IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER: C100/2009

DATE: 18 FEBRUARY 2010

In the matter between:

PUBLIC AND ALLIED WORKERS UNION OF SOUTH AFRICA APPLICANT

and

EDWIN AVONTUUR & 5 OTHERS RESPONDENTS

J U D G M E N T

CHEADLE, AJ:

[1] This is an application for rescission of a default judgment handed down by this Court on 6th August 2009. The applicant in this matter is the Public and Allied Union Workers Union of South Africa. It retrenched certain of its employees in November 2008. Those employees referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). That dispute was not resolved at the CCMA and it is common cause that the union, as the employer, attended those proceedings.

[2] Because the dispute was not resolved, the first applicant Avontuur filed and served a statement of claim on the

11th March 2009. That statement of claim failed to call upon the applicant in this matter (the respondent in that one) file a notice of intention to defend and a statement of defence if it intended to oppose the application as is required by the rules.

[3] The general secretary of the applicant and deponent to the founding affidavit in the rescission application, Mr van Wyk, stated that he did not consider it necessary to respond to the application because of its defective nature.

[4] On the 6th May 2009 a second statement of claim was filed and served. I must say by the way that I have enormous difficulty in working through these papers because although the index purports to be an index, it does not disclose what the indexed document is – it just states “confirmatory affidavit” or “affidavit” - so that one cannot find one’s way easily through the extensive documentation. The documents also do not follow chronologically. Another problem is that the page numbers do not correlate with those used by the parties. I accordingly refer to the paginated papers as they are in the Court file.

[5] The first statement of claim is Annexure H and at page 236 of the Court's paginated papers. Annexure I at page 238 is the second statement of claim which was served on the 6th May by way of registered post and that statement of claim states on the first page that:

> "If the party intends opposing the matter the response must be delivered within ten days of the service of the statement in terms of Rule 6(3) of the Rules, failing which the matter may be heard in the party's absence and an order for costs may be made against that party".

[6] Because the applicant in this application did not file a notice of intention to defend or statement of defence, the matter was then placed on the unopposed roll for default judgment. No notice of the application for default judgement was given to the applicant, as is the practice in this Court. Accordingly the applicant was absent when the matter came before the Court for default judgment.

[7] There were six individuals present in court on 6 August 2009. They were Mr Avontuur, who is the first applicant in the main application, and five others. It is common cause that all six were ex-employees, all six were retrenched, all six were part of a group who referred their

dispute to the CCMA. Evidence was led and default judgment was granted in respect of the six individuals. Insofar as the other seven applicants were concerned, the matter was struck off the roll.

[8] There were essentially two grounds in support of the application for rescission. The first was that the judgment was made erroneously in the sense that the Court was not competent to give such an order or it was so irregular that the Court was precluded from making such an order. What Mr Louw on behalf of the applicant argued was that the second statement of claim was so defective that the judgment ought not to have been given on 6 August.

[9] There were many irregularities pointed out in respect of both the first and the second statements of claim but the critical irregularity was the failure to identify the applicants, to cite the applicants by name either on the front page or, as it purported to do but did not do, by way of a list to be annexed to the statement of claim. Accordingly it was argued that the Court was only competent to make an order in respect of the first respondent, namely Mr Avontuur.

[10] However, whatever uncertainty appears from the face of the second statement of claim, the fact is that these individuals were part of the group who referred their dispute to the CCMA. The applicant could be of little doubt as to who they were and that doubt would have been clarified if they had defended the application. The Court specifically engaged in a process of identifying these individuals by reference to those who had referred their dispute to the CCMA. I refer to the transcript at page 209 of the Court's indexed documents in which the Judge goes through very carefully a schedule from the CCMA referral and he checks the names on that referral in respect of the people who were present and not present before him. He goes through each name on page 210 and finally says:

> "well that leaves me with five applicants who did refer their cases to the CCMA, they are E Senta, D Barendse, Z Johannes, N Booi and Mashinga".

Then Mr Mashinga says "and Avontuur". The Court says "and who?" and he says "Edwin Avontuur, he is because the referral says "Avontuur and Others" "Oh at the top there", "correct" and finally identifies the individuals as a result.

[11] It is clear that the Court satisfied itself that the group of

applicants contemplated by the citation "Avontuur & 13 Others" included the individuals in respect of whom a decision was made in their favour. It follows then that the Court did not make an erroneous decision in the sense that the irregularity was such that it precluded the Court from making the decision that it did.

[12] That leaves the second basis upon which the applicant based its application for rescission. That basis is that it was erroneously made in the absence of the applicant, erroneous in the sense that the applicant had intended to defend the matter and had a *bona fide* defence and had an explanation for the failure to be present and but for its failure, it would have opposed the matter.

