

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D134/2001**

DATE 2001/05/31

REVISED

In the matter between:

THE MARINE COFEE SHOP

First Applicant

FARMER BROWNS

Second Applicant

and

PRINCESS SIBONGILE MSOMI

Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE JUDGE PILLAY
ON 31 MAY 2001**

J U D G M E N T

PILLAY J

This is an application for rescission of the order granted by default by my sister STELZNER A.J. The employee had referred a dispute about her retrenchment in terms of section 191(5)(b) of the Labour Relations Act No 66 of 1995 (the LRA). The first applicant was allegedly not properly served with the referral. Nevertheless, Mr **Goncalves** appeared for the first applicant. Mr **Goncalves** was the husband and administrator of the sole member of a close corporation which traded as the first applicant. He was also the sole member of the close corporation which traded as the second applicant.

At the hearing the learned judge refused to adjourn the matter and to allow the first applicant an opportunity to defend it after considering representations from both parties.

After the employee's evidence was taken and apparently arising from her evidence Mr **Jafta**, attorney for the employee, applied successfully to have the citation amended to include the second applicant, formerly trading as Harvest Bakery as the respondent in those proceedings. The learned judge further informed Mr **Goncalves** that if he wished to oppose the matter he would have to "apply for that judgment to be rescinded and place proper facts before this Court including a reasonable explanation for the failure to do anything about the matter prior to today.

This application proceeds substantially in terms of section 165 of the LRA read with rule 16A1A(i) of the rules of this Court. Section 165 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 judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order."

The first question is, is the order tainted by an error such as is contemplated in section 165 or is it one that must be rectified on appeal or review.

The first ground of the application for rescission was that the first applicant had not been properly served and that there was no service at all on the second applicant. The second ground was that the second applicant had not been notified of its joinder and was not given a hearing at all. The third ground was that the learned judge had erred in her direction to Mr **Goncalves** to apply to have the matter rescinded. These errors, it was contended, were made "in the absence" of the applicants, they having been denied an opportunity to be heard by the Court. Therefore, although Mr **Goncalves** was physically present at the hearing, technically the applicants were not before Court. So it was submitted.

It was a considered decision of the learned judge to render the first applicant "absent" from the proceedings. This decision was taken when the first applicant was still represented. In refusing the postponement and denying the applicants an opportunity to be heard and to defend the matter, in finding that there had been service adequate to enable her to proceed and in joining the second applicant, the learned judge would have applied her mind to the facts and to the law before exercising her discretion.

The court referring to Rule 42(1)(a) of the Rules of the High Court in *ProMedia Drukkers Uitgewer (Edms) Beperk v Kaimowitz and Others* 1996(4) SA 411 in the headnote at page 412 provides that:

The Supreme Court may rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. It is a procedural step designed to create expeditiously an obviously wrong judgment or order. The Rule sets out exceptions to the general principle that a final order, correctly expressing the true decision of the Court cannot be altered by that Court. The judge is *functus officio*. The Court has a discretion whether or not to

grant an application for rescission under Rule 42(1). Relief will be granted under this Rule if there was an irregularity in the proceedings, if the Court lacked legal competence to have made the order, or if the Court, at the time the order was made was unaware of the facts which, if known to it, would have precluded the granting of the order. It is not necessary for the applicant to show good cause for the Rule to apply."

None of those circumstances obtain in this case. If the learned judge erred in any way she is *functus officio* and her decision falls to be taken on review or appeal. It cannot be rescinded in terms of section 164. This is especially so with regard to the application to join the second applicant as a respondent in those proceedings.

If I am wrong in concluding that the Court does not have jurisdiction to rescind the order, I deal with the matter on the merits. The first applicant had sufficient notice of the proceedings. It was also common cause that Mr **Goncalves** had had discussions with Mr **Jafta** prior to the hearing. On its own version it failed to make reasonable inquiries to establish what was required of it in order to defend its rights and to take the necessary steps to do so.

In these circumstances the application for rescission is dismissed with costs.

FOR THE EMPLOYEE:	ATTORNEY P.O. JAFTA
INSTRUCTED BY:	JAFTA & COMPANY
FOR THE EMPLOYER:	ADVOCATE A.G. BERRY
INSTRUCTED BY:	DE FREITAS & COMPANY