IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA39/20

In the matter between:

PHILLIP HENRY GROOM **Appellant**

and

DAIMLER FLEET MANAGEMENT (PTY) LTD **Respondent**

Heard: **27 May 2021**

Delivered: **Deemed to be 4 August 2020.**

Coram: Davis JA, Coppin JA et Savage AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the order of the Labour Court (Lagrange J) granting a LC[1] Rule 11 application of the respondent, and specifically, (a) declaring the appellant's unfair dismissal claim against the respondent to be deemed abandoned, as contemplated in section 359(2)*(a)* of the 1973 Companies Act[2] for failing to give the requisite notice, and dismissing it; and (b) striking from the roll the appellant's conditional counter-application in terms of section 359(2)*(b)* of that Act to condone his late notice or failure to give a notice, and (c) ordering the appellant to pay the costs of the respondent's application and

[1] Labour Court.
[2] Companies Act 61 of 1973.

its opposition to the appellant's conditional counter-application. Leave to appeal to this Court was granted on petition.

[2] LC Rule 11 deals with interlocutory applications and other procedures not specifically provided for in the rules. Briefly, and to give context to the order appealed against – after the appellant had instituted an unfair dismissal claim against the respondent in the Labour Court, the respondent went into voluntary liquidation. Section 359(1) and (2) of the 1973 Companies Act, which are still valid and applicable to the liquidation of companies in terms of the new Companies Act of 2008[3], reads:

> "359 **Legal proceedings suspended and attachments avoid**
>
> (1) When the court has made an order for the winding up of a company or a special resolution for the voluntary winding up of the company has been registered in terms of section 200 –
>
> (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
>
> (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void.
>
> (2) (a) Every person who, having instituted legal proceedings against the company which were suspended by a winding up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
>
> (b) if notice is not so given, the proceedings shall be considered to be abandoned unless the court otherwise directs."

[3] Issues that arise in this case which will be dealt with in the judgment are, whether (a) the respondent made out the case at the appellant's unfair

[3] See item 9 of Schedule 5 of the Companies Act 71 of 2008.

dismissal claim that it had been abandoned as contemplated in section 359; and assuming so, whether the appellant's claim had indeed been abandoned as contemplated that section. As part of both issues the question of the Labour Court's jurisdiction to determine the issue of abandonment will be dealt with.

Essential background facts

[4] The appellant was employed by the respondent on 29 June 1981. On 8 December 2015, following lengthy negotiations, the respondent terminated his employment, allegedly, due to operational requirements.

[5] Aggrieved by this, the appellant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). When conciliation failed, the appellant instituted a claim for unfair dismissal in the Labour Court. He filed a statement of claim on 1 April 2016, and the respondent delivered its response to the claim on 21 April 2016.

[6] In his statement of claim, the appellant alleges, *inter alia*, that his dismissal by the respondent was both procedurally and substantively unfair; that it was not for operational reasons at all and had resulted, *inter alia*, in a reduction of his lump sum pension fund entitlement in the amount of about R 2 million, as well as in the forfeiture of his entire severance package, allegedly because he refused alternative employment. Needless to say, the respondent disputed all these allegations and sought a dismissal of the appellant's claim.

[7] Before November 2016, rumours were circulating that the respondent was considering liquidation. A notice addressed to its customers had been posted on the respondent's website to the effect that it would be ceasing its business activities by 1 November 2016.

[8] At the time attorneys acting for the appellant had sought confirmation of the truth of the rumours and also applied for an urgent allocation of a trial date. On 4 November 2016, the respondent replied to the appellant's attorneys to the effect that it was not obliged to inform the appellant of its intentions

regarding liquidation, and that the appellant would have an opportunity to exercise his rights if and when the respondent was liquidated.

[9] Unbeknown to the appellant, in December 2016, the respondent passed a special resolution for its voluntary liquidation. Unaware of that fact, the appellant's attorney addressed two further emails to the respondent during, respectively, December 2016 and January 2017, enquiring whether the respondent was to be liquidated. The appellant only received notification of the respondent's voluntary liquidation in July 2016.

[10] The liquidator, Mr Barnard, was (allegedly) appointed on about 21 February 2017. Ignorant of this fact, the appellant of his own accord continued to try and establish whether the respondent had been liquidated, including searching on its website and the Government Gazette.

