REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

JUDGMENT

Reportable/~~Not Reportable~~

Case no: JS 651/07

In the matter between:

HON SHIN ENTERPRISES (PTY) LTD Applicant

and

NATIONAL UNION OF METALWORKERS OF SA First Respondent

SIPHO MTOLO AND 30 OTHERS Second and Further Respondents

Heard: **10 January 2013**

Delivered: **9 October 2013**

Summary: **Rescission – condonation – first rescission application withdrawn almost three years after default judgment granted against employer-second rescission application launched out of time–knowledge of judgment by employer's labour consultant and attorneys imputed to employer-delay**

inordinately long, coupled with absence of reasonable explanation for delay – condonation refused – default judgment varied from reinstatement to compensation payable by *de facto* employer – lifting of corporate veil between employer and associated companies justified.

JUDGMENT

Bank, AJ:

Introduction

[1] This matter has a long and complex history which commenced towards the end of 2006 with industrial action that was embarked upon by the second and further respondents who were employees of the applicant. The industrial action was organised by the first respondent trade union (hereinafter referred to as "NUMSA"), their official representative.

[2] The respondents (whom, for the sake of clarity, I will refer to as "the employees") claim that a deadlock arose in the collective bargaining process during November 2006 pursuant to which a dispute of mutual interest was referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for conciliation. When this dispute remained unresolved, the employees served a notice of intention to strike in terms of section 64 of the Labour Relations Act No 66 of 1995 (“the LRA”) which was set to commence on 7 December 2006. The industrial action embarked on by the employees was met with a degree of resistance from the applicant (to which I will refer as “the company”) as appears from a copy of an urgent application launched by the company in the Free State Provincial Division of the High Court on 14 February 2007 which forms part of the papers in this matter. This urgent

application was aimed at enforcing peaceful picketing and prohibiting interference with and damage to the company's business. It is interesting to note that this application was launched in the name of three separate corporate entities, namely, the present applicant Hon Shin Enterprise (Pty) Ltd, Chuang's Strapping (Pty) Ltd and Kaizen Packaging and Printing (Pty) Ltd. The founding affidavit in this application was deposed to by one Muriel Leeuwskitter ("Leeuwskitter") who states that she is an employee and personnel manager of all three of the companies which carry on business at the same address, namely, 16 Leon Bartell Street, East End, Bloemfontein, Free State Province. The company succeeded in obtaining an interdict against the strikers to prevent further unlawful activity.

[3] The company was of the view that the employees had embarked on a "go-slow" and thereafter resorted to a lock-out of the employees. This lock-out appears to have lasted several months as it was only on or about 23 April 2007, some four and a half months later, that the employees suspended their strike and attempted to report for duty on 24 April 2007. Thereafter, the employees allege that the company refused to accept their services and called the police to prevent them from gaining access to the premises and to escort them away. Various unsuccessful attempts were made to negotiate a solution to the impasse whereafter an unfair dismissal dispute was referred to the CCMA for conciliation. Conciliation took place on 21 May 2007 but the dispute remained unresolved and the matter was referred to this Court. The employees filed their statement of case against the company on 11 September 2007 in which it is alleged that they were dismissed by reason of their having participated in a protected strike and that their dismissal was, therefore, automatically unfair in terms of section 187 of the LRA. They sought reinstatement and compensation with full benefits.

[4] Because their dispute was referred some 28 days out of time, it was necessary for the employees to apply for condonation for the late filing of their statement of case and on 3 September 2008, Judge Pillay granted such condonation. I pause to point out that at this stage, all proceedings were

unopposed and were consequently heard and determined on an unopposed basis.

[5] I also note that an affidavit in support of proof of service of the application for condonation was filed prior to the granting of the application from which it appears that this condonation application had been duly served in November 2007 by telefax transmission in terms of the rules of this Court to attorneys ostensibly acting on behalf of the company.

