REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D514/2012

In the matter between**:**

AFRICON (PTY) LTD **Applicant**

and

ZAMANI RUSSEL KHUMALO & 2 OTHERS **Respondents**

Heard: 17 October 2013

Delivered on: 17 April 2014

JUDGMENT

TLHOTLHALEMAJE AJ

Introduction:

[1] This is an opposed application for rescission of an order issued by Honourable Gush J on 24 October 2012. In terms of the order, the dismissal of the respondents was found to be procedurally and substantively unfair. They were granted relief in the form of retrospective reinstatement.

Background:

[2] The respondents were dismissed on 16 November 2011 on account of operational requirements. They referred a dispute to this court by filing a statement of claim on or around 15 December 2011 under case number

D1172/12. The applicant filed an answering statement and raised a preliminary point to the effect that the court lacked jurisdiction to determine the claim, as the dispute was not initially referred to the CCMA for conciliation. On 16 February 2012, the respondent's attorneys conceded to the preliminary point and indicated their intention to withdraw the dispute before the court and to refer it to the CCMA. A notice of withdrawal of the dispute was then filed on 24 February 2012. On the same day the respondents' attorneys then filed Form 7.11 together with an application for condonation. The CCMA granted condonation and issued a certificate of non-resolution on 2 April 2012.

[3] On 7 June 2012, the respondent's attorneys served a statement of case on the applicant and filed same with the court on 8 June 2012. The applicant did not file a response to the statement of claim, and a request for a default judgment was filed on 11 July 2012. This resulted in a default judgment being granted as mentioned in paragraph 1 above. This rescission application was filed on 11 December 2012.

Relevant legal principles:

[4] Section 165 of the Labour Relations Act (LRA) empowers the Labour Court to vary or rescind orders. It provides that:

> 'The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order-
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> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order; ...'
> (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of the omission' or
> (c) granted as a result of a mistake common to the parties to the proceedings.'

[5] Rule 16A(1)(a) of the Rules of this Court is a substantial replica of the provisions of s 165(a) of the LRA, and our courts have held that if an order was erroneously made in the absence of any affected party, the court should on the application of that party rescind the order without further enquiry. Amongst decisions in this regard is *SA Democratic Teachers Union v*

Commission For Conciliation, Mediation & Arbitration and Others[1], where the court held that;

> 'In short, good cause is not required to be shown if a judgment or order was erroneously granted in the absence of a party'.

[6] In bringing this application, the applicant appears to be relying on the provisions of Rule 16A (2) even though in its founding affidavit it had merely stated that the application was brought in terms of the provisions of Rule 16A and/or Section 165 of the LRA. Rule 16A (2) provides that;

> 'Any party desiring any relief under-
>
> (a) sub rule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought,
> (b) sub rule 1(b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit'

[7] If a party relies on the provisions of Rule 16A (2), it seeks to rescind the order or judgment on the grounds that it was granted in its absence but that there is a reasonable explanation for its absence. In this regard, the applicant is required to show good cause for the default and that the rescission is not merely a delaying tactic to frustrate the claim of the other party. In addition, the applicant has to show that it has a *prima facie* case to present. However, the applicant need not deal fully with the merits of the case with the view to proving that the balance of probabilities favours its case[2].

[8] In *Northern Province Local Government Association v CCMA and others*[3], it was stated with reference to Herbstein & Van Winsen[4], that:

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[1] (2007) 28 ILJ 1124 (LC) at para 17
[2] *Sizabantu Electrical Construction v Gama & Other* (1999) 20 ILJ 673 (LC) and *Voster v EET SA (Pty) Ltd* (2006) 26 ILJ 2439 (LC).
[3] [2001] 5 BLLR 539 (LC) at 545 paragraph 16
[4] 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..."

[9] The court order of 24 October 2012 was granted by Honourable Gush J in chambers. What this implies then is that in showing good cause, the applicant must demonstrate that despite not filing an opposition to the statement of case, at no stage had it renounced its defence; that it had serious intention of proceeding with the case, and that it has a *bona fide* defence to the respondents' claim.

Intention to defend the claim:

[10] M Pillay, the applicant's Human Resources Officer deposed to the founding affidavit in which the following was averred;

The applicant became aware of the court order on 28 November 2012 when same was received from the respondents' attorneys of record. It however did not receive the respondents' statement of case under the present case number, and it also did not receive any notice of set-down or documentation pertaining to this matter from the court. To this end, it was submitted that it was not aware of this matter.

