REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 961/08

In the matter between:

HANWILL MAFOFELA MINING CC	**Applicant**
and	
NATIONAL UNION OF MINEWORKERS	**First Respondent**
KEKANA, S AND 39 OTHERS	**Second to Further Respondents**

Heard : 5 August 2012

Delivered : 7 February 2013

Summary : Application for rescission of Default Judgment in terms of Rule 16A - Good cause must be shown:- which requires a reasonable explanation for the default, a bona fide defence and proof that the application is *bona fide* and not actuated by an intention to delay – Whilst a very good defence may compensate for a weak explanation the best of - and even unassailable - defences cannot trump a complete failure to provide any reasonable explanation for default, (such as a dishonest attempt), in applications for rescission of Judgments – if no such reasonable explanation is provided, there is no need to enquire into whether a *bona fide* defence has been shown

JUDGMENT- REASONS FOR ORDER

HALGRYN AJ

Nature of application

[1] This is an application for an Order to rescind a Judgment by this Court, granted by default, on the 22nd of July 2011.

[2] The application was filed some eight days out of time and the Applicant also seeks an Order condoning this late filing.

[3] Enthusiastically – the Applicant also sought an Order for costs.

The Applicant's application for condonation

[4] I did not understand there to be (much) opposition to the application for condonation; the Respondents electing to rather deal with the merits of the application for rescission during argument.[1]

[5] So much so, that I did not say anything about the application for condonation in my *ex tempore* Judgment - which upon reflection - I ought to have done.

[6] The fact that the application for condonation was not (strongly) opposed does not entitle the Applicant to an Order in this regard and I still needed to exercise my discretion, irrespective of opposition or not.

[1] They did seek an Order dismissing the condonation application at the conclusion of the answering affidavit.

[7] I do not intend to deal with the application for condonation in any amount of depth, nor do I intend to restate the Law on applications for condonation.

[8] By reason of the fact that I found that there was no merit whatsoever in the application for rescission, it follows that it would be wrong of me to grant condonation and to thereafter dismiss the application for rescission.

[9] The proper approach would be to dismiss the application for condonation by reason of the fact that the Applicant failed to show any prospects of success in the application for rescission and I intend to do so hereunder.

[10] As a result I need not deal with the remainder of the requirements for condonation applications, such as the period of the delay or the explanation therefore and so on.

The factual background to the dispute

[11] The Second to Further Respondents – by all accounts members of the First Respondent at all times material hereto - were once employed by the Applicant, until their dismissal for participating in an unprotected strike on the 16th of February 2008.

[12] Dissatisfied with their dismissal, an unfair dismissal dispute was referred to the CCMA, where the matter was arbitrated.

[13] The result of the arbitration found its way into an award, dated the 23rd of November 2008, in terms of which, it was ruled that the CCMA does not have jurisdiction to adjudicate the dispute between the parties, as it fell

within the ambit of section 191(5)(b)(iii) of the Labour Relations Act,[2] a dispute which had to be adjudicated by this Court.

[14] The parties accepted this ruling as correct and the Respondents subsequently referred their unfair dismissal dispute to this Court on the 19th of December 2008, by way of a Statement of Case.

[15] The Applicant held the view that the Respondents' referral was late and objected to this Court's jurisdiction.

[16] Understandably - and as a result, the Respondents brought an application for an Order declaring that the said referral was not late, alternatively for an Order condoning the late referral, if it was found to be late.

[17] The outcome of this application was a curiously worded Order, dated the 20th of October2009, by Jammy AJ, which read as follows:-

"1. The application for condonation falls away.

2. The statement of case dated 19 December 2008 stands as filed.

3. ***The Respondent is to file answering affidavit*** **(sic)** ***within the periods prescribed by the rules of this Court.***

4. The Applicants are to pay the wasted costs of today's (sic) *jointly and severally the one paying the other* (sic) *to be absolved."* (I added the emphasis.)

[18] Prayer 3 of this Order warrants some comment before I proceed.

[2] No 66 of 1995, ("the LRA").

[19] Upon a proper construction thereof, it required of the Applicant to file its Answering Statement of Case within the periods prescribed by the Rules of this Court, i.e. within 10 days.

[20] The reference to "*answering affidavit"* was a clear error and should have read *"answering statement of case".* Nothing turns on it and no-one made an issue of it.

[21] The Order is also silent as from which date the prescribed period would become operative, but it seems to be self-evident, that it was meant to run from the date of the Order. Again – nothing turns on it and no-one made an issue of it.