[11] Notice of the respondent's liquidation and Mr Barnard's appointment as the liquidator was only published in the Government Gazette of 10 July 2017, and it is only then that the appellant acquired actual knowledge of those facts.

[12] The appellant engaged new attorneys to represent him and they promptly contacted the respondent on 12 July 2017 to enquire about the liquidation and Mr Barnard's appointment. Further correspondence between them ensued.

[13] On 25 August 2017, about six months after the liquidator's appointment, the appellant, through his attorneys, gave the liquidator a notice contemplated in section 359(2)*(a)* to the effect that he would be continuing with the unfair dismissal claim that he had instituted in the Labour Court before the respondent's voluntary liquidation.

[14] On 6 October 2017 attorneys representing the liquidator informed the appellant (i.e. through his attorneys) that the section was not applicable. On 12 October 2017, the appellant requested that the matter (i.e. his unfair dismissal claim), which was set down to proceed to trial in the Labour Court on 23 October 2017, be removed from the trial roll and, instead, be set down for 27 October 2017.

[15] On 6 December 2017, the respondent's attorneys by email addressed to the appellant's attorneys enquired with reference to the matter that had been removed from the trial roll to "[k]indly advise whether your client intends to pursue the referral, and if so, the date on which the referral will be heard.'' The appellant's attorneys confirmed that the matter was to proceed and was to be enrolled for trial on 4 March 2019.

[16] In May 2018, the respondent set the matter down for trial on 4 March 2019. In a letter dated 23 May 2018 the respondent's attorneys acknowledged the notification of the set down by the registrar of the Labour Court and requested the registrar to forward the set down to them.

[17] On 5 July 2018, the respondent's attorneys informed the appellant's attorneys by letter, *inter alia*, that the appellant had failed to comply with section 359(2)*(a),* and in particular, had failed to give the liquidator the notice contemplated in that section and that the appellant's claim was "deemed abandoned" as contemplated in that section.

[18] The appellant addressed various items of correspondence in response to clarify the position, in particular, since the letter of 5 July was a volte face in respect of the position the respondent, or more particularly, the attitude Mr Barnard took earlier when he advised that the section did not apply. To these there was no reply.

[19] The appellant proceeded in December 2018 to institute another action against the respondent, and others, including Mr Barnard, for breach of his employment agreement. Amongst other things, the appellant contemplated consolidating the actions and joining the respondents in the second action as respondents in the first matter, but, ultimately, did not act upon some of those ideas.

[20] On 28 February 2019, the Friday before the trial of the unfair dismissal matter, the respondent caused a practice note to be filed in which it, for the first time, raised as a preliminary point to be decided that the appellant' claim was deemed to be abandoned as contemplated in section 359(2)*(a).*

[21] The appellant's attorneys took issue with those contentions and argued that the appellant had indeed complied with the section, but that, in any event, the Labour Court would be requested to declare that the appellant's claim had not been abandoned.

[22] At the trial hearing on 4 March 2019, when the respondent raised the issue of the abandonment of the claim as a preliminary point, it was directed to deliver a Rule 11 application dealing with the point.

[23] Following an exchange of affidavits, which included a conditional counter-application brought by the appellant, effectively, seeking an order that his claim had not been abandoned, the rule 11 application was argued. In its replying affidavit the respondent, *inter alia*, asked for the dismissal of the appellant's claim and for the striking –off of the counter-application, on the ground, *inter alia*, that the Labour Court did not have jurisdiction to consider it (presumably in light of section 12 of the 1973 Companies Act).

The court a quo's judgment

[24] The court *a quo* described the situation confronting it as a "paradox". This is what it said: "[23] The somewhat paradoxical situation this presents is that this court is being asked to consider and determine whether Groom's manifest non-compliance with section 359 means that his referral should be dismissed because it is deemed to be abandoned, but to refuse to deal with his application to obtain an indulgence to be allowed to continue to prosecute his claim on grounds of lack of jurisdiction. If this court should rule that Grooms referral ought to be dismissed because his non-compliance with section 359 means he is deemed to have abandoned it, that effectively will prevent him proceeding with an application before the High Court, which does have jurisdiction to entertain his application for indulgence."