[11] Pillay further averred that he was the only person responsible for Labour Relations matters, and that the first time he had knowledge of the matter was on 26 November 2012 when he received a letter from the respondents' attorneys of record, which was accompanied by a copy of the court order. He had then contacted the applicant's attorneys of record, who had also confirmed that they had no knowledge of this matter. Pillay contended that the applicant did not understand the reason the respondents' attorneys of record did not serve the second statement of case on its attorneys of record as they had always corresponded previously. He contended that it would be ludicrous to assume that the applicant would simply ignore the second statement of case after it had opposed the first one. He further pointed out that the

applicant had opposed the matter from the onset, and had also opposed the referral of the dispute at the CCMA.

[12] In opposing the application, Zamani Khumalo, one of the respondents pointed out that on 24 October 2012 there was no hearing held in respect of the main claim, and that the court had decided the matter on the papers. He disputed the applicant's contention that it did not receive the second statement of case on 7 June 2012 as its Angela Seach had confirmed receipt thereof.

[13] Khumalo also disputed the contention that the applicant's attorneys of record were on record at the time that the second statement of case was filed, and that the statement of case should have been served on them. In this regard, Khumalo contended that when the matter was before the CCMA, the applicant was represented by Labour Net Holdings, and there was no indication that the current attorneys of record, Snyman Attorneys, were still on record. Khumalo submitted that the second statement of case was served on both Labour Net Holdings and the applicant, and there was no reason to believe that Snyman Attorneys was still acting for the applicant at the time. He further contended that after the withdrawal of the first statement of case, there was no further communication between the applicant's attorneys of record and Snyman Attorneys.

[14] In his replying affidavit, Pillay denied that Angela Seach had received the second statement of case on 7 June 2012 or at any time. Seach had also not had any discussions with any person from the respondent's attorneys of records' office. Seach had confirmed receiving the original statement of case and the subsequent CCMA documentation, which she had forwarded to Pillay. Seach filed a confirmatory affidavit in this regard. Pillay contended that it could only be speculated as to the reason the fax did not reach Seach, including that it could have not been properly transmitted, or that it could have been collected by another employee and misfiled.

Evaluation: Re- intention to defend the claim:

[15] The applicant's main contention was that it always intended to oppose the respondents' claim as evident from its opposition to both the original

statement of case and the respondents' subsequent referral of the dispute to the CCMA. It had however not done so in respect of the second statement of claim as it had not allegedly received it. One of the principal reasons behind the promulgation of Rule 4 (2) of the Rules of this Court was to prevent disputes surrounding whether proper service by any means contemplated in Rule 4 (1) had been effected or not. An affidavit of service in respect of the second statement of claim was filed by Lindelwa Shabalala, an Office Assistant in the employ of the respondents' attorneys of record, wherein she averred that she had called telephone number 031 705 4490 and spoke to Angela Seach, who had confirmed receipt of the documents.

[16] Seach in her confirmatory affidavit attached to Pillay's answering affidavit in respect of this application had denied receipt of the second statement of case, and ever having had any discussions with anyone from the respondents' attorneys' offices. The provisions of Rule 4 (2) were clearly intended to circumvent the usual excuse that a facsimile transmission is not regarded as a reliable or conclusive method that a document was received by the intended recipient. Where an affidavit confirming service is filed, and the intended recipient of a document who was confirmed as having received that document denies receipt thereof under oath, it can only be inferred that either Shabalala or Seach is being untruthful.

[17] There will always be a difficulty in making a finding on the papers. However, having had regard to other averments in regard to the explanation as to the reason the statement of case could not have been received, Pillay speculated that the second statement was not properly transmitted, or was unclear and/or misfiled by another employee that did not realise the content. In my view, I have no hesitation in concluding that the second statement of case was indeed served on the applicant, and in the light of these speculations by Pillay, it can be inferred that there was negligence on the part of the applicant in not attending to it at all. I have no reason to doubt the truthfulness of Shabalala's averments, nor is it being suggested that Seach was untruthful. The probabilities and conclusions in this regard as pointed out are based on Pillay's speculations. This is even moreso as it was not denied that the respondents had utilised the correct fax number in despatching the statement

of case. On the whole I am not satisfied with the explanation that the applicant proffered in contending that the second statement of case was not served on it, even though as appears from its initial opposition to the matter, it cannot be said that it had abandoned its intention to oppose the claim.