[6] Thereafter, the matter was again set down for hearing of the main case (which at this stage was still unopposed) on the default judgment role for 15 October 2008. The matter came before Judge Francis, presumably on that date (although the typed order is confusing: it is headed 15 June 2008 but date stamped 24 October 2008). On that occasion, Judge Francis ordered that the employees' dismissals by the company on 24 April 2007 were indeed automatically unfair in terms of section 187(1)(a) of the LRA, that the employees listed in annexure "AA" were reinstated from their date of dismissals with no loss of benefits and that the company was to pay the costs of the application. I note that annexure "AA" contains an "amended list of employees" setting out some 19 employees. I pause to mention that the statement of case has attached to it a list of some 22 employees as opposed to the 31 mentioned in the heading of the case. There is thus some confusion regarding exactly which of the employees still seek relief in this matter and, if they are entitled to any such relief, what would be the most appropriate manner to accommodate this. I will return to this aspect later in this judgment.

[7] When the company was subsequently notified of the default judgment against it, a letter dated 22 October 2008 was then sent from Greyvenstein and Gründlingh Inc Attorneys in Pretoria (ostensibly instructed on behalf of the company) stating that they were aware of the fact that no response to the statement of claim had ever been drafted as although documents had been drafted they “could not be signed due to the fact that our deponent to the condonation application were hospitalised as he has cancer and were [sic]

very ill". It is then stated that a rescission application would be filed by Monday 27 October 2008.

First rescission application

[8] An application for rescission of judgment was indeed launched on behalf of the company, but approximately one month later than had been promised, by way of an application dated 21 November 2008. This application was supported by a founding affidavit deposed to by one Riaan Bronkhorst, who describes himself as a labour consultant in the service of Employer Association for the Entertainment and Other Industries of Southern Africa ("EAE") of Kroonstad, Free State Province.

[9] Bronkhorst states that he was involved in negotiations between the parties during the aforegoing collective bargaining dispute and that a response to the employees' statement of claim was drafted but, owing to the fact that he contracted leukaemia, was unavailable for an extensive period. He then states that the default judgment was erroneously sought and granted and prays for rescission on this basis. This affidavit is supported by various items of correspondence demonstrating that there clearly were ongoing discussions and communications between the company's attorneys in Pretoria and NUMSA's attorneys, Motaung Inc, in Johannesburg, concerning the matter long prior to condonation and default judgment having been granted. In fact, it was agreed between the parties that the company could file its opposing papers in the condonation application by 18 January 2008.

[10] In the draft response to the statement of case (which is attached as an annexure to Bronkhorst's affidavit), reference is made to a hostage crisis which ensued during the strike action and that this hostage situation was resolved only with the intervention of the police. It is stated that a rule *nisi* was issued in the Free State High Court and confirmed on 5 April 2007. It is further stated that once the employees suspended their strike and gave notice of their intention to resume work on 24 April 2007, the company

reiterated that, as its demands in terms of the lock-out had not been met, the responsive lock-out, which was effected from 7 December 2006, would remain in place and employees be forbidden entry to the premises. It is repeatedly denied that the employees have ever been dismissed. This response was of course never filed and remains only a draft which was presumably annexed to the affidavit to demonstrate the company's intended defence.

[11] This rescission application was opposed by the employees who raised a point *in limine* that Bronkhorst had failed to aver that the employer's association whom he represented was registered in terms of the LRA; that there was no allegation that the company was a member of this association; and that the association had no *locus standi* to launch the application. It is also stated that despite an agreement that the company would file its opposing papers in the condonation application by 18 January 2008, this had not been done by as late as 7 February 2008 on which date Motaung Inc reminded the company's attorneys that its opposing papers had not yet been filed. No response was ever received to this letter. A further letter on 26 February 2008 elicited no response and no opposing papers were filed. The employees had then sought and obtained the default judgment referred to above.

[12] It is noted that the company only filed its rescission application on 21 November 2008, one month later than had been promised, when threatened with a contempt of court application.

[13] Thereafter, the matter appears to have lain dormant for several years. On 12 April 2011, NUMSA launched an application to dismiss the company's rescission application.

[14] The founding affidavit in the application to dismiss is deposed to by Norma Craven, NUMSA's national legal officer, who explains that after the close of pleadings in the rescission application in the beginning of December

2008, NUMSA terminated the mandate of Motaung Inc and the file eventually came to her desk where she attended at court and discovered that nothing had been done by the company to prosecute the rescission application since December 2008. She points out that the matter had not been indexed or paginated and there was still no statement of defence served or filed by the company. She states that some four years had elapsed since the employees were dismissed and some two and a half years since the granting of the default order. The company's failure to prosecute its rescission application was "egregious" and the employees had suffered extreme prejudice as a result thereof.

