IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J 1443/09
Reportable

In the matter between:

HANNES DERCKSEN t/a INTERMENT CARRIERS **Applicant**

and

LESIBANA ANNANIAS SELOMANE **Respondent**

JUDGMENT

Bhoola J:

Introduction

[1] The applicant seeks to rescind the order ("the order") granted by default by this Court under case number JS 915/08 on 29 April 2009, as well as leave to oppose the respondent's claim and file its statement of defence

[2] The order issued was as follows:

a) The Applicant's retrenchment by the Respondent is found to be both substantively and procedurally unfair.

b) The Respondent is to pay the Applicant compensation of R53 640-00 which is the equivalent of 12 months remuneration payable within 10 days of service of the order.

c) The Respondent is to pay the Applicant's costs.

[3] The respondent was employed by the applicant from about 1995 as a Code 10 driver prior to being retrenched on 21 January 2008.

[4] The respondent's duties were to deliver frozen chickens and groceries on behalf of the applicant to its clients, including Fresh Mark (Pty) Ltd. On 30 October 2007, Fresh Mark (Pty) Ltd advised the applicant that its services would no longer be required. On or about November 2007, the applicant notified the respondent that it contemplated making his position redundant as Fresh Mark (Pty) Ltd had terminated its contract with the applicant. The applicant proposed that the respondent should go on leave in order to give him time to consider possible alternatives in order to avoid his retrenchment. The respondent accepted this proposal. When the respondent returned in January 2008 the applicant enquired whether he had any alternatives to propose. He had none. The applicant alleges that he had explained to the respondent that since he was employed as a code 10 driver for a specific truck that solely delivered fresh produce for Fresh Mark (Pty) Ltd, he could not allocate him to an alternative position in the business since all other employees were code 14 drivers and the respondent did not possess a code 14 licence. The respondent was advised that the applicant had no alternative but to make his position redundant and sell the vehicle that was used to deliver goods on behalf of Fresh Mark (Pty) Ltd. It was agreed between the parties that the respondent would receive two weeks' severance pay per year of service.

[5] The respondent alleges that he is in possession of a code 14 drivers' licence and disputes that he only delivered products to Fresh Mark (Pty) Ltd. A copy of his code 14 licence (obtained in 1993) was annexed to his answering affidavit. He admits that he went on leave as proposed by the applicant, but denies that the purpose of the leave was to give him time to consider possible alternatives to retrenchment, as the possibility of retrenchment had for the first time been communicated to him only upon his return from leave. On his return on 21 January 2008, the applicant instructed him to wait for him and not to perform his normal duties. He waited to be called to commence his duties but instead the applicant emerged from his office with a notice of retrenchment which he handed to him. He was advised by the applicant that he was retrenched and should approach the Department of Labour and the National Bargaining Council for the Road Freight Industry to claim his Unemployment Insurance Fund and Provident Fund benefits.

[6] The applicant referred a dispute concerning his unfair dismissal to the National Bargaining Council for the Road Freight Industry on 3 July 2008. On the same day a copy of the referral form was faxed to the applicant. Thereafter notice of set down of the conciliation hearing was sent to the applicant.

[7] The applicant did not attend the conciliation hearing and a certificate of non-resolution was accordingly issued. The respondent referred the dispute to this Court. On 26 January 2009 a copy of his statement of claim was sent to the applicant by the respondent's attorneys of record to the fax number on record. On 28 January 2009 a copy was sent by registered post to the applicant's postal address.

[8] On 27 January 2009 the respondent alleges that the applicant telephoned Mr Daniel Madiba ("Madiba") of the respondent's attorneys of record and indicated that he did not intend opposing the claim as he did not have money to waste on attorneys' fees. Madiba avers in his confirmatory affidavit that he sought to impress upon the applicant the consequences of failing to reply to the statement of claim. The applicant denies that this telephonic discussion ever took place.

[9] The matter was enrolled for default judgment on 29 April 2009, following which the order was granted.

[10] The respondent's attorneys then addressed correspondence to the applicant (dated 29 April 2009 and faxed on 30 April 2009) enclosing the court order and requesting payment in compliance.

