REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J1534/98

In the matter between –

JOSEPH MABAYO NDHLELA *Applicant*

and

TRANSNET LIMITED *Respondent*

JUDGMENT

KENNEDY A J:

1] At the conclusion of argument of the rescission application in this matter, heard on 5 February 2004, I granted an order in the following terms :

a) The order granted by Revelas J on 1 September 2003 is rescinded.

b) There is no order as to costs.

My reasons for granting that order are as follows :

2] The applicant, Mr Joseph Ndhlela ("Ndhlela"), was formerly employed as an executive director of the respondent, Transnet Limited ("Transnet"). He was dismissed on 20 January 1998, after a lengthy disciplinary enquiry chaired by a former judge of the Supreme Court of Appeal, John Trengove, who found Mr Ndhlela guilty of a number of serious charges. Mr Ndhlela was subsequently prosecuted and convicted on three charges of fraud, for which he was sentenced to three years imprisonment. He lodged an appeal against the conviction and sentence and apparently this appeal is still pending.

3] Mr Ndhlela challenged the fairness of his dismissal in a dispute which was originally referred to the CCMA, but was then referred by the director of the CCMA

to the Labour Court.

4] Pleadings were filed by both parties during July 1998. On 26 November 1998 an order was granted by Seady A J that the matter was to be set down on a date suitable to both parties and by arrangement with the Registrar. That order was made by agreement of the parties, who concurred that having regard to the size and importance of the matter, consensus should be reached on dates to suit the chosen legal representatives of each side.

5] Thereafter, over a period exceeding four years, little progress was achieved in bringing the matter to trial. On various occasions it was set down for trial, on some occasions at the instance of Mr Ndhlela's attorneys, on other occasions of Transnet's attorneys and on further occasions by the Registrar without reference to the parties. On each occasion the matter did not proceed and was removed from the roll, the usual reason being that it had been set down without agreement to the dates by both parties' representatives as required by the order of Seady A J.

6] During June 2003 the Registrar notified the parties that the matter was set down for trial for five days, commencing on 1 September 2003. Again, this was a date which had not been agreed to by either party and was accordingly not consistent with the order of Seady A J.

7] A pre-trial conference was held on 22 August 2003 with a view to limiting the issues for the trial which the parties hoped could proceed on the date on which it was set down. However, no agreement was reached on proposals made for shortening the proceedings by Transnet's legal representatives.

8] On 26 August 2003 the attorney then representing Transnet, Mr Mazwai, wrote to Mr Ndhlela's attorney, Mr Moshoana, stating as follows –

"1 ...

2 In view of your client's wish to proceed with his claim on the basis of a new hearing of evidence on charges preferred and on which adverse findings were finally made, our view, based on evidence led at the internal disciplinary enquiry is that a minimum of ten consecutive court days will be required for a trial of this nature. The present set down for trial is not for a period of ten days on the assumption that it is a set down on continuous roll ending at the latest on Friday, 5 September 2003. We also confirm having advised you of our client's new counsel (Mr A Redding) that he is not available in the week commencing on 8 September 2003. We have also ascertained that Mr Redding is not available for all of the days between 1 September 2003 to 5 September 2003.

3 We also confirm that the trial date of 1 September 2003 was not obtained at the request of either your client or our client but was procured at the instance of the Registrar without having regard to the order granted by

Judge Seady in the above matter on 26 November 1998 and in particular paragraph 3 thereof which states that 'the matter shall be set down on a date suitable to both parties and by arrangement with the Registrar.'

4 In the circumstances of firstly the insufficiency of the number of days required for the trial hearing, the availability of our client's new counsel and the terms of paragraph 3 of Judge Seady's order our instructions are to request the Registrar of the Labour Court to remove the matter from the trial roll of Monday, 1 September 2003. We according[ly] transmit herewith a copy of our facsimile letter of even date.

5 ...".

9] Mr Moshoana replied by letter addressed and dispatched to a facsimile number which was not that applicable to Mr Mazwai, who therefore did not receive it. In that letter Mr Moshoana indicated that his client did not consent to the removal of the matter from the roll.

10] Mr Mazwai then wrote on 28 August 2003 to the Registrar stating as follows –

" ...

