IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESGURG

NOT REPORTABLE

CASE NO: JR 410 / 05

In the matter between

GENERAL WORKERS UNION OF SA **1st Applicant**

N NDLOVU &10 OTHERS **2nd to Further Applicants**

And

RAMADE PLASTICS (PTY) Ltd **Respondent**

Judgment

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant seeks an order to rescind the order made by Francis J on 7th August 2006. In that order the Learned Judge dismissed the applicants' claim relating to the alleged unfair dismissal for operational reasons because there was no appearance on behalf of the applicants' on that day.

[2] The respondent has opposed the application and has asked for its dismissal with cost *de boni de propriis*.

Background facts

[3] The brief background facts which are common cause are as follows:

3.1 On the 19th February 2005 the individual employees of the respondent were given notices informing them that the respondent intended entering retrenchment consultations.

3.2 Consultation meetings took place on the 10th, 14th and 23rd February 2005. The retrenchment arose from the restructuring of the shift patterns of the respondent.

3.3 The applicants' were made aware of the respondents' financial constrains at the meeting of 10th February 2005.

3.4 The operational requirements and restructuring required inter alia that the shift pattern that existed before the consultation be changed.

3.5 The first applicant and second to the eleventh applicants' put forward their own proposals concerning the change in the shift pattern which the applicants' believed, if implemented, would have negated the need to retrench any employees.

3.6 Five of the second to further applicants' were retrenched on the 24th February 2005, namely Julia Luruli, Prudence Manyama, Sheron Mudau and Frank Chauke.

3.7 The remaining second to further applicants' were retrenched on the 28th February 2005.

3.8 Other employees were re-instated on the 28th July 2005."

[4] The applicant's contend that the termination of their employment was both substantively and procedurally unfair. The first applicant specifically contends that it never at any stage whatsoever agreed to the retrenchment process as alleged by the respondent. The first applicant further contends that the respondent terminated the contracts of employment of its members without consultation in relation to issues like the selection criteria, severance pay and other related matters that could have been considered in order to ameliorate the hardships of retrenchment.

Principles governing rescission

[5] In terms of section 165 of the LRA, this court may acting on its own accord or on application by any of the parties vary or rescind an order or judgment erroneously sought or erroneously granted in the absence of the party affected by such an order or judgment. An application to rescind may be brought either in terms of rule 16A (1) (a), or rule 16A (1) (b) or the common law.

[6] The requirements for filling an application under any of these rules are different. In terms of rule 16A (1) (b) read with rule 16A (2) (b), an application to rescind or vary an order or a judgment must be brought

within 15 (fifteen) days. The 15 (fifteen) days requirement does not apply to both rule 16 (1) (a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others (2006) 27 ILJ 23356 (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 16A (1) (a).

[7] In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), the court at: 765A-C held that

> *"The term sufficient cause (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairns Executors v Gaarn 1912 AD 181 at 186 per Innes JA). But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default is:*
>
> *(i) 'that they party seeking relief must present a reasonable and acceptable explanation for his default; and*
>
> *(ii) that on the merits such party has bona fide defense which, prima facie, carries some prospects of success."*

The Learned Judge went further to say:

> "*It is not sufficient if only one of these requirements is met; for obvious reason a party showing no prospects on the merits will fail*

in an application for rescission of a default judgment against him or her no matter how reasonable and convincing the explanation of his or her explanation of the default. And orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his or her default other than his disdain of the Rules was never permitted to have judgment against him or her rescinded on the ground that he or she had reasonable prospects of success on the merits."

Applicant reasons for rescission.

