IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: C139/10

In the matter between:

MARTIN AND HAUPTFLEISCH CIVILS CC	Applicant
and	
DESMOND MBUTHO	First Respondent
MBONENI NGQOBE	Second Respondent
MASIBULELE SIGOBELWANA	Third Respondent
MHLANGABEZI SIBHIDLA	Fourth Respondent

Date of hearing : 21 April 2011

Date of judgment : 18 October 2011

JUDGMENT

VAN VOORE AJ

Introduction

1 On 23 November 2010 Steenkamp J handed down default judgment against Martin and Hauptfleisch Civils CC (the employer). In that default judgment Steenkamp J, *inter alia*, ordered, *inter alia*, that the First, Second and Third

Respondents be paid compensation, together with interest, and that the employer pay the costs.

2 In this matter the employer applies for an order rescinding the default judgment dated 26 November 2010, that it be granted leave to file a response and the costs of the rescission application.

3 The legal principles in relation to an application for rescission of a default judgment in this Court are well known. An applicant in a rescission application must have a reasonable explanation for the default in delivery their response and in relation to the merits of the dispute, a bona fide defence which, prima facie, carries some prospect of success. I will deal with each of these requirements in turn.

Explanation for the default

4 The First and Second Respondent served a statement of claim dated 26 February 2010 under case no. C139/2010 alleging, *inter alia*, that they were unfairly dismissed. On 1 March 2010 the First to Fourth Respondent wrote a letter to the employer advising it to ignore the statement of claim dated 26 February 2010.

5 The First and Second Respondents served and filed a further statement of claim on 17 May 2010. At that stage the First and Second Respondents were

represented by Adams & May Attorneys. In this statement of claim the First and Second Respondents alleged that they were unfairly dismissed and they sought, inter alia, compensation for their alleged unfair dismissal.

6 On 17 May 2010 the First and Third Respondents delivered a statement of claim alleging that they were unfairly dismissed (retrenched). They sought, *inter alia*, reinstatement alternatively compensation. Following a change of attorneys of record and an application to amend the statement of claim, which application was unopposed, the First to Fourth Respondents alleged that they were unfairly dismissed (retrenched) and they sought, *inter alia*, compensation for the alleged unfair dismissal severance pay as well as remuneration in respect of work performed and in respect of which they were allegedly not paid.

7 The facts in relation to the service of the various statements of claim are that:

7.1 A statement of claim on behalf of the First and Second Respondents was served on the employer on 26 February 2010. On 1 March 2010 the employer was advised in writing by the First to Fourth Respondents to disregard the statement of claim sent to it by telefax on 26 February 2010.

7.2 A further statement of case (in respect of the First and Third Respondents) was served on the employer on 17 May 2010.

7.3 An amended statement of claim was served on the employer on 18 October 2010. The Respondents applied for default judgment on

15 November 2010.

7.4 On 15 November 2010 the First to Fourth Respondents delivered an application for default judgment. Default judgment was granted on 26 November 2010.

8 The facts, not in dispute, in relation to the employer's conduct following the initiation of proceedings against it in this Court may be summarised as follows:

8.1 The employer did receive the 'initial' statement of case dated 26 February 2010 and the subsequent letter sent on 1 March 2010 advising the employer to disregard that statement of case.

8.2 The employer did receive the statement of claim served and filed on 17 May 2010.

8.3 The employer did receive the notice of withdrawal of the First and Second Respondents' then legal representatives.

8.4 The employer did receive the Respondents' notice of intention to amend statement of claim on 6 September 2010. That amendment was effected and the amended statement of claim was filed during October 2010.

8.5 The employer did not deliver a response to the February 2010 or May 2010 statement of claim. The employer did not respond to the Respondents' notice of intention to amend their statement of claim and the employer did not respond to the amended statement of claim.

9 In the rescission application the employer does not take any issue with the fact

that the Respondents had properly served and filed statements of claim and that they were properly before the Court. The employer's rescission application is based on the explanation offered for not delivering a response timeously and what it alleges to be a bona fide defence.

10 It is the employer's case that upon receipt of the 'pro forma' statement of case the employer 'immediately' sent these documents to its labour consultant, Mr Renier van Vuuren (van Vuuren).