(2) Having had the opportunity to engage with the applicant's attorney and our client in relation to the matter in which the trial is envisaged the abovementioned date is not suitable to the respondent as Judge Seady's order of 26 November 1998 in particular paragraph 3 which states that 'the matter shall be set down on a date suitable to both parties and by arrangement with the Registrar.' We also note that a period of five days is insufficient given the applicant's desire to lead all of its evidence afresh in relation

to the charges of misconduct which were prefer [sic] against the applicant in an internal disciplinary enquiry (where the enquiry was heard in thirteen days and further to that our client's new counsel (Mr A Redding) is not available on this [sic] five days.

(3) We also note that no pre-trial minute has been agreed or signed between applicant and respondent. In our understanding it is not competent for a trial date to be sought and/or allocated in the absence of a pre-trial minute and in such circumstances it would be more appropriate for a pre-trial to be convened before a Judge.

(4) In the circumstances we request you to remove the above matter from the trial roll of Monday 1 September 2003 and advise us accordingly."

11] Later the same day, Mr Mazwai's Johannesburg correspondent, Mr Baloyi, filed with the Registrar a notice stating –

"Kindly take notice that <u>the applicant and the respondent have agreed</u> to remove the above matter from the trial roll on 1 September 2003 with no order as to costs."

12] It is common cause that this notice misrepresents the true position and that in fact there was no such agreement between the parties that the matter should be removed from the trial roll on 1 September 2003.

13] The circumstances in which Mr Mazwai's letter to the Registrar and the notice of removal were forwarded to the Registrar have been explained in the founding affidavit as follows –

"26 Mazwai thereafter telephoned Baloyi who confirmed that he had received from Dladla [Mazwai's professional assistant, who was dealing with the matter while Mazwai was off ill] a copy of the letters addressed to the Registrar and to the applicant's attorneys. Mazwai requested Baloyi to not just deliver the letter to the Registrar but to actually meet with the Registrar, Mr Phophi ... in order to ensure that the Registrar either issued a notice of removal of the matter or gave an undertaking to remove the matter from the trial roll. Mazwai informed Baloyi that the basis for the removal was the unsuitability of the trial date (for the reasons set out in the letter addressed to the Registrar) and that the date had been allocated without compliance with the order of Seady A J in that the date had not been arranged as being suitable to both parties. Baloyi suggested to Mazwai that a notice of removal of the matter from the trial roll could be filed. Mazwai, however, instructed Baloyi that a notice of removal could only be utilized if he was unable to contact the Registrar and that any notice of removal must make reference to the order of Seady A J and the letter addessed to the Registrar of 26 August 2003 which had both been attached to the notice of removal. Mazwai enquired of Baloyi as to whether he had a copy of the order of the Seady A J and when informed that he did not, Mazwai informed Baloyi that he should obtain a copy of the order of Seady A J from Dladla. Later the same day, Mazwai again telephoned Baloyi who confirmed that he had received a copy of the order of Seady A J and that he would attend to meet with the Registrar. Mazwai requested that Baloyi inform him if he encountered any difficulties.

27 Mazwai was still off ill on Friday 29 August 2003. He, however, telephoned Baloyi who informed him that he had been successful in removing the matter from the trial roll for 1 September 2003 but had to file a notice of removal as Phophi was on leave and he had not been able to meet with him. Baloyi also informed Mazwai that the person with whom he had spoken in the Registrar's office had informed him that on filing of the notice of removal, the matter would be removed from the trial roll and that the court file had, in any event, not been indexed and paginated and that the matter would have been struck off the court roll.

28 Mazwai telephoned me [the deponent Dr Madima, Transnet's general counsel] on Friday 29 August 2003 and informed me that the matter had been removed from the trial roll. Mazwai also informed Mr Redding that it would no longer be necessary for him to attend court on 1 September 2003 as the matter had been removed from the trial roll.

29 Mazwai informs me that he considered whether Redding should attend court on 1 September 2003 and believed it would not be necessary in that -

29.1 he had been informed that the matter had been removed from the trial roll;

29.2 the matter was not ripe for trial as no pre-trial minute had been filed and that as the court file had apparently not been properly indexed and paginated the matter would have been struck of the roll;

29.3 there had been no response from the applicant's attorneys to the telefax of 26 August 2003 addressed to them by Ledwaba Mazwai ... Mazwai was of the view that the applicant's attorneys could not, in any event, object to the removal by the Registrar without seeking a variation of the order of Seady A J."