[25] The court a quo then referred to a decision of the Labour Court in *Direct Channel KwaZulu-Natal (Pty) Ltd (in liquidation) v Naidoo & others*[4] ("*Direct Channel*") and held that, even though there were factual differences between

[4] (2015) 36 ILJ 2611 (LC).

the cases, the central tenet applicable to both, was that compliance with section 359 was peremptory, and the failure to file the required notice meant that the claim was deemed to be abandoned. It then went on to find that it did not have the jurisdiction to entertain the appellant's counter-application because "the court" contemplated in that section only referred to the High Court.

[26] The court *a quo* returned to consider the paradox, reasoning that one possibility was, instead of dismissing the appellant's claim, to postpone the rule 11 application to dismiss the claim pending the appellant launching an application in the High Court in terms of section 359(2)*(b)* to establish that his claim had not been abandoned, but was dissuaded from taking such a course.

[27] It held: "However, as things presently stand, his claim is abandoned and the application to dismiss it was properly placed before this court. The situation might have been different if he had already launched an application in the High Court under section 359(2)*(b),* and if the outcome of that application was pending. Under those circumstances, he might feasibly have sought to stay the application to dismiss his referral." The court *a quo* finally held that the respondent's objection to its entertainment of the appellant's conditional counter- application had to be upheld.

[28] In respect of the costs, the court *a quo* held that there was no justification for the appellant not to have acted expeditiously in bringing an application in the High Court to direct that his claim in the Labour Court was not abandoned; that it would have been inclined to make a punitive costs order against the appellant if the respondent persisted in seeking such an order, but since it did not, an ordinary "limited costs award" was justified.

[29] The court *a quo* then proceeded to make the following order:

> [1] The application to condone the late filing of the applicant's replying affidavit in the dismissal application is condoned.
>
> [2] The referral of the respondent's unfair dismissal claim under case number JS166/16 is deemed abandoned, by virtue of the operation of

section 359 of the Companies Act, 61 of 1973, and accordingly is dismissed.

[3] The respondent's application for an order declaring that his unfair dismissal claim should be declared not to be abandoned is struck off the roll for lack of jurisdiction.

[4] The respondent must pay the costs of the drafting, preparation and argument of applicant's application and its opposition to his counter-application on 26 March 2019.

[5] Each party must bear their own costs of the hearing on 4 March 2019.'

Arguments on appeal

[30] In heads of argument filed on behalf of the appellant, the following is essentially contended: firstly that, while it is correct that only the High Court has jurisdiction to direct in terms of section 359(2)*(b)* that a claim is not abandoned, the court *a quo* "should have gone no further than to hold that, absent condonation from the High Court, Mr Groom's claims in the Labour Court are deemed abandoned", which would have enabled the appellant to obtain the required "condonation" from the High Court and to have proceeded to prosecute his claim in the Labour Court. However, having dismissed the unfair dismissal claim the court *a quo*, in effect, went further and determined that claim in the respondent's favour, thereby purporting "to tie the hands of the High Court if and when it was approached for an order condoning non-compliance", because the claim is already dismissed. It is submitted that the court *a quo*'s approach and order "constitute an unwarranted limitation" of the appellant's right in terms of section 34 of the Constitution of the Republic of South Africa, 1996 to have his dispute fairly determined by a court or other relevant tribunal.

[31] Secondly, it is argued that the respondent (represented by Mr Barnard) had explicitly, implicitly or tacitly waived his right to rely on section 359 when it was stated unequivocally by him, or by his attorneys on his behalf, that the section was not applicable, when a notice was first given by the appellant to Mr Barnard in terms of that section and pertaining to the claim in question.

[32] Thirdly, it is submitted that it was not possible for the appellant to comply with section 359 because he was not notified of the respondent's liquidation and the appointment of Mr Barnard as and when it occurred, and that this was also a fact that distinguished the present matter from those in *Direct Channel*, where the claimant was timeously aware of the dates of the liquidation and the appointment of the liquidator.

[33] Fourthly, it is argued that the appellant did not unreasonably delay the prosecution of his claim against the respondent and the delay that occurred was not prejudicial to the respondent and/or outweigh the prejudice of the appellant because of the dismissal of his claim.

