IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J347/97

In the matter between:

CONSTRUCTION AND ALLIED WORKERS UNION FIRST APPLICANT
LOVELY MPHILA SECOND APPLICANT

and

FEDERALE STENE (1991) (PTY) LIMITED RESPONDENT

JUDGMENT

1] This is an application for the rescission of a judgment of this Court granted against the applicants by default. The first and second applicants are the Construction and Allied Workers Union and Lovely Mphila respectively. The respondent is Federale Stene (1991) (Pty) Limited.

2] Section 165(a) of the Labour Relations Act, 1995 ("the LRA") provides that the Labour Court may, acting of its own accord or on the application of any affected party, vary or rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order.

3] It is not necessary for the purposes of this judgment to consider whether, apart from the provisions of section 165 of the LRA this Court has any other power, under the

common law or the rules of this Court, to rescind a judgment granted by default.

4] Section 165(a) of the LRA is similar in its terms to rule 42(1)(a) of the uniform rules of the High Court. Commenting on the High Court rule Erasmus, Superior Court Practice, Juta, at p B1-308 (original service 1994) states the following:

> "An order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or 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. ..... Judgments have been rescinded under the sub-rule .... where the summons had not been served on the respondent; where counsel for the applicant in an **ex parte** **application had led the court mistakenly to believe that the respondent had deliberately decided not to consult his attorney or to appear at the hearing; where a final order had been granted in an ex parte application which had not been served on the respondent whose rights were affected by the order; .... the courts have .... consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney."**

5] In Topol and Others v L S Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) the Court held on the probabilities that the applicants for rescission had at all times intended proceeding with the relevant application and that the reason why they had not been represented at the application was that they had no knowledge of the set down of that application. The Court found that in the circumstances the judgment in the application had been "erroneously" given within the meaning of rule 42(1)(a) of the uniform rules of the High Court. It was further held in that judgment that it was not necessary in addition for a party to show good cause in order for a judgment to be rescinded in terms of the provisions of rule 42(1)(a).

6] This matter has a long and most unfortunate history. I do not intend to repeat this history in this judgment. However, having regard to the facts as set out on the papers, certain conclusions may be drawn. These are:

6.1 that the first applicant union at all times intended to defend the proceedings brought against it by respondent. Its default was not wilful. Whatever one might say about the conduct of the union and its officials in this matter, their actions as testified to on the papers appear to have been directed and dictated by their intention to defend the proceedings brought against them by the respondent.

6.2 that the first applicant union was through an unfortunate set of circumstances under the false impression that the matter would not be heard on the date upon which it had been set down.

6.3 that as a matter of overwhelming probability, the proceedings concerning as they did, an award of damages against the applicant union arising out of an alleged unprotected strike, this Court would not have made such an award by default unless it believed that the union was of a mind deliberately to refrain from attendance at the hearing.

7] On these facts and following the reasoning of Shakenovsky AJ in the Topol case referred to above, I find that judgment granted by default was erroneously granted within the meaning of section 165(a) of the LRA. This being the case, there is no

need for the applicant in addition to show good cause for rescission.

8] In regard to the question of costs, the ordinary position is that where an applicant comes to Court to seek an indulgence, the Court is loathe to deprive a respondent of the costs of opposition which have reasonably been incurred in opposing such an application. In so far as considerations of fairness are concerned, it is clear from the facts contained in the affidavits before this Court that the error which gave rise to the judgment being granted by default was entirely attributable to a series of unfortunate occurrences, the responsibility for which must rest with the applicant union. There is no reason in law or in fairness why the respondent should have to bear any of the costs it has been obliged to incur in this opposing application.

9] It was pointed out to me in argument that the default judgment in this matter was granted not only against the first applicant union, but also against the second applicant. It was argued that because no case had been made out by the second applicant, Lovely Mphila (who is a shopsteward and the chairperson of the shopstewards committee at the respondent's premises) as to why the judgment had been erroneously granted against him, only the judgment against the first applicant was capable of rescission. For judgment to be rescinded against the first applicant, but to stand against the second applicant, would be an untenable result. What is clear from the facts of this matter, is that the second applicant acted at all times in his capacity as a union representative. The only reasonable conclusion to draw from all the circumstances of this case is that he had relied upon the first applicant union to deal with the matter, not only on its behalf, but on his behalf as well. For these

reasons, the judgment against the second applicant must, along with that against the first applicant union, be rescinded.

10] Accordingly, I make the following order:

10.1 The judgment granted by default against both applicants under case number J347/97 is rescinded and set aside.

10.2 The applicants are directed to deliver an answer to the respondent's statement of case within 14 days from the date upon which this judgment and order are delivered. Thereafter, the matter is to proceed in accordance with the rules of this Court.

10.3 The costs of the application for rescission are to be paid by the first applicant.

DATED AT JOHANNESBURG THIS 27 DAY OF FEBRUARY 1998.

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P J PRETORIUS, AJ