THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case: JS 822/08

In the matter between:

STRATI PHOFFU & 3 OTHERS **Applicant**

and

QUEST FLEXIBLE STAFFING SOLUTIONS **Respondent**

JUDGMENT

LAGRANGE, J:

Introduction

[1] This is an application to rescind a default judgement handed down on 10 June 2009 by Justice Molahlehi J in favour of the applicants in the main matter (the respondents in the rescission application). The application is brought in terms of section 165 of the Labour relations act 66 of 1995 (' the LRA').

Background

[2] The applicant (the respondent in the default judgment) is a temporary employment service provider in terms of section 198 of the LRA which supplied the services of the individual respondents to work as direct sales

agents for ABSA. The individual respondents were employed on fixed term contracts by the applicant and were all so engaged on learnerships which were due to end sometime in November 2008. The fixed term contracts of the three respondents were due to end between November 2008 and February 2009. For the purposes of this judgment the parties' designations in this rescission application will be used rather than their designations as applicants and respondent in the main matter.

[3] The bank instructed the applicant to reduce the number of staff assigned to it drastically from 1000 to 291 by the end of August 2008. The applicant alleges that it engaged the affected person now in a consultation process and sought to give them an opportunity to finalise their learner ships. As a result of the termination of their assignment by the applicant to the bank the respondents referred an unfair dismissal case to the CCMA, which was conciliatory on 7 October 2008 without success.

[4] The applicant claims that it engaged with the bank to try and avoid the drastic reduction in the number of staff assigned to it, but during August 2008 the bank rejected all the alternatives proposed. Following this the applicant claims it started a detailed consultation process during August 2008 with the affected employees, the main object of which was to find alternative positions for them and to minimise the impact of retrenchment as well as the completion of their learner ships notwithstanding the termination of the assignments by the bank. The respondents dispute the applicant's claims about a consultation

process, saying that in fact they were simply advised to stop working. Insofar as there was any attempt by the applicant to assist them in finalising their learnerships, they claim only one of them was contacted with a promise of remedying this issue and it never came to fruition.

[5] The applicant says it has been successful in re-deploying the majority of the affected employees in the Polokwane region but the respondents did not make themselves available for such redeployment. Accordingly, it submits that the retrenchment process was substantively and procedurally fair, and even if there had been any procedural unfairness it was not so serious that would have justified the 12 months compensation which was awarded, particularly taking into account the fact that the fixed term contracts were due to expire within a few months of them being retrenched.

[6] In November 2008, the respondents sent a statement of claim to the applicant's office in Polokwane. The original statement of claim did not have a case number but another copy of the statement- this time containing a case number- was sent to the applicant's Polokwane office on 26 February 2009. The first referral was made within the 90 day period after the unsuccessful conciliation, but the second referral fell outside the time limit.

[7] The applicant states that no further documentation was received concerning the case until on or about 15 June 2008 when it received a copy of the default judgement.

Grounds of rescission

[8] The applicant claims that the default judgement was granted in error. The basis for it saying so is that because the original statement of case did not contain a case number it was invalid and the subsequent referral of the corrected statement of case was outside the time limit for such a referral and in the absence of a condonation application being brought the court did not have jurisdiction to hear the unfair dismissal dispute.

Wilful default

[9] The applicant concedes that the dispute concerned its local Polokwane office. It offers no explanation on affidavit why it did nothing about the first referral which lacked the case number, but focuses on its failure to respond to the second referral. In this regard it claims that nothing was done because the Polokwane office was "unfamiliar with the processes involved." It claims that previously the local office had only dealt with CCMA disputes. Consequently it claims that it was unaware that Labour Court disputes could be initiated by telefax rather than by service of a sheriff. Likewise it was supposedly unaware that it needed to file a response to the referral, and also that it would not be notified of the hearing date if the matter was not formally opposed. As a result of these factors and the ‘disputed’ the veracity of the papers it received, as well asnot receiving notice of a trial date, the applicant claims that it assumed

that the referral had been incorrect. It was only after receiving the default award that it sought legal advice and became aware of what was required of it. On this basis, the applicant says that it was not wilfully in default.