[34] Lastly, in respect of the costs, it is submitted in the said heads of argument of the appellant that there were no exceptional circumstances that warranted a departure from the general rule in labour matters that costs do not as a matter of course follow the result. Further, the court *a quo* should not have focussed exclusively on the appellant's perceived omissions, but ought to have considered all the facts, including the following: that the respondent wilfully and deliberately concealed the fact of its liquidation and the appointment of the liquidator, Mr Barnard, from the appellant. These facts were (seemingly deliberately) only published many months after the actual dates of those events, and inconsistently with the Companies Act; that the liquidator first informed the appellant in response to the notice given by the appellant that section 359 was not applicable, and then on "the eleventh hour" purported to invoke the section again; that the appellant was an individual, proverbially, a "David" against a "Goliath", who had suffered a huge reduction in his pension fund benefits and the loss of the entire severance package that was due to him.

[35] The respondent's arguments were essentially in support of and confirmatory of the correctness of the court *a quo*'s judgment and order. Its arguments, basically, were that the respondent was entitled to the effective and speedy resolution of its dispute with the appellant; the appellant failed to litigate in accordance with the applicable law, i.e. section 359 of the 1973 Companies Act; the court *a quo* correctly determined that, despite having been

forewarned to do so and despite an indication that he would, the appellant failed to apply to the High Court for the relief contemplated in section 359(2)*(b);* and that the court *a quo* "determined the rule 11 application on the basis it considered expedient in the circumstances to achieve the objectives" of the LRA[5].

[36] The respondent relied, in defence of the court *a quo*'s dismissal of the appellant's claim, on selected portions of an unreported decision of the Supreme Court of Swaziland in *Mkhatshwa v Stewart and Others* [6]((*'Mkhatshwa'*) where it dealt with the deemed dismissal of an appeal deemed abandoned for failure to comply with the applicable rules. Reliance was placed in particular on a *dictum*[7] where that court seemingly answered the question: "Why bother to dismiss a 'dead' appeal?" and posed the following questions: "… is it that the appeal is not really 'dead' notwithstanding abandonment, so that the dismissal is to ensure that it is truly dead and buried and unlikely to resurrect? Or is the dismissal intended to secure the applicant's costs?"

[37] It also relied in support of the dismissal on *dicta* of this court in *Macsteel Trading Wadeville v Van der Merwe & others*[8] (*'Macsteel'*), where this court dealt with the rationale of Rule 11 and the powers of the court in terms of that rule, more particularly the powers or discretion afforded to the court by Rule 11(4) "to take any course of action to achieve the objects of the [LRA]. "

[38] It was argued on behalf of the respondent that there was no reason for the court *a quo* "to have left the door open for the [appellant] to proceed to the High Court in terms of section 359''; and that it was not required of the court *a quo* to determine whether the appellant "showed good cause why the claim for unfair dismissal should be considered to be not abandoned"; that the court *a quo* correctly determined that the appellant had "failed to prosecute his unfair dismissal claim in terms of the requirements in law and that no reason has

[5] The Labour Relations Act 66 of 1995.
[6] (3/2016) [2017] SZSC 3 (05 May 2017).
[7] See para 7 of the judgment.
[8] (2019) 40 ILJ 798 (LAC) paras 18-20.

been advanced for such failure, despite being forewarned; and that section 359(2)(a) " is peremptory".

[39] Rather surprisingly, as the contrary seems to be stated in its supporting affidavit in the Rule 11 application, counsel for the respondent argued further that the deeming provision was not for the benefit of the liquidator; and that the liquidator does not have the discretion to waive compliance with the section and/or to elect not to invoke the section. It was also submitted that the respondent did not raise "the requirement in section 359 as a nominal defence"; that the requirement, i.e. to bring a substantive application in the High Court for it to direct that the claim is not abandoned, if not complied with, in respect of a claim deemed to be abandoned, will result in the liquidator not being confronted with litigation in respect of that claim; and that the appellant was the author of his misfortune, in pursuing the litigation in the Labour Court in the manner that he had done. In respect of costs, the respondent argued, in essence, that the order was justified.

[40] Two further aspects were raised and dealt with in argument before us, namely, the issue of jurisdiction and whether the respondent had made out a case in its Rule 11 application, i.e. that the appellant's claim had been abandoned as contemplated in section 359. Briefly, in respect of the former issue, senior counsel for the appellant, who did not draft the heads of argument for that party, submitted that the concession made in those heads that the court *a quo* did not have the jurisdiction or power to consider the appellant's counter application, ie for the relief contemplated in section 359(2)*(b),* was possibly wrong and that the court *a quo* had the power. Further, he submitted that the respondent did not make a case on its papers in the Rule 11 application for invoking the deeming provision.

