



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA81/16

In the matter between:

KBC HEALTH & SAFETY (PTY) LTD

Appellant

and

SOLIDARITY obo S SMITH

First Respondent

Heard: 01 June 2017

Delivered: 19 September 2017

Summary: Application for rescission of a default Judgment - the Labour Court refusing to rescind the default judgment without considering the employer's prospects of success.

On appeal to the Labour Appeal Court – finding that it behoved the Labour Court to consider whether the employer had a *bona fide* defence to the employee's unfair dismissal claim which *prima facie* had some prospects of success – further finding that although the employer's defence to the employee's claims was somewhat tersely stated, in its founding papers, it established good cause or at least a *prima facie* case fit for trial – further finding that the Labour Court misdirected itself in refusing to grant the rescission application.

The appeal - upheld with no order as to costs. The order of the Labour Court substituted with an order granting the rescission of the default judgment.

Coram: Davis JA, Landman JA and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

- [1] This is an appeal against the whole of the judgment and order of the Labour Court (Chaane AJ) handed down on 21 June 2016 under Case No: JS251/14 refusing to rescind and set aside the default judgment granted by Sono AJ on 28 October 2014. The appeal is with leave of the Court *a quo*.
- [2] There is also before us an unopposed application for condonation of the late delivery of the power of attorney by KBC Health & Safety (Pty) Ltd ("KBC"), the appellant. Rule 6(1) of the Rules regulating the conduct of proceedings in this Court¹ provides that a power of attorney authorising a representative to prosecute the appeal or the cross-appeal must be delivered within 10 days of the delivery of any notice of appeal or cross-appeal. KBC filed its Notice of appeal on 02 September 2016. Its power of attorney was delivered on 23 September 2016, five days out of time. It gave a detailed explanation for the delay. Amongst others, its deponent and legal representative, Mr Sandile Thokozani Mabaso, says that he had been moving offices and in the midst of that the file was incorrectly diarized for 23 September 2016. Upon discovery of the mishap, the power of attorney was signed and immediately filed with the Labour Court. I am of the view that the delay is slight and the explanation therefor reasonable. The sought condonation is granted.

The factual background

- [3] KBC generated its revenue by offering training to learners of its clients. During 2013, as a result of recession, KBC's clients requested it to review its costs structures. This resulted in KBC training 300 learners per day as opposed to approximately 800 learners as it used to. The decline in training figures heralded KBC's financial distress which necessitated taking drastic steps to ensure that it remained afloat through to 2014. On 21 October 2013, it issued notices to all its employees explaining its financial difficulties. In that notice it proposed, *inter alia*, as a means of avoiding retrenchments, that the salary

¹ The Rules Regulating the Conduct of Proceedings in the Labour Appeal Court are published under GN 1666 in GG 17495 of 14 October 1996.

costs be reduced by 20% over a period of three months starting from November 2013. The employees were invited to submit their alternative suggestions, if any, by 25 October 2013.

- [4] Mr Henry Sipho Simelane ("Mr Simelane"), a Human Resource Manager at KBC and a deponent to its affidavit in support of the rescission application, intimated that Ms Suzette Smith ("Ms Smith"), an administrator in the employ of KBC, and her colleagues rejected KBC's proposal and made counter proposals which KBC found not to be viable. On 24 October 2013 KBC issued Notices in terms of s189 (3)² of the Labour Relations Act, 66 of 1995 ("the LRA") in which it notified its employees that it contemplated effecting dismissals based on its operational requirements. Mr Simelane further states that the employees were informed that the selection criteria, for those likely to face retrenchment, were to be based on skills. Further consultations took place on 28 October 2013. Ms Smith, who commenced employment at KBC on 01 July 2007, and other employees were retrenched on 30 November 2013.
- [5] Ms Smith maintains that although the employees did not accede to the employer's 20% salary reduction they submitted alternative suggestions which had to be reviewed and considered by KBC. This was not done. Instead, KBC resorted to retrenchment on the assumption that Ms Smith and others accepted the retrenchment. She says that KBC informed the affected employees that, in the event that they were not amenable to accepting the 20% salary reduction, LIFO would be used as a selection criterion to put into effect their dismissal. Ms Smith explained that she and her colleagues were nevertheless retrenched without observance of the LIFO selection criterion.
- [6] Solidarity, a trade union acting on behalf of Ms Smith, referred her alleged unfair dismissal dispute to the Metal and Engineering Industries Bargaining

