REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN JOHANNESBURG

CASE NO J2255/2000

DATE 2001/08/10

In the matter between:

CRWUSA AND OTHERS Applicants

and

GIRLOCK SA (PTY) LIMITED Respondent

REASONS FOR JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

ON 30 JULY 2001

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

PILLAY J

1. Rule 6(4)(a) of the Rules of the Labour Court provides:

   i."When a response is delivered, the parties to the proceedings must hold a pre-trial conference in terms of paragraph (b) within ten days of that date." [my underlining]

The language is peremptory.

2. Rule 6(7) provides:

"If any party fails to attend any pre-trial conference convened in terms of sub-rule 4(a), 5(b) or 5(c) or fails to comply with any direction made by a judge in terms of sub-rules 5 and 6, the matter may be enrolled for hearing at the direction of a judge and the defaulting party will not be permitted to appear at the hearing unless the Court on good cause shown orders otherwise." [my underlining]

3. Rule 37 and 37A relating to pretrial conferences in the High Court generally and in the Cape of Good Hope Provincial Division of the High Court respectively are markedly distinguishable from Rule 6(7). Rule 37 makes no provision for barring a party from the proceedings or granting judgment by default as a penalty for non compliance. Rule 37A(12) however requires a prescribed notice of default to be delivered [subrule (9)]. If the default persists after 7 days a default hearing is held on notice to all parties [subrule 12(b) and (e)]. At that hearing the High Court “shall” extend the compliance date “only” on good cause shown [subrule 12(g)]. The High Court may also make orders for the dismissal of the proceedings or part thereof, or for striking out any defence or pleading and costs.

4. Rule 6(7) does not require the equivalent of a notice of bar or notice of default to be delivered before the matter is enrolled. The penalty for non-compliance is that the defaulting party is disallowed from attending the hearing. When that happens the claim may be dismissed if the defaulting party is the applicant or the defence may be struck off

and judgment granted by default if the defaulting party is the respondent.

5. Similarly to Rule 37A(12)(g) of the Rules applicable to the Cape Court, the Labour Court acting in terms of Rule 6(7) is not required to exercise a discretion to allow a party to appear unless and until the defaulting party has shown good cause. Good cause is effectively a jurisdictional prerequisite for invoking the discretion of the Courts.

6. Rule 6(5) provides:

"When the minute of a pre-trial conference is delivered or the time limit for its delivery lapses, whichever occurs first, the registrar must send the file to a judge of the Court for directions in terms of this rule. The judge who receives the file from the registrar may -

a. direct the registrar to enroll the matter for hearing if the judge is satisfied that the matter is ripe for hearing; or

b. direct that an informal conference be held before a judge in chambers to deal with any pre-trial matters; or

c. direct the parties to convene a further formal pre-trial conference at a date, time and place fixed by the registrar, at which a judge must preside, to deal with any pre-trial matters." [my underlining]

7. Read together, sub-rules (5) and (7) provide a mechanism for the Labour Court to convene a pre-trial conference whenever a judge considers it appropriate to give directions about such a conference. Ideally, this should be after the parties have held a conference amongst themselves and delivered a minute.

8. Rule 6(5) does not exist as an unqualified right or a convenience for the parties. Nor does it follow automatically when pleadings close that directions will be given that a conference be held under the supervision of a judge. The discretion rests entirely with the judge giving

the directions. Rule 6(5) is a mechanism available to the Court to drive the process when the parties have difficulties in doing so. (I will return to this later).

9. Litigants must be aware of the unnecessary burden that is imposed on the Labour Court whenever they fail to conduct a pre-trial conference properly or at all. Where the parties are represented by their respective organisations or lawyers, there should be even less of a need to invoke the provisions of rules 6(5) and (7). Litigants should be left in no doubt that the responsibility for conducting a pre-trial conference is theirs and theirs alone. Although the duty is mutual, a greater responsibility rests on an applicant as the *dominus litus* to initiate the process. (*Standard General Insurance Co Ltd v Eversafe (Pty) Ltd & others 2000 (3) SA 87 @ 93G*)

10. In this matter the employee applicants were retrenched in October 1999. After considerable delay, due mainly to the incorrect referral for conciliation by the applicants to a bargaining council that did not have jurisdiction, and partly by the respondent delivering its Statement of Defence about a month late, the pleadings closed on 12 July 2000. Nothing was said or done by either party to comply with Rule 6(5)(a) until 4 October 2000 when the respondent invited the applicants to conduct a pre-trial conference by telefax. On the respondent's version the applicants did not respond to the invitation at all. The applicants alleged that they telephonically advised the respondent that they preferred to conduct the conference before a judge.