[22] Without getting ahead of myself – and as it turns out – as at the date of the application for rescission on the 5th of July of 2012, the Applicant had not yet filed its Answering Statement of Case and by any analysis, I have to find that the Applicant had failed to comply with an Order of this Court; which failure – it has to be said - is the sole cause of the Applicant's predicament and consequent unhappiness; albeit that it sought to blame all and sundry therefore.

[23] This failure to file an Answering Statement of Case was also the cause why this Court was prepared to grant a Judgment by default on the 22nd of February 2011.

[24] Unprepared to accept that it was the author of its own misfortune, the Applicant sought to convince me that its failure to file an Answering Statement of Case as per the clear directive in the aforesaid Order, was in point of fact by reason of an agreement reached with the Respondents

to file at a later date and more specifically at a pre-trial conference meeting - which never materialised; a contention which was disputed by the Respondents.

[25] Assuming for current purposes that it was indeed open for the parties to enter into such an agreement, i.e. not to comply with the Order of the Court,[3] an aspect in respect of which I make no final pronouncement - save to record that I discourage it strongly - I now proceed to investigate if such an agreement indeed existed.

[26] Applicant's counsel also strongly urged upon me that I ought to take the entire history of the matter into account and that if I did so, I would be constrained to find that everything points in the direction of the Applicant – at all material times hereto – intending to oppose and defend the Respondents' claims herein.

[27] Whilst I accept that this is a factor which should be taken into account – i.e. whether the Applicant by its actions evidenced a clear desire and intention to oppose the Respondents' claims – I find that the primary investigation herein ought to be whether an agreement indeed came into existence that the Applicant could – albeit in violation of the aforesaid Court Order – only file its Answering Statement of Case at a date much later than the one, dictated to by this Court.

[3] I hasten to record that this Judgment by no means sets a precedent for non-compliance with Orders of this Court – on the contrary – if anything, I intend to set a precedent (in so far as this may be necessary) that Orders of this Court ought (always) to be complied with. All that I am prepared to accept, (begrudgingly), is that it was open for the parties to agree to file at a later stage, the Court Order notwithstanding, bearing in mind that the Applicant would have had to apply for condonation for its late filing if the matter proceeded to trial. The trial Court could – in my view – condone the late filing if good reason existed for the agreement to file at a later stage.

[28] If I find that such an agreement did come into existence – I am prepared to find that the enquiry should end there and that I should grant the Order rescinding the default Judgment.

[29] If, however, I should find that no such agreement came into existence, I am of the view that I need not – in addition – enquire into the entire history of the matter (although I did so in any event[4]) in order to ascertain if I am able to find that there was a genuine desire and intention to oppose the Respondents' claims.

[30] I say this by reason of the fact that the Applicant was unable to persuade me – on its papers or in argument – that no amount of effort made in the further prosecuting its defence, shy of actually filing its Answering Statement of Case in compliance with the said Order of this Court, can conceivably suffice.

[31] As a matter of fact – the genuineness of any such efforts is belied by the failure to comply with the Order of this Court and the only way to show that these efforts were indeed sincere is to explain why there had not been compliance with the Order - which in turn - hinges on my finding if an agreement existed not to file on the date as prescribed by the Order.

[32] To illustrate – even it if were so that the Applicant wrote to the Respondents, every week for the entire period of more than 3 years – reminding the Respondents of just how serious it was with its intention to defend their claims, making offers of settlement, making suggestions as

[4] If it appears that my recordal of the history of the matter hereunder – as manifested by the correspondence – seem to be over inclusive, it is by reason of the Applicant's insistence that it was all relevant.

to pre-trial conference meetings, procedural issues and the like – in the face of a failure to file an Answering Statement of Case – especially in (wilful) disregard of an Order of this Court, all of this comes to naught, as the best (and arguably only) way to illustrate its genuine intention to further prosecute its defence herein, would have been to simply file its Answering Statement of Case, in compliance with the said Order.

[33] As it turns out, the Applicant contends that an agreement existed to hold a pre-trial conference and that the Applicant's Answering Statement of Case would be served on the Respondents thereat.

[34] Applicant's counsel meticulously referred me to all the correspondence exchanged between the parties, in order to drive this point home.

[35] I have considered the contents of all the correspondence carefully and I am not convinced that such an agreement came into existence.

[36] As a matter of fact – if the correspondence is what I am to be guided by – I am convinced that there existed no such an agreement.

[37] Significantly – as I will point out – and conveniently so, the Applicant saw fit to rely and seek to enforce that portion of the Order by Jammy AJ, which was in its favour, (strangely so), i.e. ordering the Respondents to pay the Applicant's costs,[5] whilst (deliberately) ignoring that portion of the Order which compelled it to file its Answering Statement of Case by a certain date.

