



**REPUBLIC OF SOUTH AFRICA**

Not Reportable

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

Case no: CA23/2011

In the matter between:

**KWESTHUBA CONSULTING (PTY) LTD**

**Appellant**

and

**ADESEMOWO KAYODE**

**Respondent**

**Heard: 29 August 2013**

**Delivered: 31 January 2014**

**Summary: Rescission of a default judgment- appellant served with statement of claim- appellant wrongly assumed legal proceedings commence at the Labour Court when served with summons by sheriff - Explanation for the delay reasonable- appeal upheld- Labour Court judgment rescinded.**

**Coram: Waglay JP, Dlodlo AJA and Musi AJA**

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**JUDGMENT**

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**DLODLO AJA**

[1] On 26 November 2010, the Labour Court granted judgment by default against the Appellant. The Respondent is a former employee of the Appellant. The

appellant dismissed the Respondent at the end of November 2009 due to its operational requirements. The Respondent referred a dispute to the Commission for Conciliation Mediation and Arbitration (“the CCMA”) for conciliation. The Appellant participated in the Conciliation and was represented by one William Edward Davy (“Mr. Davy”), the managing director of the appellant. The dispute remained unresolved. The Respondent then referred his dispute to the Labour Court. As mentioned above, the Labour Court granted judgment in favour of the Respondent by default. The default judgment ordered the Appellant to pay the Respondent the equivalent of nine months remuneration, calculated at R42600.00 per month. On 8 September 2011, an application for rescission of the default judgment launched in terms of Rule 16 A of the Rules of the Labour Court by the Appellant was refused. This therefore is an appeal against the refusal to grant such rescission application. Leave to appeal was granted by the Labour Court.

- [2] The Appellant only became aware of the default judgment against it on 24 January 2011 when the sheriff arrived at its premises to serve a warrant of execution issued pursuant to the granting of the said default judgment. The application for rescission was launched by the Appellant on 14 February 2011. It was opposed by the Respondent. I need to mention that the essence of the Appellant’s explanation for its failure to oppose respondent’s Statement of Claim is that Mr. Davy who received the Statement of Claim wrongly assumed that the Statement of Claim was a supplied to him as a courtesy and was not an official “*Summons*” from the Labour Court and that the “*Summons*” would eventually be served by the Sheriff of the Court.
- [3] Mr. Davy, admitted that with hindsight he realised that the assumption he made was wrong. The reason he gave for making such a wrong assumption was that according to his past experience in litigious matters the proceedings have been initiated by service of a Summons by the Sheriff. Questions may come to mind as to why he did not seek advice from the Appellant’s usual Labour consultants? Why did he not resort to phoning the Registrar of the Labour Court to enquire

whether the Statement of Claim he received had any legal force and effect? Why did he not gather from the document he received what was required of him to do? All these questions have one answer, namely, Mr. Davy believed that there was no reason to do anything until the Sheriff had served the Appellant with the “Summons”, and, even though he is a director of the Appellant, he is and remains a layperson in legal matters.

- [4] There is no assertion that he even read the Statement of Claim he received. His expectation that the Sheriff of the Court would come and serve the Appellant with the Court papers accords with the practice in courts such as the Magistrate’s Court as well as the High Court. His belief, erroneous as it was, cannot be interpreted to mean that the appellant failed to show an interest in this matter. It participated in the conciliation of the dispute and gave every indication that it intended opposing the matter. Had it not been for the wrong assumption made by Mr. Davy on receipt of the Statement of Claim, the Appellant would clearly have defended the matter. This is evidenced by the fact that the Labour Court found that on the merits the Appellant does *prima facie* have a *bona fide* defence.
- [5] I accept that Mr. Davy may very well have been negligent in certain respects but I do not share the view that this is the kind of negligence that qualifies to be stigmatised as gross negligence at all. The conduct of the Appellant, in my view, does not “*involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme*”. See: *MV Stella Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA). Importantly, even if it was found that (with regard to the explanation that Mr. Davy gave for the default) “*the sufficiency thereof is finely balanced*”, the Court in the circumstances of a matter like the present one should have considered that the Appellant’s prospects of success “*tips the scale*” in favour of the granting of the relief sought by the Appellant. See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 768.

- [6] The Applicant for rescission must show good cause. Such Applicant must also give a reasonable explanation for the default (the default must not be willful or due to gross negligence on the part of the Applicant). It is my view that the explanation put forth by Mr. Davy in this matter is reasonable. The application certainly has been shown to be *bona fide* and there are no indications that it has been made with the sole intention of delaying the Respondent's claim. As found by the court *a quo* indeed a *bona fide* defence to the Respondent's claim has been disclosed in the application. The dictates of law and equity demand that the Appellant be accorded an opportunity to have its day in court with regard to this matter.
- [7] With regards to costs, this Court only grants costs where both law and equity demands that an order of costs is appropriate. I am of the view that this is a matter where it would be just and fair to make no order as to costs.

#### Order

- [8] In the result, I make the following order:
- (a) The appeal succeeds.
  - (b) No order is made as to costs.
  - (c) The order made by the court *a quo* is set aside and replaced by the following order:
    - “(i) The judgment granted by default on 26 November 2010 against the Applicant is hereby rescinded.
    - (ii) The Applicant is granted leave to defend the matter and file its Statement of Defence within ten (10) days from the date of this order.”

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Dlodlo AJA

I agree.

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Waglay JP

I agree.

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Musi AJA