14] In an affidavit furnished by attorney Mazwai (who has since been replaced as Transnet's attorney of record in this matter by attorneys Bowman Gilfillan) he confirms what is stated by Dr Madima in the founding affidavit and states further –

"I apologize to the above honourable Court for the failure of the respondent to attend at Court on 1 September 2003 which was in no way attributable to any fault on the part of the respondent ...".

15] Mr Baloyi, the author of the notice of removal which wrongly stated that the parties had agreed to remove the matter from the roll, has also furnished an affidavit in which he states –

"I apologize to the above honourable Court in relation to the filing of an incorrect notice of removal of

the matter from the trial roll. I did so under the belief that the applicant's attorneys were aware that the matter had been incorrectly enrolled by the Registrar and did not object to the removal. I did not intend to misrepresent any incorrect facts and I apologize for any inconvenience to the Court."

16] On 1 September 2003 the matter was called before Justice Revelas. Mr Moshoana appeared on behalf of Mr Ndhlela, but there was no appearance for Transnet. Judge Revelas pointed out that the notice of removal indicated that there was an agreement between the parties to remove the matter from the roll, but Mr Moshoana stated that there had been no such agreement. He referred to a letter (presumably that of 26 August 2003) in which Transnet's then attorney had indicated a desire to have the matter removed from the roll but that this was unacceptable to Ndhlela. Mr Moshoana handed up to the Judge his letter of reply in which he had indicated this, but did not hand up the letter of Mr Mazwai in which the basis had been set out for the request that the matter be removed from the Roll.

17] The Court then heard the evidence of Ndhlela who testified that there had been no basis for the allegations against him, that Judge Trengove had been wrong in finding him guilty of the relevant charges and that Judge Trengove had, despite being required to make a recommendation, refrained from making any recommendation as to the appropriate punishment to be imposed on Mr Ndhlela.

18] Justice Revelas delivered a brief judgment in which she stated *inter alia* –

"The respondent did not oppose this matter. The notice of set down was sent to both parties which clearly stated that the matter would be heard today, 1 September 2003. However, on 28 August 2003 (last week) attorney Ledwaba Mazwai wrote to the Labour Court raising certain objections to the matter being set down. They had also written to the applicant's attorneys seeking to postpone the matter.

Mr G N Moshoana ... wrote to Ledwaba Mazwai Attorneys as follows –

'Your letter of 26 August 2003 is hereby acknowledged. Unfortunately our view is to proceed with the matter as the parties have been informed that the Registrar keeps a continuous roll [...].'

Then thereafter, on 28 August 2003, Ledwaba Mazwai Attorneys filed a 'Notice of removal from the roll: 1 September 2003'. The notice advises as follows –

'Kindly take note that the applicant and the respondent have agreed to remove the above matter from the trial roll on 1 September 2003 with no order as to costs.'

It appears that it is signed by a person with the surname Baloyi of Ledwaba Mazwai Attorneys.

It is apparent from the facts before me that there was no agreement to have the matter removed from the roll and it appears that the notice was a ploy by the respondent's attorneys not to have the matter heard today. This type of conduct will not be tolerated by the Labour Court.

The matter is treated as if unopposed and I therefore have to accept the applicant's version of events in the absence of the respondent, and more particularly that he committed no dismissable defence.

In the circumstances I make the following order:

1) The applicant be reinstated in the employ of the respondent.

2) The reinstatement will be with retrospective effect but limited to 12 months' remuneration.

3) The respondent is to pay the applicant's costs of this application.

4) Ledwaba Mazwai Attorneys are to appear before the Labour Court on 15 September 2003 to give an explanation as to why the aforesaid costs should not be paid de bonis propriis by that firm of attorneys."

19] The last paragraph of the order of Revelas J, relating to a possible *de bonis propriis* award of costs against Mazwai, was postponed and now forms part of the proceedings before me. During argument, Mr *Franklin* indicated that Mr Mazwai was present in Court and that all that he required to state in relation go the possibility of a *de bonis propriis* costs order against him was that the explanation had been fully set out in the affidavits referred to above and that there had been no intention on his part to mislead the court.

20] At the outset of his argument, Mr *Franklin* readily conceded that the conduct of the then attorneys for Transnet was inappropriate, in particular that they were not entitled to –

- assume that they could simply remove the matter from the roll;
- state that such removal was by agreement of both parties; and

- assume that there was no need to appear in court on 1 September 2003.