²Section 189(3) of the LRA requires an employer who is contemplating dismissing its employees based on its operational requirements to issue a written notice inviting the other consulting party to consult with it. In the notice the employer should disclose in writing all relevant information, inter alia: (a) the reasons for the proposed *dismissals*; (b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives; (c) the number of *employees* likely to be affected and the job categories in which they are employed; (d) the proposed selection criteria; (e) the time when the *dismissals* are likely to take effect; (f) the severance pay; (g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed.

Council for conciliation. The dispute remained unresolved as at 31 January 2014. Sometime in April 2014 Solidarity filed a statement of case with the Labour Court claiming that Ms Smith's retrenchment was procedurally and substantively unfair and sought the fullest redress obtainable in terms of s194 of the LRA. The period for giving notice of intention to oppose the statement of claim expired on 10 April 2014. KBC did not enter an appearance to defend the claim. On this basis Solidarity and Ms Smith filed an application for default judgment on 20 May 2014.

[7] On 28 October 2014 Sono AJ granted default judgment against KBC as follows:

- '1. The dismissal of the applicant [Ms Smith] was substantively and procedurally unfair.
2. The respondent [KBC] is ordered to pay the applicant an amount of R124 668.00 being the equivalent of the applicant's twelve (12) month's salary.
3. Payment of the above mentioned amount must be made within 14 days of this order.
4. There is no order as to costs.'

[8] KBC states that it was not aware of the order of Sono AJ until on 05 November 2014 when Solidarity forwarded a letter to it to which was attached the order of the Labour Court. Mr Simelane says that he was unaware that Ms Smith had declared a dispute against KBC. He did not receive the statement of case, the application for default judgment, and the schedule of documents; otherwise, KBC would have defended the process because the retrenchment of Ms Smith and other employees was both procedurally and substantively fair.

[9] Mr Simelane further explained that upon being made aware of Sono AJ's order, he set about investigating what had transpired at the Labour Court. The fax number, appearing in the affidavit of service, which was used by Solidarity to correspond with KBC, is 0866442569 which number was mostly used for

“bookings” and receipt of invoices. Mr Simelane enquired from Ms Vashni Rammarain, an admin clerk at KBC, whether she received the stated documents but she could not recall receiving them. He intimated that all the employees, including Ms Smith, knew what facsimile had to be used for all correspondence that had to be brought to his attention, as an HR official responsible for employment related disputes, which is (011) 675 3721. This number appears in para 3.3 of the statement of claim filed by Solidarity and para 5 of the application for default judgment.³ The papers were not transmitted to the latter fax machine.

[10] On 18 November 2014 KBC filed an application to rescind the default judgment entered against it. In addition to its averment that Solidarity’s papers were not brought to its attention, it maintained that it had a *bona fide* defence to Ms Smith unfair dismissal claim in that: both in the statement of case and the affidavit in support of default judgment Solidarity only took issue with the procedural fairness of the dismissal in that the allegation made therein was that there was no meaningful consultation before the retrenchment was effected. Mr Simelane argued that on the question of substantive fairness of the dismissal no facts were presented to the Court save that there was no fair reason given for the dismissal. He went on to say that Ms Smith’s salary was R8 890.00 per month and not R10 389.00 as relayed to Sono AJ. He urged that Sono AJ would consequently not have ordered that Ms Smith be paid compensation in the amount of R124 688.00.