[10] The respondents dispute the applicant's attempt to justify its failure to do anything on account of the ignorance of staff at its Polokwane office. They point out that the company has a legal department which could have advised them and that they too were not familiar with Labour Court processes but managed to seek and obtain help when necessary. The respondents also rightly query why the Polokwane staff could not have contacted the head office for assistance as they obviously did subsequently. In its replying affidavit, the applicant does not dispute the respondent's claims about the in-house expertise that was available to the Polokwane office, nor does it offer any explanation why no assistance was sought from the head office or the legal department. The respondents dispute the applicant's *bona fides* in the matter and submit that the rescission application is merely a delaying tactic.

Evaluation

[11] The first reason why the applicant says it did not file a notice of opposition was the alleged unfamiliarity of the branch manager at the Polokwane office with Court processes, and the manager's alleged assumption that court proceedings could only be initiated by the sheriff. The difficulty with this contention is that the respondents used the pro forma

statement of claim which is annexed to the rules of the Labour Court, and paragraph 2 of the pro forma document clearly states that: "If a party intends opposing the matter, the response must be delivered within 10 days of service of the statement in terms of sub rule 6 (3) of the Rules of the Labour Court, failing which the matter may be heard in that party's absence and an order for costs may be made against the party." There is no explanation by the Polokwane manager why he did not understand this. If he had bothered to read this paragraph, it is inconceivable that he would not have realised that it appeared that it was necessary for the applicant to respond. If he did not understand precisely what this entailed there is no explanation why he didn't seek further clarity from the applicant's head office or legal department. The reason the applicant was not notified of the matter being set down was because no notice of opposition was filed.

[12] The other reason relied on for the applicant’s inaction after receiving the second statement of claim is the manager's alleged belief that court process could only be initiated by service by the sheriff. No explanation is provided for this selective legal knowledge on the part of the manager nor, if he was uncertain of Labour Court processes generally, why he did not seek advice on this point either from the head office. Looked at in its totality, the applicant's explanation for its in action is a curious combination of ignorance and selective knowledge of legal processes. It is an explanation that fails to convince.

[13] On the other hand, it cannot be said with any degree of certainty that if the applicant had received notice of the set down for the default hearing from the court that it would not have attended and sought belatedly to oppose the matter. Moreover, there does appear to be a genuine dispute about the fairness of the respondents' retrenchment. On the face of the affidavits filed, the applicant appears to have a *bona fide* case. If it is able to prove what it alleges in its affidavits, it should succeed in defending itself against the respondents' claim of unfair retrenchment.

[14] I also accept that, in the context of employees who were engaged on fixed term contracts and whose service was terminated early for operational reasons, the question of compensation for an unfair retrenchment might be materially affected by the consideration that their contracts were due to expire in any event in less than 12 months.

Was the judgment granted in error?

[15] Even though the applicant's bona fides in the conduct of its opposition to the respondents' claim is questionable, I must still consider whether the default judgement was granted in error. There is case authority for the proposition that a statement of case which does not contain a case number issued by the registrar does not qualify as a statement of case that complies with the Labour Court rules, for the purpose of determining if a valid referral of

a case has been made to the Labour Court. In ***Kungwini Residential Estate & Adventure Sport Centre Ltd v Mhlongo NO & others*** **(2006) 27 *ILJ* 953 (LAC)**, McCall AJA, said, in relation to a failure by an applicant to put a case number on his rescission application in contravention of CCMA rules:

> "[21] ... There is no reason why an applicant should not obtain a case number from the commission and insert it in the notice of application before serving the application on the other party or parties. Moreover, for practical reasons, this is what should be done. The alternative would mean that the respondent will either have to endeavour to obtain the case number from the office of the commission, after the application has been delivered to the commission, or that the respondent will deliver a notice of opposition without a case number on it. The first possibility could present difficulties, bearing in mind that documents may, in terms of rule 7, be filed with the commission by sending a copy by registered post or by faxing it. Without a case number as a reference the office of the commission may have difficulty in tracing a case in order to furnish the respondent with the case number. The second possibility could result in the opposing documents, without a case number, being mislaid. I do not understand the first respondent's reasons for criticizing what the appellant's representative did and why he considers that what he did was unfair. Be that as it may, he found that the appellant's representative used the absence of a case number 'as an excuse not to oppose the application in order to proceed with holidays which was done after receipt of the application (sic)'. He said that: 'In light of rule 10, I find that the applicant had no bona fide defence to oppose the application for condonation.'

