

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA 67/21

IN THE MATTER BETWEEN:

DIPLOPOINT (PTY) LTD

Appellant

and

TSANE MISHACK TWALA

Respondent

Heard: 12 May 2022

Delivered: 26 May 2022

Coram: Waglay JP, Coppin JA et Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the entire order of the Labour Court (Reddy AJ) in terms of which it dismissed an application by the appellant in terms of section 165 of the Labour Relations Act¹ ("LRA"), read with Rule 16A of the Rules for the Conduct of Proceedings in the Labour Court ("the LC Rules"), to rescind a default judgment granted against it by Nkutha – Nkontwana J on 30 April 2018. Leave to appeal was granted by the court *a quo*.

¹ Act 66 of 1995.

[2] The respondent did not oppose the appeal. The appellant seeks to have the court *a quo*'s order substituted with one in terms of which the rescission is granted with costs.

[3] The issue that arises for decision in this appeal is essentially whether the appellant made out a case for rescission.

Background

[4] The respondent, who was employed by the appellant as a factory manager, was dismissed by it on 20 July 2017, allegedly for operational reasons. He referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 3 August 2017. A certificate declaring that the dispute was unresolved was issued by the CCMA on 1 September 2017 and the respondent proceeded to refer the matter to the Labour Court for resolution.

[5] The respondent filed his statement of case on 31 October 2017, which he alleged to have served by means of a fax transmission to the appellant. In the statement of case, the respondent, essentially, alleged that his dismissal by the appellant was both procedurally and substantively unfair; that it was founded on "unknown reasons" and was premeditated in that it was made before the appellant could properly engage and consult with affected employees, including the respondent on the need to retrench, the criteria to be applied, et cetera. Consequently, the respondent sought the following relief in the statement of case: (a) An order declaring that his retrenchment was both procedurally and substantively unfair; (b) retrospective reinstatement, alternatively, (c) an order for maximum compensation; (d) costs of suit and (e) further and/or alternative relief.

[6] In terms of the statement of case, the appellant had 10 days from the date of receipt of that document to deliver its response. When no such response was forthcoming, the respondent lodged an application for default judgment with the court on 29 November 2017 in which he alleged: (a) that the statement of case was served on the appellant on 27 October 2017 and filed on 31 October 2017; (b) that the time period of 10 days for the delivery of the statement of defence/opposition had

elapsed; (c) that the appellant had failed to deliver a statement of defence/opposition; and (d) that in light of those circumstances the court *a quo* ought to grant the respondent default judgment against the appellant as prayed for in the statement of case.

[7] The respondent's application for default judgment was accompanied by an affidavit of service deposed to on 15 November 2017 by Ms Precious Montjane, a receptionist employed by the respondent's attorneys of record at the time, Mitti attorneys, and a confirmatory affidavit as contemplated in paragraph 10.1.3 of the Labour Court's Practice Manual in which the respondent confirmed the truth of the contents of the statement of case and, *inter alia*, that the statement of case "was properly served".

[8] In the service affidavit, Ms Montjane avers, in essence, that on 27 October 2017 a copy of the respondent's statement of case was served on the appellant by faxing it to the appellant at fax number (086) 219 5793 and that a copy of the fax transmission slip was attached. She furthermore averred that on 30 November 2017, she called the appellant's office on telephone number (011) 440 0645 to confirm whether it had received the statement of case. According to Ms Montjane she spoke, on that occasion, to a Ms Nicole Van Heerden who confirmed receipt of the document.

[9] On 30 April 2018, and in the absence of the appellant, Nkutha-Nkontwana J granted an order in the following terms: (1) declaring that the respondent's dismissal was substantively and procedurally unfair; and (2) ordering the appellant to reinstate the respondent as from 30 April 2018 with full backpay.

[10] On 19 July 2018, the appellant brought its application to rescind that order. The application was supported by a founding affidavit deposed to by Ms Qunsen Boyens, an accountant employed by the appellant. In the affidavit, Ms Boyens averred, *inter alia*, that: (a) the appellant only became aware of the order it sought to rescind on Friday 29 June 2018 when the order was served on it; (b) with the help and advice of its attorneys of record, the matter had been investigated, including the circumstances in which the order had been obtained by default; and (c) in the course

of consulting with its attorneys of record it had also become aware of the averments in the service affidavit deposed to by Ms Montjane.

