



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2055/2010

In the matter between:

STARFISH GREATHEARTS FOUNDATION

Applicant

and

DIMAKATSO LEKALAKALA

Respondent

Heard: 30 June 2015

Delivered: 29 October 2015

Summary: Labour Court Practice and Procedure. Application for Rescission, section 165(a) of the Labour Relations Act ("the LRA") and item 14.1.5 of the Practice Manual of the Labour Court of South Africa. Applicability of principles and tests for rescissions of judgments in circumstances where registrar serves notice of set down on the parties by way of telefax and the respondent denies receipt of the relevant telefax.

Applications such as the current one avoidable if parties adopt a procedure analogous to that provided in Rule 4(2)(b) of the rules read together with item 14.1.5 of the practice manual.

JUDGMENT

SNIDER, AJ

[1] This is an application for the rescission of the judgment granted by Van Niekerk, J on 29 May 2014 in this matter.

[2] A brief chronology of the matter is as follows:

2.1. On 7 September 2010, it appears that the commissioner in the Commission for Conciliation Mediation and Arbitration (“the CCMA”) certified that the dispute between the parties was unresolved and indicated that the matter could be referred to this court;

2.2. The respondent delivered a statement of case which, although signed on 22 October 2010, appears to have been filed with this Court on 24 November 2010;

2.3. On 11 January 2011, the applicant answered the respondent’s statement of case. The Labour Court date stamp on the applicant’s answer to the respondents statement of claim is 13 January 2011;

2.4. On 17 February 2011, a pre-trial conference was held at the applicant’s attorneys of record’s offices;

2.5. Between May and November 2011, there was correspondence between the parties attorneys in relation to the finalisation of the pre-trial minute;

- 2.6. On 21 November 2011, the last of this correspondent was sent by the applicant's attorneys to the respondent's attorneys;
- 2.7. On 10 October 2013, the respondent's attorneys delivered a letter to the applicant's attorneys dealing with a request for condonation for the late filing of the pre-trial minute;
- 2.8. On 13 February 2014, the applicant forwarded a version of the pre-trial minute that was signed by it;
- 2.9. On 15 May 2014, the applicant received an index and schedule of documents from the respondent;
- 2.10. On 8 May 2014, as appears from the court file itself, the registrar of this court sent a notice to the parties by telefax setting the matter down for hearing on 29 May 2014;
- 2.11. On 29 May 2014, the matter was heard and judgment was given by van Niekerk, J; and
- 2.12. On 7 August 2014, a letter from the respondent indicating that judgment had been given on 29 May 2014 and demanding payment was sent by the respondent to the applicant.

[3] There is little value in unravelling precisely why the matter took from 7 September 2010, when the respondent must have become aware that she could refer her matter to this court, until it being set down for trial on 29 May 2014, a period well in excess of three years. I have set out the above chronology merely to illustrate that it does not appear that either party, for whatever reason, pursued the litigation with alacrity nor does it seem that either party displayed a complete lack of interest in the matter.

[4] It does appear, from the letter sent by the respondent dated 10 October 2013, that there was a period during which the respondent was unable to

place her attorneys in funds.

[5] There are two closely related issues which require consideration:

5.1. whether the applicant has made out a case for rescission of judgment on any basis; whether in terms of the LRA, the rules or the common law; and

5.2. precisely what the consequences are when the Registrar of this court sends a notice of set down to a party by telefax, there is a telefax transmission slip on the file indicating that the fax was sent, and the party to whom it was sent, in this case the applicant, denies receipt thereof.

[6] For the purposes of considering whether or not a case for rescission has been made out by the applicant, Mr Edwards, the applicant's counsel, has, in his heads of argument, examined the requirements for a rescission application in terms of section 165(1)(a) of the LRA as read with Rule 16A(1)(a)(i), Rule 16A(1)(b) and the common law.

[7] Section 165(1)(a) is, for all intents and purposes, identical to Rule 16A(1)(a)(i). Accordingly, there is no need to set out both here. For the sake of convenience, however, I do set out the provisions of rule 16A(1)(a)(i):

- '1. The court may, in addition to any other powers it may have –
 - (a) On its own motion or on application of any party affected, rescind or vary any order or judgment –
 - (i) erroneously sought or erroneously granted in the absence of any party affected by it...

[8] Rule 16A(1)(b) states:

- '1. The court may, in addition to any other powers it may have –

...

- (b) On application of any party affected, rescind any order or judgement granted in the absence of that party.'