[11] Madiba alleges that on 21 May 2009 he telephoned the applicant to ascertain whether he had received the faxed letter and order. The applicant stated that "*he had sent the documents to the respondent's union as he had nothing to do with the respondent anymore".* Madiba recorded this in a file note. The applicant denies these allegations.

[12] On 26 May 2009 Madiba forwarded a copy of the notice of taxation and bill of costs to the applicant by fax under cover of a handwritten fax sheet.

[13] Madiba alleges further that during May 2009 he received a telephone call from a Mrs Yvette Benade ("Benade") who claimed to be representing the applicant. She informed Madiba that the applicant was bankrupt and was not in a position to meet his financial obligations.

[14] Madiba filed a supplementary confirmatory affidavit annexing email correspondence from Benade which he received on 8 June 2009. The email read as follows:

"Dear Daniel

As per our conversation, attached find the letter stating that the client no longer has a contract with Fresh Mark and had no alternative to retrench your client. Your client was consulted and signed his retrenchment letter excepting (sic) his retrenchment that stated that my client can no longer employ him. Your client showed no objection at that time or asked for any interpreter or help or asked for a delay until time he had council (sic). He signed and excepted (sic) his retrenchment. Your client was given a month (sic) notice pay as well as 2 weeks for every year he worked, instead of the one week payment as per law for every year he worked. Your client received those payments and again gave no objection. He did not contact my client to object against the amount that was payed (sic) to him, therefore we can expect that your client felt everything was in order. He also received his benefits from the National Bargaining Council. His computer number is 1674877 at the Council. His employer file number is 9472. The client followed the law to the letter and

contributed to the council for many years as it was impotent (sic) for him to his workers benefits as stipulated by the National Bargaining Council.
If possible can your client specify which of the retrenchment steps was not taken according to him and what monetary loss he ensured as a result of that specific step that was not taken, and he felt legally entitled to. As we discussed my client is not financially in the position to take care of his own family due to our crippling economy. My client is not in a position to pay my fee or any other legal cost as per my knowledge. If you can get a (sic) answer from your client before 30 June 2009 we will be thankful as we would like to conclude this matter, due to both clients not being financially in the position to drag this matter out.

I thank you for your pleasant manner during our telephonic conversations.

Regards
Yvette Benade"

[15] Madiba complied with Benade's request and in a letter dated 10 June 2009 he set out the history of the matter. In this letter he confirms, *inter alia,* that the applicant acknowledged receipt of the respondent's statement of claim "*by telephoning the writer indicating his unwillingness, refusal and/or unpreparedness to file his Opposing documents to the allegations made by our client indicating that he was not going to waste his time and money by engaging the services of an attorney to assist in preparing a response to the statement of claim".*

[16] Thereafter Benade telephoned Madiba to inform him that she was no longer representing the applicant. This was followed by a fax from her dated 16 June 2009 in which she confirmed that she no longer represented the applicant and had advised her client to consult an attorney. The applicant denies that he knows Benade or that she was acting on his instructions.

[17] A writ of execution was thereafter served and property attached. The applicant alleges that the writ was served on an entity other than himself, at an address that the applicant does not operate from, and that the movable property attached belonged to the entity at the other address. He however successfully applied to set aside the writ.

The applicable legal principles

[18] This court has the power, in terms of section 165(a) of the Labour Relations Act 66 of 1995 ("the LRA"), *inter alia*, to rescind a judgment or order "*erroneously sought or erroneously granted in the absence of any party affected by that judgment or order".*

[19] The applicant relies on Rule 16A (1) (a) (i) of the Rules for the Conduct of Proceedings in the Labour Court ("the Rules") in contending that the order was erroneously granted in his absence. The applicant submits that it is not required to show good cause.

[20] Rule 16A provides that:
'(1) *the Court may, in addition to any other powers it may have-*

(a) of its own motion or on application of any party affected, rescind or vary any order or judgment-

(i) erroneously sought or erroneously granted in the absence of any party affected by it.

