IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

LAC CASE NO: JA21/2007

In the matter between:

EBERSPÄCHER **APPELLANT**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA o.b.o. SKADE AND 37 OTHERS **RESPONDENTS**

JUDGMENT

WAGLAY, JA.

Introduction

[1] The appellant petitioned the Judge President of this Court to grant it leave to appeal against the dismissal of its application to rescind the directive issued by Cele AJ pursuant to Rule 6(7) of the Rules of this Court and to rescind the default judgment handed down by the Labour Court pursuant to the abovementioned directive. On the direction of the Judge President this petition was set down for oral argument and the parties were required to argue both the petition and the merits of the appeal at the same time.

The facts

[2] On 21 August 2001, 38 employees of the appellant ("the individual respondents"), all members of the National Union of Metal Workers of South Africa ("the Union"), were dismissed from the appellant's employ. The reason given for such dismissal was that the individual respondents had participated in an unprotected strike.

[3] The union and the individual respondents ("the respondents") believing the dismissals to be unfair, referred a dispute concerning the fairness of such dismissals to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation and thereafter to the Labour Court for adjudication. The respondents, who were not legally represented, served their statement of claim upon the appellant on 26 November 2001. In terms of Rule 6(3)(c) of the Rules of the Labour Court the appellant had 10 days within which to file its response to the respondents' statement of claim if it intended to oppose the matter.

[4] The appellant, also unrepresented at the time, filed a notice to the effect that it intended opposing the matter, but failed to file its response to the respondents' statement of claim. Some 5 months later, on 3 May 2002, the appellant, then legally represented, filed its response to the respondents'

statement of claim and with it an application for the condonation of the late filing of its response to the respondents' statement of claim.

[5] One of the reasons for the appellant's failure to file its response to the respondents' statement of claim timeously (as attested to by Michael Craig Kirchmann, ("Kirchmann") of Kirchmanns Inc., appellant's attorneys of record) was that the respondents had failed to reply to his letter calling upon them to provide him with the annexure to their (respondents') statement of claim. The annexure set out the names of the individual respondents. In their answering papers respondents provided proof that the annexure was faxed to the appellant's attorneys the day after the request had been made. In reply, Kirchmann, under oath, denied receiving such response. His denial did not exclude the possibility that the response may have been received by his office but not brought to his attention.

[6] A further explanation deposed to by Kirchmann as to why the response to the claim was filed five months late and five months after he had requested the document from the respondents was the following:

> *"It appears as if the relevant file was filed away during my annual Christmas shutdown without it being diarised to be brought to my attention."*

[7] Mr Paul Erasmus ("Erasmus") of the appellant company also deposed to an affidavit in support of the application for condonation. According to

Erasmus the only reason for the appellant's attorneys not filing its statement of defence was the respondents' failure to forward the document requested by the appellant's attorneys. Erasmus makes no mention of the fact that the appellant's file had been misplaced by its attorneys for a period of five months.

[8] Condonation for the late filing of its statement of defence was in any event granted by the Labour Court. The respondents sought leave to appeal against that decision. Leave was granted on 24 December 2003. Although respondents thereafter filed their notice of appeal, they failed to take the further steps necessary to prosecute the appeal. As a result the appeal lapsed.

[9] Some 14 months after the appeal had lapsed, respondents, who by then had appointed attorneys to represent them, called upon the appellant, to attend a pre-trial conference. The appellant refused to attend such a conference. The appellant took the view that the delay by the respondents had led to a reasonable belief on their part that the matter had *"died a natural death".*

[10] The respondents subsequently enrolled the matter for a pre-trial conference. The day before the matter was to be heard, the respondents provided the appellant with an agenda for the conference and a list of questions which they required the appellant to answer. The following day, at the Labour Court, the parties concluded an agreement which was made

an order of Court in terms of Rule 6(6) of the rules of the Labour Court. The order of Court, dated 5 August 2005, was that the appellant had to respond to the pre-trial questions raised by the respondents within 10 days of the date of that order and that the respondents would thereafter, within 5 days of receipt of the response, file a pre-trial minute.

[11] The appellant failed to comply with the Court order. After the expiry of the time prescribed by the Court order, (this was on 19 August 2005), respondents again called upon the appellant to reply to its pre-trial questions. The appellant did not respond. However, on 6 September 2005 Kirchmann telephonically requested an extension until 30 September 2005 to comply with the Court order. By 10 October 2005 the appellant had still not complied with the Court order and had not filed its response to the pre-trial questions. As a consequence, the respondents informed the appellant in writing that, since it had failed to file a response to the pre-trial questions, they would be taking further steps towards finalising the matter. To that end, respondents wrote to the registrar of the Labour Court requesting that the Court file be handed to a judge in chambers for a directive in terms of Rule 6(7) of the Rules of the Labour Court. This Rule provides for a matter to be enrolled for trial where one of the parties fails to comply with an order or directive of the Court relating to pre-trial procedures.

