REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

CASE NO D140/99

In the matter between:

Applicant

and

BARTEL KABEL WERKE (PTY) LTD Respondent

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

JUDGMENT

PILLAY, AJ

[1] This is a referral of an alleged unfair dismissal in terms of section 187 and 189 of Labour Relations Act. The dispute had been conciliated before the Metal and Engineering Industries Bargaining Council before being referred to arbitration under the auspices of the CCMA.

[2] On the 17th of December 1998, an arbitrator found that the CCMA did not have jurisdiction as the applicant had been dismissed for operational reasons and that the matter should therefore be referred for adjudication to the Labour Court.

[3] The matter was then referred to the Labour Court on 9th of March 1999 by Mr M K James of M K James and Associates, a labour consultant. On or about 4th of April 2000, the applicant instructed attorney, Mr D Murugasen. Mr Murugasen appeared on the first day of the trial and applied for a postponement, on the grounds *inter alia* that Mr James had been on record as representative of the applicant, that Mr James had threatened to report Mr Murugasen to the Law Society if he took over the matter without paying, his, Mr Jame's fees, that he could not get the file from Mr James because the latter claimed to have a lien over the file for his cost and refused to render an account in order that the costs could be paid.

[4] The application for the postponement was accompanied by a tender to pay the respondent's costs.

[5] Mr I Moodley, counsel for the respondent opposed the application on the grounds *inter alia* that the matter had been delayed considerably, that two witnesses had already emigrated; that the applicant had an adequate opportunity to prepare for trial; that the failure or inability to secure the file from Mr James was an irrelevant consideration and that the applicant found himself in a situation as a result of his own remissness; that the applicant failed to respond to an offer of settlement; that a substantive application supported by affidavit should have been made for the postponement.

[6] In refusing the application for postponement, the Court considered the following: Mr Murugasen ought to have been aware that Mr James could not represent litigants in this court as he was not a legal representative as defined in the Labour Relations Act. If he had checked the court file, he would also have noted from the pleadings that Mr James had not placed himself on record as a representative of the applicant but merely provided his address for service of the pleadings.

[7] The applicant had engaged the services of Mr Murugasen about 4 April 2000. Mr Murugasen had adequate time to check the court file and communicate with the other side about pre-trial issues, including the possibility of settling the matter. Mr Murugasen acquainted himself with the pleadings by uplifting the copies of the court file only a week or two before the trial. Even if he had been dissuaded from placing himself on record with the Court or from getting the file from Mr James because of the latter's threats to report him to the Law Society, Mr Murugasen should have acquainted himself with the pleadings in good time before the trial, if for no other reason but to establish whether there was a need for any urgent intervention at all. At the very least, Mr Murugasen ought to have been aware that as the representative of the applicant, he would have to paginate the court file. He did nothing to either prepare himself or the court file for trial. He should also not have assumed that his application for a postponement would be granted merely because he was not prepared for trial.

[8] The application for a postponement was also made from the bar. Yet there were material issues, such as, whether the applicant was aware of the offer of settlement or whether there were in fact threats from Mr James, whether he had failed to render an account, all of which should have been dealt with by way of evidence.

[9] The applicant ought to have made it clear to Mr Murugasen as to who he chose to have as his representative. Adv Bezuidenhoudt had represented him at the pre-trial on instructions from attorneys Carlitz, Crocket and Associates. From correspondence filed with the Court, it would appear that this firm of attorneys was engaged by Mr James purely to get around the rule which precludes advocates from representing parties without the intervention of an attorney.

[10] The applicant has the prerogative of choosing his representatives and Mr Murugasen should have advised him to assert this right. If he terminated Mr James's mandate, then the latter would not have been authorised to do anything on his behalf. Accordingly, if Mr Bezuidenhoudt had been briefed for the trial as Mr Murugasen had been informed, then Mr Murugasen should have verified the advocate's mandate to represent the applicant timeously. That he only discovered shortly before the trial that Mr Bezuidenhoudt would not be appearing for the applicant, is a consequence of his and the applicant's own inaction.

