

AN

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO D1729/01

DATE _____ HEARD: _____

2003/05/09

DATE _____ DELIVERED: _____

2003/05/09

In the matter between:

BONUS BUILDING SUPPLIES (PTY) LIMITED Applicant

and

SACCAWU & OTHERS Respondents

JUDGMENT

NDLOVU AJ

- [1] This matter was set down for the 5th May 2003, which was last Wednesday, being an application for rescission of a default judgment, which was granted by this Court on the 2nd April

2003.

- [2] However, on the 5th May 2003 the applicant had not filed its heads of argument and, for that reason, I had not read the file and it necessitated that the matter should be adjourned.
- [3] Mr Kirchmann, the attorney for the applicant handed up an application for condonation of the late filing of the heads of argument. I considered the condonation application and granted it. That, however, did not detract from the fact that, since I had not read the file, I was not in a position to proceed with the matter and the person or the party responsible for that situation was the applicant.
- [4] As a result, the matter, as I have said, had to be adjourned. An indulgence was granted to Mr Kirchmann that the matter be heard today (only 4 days later).
- [5] Indeed, this morning Advocate Dutton has appeared for the applicant, duly instructed by Mr Kirchmann thereto. Mr Dutton is now applying for the postponement of the matter. In fact, he has handed up a substantive notice of motion, whereby a

request is being made that the matter be adjourned *sine die*.

[6] The grounds for the adjournment include the fact that the applicant company, i.e. the applicant in the rescission application, would need to file a replying affidavit in response to the respondent's answering affidavit.

[7] I should point out that the answering affidavit, as such, was served on the company on 2 May 2002. In other words, if things went normally in terms of the Rules of this Court, particularly Rule 7(5)(a), the applicant ought to have filed its replying affidavit within 5 court days, calculated from the 2nd May 2002. This had not been done. It was not a case that some accident occurred, for instance of the nature such as the office having misdiarised the date on which the process should have been attended to, or the like. It was, as I have been told, as a result of Mr Kirchmann having initially held the view that there was no need for the applicant to file a replying affidavit.

[8] Of course, Mr Dutton alluded to some factors that contributed to Mr Kirchmann holding that view which, in any event, as he put it, could only serve as mitigating fault on the part of

Mr Kirchmann, as the applicant's attorney. According to Mr Dutton, it was his view that, without the applicant's replying affidavit, there were some crucial issues that were raised by the respondents in their answering affidavit which would remain unchallenged and which could render some detriment to the case of the applicants.

[9] The other point raised by Mr Dutton was the fact that the applicant company had essentially ceased to exist or to trade. All employees had since been retrenched and only the directors were there. In other words, the company was merely existing by name. For that reason, even if the matter were to proceed and the order for rescission refused, it would be impossible for the company to reinstate the respondents, i.e. the 47 former employees, back to their jobs.

[10] Of course, this was an issue which subsequently was addressed by Ms Reddy that the default judgment, as such, did not only relate to the issue of reinstatement, but there was also the issue of the payment of arrear salary, etcetera, which would still be executable.

[11]The application before me at the present time is presented as one for a postponement, but it would appear that, in essence and substance, it is an application that seeks an indulgence to allow the applicant, in the rescission application, to file a replying affidavit. That is what the essence of it is about.

[12]As I have said before, the replying affidavit in this particular instance ought, in terms of rule 7(5)(a), to have been filed within five days from the 2nd May 2002, which was not done. I have not been told that an application for condonation of the late filing of the replying affidavit has been lodged or that it would be lodged. One would perhaps argue on behalf of the applicant that naturally the Court would expect that that would be done, but it was an issue which one would expect to have been mentioned in the affidavit that was filed to the Court this morning.

[13]In any event, it does appear that the attorney for the applicant, Mr Kirchmann, has been at fault on more than one occasion now. Apart from the mere fact that the present rescission application is about the very fact that the company failed to respond in time, namely, that it failed to file its statement of

defence in time, hence a default judgment was granted. As I have indicated already, this application ought to have been heard last Wednesday, on the 5th May, but due to the fact that the applicant and, in particular, Mr Kirchmann had not filed his heads of argument on behalf of the applicant timeously, the case could not proceed. It was clear from the reasons that he advanced on the 5th May as to why such heads were not filed in time, that the fault was squarely upon his shoulders and that the applicant company itself had nothing to be blamed about in that regard.

[14]When I adjourned the matter to this date from the 5th May, I ordered, among other things, that the wasted costs would be paid by the applicant. Now today everybody came to court well-prepared that the matter would proceed. By "everybody" now, I am referring to the respondent's party, because I would not say the applicant's party was ready in the light of the present developments. The Court itself was also ready to proceed with the matter.

[15]I reiterate that, for the case to be adjourned for hearing to this date, only 4 days away, some kind of a special indulgence, as

it were, was accorded to Mr Kirchmann, despite the fact that he was clearly at fault for the matter not proceeding on the 5th May. Today again he is coming to court to ask for yet a further indulgence. I say so because the request for a further postponement by Mr Dutton is upon his (Mr Kirchmann's) instructions. Indeed, I would think that he has stretched this Court too far.

[16] It is clear that he (Mr Kirchmann), and he alone, is solely to blame for this delay. By the delay now, I am referring to the case not proceeding on the 5th May. if it does not proceed today, for that delay as well. That being the case, and taking into account the developments of the 5th May in respect whereof Mr Kirchmann was again responsible, that, in the event of this matter being further adjourned, the Court's disapproval of such behaviour by him should reflect in the Court's order for costs.

[17] On the question of the application for the adjournment itself, I have pointed out that this is essentially an application seeking an indulgence to file a replying affidavit. The period within which to file a replying affidavit having long expired, the

pleadings were deemed to be closed. However, nothing would prevent or preclude the Court, in the exercise of its discretion, to allow the replying affidavit to be filed if, in the opinion of the Court, it would be in the best interests of justice to do so. Even though the other party, would obviously feel prejudiced by a further adjournment, such prejudice and inconvenience, it seems to me, would be mitigated by an appropriate order for costs.

[18]I have considered the matter carefully. It is my view that, for the interests of justice to be best served, the application for adjournment should be granted, subject to my remarks which I have alluded to above on the issue of costs and which I propose to reflect in my order.

[19]In the result, I make the following order:

- (1) The matter is adjourned to 24 June 2003 on the opposed roll.
- (2) The applicant, in the rescission application, is directed to file its replying affidavit not later than the 23rd May 2003.

- (3) Today's wasted costs are to be paid on attorney and own client scale, by the applicant's attorneys, namely Messrs Kirchmann Incorporated, *de bonis propriis*.
- (4) The wasted costs for 5 May 2003 and for today, as respectively ordered, are to be taxed and paid by no later than 13 June 2003.

NDLOVU, AJ

APPEARANCES:

: Advocate Dutton

: Kirchmann Inc.

: Ms S Reddy

of Shanta Reddy Attorneys