[12] The matter was placed before Cele AJ. On 23 February 2006, Cele AJ issued a directive barring the appellant from defending the matter. He further directed that the matter be enrolled for a default judgment.

[13] The respondents forwarded a copy of the directive issued by Cele AJ to the appellant's attorneys under cover of a letter in which they advised appellants that they (the respondents) would be enrolling the matter for judgment on an unopposed basis. No response was received to the letter or the judge's directive.

[14] The Registrar of the Labour Court then set the matter down for default judgment on 5 May 2006. No notice of set down was given to the appellant. On 5 May 2006 the Labour Court heard the matter as an unopposed matter. It found the dismissal of the individual respondents to be both substantively and procedurally unfair and ordered the appellant to reinstate the 38 individual respondents in its employ.

[15] On 25 May 2006 the appellant filed an application to rescind with costs:

(i) the directives issued "by the Registrar dated 23 February 2006" (Clearly appellant meant the directive issued by Cele AJ and not the "Registrar"); and

(ii) the "default judgment handed down on 5 May 2006".

[16] The grounds upon which the recission was sought were that:

(i) no notice/application was served upon the appellant to debar it from continuing to defend the claim; and

(ii) the Registrar had failed to notify it about the matter being set down for default judgment on 5 May 2006;

[17] The Labour Court dismissed the application for rescission. Leave to appeal was also refused. The appellant thereafter petitioned the Judge President of this Court to grant it leave to appeal the dismissal of its application. As stated earlier, on the directions of the Judge President the petition was set down for oral argument and the parties were required to argue both the petition and the merits of the appeal at the same time.

The petition and the appeal

[18] The issue in this matter relates to the effect and application of Rule 6(7). This sub-rule provides as follows:

> *"If any party fails to attend any pre-trial conference convened in terms of sub-rule (4)(a), (5)(b) or (5)(c), or fails to comply with any direction made by a Judge in terms of sub-rules (5) and (6), the matter may be enrolled for hearing on the direction of a Judge and the defaulting party will not be permitted to appear at the hearing unless the Court on good cause shown orders otherwise."*

[19] At the hearing of the petition and the appeal appellant argued that when a party fails to comply with an order of the Labour Court made in terms of

Rule 6(6), as it had done, or fails to comply with a directive issued in terms of Rule 6(5) all that a Judge could do pursuant to a request for a directive in terms of Rule 6(7) is to direct that the matter be enrolled for hearing in terms of Rule 6(7). The effect of the directive so issued would be that the party who failed to comply with the order/directive will not be allowed to appear at the hearing. The defaulting party is thus barred from pursuing its defence or its claim. Rule 6(7) however, also provides that the defaulting party can have the bar lifted and continue with its claim or defence if it is able to show good cause for its failure to comply with the order/directive made in terms of Rule 6(5) or (6). The defaulting party can apply to show "*good cause*" either on the day of the hearing, prior to its commencement, or at an earlier date. This argument is essentially correct.

[20] What this sub-rule envisages, is that, while a judge could issue a directive that the registrar enroll the matter for hearing, the registrar would have to enroll the matter on notice to both parties and the notice has to indicate that the matter had been enrolled for hearing in terms of Rule 6(7). Notice to both parties is critical because either on the day of the hearing or before that date the defaulting party is entitled to approach the Court in order to satisfy it that there is "*good cause*" for it to be allowed to continue with its claim or defence. In other words, while a directive in terms of Rule 6(7) automatically prohibits the party that has failed to comply with Rule 6(5) or (6) from continuing with its claim or defence the Court may lift the prohibition if the party prohibited from continuing with its claim or defence

shows "*good cause*" why it should be allowed to defend or prosecute its claim.

[21] Sub-rule 6(7) is directed towards the enforcement of compliance with the rules relating to pre-trial procedures and sets out a process to expedite matters where a party is dilatory. Although this sub-rule has drastic consequences it allows a defaulting party an opportunity to show "*good cause*" so as to be allowed to continue with its claim or defence. The fact that the defaulting party is entitled to seek the lifting of the prohibition against appearing at the hearing implicitly requires that the registrar notify it of the date of hearing to afford it an opportunity to show "*good cause*".

[22] Accordingly, where a judge issues a directive under Rule 6(7) the matter may not be set down without notice to the defaulting party. Additionally the registrar should notify the parties that the matter is set down pursuant to a directive in terms of Rule 6(7) so the parties are prepared, if need be, to deal with the issue of "*good cause*".