11. Other than baldly submitting that they were opposed to conducting a pre-trial conference by telefax, the applicants have not offered any explanation as to why they found such a procedure unacceptable. They could have, but did not, counter-propose an alternative way of conducting the conference. On their own version it was only in January 2001 that they attempted to engage the Labour Court to schedule a conference. Only on 3 April 2001 was notice despatched by the Court to attend a pre-trial on 16 May 2001. The delay between October 1999 and April 2001 is not adequately explained. (*Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz & others 1996 (4) SA 411 @ 419B-419J*) If the Court had difficulties in scheduling the conference, as was suggested by the applicants, then there was an even greater need for the parties to confer amongst themselves.

Having regard to the limit of 10 days prescribed by Rule 6(4) the delay of more than 7 months is excessive. The applicants have totally misconceived their responsibilities. They vaguely and casually acknowledge that they may not have adhered strictly to the rules of this Court. Quite disingenuously they hold the respondent liable for not pointing out that their referral to conciliation was incorrect.

12. It occurred to me that the respondent could have done more to convene the conference. Furthermore, it did not have to wait until the pre-trial had been scheduled before launching this application. However, the respondent had been lulled into believing that the applicants had abandoned their claims. This is particularly so as it believed that there was no response to its invitation to hold a conference. There was no obligation on the respondent to act until it became aware that the applicants persisted with their claims despite their non-compliance with the rules.

13. The applicants also criticised the respondent for not putting them on terms to attend the conference when they failed to do so within ten days from 4 October 2000. As discussed above, rule 6(7) does not call for a notice of bar or default. However, even if it is implied that such a notice is required the applicants have not overcome the hurdle of offering a reasonable explanation for non-compliance with the Rule 6(4).

14. Furthermore, non-compliance with time limits is a procedural matter and can be raised by the Court mero motu. (*Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu 1990 (4) SA 763*)

15. When exercising its discretion about granting an indulgence, the court has a wide discretion. It may enquire into the prospects of success. (*Erasmus Superior Court Practice B1-171; Du Plooy v Anwes Motors (Edms) Bpk 1983(4) SA 213 (O) @ 216H-217D*).

16. At the trial the applicants would not bear the *onus* of proving the fairness of their dismissal. For this application, however, the applicants bear the onus of proving good cause. The explanation must be sufficiently full to enable the court to access their conduct and motives. (*Standard Bank above; Silbert v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 A*

@ 353 A). The applicants must establish that they have some prospects of success. In order to succeed they must do more than recite non-compliance with sections 189, 16 and 196 as the basis for the action. The applicants' lackadaisical approach to finalising the matter suggests that they may not be entirely convinced of their prospects of success. This is borne out by an analysis of their claims.

17. In this application they testify that the respondent discriminated against them by paying one of them two weeks severance pay per year of service whilst paying the other eight employee applicants only one weeks' pay per year of service. Assuming that the allegation is true, the applicants fail to provide any evidence as to the basis on which such discrimination might be unfair.

18. It was submitted for the respondent that as the applicants did not specifically plead discrimination as a ground at conciliation they would be barred from doing so at the trial. The applicants did raise the issue of the differentiated severance pay scales without specifically labelling it as discrimination. The objection is technical. In view of my finding above, it is not necessary for me to decide this point.

19. The applicants accept that the respondent had financial difficulties. They also proffer as an explanation for the declining profits "that substantial turnover was lost as a result of the company's arbitrary price increases."

20. The applicants deny "any consultations with them took place" and submit that "no procedures as envisaged by section 189 of the LRA" were followed and that "the respondent had no good cause to retrench them".

21. At the same time they admit that "the company carried out normal ongoing cost cutting meetings as a normal course of business". Other than baldly denying that "they were in (any) way consulted with (a view) to avoid retrenchments" the applicants do not elaborate on what "normal" cost cutting measures were discussed.

22. The respondent alleges that during September 1999 it "embarked on a consultation

process with the applicants in an endeavour to come up with ways in which the company could cut costs thereby avoiding retrenchments".