21] These concessions were wisely made. What is particularly serious – indeed, deplorable – is the misrepresentation of the true state of affairs in the notice of removal. This was issued and filed by an officer of the Court and misrepresented not only to the Registrar but to the Court itself that agreement had been reached between the parties whereas that simply was not the case. There was no justification whatsoever for any such statement or any belief or assumption that either Mr Ndhlela or his attorney would not be objecting to the removal from the roll. This misrepresentation cannot be ascribed to mere carelessness: it was at the very least reckless and subversive of the vital element of integrity required of all legal practitioners in all their dealings, in particular with the Court. The Courts view such misrepresentations in a very serious light and the seriousness of the misrepresentation in the particular matter should not be underestimated.

22] What I am called upon to decide, however, is whether Transnet should be visited with the consequences of such misrepresentation in the form of a default judgment which requires *inter alia* the reinstatement of a former executive director dismissed on a number of serious charges.

23] During argument three possible bases for rescission were identified being –

- the common law;

- section 165 of the Labour Relations Act; and

- rule 16A of the Labour Court Rules.

24] In my view this matter can be resolved having regard to the requirements for rescission of default judgments as recognized in the common law and in Rule 16A.

25] Under the common law an applicant for rescission is required to satisfy two requirements :

- a reasonable and acceptable explanation for the default; and

- a *bona fide* defence which *prima facie* carries some prospect of success.1

26] Rule 16A (1) provides –

"The court may in addition to any other powers it may have –

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

1 *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 75 B – C; *Athmaram v Singh* 1989 (3) SA 953 (D) at 957 C – D.

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

(ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(iii) granted as the result of a mistake common to the parties; or

(b) on application of any party affected, rescind any order or judgment granted in the absence of that party." (emphasis added).

27] Under Rule 16A(2)(b), *"the Court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit."* (emphasis added).

28] The provisions of Rule 16A(2)(b) of the Labour Court Rules are similar to the provisions of Rule 31(2)(b) of the Uniform Rules of the High Court. Accordingly the principles developed in the case law relevant to Rule 31(2)(b) should inform the interpretation and application of Labour Court rule 16A(2)(b).

29] In applying Rule 31(2)(b), the High Court has required that an applicant for rescission must –

- give a reasonable explanation for his or her default;

- make the application *bona fide*; and

- show that he or she has a *bona fide* defence to the claim against him or her (or in the case of a claimant, has some prospects of success).2

30] An ingredient of the requirement that good cause be shown is that the element of wilfulness must be absent.3 The reasons for an applicant's absence or default must be set out because they are relevant to the question of whether or not the default was wilful.4 Before an applicant can be said to be in wilful default the following elements must be shown :

- knowledge that the action is being brought against him or her;

- a deliberate refraining from entering an appearance or appearing, though free to do so; and

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2 *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 798 (E) at 200 F – 301 C; *De Witts Autobody Repairers (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E); *Carolus & Ano v Saambou Bank Ltd* 2002 (6) SA 346 (SECLD).

3 *Maugan t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803 J.

4 *Brown v Chapman* 1928 TPD 320 at 328.

- a certain mental attitude towards the consequences of default.5

31] In the present matter, Transnet and its then attorneys were clearly aware of the action which had been brought against it and that the matter had been set down for trial on 1 September 2003. However, having regard to the facts as summarized above, neither Transnet nor its attorneys can be regarded as having deliberately refrained from appearing at Court on that day. They were clearly under the (mistaken) impression that the matter would not be called at roll call, acting under the genuine belief that the notice of removal sufficed to ensure that the matter had in fact been removed from the roll, accordingly dispensing with the need for any appearance on the day. At no stage was there anything to suggest that Transnet was abandoning its defence, was content to allow the matter to proceed to trial and for a default judgment to be given and thereby to preclude it from leading evidence, cross-examining Mr Ndhlela and his witnesses and presenting argument in its defence. On the contrary, the matter was vigorously contested from the outset and throughout the stages of pleading and pre-trial processes. Neither Mr Ndhlela nor his attorney could have been under any illusion in that regard.

