REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case nos: J2418/08

J2389/08

J 2390/08

In the matter between:

CHOICE DECISIONS 1225 CC

t/a FASTLINK TRANSPORT **First Applicant**

J H HANDFORD **Second Applicant**

and

MAKHOE JOSEPH ONTLWAETSE **First Respondent**

JANSENS INCORPORATED **Second Respondent**

Heard: **30 September 2011**

Delivered: **30 September 2011**

Summary: **Rescission of orders granted by default.**

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JUDGMENT-REASONS FOR ORDER

AC BASSON, J

[1] The first applicant in this matter is Choice Decision 1225CC trading as FastLink Transport. The second applicant is the sole member of the first applicant. (I will refer to the first and second applicants jointly as “the applicant”) The first respondent is Mr Makhoe Joseph Ontlwaetse, who is

the applicant in the three matters that served before this Court. The second respondent is Jansens Incorporated, the attorneys acting on behalf of the first respondent at all relevant times and who was joined to enable them to defend themselves against the relief sought against them (hereinafter referred to as "Jansens"). From the correspondence, it appears that at all relevant times, Mr Schöltz of Jansens was the instructing attorney.

Orders granted by this Court

[2] This Court made the following two orders on 30 September 2011.

> '1. The second Respondent Jansen Incorporated is joined as a party in these proceedings.
>
> 2. The late filing of the Applicant's opposing affidavit in the contempt application is condoned.
>
> 3. The late filing of applications to rescind the orders made under case number J 2418/08, case number J 2389/08 and case number J 2390/08 is condoned.
>
> 4. The first and second Respondents are ordered to pay the costs of this application on a scale as between attorney and client.
>
> 5. The matter is referred to the Law Society of the Northern Province in order to investigate the conduct of Jansen Incorporated (the second Respondent).
>
> 6. The second Respondent is to pay the costs reserved by Acting Justice Tip on the twenty second of September 2010.'

[3] In terms of the second court order, the Court held as follows:

> '1. Rescission of the following 3 (three) orders:
>
> 1.1 Case number J 2418/08 for a certificate of service in terms of Section 42 of the BCEA and costs of the application, granted by the Honourable Justice Francis on the of January 2008;

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1.2 Case number J 2389/08 for payment of alleged notice pay and overtime pay in the amount of R 2 184. 48 and costs of the application, granted by the Honourable Justice Francis on the 28th of January 2008;

1.3 Case number J 2390/08 for the provision of information in terms of Section 29(1) of the BCAE (purportedly to enable the first Respondent to be able to calculate the amounts owing to him) for which the order has been granted on 28 January 2008 under case number J 2389/08 and costs of the application on a scale as between attorney and own client, granted by the Honourable Justice Cele on 25 February 2008;

2. The second Respondent is directed to repay to the Applicant, all monies received by them in terms of the costs orders and pursuant taxed bills of costs plus interest thereon at 15% per annum from date of payment and/or attachment of the money;

3. Thefirst and second Respondents are directed, jointly and severally, to repay the amount of R2 148.48, plus interest thereof received in terms of the writs of execution, plus interest thereof received in terms of writs of execution, plus interest at 15,5% per annum on the total amount from date of attachment of the money from Applicant's bank account;

4. The second Respondent is directed to repay to the Applicant all monies, received by them in excess of the amount that they had writs of execution for, such amount being R 5 2500.00, plus interest at15,5% per annum from date on which second Respondent received the money;

5. The second Respondent, *de bonis propriis,* to pay the costs of this application on a scale as between attorney and own client."

<u>Present application</u>

[4] This is an application for rescission of the following three orders granted by Francis, J and Cele, J respectively. The first two orders were granted on 28 January 2008 and the third order granted on 25 February 2013.

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(i) Case no J2418/08 for a certificate of service in terms of section 42 of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"). The order was granted with costs by Francis, J on 28 January 2008.

(ii) Case no J2389/08 for payment of alleged notice pay and overtime pay in the amount of R2184.48. The order was granted with costs by Francis, J on 28 January 2008.

