

In the Labour Appeal Court of South Africa
Held at Braamfontein

Case No. JA36/09

In the matter between:

Sabela Zwane	1 st Appellant
Aaron Madonsela	2 nd Appellant
Petrus Madonsela	3 rd Appellant
Ezekial Nkosi	4 th Appellant
William Mashaba	5 th Appellant
David Matadi	6 th Appellant

And

Alert Fencing Contractors CC	Respondent
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JUDGMENT

Waglay DJP

- [1] This is an appeal against the judgment of the Labour Court (Basson J) rescinding and setting aside the default judgment granted in favour of the appellants arising from the dismissals of the appellants by the respondent based on the respondent's alleged operational requirements.

- [2] The Appellants were dismissed by the Respondent on 31 May 2004 and the reasons preferred for their dismissals was that it was necessitated by the Respondent suffering a severe drop in the amount of work it was able to secure and consequently its inability to retain its then staff complement.
- [3] The appellants believed their dismissals were both substantively and procedurally unfair and referred it as a dispute to the Metal and Engineering Industries Bargaining Council for conciliation. The dispute remained unresolved at conciliation and the appellants then referred the matter to the Labour Court for adjudication.
- [4] The respondent opposed the referral and duly filed its statement of response to the appellants' statement of case. After the response was filed the parties failed to meet to agree upon a pre-trial minute despite making arrangements to do so, with the result that the Registrar of the Labour Court, enrolled the matter for a pre-trial conference before a judge of the Labour Court. The respondent failed to appear before the judge for the pre-trial conference and an order was made barring the respondent from further defending the matter and for the matter to be set down for default judgment.
- [5] About three weeks after the order referred to above was handed down, the Registrar of the Labour Court enrolled the matter for default judgment on 25 May 2005. This notice of set-down was only forwarded to the appellants. On 25 May 2005 the Labour Court heard the matter and granted the default judgment in favour of the appellants. The relief granted by the Labour Court was the

reinstatement of the appellants together with 12 months of back pay and costs. (I assume this was done pursuant to a finding that the dismissals of the appellants were unfair although this was not expressed in the order)

[6] On 6 June 2005, less than two weeks after the default judgment was granted, the respondent brought an application in which it sought an order:

- i) to remove the bar placed by the Court disallowing the respondent from defending the matter on 13 April 2005 (hereafter “the order dated 13 April 2005”); and,
- ii) to rescind and set aside the default judgment granted on 25 May 2005 (hereafter “the judgment dated 25 May 2005”).

[7] In support of its application the respondent filed a detailed affidavit setting out its explanation for its default. It explained that it failed to appear at the pre-trial conference because its counsel had wrongly diarised the date for that conference (this was confirmed) and that it did not appear on the day the default judgment was granted because it was not notified thereof. It also set out its defence supported by documents as to why it believed it had a *bona fide* defence to the appellants’ claim. Furthermore, it averred that it was always its intention to oppose the proceedings and that this was borne out by the fact that it had duly filed its statement of response and had agreed to meet with the appellants to hold a pre-trial conference.

[8] The appellants opposed the application which was only heard by the Labour Court on 2 November 2007 that is, over two years after

it was launched. The Labour Court rescinded the judgment granted by it on 25 May 2005 but postponed *sine die* the application in relation to the order dated 13 April 2005. The appellants requested the Labour Court to provide reasons for its order, which reasons were only provided more than a year later. The judgment gives reasons for the order rescinding the default judgment dated 25 May 2005 but does not explain the reasons for making the order it did in respect of the order dated 13 April 2005.

[9] The appellant duly applied for leave to appeal and this was granted on 17 June 2009.

[10] It is apparent that the Notice of Set-down for the pre-trial conference was issued pursuant to rule 6 (5) (b) and/or (c) of the “Rules for the Conduct of Proceedings in the Labour Court” (hereafter “the rules of the Labour Court”). These sub-rules relate to the holding of a pre-trial conference before a judge either formally or informally. Rule 6 (6) then goes on to state that a judge presiding at a pre-trial conference may “*make any appropriate order for the further conduct of the proceedings...*” This sub-rule relates specifically to how the matter is to proceed on an opposed basis. As against sub-rule (6) rule 6 (7) provides as follows:

“6 (1)...

...

(7) If any party fails to attend any pre-trial conference convened in terms of sub-rule (4) (a), (5) (b) or (5) (c), or fails to comply with any direction made by a judge in terms

of sub-rules (5) and (6), the matter may be enrolled for hearing on the direction of a judge and the defaulting party will not be permitted to appear at the hearing unless the court on good cause shown orders otherwise. (my emphasis)

[11] It is clear that on 13 April 2005 the judge before whom the pre-trial conference was convened in terms of rule (5) (b) and/or (c) decided to act in terms of rule 6(7) and barred the respondent from further defending the matter and ordered that the matter proceed as an unopposed claim. The Judge made that order because the respondent failed to attend the pre-trial conference. Having regard to rule 6 (7) what was omitted in the order was the latter part of sub-rule 7 which effectively, I believe, requires that the respondent be informed that, if it is able to show “good cause”, it may be allowed to continue with its opposition. The Registrar of the Labour Court on receiving the order proceeded to enrol the matter for default judgement without notice to the respondent. The Labour Court entertained the matter and granted judgment in favour of the appellants in the absence of the respondent. It is also evident that respondent was not forwarded a copy of the order of 13 April 2005 advising it that it was barred from defending the matter.