11 In the interim and on 1 June 2010 the employer's Mr John Martin (Martin) enquired from van Vuuren whom the employer could instruct as an attorney. On the same day, 1 June 2010 van Vuuren recommended that the employer instruct Mr Carlo Swanepoel (Swanepoel). Van Vuuren also gave the employer Swanepoel's mobile telephone number together with his electronic mail address. On 6 September 2010 the employer's sent an electronic mail to Swanepoel informing Swanepoel that the employer had been referred to him by van Vuuren and enquiring whether Swanepoel could assist. The very next day, 7 September 2010, Swanepoel replied by electronic email, referring to a telephonic conversation that he had with Martin and requesting documents served in relation to the matter and a short explanation as to what the matter entailed.

12 There is a further exchange of electronic mails as between Swanepoel and

Martin on 7 September 2010. This deals only with the notice of withdrawal of the previous attorneys of record and the appointment of new attorneys of record. In his electronic mail of 7 September 2010 to Martin Swanepoel does record that he is awaiting further information from the employer.

13 During September 2010 Ms Orpen (Orpen), an employee of the employer, was instructed to send '*all the documentation in the matter received up to that point in September 2010'* to Swanepoel. Orpen was instructed to do so per telefax and to do so timeously. The Applicant's response had to be filed at the Labour Court on or before 4 October 2010. Orpen did not send the documents to Swanepoel (the attorney) but rather sent the documents to van Vuuren (the labour consultant). Martin was unaware of this. Martin "*believed Swanepoel [the attorney] to be in possession of all the necessary documents in order to oppose the matter*."

14 The employer closed its business on 15 December 2010 and reopened its offices on Monday 10 January 2011. On 26 November 2010 the Sheriff attended at the Applicant's premises for the purpose of serving and executing the default judgment of 26 November 2010.

15 Martin had instructed van Vuuren (the labour consultant) to oppose the matter and "believed him to have liaised with Swanepoel in that regard". Further Martin believed that the matter was being attended to by van Vuuren who had

been advising the employer on this dispute.

16 The employer contends that these facts are evidence of a reasonable explanation for its default in delivering a Response.

17 It is so that on 1 June 2010 Martin on behalf of the employer sought a recommendation from van Vuuren as to an attorney who could assist it. That recommendation was acted upon on 6 September 2010. By 7 September 2010 the attorney had asked the employer to furnish him with various document relevant to the dispute as well as a brief explanation as to what the dispute entails. The Court accepts that Orpen was instructed to send documentation to Swanepoel. She did not do so. The documents were however sent to van Vuuren. Martin on behalf of the employer maintains that it believed that van Vuuren was liaising and communicating with Swanepoel on the matter. In effect the employer's contention is that it was emboldemed in this view or belief by the fact that van Vuuren had dealt with the matter up to that point, that van Vuuren assisted it in labour relations matters and that van Vuuren had personal knowledge of its labour relations and the dispute that the Respondents had referred to the CCMA.

18 On the employer's own version it was aware of the fact that following receipt of the statement of claim there was a time period within which the employer was required to do the next thing (deliver a response). On Martin's version on behalf

of the employer that time period was 4 October 2010. No response was delivered on that day or indeed thereafter. Rather the business shut down on 15 December 2010 and reopened on 10 January 2011. Martin concedes, and properly so, that he should personally have enquired as to the further conduct of the matter and he regrets not doing so. In the same breath however Martin claims that van Vuuren made no further enquiry in relation to documentation being forwarded to him and also did not make any enquiries in relation to "progress of the matter, which he should have done". On balance, the explanation is a reasonable one. Notwithstanding this it remains necessary and important to consider the second leg of a rescission application, has the employer demonstrated a bona fide defence.

19 Both the High Court and the Labour Court have required that an applicant for rescission must:

19.1 provide a reasonable explanation for its default;

19.2 make the application for rescission in good faith; and

19.3 demonstrate that it has a *bona fide* defence to the claim or in the case of a claim, has some prospects of success.

20 In the matter of *Vorster v EET SA (Pty) Ltd*,[1] the Labour Court confirmed the principle that in terms of Rule 16A(1):

1 (2006) 27 ILJ 2439 (LC)

> "An Applicant in order to succeed in an application for the rescission of a judgment ... is obliged to show good cause.... In considering whether the Applicant was grossly negligent in not delivering it s answering affidavit or whether there is no acceptable explanation for the Applicant's failure to deliver its answering affidavit, the Court must have recourse to the Applicant's reasons, these are relevant to the question whether the Applicant's default is wilful or not. Before a person can be said to be in wilful default, the following must be shown:
>
> a) knowledge that the action is being brought against him;
> b) a deliberate refraining from entering an appearance though free to do so; and
> c) a certain mental attitude towards the consequences of the default."