(iii) Case no J2389/08 for the provision of information in terms of section 29(1) of the BCEA purportedly in order to enable the first respondent to calculate the amounts owing to him for which the order had been granted on 28 January 2008 under case no J2389/08. The order was granted with costs on an attorney and own client scale by Cele, J on 25 February 2008.

[5] The following applications served before this Court:

5.1 An opposed application for the condonation forthe late filing of an opposing affidavit in the contempt application under case no. J2418/08 and an application for condonation for the late filing of the three rescission applications (see hereunder).

5.2 An application to rescindthe orders granted under case numbers J2418/08; J2389/08 and J2390/08 (consolidated under case number J2418/08). The three rescission applications proceeded on an unopposed basis as no submissions were advanced on behalf of the first and second respondents despite the fact that Jansens Incorporated ("the second respondent") had a legal representative in Court. The applicant prayed for a punitivecost order against the first and second respondents jointly and severally.

[6] On 22 September 2010, the three matters (J2418/08; J2389/08 and J2390/08) were consolidated under case no: J2418/08.

<u>The contempt application</u>

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[7] The contempt application in respect of matter no J2418/08 became academic in respect of its merits since the respondents had been furnishedwith the certificate of service, before the application had been brought. The certificate of servicewas also sent to the second respondent (Jansens Incorporated). The issue remaining in respect of the contempt application is only costs. I will return to these issues herein below.

[8] Before I proceed with the matter, I need to point out that the indexed bundle of pleadings and annexures in the condonation application alone consists of 567 pages. The indexed bundle in respect of the rescission application consists of 60 pages.The applicant in the opposed contempt application had not filed an index to bundle. I have taken this complete waste of the Court's time into consideration in arriving at my decision in respect of costs.

[9] As already pointed out, the attorneys for the first respondent, Jansens Incorporated ("Jansens"), have been joined in these proceedings because certain relief is sought against these attorneys in terms of prayers 4 and 5 of the notice of motion. The applicants in these proceedings have decided to join Jansens to afford them an opportunity to respond to the allegations levelled against them. I will return to these allegations hereinbelow.

<u>Brief exposition of the facts giving rise to the current application:</u>

[10] The factual history of the matter is set out in detail in thefounding affidavit. I will suffice with a brief summary of the facts. The applicant explains that the first respondent voluntarily left the employ of the (first) applicant on 20 February 2008. It was in dispute whether the first respondent was dismissed or whether he had resigned. The first respondent referred an unfair dismissal claim to the Bargaining Council. On the day of the arbitration, the first respondent indicated that he no longer wished to pursue his claim for unfair dismissal but that he wanted all monies still owed to him in terms of salary and overtime to be paid to him. The Commissioner, Mr Eric Louw, made calculations regarding the first respondent's leave entitlements and the days that he had worked

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and it was agreed that the applicant would pay an agreed amount to the first respondent in full and final settlement of the first respondent's claim. It is important to point out that the settlement agreement states that the agreement was in full and final settlement of the dispute. The settlement amounted to R 364.18. The date of the settlement is 9 October 2008.

[11] On or about 29 October 2008, Jansens (more in particular Mr Schöltz) wrote three letters of demand to the first applicant claiming information and payments from the applicant in terms of various provisions of the BCEA. Apparently, the information was needed in order to calculate whether the applicant still owed the first respondent any further money. Jansens claimed a further amount of R 2077.92 which was allegedly still owed by the first applicant to the first respondent. In addition, Jansens claimed the first applicant's certificate of service.

[12] The first applicant handed the matter over to SEESA. The staff file of the first applicant was forwarded to SEESA. Included in the file was the contract of service of the first respondent which he refused to sign as well as the certificate of service which the first respondent refused to take on the day that he left. The settlement agreement referred to was also contained in the file that was sent to SEESA. SEESA confirmed with the applicant that all the documents were forwarded to Jansens.

[13] According to the applicant, the first respondent's claim regarding notice pay and overtime has already been dealt with by the Bargaining Council as the dispute between them was settled in full. Moreover, because the service certificate was contained in the file and forwarded to Jansens, the applicant has, as far as it was concerned, compliedwith all the claims by the first respondent against it. The applicant further submitted that the respondents ought to have known that the matter was settled in full at the Bargaining Council and that the settlement included the first respondent's claim for notice pay and overtime.