[41] The respondent's counsel referred to section 12 of the 1973 Companies Act in support of his argument that the court *a quo* did not have the requisite power or jurisdiction to direct that the claim was not abandoned, as contemplated in section 359(2)*(b).* While pressed to concede the glaring defects in the supporting papers of the respondent in its rule 11 application, in particular those caused by a certificate of the Master of the High Court pertaining to the

appointment of the liquidator, the respondent's counsel (unsuccessfully) sought leave to replace the defective certificate with a new, allegedly corrected one, on appeal, by merely transmitting a copy of such document to the Court.

Discussion

[42] The arguments raised by the parties in their heads, as summarised above, save for the issue of costs, will first be evaluated, and thereafter whether a case had been made out by the respondent in its Rule 11 application for invocation of the deeming provision. The issue of jurisdiction will then be considered, and lastly, the costs aspect.

[43] The appellant's arguments relate in particular to the issue of jurisdiction and the powers of the court *a quo* in respect of the determination of the section 359 aspects, and shall be evaluated when dealing with that topic. The arguments made by the respondent, as summarised above, are capable of swift disposal with reference to general or trite principles, including those pertaining to section 359 specifically.

[44] Both the *Mkhatshwa* and *Macsteel* decisions are distinguishable on the facts. In addition, in respect of the former, it is a foreign judgment, *dicta* of which should not readily and without caution be marshalled in resolution of legal issues in South African domestic law. Having said that, in any event, the respondent's reliance on the dicta from those cases is misplaced.

[45] The court in *Mkhatswa* did not conclude that an appeal that was deemed to be abandoned had to be dismissed. On the contrary, it seemed to be questioning the utility of such an order in respect of an appeal that was deemed to be abandoned. In *Macsteel,* this Court never implied that the expediency contemplated in the LRA excluded fairness. A key purpose of the LRA, if not one of the foundational values it espouses, is fairness.

[46] Contrary to the argument of the respondent, it is trite that the deeming provision in section 359(2)*(a)* is purely for the benefit of the liquidator and he is at liberty to waive, or to dispense with its compliance[9].

[47] The object or purpose of the section is to prevent the liquidator from being overwhelmed or inundated with legal proceedings without having sufficient time within which to consider properly whether the company in liquidation should resist or settle them[10].

[48] Section 359 is intended to regulate, not only the termination of the suspension of claims against the company in liquidation, but also the deemed abandonment of proceedings in the absence of the required notice. Hence it was necessary to fix the date of the termination of the suspension period and the date of the deemed abandonment, i.e. four weeks after the date of the appointment of the liquidator[11].

[49] The defence that the liquidator has to a claim in terms of section 359(2)*(a),* namely, that the claim is deemed abandoned, is not an absolute defence, because the court may direct in terms of section 359(2)*(b)* that notwithstanding non-compliance with subsection (2)(a), the claim is not abandoned.

[50] Against that background we turn to consider the court *a quo*'s approach and conclusion.

[51] It seems logical that where the defence, namely, that the claim is deemed abandoned, is invoked by the liquidator, and in response to it, the claimant seeks a direction that the claim is in fact not abandoned, it would require the

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[9] See, *inter alia*, *Gilbert Hamer & Co Ltd v Icedrome Promotions (Pty) Ltd* 1962 (3) SA 372 (D) at 373; *Van der Harst v Wells NO* 1964 (4) SA 362 (W) at 363; *Michaels v Wells NO* 1967 (1) SA 46 © at 53; *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 (A) at 884F-G; PM Meskin et al *Henochsberg's Commentary on the Companies Act 61 of 1973* (Lexis Nexis; 5ed) Commentary on section 359.

[10] See, inter alia, *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (in Liquidation)* 2010 (2) SA 517 (SCA) at 343; *Umbogintwini Land and Investment Co (Pty) Ltd v Barclays National Bank Ltd* 1987 (4) SA 894 (A) at 910; *Henochsberg's Commentary on section 359 of the Companies Act 61 of 1973* (above).

[11] See *Ronbel* (above) at 342.

court to determine whether the claim has indeed been abandoned. The defence and its response, ultimately, do not entail two disparate enquiries.

[52] After all the provision in section 359(2)*(a)* is a "deeming" provision, implying, as in the case of all other deeming provisions, that it is a provisional assumption of a fact[12]. In light of the provisions of subsection (2) (b) it is capable of 'rebuttal'. In other words, according to the section, the claim, in respect of which notice was given as contemplated in that section, is presumed (in terms of the law) to have been abandoned, but that presumption is capable of being rebutted by evidence showing that the claim in fact had not been abandoned. The ultimate actual question the court has to resolve is whether the claim has indeed been abandoned. The assumption may only be taken to have been established as a fact if there is no countervailing evidence destroying that assumption[13].

[53] Hence, it appears incongruous that a court, faced with the invocation of the deeming provision (i.e. as the defence) and in response to it, an application in which evidence is adduced that the claim has not been abandoned, would find that it has jurisdiction to determine the former, but not the latter, notwithstanding the fact that these two aspects are not merely ancillary to each other, but are interlinked. As mentioned, the defence of the liquidator, is not a complete defence**;** it is merely a presumption that he can rely on, but it is capable of rebuttal.

[54] The court *a quo*'s finding, effectively, that it only had the power or jurisdiction to determine (effectively, a portion) of the Rule 11 application (which was the vehicle used by the liquidator (respondent) to raise a defence to the appellant's unfair dismissal claim instituted in that court), but that it did not have the power to determine the conditional counter-application of the appellant, (that the claim was not abandoned), appears to be incorrect. This is especially so when viewed in light of the incidental jurisdictional powers of the Labour Court.

[12] See 18 LAWSA (3 ed) para 236.
[13] Ibid.

[55] The decision in *Direct Channel* is distinguishable on the facts, not merely because the claimants there were aware of the date of the liquidation and when the liquidator in that matter had been appointed, but because there was no application in terms of section 359(2)*(b)* to declare that the claim there had not been abandoned; and the court there did not have a jurisdiction issue with which to contend**.** In that situation the presumption, that the claim was abandoned was not rebutted, and the actual abandonment, arguably, became an established fact.

[56] As pointed out above, the respondent's counsel tried to justify that the finding of the court *a quo* with reference to section 12 of the 1973 Companies Act. The section reads as follows: "The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate."

[57] The respondent's counsel and, presumably, the appellant's counsel who drafted the heads of argument, seem to be of the view that in terms of section 12, the Labour Court had no jurisdiction to determine the appellant's counter–application for a direction that his unfair dismissal claim had, in fact, not been abandoned, even though the Labour Court could determine the Rule 11 application – and that the only court that had jurisdiction to determine the issue raised in the counter-application was a provincial or local division of the High Court (more particularly, the Gauteng Division and/or Local Division of the High Court, in light of the situation of the respondent's registered office).

[58] While one accepts that the Labour Court would not have jurisdiction to determine a self-standing application for such relief in light of the literal meaning of section 12, it cannot hold true where an application is brought in proceedings ancillary or incidental to other proceedings in respect of which the Labour Court has jurisdiction in terms of the LRA.

[59] There is no doubt that the Labour Court had jurisdiction to determine the main claim of the appellant. The defence involving the invocation of the deeming provision, albeit by way of a rule 11 application, and the counter-application,

which is also interlinked to that application, are ancillary or incidental to the Labour Court's determination of the main claim.

[60] Section 12 of the 1973 Companies Act does not preclude the Labour Court from assuming and exercising jurisdiction in respect of any ancillary aspects to a claim that is before it, and in respect of which it has jurisdiction. It is also a trite principle that if a court has jurisdiction in the main action it also has jurisdiction in any ancillary matter to that main claim[14].

[61] Convenience is a key consideration. In terms of the common law principle of *causae continentia*, for example, in order to avoid duplication of proceedings, or conflicting decisions in the same matter, or in order to dispose of cases more conveniently: "(a) more than one claim against different persons or in respect of different things in different jurisdictional areas may be joined in one process before one court if it could be said that together they really constituted one case in that the one began where the other ended"; and "(b) one indivisible obligation in respect of an indivisible thing which was situated in two different jurisdictional areas may be enforced in any of the areas concerned." [15]

[62] The jurisdiction of a High Court, and equally that of the Labour Court, may be extended by application of the principle of *causa continentia*[16]. Those courts are also equally obliged in terms of the Constitution to develop the common law, including the common law relating to jurisdiction in order to promote the spirit, purport and objects of the Bill of Rights[17].

