

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:

C894/2000

In the matter between:

LOUISE ANNE VAN SCHALKWYK

Applicant

and

McCARTHY'S ARMED RESPONSE (PTY) LTD t/a

MILNERTON ARMED RESPONSE

Respondent

J U D G M E N T

Date of hearing : 2 May 2002

On behalf of Applicant: Mr D Dykman, Dykman Attorneys

On behalf of Respondent: Mr R de Lange, De Lange Attorneys

MacROBERT, AJ:

1. An arbitration was conducted by CCMA Commissioner Rubin and an award was issued on 14 August 2000.
2. The parties to the arbitration were Ms LA van Schalkwyk (Respondent in this matter) and Milnerton Armed Response (no details of incorporation specified), but referred to for convenience as the employer party where appropriate in this judgment.

3. I have not had sight of the requisite form 7.11, nor have I had sight of the record of the arbitration itself.
4. The arbitration was conducted in the absence of the employer party. The arbitration award states that notification of the proceedings was served on the employer party by registered post.
5. After hearing the evidence of Ms van Schalkwyk, together with the supporting evidence of her husband and having had sight of certain documentary evidence including a purported letter of dismissal (see below), Commissioner Rubin held that Ms van Schalkwyk's dismissal was procedurally unfair and that in the absence of the employer and based on certain other grounds, the Respondent employer had been unable to demonstrate the substantive fairness of her dismissal, her dismissal was thus also substantively unfair.
6. Compensation of R10 2000 equivalent to six months remuneration was ordered in respect of the substantive unfairness of the dismissal and R10 200 in respect of the procedural unfairness of the dismissal, six months having elapsed from the date of dismissal to the date of the award. The compensation thus totalled R20 400 which was ordered to be paid "forthwith".

7. Ms van Schalkwyk then completed the requisite Form 1 referring the matter to the Labour Court, on 6 December 2000, pursuant to having the arbitration award made an order of court, in which she cited Respondent as Mr GM McCarthy - Milnerton Armed Response.
8. A Notice of Motion was then apparently drawn by Ms van Schalkwyk's attorneys, De Lange attorneys, on 26 March 2001, in which Respondent was cited as McCarthy's Armed Response (Pty) Ltd t/a Milnerton Armed Response. The Notice of Motion together with supporting affidavits was served by Mr AR Smit, candidate attorney of De Lange attorneys, on Mr Gary McCarthy personally, at Unit 5, Milnerton Centre, Milnerton on 18 May 2001.
9. The Notice of Motion was supported by an affidavit of Ms van Schalkwyk and the arbitration award, and called upon Respondent, if it intended opposing the application, to, within ten days of service of the application, deliver a Notice of Opposition and Answering Affidavit, failing which the matter may be heard in Respondent's absence.
10. It is common cause that Respondent did not enter a formal entry of appearance opposing the matter. Mrs Wanda McCarthy, on the

letterhead of "Milnerton Armed Response" sent a telefax to the Registrar of the Labour Court on 28 May advising that:

- Ms van Schalkwyk had never worked for McCarthy's Armed Response (Pty) Ltd, but had rather been employed as a training control room operator for Milnerton Armed Response CC;
- That she had been employed from 1 November 1999 to 8 January 2000 as training control room operator for Milnerton Armed Response CC;
- That she had not completed her three months probationary period successfully and that she was not permanently employed by the company (sic).
- The facts further state that a telefax had been despatched to Commissioner Rubin on 4 December 2000 (to which I will revert below) giving the background to Ms van Schalkwyk's dismissal and that Commissioner Rubin had "committed himself to call up the above case again for arbitration";
- That Commissioner Rubin was out of the country and they had awaited a new date of arbitration from him.

- The telefax conclude with the following: "Please remove the above matter off the name of McCarthy's Armed Response (Pty) Ltd as she was employed by Milnerton Armed Response CC".

It does not appear as if this telefax was responded to by the Registrar.