[14] The first respondent then proceeded to institute three separate actions against the applicant, under the above three separate case numbers. The applicant was under the impression that there was only one Labour

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Court case namely J2389/08. The applicant gave instructions to oppose this application and SEESA proceeded to draft an opposing affidavit. When the Sheriff arrived to attach goods, the applicant realised that the first respondent and his attorneys somehow managed to obtain a Labour Court Order. It transpired that SEESA was also not aware of the fact that there were in fact different Labour Court matters involved.

[15] It also appears that the applicant had entered into a settlement agreement with Jansens Attorneys in terms of which it will pay their claim in instalments of R 750.00 each month. It appears that Jansens Attorneys has instituted a claim in the Magistrate's Court in Potchefstroom under case number 4204/09 for an amount of R 10541.74 plus interest. At that stage, the applicant was under the *bona fide* belief that this was the total amount payable in respect of the Court order against it. However, on 10 August 2010 Jansens Attorneys attached the bank account of the applicant and removed R 40 438.40 from the first applicant's bank account. It was then that the applicant realised that something "is very wrong". An investigation was then conducted and it was only then that it was discovered that Jansens Attorneys have instituted three matters under three different case numbers all concerning the first respondent.

<u>Case number J2418/08</u>

[16] Under case number J2418/08, the first respondent claimed that certain information ought to have been given to him upon the termination of his employment in terms of section 77(1) and (3) of the Basic Conditions of Employment Act[1]("the BCEA"),namely, a certificate of service in terms of section 42 of the BCEA. The order ordering the first applicant to furnish the certificate of service was granted and a cost order was alsogranted against the applicant. In the confirmatory affidavit deposed to by Mr WP Schöltz of Jansens Incorporated attached to the application, he confirmed the contents of the first respondent's affidavit as far as it relates to him. One of the averments that is made in the founding

[1] Act 75 of 1997.

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affidavit is that the certificate of service has not been furnished to the first respondent. However, as will become clear herein below, it now transpires that Jansens (and by implication Mr Schöltz) has been in possession of the certificate of service all along and has failed to disclose this to the Court. There is also no indication that the second respondent had ever contacted SEESA and informed them that the certificate of service was not included in the documents forwarded to them.

[17] Furthermore, under case number J2418/08, the first respondent also brought an application for contempt of court for the imposition of a fine or imprisonment of the second applicant for purportedly not complying with the Court's order in terms of which the applicant was ordered to furnish the first respondent with a certificate of service. This application became academic, I have, however ordered the second respondent to pay the costs of this application on a scale as between attorney and client.

[18] As pointed out, it now transpires that when the Court order for the certificate of service was granted under case nr J2418/08, Jansens had already been in possession of the certificate of service but failed to disclose this to the Court. What is of concern to this Court is the fact that it appears that Mr Schöltz withheld this important information from the Court.

[19] I have already pointed out that there is no indication from the file that Mr Schöltz has contacted SEESA to inform them that the certificate of service was not amongst the documents that were forwarded to them. The certificate of service must, therefore, have been in the possession of Jansens. Moreover, from the answering affidavit in opposing the condonation application, the respondents now disclose that they have been in possession of copies of the first respondent's staff file from the outset. Mr Schöltz also confirmed under oath that the second respondent received 44 pages from SEESA.

[20] In the opposing affidavit to the condonation application, it is now alleged that some candidate attorney had committed an oversight by not attaching all the documents.

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Case numberJ2389/08

[21] In this application, the first respondent claimed an amount of R 2184.48 in respect of four weeks' notice that was purportedly not paid to him. This amount amounted to R 799.20. In addition, the first respondent claimed an amount of R 1278.72 in respect of overtime. Again, this application was granted with costs. Attached to the application is a letter from SEESA clearly stating that the first respondent had deserted and that the first respondent was not entitled to any leave pay. Also attached to the papers are some of the documents that were sent by SEESA to the second respondent. Strikingly absent is any letter from Jansens to SEESA indicating to them that the documents sent to SEESA did not also contain the certificate of service. Furthermore, if the clock cards together with the pay slips and proof of payment are perused, it appears that the first respondent had made false statements under oath. These documents were in the possession of the second respondent and the question arises why did the attorney then allow this application to serve before the Court.