[11] Mr Murugasen submitted that he would consider bringing an urgent application against Mr James to deliver the files. Why such an application could not have been brought sooner, was not explained.

[12] In criticizing the applicant and Mr Murugasen, the conduct of Mr Mike James is also not beyond reproach. To air his grievances by filing copies of communications with the applicant in the court file is unethical. Were he an attorney, it would probably have attracted disciplinary action from the Law Society. The need for a code of conduct for labour consultants and those who style themselves as industrial relation practitioners as Mr James does, is long overdue.

[13] With regard to the offer, Mr Murugasen submitted, that he was not aware of the offer until a few days ago. The applicant denied having received a letter dated 3 April 2000 from Mr Mike James advising him of the offer. However, he admitted receiving a letter dated 9th of May 2000 which also referred to an offer. Mr Murugasen could not explain why he had not contacted the other side to establish what the content of the offer was. He apparently only discovered what the offer was on the morning of the trial. The letter dated 3 April 2000 which the applicant said he did not receive is in fact included in the bundle of correspondence filed by Mr Murugasen under cover of his letter dated 7th of June. It would appear that Mr James had copied that letter under cover of his, that is James's letter dated 5 April to Mr Murugasen. Mr Murugasen must therefore have been in a position to know that an offer had been made as early as 5 April 2000. Whether he in fact read the letter is another matter. But it is quite clear that he had possession of it.

[14] The applicant and his representatives have been utterly remiss in the conduct of this matter and accordingly the application for a postponement was refused with costs.

[15] Mr Murugasen then withdrew as attorney for the applicant. The applicant himself decided to leave the court thereafter saying that he was unable to conduct his case without legal representation. The Court pointed out to the applicant that the matter would proceed in his absence. Despite this, the applicant chose to leave.

[16] Rule 11(3) of the Rules of the Labour Court permit the court to adopt any procedure that it deems appropriate if the Labour Court rules do not provide for the situation. The court turned to the Rules of the High court for assistance.

[17] Rule 39(3) of the rules of the High Court, provides:
"If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the Court that final judgment should be granted in his favour and the Court, if so satisfied, may grant such judgment."

Sub-rule 9 of Rule 39 provides:
"If the burden of proof is on the defendant, he or his advocate, shall have the same rights as those accorded to the plaintiff or his advocate by sub-rule 5."

And sub-rule 5 of Rule 39 provides:
"Where the burden of proof is on the plaintiff, he or an advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof."

[18] Mr Moodley applied for the dismissal of the matter and accordingly lead evidence.

[19] The case pertinent to the circumstances of this case is ***Hayes v Baldachin* & Others** 1980 (2) page 589. In that case, the relevant facts were that the plaintiff applied on the first day of a trial for its postponement *sine die*. The application was renewed on the second day of the trial. The trial was adjourned to the next morning. The applicant again applied for postponement *sine die*, raising for the first time certain other grounds. The Court dismissed the application.

[20] The plaintiff then stated he did not wish to have anything to do with the trial and, although the consequences of withdrawing from the trial were explained to him, he withdrew and left the courtroom. The defendants thereupon sought to lead evidence in order to rebut the plaintiff's evidence and to obtain final judgment in their favour. Such leave was granted and evidence was adduced by the defendant.

[21] In holding that in the circumstances of the case, it was open to it to grant final judgment in favour of the defendant, the court pointed out that the fact that the plaintiff had originally been present and had commenced leading evidence including his own evidence, did not in any way detract from the proper application of the principle laid down in the authorities with regard to when judgment could be granted in favour of the defendants if the plaintiff was in default. Furthermore, the court found that the circumstances of that case constituted sufficient cause for departing from the ordinary procedure, namely that of granting absolution from the instance and for granting final judgment in the defendant's favour.

[22] In ***Bosman v Du Toit's Executors*** 1937 CPD 209, the Court accepted that the right to determine an action finally in these circumstances is one that should be carefully exercised and suggested that there should be special circumstances .