[5] I say strangely so – as the reason for that application was the jurisdictional objection raised by the Applicant. I would have thought the unsuccessful objector should have been ordered to pay the costs. This has become academic however.

[28] This attitude manifested itself as early as the first letter written after the Order by Jammy AJ, by the Applicant's then attorneys, dated the 20th of October 2009.[6]

[39] In it, attorney M Hart, of the firm Cliffe Dekker Hofmeyer Inc, proposes that the matter be settled on the basis that the Respondents unconditionally withdraw their dispute, in return for the Applicant not enforcing its rights to claim the costs as per the Order.

[40] The Applicant's attorney then extended the deadline after a response from the Respondents' attorneys dated the 23rd of October 2009[7], in a letter dated the 26th of October 2009[8], until the 28th of October 2009.

[41] On the 28th of October 2009, the Respondents' attorneys advised the Applicant that the First Respondent's attorneys were unable to take instructions regarding the settlement proposal[9] and undertook to revert.

[42] On the 2nd of November 2009, the Applicant's attorneys recorded an agreement to hold the *dies* for the filing of the Applicant's Answering Statement of Case in abeyance, pending the final determination of the settlement negotiations.[10]

[43] On the 13th of November 2009, the Applicant's attorneys requested feedback regarding the offer of settlement.[11]

[6] At p31.
[7] At p33.
[8] At p34.
[9] At 36.
[10] At p37.
[11] At p39.

[44] The Respondents' attorneys responded on the 23rd of November 2009, that they had been unable to get a mandate, but suggested a *"pre-arbitration"*; which I take it, was meant to be a pre-trial meeting.[12]

[45] Some toing and froing ensued as far as suitable dates for the pre-trial conference meeting were concerned during which period the Applicant's attorneys instructed cost consultants to prepare the bill of costs as per the Order by Jammy AJ.

[46] I pause to record that although it appears to be so that at this juncture an agreement existed between the parties, i.e. that the Applicant need not file its Answering Statement of Case pending the outcome of settlement negotiations, the compulsion to file the Answering Statement of Case was not one founded (only) in the prescripts of the Rules of this Court, but in an Order of this Court.

[47] Whilst I fully accept that the Applicant would in all probability have been successful in applying for condonation for the late filing of the Answering Statement of Case, (on the basis of the agreement), if the matter went to trial, I have to reiterate that it is indisputably and fundamentally so that Orders of our Courts have to be complied with; and in this case the Applicant had simply not done so.

[[48] On the 17th of February 2010, the Respondents' attorneys recorded a conversation with attorney Hart, during which it was agreed to postpone the pre-trial conference *sine die*, that the Respondents suggested that the record of the arbitration hearing be submitted as the evidence in the

[12] At p41.

Labour Case, that the parties file Heads of Argument and then request a date of set down.[13]

[49] Attorney Hart responded on the 23rd of February 2010, that she would take instructions,[14] in respect of the Respondents' suggestions.

[50] On the 23rd of February 2010, one Theo Potgieter ("Potgieter")[15] sent an email to Attorney Hart, in which he complimented her on her *"…advice and professional contribution…"* which *"…has always been and is the best of the champions…"*[16]

[51] In this email, Potgieter also records that the Applicant believes that the suggested route – i.e. filing the arbitration record as the evidence in the Labour Case – was the route to go.

[52] On the 19th of April 2010, the Respondents' attorneys enquired about the Applicant's response to their suggestion.[17]

[53] So far so good; so it would appear - until there appears a sudden and unexpected twist in events.

[54] A very surprising recordal is made by the Respondents' attorneys on the 19th of April 2010:-

"We also refer to today's telephone conversation with your Ms Hart, and confirm that she indicated that you do not have instructions to act for the Respondent in the Labour Case."[18]

[13] At 49.
[14] At p50.
[15] Manager Legal Services in the employ of the Applicant and deponent to the Applicant's founding affidavit.
[16] At p52.
[17] At p53.

[55] On the 22nd of April 2010, the Respondents' attorneys recorded another conversation with attorney Hart on the 20th of April 2010, during which she again confirmed to the Respondents' attorneys that she is *"…not mandated to do the case…"* on behalf of the Applicant, *"…except for the condonation application."*

[56] These advices by attorney Hart – and I was not presented with any evidence that the advices were incorrectly recorded; (in fact, the Applicant relies on it as part of its case) - are the cause of much concern for me herein.