[22] Following the Court order in respect of Case no J2389/08, Jansens caused a writ of execution to be issued for the amount awarded to the first respondent. Costs were awarded by Cele, J on 25 February 2008 on a scale as between attorney and own client. The applicant seeks an order directing the first and second Respondents, jointly and severally to repay the amount of R 2184.48 plus the interest thereof received in terms of the writs of execution plus interest at 15.5% per annum on the total amount from date of attachment of the money from the Applicant's bank account. The applicant seeks a further order directing secondrespondent to repay to the applicant all money received from them in excess of the amount that they had writs of execution for such amount being R5250.00 plus interest at 15.5% per annum from the date on which the second respondent received the money.

[23] According to the applicants, the date in respect of notice pay and overtime had been dealt with at the Bargaining Council and was settled in full and final. It was submitted that had the Court been made aware of

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the settlement agreement, the Court would not have made the orders under case number J 2418/08. I can find no reason, in light of these facts, to grant the applicant the order it sought. I can also find no reason to grant an order directing the second respondent to repay the said amount with interest

[24] As will be indicated herein below, the question also arises why it was necessary to split the different actions and moreover, why did Mr Schöltz of Jansens advised the first respondent to approach this Court under three different case number whereas the cause of action (at best for the first respondent) arose from the same cause of action and to claim costs in respect of each of these applications separately. This scheme was in my view clearly devised to farm the maximum amounts of costs.

[25] This Court has already expressed its dismay at the manner in which Mr Schöltz (of Jansens Attorneys) litigates in this Court. See in this regard the decision in *Indwe Risk Services (Pty) Ltd v van Zyl in re van Zyl v Indwe Risk Services (Pty) Ltd*:[2]

> '[38] I have little hesitation to award costs on this extraordinary scale in the light of the conduct of Jansens Inc in prosecuting the respondent's claim in the manner in which it did.
>
> [39] I am also mindful of the fact that an order for costs de bonis propriis is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party

[2] (2010) 31 *ILJ* 956 (LC) at paras 38-42.

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against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.)

[40] As already pointed out, it cannot in the present case be concluded that Jansens Inc was merely negligent or made an error in law. I am also not of the view that the conduct was merely unacceptable. I am of the view that the conduct was improper. Jansens Inc, and Schöltz in particular (and this appears to have been a trend in this matter having regard to his conduct before the CCMA), acted in a manner which constitutes a material departure from his duties as an officer of this court. I have no hesitation in making a special costs order and ordering that Jansens Inc pay the costs. It will be manifestly unfair to saddle the respondent with the costs in the present circumstances. See also *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board andOthers* 2009 (1) SA 565 (CC) at para 54:

> "An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs *de bonis propriis* on the scale as between attorney and client... This court's displeasure is primarily directed against the office of the State attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate."

[41] See also in general *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) at 37:

> "There remains to be considered the appeal against the costs order. The general principle of the common law is

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> that a trustee, who acts in a representative capacity, cannot be ordered to pay costs *de bonis propriis* unless he has been guilty of improper conduct. The Judge *a quo* found the appellant's conduct to be ''unacceptable'. Improper conduct is always unacceptable; but unacceptable conduct is not necessarily improper. While the appellant's conduct may have been ill-considered, and his application lacking in certain essential detail to the extent that it may be said that he did not make a full disclosure of all relevant facts, one cannot, in my view, go so far as to hold that his conduct was improper. It has not been shown that there was a conscious attempt on his part to mislead the magistrate or to use s 69(3) unfairly to his advantage. In the circumstances the special costs order against the appellant was not justified and falls to be set aside."

> *Referral to the Law Society of the Northern Provinces*
>
> [42] In light of the conduct of Jansens Inc and Schöltz in particular, I have instructed the Registrar of the Labour Court to refer the matter to the disciplinary committee of the Law Society of the Northern Provinces. The registrar has done so. I will in furtherance of this referral also request the registrar to forward a copy of this judgment to the law society.'