These findings by the first respondent were, in my view, a gross misdirection. Firstly, the respondent was perfectly entitled to refer to rule 31(3) and to rely upon the absence of a case number as a reason for not filing a notice of opposition."[1]

(emphasis added)

[16] In ***Windybrow Centre for the Arts v SA Commercial Catering & Allied Workers Union on behalf of Gina & Others*** **(2007) 28 *ILJ* 1343 (LC)**, Mohlahehi J, considered the principle applied in *Kungwini's* case in the context of a failure to include a case number on a statement of claim as required by the Labour Court Rules:

"[19] ... [T]he fact is that the respondent's service of its documents on the applicant failed to comply with the requirements of both rules 3(1) and 6(1)*(c)* of the rules of this court. If the approach in *Kungwini Residential Estate* were referred to above was to be adopted, then it would mean that the respondent never served its papers on the applicant. In terms of this approach it could be said that because of the defect in the service by the respondent, the applicant was not obliged to file a response.

[20] The other approach, which seem to me in the circumstances of this case to be the most appropriate, is to regard the date of service as

[1] At 964

being the date on which the applicant's attorneys were informed of the case number by the respondent."[2]

[17] In this instance, the respondents had not complied with the requirements of Rule 6(1)(a)(ii) of the Rules of the Labour Court, by failing to include a case number in their statement of claim. I appreciate that, at that stage, the applicants might have been prosecuting their case as lay persons without assistance. However, the failure to include the case number is not merely a formal 'technical' disqualification, but one which can seriously hamper the administration of cases by the registrar's office. The practical significance of the requirement is no less important in the context of labour court proceedings as it is in the case of the CCMA, which McCall AJA referred to in *Kungwini*'s case.

[18] In this case, the original statement of case did not contain a case number and this was only rectified when the second referral was made in February 2009. In the circumstances, I believe it is appropriate to follow the approach of Molahlehi J in the *Windybrow* matter, which means that the true date of referral, for the purposes of calculation of time limits, is the date of the second lodging of the referral with the court in February 2009.

[2] At 1348

[19] It is a requirement of section 191 (11) of the LRA that a late referral of a dispute over an unfair dismissal for operational reasons in terms of section 191 (5) (b) (ii) must be made within 90 days of the unsuccessful conciliation of a dispute, and a late referral may be condoned by the Labour Court on good cause shown. Without an application for condonation being granted by the court, the court simply has no jurisdiction to consider the referral. It is evident from the default judgment that no such condonation was granted. Had the court being aware that condonation was required, it would undoubtedly have considered and made a ruling on this question. Accordingly, I can only conclude that the court considered the referral and made a default order in circumstances where the learned Judge was not aware of the need for condonation.

[20] Therefore, for this reason alone it is clear the default order was made in error and must be rescinded on that account.

Costs

[21] Even though the applicant is ultimately successful in this application, these proceedings would have been unnecessary had it acted properly on receipt of the second referral. The applicant, upon obtaining proper legal advice, should have filed an answering statement in accordance with the

provisions of Rule 6(3) of the Labour Court rules, noting as a preliminary objection the failure of the respondents' to file a condonation application for the late referral of the case. Instead it did nothing, but remained silent. It is not correct that it can simply fold its arms and take the view that until a condonation application is filed it can ignore the referral.

[22] In the circumstances, it was perfectly reasonable for the respondents to have taken the view that the applicant was not opposing the matter. The only reason the default judgement is being rescinded is owing to the error made in relation to the question of condonation. Had the applicant noted its opposition properly, the matter would probably be on its way to trial by now, and neither the default proceedings nor the rescission application would have been necessary for this matter to progress. Accordingly, I believe it is fair and equitable in the circumstances for the respondents to be compensated for the legal costs and they might have incurred.

Order

[23] The court order handed down in this matter on 10 June 2009 is rescinded on the basis that it was made in error in the absence of the applicant, because no application for condonation was made for the late referral of the case in February 2009.

[24] The applicant is ordered to pay the respondents' costs incurred in opposing the rescission application.

[25] The respondents are directed to file a condonation application for the late referral of their dispute on 26February 2009, within 10 days of the date of this judgment.

[26] The applicant is directed to file its answering statement within 15 days of the date of this judgement.

R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 24 November 2010

Date of judgment: 15 October 2011

Date of variation to clarification designation of parties: 07 November 2011.

Appearances:

For the applicant: Ndumiso P Voyi Attorneys

For the third respondent: Wayne Hutchinson Kirschmanns Incorporated