The parties' submissions

[21] The applicant submits that where a party was genuinely unaware of the date of set down or that proceedings were pending, the granting of default judgment would be erroneous and it is not necessary to show good cause. The applicant relies on the authority of *Electrocomp (Pty) Ltd v Novak* (2001) 10 BLLR 1118 (LC) at 1120 E-F where Jammy AJ stated:
"where a party to an application was genuinely unaware of the date of set down, alternatively that proceedings were pending, the granting of judgment by default would be erroneous and it is not necessary for the party concerned, to have shown or proved proper cause".

[22] The applicant denies that he received the statement of claim, either by fax or registered post or at all. In addition, he submits that fax or registered mail does not constitute sufficient proof that there was proper notification and /or receipt:
*Halcyon Hotels (Pty) ltd t/a Baraza v CCMA & Others [*2001] 8 BLLR (LC)
Roux v City of Cape Town [2004] 8 BLLR 836 (LC)
MTN SA v Van Jaarsveld & Others [2002] 10 BLLR 990 (LC)
NUMSA & Another v Virginia Toyota [2003] 4 BLLR 392 (LC).

[23] The applicant alleges that the explanation for the non-receipt was that he was on leave from 24 December 2008 to 9 February 2009 and his fax machine cannot receive faxes automatically without a voice prompt to connect it. The applicant denies receipt of the referral of the dispute to the Bargaining Council or other communication to the effect that a dispute was pending. He was furthermore was not notified that the matter had been enrolled for default judgment. He submits that he was not in wilful default, and had he received notice of the proceedings he would have defended same. He first became aware of legal proceedings against the applicant when he saw the writ of execution on 15 July 2009, which was handed to him by an unknown person, and successfully obtained a stay of the writ pending the outcome of this application. The respondent specifically disputes the contention that applicant's fax line does not accept automatic transmissions, and states that at all material times that respondent's attorneys transmitted documents to applicant, same were transmitted automatically without any voice prompt as alleged by applicant, and the transmission reports confirmed this.

[24] The applicant denies that he had any contact with the respondent's attorney of record. It was submitted on his behalf that the respondent bears the onus of proving that the telephone conversation in fact occurred, failing

which the applicant's version must prevail. The applicant also denies that he knows Benade and that she was acting on his instructions.

[25] The applicant submitted that the requirements of fairness and expedition should be balanced and where there is an apparent conflict, fairness should be given precedence in order to avoid injustice:
Foschini Group (Pty) Ltd v CCMA & Others [2002] 23 ILJ 1048 (LC)
Halcyon Hotels (Pty) ltd t/a Baraza v CCMA & others [2001] 8 BLLR (LC)

[26] In opposing the application, the respondent submitted that it cannot be contended by the applicant on the facts that that the order was granted in its absence in error. The respondent submits that the Bargaining Council referral must have come to the applicant's knowledge and/or his attention and he chose to ignore it. As a result of his failure to attend a conciliation meeting, the presiding commissioner issued confirming that the dispute was unresolved, and this led to the referral to this Court. The applicant must have known that proceedings were pending, and it would appear that he chose to ignore them, and in so doing acted in wilful disregard of the Rules of this Court. The respondent submits that proper service was effected as required by the Rules and the applicant was at all material times aware of the order or ought to have been aware of its existence. Notwithstanding this the applicant has failed, refused and/or neglected to comply with the order. It is only once his property was attached that he realised that his conduct could result in detrimental consequences.

[27] Whilst the respondent did not raise the late filing of the application as a point *in limine*, it contends that it cannot be construed on this basis to have waived its right to oppose the application on this ground. The application was brought some three months after the matter first came to the attention of the applicant (on his version), and no application for condonation has been filed. In this regard it is clear from *Saloojee and Another NNO v Minister of Community Development* 1965 (2) AD 135 at 138–H, that *"..an appellant should, whenever he realises that he has not complied with a Rule of this Court, apply for condonation without delay*".
Furthermore (at 138 D-E):
"In their petition..., the applicants mention some of the facts to which I have referred, but they hardly make any attempt to explain the inordinate delay in approaching this Court. They state that the respondent has no objection to the grant of the relief prayed, and apparently regarded the application as a mere formality. It is necessary once again to emphasise... , that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration."