[8] It is common cause that the notice of set down was faxed to the applicant's attorney of record on the 24th May 2006. The applicants do not deny having received the notice of set down. The explanation for the non appearance on the date of the hearing is set out in the founding affidavit to the rescission application, deposed to by the applicant's attorney of record, Mr. David Cartwright. He explains as follows:

> *4. This matter set down on the 7th August 2006. I did not attend on that day and the matter was dismissed with costs.*
>
> *5. Since receiving this information from the Respondents attorneys I have initiated an investigation to establish why I did not receive the notice of set down.*

6. *I uplifted the Court file and the notice of set down in the file indicates that the set down notice was faxed to my office fax on the 24th May 2006.*
7. *At the time I was in and out of the office as my wife gave birth to my son on the 17th May 2005 and I was spending a significant portion of my time assisting her with the domestic chores associated with caring for a new born child. I was also generally spent more time at home in order to baby- sit our first born who is two years old and exceedingly energetic.*
8. *The situation in relation to the above only returned to an approximate of normalcy at the end of the month once my wife had sufficient recovered from the birth and was able to manage the two children on her own.*
9. *I have until the end of April operated as a one man firm and have not had the resources to employ a full time secretary. In April I employed a young woman straight from school who although not trained as a secretary and with no experience as such had the potential to learn and in time to become competent at the kind of secretarial and administrative by someone in this position.*

10. *At the time the set down notice was sent she was still very new to the position and unaware of the importance of such a document.*
11. *She had also received brief training on how the office and the filling system was managed and organized.*
12. *After conducting an intensive search for the set down notice I located it in general correspondence file.*
13. *My assistant admitted that although she had no specific recollection of the filling notice in that file, it was likely that she had done so as she recalled that at one stage, before she was properly inducted into how the filling system worked, she had developed a practice of placing Court documents in the general correspondence file."*

Evaluation

[9] In my view the explanation proffered by the applicants' is wholly unsatisfactory, unreasonable and cannot remotely serve as good cause. In this respect I agree with the counsel for the respondent that it was negligent for the applicants' attorney to entrust important matters of the client with an inexperienced person with no proper supervision. The case of the applicant is made worse by the fact that prior to the date of the hearing; the respondent addressed several letters to the applicants' attorneys about discovery of the documents for the purposes of trial.

This should have made him aware that the date of the trial was nearing and ought reasonably to have checked with his secretary about the trial date.

[10] The applicant has also in my view failed to make a case showing the existence of prospects of success as and when the matter was to finally be considered on its merits. In seeking to show prospects of success the applicant based its argument on a dispute about the facts concerning reinstatement or re-employment.

[11] I again agree with the respondent that there is no dispute of facts in this matter. The dispute which is purported to exist comes as a result of the applicants' own accuracy in not disclosing at the pre-trial that they were reinstated and later changing to say they were re-employed.

[12] As concerning the issue of costs the respondent argued that the costs *de bonis propriis* should be awarded. The counsel for the applicant argued that the cost *de bonis propriis* would not be appropriate because what had happened was an administrative problem which is systematic and procedural. It was further argued on behalf of the applicant that what happened was a human mistake between the attorney and his secretary, which mistake the attorney has admitted.

[13] According to Van Winsen, Cilliers and Loots, The Civil Practice of the Supreme Court of South Africa (4th ed) page 728, an award of costs *de bonis propriis* is made only when a person acts or litigates in a

representative capacity. In general costs *de bonis propriis* will be awarded where it is shown that there is lack of *bona fide*, negligent or unreasonable action, or improper conduct on the part of the person who litigates on behalf of another.

[14] It has already been shown earlier that the applicants' attorney acted negligently in the manner in which he handled this matter. There is therefore no reason why the respondents' application in this regard should not succeed.

[15] In my view, based on the above analysis, the applicants' application to have the order dismissing their claim rescinded stand to fail. It is also my view that the circumstances of this case requires that the conclusion reached should serve as a message to other attorneys that their negligent conduct and disregard of the court Rules will not be tolerated.

[16] In the premises the following order is made:

1. The application to rescind the order made by the court on 7th August 2006 is dismissed.
2. The applicant's attorney is to pay the costs of the responded *de bonis propriis*.

Molahlehi J

Date of Hearing: 7th August 2006

Date of Judgment: 11th February 2010

Appearances

For the Applicant: Adv R.G Maxwell

Instructed by: David Cartwright Attorneys

For the Respondent: Adv S Bekker

Instructed by: Geyser Attorneys