[18] The applicant contended that when it became aware of the second statement of case, it took immediate steps to rectify the situation. It can only be assumed that those steps were in respect of filing of this application. However, as things stand, no opposition has been filed against the second statement of case, and it is not my understanding that the steps to rectify the situation only extend to the filing of a rescission application. At the most, to indicate that the application was not merely to frustrate the respondents' claim, the applicant should have filed an answer to the respondents' claim simultaneously with this application.

Bona fide defence to the respondents' claim:

[19] The applicant's contention was that the respondents were employed at the applicant's Umlazi Road site on a road works contract. That contract came to an end, and the respondents were dismissed for reasons related to operational requirements following a joint consensus seeking process as envisaged by section 189 of the LRA. In this regard, it was contended that all the employees at that site were retrenched, and not only the respondents.

[20] The court in dealing with the element of good cause, and in particular, a party's claim of a *bona fide* defence, stated in *Edgars Consolidated Stores Limited v Dinat and others*[5] that;

> "(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."

[5] (2006) 27 ILJ 2356 (LC)

The same principles were stated in *Sizabantu Electrical Construction*[6], a case referred to in the applicant's written heads of argument, where this court had held that;

> 'The applicant must show that it had a bona fide defence on the merits. Although it need not deal fully with the merits of the case or produce evidence to show that the probabilities are in its favour, it must demonstrate it has a defence which prima facie carries some prospects of success."

[21] Khumalo in his answering affidavit had denied that the applicant has any prospects of success in the matter and made reference to the respondents' statement of case. In that statement, it was contended that in August 2011, the respondents despite being illiterate, were advised to sign documents in terms of which they were required to accept that they would be on probation for a period of three months. Although some of the respondents refused to sign the documents, on 16 November 2011, and without prior indication, they were served with letters of dismissal, giving them notice until 15 December 2011. The applicant allegedly informed the respondents that it was closing down its Umlazi Road site and that it was moving to Richards Bay. The respondents contended that they applicant was however still operating at the Umlazi site. They also contended that not all employees were retrenched as alleged.

[25] It is accepted that the applicant in demonstrating a *bona fide* defence need not spell out in detail, the factual material it would rely on at trial. Having had regard to the respondents' statement of claim, Pillay's averments in the applicant's founding and replying affidavit, it is apparent that there are various disputes of facts on the papers. Given those disputes, I am prepared to accept that the applicant may have a *prima facie* defence in the sense that its averments, if established at trial, would establish a *bona fide* defence to the respondents' claim.

[26] The court has a discretion in deciding whether to grant rescission or not. That discretion must be exercised judiciously, taking into account a variety of factors. In this case, a conclusion has been made that the second statement

[6] *Supra*

of case was indeed served on the applicant. The applicant had been negligent in not attending to that statement of case at all. Even though the applicant was found to have been negligent, it is taken into account that the applicant timeously attended to the original statement of case and to the dispute before the CCMA. Furthermore, when the respondents approached the court with a request for a default judgment, it does not appear that the applicant was aware of such an application. In these circumstances, and notwithstanding its negligence in respect of the second statement of case, a discretion should be exercised in the applicant's favour, more specifically having regard to the conclusions made in respect of the second enquiry relating to good cause. This indulgence however must come with costs, as the applicant has not as yet filed its opposing papers, which is indeed prejudicial to the respondents. Other than this factor, it is my view that considerations of law and fairness dictate that the applicant must bear the costs of this application.

Order:

i. The application for rescission is granted.
ii. The applicant is to file its opposing papers within 14 days from the date of this order.
iii. The respondents are to file their reply within 14 days from the date that they are in receipt of the opposing papers.
iv. The parties are further ordered to hold and complete a pre-trial, and minutes in that regard should be filed with the court on or before 30 May 2014.
v. The applicant is ordered to pay the costs of this application

Tlhotlhalemaje AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. AJ Posthuma of Snyman Attorneys.

For the Respondents: Mr. Z Luthuli of AP Shangase & Associates

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