IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: DA 16/2002

In the matter between

BTN BUILDING CONTRACTORS **APPELLANT**

And

ABRAHAM ROUX **RESPONDENT**

JUDGMENT

JAPPIE AJA

[1] The appellant is BTN Building Contractors, a firm of which Johan Gotlieb Grobler is the sole proprietor. The respondent is Abraham Roux.

[2] On or about the 26th February 2001 the respondent referred a dispute regarding his dismissal by the appellant to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation and later, for arbitration. The respondent alleged that his dismissal was both procedurally and substantively unfair and claimed, inter alia, unpaid salary as well as compensation. The CCMA arbitrated the dispute and on the 18th July 2001 issued an award in the following terms:-

"The employer, BTN Building Contractors, is ordered to pay the employee, Mr A Roux, the

following amounts within fourteen days of the date of this award or as agreed otherwise by subsequent written agreement between the parties, at P.O. Box 906, Westville, 3630:-

1. Compensation for an unfair dismissal in respect of the L R A in the amount of R79 200,00 being the equivalent of six (6) months renumeration at R13 200.00 per month.

2. Outstanding salary or R9 390.00 and car allowance of R1800.00 in respect of the BCEA totaling R11 090.00.

3. No order as to costs is made."

[3] On or about the 20th August 2001 the appellant received the respondent's application to the Labour Court under case no. D1115/01 for the award made on the 18th July 2001 to be made an order of Court in terms of section 158(1)(c) of the Labour Relations Act No. 66 of 1995 ("the LRA"). On the 13th November 2001 and in the absence of the appellant the Labour Court made the award an order of Court.

[4] By notice of motion dated 25th January 2002 the appellant launched an application in the Labour Court to have the order made on the 13th November 2001 rescinded. The application was heard by Pillay J on the 19th April 2002 and in a judgment handed down on the 6th May 2002 the learned Judge dismissed the application with costs. With the leave of that court the appellant now appeals against that order.

[5] Johan Gotlieb Grobler, is the sole proprietor of the appellant and he denies that the respondent was ever employed by the appellant. His version is as follows: He and the respondent had been friends since their school days. They had last seen each other during or about 1980. At a school reunion in 2000 the two once again met. He then invited the respondent to join him in his business at Empangeni, KwaZulu-Natal. The respondent then went to Empangeni and lived with Grobler and his wife. This occurred on or about the 16th October 2000. He offered the respondent "the infra-structure" of his business from which the respondent could develop his own income. He and the respondent discussed the possibility of a formal partnership at a later stage, if things went well. On the arrival of the respondent

at Empangeni, the respondent informed him that he was experiencing financial difficulties and he then deposited R1200.00 into the respondent's account. The respondent also asked him to pay his bond installment, which he duly did in the sum of R3200.00. The respondent took advantage of their friendship and his willingness to help. On the 4th February 2001 matters between him and the respondent came to a head and the respondent offered to leave Empangeni and to return to Durban. He accepted the offer and the respondent then left. On the 7th February 2001 he received a fax from the respondent in which the respondent claimed payment of his arrear salary together with certain other amounts due to him. He was horrified at the respondent's audacity, but he does not say that he replied to the respondent's fax.

[6] On the 26th February 2001 the respondent faxed to Grobler documentation indicating that the respondent was now referring the dispute between the two of them to the CCMA for conciliation. Grobler did not respond to the receipt of this information. On the 14th May 2001 Grobler received the certificate of the outcome of the conciliation proceedings and a request to have the dispute referred for arbitration. According to Grobler he immediately went to see a labour consultant, Eric Botha, to find out what could be done. He handed to Eric Botha all the documentation he had received up until that date. Botha told Grobler that he, Botha, would sort out the matter. Grobler did not hear from Botha again and assumed that everything had been taken care of.

[7] On the 19th July 2001 Grobler received, by fax, the arbitration award. He telephoned Botha who then informed him that the respondent would probably go to the Labour Court and have the award made an order of court. Botha then advised Grobler to wait until this was done and that he, Grobler, should then go to court to give his side of the story. Grobler received the notice of motion for the application to have the award made an order of court on the 20th August 2001. Grobler's response to this is set out in paragraph 14 of his affidavit as follows:-

"My wife and I read through the papers and filed them with the other documentation to wait for a court date. I annex hereto, marked "JG6" a copy of the Notice of Motion. It has been pointed out to us by my current attorney that we should have filed a notice of intention to oppose the application, but we did not see the clause at the time and were waiting, on advice, to go to court ourselves."

[8] Grobler alleges that, although he had received the referral forms for the conciliation and arbitration proceedings and the notice of motion in the Labour Court, he did not receive any notification of the dates for the set down of the conciliation, the arbitration or for the hearing in the Labour Court. According to Grobler he was awaiting notification of a date so that he could appear and oppose the application and give his version to the court.

[9] The appellant relies on the circumstances outlined above for the relief sought and in submitting firstly, that he has a bona fide defence to the respondent's claim and, secondly, that he has an acceptable explanation for having failed to defend the claim.

[10] The learned Judge in the Labour Court concluded that on the merits of the case there was a substantial dispute of fact. The substance of the dispute between the parties is whether or not the respondent was an employee of the applicant. On this issue the versions of the parties are diametrically opposed. The learned Judge did not deal with the appellant's prospects of success.

[11] In respect of the appellant's explanation for its default the learned Judge concluded as follows:-

"It is not as though the applicant is illiterate or in any other way incapacitated from understanding the simple language of a notice of motion directing him on what steps to take if he wishes to oppose the matter. It also informs him that the matter may be heard in his absence if he fails to oppose it. Simply filing the application away while being conscious of its contents can hardly be regarded as reasonable conduct for a businessman.