[23] In ***O' Brien v Nurick*** 1930 WLD 322, SOLOMON J had to consider an application for final judgment in the following circumstances:The plaintiff's counsel on the first day of the trial applied for a postponement *sine die* on the strength of a medical certificate of a doctor, to the effect that the plaintiff was suffering from nervous shock and pain and that in the opinion of the doctor, he should have complete rest in bed for at least one week. Counsel for the defendant requested that the doctor should appear in the witness box for cross-examination. As a result of the cross-examination, it transpired that the plaintiff, although he had a tooth extracted the day before, was in a fit condition on the day of the trial to appear in court and give his evidence. When the application for a postponement was refused, the plaintiff's counsel withdrew from the case. Defendant's counsel was not satisfied with absolution from the instance on the plaintiff's claim and asked for leave to call the defendant to testify so that he might get final judgment. SOLOMON J said :
"The principle underlying the judgment appears to be that there is no objection to granting an application [for final judgement] ....provided it is clear to the Court that the plaintiff is not in default through circumstances beyond his control. "

[24] In the light of these authorities, the Court heard the evidence for the respondents. The issues for determination by this Court are whether the dismissal for operational reasons was fair and whether the Applicant was discriminated against.

[25] Mr Eberhard Alfred Schmidt testified for the respondent. He was the managing director at the time.

The applicant was promoted to the position of sales manager for KwaZulu-Natal. It was hoped at the time that the applicant's appointment and his mandate to improve sales in Kwa-Zulu Natal region would help develop the business and that the position of sales manager could be a permanent one.

[26] When the applicant was appointed to the position, the target for the KwaZulu-Natal region was agreed with him to be R150000.00 per month. That figure would have allowed the respondent to break even. The figures for the 1997/1998 period showed that the actual sales target achieved was in the region of R70000.00 per month, which was considerably less than the agreed monthly target. Over a year the sales that the respondent had hoped to achieve did not materialize.

[27] The applicant was then invited to discussions with Mr Schmidt and several meetings were held during or about September 1997. Mr Schmidt met with the Applicant and it was mutually acknowledged that the sales target were not being met. The Applicant was given three months to improve the sales. After the period of three months had expired, Mr Schmidt extended it for a further two months. The sales still did not improve. Further meetings were held on 11th and 17th of February and on 4th of March with the applicant. It was mutually acknowledged that despite the applicant's best efforts the position of sales manager for KwaZulu-Natal was not a viable proposition and that the position should be withdrawn.

[28] That meant that the applicant fell to be retrenched unless he could have been absorbed in some other position. Having considered all other alternatives, the applicant was not employable in any other position. The applicant, in fact, indicated that he wished to leave the employment of the respondent and to join a family business. Mr Schmidt and the applicant parted on what the latter believed were amicable terms.

[29] With regard to the allegations that Mr Scholtz had discriminated against the Applicant by swearing at him, Mr Schmidt's information was based on reports that he had received from his secretary. However, the main witness as regards this incident was Mr Scholtz himself. He testified that the incident which the applicant said had occurred on the 18th of January 1998 could not have taken place because on that day the respondent did not work. It was a Sunday. He acknowledged, however, that he did on another occasion in August the previous year refer to the applicant as a "brain-dead moron". He denied referring to him ever as a "fucking coolie moron". Both witnesses confirmed that an apology had been tendered for the August incident and as far as all the parties were concerned, that matter had been resolved.

[30] In the circumstances, I find that the respondent has made out a case that firstly, the dismissal of the applicant had in fact been for operational reasons. Secondly the reasons for the dismissal for operational reasons had been substantively established through the oral testimony of Mr Schmidt and the financial statements which form part of the record in this matter. Thirdly, as regards the complaint of discrimination, there is no evidence that the applicant was discriminated.

[31] In the circumstances the matter is dismissed with costs including the costs of securing the attendance of the witness, Mr Schmidt.

Pillay AJ

Acting Judge Labour Court of South Africa

: 12 June 2000

: 13 June 2000

: Mr D. Murugasen / Applicant in person

: Mr I Moodley