[26] As in the case before Van Niekerk, J, the case before Cele, J was also not framed in contractual terms but fell squarely within the ambit of the BCEA which affords certain statutory rights to employees. It is noteworthy to point out that Mr Schöltz (of Jansens Incoporated) was also the legal representative in the matter before Van Niekerk, J. Van Niekerk,J correctly, in my view, pointed out (at paragraph 5) that applications in terms of s 77 (as opposed to claims based on contract) should be dealt with by the duly appointed functionaries of the Department of Labour and that the Labour Court should not be the point of first entry in the enforcement process:

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'In the absence of any provision in the BCEA that confers jurisdiction on this court to enforce the provisions of the Act directly and as an agent of first instance, the applicant's claim is misconceived. To hold otherwise would entirely undermine the system of enforcement established by chapter 10 of the Act. Chapter 10 establishes the mechanisms to monitor and enforce the protections guaranteed by the Act. In summary, the entry point into the system is the office of the labour inspector, to whom complaints may be made. The labour inspector is required to endeavour to seek an undertaking from the employer against whom the complaint is made (s 68), failing which the inspector may, if the inspector has reasonable grounds to believe that an employer has not complied with the Act, issue a compliance order (s 69). An employer may object to a compliance order by making representations to the director-general (s 71) and appeal to this court in terms of s 72 against any order made by the director-general. In terms of s 73, the director-general may apply to this court to have a compliance order made an order of court in terms of s 158(1)*(c)* of the Labour Relations Act. What relevance and purpose would this carefully crafted system continue to have if an employee were entitled to bypass it and approach this court for orders directly enforcing the provisions of the Act?'[3]

[27] I concur fully with this statement. The processes of this Court should not be usedto enforce statutory rights often at great expense to the other party. Van Niekerk J expressed a similar concern in respect of the conduct of Schöltz in bringing applications in terms of s 77 of the BCEA in the matter that was before him. Of particular concern to the court in that matter (*Ephraim*) was Schöltz's strategy of approaching the Labour Court with claims which are relatively small and which are accompanied by a prayer for costs on a punitive scale. The Court further expressed the view that the strategy adopted by Mr. Schöltz in instigating litigation in circumstances where the first point of entry should have been the Department of Labour was with the intention of running up legal costs that might later be recovered from the employer. This clearly amounts to unprofessional conduct.

[3] *Ephraim v Bull Brand Foods (Pty) Ltd* (2010) 31 ILJ 951 (LC) at para 5.

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[28] It was also submitted on behalf of the applicants that the application for a certificate of service under case number: J2418/08 was simply a fraudulent application. The certificate of service was forwarded to the second respondent by SEESA, which is the portion the second respondent sought to withhold from the Court and which constitutes fraudulent non-disclosure. The second respondent failed to attach the documents so forwarded, to their opposing affidavit.

[29] The applicants sought thatall three of these judgments be rescinded and set aside, including the cost orders. As is evident from the orders, I have granted the rescission in respect of all three applications with a special cost order.

<u>Condonation application forthe late filing of the rescission application.</u>

[30] The rescission application in the present matter is brought in terms of section 165(a) read with rule 16A(1)(a)(i) which provides for the "rescission of a judgment, erroneously sought or erroneously granted in the absence of a party". Neithersection 165, nor rule 16(1)(a)(i) of the Rules of this Court stipulates a prescribed periodwithin which the application for rescission must be brought. It is, however, accepted that such an application must be brought within a reasonable time after becoming aware of the judgment.

[31] The question of what constitutes a reasonable time, is determined by the facts of each matter. See in this regard: *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad.*[4]In terms of this judgment, and the many other judgments that followed it was held that since equity principles are applicable, prejudice to the respondent is the most important consideration, followed by prospects of success, public interest and proper administration of justice. The effect of the proceedings on parties not before the court may also be taken into account.[5]

[32] In the matter before the Court, two issues are important in considering

[4]1978 (1) SA 13 (A).

[5]See *Associated Institutions Pension Fund and Others v van Zyl and Others* [2004] 4 All SA 133 (SCA) at para 53.