[15] On 21 June 2011, the company delivered a notice of intention to oppose the dismissal application and also noted that its attorneys were now E G Cooper Majiedt Inc of Bloemfontein.

Second rescission application

[16] It then appears that the company withdrew the first rescission application and tendered the wasted costs occasioned thereby. It immediately launched another rescission application together with an application for condonation. It also sought that the company be granted leave to oppose the main proceedings and to file a response to the statement of case within 10 days of the order. This application was dated 25 August 2011 and served on NUMSA on 14 September 2011. This is the application before me today, which I will term “the second rescission application”.

[17] In this matter, the company seeks rescission of judgment on the basis of Rule 16A(1)(a)(i). This affidavit is deposed to by Leeuwskitter who deposed to the first rescission application.

[18] Leeuwskitter alleges that she was unaware of the fact that the main proceedings had been set down for hearing on 15 October 2008 and that a default order was granted on that date. She then makes the startling

allegation that she was completely unaware that the first rescission application had even been brought on behalf of the company. She states that she was "shocked to learn" that no response to the statement of case had ever been filed and that the company's defence to the main proceedings had never been pursued.

[19] Leeuwskitter then goes on to explain that the company had previously been a member of EAE who had taken on the responsibility of negotiations with NUMSA and had handled the unfair dismissal dispute proceedings in the CCMA and this court. She states that she had always been advised by Bronkhorst that the company's defence was being pursued and regularly made requests to Bronkhorst for updates on the finalisation of the dispute as it was taking an unduly long time to be finalised. She states that she later "became concerned" and instructed the company's present attorneys to ascertain what the status of the main proceedings was, receiving the entire file of contents from Greyvenstein and Gründlingh during the middle of June 2011.

[20] Leeuwskitter states that she first became aware of the granting of default judgment on 23 June 2011.

[21] Her affidavit then goes on to state that further consultations took place with Bronkhorst who was unable to recall much of what had occurred but that Bronkhorst had furnished documentation indicating the holding of a pre-trial conference during March 2009 and that an indication had been received from the registrar of this Court during May 2009 that a pre-trial minute had been filed and that the court file had been presented to the Judge President for allocation of a trial date. This is in itself quite strange because with no statement of response ever having been filed, it is difficult to understand how the matter could in any way have been deemed as ripe for trial. In any event, Bronkhorst had been unable to confirm the authenticity of annexure "D" to Leeuwskitter's affidavit which purports to be a letter from the registrar of this court indicating the above facts.

[22] Leeuwskitter does, however, attach some support for her contentions:

22.1 A memorandum dated 9 January 2009 purportedly from Bronkhorst to herself discussing the matter which inter alia states: "As also explained, the particular Court Order, should it be made against us will only affect as we have discussed 11 (eleven) Employees." Leeuwskitter states that this served to indicate to the company that no order had as yet been made. I do not necessarily agree with this and note that no confirmatory affidavit from Bronkhorst has been obtained nor was there any explanation from the company as to what efforts had been made to locate him and why it was not possible to obtain one from him;

22.2 Annexure "F" - a copy of a fax dated 20 February 2009 allegedly sent to Bronkhorst confirming certain discussions with him and pointing out that the company would not be liable for any costs involved in the instruction of attorneys by Bronkhorst on behalf of the company;

22.3 Annexure "G" - a telefax dated 5 March 2009 from Bronkhorst to the company regarding the conduct of the matter.

[23] I note in passing that Bronkhorst's correspondence on the letterhead of EAE displays a misspelled Latin motto "*diligentia vinc[i]t*", meaning "diligence conquers", which, given Bronkhorst's particular lack of diligence in dealing with this matter, appears to be a particularly ironic and inappropriate choice of maxim in the circumstances.