[57] It makes a mockery of any suggestion that an agreement existed that the Applicant need not file its Answering Statement of Case pending outcome of settlement negotiations, as attorney Hart was not mandated to enter into such an agreement; her mandate being limited to the condonation application - which in turn - meant dealing with the costs Order.

[58] To make matters worse, the Respondents' attorneys, (who have by now directed their attention to Potgieter directly), on the 22nd of April 2010, recorded yet another incredulous twist in the tale,[19] i.e. a conversation with Potgieter on the 20th of April 2010, in which conversation Potgieter confirmed that he (in turn) was of the view that the Applicant's *"… Johannesburg attorneys are attending to the preparation of the Statement of Defence, and the Pre-trial Conference,"* which on the face

[18] At p54.
[19] At p57.

of it at least, stand in stark contradiction to the advices by attorney Hart, i.e. that she had no such mandate.

[59] This does not - in my view - amount to an innocuous situation of the left hand not knowing what its right counterpart is up to – this is fundamentally damning for the Applicant who seeks to provide a reasonable explanation for its failure to file its Answering Statement of Case, as per an Order of this Court.

[60] These contradictions were never explained and this means that for months on end – nothing (serious) was done to further the Applicant's defence herein.

[61] Significantly further, Potgieter seemed to be oblivious of the *"agreement"* to hold over the filing of the Applicant's Answering Statement of Case pending settlement negotiations. If he was indeed aware of it, that would have been the moment to record such awareness.

[62] I have little option but to find, on the strength of the aforesaid advices by attorney Hart, that there was no agreement to hold over the filing of the Applicant's Answering Statement of Case pending the outcome of settlement negotiations, as she had no mandate to enter into such an agreement.

[63] Even if I am wrong about all of this, the settlement negotiations broke down in any event, (as I will show hereunder), which in itself brings an end to this debate.

[64] This letter by the Respondents' attorneys[20] records further that an agreement was reached in terms of which the Respondents' attorneys would send Potgieter a copy of the Respondents Statement of Case and that he would revert within ten days.

[65] Potgieter hereafter dealt with the matter personally.

[66] Ignoring the undertaking to revert within ten days, and nearly another month later, on the 18th of May 2010, Potgieter saw fit to deal with the matter again, recording *inter alia* the following:

"… we apologise for reverting only now. It was regrettably caused by a confluence of difficult operational duties and ***leave.****"* (I added the emphasis.)

[67] A clear pattern of inconsistency, disregard and disdain is now emerging. Inconsistency - as it is by no means clear that any-one had been attending to the Applicant's case at all – for months on end - and disregard and disdain for the Order of this Court, because as at this stage, there existed no reason whatsoever for the non-compliance with the said Order.

[68] It must be borne in mind that a period of six months had by now expired since the date of the Order by Jammy AJ, during which period – if the advices by attorney Hart are to go by – nothing was done to further the Applicant's defence herein.

[20] At p57.

[69] Potgieter does record the Applicant's preparedness to meet and discuss the way forward and that:-

"At the that(sic) *venue, we will be handing over our Statement of defense* (sic) *as well."*[21]

[70] Significantly there is no recordal of an agreement to *"hand over"* the Applicant's Answering Statement of Case at this proposed meeting. It is a casual remark and not even a request to be allowed to do so.

[71] The Respondents' attorneys agreed to hold the suggested meeting in a letter dated the 2nd of June 2010.[22]

[72] This letter is silent on the topic of the *"handing over"* of the Applicant's Answering Statement of Case and this silence notwithstanding, I was urged upon by Applicants' counsel to find that an agreement to do so came into existence.

[73] I fail – entirely – to appreciate the factual basis for this submission. The information that the Applicant would *"hand over"* its Answering Statement of Case at this proposed meeting was as casual and informative, as would have been a remark that the Applicant expected the Respondents to provide tea and biscuits at the said meeting.

[74] Potgieter responded on the 7th of June 2010, advising of his unavailability to attend to the suggested meeting[23] and requested a date beyond the

[21] At p58.
[22] At p60.
[23] At p61.

25th of June 2010 *" … for me to be prioritizing our consultation on subject."*

[80] The Applicant's erstwhile attorneys – briefed with the task of dealing with the condonation application (only) – i.e. the bill of costs, managed to have the bill taxed in the princely sum of around R22 282-56,[24] and in keeping with their stated mandate - insisted on payment by way of letter dated the 10th of June 2010.

[81] It must be said that the response by the Respondents' attorneys dated the 11th of June 2010, was refreshingly even keeled,[25] bearing in mind that the Applicant and its then attorneys have until then acted in an inconsistent way and in a manner which cannot be said to be in keeping with a firm resolve to diligently and genuinely oppose the Respondents' claims.

[82] This letter records, *inter alia,* the following:-

"We have since been advised that you are pursuing a costs order against our client, which costs were incurred because you, ***instead of filing your Statement of Defence,*** *raised the issue of lateness of our client's referral to the Labour Court.*

We then applied for condonation, and the court indicated that the application was not necessary, as we were not late. The court then proceeded to order costs against us.

[24] Which makes a mockery of the sincerity of the earlier offer of settlement, i.e. the Respondents withdraw their claims and in return the Applicant will not enforce the costs Order; the disparity being too great.
[25] At p66.

The significance of the judgment is that you are way out of time to file you Statement of Defence."(I added the emphasis.)

[83] This letter further records the following:-

"…our client have (sic) *instructed us* ***to suspend any further discussions with you*** *until you waive your rights to costs in terms of the court order."* (I added the emphasis.)

[84] These recordals are significant, in that it brings an end to any suggestion that the *dies* for the filing of the Answering Statement of Case was extended until the outcome of settlement negotiations, which I – in any event – have found could not have been agreed to, due to Attorney Hart's stated lack of a mandate to deal with anything but the condonation application.

[85] Moreover, this letter records the following:-

"In the meantime, ***we have been instructed to proceed with default hearing application****, unless the parties otherwise agree.*

This means that you should *either settle the issue of costs and your lateness to* ***file your Statement of Defence with our clients, or apply for condonation of your lateness,*** *which application our instruction* (sic) *are to oppose and ask for costs, in the same way you did."*[26] (I added the emphasis.)

[86] The purpose of my emphasizing the aforesaid portions is to draw attention to the fact that the reader thereof, could not conceivably have

[26] At p67.

laboured under any misapprehension as to how the Respondents' attorneys felt about the fact that the Applicant had not yet filed its Answering Statement of Case – which negates any suggestion of an existing agreement to file at a later stage.

[87] Moreover in response to this letter, Potgieter writes to the Respondents' attorneys on the 23rd of June 2010, recording that the Applicant "*agrees with the gist and purpose"* of the Respondents' letter[27] and he does not – as one unquestionably would have expected him to do – record that an agreement exists to file at a later date. To me it is clear that it did not even cross his mind that such an agreement existed.

[88] It is certainly so, that if Potgieter was genuinely of the view that an agreement came into being that the Applicant would file its Answering Statement of Case at a pre-trial meeting, this is an aspect so significant, that he would have recorded it in this very response. The fact that he did not - and never did at any stage thereafter – is indisputable evidence that he never even thought that such an agreement came into existence.

[89] Significantly, the first recordal of such an agreement was in the founding affidavit in this application for rescission. It was thus evidently a belated afterthought.

[90] On the 15th of June 2010, the Respondents' attorneys applied for a trial date from the Registrar,[28] without notice to the Applicant.

[27] At p70.
[28] At p68.

[91] Applicant's counsel strongly urged upon me to make a finding that doing so was improper (and actually dishonest) and at the very least, notice to the Applicant was required.

[92] There is no merit in this unsubstantiated submission.

[93] There is no legal requirement to do so and if anything – I am amazed that it took the Respondents' attorneys so long to apply for default Judgment.

[94] Significantly, Potgieter responded to the aforesaid letter by the Respondents' attorneys dated the 11th of June 2010, by way of letter dated the 23rd of June 2010.[29]

[95] In it, Potgieter stated *inter alia*:-

"We agree with the gist and purpose as espoused in your correspondence and suggest that we meet urgently…"

[96] Potgieter then wrote to attorney Hart on the 24th of June 2010[30] – who, as I have shown herein above, was allegedly not mandated to deal with anything more than just the condonation application. After apologising for the Applicant's failure to effect payments to the said attorneys,[31] he records the following:-

"Makinta has threatened to proceed with the LC matter if we persist with the cost taxation and claim against the Applicants."

[29] At p70.
[30] At p72.
[31] A fact that has not gone unnoticed. This, from an Applicant who urged upon me to find that it genuinely wanted to oppose the Respondents' claims herein.

[97] Potgieter knew full well what the Applicant was facing at that time and yet no Answering Statement of Case was filed. Significantly, Potgieter did not even advise the Applicant's attorneys of the agreement to file at a later stage; which I have no doubt he would have done if he felt it existed, in order to engage her to stop the rot.

[98] On the 24th of June 2010, the Respondents' attorneys requested an indulgence to settle the costs bill.[32]

[99] There appears to be a lack of disclosure of all the correspondence thereafter. This – I do not think is deliberate – and what I have before me, sufficiently tells the story.