[11] Ms Nicolette Greeff, a legal officer in the employ of Solidarity and the deponent to its affidavit resisting the rescission, states that the alternative fax number (086 644 2569) was provided by Ms Rammarain when Solidarity faxed through the statement of claim, who subsequently confirmed receipt of the statement of claim. Ms Greeff further state that on 13 May 2014 Ms Octavia Seleka of KBC also provided the same fax number 086 644 2569 and confirmed receipt of the application for default judgment.

³ These paragraphs capture the particulars and/or details of KBC.

The proceedings before the Court *a quo*

[12] The Labour Court was persuaded that there had been proper service of the statement of claim and default judgment on KBC and held:

[11] Outlandishly, the applicant [KBC] on the other hand just makes bald denials which are not substantiated by affidavits of both Ms Seleka and Ms Vashni, both of whom are still in its employ. I am constrained to come to this conclusion because all which is being said about Ms Seleka is that she was on maternity leave and could not be reached telephonically. I expect a reasonable employer in the like of the applicant to have sufficient details of its employees, like their physical addresses and details of their next of kin to be used in the event they cannot get hold of the employees. In fact, the applicant does not indicate endeavours made to get in touch with Ms Seleka except that 'she is currently on maternity leave, however, she is not available on the phone.'

Ad paras 17 -21 of the judgment the Court went on:

[17] If regard is had to all the stubborn facts and tenacious evidence before me, it can hardly be said that the order sought to be rescinded was erroneously granted in the absence of the applicant.

[18] I am persuaded to come to a realistic conclusion that the applicant did not only receive the statement of claim but also received the application for default judgment and just espoused a remiss and conceited attitude in dealing with the entire matter. I must add that the statement of claim was delivered to the applicant on 01 April 2014 and the default judgment application was delivered to the applicant on 13 May 2014, a period of over a month apart and confirmation of receipt of both processes is confirmed by the two employees.

[19] In the absence of any other facts to the contrary, I accept that proper service was effected upon the applicant in respect of both the statement of claim and the application for default judgment. I cannot cast-off the fact that nothing contradicts the evidence of the applicant to the effect that there was proper service upon the applicant.

[20] I must emphasise that in an application of this nature it is incumbent upon the applicant to provide this Court with adequate and reasonable explanation [of] its failure to oppose the action and/or application, as the case may be, giving rise to the order that it seeks to rescind. The applicant failed to do so. In the absence of sufficient explanation, I am unable to come to the succour of the applicant by granting it an order sought.

[21] In fact, I am inhibited to look adversely at the conduct of the applicant. This applicant does not take this Court in confidence and also approaches this Court with enormously dirty hands. The Court is bothered by litigants displaying this kind of conduct.'

[13] As adumbrated earlier, the Labour Court (Chaane AJ) dismissed with costs the application to rescind and set aside the default judgment granted by Sono AJ.

The grounds of appeal

[14] As its grounds of appeal to us KBC contended that the Court *a quo* erred in:

[14.1] not taking into account its prospect of success in the main dispute concerning the retrenchment of Ms Smith.

[14.2] citing authorities on rescission applications without applying the legal principles enunciated in those authorities.

[14.3] not taking into account that there was no affidavit by Ms Smith gainsaying Mr Simelane's averments that the fax number that had to be used to direct correspondence related to issues of employment at KBC was 011 675 3721.

[14.4] holding in its judgment that "*Ms Seleka has put evidence forward disputing what Ms Viljoen and Ms Slater said.*" It was contended that no evidence was adduced by Ms Seleka to dispute what Ms Viljoen and Slater attested to. I must immediately say that nothing turns on this ground.

[14.5] failing to take into account that the evidence by KBC was to the effect that Ms Smith's salary was R8 890.00 and not R10 389.00 which resulted in Sono AJ erroneously granting compensation in the amount of R124 688.00

The evaluation

[15] The application for the rescission of the default judgment was brought in terms of s165 of the LRA⁴ read with Rule 16A(1)(b)⁵ of the Rules for the conduct of proceedings in the Labour Court. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,⁶ the Court restated the principles applicable to rescission of judgments or orders as follows:

'[11]....The authorities emphasize that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait* [1979 (2) SA 298 (E)]:

'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd* [1949 (2) SA 470 (O)], *HDS*

⁴ Section 165 of the LRA provides:

'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-

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.'

⁵ Rule 16A(1)(b) provides:

"(1) The court may, in addition to any other powers it may have-

- (a)
- (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

⁶ 2003 (6) SA 1 (SCA) at para 11.

Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal [1985 (2) SA 756 (A)].'

[16] It is common cause that the statement of claim and the application for default judgment were successfully transmitted to KBC by telefax. In explaining its default KBC's case is that it was unaware that these processes had been issued against it because the papers were not transmitted to the fax machine of the responsible officials but were forwarded to a different fax machine and received by employees who did not appreciate their import. In *MTN South Africa v Van Jaarsveld and Others*,⁷ the Labour Court considered a similar rescission application where correspondence had been transmitted by facsimile but had not reached the official responsible and it made this important observation:

'[12] It is plain from anyone who attends the hearings of the Labour Court, that the enormous growth in the number of applications for rescission in circumstances where the respondent party claims that albeit on the face of it a telefax transmission was sent, it was not received or did not reach the person responsible for giving it attention, leads to the conclusion that the provisions of the Act in this regard require reconsideration. In my view, it is appropriate that the statute be reappraised in this regard and that the Rules Board for the Labour Courts gives its attention to this matter of procedure. As aptly illustrated on the facts of this case, the arrival of a document in the midst of a deluge of others, handled by staff not inducted to divine, in the absence of some clue, who should be given the document nor how rapidly that should happen, may predictably lead to delay or misplacement or outright loss of the document.'

[17] The authorities are replete that a successful fax transmission slip does not render conclusive proof that indeed a document was received.⁸ The explanation offered by Mr Simelane that the telefaxes were not forwarded to him for his attention, as the responsible HR official, cannot be said to be palpably false. I am of the view that, regardless of the reasonableness of the

⁷ (2002) 23 ILJ 1597 (LC) at 1602 para 13

⁸ See *Vemisani Security Services CC v Mmusi and another: In re Mmusi and Another v Vemisani Security Services CC* (2013) 34 ILJ 440 (LC) at 445-446 paras 16-18 and other authorities cited therein.

explanation offered by Mr Simelane or the implausibility thereof, it behoved the Labour Court to consider whether KBC had a *bona fide* defence to Ms Smith's unfair dismissal claim which *prima facie* has some prospects of success.

[18] What can be gleaned from the Court *a quo*'s finding is that the confirmation of receipt of pleadings by the officials of KBC, regardless of whether these employees could appreciate their significance or not, was dispositive of the application for rescission of the default judgment. It is glaring that the Court did not concern itself with the question whether KBC had a reasonable prospect of success at the hearing in due course. This was a wrong approach amounting to a misdirection on its part. In *Northern Province Local Government Association v Commission for Conciliation, Mediation & Arbitration and Others*,⁹ the Labour Court pronounced that where the explanation was wanting in demonstrating that there was a wholly blameless absence of a defaulting party at the time of the hearing, the force of that explanation should be balanced against the force of the case which the employer sought to present in support of its decision to dismiss an employee. The weight of a *bona fide* case will usually make up for the inadequate explanation for the default.

[19] In view of the fact that the Court *a quo* did not consider KBC's prospects of success we are at large to determine this aspect which I now turn to.

[20] Save to submit that there was no reason to retrench Ms Smith, the commercial rationale for the retrenchment exercise was not, on the papers before us, seriously challenged by Solidarity and Ms Smith. At the heart of the contestations between the parties is the question whether they attempted to reach consensus on the appropriate measures aimed at avoiding the dismissal. Solidarity argued that KBC did not consider alternatives, short of dismissal, prior to the retrenchment of Ms Smith and/or the alternative proposals submitted by Ms Smith and her colleagues. As already highlighted, KBC proposed on 21 October 2013 a salary reduction of 20% as a means of avoiding retrenchments. Solidarity contended that KBC interpreted the

⁹ (2001) 22 ILJ 1173 (LC).

rejection of the 20% salary reduction as Ms Smith's consent for retrenchment. *Ex facie* the s189(3) notice of retrenchment dated 24 October 2013 it appears that there may have been some consultation between KBC and its employees on alternative measures short of retrenchment. Para 3 of the notice in question reads in part:

- '- Following the review, we will consult with the individuals that are affected to record their individual situation and circumstances. At this consultations, we will once again entertain alternatives to minimise retrenchments.
- Furthermore we will continue to consult with the Business Units to maximise costs reduction interventions in their workplace.'

[21] There are disputes of fact on the question whether the alternatives proposed by Ms Smith¹⁰ were considered by KBC. Mr Simelane stated that: *"The management of the company did indeed notify the employees that their proposal was not feasible in order to save the situation of the company."* It is important to remember that at the hearing in due course, which is in the form of a trial, these disputes would ordinarily be resolved through the leading of oral evidence.

[22] The selection criteria that were adopted by KBC were also placed in issue. Solidarity argued that KBC unilaterally chose LIFO as a method of selecting the employees likely to be retrenched. It contended that, despite this, LIFO was not adhered to instead the employees who were employed after Ms Smith, doing exactly the same job as Ms Smith, were retained while she was retrenched. Mr Simelane disputed that LIFO was adopted as the selection criterion. On the reading of the Notice in terms of s189(3) of the LRA, it does not appear that KBC proposed LIFO as a method of selecting the employees likely to be retrenched. The relevant clause in the notice reads:

'KBC will conduct a business review of the current demand for services for each of the respective Business Units. Based on the recent demand and the projection of what the demand will be for that business unit in the

¹⁰ The alternatives which Ms Smith says were not considered by KBC are set out in the undated and unsigned letter marked annexure "NG6" headed "Objectives in regards with the 20% in salary costs".

short/medium term we will restructure the Business Units to effectively offer those services.

Where more than one person is involved in a given position, consideration will be given to skills-set to deliver the required services at the respective Business Unit and length of service - bearing in mind what competencies will be required once structural and other organisational changes are to be made.

However, if you would like us to consider other criteria, kindly put that forward.'

[23] In light of the above it cannot be said that Mr Simelane's averment that the employees' skills, as opposed to LIFO, were used as the selection criteria is devoid of any merit. It is so that KBC's defence to Solidarity's claims is somewhat tersely stated in its founding papers. However, I am not swayed that it has no reasonable prospects of success. The Court *a quo*'s conclusion that KBC did not approach it with clean hands is not supported by the facts. I am satisfied that KBC established good cause or at least a *prima facie* case fit for trial. The Court *a quo* misdirected itself in refusing to grant the rescission application. The corollary of this is that the appeal must succeed.

[24] On the question of costs. I am unpersuaded that the requirements of law and fairness, in the circumstances of this case, dictate that any of the parties be ordered to pay costs in respect of the proceedings both in this Court and in the Labour Court. Therefore, there shall be no order made as to costs. I make the following order.

Order

1. The late delivery of the power of attorney by KBC Health & Safety (Pty) Ltd, the appellant, is condoned.
2. The appeal is upheld with no order as to costs.
3. The order of the Court *a quo* refusing the application for rescission of the default judgment granted by the Labour Court on 28 October 2014 is set aside and substituted with the following:

- ‘1. The application for the rescission of the default judgment issued under Case No: JS 251/14, dated 28 October 2014, entered against the applicant, KBC Health & Safety (Pty) Ltd, in favour of Solidarity on behalf of Ms S Smith, the respondents, is hereby granted.
2. No order is made as to costs.’

MV Phatshoane

Acting Judge of the Labour Appeal Court

Davis JA and Landman JA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:

Adv Z Ngwenya

Instructed by Mabaso Attorneys

FOR THE RESPONDENT:

Ms NG Ras (Solidarity Trade Union)