[11] Ms Boyens specifically denied that the fax number to which the statement of claim had allegedly been transmitted belonged to the appellant, even though it appeared on a letterhead produced by the respondent purporting to be that of the appellant. She averred that she did not know to whom the fax number belonged and that no one in the office of the appellant knew that fax number. She, therefore, contended that it was clear that the service of the statement of case was defective. Ms Boyens further averred that Ms Nicole van Heerden could not remember receiving a call from the respondent's attorneys, and confirmed that she had never received any documents including a statement of case in the matter.

[12] Ms Boyens further stated in the founding affidavit that had the appellant been aware of the statement of case, it would have instructed its attorneys to oppose the action since that had been its intention from the outset of the referral of the matter to the CCMA; and that the appellant had good prospects of success in defending the respondent's claim. In respect of the latter, Ms Boyens pointed out that the respondent had been dismissed "following a duly constituted retrenchment process" and that the appellant had good reasons for the retrenchment; that the appellant utilised the services of an external labour law consultant to conduct the process properly; and that the respondent had made written representations to it regarding alternatives, which had been considered.

[13] Under the heading, "The requirements of 16A", Ms Boyens averred that the order made by the Labour Court on 30 April 2018 was done so erroneously in the absence of the appellant, and that had the court been aware of the facts that she had deposed to in the founding affidavit, including those relating to service of the statement of case, it would not have granted the default judgment.

[14] The respondent opposed the rescission application and caused an answering affidavit to be delivered in which he, essentially, disputes the appellant's averments in support of its contentions of the procedural and substantive fairness of his dismissal. Significantly, in respect of the service of the statement of claim, the

respondent essentially denied Ms Boyens' averments in that regard and stated that the fax number "definitely belongs" to the appellant. He further alleged that the appellant had received the statement of claim and had simply done nothing to oppose it. He contended that the fact that Ms Nicole Van Heerden could not remember being called by his attorney's office did not mean that she did not receive the statement of claim. He also averred that the fax number to which the statement of claim was transmitted appears on a letter from the appellant dated 25 May 2017, a copy of which he attached ("the letterhead").

[15] In the replying affidavit delivered on behalf of the appellant, Ms Boyens averred that, initially, in the course of the retrenchment process and when he served the referral form, the respondent utilised the correct fax number of the appellant, but when he served the statement of case, he suddenly used his own fax number (one that he had created). Ms Boyens contended that he did so intentionally in order to mislead the court. She explained that the second fax number utilised is a "fax to email" number which belonged to him while he was employed at the appellant. He created it on his own laptop because it was more convenient for him to receive faxes directly on his laptop, instead of from the fax machine to which he would have had to walk on a daily basis to collect them. Mr Gareth De Nysschen, the managing director of the appellant, confirmed that version in a confirmatory affidavit that accompanied the replying affidavit.

[16] Regarding the letterhead relied upon by the respondent – Ms Boyens explained that while the letterhead had been signed by Mr Kosta of the appellant it had been typed and created personally by the respondent and that Mr Kosta signed it, unaware of the fact that on the letterhead the respondent had represented his fax number as being that of the appellant. Mr Kosta deposed to a confirmatory affidavit that accompanied the replying affidavit confirming Ms. Boyen's version in so far as it related to him.

The Labour Court

[17] The court *a quo* essentially held that the appellant did not make out a case for rescission of the default judgment and that "good cause" had not been shown even

though the application itself was *bona fide*. It effectively rejected the appellant's explanation for the default, finding, in essence, that there was "no evidence that the fax transmission of the statement of claim to the appellant was not successful"; and that even if it were to be accepted that the fax number used by the respondent for that purpose was a "fax to email" created by the respondent for his own convenience, "one can assume that the fax number still belonged to the [appellant] and was still in operation after the [respondent's] dismissal given that the transmission was successful and on balance was received by Ms Van Heerden."

[18] The court *a quo*, accordingly, found that the appellant must have received the statement of case but had "wilfully or negligently failed to file a response". It further found that the appellant had not established a *bona fide* defence to the respondent's claim and was highly sceptical of the consultation process that was followed. The court *a quo* consequently dismissed the appellant's rescission application and made no costs order.

Discussion

[19] In terms of section 165 of the LRA, the Labour Court, acting of its own accord or in the application of any affected party, may vary or rescind a decision, judgment, or order "erroneously sought or erroneously granted in the absence of any party affected" by the decision, judgment or order. The LC Rule 16A(1)(a) is worded very similarly to section 165. LC Rule 16A(1)(b) however seeks to extend the court's power beyond that envisaged in section 165, so that the court may also "on application of any party affected, rescind any order or judgment granted in the absence of that party." In terms of LC Rule 16A(2)(b), it is only in such applications that the applicant must show "good cause" for the rescission. In rescissions envisaged under rule 16A(1)(a), and similarly under section 165, the cause for the rescission is self-evident.

