C142/2010

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER: C142/2010

DATE: 2011-09-08

In the matter between:

KWESTHUBA CONSULTING (PTY) LTD Applicant

and

KAYODE ADESEMOWO Respondent

J U D G M E N T

STEENKAMP, J:

The respondent in the main application, Kwesthuba Consulting (Pty) Limited, applied for rescission of the default judgment handed down on 26 November 2010. In that judgment the respondent was ordered to pay the applicant, who is the employee, Mr Kayode, the equivalent of nine months' remuneration, the Court having found that his dismissal was unfair. No order was made as to costs.

The application for rescission was brought in terms of Rule 16A(1)(b), read with Rule 16A(2)(b), read with section 165 of the Labour Relations Act. In terms of that rule, the application for rescission had to be brought within 15 days after acquiring knowledge of the judgment sought to be rescinded.

Although the judgment was already handed down on 26 November 2010, the application for rescission was only brought on 14 February 2011. When questioned about that, Mr *Coetzee*, who appeared for the company, submitted that the judgment only came to the attention of the company on 24 January 2011 when the Sheriff of the Court attended at its premises to serve a warrant of execution.

Although it could have been more pertinently stated in the application for rescission, I accept that that was the case, and that, therefore, the application was brought on the 15th day after the judgment came to the attention of the company. There was, therefore, no need to apply for condonation.

The test for rescission has been set out in numerous judgments of this Court, for example by the Labour Appeal Court in Shoprite Checkers v CCMA [2007] 10 BLLR 917 (LAC), and even though that case dealt primarily with the rescission of a CCMA award in terms of section 144, it dealt with the

principles relating to rescission generally. In paragraph 35 of that judgment, Jappie AJA said the following –

> "The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default, and, secondly, whether the applicant has a *prima facie* defence."

In Northern Province Local Government Association v CCMA and others [2001] 5 BLLR 539 (LC) at 545 paragraph 16, it was stated with reference to Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (4th ed 540-541):

> "An applicant for the rescission of a default judgment must show good cause and prove that he at no time renounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made *bona fide* and he must show that he has a *bona fide* defence to the plaintiff's claim..."

Jappie AJA went on, in paragraph 36 of his judgment in

Shoprite Checkers, to quote from the earlier judgment of Nugent J, as he then was, in *M M Steel Construction CC v Steel & Engineering and Allied Workers Union of South Africa and others* (1994) 15 *ILJ* 1310 (LAC) at 1311J to 1312A, where Nugent J said:

> "Those two essential elements are, nevertheless, not to be assessed mechanically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence."

The relevant authorities were also usefully summarised in Edgars Consolidated Stores Limited v Dinat and others (2006) 27 *ILJ* 2356 (LC), with specific reference to Rule 16A(1)(b). In discussing that rule, the Court quoted from the earlier judgment of Grant v Plumbers (Pty) Limited 1949(2) SA 470 (O) that the following requirements should be complied with in order to show good cause:

A "(a) An applicant must give a reasonable explanation of his default. If it appears that his default was wilful, or that it was due to gross negligence, the Court should not come to his assistance.

B "(b) The application was *bona fide*, and not made with the intention of merely delaying plaintiff's claim.

C "(c) The applicant must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

It is further clear from the authorities that the applicant for rescission must satisfy both elements of the test.

In applying those authorities to the present application, I will deal firstly with the second leg – that is if the company appears to have a *bona fide* defence to the employee's claim of unfair dismissal.

In this regard, there are various disputes of facts on the papers. Given those disputes, I am prepared to accept that the employer – that is the company – may have a *prima facie* defence in the sense of having set out averments which, if established at trial, would establish a *bona fide* defence to the

claim. As I have pointed out, though, both requirements must be satisfied.

I turn then to the explanation for the default.

It is common cause that the respondent company did receive the applicant's – that is the employee's – statement of claim on the 7th of May 2010. That was shortly after both parties had attended the conciliation at the CCMA, and the CCMA issued a certificate of outcome that the dispute remained unresolved and had to be referred to the Labour Court, on 19 January 2010.

The applicant – that is the employee -- served the statement of claim on the respondent company in terms of Rule 4 of the Labour Court Rules by telefax. There is no dispute that the respondent, and more specifically its director, Mr William Davy, who opposed to the founding affidavit in the rescission application, did receive that statement of claim, and that it was properly served.

The statement of claim is in the prescribed Form 2 in terms of Rule 6, and sets out pertinently in paragraph 2:

> "If a party intends opposing the matter, the response

must be delivered within 10 days of service of this statement, in terms of Sub-Rule 6(3) of the Rules of the Labour Court, failing which the matter may be heard in that party's absence, and an order for costs may be made against that party."

Despite that, the respondent's Mr Davy did nothing about it. He explains in his affidavit that he was under the impression that he would be informed by the Labour Court regarding the "further conduct of the matter". Before having received the statement of claim, he had what he called "an informal discussion" with an acquaintance of his who is familiar with labour law, who informed him that the company would be notified by the Labour Court of any proceeding initiated. He does not elucidate who that acquaintance was, what his familiarity with labour law consists of, and on what basis he formed the clearly mistaken impression that the Labour Court would inform him of any proceedings initiated. Neither does he attach a confirmatory affidavit by that unnamed acquaintance.

Having received the statement of claim notifying him that he, or the company, had to submit its response within 10 days, the company, in the form of Mr Davy, did nothing further. Despite the fact that he had obtained advice on the dismissal of the employee from a labour consultant, one Redge Wrigget, he did

not enquire from that consultant what he should do. Neither did he obtain any advice from attorneys or counsel, despite the fact that he says he had previously been involved in civil litigation matters with counsel on brief. He simply says that he assumed the statement of claim to be “a mere courtesy”, and that he would still be issued with a summons by the Sheriff of the Court, or by an attorney representing the employee.

For the next eight months, until the sheriff knocked on its door on the 24th of January 2011, Mr Davy and the company did absolutely nothing to either respond to the statement of claim, or to make further enquiries.

Mr *Dhansay*, who appeared for the employee, referred me in his argument to the unreported case of Pillay J in The Marine Coffee Shop and another v Msomi, which appears on SAFLII at [2001] ZALC 81, and specifically the penultimate paragraph, where Pillay J had the following to say:

> "The first applicant had sufficient notice of the proceedings ... On its own version, it failed to make reasonable enquiries to establish what was required of it in order to defend its rights and to take the necessary steps to do so. In these circumstances, the application for rescission is dismissed with costs.”

In the matter before me, the circumstances are similar. The company's failure to respond to the statement of case, or to make any further enquiries, amounts, at the very least, to gross negligence.

In that regard, as the Court pointed out in the Edgars case with reference to Chetty v Law Society Transvaal 1985 (2) SA 756 (A):

> "A court will not come to the assistance of a defendant whose default was wilful or due to gross negligence."

And further, that:

> "it is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default, other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable

prospects of success on the merits."

It is clear to me that, even if the respondent may have some prospects of success on the merits, his explanation for the default amounts to no more than gross negligence.

In those circumstances, the application for rescission must fail. In law and fairness, costs should follow the result.

THE APPLICATION FOR RESCISSION IS DISMISSED WITH COSTS.

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STEENKAMP, J

For the applicant: Adv A Coetzee

Instructed by: Brink & Thomas Inc.

For the respondent: AS Dhansay of Parker attorneys.