11. In the absence of a formal notification of intention to oppose, and in the absence of the employer party filing answering papers as required by the rules and as invited by the Notice of Motion, the Registrar set the matter down for default judgment on 30 August 2001. As is customary there was no notification to the employer party, in the absence of formal entry of appearance.
12. On 30 August 2001 my brother Cheadle AJ made the order of Commissioner Rubin an order of Court and ordered Respondent to pay her costs. It then appears that Ms van Schalkwyk, through her attorneys, sought to execute against Respondent in terms of the order, on 16 October 2001.
13. This prompted the employer party (the Applicant in this matter) and which describes itself in these proceedings as "McCarthy's

Armed Response (Pty) Ltd t/a Milnerton Armed Response" to apply to rescind the judgment and order of Cheadle AJ made on 30 August 2001 and to stay the removal of goods which had been attached, as also the execution of the judgment, pending this hearing and the determination of the Labour Court.

14. In his founding affidavit, Mr Gary McCarthy states that he is the Managing Director of Applicant, which conducts business at No 5 and No 6 Milnerton Centre, Koeberg Road, Milnerton.
15. He strangely makes no mention in his founding affidavit of the telefax from Mrs Wanda McCarthy to the Registrar of the Labour Court on 28 May although a fax in almost identical form was sent to Ms van Schalkwyk's attorneys, to which he does refer.
16. In his affidavit he concedes that Ms van Schalkwyk was employed by the employer party (i.e. the Applicant in this matter). (It is also apparent from the documentation before me that Milnerton Armed Response is a trading entity of Respondent).
17. The issue of the failure on the part of the employer party to appear at the CCMA arbitration is a matter in respect of which there is insufficient material before me to pronounce upon. It is however

clear that after receiving notification of the CCMA award (and in this regard Ms van Schalkwyk attests that she personally advised Mr McCarthy of the award and handed him a copy shortly after she had received it) no application for rescission was made and Respondent did not comply either with the provisions of the Labour Relations Act or the Rules of the Labour Court. It appears that the telefax of 4 December 2000 despatched by Applicant (the employer party) to Commissioner Rubin was prompted by Ms van Schalkwyk's notification to Respondent of the award.

18.1 The employer party (Applicant in these proceedings) contends that had it received notification of the default judgment hearing in the Labour Court, it would have briefed attorneys to act on its behalf and protect its interests. I cannot agree with this contention. Applicant received notification of the award from Ms van Schalkwyk and did nothing save to pen a fax to Commissioner Rubin.

18.2 Applicant subsequently received the Notice of Motion in which it is quite clearly required of it, that should it wish to oppose the proceedings, it should enter an appearance, an answering affidavit etc,

18.3 The Notice of Motion also makes it quite clear that Ms van

Schalkwyk intended having the arbitration award made an order of the Labour Court.

18.4 Once again Applicant did nothing save to draft a fax to the Registrar of the Labour Court which I have alluded to above and a similar fax to Ms van Schalkwyk's attorneys. There is a dispute of fact on the papers as to whether Ms van Schalkwyk's legal representative advised Mr McCarthy personally that he was under obligation to comply with the Rules of Court. This dispute is not material to my findings and order.

19. Applicant's papers in this application also disclose the extraordinary averment that the letter of dismissal which Ms van Schalkwyk contends was issued to her and which she in turn presented to Commissioner Rubin at the CCMA arbitration, is a forged document. Mr McCarthy denies that Ms van Schalkwyk was dismissed at all. However, this runs completely contrary to admitted correspondence in the papers issued by Ms Wanda McCarthy, as appears from the foregoing and from the papers.

20. It is glaring when one considers the Applicant's papers, that at each and every step it has sought to "duck and dive" from the inevitable consequences of the award in Ms van Schalkwyk's

favour, and along the way issues, contradictory correspondence and versions. The following are but a few examples:

20.1 Mrs McCarthy pens a telefax to the Registrar of the Labour Court indicating that Ms van Schalkwyk was never employed by the Applicant company, whereas in the substantive application before this court, Mr McCarthy makes it quite clear that she was indeed employed by the company under the trading entity Milnerton Armed Response.