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the period of delay. The first is whether there was an unreasonable delay in bringing the application for rescission; and secondly, if the delay is found to have been unreasonable, what would have been a reasonable time on the facts within which the applicant could reasonably have been expected to bring the application and whether the delay should be condoned.[6] In this regard, the applicant contended that, having regard to the facts, the delay is not unreasonable and, in the alternative, that the applicants have an acceptable explanation for the unreasonable delay. The first respondent's only prejudice will be that he may have to repay the amount of R2184.48, which amount, according to the applicant, he was in any event not entitled to. On behalf of the applicant, it was further submitted that in any event, any prejudice to the first respondent can also be addressed by the Court by only granting the orders against Jansens particularly as the first respondent instituted the actions on the advice of Jansens.

[33] Turning to the facts as set out in the founding affidavit in the condonation application,it appears from the founding affidavit that the applicant believed and had good reason to do so that the settlement agreement at the Bargaining Council was in full and final settlement of all disputes between the applicant and first respondent. Furthermore,SEESA did in fact forward the required documentation and information to Jansens but Jansens failed to disclose this information to the Court at the time the default judgments were obtained from this Court. More in particular, the settlement agreement and the certificate of service were forwarded to Jansens. Jansens also failed to disclose the documents faxed to them by SEESA in these proceedings.

[34] When the applicant came to realise the impact of the default judgments the applicant immediately took steps to address the issue. It was only then discovered that Jansens recovered much more money than what they were entitled to in terms of the court orders and taxed bills of cost.

[35] It was also submitted that if the applicant's case cannot be heard, it will

[6] *Bayete v Security Holdings v Mokgadi and Others* [2000] 9 BLLR 1020 (LC).

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result in severe injustice to applicant, not only in monetary terms, but also in respect of having its case heard fairly. It was further submitted in strong terms that not allowing the applicant's case to proceed, will effectively allow default judgments, which had been obtained fraudulently to stand and condone failure by officers of the Court to place all relevant facts and information before the court. If the undisclosed facts were disclosed to the Court, the default judgments would not have been granted.

[36] I have considered the length of the delay. Although the length is substantial, I am satisfied that there is an adequate explanation for the delay.

[37] In respect of prospects of success, prejudice, the importance of the case and public interest, I am equally of the view that condonation should be granted. I will refer to these facts in more detail where I refer to the merits of the application in the rescission application. Before I do so, I shouldalso briefly refer to the points *in limine* raised on behalf of the first respondent. Firstly, the respondents are of the view that the Court does not have the jurisdiction to entertain the condonation application in the absence of rescission applications having been filed first. I can find no merit in this point and the point is dismissed. The respondents also contended that the sole member of a close corporation is not "an affected party" as contemplated by section 165. This proposition is equally ill-founded.If the contention is that the second applicant does not have the necessary *locus standi* the point falls to be dismissed. The second applicant is the sole member of the first applicant and its directing mind and therefore both the first and the second applicant have an interest in the outcome of the rescission application.

[38] In respect of the merits, it is clear from the papers that it was in dispute whether the first respondent was dismissed or whether he resigned. I have already referred to the fact that a dismissal dispute was referred to the National Bargaining Council for the Road Freight Industry by first respondent and that the "dismissal dispute" was settled fully and finally. The applicants' submission in this regard was that this settlement was in

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respect of *all* disputes between the parties arising from the termination of the employment relationship between the parties. The respondents on the other hand contended that the amount paid by the applicants in terms of the settlement agreement was compensation for unfair dismissal.What is of concern to the Court in this regard is what the first respondent says in his own affidavit. Firstly, the first respondent states that he was paid salary for the period 1 to 12 February 2008, which salary was owed to him for that period worked. This amount could therefore not have represented compensation. Secondly, the first respondent denies that he was advised by the Commissioner that he had not been dismissed, but then admits that the Commissioner advised him to accept the salary to which he was entitled for the period he had worked.Then the first respondent says that he realised after he discussed the matter with his attorneys, that he should not have accepted the settlement offer. Thirdly, what is of further concern to the Court is the fact that the settlement agreement was never disclosed to the Court during any of the three default application. This is of concern especially in light of the fact that it is clear from the papers that Jansens had in fact been in possession of the settlement agreement even before they had sent out their letter of demand.