[24] Leeuwskitter states that she eventually became concerned at the lack of progress and then instructed the company's present attorneys to investigate the matter and take it further. She states:

> 'I am a lay person and relied upon the advices of EAE and/or Bronkhorst in order to protect the Applicant's interest in the main proceedings. I was not aware of all the procedural requirements but was assured by Bronkhorst that

everything had been done. Had I known that EAE and/or Bronkhorst had failed to protect the Applicant's interest, I certainly would have appointed and instructed someone else to protect the Applicant's interest and handle the opposition of the main proceedings on behalf of the Applicant, in view of the fact that Applicant had a good defence.'

[25] She then states that the company has good cause for condoning the late filing and that "it has itself not been negligent at all in pursuing its defence".

[26] It is noteworthy that although Leeuwskitter attaches a copy of a covering letter dated 9 June 2011 under cover of which the contents of the file was dispatched, she has not supported her earlier allegations by providing this court with any of the following:

26.1 proof of the company's membership of EAE;

26.2 any explanation of the unduly long period between receipt of the employee's statement of case in September 2007 and the abovementioned correspondence between her and Bronkhorst commencing in January 2009 (some 17 months);

26.3 any evidence, email and letters between the company and Bronkhorst regarding the pursuit of the matter after the last-mentioned correspondence of 5 March 2009 and the enquiries made by her in June 2011, a period of more than 24 months later;

26.4 any evidence of Leeuwskitter's regular "requests for reports" to be updated by Bronkhorst;

[27] With regard to the merits of the main case, Leeuwskitter states that the employees were never dismissed and supplies evidence in the form of annexure "I", an internal memorandum of NUMSA dated 20 August 2007 as well as several other of the employees' own documents. I note in passing that at no stage does it appear that the lock-out was ever the subject of an

interdict or declaration proceedings at the instance of NUMSA or any of the employees.

[28] Leeuwskitter then states that the employees committed further misrepresentations by pointing out that only certain of the employees work for the company whereas the remainder work for the sister companies known as Chuang Strapping (Pty) Ltd, Belize Construction and Kaizen Packing and Printing (Pty) Ltd. She also attaches printouts from the Department of Labour Systems Portal from which it appears that certain employees have obtained alternate employment with new employees with effect from various dates after the imposition of the lock-out together with various resignations. Leeuwskitter concludes that at least half of the employees:

28.1 were either never employed by the company itself;

28.2 were never under the impression that they had been dismissed;

28.3 were not in a position to tender their services for purposes of reinstatement; or

28.4 ever intended being bound by such order of reinstatement.

[29] It is on this basis that she states that the court was misled into granting the default order.

[30] NUMSA filed an answering affidavit to this second rescission application under cover of a notice of motion (presumably a counter application) seeking the dismissal of the rescission application and punitive costs. NUMSA is now represented by David Cartwright Attorneys of Germiston. The answering affidavit is deposed to by the aforesaid Norma Craven.

[31] Although one can understand the impatience of NUMSA and its members at having to wait as long as they have to have the matter heard, certain of the language in this answering affidavit is somewhat extravagant, intemperate

and unjustified, especially in light of the fact that NUMSA also does not appear to have taken up the cudgels on behalf of its members during the time that the matter lay dormant after termination of the mandate of Motaung Inc. I give only a few examples of such language: "contempt of the highest pitch", the necessity for the company to adopt an attitude of "supine humility" rather than "fatuous arrogance", the blaming of representatives which is "an old hoary tale that has long been debunked" and that the version placed before the court can only be "a mendacious fabrication".

[32] Amid all this hyperbole, however, a cogent argument emerges querying how Leeuwskitter, a senior manager of the company, has instructed a consultant such as Bronkhorst to handle the matter on the company's behalf, pay for his services but fail to require him to keep the company abreast of the progress of the case. Indeed, Leeuwskitter's failure (as the senior manager responsible for managing legal matters) to hold Bronkhorst accountable for his services for a period of four years from 2007 to 2011, is severely criticised. To this criticism, I might add my own, namely, that although Leeuwskitter's annexure "F" dated 20 February 2009 states that the company will not be responsible for any costs incurred by Bronkhorst in instructing attorneys, she failed to go further and explain why the company itself did not instruct its own attorneys when it must have been plain to her during the remainder of 2009, all through 2010 and the first half of 2011, that nothing was being done. It must also be remembered that Leeuwskitter had personal knowledge of the events in question from their inception and ought to have been well aware of the fact that the matter was still pending and had not yet been resolved.