20.2 There is a denial on the part of Applicant that correspondence directed to Unit 4 Milnerton Centre, Milnerton was received or that Respondent operated from those premises, whereas it is clear that certainly at least one of Respondent's trading entities did operate from these premises.

20.3 There is then the allegation that there was no dismissal of Ms van Schalkwyk whereas it is conceded elsewhere by Applicant that there was indeed a dismissal.

21. A careful perusal of Applicant's papers indicates an abuse of the Labour Relations Act and the Labour Court rules and process. It was only when the Sheriff came knocking at the door armed with a

writ of execution that Applicant for the first time commenced an attempt at some degree of compliance with court process and the rules.

22. Under the circumstances and with the weight of material before me, I am satisfied that should Applicant seek now to apply to have the award of Commissioner Rubin rescinded, that such application would be refused (bearing in mind that this is one of the alternative remedies that the Applicants are seeking from this court).

23. Turning to the Heads of Argument and the substance of the argument delivered in this matter, I note the following:

23.1 Rule 16A(1)(b) provides that recession may take place "*on application of any party affected, (the Court may) rescind any award or judgment granted in the absence of that party*".

23.2 The test involved is essentially one of sufficient cause entailing:

- A reasonable and acceptable explanation for the Applicant's default must be presented;

- On the merits, the Applicant must have a bona fide case which prima facie carries some prospect of success (see *Speciality Metals CC v Mtshangane* (1998) 9 (3) SALLR 122 (LC)).

23.3 Rule 31(2)(b) of the High Court Rules is the mirror provision which can supply some guidance (see *Erasmus - Superior Court Practice* 1994 (B1 - 202) :

- The Applicant must give a reasonable explanation for his default. If the default was wilful or due to gross negligence, the Court should not come to the Applicant's assistance;
- The application must be bona fide; and
- The Applicant must show that it has a bona fide defence to the claim.

23.4 Respondent contends that a case has been made out that the Applicant was indeed in wilful default and refers to *Erasmus* (op.cit) which requires the following elements to be present:

- *"Knowledge that the action is being brought against him;*
- *A deliberate refraining from entering appearance, though free to do so; and*

- *A certain mental attitude towards the consequences of the default/*"

23.5 Respondent also referred me to the decision in *Grant v Plumbers (Pty) Ltd (1949) 2 SA470 (O) @ 467* where the requirements are summarised as follows:

- The Applicant must give a reasonable explanation for his failure to enter appearance. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance;
- He must show a bona fide intention to defend, and his application should not be merely to delay Plaintiff's claim; and
- He must make out a prima facie defence on the merits (he must set out the averments which, if established at trial, would entitle him to the relief asked for).
- In that decision it was found that the Defendant was "neglectful in not paying proper attention to the summons which was served upon him. ...". In other decisions the requirements for prima facie defence has been described as the Applicant having "prospects of success".

- I was also referred to the decision in *Wincolette v Calvert* 1974 (4) SA 275 (E) @ 276H in which the Court held: "*His attitude, in effect, is that he was free to treat the summons which was served upon him light heartedly. Indeed, on his own showing, the Respondent's attorney clearly advised him to consult his own attorney in view of the situation which has arisen. He chose to disregard that advice and he allowed the matter to develop to the stage where judgment was entered against him by default.*"

24. Against the analysis of the facts given above, measured against the legal test for rescission contained in the rules and decided cases referred to, I am satisfied that Applicant has not made out a case for rescission. The Applicant has displayed a cavalier and evasive attitude to the arbitration award issued by Commissioner Rubin. It was neglectful and grossly negligent in not complying with the provisions of the Labour Relations Act after receiving notice of the award, and was similarly neglectful and negligent with regard to the rules of the Labour Court after receiving the Notice of Motion. Moreover, the Applicant has not established a bona fide defence to the claim, or that it has any prospects of success should the matter be reheard.

25. In the premises, the following order is made:

25.1 The application for rescission is refused;

25.2 The arbitration award of Commissioner Rubin issued on 14 August 2000 which was made an order of Court by Cheadle AJ on 30 August 2001 stands.

25.3 The Applicant is to pay the respondent's party and party costs.

MacROBERT, AJ

Date: