IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J6019/00

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

T.S. MAKHOKE **Second Applicant**

and

VIRGINIA TOYOTA **Respondent**

J U D G M E N T

CORAM FARBER AJ:

The second applicant seeks a judgment by default against the respondent for compensation and ancillary relief arising from his unfair dismissal by the respondent on 5 August

2000. The statement of claim initiating the proceedings was purportedly served on the respondent by way of telefacsimile transmission. Plainly, service in this form is sanctioned by rule 4(1)(a)(iv) of the Rules for the conduct of proceedings in the Labour Court. It provides that a document that is required to be served on any person may be served "by faxing a copy of the document to the person if the person has a fax number ....". This rule must be read with rule 4(2)(b), which provides as follows:-

"(2) Service is proved in court in any one of the following ways -

(a) .....
(b) If service was effected by fax, by an affidavit of the person who effected service, which must provide proof of the correct fax number and confirmation that the whole of the transmission was completed;
(c) .....
(d) .....
(e) ....."

The body of the affidavit in support of proof of service *in casu* reads as follows:-

"I the undersigned T S Ngcana do hereby make oath and say that:

I served the Notice of Motion, Affidavits and Annexures / Statement of Claim with Annexures in this matter on the Respondent by way of telefaxing it to number (057)212 5163 on the 14 day of December 2000 at 9:45 (Time).

I further state that this fax number is indeed the fax number used by the Respondent, and that the whole transmission was successfully completed. I confirm that the attached fax transmission report relates to this transmission."

In my judgment, it is manifest that the affidavit in question does not comply with the provisions of rule 4(2)(b). The statement therein that "this fax number is indeed the fax number used by the Respondent" amounts to little more than a bald and conclusory allegation of fact. It does not serve to provide proof that the number used was in fact correct.

Proof to that end may be facilitated in a number of ways. As an example, very frequently, telefacsimile numbers are recorded in telephone directories under the name of the user thereof. Reference in the affidavit to a suitably identified extract from the relevant directory would in my judgment satisfy the requirements of the rule. Similarly,

reference in the affidavit to a letterhead of the respondent recording its telefacsimile number would equally serve the purpose. Subsequent confirmation by the respondent, whether by letter or otherwise, that it has received the process in question will also suffice. Plainly, there are many ways in which the proof required under the rule may be facilitated. Dependent on the nature of the proof relied upon, documents or extracts therefrom may have to be referred to in the affidavit and annexed thereto.

When the matter was moved before me in the Motion Court by Mr Ngcana, an official of the first applicant, I indicated to him that I was not satisfied that the affidavit in support of proof of service complied with the provisions of the rule.

His response was two-fold. Firstly, he contended that the wording of the affidavit was in standard form, based as it was on a *pro forma* document which had been issued by the registrar's office. The short answer is that a *pro forma* document which does not accord with the requirements of the rule cannot serve to render such requirements *pro non*

scripto.

Secondly, Mr Ngcana made reference to the fact that other judges of the court had, without hesitation, accepted affidavits of service in identical format. I am not aware whether this is in fact so. Be that as it may, the need for any individual judge to satisfy himself that service has been proved adequately in a particular case cannot be fettered by what other judges may or may not have done in the past.

It merits mention that Mr Ngcana sought leave to adduce *viva voce* evidence to supplement the affidavit in question. I declined to accede thereto. The unopposed motion roll in Johannesburg is particularly lengthy and it would be disruptive of its orderly flow if the indulgence sought was readily acceded to. The inconvenience which would be occasioned thereby, both to the court and the litigants who anxiously await the disposal of their matters, is manifest. An indulgence of the type sought would moreover serve to discourage fidelity to the rules. They, after all, are designed to ensure that the court functions efficiently and

expeditiously.

One further aspect merits mention. During the course of the debate with Mr Ngcana, I invited him to supplement the affidavit of service in a further affidavit. I indicated to him that, once this had been done and provided that there was compliance with the rule, I would entertain the application on its merits. Mr Ngcana has availed himself of that opportunity. This affidavit cures the deficiency to which I have referred and the applicant is entitled to relief, albeit in a form slightly different to what had been originally sought.

Finally, I invite attention to the remarks of Sutherland AJ in *MTN SA v Van Jaarsveld & Others* (2002) 10 BLLR 990 (LC) at 994C-E:-

"[13] It is plain from anyone who attends the hearings of the Labour Court, that the enormous growth in the number of applications for rescission in circumstances where the respondent party claims that albeit on the face of it a telefax transmission was sent, it was not received or did not reach the person responsible for giving it attention, leads to the conclusion that the provisions of the Act in this regard require reconsideration. In my view, it is

appropriate that the statute be reappraised in this regard and that the Rules Board for the Labour Courts gives its attention to this matter of procedure. As aptly illustrated on the facts of this case, the arrival of a document in the midst of a deluge of others, handled by staff not inducted to divine, in the absence of some clue, who should be given the document nor how rapidly that should happen, may predictably lead to delay or misplacement or outright loss of the document."

I share those sentiments.

I make the following orders:-

1. Subject to paragraph 2 hereof, an order is granted in terms of prayers 4(i), (iii) and (iv) of the application for default judgment dated 14 August 2001.

2. (a) The compensation referred to in paragraph 4(iii) of the application for default judgment shall be limited to a period of twelve months, reckoned from 5 August 2000, being the date of the second applicant's dismissal.

(b) The costs associated with the hearing on 13 November 2002 are disallowed.

G FARBER
ACTING JUDGE OF THE
LABOUR COURT

DATE OF HEARING:
13 NOVEMBER 2002

DATE OF JUDGMENT:
25 NOVEMBER 2002

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