[33] Leeuwskitter is properly criticised, although perhaps too severely, by Craven for her version ("an odious lie of the rankest kind"). Craven further denies that any pre-trial conference was held and I must agree that it seems unlikely that this did in fact occur. The company, however, could not take this allegation further as it is itself unsure as to what occurred.

[34] As stated earlier, I note that at no stage did either NUMSA or any of the individual applicants seek to challenge the validity of this "lock-out". The simple answer to this, as stated in the answering affidavit, is that NUMSA and the employees always viewed themselves as having been unlawfully dismissed and not locked out at all. Indeed, I find that the attitude and behaviour of the company, at least from 27 April 2007, is consistent with a dismissal rather than a mere lock-out of its employees, as one would have expected evidence of at least some further negotiations consistent with a sustained period of lock-out. It must be remembered that this was not a strike over wage demands but rather over a deadlock in negotiations about the collective bargaining process itself. When this strike was suspended and the employees tendered their services on 27 April 2007, that ought to have been the end of the matter as they had effectively thrown in the towel, conceding defeat. One wonders what the purpose of maintaining the lock-out would have been other than to conclude that this was in fact a refusal to accept the employees' tender of services, in other words, a dismissal.

[35] Further in Craven's affidavit the point is made that the three or four corporate entities of which the company is but one, were so intertwined in their management structure, family ties and shared workplace that there is very little to distinguish one from the other. It is, moreover, submitted that the company is itself to blame for the perception that these companies are indistinguishable as they are all run by family members and that the business operates as an integrated whole. This suggestion is not adequately rebutted in the replying affidavit and this document (dated 19 December 2011) does not really take the matter any further, merely denying most of the material allegations of the answering affidavit and reiterating and explaining the material allegations in the founding affidavit. I will return to this aspect shortly.

Analysis

[36] I turn now to consider the application before me. The company seeks rescission of the default award on two alternative legs:

36.1 On the one hand, it is argued that the default judgment was erroneously sought or erroneously granted in the company's absence as contemplated by section 165 of the LRA as read with Rule 16A(1)(a)(i) of the Rules of this Court. An application under this subrule has no stipulated time limit within which it must be brought save that it must be brought within a reasonable time after acquiring knowledge of the judgment. Furthermore, good cause is not required to be shown where the judgment or order was erroneously granted in the absence of a party.[1]

36.2 On the other hand and in the alternative, the company seeks rescission of the default judgment in terms of Rule 16A(1)(b) as read with Rule 16A(2)(b) which requires such application to be brought within 15 days after acquiring knowledge thereof and also requires that the applicant show good cause therefor, which includes the requirement to provide a reasonable explanation for the default.[2]

[37] The first question for me to decide is, therefore, whether the default judgment was granted erroneously. The Supreme Court of Appeal has held that a judgment is 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.[3]

[38] In this matter, there can be no doubt that the statement of case was not only served upon the company but that it came to its attention and simply relied

[1] *Sizabantu Electrical Construction v Guma and Others* (1999) 20 *ILJ* 673 (LC) at para 6.
[2] *Griekwaland Wes Koöperatief v Sheriff, Hartswater and Others: In Re Sheriff, Hartswater and Others v Monanda Landboudienste* (2010) 31 *ILJ* 632 (LC) at para 9.
[3] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 18. See also *Topal and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise and Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4)

upon the fact that Bronkhorst and EAE would sort out the problem. I pause to point out that during argument, it appeared to be common cause that EAE was not a registered employer's organisation and I have confirmed this in accordance with the information provided on the website of the Department of Labour which is current as at June 2013.

[39] In my view, the company could and should have taken far more care in instructing such an organisation to serve its interests and it would not have been unreasonable to have expected the applicant to have instructed duly qualified attorneys and counsel to represent it in the same manner that it did when approaching the Free State High Court for urgent interdictory relief against the striking employees.