[100] On the 24th of June 2010, the Respondents' attorneys also wrote to Potgieter, advising him *inter alia* as follows:-[33]

"In the light of your change of approach ***we confirm that we will proceed with the matter in terms of the Act and Rules of the Labour Court and will not be involved in any further discussions with you.****"*
(I added the emphasis.)

[101] Even if I am wrong about (all of) my findings herein above, this letter brings an end to any debate herein.

[102] Any suggestion of a suspension of the obligation to file its Answering Statement of Case – for whatever reason or period -could no longer exist.

[32] At 73.
[33] At p74.

[103] Rather than file its Answering Statement of Case, the Applicant pursued it's by now (much) preferred option, i.e. resort to further correspondence.

[104] Potgieter wrote a letter on the 24th of June 2010,[34] in which he carefully attempts to record everything that transpired between the parties in order to revive some form of settlement talks and significantly he does not record any agreement to hold over the filing of the Applicant's Answering Statement of Case.

[105] In keeping with her stated mandate, attorney Hart writes the Respondents' attorneys on the 28th of June 2010 and records the Applicant's preparedness to grant the Respondents an indulgence to pay the taxed bill.[35]

[106] Potgieter wrote another desperate letter to the Respondents' attorneys on the 29th of June 2010,[36] in which he again attempts to revive the settlement talks. Again, there is no recordal of an agreement to hold over the filing of the Applicant's Answering Statement of Case.

[107] The Respondents' attorneys responded to this letter on the 2nd of July 2010,[37] making it very clear, that the suggested meeting will not serve any purpose, that the Respondents will pay the taxed bill of costs and proceed with the matter in the Labour Court *"… in terms of the Act and its Rules…"*

[34] At p75.
[35] At p78.
[36] At p80.
[37] At p82.

[108] These strong and lucid advices notwithstanding, the Applicant steadfastly failed to file its Answering Statement of Case in compliance with the Order of this Court.

[109] Cliffe Dekker Hofmeyr Inc withdrew as the Applicant's attorneys on the 16th of September 2010.[38]

[110] The Respondents applied for default Judgment on the 5th of November 2010[39] and the rest is history; this Court granting default Judgment on the 22nd of February 2011.

The legal position

[111] A Judgment of this Court may be rescinded in terms of the Common Law, section 165 of the LRA or Rule 16A of the Rules for the Conduct of Proceedings in this Court.

[112] This application is brought in terms of Rule 16A[40] and it is thus incumbent upon the Applicant to show good cause.

[113] I agree with the exposition of the apposite legal position by Seady AJ,[41] to wit:-

"The application before me is brought in terms of rule 16A(1)(b) of the Labour Court Rules. So I confine myself to a consideration of whether the applicant has shown good cause for the rescission as required by that rule. Rule 16A(1)(b) is similar to rule 31(2)(b) of the Rules of the

[38] At p87.
[39] At p90.
[40] See paragraph 2.1 of the Applicant's founding affidavit at p5.
[41] In SIZABANTU ELECTRICAL CONSTRUCTION V GUMA & OTHERS [1999] 4 BLLR 387 (LC), at [7].

High Court. The requirements of good cause as contemplated by rule 31(2)(b) have stated as follows:

- *The applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance;*

- *The application must be bona fide and not made with the view merely delaying plaintiff's claim; and*

- *The applicant must show that he has a bona defence to the plaintiff's claim. It is sufficient if it makes out a prima facie defence in the sense of setting out the averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.*

(See Erasmus Superior court Practice Juta at B1-201 and 202.)"

[114] In that matter, Seady AJ enquired only into the requirement of setting out a *bona fide* defence and having found that the Applicant therein had failed to do so, did not enquire into the remainder of the requirements of good cause.

[115] I intend to follow a similar approach herein, in that if I find that the Applicant failed to provide a reasonable explanation for its default, then the application has to fail, without the need for me to enquire into whether the Applicant has set out a *bona fide* defence.

[117] I am aware that where an Applicant in similar proceedings has provided a poor explanation for default, a good defence may compensate.[42]

[118] That does not avail an Applicant who had failed to provide any explanation whatsoever and in my view, the best of (even unassailable) defences cannot trump a complete failure to provide any reasonable explanation for default, (such as a dishonest attempt), in applications for rescission of Judgments.

[119] The explanation proffered in this matter is palpably untrue.