Analysis of pleadings and submissions

[28] It is trite that a party seeking rescission of a default judgment has to show good or sufficient cause. This has been held to constitute both a reasonable explanation for the default as well as a *bona fide* defence on the merits which carries some prospect of success :*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 756 (B-D). The Labour Appeal Court has found this to apply equally to rescission of an arbitration award in terms of 144 of the LRA in the interests of fairness and justice: *Shoprite Checkers (Pty) Ltd v CCMA and Others* (2007) 28 ILJ 2246 (LAC).

[29] The Labour Appeal Court has held that good cause is a requirement in the context of Rule 16A. In Superb Meat Supplies CC v Maritz (2004) 25 ILJ 96 (LAC) Nicholson JA : *"..In terms of section 165 of the Labour Relations Act 66 of 1995 (the Act), the Labour Court has the power to rescind a judgment erroneously granted (my emphasis) in the absence of any party affected by the order...The rule further requires an application on notice to all interested parties to set aside the order or judgment, which the court may grant on good cause being shown".*

[30] It is clear at the order was granted in the absence of the applicant, and that he was affected by it. The only question then is whether it was granted erroneously or whether good cause has been shown. The applicant relies on Rule 16A(1)(a)(i) and contends that it is not required to prove good cause, but simply that the order was granted in the applicant's absence. Insofar as the applicant seeks to rely on the authority of *Electrocomp* (supra) for this approach, in my view this is misdirected. The matter is distinguishable on the facts. Jammy AJ pointed out that the facts in *Electrocomp* were "*extraordinary*". He referred to a line of authorities which laid down the principle that the applicant refers to, but confirms that this principle has been qualified by the consistent refusal of the courts to grant rescission orders, *inter alia,* where there was no irregularity in the proceedings. According to him (at para [13]) an order or judgment would be granted erroneously where:
"11.1 there was an irregularity in the proceedings;
11.2 it was not legally competent for the court to have made such an order; or
11.3 if there existed at the time of the order or judgment a fact of which the judge was unaware and which would have precluded the granting of the judgment or order or would have induced the judge, if he or she had been aware of it, not to grant the judgment or order. Erasmus Superior Court Practice (Juta): BI-308A ; CAWU v Federale Stene (1991)(Pty) Limited [1998] 4 BLLR 374 (LC)".

[31] It is clear that *in casu* there was no *justus error* precluding the granting of the order, nor was there any irregularity in the proceedings. The fact that the applicant may not have been informed of the default judgment hearing is entirely due to his attitude in the matter, as conveyed to the respondent's attorney.

[32] In my view, having considered the pleadings and submissions of the parties, it is clear that the applicant has failed to prove that the order was erroneously granted in its absence. The applicant denies that he received a statement of case, referral form, notice of taxation or writ of execution – this is implausible given that he proffers no explanation for the failure to collect the statement of claim sent by registered mail, nor does he contend that the fax number used was incorrect. Although this may indeed constitute insufficient proof of service, the Rules authorise service by fax and registered mail. The applicant denies every material fact in issue. Notwithstanding his denial that the writ was served on him at his address or that the movable property attached by the Sheriff was at his place of business, he nevertheless brought an application to have the writ set aside. It is apparent that the applicant's allegations are a complete fabrication. If indeed the applicant is to be believed that he did not instruct Benade and has no knowledge of who she is or how she came to be involved, it must then be sheer coincidence that her rendition of the events that led to the respondent's retrenchment appears to mirror his version. The applicant's contention moreover that an attorney has deliberately sought to mislead this Court by lying under oath is to say the least, disingenuous and reflects a manifest disregard for the Rules of this Court. In my view the applicant is in wilful default, is not *bona fide*, and is the author of his own misfortune. This cannot justify visiting an injustice on the respondent so as to require him to defend the matter from its inception. In the circumstances it would appear to me that the respondent is justified in seeking costs on an attorney and own client scale.

[33] In the premises, the following order is made:

1. The application for rescission of the order of this Court dated 29 April 2009 is dismissed.

2. The applicant is to pay the respondent's costs on a scale as between attorney and own client.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 23 February 2010
Date of Judgment: 26 March 2010

Appearances:
For the applicant: Mr De Villiers, from DE VILLIERS-MOHR ATTORNEYS
For the respondent: Adv Mathabathe instructed by F R PANDELANI INC