[12] This matter is similar to the matter of *Eberspäcer v National Union of Metalworkers of SA on behalf of Skade & Others*.¹ That matter came before this Court last year and this Court held that while an order/directive issued pursuant to rule 6(7) barring a party from pursuing its defence or claim entitles the other party to obtain default judgment or to have a claim against it dismissed, the party

¹ (2009) 30 ILJ 880 (LAC)

that is barred (the defaulting party) may have the bar against it lifted and it may continue its defence or claim if it is able to show “good cause” for its default.² This Court, in that matter, went on to hold that the Registrar of the Labour Court must, when enrolling the matter for default judgment based on an order issued pursuant to rule 6(7), enrol the matter on notice to both parties and that the Notice must indicate that the matter has been “*enrolled for hearing in terms of rule 6(7).*” This Court further held that:

[20] “...Notice to both parties is critical because either on the day of the hearing or before that date the defaulting party is entitled to approach the court in order to satisfy it that there is ‘good cause’ for it to be allowed to continue with its claim or defence. In other words, while a directive in terms of rule 6(7) automatically prohibits the party that has failed to comply with rule 6(5) or (6) from continuing with its claim or defence the court may lift the prohibition if the party prohibited from continuing with its claim or defence shows ‘good cause’ why it should be allowed to defend or prosecute its claim.

[21] Rule 6(7) is directed towards the enforcement of compliance with the rules relating to pre-trial procedures and sets out a process to expedite matters where a party is dilatory. Although this sub-rule has drastic consequences it allows a defaulting party an opportunity to show ‘good cause’ so as to be allowed to continue with its claim or defence. The fact that the defaulting party is entitled to seek the lifting of the

² See paragraph [19]

prohibition against appearing at the hearing implicitly requires that the registrar notify it of the date of hearing to afford it an opportunity to show 'good cause'.

[22] Accordingly, where a judge issues a directive under rule 6(7) the matter may not be set down without notice to the defaulting party. Additionally the registrar should notify the parties that the matter is set down pursuant to a directive in terms of rule 6(7) so the parties are prepared, if need be, to deal with the issue of 'good cause'."

[13] In the circumstances the judgment granted by the Labour Court on 25 May 2005 was erroneously sought and erroneously granted³ because the Registrar of the Labour Court was not permitted to enrol the matter without notice to the respondent nor was the Labour Court entitled to entertain the default judgment in the absence of respondent being notified thereof. Mr. Maluleke who appeared on behalf of the appellants argued that where a party such as the appellants herein were entitled to a judgement in the absence of the other the judgment so granted cannot be said to have been erroneously granted. In support of this submission he referred to the matter of *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 SCA at paragraph [27]. This argument is misconceived. The *Lodhi* matter is no support for the appellants herein as the default judgement granted in that matter was granted pursuant to a proper application of the rules of the Uniform Rules of Court and unlike in this matter where

³ See section 165 of the Labour Relations Act 66 of 1995 which provides that the Labour Court may rescind a judgment or order that was "erroneously sought or erroneously granted in the absence of any party affected by that judgment or order."

the rules were not complied with.

[14] Hence, although the reasons proffered by the Labour Court for rescinding the default judgment were based on the normal requirements for rescission, the order was indeed correct.

[15] With regard to the order barring the respondent from continuing with its defence of the appellants claim, that matter remains pending in the Labour Court as that Court, when granting the rescission of the judgement dated 25 May 2005, postponed the application to set aside the order dated 13 April 2005. The parties therefore need to deal with that matter before the Labour Court.

[16] Finally, I need to mention that I have not dealt with the various grounds of appeal raised by the appellants because they were clearly based on their failure to appreciate the import and application of rule 6. Their grounds of appeal were in any way without merit because although the application for rescission was also not based on rule 6 the respondent did make out a case to rescind the judgment granted by the Labour Court on 25 May 2005. The respondent in its application demonstrated that it was not in wilful default and showed good cause to have the judgment rescinded. It also set out a *bona fide* defence to the appellants' claim, and a reasonable and acceptable explanation for its default.

[17] As both parties appeared to miss the crucial issue I am of the view that there should be no order of costs herein.

[18] In the result, the appeal is dismissed.

Waglay DJP

I agree

Tlaletsi JA

I agree

Musi AJA

For the appellant: Mr. Maluleke (Trade Union)

For the respondent: Adv.JJC Swanepoel instructed by Tuckers Attorneys

Date of hearing: 27 May 2010

Date of judgement: 28 May 2010