120] Potgieter never – not even for a moment - thought that an agreement had come into being which allowed the Applicant to file its Answering Statement of Case only at a pre-trial conference and as a result he never acted as if there was such an agreement.

[121] He thus never recorded his belief that one existed - which he indubitably would have done when he wrote his anxious letters, attempting to revive the settlement talks – had he indeed harboured such a belief.

[122] I am also fully aware that, in the exercise of the wide discretion I have in evaluating good cause, I have to exercise that discretion in a manner which ensures that justice is done.[43]

[123] Having found that the Applicant attempted to rely on a false and belatedly contrived explanation for its default, it would not be in the interests of justice if I embark on an investigation to ascertain if the defence set out by the Applicant, is so remarkably strong, that I am obligated to - somehow - ignore the Applicant's dishonest explanation.

[42] See ERASMUS; SUPERIOR COURT PRACTISE; JUTA; at B1-204. See also CAROLUS V SAAMBOU BANK LTD, SMITH V SAAMBOU BANK LTD 2002 (6) SA 346 (SE), CREATIVE CAR SOUND V AUTOMOBILE RADIO DEALERS ASSOCIATION (PTY) LTD 2007 (4) SA 546 (D).

[43] See ERASMUS; SUPRA; at B1-204. See also WAHL V PRINSWIL BELEGGINGS (EDMS) BPK 1984 (1) SA 457 (T).

[124] *In casu*, the Applicant sought mainly to rely on an agreement with the Respondents that the Applicant may file its Answering Statement of Case as the pre-trial conference meeting, which was still pending at the time default Judgment was sought.[44]

[125] In my investigation into the history of the matter I actually went further and examined the correspondence to ascertain if (perhaps) there existed an agreement to hold over the filing of the Applicant's Answering Statement of Case pending the outcome of settlement negotiations.

[126] On the face of it, this appears to have been the case – for a while at least.

[127] The problem the Applicant faces in this respect is the belated advices by attorney Hart, that she actually had no mandate to deal with the Labour Court matter and that her mandate was in fact restricted to dealing with the condonation application.

[128] This effectively brings an end to this enquiry; but even if I am wrong about this, the correspondence – especially that of the Respondents' attorneys in June and July of 2010, eradicates any notion that settlement talks were still an option – it clearly was not.

[129] As far as the alleged agreement between the parties that the Applicant may file its Answering Statement of Case at the pre-trial conference, which still has to be held – and which the Applicant strongly seeks to rely on – the correspondence do not evidence such agreement at all.

[44] See paragraphs 24 – 29 of the Applicant's counsel's Heads of Argument.

[130] As it turns out, the high-water mark of the Applicant's case in this respect is a casual informative remark by Potgieter contained in his letter of the 18th of May 2010,[45] to wit:-

"We are hence amenable and available to meet at a mutually convenient date, time and place to discuss the practicalities and way forward. At that venue, we will be handing over our Statement of defense (sic) *as well."*

[131] By reason of the Respondents' attorneys writing a letter in response, dated the 2nd of June 2010,[46] wherein they suggest a date, time and venue for the meeting, the Applicant contends that an agreement came into being that it would be allowed to file its Answering Statement of Case at such a meeting.

[132] The contention that this almost matter of fact and relaxed remark by Potgieter could – somehow – be (super) transposed to an agreement by reason of the Respondents' attorneys not responding to it in its letter, is opportunistic and desperately grasping at straws.

[133] Potgieter's by the way remarks that the Applicant would file its Answering Statement of Case at the suggested meeting were only informative and cannot be elevated to an agreement, simply by reason of the Respondents' attorneys' silence on this in their written response, in which they merely suggested a date, time and place for the suggested meeting.

[134] To illustrate – the lateness of the Applicant's Answering Statement of Case, may well have been (and I very much suspect that it definitely

[45] At p58.
[46] At p60.

would have been) very high on the Respondents' attorneys agenda for this very meeting; intent on recording their prejudice suffered thus far and their objection to any late filing of the Answering Statement of Case; without an application for condonation.

[135] The letter responding only in respect of a date, time and venue for the meeting cannot be construed to mean that the Respondents have waived any rights they had to object to the late filing of the Applicant's Answering Statement of Case; and to suggest that this is so, is farcical.

[136] Even the Applicant will have to concede that no express agreement came into existence. At best for the Applicant therefore, what it contends for is a tacit agreement coming into existence, which is belied by both parties' conduct immediately after the Respondents' attorneys' letter suggesting only a date, time and venue for the meeting.