[9] The essence of the difference between these two provisions is that in applications in terms of Rule 16A(1)(a)(i) where an order was erroneously granted, the applicant is not required to show good cause. Apposite in this regard is the decision of Pretorius, AJ in *CAWU v Federale Steene (1991) (Pty) Ltd*¹ where it was found that where a defaulting party is genuinely unaware of the date of set down, granting judgment by default is erroneous and, in these circumstances, it is not necessary to show good cause. The decisions cited by Mr Edwards in his heads of argument are to similar effect.² As set out above the applicant has, in the alternative, sought to rely on Rule 16A(1)(b).

[10] However, the explanation as to why the applicant did not attend at court on the day on which the matter was set down, obviously, does not change regardless of which legislative rubric the application is brought under or, for that matter, whether it has been brought under the common law.

[11] It seems quite clear from the jurisprudence that where a notice of set down, genuinely, does not come to the attention of a party, any judgment by default would be granted erroneously.³

[12] There is a plethora of authority on this point and it seems that notwithstanding that there is a fax transmission slip which shows a successful transmission of the document to the correct fax number this is merely *prima facie* evidence and is not conclusive evidence that the applicant received the fax and was therefore negligent or wilful in not (in

¹ [1998] 4 BLLR 374 (LC).

² *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC) at para 26 and *Gay Transport (Pty) Limited v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1917 (LC) at para 13.

³ *CAWU (supra)*, *Gay Transport (supra)* and *Roux v City of Cape Town* [2004] 8 BLLR 836 (LC).

that matter) filing its opposing statement of case.⁴

[13] The fact that other documents were successfully sent to and received at the same fax number as the document under discussion, is not convincing evidence of receipt of the statement of case by the applicant, this was the finding of Molahlehi, J in *Gay Transport (supra)*.⁵

[14] It is clear that the denial of receipt of the fax refutes the presumption of its receipt. The burden is then on the respondent to show that the applicant did in fact receive the statement of case through the fax transmission. The evidence that the applicant did receive other documents through the same fax number previously is, as set out above, not sufficient to discharge the duty on the respondent to show that the applicant did receive the notice of set down telefaxed to the same number.⁶

[15] If there was substantial negligence on the part of the attorney which lead to it not receiving the relevant telefax, this may, in my view, constitute a reason for not granting the rescission application. As Mr Makgato, on behalf of the respondent, correctly submitted, there is a point beyond which a party cannot rely on the negligence of its attorney.⁷

[16] However, in this situation I am unable to find on the papers that there was negligence on the part of the applicant's attorneys.

[17] It appears that there was active engagement between the parties in the sense that a statement of case had been delivered, an answer thereto had been delivered, the parties had engaged in a pre-trial conference, ultimately produced a pre-trial minute, and a schedule of documents had been delivered by the respondent to the applicant.

[18] In these circumstances, I cannot find negligence on the part of the applicant

⁴ *Gay Transport (supra)* at para 17 and 19.

⁵ *Ibid* at para 18.

⁶ *Ibid* at para 19.

which would vitiate its right to have its matter heard in accordance with the overriding *audi alteram partem* principal.

- [19] In her answering affidavit, the respondent does little more than deny the allegations made by the applicant and makes relatively bald allegations of negligence on the part of the applicant's attorneys.
- [20] The time period between the last exchange between the parties when, on 15 May 2014, the applicant received an index and schedule of documents from the respondent, and 7 August 2014 when it received the letter from the respondent indicating that judgment had been given on 29 May 2014 is a period of a little less than three months.
- [21] It cannot be regarded as being totally out of the ordinary that parties would wait that long for a trial matter to be set down. This would depend largely on the vagaries of the roll which in turn depends on the number of matters, during a given period, which this court hears.
- [22] What is of further interest in this matter is the genesis of the difficulties encountered by the parties. The notice of set down was served, by the Registrar of this court by way of telefax. Most of the jurisprudence surrounding the issue of service by telefax deals with service between parties.⁸ This situation is well catered for in the Rules and in the Practice Manual. Rule 4, for the purposes hereof, states that:

'(1) A document that is required to be served on any person may be served in one of the following ways; namely...

(iv) by faxing a copy of the document to the person, if the person has a fax number;

(2) Service is proved in court in any one of the following ways

⁷ *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at paras 15-16.

⁸ With an exception of *Roux v City of Cape Town* (*supra*) and *CAWU* (*supra*).

If service was effected by fax, by an affidavit of the person who effected service, which must provide proof of the correct fax number and confirmation that the whole of the transmission was completed...'

[23] Item 14.1.5 of the Practice Manual provides that:

'When a party serves any document by fax in terms of rule 4, the deponent to any affidavit filed in terms of rule 4(2)(b) must, in addition to providing proof of the correct fax number and confirmation that the whole of the transmission was completed, state under oath that the party to whom the fax was addressed telephonically confirmed receipt of the whole of the fax transmission and the name of the person who confirmed receipt of the transmission.'