7.
Finally, the applicant holds the labour consultant responsible for his failure to oppose the application. He alleges that the consultant was negligent. I am surprised that the labour consultant would give incorrect advice.... Furthermore when he received the notice of motion which was unambiguous about his obligations he did not revert to the consultant. The applicant obviously did not take the proceedings in the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court seriously. That is not responsible conduct for a businessman. It amounts to willful disregard of the procedures."

[12] Having concluded that the appellant had willfully disregarded the procedure in the Labour Court, the learned judge dismissed the application.

[13] Section 165 of the LRA reads as follows insofar as it relevant:-

"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,..."

Rule 16A of the rules of the Labour Court reads as follows:-

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

(a) of 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;

(ii) …,
(iii) …, or

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

(2). Any party desiring any relief under-

(a) subrule 1*(a)* must apply for it on notice to all parties whose interests may be affected by the relief sought.

(b) subrule 1*(b)* may within 15 days after acquiring knowledge of an order of judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit."

[14] It is, therefore, clear that in terms of section 165 (a) and rule 16A(1)(a)(i) an applicant for rescission is required to show that the order was erroneously sought or erroneously granted in his absence, whereas in terms of rule 16A(1)(b) read with sub-rule 2(b) he is required to show good cause for rescission for an order granted in his absence.

[15] Counsel, who appeared for the appellant, has submitted that the order made on the 13th November 2001 was made erroneously and that the appellant had shown good cause to have it set aside. However, in the course of argument, counsel could not refer to any fact or factors from which it could be concluded that the order had been erroneously made. Counsel further submitted that the reliance of the appellant on the advice of the labour consultant to wait until such time as Grobler had been informed of a court date and to do nothing until then, is in all the circumstances, reasonable.

[16] It is Grobler's version that he had been advised by Eric Botha that the respondent would apply to have the arbitration award made an order of court and that he should wait until he

does so and then go to court to give his side of the story. On the 20th August 2001 he received the notice of motion for the application to have the award made an order of the Labour Court. In the body of the notice of motion the appellant was called upon to notify the registrar of the Labour Court, in writing, within ten days of receipt of the application if he intended opposing the application and was informed that, failing such notification, the matter could be heard in his absence. Although Grobler claimed to have read the notice of motion, he said that he did not see this particular "clause". There is no explanation from him as to why he did not see it. However, after having received the notice of motion, not only did he not react thereto but he made no attempt to get in touch with Eric Botha to seek further advice on placing his version before the court. All he did was to file away the notice of motion together with the other documents and to wait for a court date.

[17] In *Chetty v Law Society Transvaal 1985 (2) SA 756 (A)* Miller JA at 765 A - C dealt with the expression "sufficient cause". The learned Judge equated it with that of "good cause". He stated that it had two essential elements, the first of which was that the party seeking relief must present a reasonable and acceptable explanation for his default and the second, that such a party had to show on the merits that he had a bona fide defence which prima facie had some prospect of success. The learned judge further pointed out at 765 D to E the following:-

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[18] The conclusion by the learned Judge of the Labour Court that the appellant did not take the proceedings in the Labour Court seriously is supported by all the facts. On the 20th August

2001 the appellant received the notice of motion to have the award made an order of the Labour Court. The notice of motion which the appellant received made it clear that in the event of it not opposing the application the matter could be dealt with in its absence. Although the Grobler says he and his wife read through the papers, he claims not to have seen this part of the notice. This is strange because, on his version, before the arrival of the notice of motion, he was awaiting notification of when he could go to the Labour Court to give his version. I would have thought that, when he received the notice of motion which showed that the matter was now in the Labour Court, he would have read it exhaustively to see whether there was anything therein about a date. As it turned out, the part he says he did not read would have told him what steps to take if he wanted to tell his version.

[19] In the light of the aforegoing I am unpersuaded that Pillay J erred in concluding that the appellant showed a complete disregard for the proceedings in the Labour Court. In my judgment the appellant has demonstrated only his disdain for the rules and has, therefore, failed to demonstrate good cause for not opposing the granting of the order in the Labour Court on the 13th November 2001.

[20] I am mindful of the appellant's allegation that at no stage was the respondent in its employ. The award made against the appellant is a substantial one which could cause the appellant hardship. However, these are not the only considerations to be taken into account. To allow a party to rescind a judgment only on the basis of his averment that he has reasonable prospects of success on the merits would render an ordered judicial process ineffective. A party who believes that he has a good defence would then simply allow default judgment to be taken against him in the knowledge that he can at some time thereafter apply to have that judgment rescinded only on the basis that he has a defence on the merits. Such a situation would render the rules applicable to

the granting of default judgments nugatory and ineffective. It is for this reason that a party is required to show, in addition to a bona fide defence that he has a reasonable explanation for allowing the granting of default judgment against him before a court can rescind such a default judgment. It follows, therefore, that the appeal must fail.

[22] In the result, the appeal is dismissed with costs.

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A.N. JAPPIE
Acting Judge of Appeal

I agree

_____
R M M ZONDO
Judge President

I agree

_____
E L GOLDSTEN
Acting Judge of Appeal

For the Appellant: Mr Kirstein

Instructed by: Schreiber Smith Attorney

For the Respondent: Ms Jafta
Instructed by: Jafta & Company

Date of Hearing: 27th February 2003

Date of Judgement: 31 March 2003