[20] The appellant contends, *inter alia*, that the court *a quo* was wrong in treating the application as one in terms of LC Rule 16A(1)(b), whereas it was one in terms of section 165 of the LRA (i.e. effectively, that it was brought in terms of LC Rule 16A(1)(a) and not (b)). The appellant argues that the court *a quo* erred in not finding

that it was unaware that the statement of claim had been served and that the grant of the default judgment was therefore erroneous.

[21] It is generally essential that the party against whom legal proceedings are instituted must be given notice of the process in accordance with the law, or applicable practice or rules. A judgment or order may be “erroneously sought or erroneously granted” in the absence of a party affected thereby, if, for example, the process concerned (such as a summons, or a statement of claim, as is in this case) had not been served on the party². In such instances, it only has to be shown that the process concerned was not served on the affected party and that would be sufficient to oblige the court to grant the rescission. It was not necessary for the appellant to show any further good cause.

[22] Having approached the matter robustly, it was incumbent on the court *a quo* to have correctly distilled and dealt with the essence of the matter. It, unfortunately, erred in that it clearly overlooked the significant fact that throughout the CCMA process, the respondent actually used the fax number that was undoubtedly the correct fax number of the appellant, but then, for no apparent reason, he used a different fax number when serving his statement of case on the appellant. That was not all, but the number was a “fax to email” number which he had created for his own convenience. In addition, the letterhead which he used to “prove” that the number was indeed that of the appellant, was also his creation and was seemingly devised by him to facilitate such “proof”.

[23] There was no reason why the appellant would wilfully have refrained from defending or opposing the respondent’s claim as per his statement of case. Proverbially, that would have been like sticking its head into the sand, while the rest of its body remained exposed. The appellant did not stand to benefit from such an attitude. On the contrary, instead of having blatantly exposed itself to an adverse judgment, which it would have difficulty rescinding if it adopted such an attitude, a more likely scenario is that the appellant was actually unaware of the statement of case, as it was transmitted to a “fax to email” address that had been created by the

² Compare cases decided under Uniform Court Rule 42(1)(a), *inter alia*, *Custom Credit Corporation (Pty) Ltd v Bruwer* 1969 (4) SA 564 (D), *Fraind v Nothmann* 1991 (3) SA 837 (W). See also, *Clegg v Priestley* 1985 (3) SA 950 (W).

respondent for his own convenience. The statement of case transmitted to that number would not have come to the attention of the appellant, unless it was specifically alerted to that fact and it had ready access to the emails of the respondent.

[24] The fact that Ms Nicole van Heerden could not remember receiving a call from the appellant's attorneys does not detract from the veracity of her version. On the contrary, it strengthens it, because she could easily have denied having received such a call. Regarding the contents of the alleged call – one would have expected Ms Montjane, the receptionist of the respondent's attorneys who deposed to the service affidavit, to have confirmed in writing, reasonably contemporaneously, the fact of the call and its content, especially that Ms Van Heerden had confirmed that the appellant had received the statement of case, if that was indeed so. The fact that that was not done, detracts from the reliability of the version of Ms Montjane.

[25] The respondent's approach in respect of the service of the statement of case bears the hallmarks of a stratagem, to not only mislead the court into granting a judgment in the absence of the appellant, but to effectively prevent the appellant from becoming aware of the statement of case before an order for default judgment was obtained against it.

[26] The court *a quo* should thus have found, in the light of all those factors, that the impugned order had, at least, been erroneously granted, and that if the court had been aware of the true facts it would not have granted the default judgment. In any event, this was not an instance where the appellant failed to show that it had a *bona fide* defence to the respondent's claim. Ironically, the court *a quo* itself concluded that the rescission application was "*bona fide*".

[27] In the circumstances, the appeal must succeed. The respondent did not oppose the appeal and a costs order against him at this juncture does not appear justified. As for the costs of the rescission application, there is no reason, at least, why those costs should not have been ordered to have been costs in the cause of the main action.

[27] In the result, the following is ordered:

27.1 The appeal is upheld;

27.2 There is no costs order in respect of the appeal.

27.3 The entire order of the court *a quo* is set aside and is substituted with the following order: “1. The order made by Nkuta-Nkontwana J on 30 April 2018 under case number JS 854/17, in the absence of the applicant, be and is hereby rescinded; 2. The costs of the rescission application are to be costs in the cause of the main action.”

P Coppin
Judge of the Labour Appeal Court

Waglay JP and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	Mr R Makoele Instructed by De Beer Makoele Inc.
FOR THE RESPONDENT:	None. The appeal was not opposed.