[24] It does not appear to be, in my mind it cannot be the case, that the Registrar is bound to proceed in terms of Rule 4 of the Practice Manual. These provisions relate to litigants in this court.

[25] Similarly, it would be impossible, given that it is the registrar who serves the notice of set down by fax, for a party who has attracted the onus to prove on a balance of probability that another party, who denies same, has in fact received a particular fax. The party seeking to prove such receipt would have to obtain any evidence that it could from the registrar which would inevitably prove a hindrance both to the registrar and to that party.

[26] I am of the view that given the inordinate delays that are caused in situations like this where default judgment was given on 29 May 2014 and the parties are still litigating in July 2015, it would be a salutary and practical course of conduct for litigants in this court, upon receipt of a telefax from the court, to confirm that the other party or parties have similarly received the said telefax. The relevant party would then be in a position to adopt a procedure analogous to that provided in Rule 4(2)(b) of the Rules read together with item 14.1.5 of the Practice Manual.

[27] I am not in any way suggesting that this is a practice of this court or that there is any obligation whatsoever on the parties to conduct themselves as outlined above. I am simply suggesting a practical method to avoid unnecessary delays and the incurring of unnecessary costs.

[28] Mr Makgato urged me to consider the decision in *Edgars Consolidated Stores Limited v Dinat and Others*⁹ to the effect that a situation such as the current one does not lead to the conclusion that the judgment was erroneously sought or granted. With respect to the Learned Judge in that matter, I prefer the decision of Molahlehi J in *Gay Transport (supra)* and other decisions to the same effect. In any event, in that case, there was an affidavit confirming service by telefax.¹⁰ The matter is thus in any event distinguishable. It is also a matter where the service was *inter partes* as opposed to, as in this situation, service effected by the Court.

[29] As I have set out above, the applicant goes further than relying solely on the “erroneously granted” ground and does set out what is, in my view, a *bona fide* defence which *prima facie* carries some prospects of success. In fact, only the applicant deals with the merits of the matter in its affidavit. In its answering affidavit, the respondent does nothing more than deny the allegations made by the applicant.¹¹

[30] I must say that I was rather surprised by the allegation in the founding affidavit¹² that the applicant’s attorneys advised the applicant that there was no notice of set down in the court file. On my perusal of the court file, there is such a notice of set down and it does appear that it was affixed to the court file in the ordinary chronological course.

[31] The following extract from Herbstein & Van Winsen was referred to:¹³

⁹ (2006) 27 ILJ 2356 (LC).

¹⁰ Ibid at para 15.

¹¹ The answering affidavit at para 5 of the founding affidavit on page 7 and para 11.

¹² The answering affidavit para 4.11 on page 6.

¹³ The Civil Practice of the Supreme Court of SA at 540-1

‘An applicant for the rescission of a default judgment must show good cause and prove that he at no time renounced his defence and that he has a serious of intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation of his default, his application must be made *bona fide* and he must show that he has a *bona fide* defence to the plaintiff’s claim... When a defendant appears in order to have the judgment set aside he must, in addition to explaining the failure to deliver a notice of intention to defend, place before the court sufficient evidence from which it can be inferred that he has a *bona fide* defence to the action. It is not sufficient for the applicant to content himself with saying that he has a *bona fide* defence. In order to establish a *bona fide* defence, the defendant must set out averments, which, if established at the trial, would entitle him to the relief he asks for; he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.’

[32] Mr Makgato also referred me to *De Wet and Others v Western Bank Limited*.¹⁴

[33] The above extract does not deal with the erroneous granting of a judgment. In any event, I am satisfied that the applicant did not at any time renounce its defence. Its intention to proceed with the case is *bona fide*, it has a *bona fide* defence and has shown sufficient evidence of such defence.

[34] In considering the issue of costs, I am of the view that if the respondent has sought to oppose this application and it ultimately comes to pass that she was not entitled to judgment, she should bear the costs of this matter. Similarly, if it comes to pass that the applicant is unsuccessful at the trial, it should bear the costs of this application.

[35] In the premises, I make the following order:

35.1. The judgment of van Niekerk J in this matter dated 29 May 2014 is rescinded;

35.2. The costs of this application are costs in the main matter.

Snider, AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate B Edwards

Instructed by: Schindlers Attorneys

For the Respondent: Advocate M C Makgato

Instructed by: Phamane Mokane Inc

¹⁴ 1979 (2) SA 1031 (A).