32] Viewed in this light, it is difficult to understand how it came about that when the matter was called at the trial roll and then allocated to Revelas J for hearing, and

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5 Erasmus: Superior Court Practice B1 – 202 to 203.

there was no appearance by any representative on behalf of Transnet, no effort was made by Mr Ndhlela's attorney to make contact with Transnet's attorney, or to ask the presiding Judge for an opportunity to stand the matter down to make a telephone call to Mr Mazwai or his counsel. That would have been a simple and quick process (particularly in the age of the cellphone). It was appropriate not only having regard to collegiality between legal practitioners but also because it was abundantly clear that Transnet intended to defend the claim. Mr Ndhlela's attorney was justified in his unhappiness at the misrepresentation contained in the notice of set down and he had sent off a fax objecting to it. But that fax was sent to the wrong fax number and had not reached the attorney acting for Transnet. A telephone call to Mr Mazwai would have established that. Mr Ndhlela's attorney must have suspected that Mr Mazwai, his counsel or client had not arrived at Court probably because of the misleading notice of removal or possibly for some other reason of mishap or the like. However offended he may (justifiably) have felt about the misleading notice, it was nonetheless still appropriate for an attempt to be made to contact Mr Mazwai by phone.

33] Be that as it may, the default cannot be regarded as having been wilful. Mr Moshoana argued that both the in-house general counsel of Transnet, Dr Madima, and his then legal team, were *mala fide* in deliberately misinterpreting the order of Seady A J. In my view this criticism is unjustified. That order, which was granted

by agreement of both sides, required that dates be found for the setting down of the trial which were suitable to both parties and their legal teams. The Registrar had set down the trial for 1 September 2003 without reference to the parties or their legal teams. Initially there was an attempt by both sides to proceed with the trial on 1 September, but this proved to be impractical due to the unavailability of Transnet's counsel. In my view there is nothing on the papers to show any basis for inferring a lack of good faith on the part of any of the parties or their legal representatives.

34] Turning to the requirement that an applicant for rescission must show a reasonable prospect of defending the claim, I am satisfied on the papers that Transnet shows a defence which is both *bona fide* and one which has a reasonable prospect of succeeding. Of particular significance in this regard are –

- the findings of Judge Trengove, in which he found Mr Ndhlela guilty of serious acts of misconduct which have a serious impact on the relationship of trust between an employer and its employee, particularly an executive director of a large parastatal; and

- the conviction and sentencing of Mr Ndhlela on charges of fraud which have a direct relationship with the disciplinary charges.

35] Neither the findings of Judge Trengove nor the conviction and sentence by the

Regional Court in the criminal matter will be decisive when this Court deals with the merits of the trial action. It will have to come to its own conclusions in that regard. However, the outcome of both the disciplinary process and the criminal prosecution lends support at least *prima facie* for Transnet's defence which in my view must be regarded as having substance and a realistic prospect of success.

36] For these reasons I conclude that Transnet satisfies the requisites for rescission of the default judgment.

37] In relation to costs, Mr *Franklin* submitted that costs should follow the result and that Mr Ndhlela's opposition to the rescission application was unreasonable. Mr Moshoana on the other hand contended that even if rescission were granted, the Court should grant his client costs to mark its disapproval of the conduct of Transnet and its legal representatives.

38] In my view, the requirement of fairness would be well served if each party were to bear its own costs of this application. Each of the parties or their then legal representatives must bear some of the blame for the judgment having been granted by default, to the extent indicated above.

39] I have decided against making a special costs order against Mr Mazwai *de bonis propriis*. One of the relevant factors in this regard is that the misrepresentation in

the notice of removal seems to have emanated not from Mr Mazwai but from Mr Baloyi, who was not given an opportunity to make submissions in this regard. However, my refraining from making an order for costs *de bonis propriis* should not be construed as detracting from the seriousness of the misrepresentation and the dim view that Courts take of such conduct by officers of the Court.

40] In the result I confirm making the order as follows :

(a) The order granted by Revelas J on 1 September 2003 is rescinded;

(b) There is no order as to costs.

P M Kennedy

Acting Judge of the Labour Court

Date of hearing: ***5 February 2004***

Date of delivering reasons

for judgment: ***13 February 2004***

Transnet's counsel: ***A E Franklin SC with A I S Redding***

Instructed by: ***Mr Robin Carr of Bowman Gilfillan***

Mr Ndhlela's Attorney: ***Mr G Moshoana of Mohlaba Moshoana Incorporated***