23. The applicants denial that "any consultations" were held and any procedures followed is contradicted by its admission that "cost cutting meetings" were held. Cost cutting meetings are not inconsistent with consultations to avoid retrenchments. The probabilities favour the respondent's version.

24. The applicants acknowledged that "notice was again sent out to employees requesting for suggestions as to how costs reductions could be achieved." However, they dismissed it as a vague reference to the respondent's declining profits. If it was vague, the applicants do not indicate what they did to get clarity about the notice. Nor do they say what suggestions they made in response to the notice.

25. The applicants also acknowledge that notice offering voluntary retrenchment had been tabled on 1 October 1999. However, they deny that it was "specifically given to the applicants." Allegedly "out of concern for their jobs" they enquired whether the notice would affect them and "they were all assured that their jobs were secure and that they were not affected."

26. There is no evidence that the applicants protested at any stage whatsoever about being deliberately misled in this fashion. Nor is it specifically pleaded as a ground of unfair retrenchment.

27. The allegation that "no procedures" were followed is contradicted by the acknowledgement that some procedures were followed. The applicants failed to respond meaningfully and constructively to the two notices referred to above. The respondent's evidence that an attempt to reach consensus with the applicants on retrenchment proved unsuccessful, is more probable.

28. Finally, the applicants make the bald allegation that some of them had been replaced shortly after their retrenchments. The respondent denied that the positions had been "re-

advertised" as alleged in the Statement of Claim. The applicants do not say which of them were so replaced or what positions were re-staffed. If the positions had been re-advertised, proof of such advertisement could have tipped the scales in favour of the applicants' version.

29. They also allege that the respondent "embarked on a major expenditure programme to refurbish its factory in Isando and that it has spent some millions of rands on new equipment." This is merely noted by the respondent who denies that the retrenchments were unfair. Expenditure of this kind undertaken after the retrenchments does not, without more, render the retrenchments unfair.

30. A conspectus of the aforegoing leads me to conclude that there are no prospects of success on the merits. In these circumstances having regard to the provisions of rule 6(4), (5) and (7), the objective of the LRA to resolve disputes expeditiously, the applicants' substantial delay after pleadings closed to prosecute their claims, their failure to advance an adequate explanation for the delay, the absence of any reasons for insisting on a pre-trial supervised by a judge without first having attempted to hold an unsupervised conference, and ultimately, the absence of prospects of success, I find that the applicants have not discharged the onus of proving good cause for their non-compliance with rule 6(4).

31. The applicants' case cannot be rescued from foreclosure. They should have been more vigilant in pursuing their claims.

32. The remedy provided for in Rule 6(7) is drastic. Recourse to it is justified only in extreme cases which this case is. I have not been referred to any decisions on non-compliance with rule 6(4) specifically. Nor have I been able to find any authority specifically on the point. The respondent relied on the jurisprudence relating to condonation in labour disputes generally. (*Zondi & Others v President of the Industrial Court & another [1997] 8 BLLR 984 (LAC) at 989 E-F; Mziya v Putco Ltd [1999] 2 BLLR 103 (LAC) at 107A-C; and NEHAWU v Nyembezi [1999] 5 BLLR 463 (LAC) at 465J-466A.*)

33. It was submitted for the respondent that the applicants should have brought a formal application for condonation for non-compliance with rule 6(4). That was not necessary as all the elements of a condonation application have been canvassed in this application to dismiss.

34. Finally, there is an application to condone the applicants' late delivery of their opposing affidavits and the respondent's late delivery of its reply. The Court hearing the matter previously granted an order directing the applicants to deliver their opposing affidavits by 25 May 2000 and the respondents to reply by 15 June 2000. Compliance with these directions disposed of the applications for condonation.

35. For these reasons I granted the application to dismiss with costs the applicants' claim in the principal case for unfair dismissal and certain other relief.

36. Returning to the application of rule 6(5), it occurs to me on hindsight to question whether this application was competent at all once a judge had given a direction to hold a pre-trial conference on 16 May 2001. In *Promedia Drukkers above@ 420E-I* the Cape Court in interpreting Rule 37A(3) and (8) analysed the meaning and effect of an "order" and "direction". It is arguable that the application effectively challenges the Judge's direction. This may be an issue for the Labour Appeal Court to consider.

Applicants' Representative	:	Attorney G Higgins Sampson Oakes Higgins Inc
Respondent's Representatives	:	Adv AT Myburgh
Instructed by	:	Leppan Beech Attorneys