Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS866/01

2002.05.31

In the matter between

CONSTANCE MOKHACHANE Applicant

and

SEVEN ELEVEN Respondent

J U D G M E N T

NGCAMU, A.J: This is an application to rescind the judgment of this court granted in favour of the respondent on 3 October 2001. The respondent was employed by the applicant until her dismissal on 14 June 2001. As a result of her dismissal the respondent referred her dispute to the CCMA for conciliation. Conciliation failed to resolve the dispute. The respondent

referred the dispute to this court for adjudication.

The statement of claim was faxed to the applicant on 19 July 2001. The applicant received the statement but did not file the statement of response. On 23 August a notice of set down for the hearing on 3 October 2001 was sent to the applicant by fax. On 24 August the applicant filed an affidavit, signed by Vincent Alexander. In paragraph 3 of the affidavit he testified that:

"The statement of claim is unclear, unreadable in parts, some errors, and is very indecisive. It was not done in the correct manner. We cannot respond to this claim. As the letter that was faxed to us is unreadable due to poor quality, the respondent cannot respond properly to this. Time and effort were taken to read the whole document. For example, we cannot make out the applicant's address. Copy attached."

The applicant did not attend court on 3 October 2001, and a default judgment was granted in favour of the respondent. In terms of the judgment the dismissal of the respondent was found to have been substantively and procedurally unfair. The applicant was ordered to pay the respondent compensation in the amount equal to 12 months' salary. The applicant seeks to rescind this judgment on the

basis that the judgment was erroneously sought and erroneously granted.

This court is empowered to rescind its own judgments in terms of rule 16A(1)(a) of the Labour Court Rules, read with section 165 of the Labour Relations Act, 66 of 1995. The rule provides that the Labour Court may vary or rescind a decision, judgment or order, erroneously sought or granted in the absence of a party affected by that judgment or order.

In order for the application for rescission to succeed the applicant has to show that the judgment was erroneously granted in its absence. As an alternative to this, applicant has to show good cause. (See *Sizabantu Electrical Construction v Guma and Others* (1999) 20 ILJ 673 (LC), at para.6: *Construction and Allied Workers' Union and Another v Federale Stene (1991) (Pty) Ltd* (1998) 19 ILJ 642 (LC) (5)).

In order for the applicant to show good cause it has to give a reasonable explanation for its default. The applicant must demonstrate that the application is *bona fide* and not made for the purposes of delay. The applicant must show a *bona fide* defence to the claim.

The applicant has submitted that by sending the affidavit it believed that the court will take the affidavit into account.

He believed that the judgment would be stayed. It was therefore submitted that the judgment was erroneously granted.

The applicant has also submitted that if the court was aware of the replying affidavit it would not have granted the default judgment. The applicant has referred to the case of *Construction and Allied Workers' Union and Another v Federale Stene, supra* for the proposition that where a defaulting party was unaware of the date of set down, the granting of the default judgment would be erroneous.

This case does not assist the applicant in that the statement of claim was served properly as well as the notice of set down. The applicant was aware that the matter was set down for default judgment on 3 October 2001. The date of set down was well-known to the applicant. The applicant's response was outside of the period allowed by the rules. He elected not to attend court on 3 October 2001. The court was aware of the applicant's affidavit, but it was not properly before court, if it was a proper response to the statement of claim. By not attending court the applicant took a risk for which it has to pay the price. As the notice of set down was served on the applicant, and the applicant acknowledges

receipt thereof, it cannot be said that the judgment was erroneously granted. The court was aware of the contents of the affidavit. The applicant fails to explain why it did not appear in court on 3 October 2001.

The applicant's complaint is that the statement of claim was not legible. It however fails to explain why no efforts were made to check the original in the court file immediately after it had been faxed. It was only after receipt of the date of set down that the applicant reacted by sending an affidavit with its complaint. The applicant has submitted that it could not read the service address of the applicant. This may well be true, but the matter does not end there. The applicant fails to explain why it did not contact the registrar to obtain the correct address and/or telephone number of the respondent.

In the light of this the applicant was the author of its own misfortune, the court cannot come to the assistance of the applicant as the judgment was not erroneously sought or granted. The applicant has failed to show that the reasons for its default was for good cause. The applicant deliberately did not attend court. No good cause appears from the affidavit. I find it difficult to accept that the mere filing of an affidavit, stating that the statement of case is not clear, entitles the

applicant to come to the conclusion that the case would be postponed.

In *Newman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) the court refused to grant a rescission where the applicant was aware of the date but chose to take a trip overseas.

The applicant has to submit facts before the court which may give the court an indication that it has a *bona fide* defence. It does not mean that it must show the probability of success. The applicant states that there were economic reasons for the reduction of staff. It further states that there was a discussion with the respondent on 14 June 2001. It however fails to set out facts to indicate that there was a proper consultation with the applicant, or that there was compliance with section 189 of the Labour Relations Act. No facts have been set out. The grounds of defence must be set out in sufficient detail to enable the court to conclude that there is a *bona fide* defence, and that the application is not made merely for the purposes of delay. (See Erasmus - *Supreme Court Practice* B1-204).

The applicant has failed to raise an issue which, if raised at the trial, may indicate its prospects of success. If there are no prospects of success, the court is entitled to refuse the

rescission. (Cf *Tekwini Security Services CC v Mavana* (1999) 20 ILJ 2721 (LC).

After considering the information contained in the applicant's affidavit and submissions made I have come to the conclusion that the applicant has failed to make out a case for the review of the default judgment that was granted.

In the circumstances the application for rescission is dismissed with costs.

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