[137] Moreover, the suggested meeting did not take place and up and until the time when the relationship soured to the extent that the Respondents' attorneys expressly advised the Applicant that it will not meet with the Applicant any more as it would serve no purpose, there was never any recordal of the alleged agreement and none of the parties ever acted in a manner which evidences that it/they felt/believed there was such an agreement.

[138] When Potgieter realised that matters were now totally out of control and he excitedly wrote his letters in June and July of 2010, desperately trying to revive the settlement talks - under repeated and express threats of the Respondents' applying for default Judgment - he was at pains to record

much – if not all – that had transpired, and not once did he record any hint or a suggestion of an agreement to hold over the filing of the Applicant's Answering Statement of Case, until the holding of a pre-trial conference meeting.

[139] I therefore have little difficulty in finding that no such agreement ever came into existence and I reject this contention as false, contrived and opportunistic.

[140] It follows that the Applicant has failed to put up any explanation for its default; let alone a reasonable one.

[141] It is so that an Applicant who acted under a *bona fide* but mistaken belief should not be held to in wilful default.[47]

[142] This is not such a case and no such case was argued for.

[143] If Potgieter believed – albeit mistakenly – that such an agreement existed, he would acted accordingly. He never did – because, quite obviously, the very thought that his casual remark could constitute an agreement, not once, dawned upon (even) him.

[144] It is said[48] that before a person can be found to be in wilful default, the following elements must be shown:-

(a) knowledge of the action being brought against him;

(b) a deliberate refraining from entering an appearance to defend, though free to do so;

[47] See ERASMUS; SUPERIOR COURT PRACTISE; JUTA; at B1-203. See also KOEKEMOER V VILJOEN 1921 TPD 129.
[48] See ERASMUS; SUPRA; at B1-202.

(c) a certain mental attitude towards the consequences of the default.

[145] Applied to the facts of this case, the Applicant certainly knew of the Respondents' case brought against it and the Court Order compelling it to file its Answering Statement of Case but it failed to do so for no apparent or credible reason and it has throughout manifested a mental attitude of dragging the matter out by way of correspondence, rather than to simply filing its Answering Statement of Case.

[146] I thus find that the Applicant's default was wilful.

[147] As I have pointed out herein above, I actually enquired into the history of the events in more detail than I was requested to do.

[148] The result of my doing so, leaves me with the distinct impression of an Applicant who has little - if any – regard for the processes of this Court and its Orders.

[149] The fact that attorney Hart seemed to create the impression that she was mandated to deal with the Labour Court matter and only after the lapse of much time advised the Respondents' attorneys that she had no such mandate causes me much discomfort and in addition, her advices seem to be (expressly) contradicted by Potgieter who advised the Respondents' attorneys that the Applicant believed that she was dealing with the Applicant's Answering Statement of Case and pre-trial conference meetings.

[150] All of this means that for many months, no-one actively further prosecuted the Applicant's defence, which in itself is sufficient to dismiss

this application as it amounts to no reasonable explanation for the failure to file the Answering Statement of Case.

[151] There exist too many inconsistencies in the version/s by the Applicant, as to the history of the matter, to enable me to make a finding that it acted *bona fide*.

[152] As a matter of fact, everything about the Applicant's conduct herein leads me to believe that it was everything but *bona fide*; so much so – that I find that this application too – was not *bona fide*.

Conclusion

[153] The Applicant failed to provide any explanation for its default, let alone a reasonable one.

[154] The one proffered is a belatedly contrived version, belied by all the correspondence and the conduct of the parties.

[155] The Applicant's conduct herein has never been *bona fide* and this application – likewise - is not *bona fide*.

[156] The Applicant came to Court, brimming with self-confidence, accusing everyone but itself of improper conduct, (and in fact of dishonesty by not disclosing the alleged agreement to file its Answering Statement of Case on a later date, to the Registrar), whilst it had no case whatsoever and truth being told, had always been in wilful disregard of an Order of this Court – at all times material hereto.

[157] The Applicant burdened this Court with arduous papers and boldly made submissions not supported by any fact; even spuriously seeking an Order for costs.

[158] It is by reason – only - of the Respondents not seeking a punitive costs Order; that I do not make one.

[159] I intend to recall the *ex tempore* Order I made on the 5th of July 2012 and replace it with the following Order:-

[160] The Applicant's application for condonation is dismissed with costs.

161.1 The Applicant's application for rescission is dismissed with costs.

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L. HALGRYN
Judge of the Labour Court

APPEARANCES

For the applicant	:	Advocate L Giai-Coletti
Instructed by	:	Webber Wentzel Attorneys
For the Respondents	:	Advocate IM Maunatlala
Instructed by	:	Es Makinta Attorneys

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