[40] Nevertheless, it is argued by the company that the order was erroneously sought and granted in that:

40.1 the employees failed to disclose to the court that several of them had at no stage been employed by the company but rather by other companies related to and operating from the same premises as the company;

40.2 several of them had resigned and others had obtained other employment and could not be reinstated; and

40.3 the employees misled the court in alleging that they had been dismissed whereas they had been lawfully locked out.

[41] I am not persuaded by these arguments. The individual applicants had every reason to conclude that, at the date default judgment was granted, they had in fact been dismissed given the fact that they had not been at work since December 2006, almost two years earlier. As stated above, there is no evidence of any collective bargaining or negotiations subsequent to April

SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C).

2007 that would support the company's version of a lock-out. Furthermore, the distinction between the various corporate entities was easily blurred, at least in the minds of its employees, given that the applicant is but one component of a family business operating as a group of corporate entities from the same premises. The company could have rebutted these suggestions (which were set out clearly in the answering affidavit) in its replying affidavit by providing the Court with sufficient explanatory detail. It failed to do so. In the circumstances I therefore find that there are sufficient facts before me to justify a lifting of the corporate veil between these various entities and that the company, the present applicant, was indeed the *de facto* employer of the employees in this matter and that a manifest injustice would result should this not be done in this particular instance.[4]

[42] A survey of the case law referred to in the applicant's heads of argument and cited herein leads me to conclude that it can in no way be said that the default judgment was either erroneously sought or erroneously granted by the court. Accordingly, the first leg of the applicant's argument must fail. Having found that, the company is thus constrained to rely upon the provisions of Rule 16A(2)(b) for its relief with the required 15-day time period within which to bring such application. It is common cause that the second rescission application was not brought within this time period and, accordingly, condonation has been sought and must be considered.

[43] This court has a discretion to be exercised judicially upon consideration of all the facts in deciding whether sufficient cause has been shown to condone the lateness of the referral. Factors that are usually relevant are the degree of lateness, the explanation provided, prospects of success and the importance of the case. Ordinarily, these facts are interrelated and are not individually decisive and a piecemeal approach is incompatible with a true discretion

[4] See *Gildenhuys (Sheriff of the High Court, Kuilsriver) v Siebrits & another* (2007) 28 *ILJ* 1261 (LC) at para 58; *Cape Pacific v Lubner Controlling Investments Ltd & others* 1995 (4) SA 790 (A) at 803A-804D.

unless there are no prospects of success whatsoever in which case there is little point in granting condonation.[5]

[44] I therefore have to consider:

44.1 what is the exact period of delay applicable in this case;

44.2 has the company provided a reasonable explanation for its delay; and

44.3 what are the company's prospects of success on the merits.

[45] Having withdrawn its first application for rescission of judgment and launched the second application, it is clear that this application has been launched almost three years after default judgment was granted against it. This is an inordinately long period of time. Against this, however, is Leeuwskitter's allegation that she (and consequently the company) first became aware of the default judgment on 23 June 2011. As stated above, the second rescission application was first served on NUMSA on 14 September 2011 which is approximately 60 days or 12 weeks after the company, on Leeuwskitter's version, first obtained knowledge of the order.

[46] More importantly, however, the question arises as to whether Bronkhorst's earlier knowledge of the default judgment (and that of the attorneys that he instructed to launch the first rescission application) in October 2008 can be imputed to the company, in which case the launching of the second rescission application on 25 August 2011 would be deemed to be almost three years late, or whether one simply accepts what Leeuwskitter says at face value and agrees that the company cannot be faulted for the misdeeds and inaction of Bronkhorst and that it is only some 60 days late.

[47] As I have stated above, I am not at all satisfied with the explanation given by the company for the fact that it completely abdicated all responsibility for this

[5] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532 B-F, *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC); *Khan v Cadbury South Africa (Pty) Ltd* [2011] JOL 27124 (LC).

matter to a labour consultant or an employer's organisation (whose lawful registration was never demonstrated) and simply sat back with folded hands for such a long period of time, probably hoping that the matter had died a natural death. Although nothing much is said about the applicant company in its own papers, it appears to be a manufacturing concern with at least two or three other interrelated companies and there is no reason why, given the importance of the collective bargaining dispute and the violence that accompanied such dispute, these companies could not have employed properly qualified legal representatives and counsel at the very outset rather than have delegated this decision to the elusive Mr Bronkhorst, only to later rely on the assertion that, from the very outset, he had no authority to instruct attorneys and launch the ill-fated first rescission application. I note that NUMSA and the employees were certainly under the reasonable impression that both Bronkhorst and the Pretoria attorneys instructed by him were duly authorised to represent the company, until the launching of the defective first rescission application.