21 In that matter the Court also referred to a decision of *Grant v Plembers (Pty) Ltd*,[2] in which that Court held that:

> "(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...."

22 Albeit late in the day (September 2010), the employer did make contact with an attorney as recommended to it by its labour consultant (van Vuuren). An instruction was given for documents to be delivered to the attorney. That

2 1949 (2) SA 470 (O) at para 3 of the Mokgoatlheng AJ's judgment.

instruction was not carried out.

Prospects of Success

23 The employer contends that the Respondents were employed on fixed term employment contracts and that they were remunerated every fortnight. The Respondents confirm that they were remunerated fortnightly but contend that they were employed on contracts of indefinite duration 'after completion of a year of service' with the employer. The Respondents deny that they signed fixed term employment contracts. However the employer produced two documents which, *prima facie*, appear to be fixed term employment contracts between it and two of the Respondents. The Respondent contents that upon the expiration of the last of the employees fixed term employment contract it had no further work for them. The Respondent's case is that its work is the result of successfully competing for work in the construction industry and that its work involve smaller construction projects typically done as a sub-contractor for the main building contractor. The Respondent further contends that the nature and lifespan of those projects is necessarily limited and that for this reason also it employed the Respondents on a fixed term basis.

24 This Court is not required to determine the merits or otherwise of the employer's defence. At this stage all that is required is for the employer to demonstrate a *bona fide* defence. The employer has demonstrated a *bona fide* defence which, *prima facie*, does indeed carry some prospect of success. That being the case

this Court is reluctant to "close the door" to the employer. However the employer has advanced an explanation which is not without difficulty or problems. Notwithstanding these problems, on the facts of this case it cannot be said that the employer was in wilful default or acted in "complete" disregard of the rules of this Court.

25 However and as conceded by counsel on behalf of the employer, it is appropriate for this Court to express some displeasure with the employer's conduct. Both Counsel for the employer and Ms P P Genqese for the First to Fourth Respondents are in agreement that the Court may in a matter such as this make an appropriate order as to costs. The Court has been referred to at least two judgments one of Steenkamp J in the matter of *Bernadette Zeeman v Anthony Charles Quickelberge and the Railway Shed CC*[3] as well as the matter of *Lorna E Naude v Bioscience Brands Ltd*[4]. In the matter of *Lorna E Naude v Bioscience Brands Ltd* Cele J in his judgment held that:

> "The Applicant was represented on a pro bono basis. The considerations of law and fairness of this matter suggests that a costs order should be issued against the Respondent. There is no specific provision in the Rules of this Court for awarding costs in these circumstances. Rule 40 of the High Court provides for a costs order for a successful litigant in forma pauperis."

26 In the matter of *Bernadette Zeeman v Anthony Charles Quickelberge and the*

3 Zeman v Quickelberge & another (1) 2011 32 ILJ 453 (LC)
Zeman v Quickelberge & another (2) 2011 32 ILJ 469 (LC)
4 Naude v BioScience Brands [2010] JOL 25373 (LC)

Railway Shed CC, Steenkamp J held that:

> "In this respect I respectfully agree with Cele J that, in appropriate cases, a pro bono litigant may be awarded costs, and disagree with the contrary view taken in Morkel N O & Others v CCMA & Others. In litigation the pro bono client is at a disadvantage. As between attorney and client the attorney for the pro bono litigant can only claim such expenses from the client as are actually incurred by the attorney. It has been argued that since his client has incurred no fees, the attorney acting pro bono can claim no fees, only disbursements, from the losing party.
> The problem with this view is that it enables the opposing party to litigate with impunity, discourage a settlement, and militates against the public interest."

27 I align myself with the judgments of Cele J and Steenkamp J as referred to above.

28 In conclusion I make the following order:

28.1 The default judgment dated 26 November 2010 is rescinded.

28.2 The Applicant is ordered to pay the Respondents' costs.

VAN VOORE AJ

Appearances:

For the Applicant:	Adv. T. Golden instructed by Carlo Swanepoel Attorneys
For the Respondents:	Mr. P.P. Genqese instructed by Herold Gie Attorneys