[13] That requires us first to look at the explanation. That is set out by Mr van Wyk in paragraphs 31 to 36 of the founding affidavit (page 18-19 of the Court's bundle) and it is confirmed by a confirming affidavit of Mr Cottle.

[14] In summary the explanation is that on 11 March the first respondent faxed to the applicant a statement of claim. This purported pleading had a heading "case number" but did not comply with the Rules of Court. He says there that "I am advised" that it did not comply - that advice one must assume is the advice he got when the founding

affidavit was formulated and not at the time he made the decision not to file a notice of intention to defend.

[15] The most obvious and significant non-compliance was that it failed to notify the applicant that it may file a notice of opposition if it so wished. It failed to provide any address whatsoever in respect of any of the respondents for service. The statement of claim marked "Annexure F" was received by Mr van Wyk and Mr Cottle and Mr Cottle being a full time shop steward employed by the Department of Education. This is what he says:

> "We did not consider it necessary to take any action in terms of the purported statement of claim because in the absence of a notification that the applicant should oppose the application if it so wished, we were under the impression that it is only a notification that the applicants (respondents in herein) intended to make application to the Labour Court. Furthermore, and in any event, we did not know who to respond to".

[16] It must be borne in mind that this is a general secretary of a trade union. Trade unions litigate in these courts and it is really very difficult to believe that a general secretary of a trade union would not understand the import of even a defective statement of claim. If he was

not able to serve on the respondents, he could certainly have filed a notice of intention to defend in the Court file. He could have written a letter to the registrar to ensure that its opposition to this defective claim be placed in the file for the record of any judge that may be faced with the matter based on that statement of claim.

[17] He then goes on:

> "On or about the 6th May 2009 a second statement of claim was served on the applicant's head office by registered mail".

A copy of that second statement is attached and it is at Annexure I page 238 of the paginated Bundle:

> "The second statement of claim was not addressed to me but only to the union. In this instance however the statement of claim was received by Mr Cottle, Mr Cottle is a full time shop steward and not an employee of the applicant. Mr Cottle has no legal training and is not conversant with this Court's rules and procedures. Mr Cottle failed to inform Mr van Wyk of the second statement of claim. Mr Cottle's explanation is that because Mr van Wyk had informed him upon receiving the first statement of claim that he was of the view that it was not necessary then to deal with it, it would

again apply in the instance of the second statement of claim".

In other words, Mr Cottle then interpreted that the appropriate response to the first statement of claim should be followed in respect of the second statement of claim.

[18] No allegation is made that Mr Cottle cannot read and if he had merely looked at the first page he would have seen that the union was being called upon within ten days to file a notice of intention and a statement of defence. Mr Cottle was under the impression that if anything were to come of the application by the applicants, the applicant would be duly notified of a court date in which case it would attend the court and deal with the matter.

[19] What is not explained is why Mr Cottle is opening up the post for the union. What is not explained is the lack of a system for dealing with registered letters and court processes and what is not explained is why Mr Cottle never hands the document to the general secretary. Mr Louw was correct to say that this was negligent, probably gross negligence. But I accept that it may not have been wilful but so grossly negligent, particularly that this is a

union and it is part of the practice of a trade union to know just how important court documents are, that I find it very difficult to accept that this is in any way an acceptable explanation for its failure.

[20] That then brings me to the question of whether it has a *bona fide* claim and part of that determination is of course whether it has a *prima facie* case. What is important to recognise in respect of this case is that there are two aspects to the claim. The first is that the decision to retrench is a decision made by one faction against another. It is alleged in the second statement of claim where it talks about the split in the National Executive Committee ("the NEC") and the reference to a rogue NEC and a case that was lost in the High Court, but that is not the High Court case that is attached to the application as I understand it, this is the case that is referred to in the evidence before Judge Cele when he heard the application. This is part of the case as is evident from that record.

[21] If one goes to the record at page 212 of the paginated papers, Mr Alistair Charles is called as the first witness and he was the acting general secretary. He then gives evidence as to the split, the factional dispute between

one group of NEC members and another. It is central to the claim that there was no authority to retrench in the first place let alone once the retrenchment had been purportedly effected that there had been no proper consultation and no proper application of the provisions of section 189.

[22] The evidence in the record is not specifically traversed in the founding affidavit, although many of the issues are dealt with in the High Court application, which is still to be resolved. Accordingly, there may be some basis of the case that could be advanced by the applicant but when it is weighed up, and I say the *prima facie* nature of the case is slight in view of the very serious disputes concerning who had the authority to dismiss who, I do not believe that it is sufficient to discharge the degree of negligence on the part of the applicant in failing to heed documents produced by this Court.

[23] Accordingly I dismiss the application, with costs.

CHEADLE, AJ