[48] Although this state of affairs can be described as nothing less than a shambles, it must be recognised that it has had the net effect of preventing the individual employees in this matter having any semblance of finality in the matter for a period of almost six years since December 2006 despite a default judgment granting them reinstatement. The magnitude of the economic effect on these employees and their families cannot be underestimated and can only have been horrendous. This is inexcusable and completely negates the underlying principles upon which this Court was established and the LRA itself promulgated.

[49] The fact that the first rescission application was withdrawn with a tender of costs cannot wipe the slate clean for the company. It cannot, therefore, simply rely on the fact that it claims its first knowledge of the default judgment as late as 23 June 2011 but blithely wish away the events of the extended period since October 2008 to date. In my mind, it is completely inexcusable for Leeuwskitter to have not taken any steps at all on behalf of the company

prior to this date to ascertain what the status of the legal proceedings were or to have at least made enquiries of the Registrar of this Court by employing a local attorney at minimal cost and convenience to ascertain this. Such a simple enquiry would easily have unearthed the fact that default judgment had been granted in October 2008 as this appears plainly from the cover of the court file, not to mention a typed copy of the order having been placed in the file.

[50] Mr Cartwright also drew to my attention the matter of *Enzo Panel Beaters CC v CCMA and Others*[6] in which it was stated that the courts have consistently refused to grant rescission where attorneys' negligence is responsible for the default and that there is no reason why the court should not adopt the same approach to labour consultants who purport to be experts in the field of labour law. To this I might add the comments of Judge Steenkamp in *Silplat (Pty) Ltd v CCMA*[7] that this Court has accepted those judgments which hold that if the attorney displays “gross ineptitude” the court cannot extend any indulgence to the applicant”. The company, however, was in my view, equally complicit in the gross dilatoriness which has delayed these proceedings for so many years.

[51] I, therefore, find that knowledge of the default judgment came to the company by no later than 22 October 2008 when attorneys ostensibly acting on its behalf wrote to Motaung Inc advising that the first rescission application would be launched shortly. This knowledge is imputed to the company which delegated its responsibilities to Bronkhorst and it must be held responsible for his actions and failures. I accordingly find that the second application for rescission launched on 25 August 2011 is therefore approximately 33 months late, three months short of three years.

[52] In this matter, I cannot gloss over the inordinately long period after the granting of default judgment taken by the applicant to eventually launch the

[6] (1999) 20 *ILJ* 2620 (LC) per De Villiers AJ.
[7] (2011) 32 *ILJ* 1739 (LC) at para 58.

second rescission application. I have already dealt at length above with my rejection of the explanation for the company's reliance upon Bronkhorst and the EAE organisation. The period of delay of 33 months is excessive and counts against the company. In addition I do not consider that the company's explanation for its delay is either acceptable or reasonable and therefore find that it is unacceptable.

[53] I then turn to consider the question of the prospects of success for the company in the main action. Mr Louw argued that there was nothing to disturb the *prima facie* evidence that the company had engaged in a lock-out of the individual employees pursuant to protected strike action and that the length of this lock-out had been misconstrued by both the employees and NUMSA as a dismissal. Moreover there was no application by NUMSA or the employees to have the lock-out declared unlawful at any stage of the proceedings. On the other hand, and as argued by Mr Cartwright on behalf of the respondents, it is alleged in the statement of case that the employees attempted to report for duty on 24 April 2007 "cap in hand" after unilaterally lifting their strike but they were refused entry to the premises which refusal was supported by the company's call to the police to escort the employees from the premises and this is tantamount to a shut-out and not a valid lock-out used as a bargaining tool. It is for this reason, the argument goes, that the probabilities are that the employees were in fact dismissed. As I have mentioned above, the strike had been called in support of collective bargaining rights in the workplace to which the company as employer had obviously refused. It is, therefore, difficult for me to accept that the argument of a sustained and indefinite lock-out being called in response to this has any reasonable prospects of success.