[39] As far as the merits of the rescission application are concerned, the merits are overwhelmingly in favour of the applicants. In the event the application for condonation is granted.

<u>Why were the three matters in the default judgment not consolidated?</u>

[40] It is trite that one of the primary objectives of the Labour Relations Act[7] is the effective and speedy resolution of labour dispute. One way of ensuring that labour disputes are resolved speedily is to consolidate proceedings to ensure that disputes are resolved speedily and not in a piecemeal fashion. Section 74 of the Basic Conditions of Employment Act[8] ("BCEA") further allows the Labour Court and the CCMA to adjudicate claims for amounts owing to an employee in terms of the

[7] Act 66 of 1995.
[8] 75 of 1997.

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BCEAtogether with a dismissal dispute. In this regard, section 77 provides that "[s]ubject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act". Section 74 specifically provides for claims that sound in money arising from the BCEA, which includes overtime, salary and leave pay, that the Labour Court and the CCMA can determine such claim in proceedings regarding unfair dismissal. Section 138(9)(b) and (c) of the LRA further specifically empowers an arbitrator to make an award that gives effect to the primary objectives of the Act and which may be in the form of a declaratory order. In other words, in so far as that the first respondent had a claim for overtime or leave pay as later claimed in the Labour Court, he should have claimed it in the Bargaining Council. In respect of the certificate of service,he could have approached the Department of Labour. There exists absolutely no reason why the first respondent had approached this Court in three separate actions to claim overtime, leave pay and a certificate of service. The only reason why this was done was for Jansens to obtain a cost order in respect of each of the three separate actions. The institution of the claim for alleged further notice and overtime pay in the Labour Court is an abuse of process. What is of further concern to the Court is the fact that the first respondent, on the advice of Jansens split the same set of facts, which is contemplated by section 74 of the BCEA read with section 1 and section 138(9)(b) and (c) to be heard in one process at the Bargaining Council, to create different causes of action. As a result, Jansens obtained a cost order in respect of each of these actions. I am in agreement with the submission that it appears as if this scheme could only have been devised by Jansens in order to generate fees and not by the first respondent.[9] The splitting of claims, as was done here by Jansens amounts to a shocking abuse of process. It is also not the first time that this Court has commented on his practice.

[9] See *De La Noski v Bredell,* Brown Co 1911 TPD at 118; *Darby v Levinsohn* 1926 NPD 146 at 147*; Mahomed and Son v Mohamed* 1959 (2) SA 688 (T) at 692A and *Polverini v General Accident Insurance Co Sa* Ltd 1998 (3) SA 546 (W) at 552D.

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[41] Furthermore, in terms of the recognised common law rule, a party is obliged to claim in a single cause of action whatever remedies the law allows. As already pointed out, the BCEA specifically provides a remedy for all money claims in terms of the BCEA in the CCMA or Bargaining Council, to be heard, together with an unfair dismissal dispute. There was, therefore, no reason why the first respondent could not have instituted these claims in the Bargaining Councilas part and parcel of the dismissal dispute and why it was necessary to institute a further claim in the Labour Court for leave pay and overtime pay. What makes matters worse, it the fact that Jansens had instituted three different claims on exactly the same set of facts. This is an appalling abuse of court processes.[10]

[42] In addition to the aforegoing, the first respondent engaged in forum shopping, a practice that has also been strongly condemned by the Constitutional Court.[11]

[43] The Court has also taken into consideration in making the costs order that it did, the fact that Jansens has overburdened this Court with vast amounts of papers. The matters that were referred to the Court are simple matters and not remotely complicated, yet Jansens generated voluminous papers in all three matters.

[44] The most alarming aspect of this matter is the fact that it is evident from the court bundle itself, that the Jansens has failed to attach the relevant documentation that was forwarded to them by SEESA to their application or at any time during the default hearings or to disclose the content thereof to the presiding Judge.In the opposing affidavit, Jansens blames the failure on a candidate attorney (one Mr Willard Chisora). Mr J H

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[10] *Custom Credit Corporation (Pty) Ltd v Schoombie* 1972 (3) SA 462 (A.

[11] *See in this regard Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 (CC)at para 57where theCourt held as follows: "Following from the previous points, forum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered. One may specifically now want litigants to relegate the LRA dispensation because they do not trust the structures to do justice as much as the high court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in *Chirwa* , referred to above.'

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Jansen of Jansens states that Chisora "may" have neglected to attach the rest of the documents. The fact remains that Jansens has failed to bring these documents to the attention of the Court whereas it appears from the papers that Jansens were in possession of all the relevant information pertaining to the dismissal dispute.

[45] I am in agreement with Ms Anderson that the irresistible deduction to be made is namely that Jansens had wilfully not disclosed the settlement agreement and other information to the Court and that this has influenced this Court to grant the orders (and the costs orders) by default.

Rescission applications in terms of Section 165(a) Read with Rule 16(1)(a)

[46] In terms of section 165(a) (read together with Rule 16(1)(a),rescission of an order or judgment may be granted when such order or judgment was 'erroneously sought or erroneously made in the absence of any party affected by that award.'

[47] Section 165(a) of the LRA, as amended and rule 16A (1)(a)(i) is similar to rule 42(1)(a) of the Uniform rules of the High Court.

[48] In *Ntombela v Herridge Hire and Haul CC and Another*[12]and in *Sizabantu Electrical Construction v Guma and Others*[13]the Labour Court distinguished between the requirements for rescission in terms of section 165 and rule 16A(1)(b) and (2)(b). The same distinction obviously applies to rule 16a(1)(a)(i). The Court held that for an order in terms of section 165, good cause is not required if it can be shown that the judgment or order in question had been erroneously granted in a party's absence.

[49] In*Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA andOthers,*[14]Faber, AJ found, with reference to rule 42(1)(a) of the Uniform Rules of the High Court:

> '[A]n order or judgment will be held to be erroneously granted if there

[12][1999] 3 BLLR 253 (LC).
[13][1999] 4 BLLR 387 (LC).
[14][2001] 8 BLLR 911 (LC) at para 10.

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> was an irregularity in the proceedings, or if it is not legally competent for the court to have made the order or judgment, or there existed at the time of issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment.'[15]

[50] In the present case, it was not legally competent for the Court to have made the order or judgment, and there existed at the time issues and facts of which the Judges were unaware, which would have precluded the granting of the judgments and which would have induced the Judge, if he or she had been aware of it, not to grant the judgment.

[51] The issues and facts that the Judges were not aware of had wilfully been withheld from the Court, being information pertaining to the Bargaining Council Proceedings and the dismissal dispute, the settlement agreement and the fact that the applicant had furnisheda certificate of service. I am, therefore, satisfied that the order was erroneously granted.[16]

[52] In conclusion, I am satisfied that the applicants have made out a good case for the relief sought. I also can find no reason not to grant the further orders as set out in my order dated 30 September 2011. The rescission is, therefore, granted. I further direct the Registrar to refer the matter to the Law Society for investigation.

[53] In respect of costs, I have no hesitation to grant a special cost order against Jansens in light of the manner in which litigation has been conducted in this Court.

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[15]See*Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417G-I; *Stander and Another v Absa Bank* 1997 (4) SA 873 (EC) at 883-884. *Romani Plant Hire CC and Another v SASTWU and Others* [2001] 8 BLLR 961 (LC) at 7;*Roux v City of Cape Town* [2004] 8 BLLR; *Electrocomp (Pty) Ltd v Novak* [2001] 10 BLLR 1118 (LC) 1120E-F.

[16]It was further held in the *Halcyon* casethat once it is found that a judgment was erroneously granted, it is not necessary for a party to show good cause. Also see*Data Delta v De Bruin* [1999] 5 BLLR 482 (LC).In*CAWU and Another v Federale Stene (1991) (Pty) Ltd* [1998] 4 BLLR 374 (LC) it was held that where a defaulting party was unaware of a hearing date, granting judgment by default was erroneous and rescission will be granted without proof of good cause.

AC Basson, J

Judge of the Labour Court

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APPEARANCES:

For the Applicant : Jansens Incorporated Attorneys

For the Respondents: Riki Anderson Attorneys

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