REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA115/2013

In the matter between:

SOUTH AFRICAN REVENUE SERVICES **Appellant**

And

CHARLOTTE CONNIE MHLONGO **Respondent**

Heard: **13 November 2014**

Delivered: **12 March 2015**

Summary: rescission application – default judgment granted against employer- employer erroneously providing incorrect fax number in its answering affidavit- set down notice sent to the incorrect fax number – employer not in wilful default and having good prospects of success. Labour Court's judgment set aside- Appeal upheld- judgment rescinded.

Coram: Waglay JP, Dlodlo AJA *et* Setiloane AJA

JUDGMENT

DLODLO AJA

Introduction

[1] This is an appeal (with leave of the court *a quo*) against the judgment and order of the Labour Court (Gush J) handed down on 25 February 2012 dismissing an application for rescission of the judgment. The rescission application sought to rescind an order handed down by the Labour Court (Van Niekerk J) on 9 June 2010 granting the Respondent the relief she sought

(namely to be reinstated in the Appellant's employ as a result of being unfairly dismissed).

[2] On 19 May 2009, the Appellant dismissed the Respondent for abscondment. On 14 October 2009, the Respondent filed application proceedings seeking *inter alia*, an order declaring her alleged suspension and subsequent dismissal unlawful and that she be reinstated with full benefits. On 14 October 2009, the Appellant's then attorneys (Eversheds) filed Appellant's notice of intention to oppose. In the said notice, the Appellant appointed Eversheds' address and fax numbers (086 673 6940) as the address and fax number at which the Appellant will receive notice and service of all documents/pleadings in the application proceedings. On 3 November 2009, Eversheds attorneys filed the Appellant's answering affidavit; but then the fax number on the answering affidavit's filing sheet was recorded as 086 673 6040 (this was a wrong number) instead of 086 673 6940 (the 0 and the 9 were interchanged – appears to be a typing error).

[3] On 19 January 2010, some two months after it filed its clients' answering papers, Eversheds wrote to the Respondent's attorneys in which they complained about the lack of progress in the matter. In this letter, Eversheds threatened to apply for dismissal of the application proceedings. This letter contains the correct fax number appearing on Eversheds' letterheads. The matter was set down for hearing and the Appellant and its legal representative failed to appear at the hearing of the application (in which the Respondent sought to be reinstated in the Appellant's employ). Consequently, judgment was granted in favour of the Respondent by default. It is this judgment that the Appellant unsuccessfully sought to have rescinded. This appeal concerns the refusal to rescind the judgment.

[4] The Respondent resisting this appeal raised the point that the judgment sought to be rescinded was not granted in error. The truth is that the error was committed by the Appellant's attorneys in that they supplied a wrong fax number. That was the only reason that caused the Registrar of the Court to send the notice of Set-down for the hearing of the main application to an incorrect fax number. It is, however, common cause that the Appellant's

attorneys did not receive notification of the set-down from the Registrar of the Labour Court. I fully agree with the submission made on behalf of the Respondent that the judgment sought to be rescinded was not granted erroneously.

[5] It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware of which would have precluded the granting of the judgment and which would have induced the judge (if aware of it) not to grant the judgment.[1] Judgments have been rescinded on the ground of a mistaken belief on the part of the court that the defendant knew of the hearing when in fact this was not the case.[2]

[6] In order to succeed, an applicant for rescission of a judgment taken against him by default must ordinarily show good or sufficient cause.[3] In effect, that entails three elements, namely (a) give a reasonable (acceptable) explanation for his default; (b) show that his application is made *bona fide*; (c) show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success. It is important to mention that the court hearing the rescission application retains a discretion which must always be exercised after a proper consideration of all the relevant facts and circumstances.[4]

[7] The "good cause" shown by the Appellant in the instant matter is simply that it was unaware of the date of the hearing. This point is admitted also by the Respondent. Without condoning the error committed by the Appellant's attorneys in supplying a wrong fax number, it is only fair to enable the parties to ventilate issues on merits in the instant matter. One only needs to read the Appellant's answering affidavit together with the Respondent's replying affidavit in order to come to the conclusion that the Appellant demonstrated the prospects of success in this matter. According to the answering affidavit

[1] *Nyingwa v Moolman* 1993 (2) SA 508 (TK GD) at 510.
[2] *De Sousa v Kerr* 1978 (3) SA 635 (W); *Topol v LS Group Management Services (Pty*) Ltd 1988 (1) SA 639 (W); *Nyingwa v Moolman supra* at 510E-F.
[3] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 1042F-1043A; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529 D-E.
[4] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-1043A; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) supra*; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 152H-153A.

filed on behalf of the Appellant after the arrest of the Respondent, she never returned to work. Ngwako James Rapholo (deponent to the appellant's affidavit) states as follows *inter alia*:

> *'32. The Respondent (Appellant) made several unsuccessful attempts to contact the Appellant with the view of having her to return to work. The letters sent to the Applicant by the Respondent, on 8 May 2009 and 19 May 2009, calling upon the Applicant to return to work and report for duty are annexed marked "CCM5" to the Founding Affidavit and "NR7" to this affidavit. The two letters were written in compliance with the Respondent's Internal HR Policy: Timely Reporting of Unexpected Absences annexed hereto marked "NR8" (See Annexure A & B of the Policy).*
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> *33. The Respondent's attempts to contact the Applicant and requests that she return to work were made with the view of making arrangements for the Applicant to attend a proper disciplinary hearing in line with the Respondent's Disciplinary Code and Procedure attached to the Applicant's Founding Affidavit marked "CCM6".'*

[8] I am mindful that the Respondent in the instant matter denies the above assertions. But the fact of the matter is that it remains the duty of the trial court to make a determination after hearing both litigants. In my view, the assertions or averments made by the Appellant quoted above reveal that there are prospects of success demonstrated by the Appellant. That this is a very important matter cannot also be doubted. The issues between the parties need to be ventilated in the Court. Accordingly, I hold that it is in the interests of justice that this default judgment be rescinded.

Order

[9] In the result, I would make the following order:

(a) The appeal succeeds and the court *a quo*'s order is altered to read as follows:

> *"Default judgment granted on 9 June 2010 in favour of the Respondent is hereby rescinded".*

(b) There shall be no order as to costs.

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Dlodlo AJA

I agree

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Waglay JP

I agree

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Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv Hw Sibuyi
	Instructed by Hogan Levells (SA) Inc.
	As Routledge Moside Inc.
FOR THE RESPONDENT:	Adv R Mastenbroek
	Instructed by Mpoyana Ledwaba Inc.