[54] I, therefore, have before me a case with an unacceptable explanation for an inordinately long delay accompanied by a case on the merits that does not, in my view, carry a reasonable prospect of success. In *National Union of*

Mineworkers v Council for Mineral Technology,[8] the Labour Appeal Court held:

> 'A slight delay and a good explanation may help to compensate for prospects of success which are not strong. *The importance of the issue and strong prospects of success may tend to compensate for a long delay*. There is a further principle which is applied and that is that *without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial*, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused' (emphasis added).

[55] See also the comments of Miller JA in *Chetty v Law Society Transvaal*[9] which is generally accepted as the *locus classicus* on this issue.

[56] In this matter, the company's prospects of success are doubtful. Added to this is the fact that it has failed to provide a reasonable and acceptable explanation for its inordinately long delay and based on the above reasoning, the prospects of success are therefore immaterial. Furthermore, the greatly excessive delay in launching the second rescission application is not accompanied by an extraordinarily good explanation.[10] Not only was the company's erstwhile labour consultant grossly negligent but the company was itself far less than diligent and, in fact, grossly dilatory in attending to this matter.

[57] I therefore dismiss the application for condonation for the late filing of the second rescission application with costs and it is, therefore, unnecessary to consider the application for rescission any further. Consequently, that leaves me in the invidious position of having to consider the effect of my order in that the default judgment stands in the form ordered by Judge Francis on 15 October 2008, and whether this falls to be varied in any way.

[8] (1999) 3 BLLR 209 (LAC) at para 10.
[9] 1985 (2) SA 756 (A) at 765A-F.
[10] See *Kahn v Cadbury South Africa*, supra, at para 7.

[58] I am mindful of the fact that several of the individual employees have in the meanwhile obtained alternative employment, others have resigned from their employ with the company or one of its associated entities and others simply cannot be located by NUMSA. Given the length of time that has elapsed I do not believe that reinstatement is an appropriate or practical solution in this case. I also see no reason why costs should not follow the result. Because it is not clear or common cause exactly which of the employees have resigned from which corporate entity, when this occurred, or if and when some have in fact found alternative employment, the parties may approach me with such further information for clarification of the order I am about to make. As stated above I have found sufficient grounds to justify a lifting of the corporate veil between the various corporate entities comprising the family business of which the company is but one entity, and the effective and *de facto* employer of the present employees.

[59] In the result, I make the following order:

1. The late filing of the second rescission application is not condoned and is thus dismissed;

2. The default judgment containing the order of reinstatement handed down by Judge Francis on 15 October 2008 is varied to read as follows:

> "1. The dismissals of the Second and Further Applicants by the Respondent on 24 April 2007 are found to be automatically unfair in terms of Section 187(1)(a) of the Labour Relations Act No. 66 of 1995.
>
> 2. Those of the Second and Further Applicants who have resigned their employ with the Respondent or any of its associated entities: Kaizen Packaging and Printing (Pty) Ltd, Belize Construction and Chuang's Strapping (Pty) Ltd, are to be compensated by the Respondent with full back pay with effect from 27 April 2007 to date of such resignation.
>
> 3. Those of the Second and Further Applicants who have found alternate employment after 27 April 2007 are awarded back pay to be paid by the

Respondent from 27 April 2007 until the date upon which they commenced such new employment.

4. The remaining Applicants are hereby compensated with full back pay to be paid by the Respodnent from 27 April 2007 to date of payment with no loss of benefits.

5. For purposes of this Order, the Second to Further Applicants are those 19 individuals whose names appear listed in a document referred to as annexure "AA" and headed "Amended list of employees", a copy of which is attached to this Order.

6. The Respondent is to pay the costs of the application."

3. The applicant (the company) is to pay the costs of the second rescission application.

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BANK; AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate M C Louw

Instructed by: PHH Badenhorst Attorneys

For the Respondent: David Cartwright of David Cartwright Attorneys