27 ILJ 2356 (LC). The other difference between the two rules is that, whilst rule 16A(1)(b) requires an applicant to provide a reasonable explanation for his or her default, this requirement does not apply to an application in terms of rule 16 A(1)(a)'.[3]

In *Sa Democratic Teachers Union v Commission For Conciliation, Mediation & Arbitration and Others,*[4] this Court quoted with approval what was held in *Sizabantu Electrical Construction v Guma and Others*[5] viz:

> 'In short, good cause is not required to be shown if a judgment or order was **erroneously** granted in the absence of a party'.[6] (My emphasis)

15] The first question therefore to be decided is whether the order was granted erroneously. If the circumstances and facts show that the order was granted erroneously the respondent need not to establish that it has good prospects of succeeding in its defence of the applicant's application, and the order must simply be rescinded.[7] If however the order was not erroneously granted the respondent is obliged to establish that it has good prospects of succeeding in its defence should the order be rescinded.

16] In its founding affidavit, the respondent conceded that there was a duty on it to show that it has good prospects of successfully opposing the applicant's application should rescission of the order be granted. This averment was repeated in the respondent's filed

2 (2010) 31 ILJ 632 (LC).
3 *Griekwaland Wes Koöperatief* at page 635 para 9.
4 (2007) 28 ILJ 1124 (LC) at para 17.
5 (1999) 20 ILJ 673 (LC); [1999] 4 BLLR 387 (LC).
6 *Sizabantu Electrical Construction* at para 17 page 1129.
7 See Erasmus et al *Superior Court Practice* (1994, Juta) at B1-308A.

heads of argument. When the matter was argued counsel for the respondent abandoned this averment and argued that the order was erroneously made and that accordingly the respondent was not required to show good prospects of success in its opposition to the applicant's application.

17] Although this change of heart occurred late in the proceedings and the respondent's counsel had not seen fit to either file an amended affidavit or fresh heads of argument, it is necessary, given the nature of an application for rescission, to consider whether the order granted in the absence of the respondent was granted erroneously. If not, then, the respondent is required to show that it has good prospects of succeeding in its defence in the main application should the order be rescinded. Whether it was granted erroneously depends on the facts and in this matter whether the court was procedurally entitled to grant an order in favour of the applicant in the absence of the respondent..

18] Erasmus et al in *Superior Court Practice*[8] when dealing with the equivalent rule in the High Court viz: Rule 42 "Variation and rescission of orders" say the following:

> 'The court does not, however, have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs *(a)–(c)* of the subrule does not exist.
>
> The rule should be construed to mean that once one of the grounds are established for example that the judgment was erroneously granted in the absence of a party affected thereby, the rescission of the judgment should be granted'.[9]

And where the order was granted in the absence of a party:

> 'An order or judgment is erroneously granted if there was an irregularity in the proceedings ... Rescission was refused where the applicant had failed to notify the registrar of companies of a change of address and a summons had been served in accordance with the rules at the office

8 Supra.
9 Eramus et al Superior Court Practice at B1-306G.

properly notified to the registrar as the applicant's registered head office. The courts have also consistently refused rescission where there was no Rule 42 irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney'.[10] [Footnote omitted]

19] The respondent's counsel in argument referred to the case of *Topol and Others v LS Group Management Services (Pty) Ltd*[11] as authority for the proposition that if the court was unaware of the fact that the respondent had not received the notice of set down it followed that the granting of the order was erroneous and that accordingly it was not necessary to show prospects of success and that the rescission should simply be granted.

20] In the matter of *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd,*[12] the Supreme Court of Appeal dealt with the decision in *Topol* and held the following:

' In *Nyingwa* at 510F - G White J relying on *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C) said:

> 'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'

In *Topol,* an application was dismissed in the absence of the applicants on the basis that the respondent had given notice to the applicants of the setting down of the application and that the applicants despite their knowledge of the hearing were in default. The application for rescission in terms of Rule 42(1)(a) was successful. White J, in *Nyingwa*, understood the factual position in *Topol* to have been that notice of the

10 Eramus et al Superior Court Practice at B1 308A and B1-309.
11 1988 (1) SA 639 (W).
12 2007 (6) SA 87 (SCA).

set down of the application had not been given to the applicants and that the dismissal of the initial application was for that reason held to have been erroneous. If that had indeed been the factual position in *Topol*, the respondent in that matter would procedurally not have been entitled to a judgment in its favour, the granting of the judgment would for that reason have been erroneous and there could have been no objection in the rescission application to evidence to the effect that proper notice of set down had in fact not been given.

Frenkel was a case in which a default judgment was rescinded on the basis that it had been granted under a misapprehension. The misapprehension would seem to have been that the legal representatives wrongly assumed that the capital sum claimed had not been paid. It was, therefore, not a case of a judgment having been granted erroneously but a case of a judgment having been sought erroneously. In *Holmes,* the rescission of a default judgment was not granted on the basis of the judgment having been granted erroneously. Although not altogether clear it would appear that White J misunderstood the factual position in *Topol*. It seems to me that notice of set down had been given in that case but that the Judge who granted default judgment was held to have granted the judgment erroneously by reason of the subsequently disclosed fact that the defaulting party had not been in wilful default. Erasmus J had shortly before the judgment by White J in *Nyingwa* differed from the finding in *Topol* and said that in light of the fact that the *Topol* matter had been properly enrolled and that all the Rules of Court had been complied with, the plaintiff was quite within its rights to press for judgment in terms of the Rules (see *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 472D). *Bakoven* Ltd contended that judgment had erroneously been granted against it in that although the matter had been properly set down for trial it did not have knowledge of such set down. Erasmus J said:

> 'An order or judgment is "erroneously granted" when the Court commits an "error" in the sense of a "mistake in a matter of law appearing on the proceedings of a Court of record'' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was "erroneously granted" is, like a Court of appeal, confined to the record of proceedings.'

He concluded that the judgment granted against Bakoven Ltd in its absence could not be said to have been erroneously granted 'in the sense contemplated in Rule 42(1)(a), as applicant cannot point to any error or irregularity appearing from the record of proceedings'.[13] [Footnote omitted]

21] The Court in *Lodhi* concluded:

[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in Stander. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order.[14]

22] The question as to whether the order in this matter was made erroneously therefore must be: was the court on the papers before it justified in granting the order in the absence of the respondent or was there a procedural error which led to the order being granted? It is relevant in that regard that the respondent's failure to attend was caused by its own negligence in providing an incorrect fax number and thereafter perpetuating the mistake in the subsequent documents filed with the court. There was clearly no error in the procedure or mistake which resulted in the court granting the order and I am accordingly not persuaded that the court in the circumstances granted the order erroneously.

13 *Lodhi 2 Properties Investments CC at* pages 92 – 93 paras 18 – 21.
14 *Lodhi 2 Properties Investments CC* at page 94 para 25.

23] The application for rescission therefore must be considered in accordance with the provisions of Rule 16 A(1)(b) of the Labour Court Rules and accordingly it is necessary in deciding whether to grant rescission to consider the respondent prospects of successfully defending the applicant's claim.

24] In her notice of motion in the main application, the applicant sought an order:

'(a) declaring the decision of the respondent to suspend and subsequently dismiss the applicant on 19 May 2009 unlawful;

b) declaring the failure by the respondent to follow its disciplinary code and procedure, a breach of the terms of the employment contract between the applicant and the respondent;

c) the respondent be ordered to allow the applicant to return to work;

d) the respondent be ordered to pay the applicant her salary and all benefits from 19 May 2009 to the date on which her salary and benefits are restored.

e) The cost of this application.'

25] The applicant was employed by the respondent as manager: legislative interpretation on 1 February 2005 until her dismissal on 19 May 2009. The applicant was dismissed for failing to report for duty.

26] The circumstances giving rise to the applicant's dismissal were as follows:

26.1 On 31 March whilst at work the applicant was arrested by a member of the South African Police Services who was accompanied by an employee of the respondent a Mr. Seshoka. Seshoka advised the applicant that she was suspended from her employment with immediate effect.

26.2 The applicant provided the respondent with medical certificates certifying her unfit for work for the periods 3 – 8 April 2009 and 8-17 April 2009.

26.3 The applicant consulted her attorneys on 2 April 2009 who in turn wrote to the respondent on 19 April 2009, recording firstly that Seshoka had advised the applicant of her suspension and had confiscated her access card, and secondly that the applicant had not received written confirmation of her suspension. The letter concluded by demanding written confirmation of the suspension. The respondent received the letter on 20 April 2009 but did not respond.

26.4 The respondent avers that it sent a letter to the applicant on 8 May 2009, which the applicant denies having received. This letter read:

> 'It has come to the attention of management of this office that you have been absent from your place of work without permission and/or approved leave and/or having communicated to your team leader/manager since 20 April 2009 to date.
>
> You are hereby requested to immediately report for duty, or to inform your team leader/manager of your whereabouts and the reason/s thereof as is required from you in terms of the SARS RS Policy, *Timely Reporting of Unexpected Absences.*
>
> I wish to inform you that should you fail to report for duty or inform your team leader/manager of your whereabouts in five working days from the first day of your absence, SARS will immediately stop your remuneration and will terminate your employment contract with immediate effect.
>
> You are hereby instructed to report for duty or to contact your team leader/manager immediately." (sic)

26.5 On 19 May 2009, the respondent addressed a further letter to the applicant this time recording:

> 'You have failed to report for duty or to inform your team

leader/manager of your whereabouts and the reason/s thereof within the prescribed 5 working days from the first day of your absence as is required from you in terms of the SARS Policy, *Timely Reporting of Unexpected Absences.*

I wish to inform you that you have made yourself guilty of abscondment and/or desertion and/or services will therefore be terminated with immediate effect.

You have the right to appeal against the termination of service within 10 working days from the date of receipt of this letter following the appeal procedure as provided for in terms of the Disciplinary Code and Procedures"

26.6 On 15 June, the attorneys again wrote to the respondent recording that they had not received a reply to their previous letter and that the applicant had not received her salary for June 2009 and seeking confirmation that it would be paid.

26.7 On 19 June 2009, the applicant's attorneys received a fax from the respondent dated 18 December 2008 referring to the letter of 15 June 2009 and advising the attorneys that the applicant had been dismissed on 19 May 2009 and that accordingly she would not be paid her salary.

27] In the answering and supporting affidavits,[15] the respondent confirms not only that it had been unsuccessful in contacting the applicant it had not managed to deliver the letters dated 8 May 2009 and 19 May 2009 to the applicant. By their own admission the respondent knew why the applicant was not at work (she believed that she had been suspended); and more importantly how the respondent could contact her. In fact the letter addressed to the respondent by the applicants attorneys specifically asked for a response to their letter which the respondent acknowledges having received on 20 April 2009.

28] In addition, despite the contents of the letters the purported

15 See the affidavit by Kgapola.

reason for attempting to contact the respondent; the deponent to the affidavit states:

'the respondent made several unsuccessful attempts to contact the applicant with a view of having her return to work. The letters sent to the applicant by the respondent on 8 May 2009 and 19 May 2009, calling upon the applicant return to work are annexed... The two letters were written include in compliance with the respondents internal HR Policy: Timely Reporting of Unexpected Absences.

The respondent's attempts to contact the applicant and requests that she return to work when made with the view of making arrangements for the applicant to attend a proper disciplinary hearing in line with the respondent's disciplinary code and procedure"[16]

29] The deponent to the answering affidavit repeated the above averment and added:

> 'when it became obvious that the applicant was not prepared to return to work she was duly dismissed on 19 May 2009'[17]

30] The applicant in her founding affidavit averred that the respondent's "Disciplinary Code and Procedure" and the "Policy on Timely Reporting of Unexpected Absences" were incorporated into her contract and formed part thereof. This was not denied by the respondent in their answering affidavit. The "Disciplinary Code and Procedure" is recorded in a collective agreement.

31] The "Disciplinary Code and Procedure" provides *inter alia* that:

'10.2 No employee may be dismissed, demoted or suspended without pay for misconduct, without being granted a formal disciplinary hearing as contemplated in this disciplinary code and procedure unless the holding of a disciplinary hearing is made impossible by the employee failing to attend the hearing for no valid reason, or the employee indicating clearly and unequivocally that he/she is not prepared to

16 Answering affidavit paras 32 and 33 page 90 of the indexed pleadings in the main application.
17 Answering affidavit paras 38.2 and 38.3 page 92 of the indexed pleadings in the main application.

participate in the disciplinary hearing.'

32] The respondent recorded that it had terminated the applicant's employment on the grounds that she had absconded and had relied on the provisions of the respondent's Policy on Timely Reporting of Unexpected Absences viz.:

'2.4.5 if an employee fails to advise the team leader or direct manager of his or her absence, and is absent for three successive workdays, the team leader or direct manager shall send a communication by registered mail to the employee's last known address or via other practical means e.g. hand delivered notification, requesting the employee to return to work, simultaneously notifying the employee that failure to do so will result in dismissal.

2.4.6 should an employee the absent from work for five consecutive workdays without communicating his or her absence and the reasons thereof as described in this policy the employee will be regarded as having absconded and his or her employment must summarily be terminated' (sic)

33] It is abundantly clear from the respondent's papers that the it did not follow its own procedures despite its somewhat clumsy and contradictory attempt to explain in its affidavits that the dismissal of the applicant was in accordance with the respondent's own policies and procedures. This is quite apart from the respondents failure to address the following in its affidavits:

33.1 Why having received the letter from the applicant's attorney on 19 April explaining her absence it was ignored it to the extent of not bothering to reply;

33.2 Why having received the letter from the applicant's attorneys the respondent it did attempt to contact the applicant via her attorneys if it was endeavouring to contact the applicant to arrange a disciplinary enquiry; and

33.3 Why if its intention in attempting to contact the applicant as stated

in the affidavits was to contact the applicant to arrange a disciplinary enquiry the letters addressed to the applicant do no more than advise the applicant that her absence constitutes "abscondment" and that unless she contacts her team leader/manager she will be dismissed.

34] The respondent's own disciplinary code and procedure clearly contemplates the holding of a disciplinary enquiry prior to dismissal unless it holding such an enquiry is made impossible by the employee. The respondent states quite categorically that attempts to contact the applicant and the requests for her to return to work were "with a view of making arrangements for the applicant to attend a proper disciplinary hearing in line with [the respondents] disciplinary code and procedure. If this was so the respondent offers no explanation for its failure to comply with its own procedure.

35] The respondent, aware of the letter from the applicant's attorney and of the fact that it had not successfully delivered its letters of 8 and 19 May 2009 or communicated its intentions to the applicant simply proceeded to dismiss the applicant.

36] Given the facts and the circumstances of this matter, I am not persuaded that the respondent has succeeded in establishing that it has any prospects at all of successfully opposing the applicant's application should rescission of the judgment by this Court be granted.

37] As regards costs and taking into account the state of the file and the circumstances which lead to the delays in hearing this application, I am satisfied that it is just and equitable that the respondent pays the applicant's costs on an attorney and client scale. The file was replete with unnecessarily duplicated documents. For example the respondent saw fit to attach the entire main application to its rescission application despite it being aware of the fact that all these documents were in the file.

38] I accordingly make the following order:

The respondent's application for the rescission of the judgment granted in favour of the applicant on 9 June 2010 is refused with costs on an attorney and client scale.

_____

D H Gush
Judge

APPEARANCES

APPLICANT:	Adv Motaung
	Instructed by: Mpoyana Ledwaba Inc.
THIRD RESPONDENT:	Adv Sibuyi
	Instructed by: Eversheds