[63] Section 151(2) of the LRA provides that "[t]he Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of south Africa has in relation to matters under its jurisdiction."

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[14] See 11 LAWSA (2ed) para 527and the cases cited there.
[15] See: *NCS Plastics (Pty) Ltd v Erasmus* 1973 (1) SA 275 (O) at 278A; and Joubert et al (eds) LAWSA (First Re-Issue) Vol 11 para 451 – *Jurisdiction*.
[16] See, inter alia, *Permanent Secretary Department of Welfare, Eastern Cape v Ngxuza* (493/2000) [2001] ZACSA 85 (31 August 2001); 2001 (4) SA 1184 SCA- at 1201D-F and *Roberts Construction Co. Ltd v Wilcox Bros. (Pty) Ltd* 1962 (4) SA 326 (A).
[17] Section 39(2) of the Constitution of the Republic of South Africa, 1996.

[64] In terms of section 158(1)*(j)* of the LRA the Labour Court has the power to "deal with all matters necessary or incidental to performing its functions in terms of [the LRA] or any other law."

[65] Effectiveness is another consideration in the exercise of incidental jurisdiction. Beside the fact that the court *a quo*'s obligation to give an effective judgment on the issue of the abandonment of the claim, had been undermined by its finding on jurisdiction, it seems to create significant inconvenience if a litigant is expected to approach another court in respect of part of a matter, that is actually ancillary or incidental to the main claim pending before the Labour Court, or to deal with such matters piecemeal in different fora. The concession that the Labour Court did not have the jurisdiction to determine the issue raised in the conditional counter-application, despite the circumstances of its incidence, does not appear to have been correctly made.

[66] Once the court *a quo* was satisfied that it had jurisdiction in respect of the main claim, i.e. the unfair dismissal claim, and accordingly also in respect of the defence raised by the respondent (or liquidator) in terms of section 359(2)*(a),* it also had jurisdiction or the power to determine the conditional counter-application which was essentially interlinked and not merely ancillary to the issue raised by the defence, namely, whether the claim had been abandoned.

Failure to make out a case invoking the deeming provision

[67] LC Rule 11 requires that the applications envisaged there be brought on notice, supported by affidavit(s), unless the application only deals with procedural aspects. It is trite that where relief is claimed in an application, the supporting, or founding affidavit, must contain all the averments necessary for the relief claimed[18]. It also trite that it may be necessary to file more than one affidavit where circumstances require it, for example where confirmation is needed of an averment from someone with personal knowledge of that fact, in compliance with the rules for the admission of evidence, including hearsay.

[18] See, *inter alia*, *Hart v Pinetown Drive-Inn Cinema Pty Ltd* 1972 (1) SA 464 (D) at 469C-E.

[68] From a perusal of the respondent's Rule 11 application, and in particular the supporting affidavit attested to by the liquidator, it is apparent that a proper case for the invocation of section 359 had not been made out. This is apparent in at least two respects, firstly, in that it failed to adduce admissible evidence regarding the date of registration of the special resolution for the liquidation of the respondent and, consequently, for the appointment of the liquidator, Mr Barnard, and secondly, by failing to establish, on its own version, that the liquidator (assuming his appointment was a regular) had not waived compliance with that section.

[69] In terms of section 350 of the 1973 Companies Act, no voluntary winding-up of a company shall be of any force and effect unless the special resolution to that effect has been registered in terms of section 200 of that Act. And section 350(1)(6) (which is similar to section 80(1) of the new Companies Act) specifies the formalities that have to be complied with. In terms of section 80(2) of the new Companies Act, the voluntary winding up of the company commences when the special resolution is filed (registered) with the Companies and Intellectual Property Commission ('the Commission").

[70] In support of his averments relating to the voluntary winding up of the respondent and his appointment as the liquidator, Mr Barnard, on behalf of the respondent, relies on the copy of a certificate, purportedly issued and signed by the Master of the High Court, which is attached to his affidavit. The certificate obviously does not support Mr Barnard's version concerning the dates of the winding-up of the respondent and the regularity of his appointment. Mr Barnard declares that the certificate is erroneous in those respects, and instead of having procured a corrected certificate, or an authoritative affidavit from the Commission, or the Master of the High Court, appears content with his own version concerning the facts, which, by their nature could only truly be within the personal knowledge of the Commission, or the Master of the High Court.

[71] The differences between his version and those in the certificate are significant. The certificate which bears a date stamp of 21 February 2017, for example, does not reflect the date upon which the liquidator was appointed. It

further appears to certify, at once, that the respondent was provisionally liquidated by the High Court, and that a special resolution was a registered on 15 December 2017, apparently long after that date upon which the liquidator, on his version, was appointed. The liquidator, on the other hand, avers that the special resolution was registered on 15 December 2016 and that he was appointed on 21 February 2017.

[72] What emanates from the certificate itself is most concerning since it suggests that the liquidator was appointed before the registration of the special resolution of the company, i.e. before the winding-up even commenced. The correct dates of the registration of the special resolution and of the liquidator's appointment are facts with the personal knowledge of the Commission and of the Master, respectively, and accordingly the facts as certified are be assumed as correct unless and until those functionaries certify or attest to the contrary.

[73] Even if the special resolution itself may have made provision for the appointment of a liquidator, a fact which is unknown, the appointment of a liquidator may only legally take place after the registration of the special resolution and after a meeting of creditors and members of the company had been called by the Master (section 364*(a)* of the 1973 Companies Act). In this instance, it is also not known whether a meeting of creditors had been called, or if the members at a general meeting had attended to those aspects as contemplated in section 349 of the old Companies Act.

[74] As things stand, on the affidavit relied upon the respondent, in the absence of admissible evidence to the contrary, the regularity of the liquidator's appointment and the correct date thereof, as well as the date of the commencement of the winding-up of the respondent is not established, bearing in mind that inadmissible hearsay is to be excluded, and that the establishment of those facts are crucial for the successful invocation of the deeming provision in section 359(2)(a).

[75] The appointment of the liquidator is not only dependent upon the registration of the special resolution, but follows from there (section 359(1)). Further, a

person who instituted proceedings to enforce a claim against the company, which were suspended by the winding-up, who intends continuing those proceedings, is required to give the liquidator notice to that effect within four weeks of the appointment of the liquidator (section 359(2)(a).

[76] There was no basis established upon which the court a quo could exercise its discretion to admit Mr Barnard's hearsay evidence. Consequently, crucial facts that had to be established by the respondent (or liquidator) had not been established for the invocation of section 359(2)(a) and that in itself should have resulted in the dismissal of the Rule 11 application.

[77] Secondly, it appears *ex facie* the respondent's application, and in particular the supporting affidavit to that application, that the liquidator had not insisted promptly and from the outset that the appellant comply with section 359(2)*(a).* But, instead he started off evincing an intention not to invoke the section, or to enforce any right conferred on him by that section, but allowed the claim to be prosecuted further, and only purported to invoke it much later after the claim was no longer subject to a suspension.

[78] It was not open to the liquidator, having waived compliance, to then insist on compliance at his own whim. He could not approbate and reprobate. Thus, even in that regard the respondent (or the liquidator) had failed to make out a case that the appellant's unfair dismissal claim before the court a quo was deemed to be abandoned as contemplated in section 359(2)*(a)* of the old Companies Act.

[79] It follows that the appeal must succeed. The question, however, is what is to be ordered in respect of the conditional counter-application of the appellant. As pointed out above, it should not have been struck from the roll. Since the counter- application was conditional upon the court *a quo* finding that that the appellant's delivery of a late notice constituted an abandonment of his claim, the court a quo did not have to decide it since it could not find on the papers that the respondent (or more, particularly, the liquidator) had made out a case for invocation of section 359(2)*(a).*

[80] There is no reason why the respondent should not have been mulcted with the costs occasioned through its abortive Rule 11 application. However, taking the law and fairness into account, including the novelty of the issues raised, no costs are to be ordered in respect of the appeal.

[81] In the result, the following order is made:

81.1 The appeal is upheld;

81.2 The order of the Labour Court is set aside and substituted with the following order: “The Rule 11 application for an order declaring that the respondent’s unfair dismissal claim under case number JS 166/16 is deemed abandoned, and related relief, is dismissed with costs.”

P Coppin

Judge of the Labour Appeal Court

Davis JA and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES

FOR THE APPELLANT:	Advs. Snider SC, G Bekker
	(heads having been prepared by CE Watt-Pringle SC and G Bekker)
	All instructed by Du Toit Attorneys
FOR THE RESPONDENT:	Adv PH Kirstein
	Instructed by Adams & Adams Attorneys