[23] Cele AJ was therefore only entitled to issue a directive to the effect that the matter be enrolled for hearing in terms of Rule 6(7), not a directive barring the appellant from continuing to oppose the claim. This matter should also not have been set down for default judgment without notice to the appellant nor should default judgment have been granted in the absence of such notice. The directive issued by Cele AJ thus falls to be

set aside and so does the default judgment granted pursuant to that directive.

[24] With regard to the costs I am of the view that the requirements of law and fairness dictate that no order as to costs should be made.

Conduct of Appellants' attorney

[25] Further it is important that I deal with the less than acceptable conduct on the part of Kirchmann, which conduct played a role in causing the unacceptable delays and the unnecessary steps that respondents were forced to take. The questionable conduct relates to the following:

(i) Firstly, in the affidavit attested to by Kirchmann in support of the application to condone the late filing of the appellant's statement of defence, he claims not to have received the fax forwarded to his office listing the names of the respondents. However, as recorded earlier he does not discount the possibility that the document was received by his office. He later, without any basis, therefor, speculates that the respondent might have faxed the document incorrectly.

(ii) Although Kirchmann states that he mislaid the appellant's file and only found it 5 months later, he fails to explain why he only filed the application for condonation more than 24 days after the affidavit in

support of the application was signed. Curiously, Erasmus of the appellant company in his affidavit makes no mention of the file being misplaced.

(iii) Despite the order of the Labour Court that the appellant reply to the respondents pre-trial questions by 19 August 2005 Kirchmann failed to do anything about it. Kirshmann then denies receiving the letter from respondents' attorneys, calling upon his client to reply to the respondents' pre-trial questions. He, nevertheless, at a later date telephonically sought an extension of time to file his client's response and again without an explanation failed to file the response within that extended period. At no time does Kirchmann mention that he had either any difficulty in obtaining instructions from the appellant or that there was any impediment to comply with the Court order.

(iv) Kirshmann's explanation with respect to his failure to file appellant's reply to the respondents pre-trial questions within the extended period is that he was under the impression that one Pattle from his office in Port Elizabeth (Kirshmann is based in East London) had dealt with the matter. The reason for him to gain such an impression, according to him, was the directive he received from the registrar two days after he sought the extension, which called upon the respondents to file an index and paginate the Court file. To my mind the directive could not genuinely form a basis for

Kirshmann to get the impression he claims. Furthermore it is surprising that Kirshmann did not speak to Pattle either before or after he sought the extension to file appellant's response, nor does he say that he spoke to Pattle after he received the directive from the Labour Court. If Pattle was indeed able to attend to the drafting and delivery of the appellant's response why does Kirchmann or Pattle not say so? There is no affidavit filed by Pattle in this matter.

(v) Most curious of all is that while Kirshmann does not receive any correspondence or documents faxed to him he received the directive of the Court which called the respondents to file an index and paginate the Court file. The receipt of this fax is curious and convenient because it happens to be the document that formed a basis for his excuse for not filing the appellant's response within the extended period.

(vi) All of the affidavits filed by Kirchmann are remarkable in what they don't say rather than what they do say. In his affidavit in support of the rescission application, he makes the statement that he believed that his Port Elizabeth office responded to the pre-trial questions. He does not explain what, if anything, he did after he requested an extention of over twenty days from the respondents to reply to the pre-trial questions. Moreover he claims that he (as opposed to his office) never received the various letters (faxes) without furnishing any explanation as to why certain faxes/communications are

received, whilst others are not. Finally, neither Kirshmann nor the appellant have to date provided any explanation as to why the appellant failed to comply with the order of the Labour Court handed down in terms of Rule 6(6).

(vii) With the directive from the Judge President of this Court that the petition and the merits of the appeal would be heard simultaneously, the parties were ordered to file their heads of argument by certain specified dates. The appellant was required to file its heads of argument by 15 October 2007. It failed to do so. Appellant only filed its heads of argument on 6 November 2007, claiming that it did not receive the directives which were faxed by the Registrar of this Court. The directives of this Court were faxed to the number provided by Kirchmann in his client's petition. In its heads of argument the appellant (through Kirchmann of course) stated that it would apply for condonation for the late filing of its heads. It only filed its application for condonation on the day of the hearing. In its application for condonation Kirchmann acknowledged that the Registrar of this Court sent the directives by fax to the number that was provided in appellant's petition but states that the number which he had provided was wrong. He simply made a mistake!

[26] Save for one unhelpful affidavit signed by the appellant's representative, all of the affidavits in support of the various applications made on behalf of

the appellant were attested to by Kirchmann. All of them were littered with vague and unsubstantiated allegations. Such statements from an experienced attorney and officer of this court raise serious questions about whether or not Kirchmann has placed all the relevant facts before the court.

The order

[27] In any event insofar as the petition and the appeal are concerned I make the following order:

1. *Leave to appeal against the order of the Labour Court dated 5 May 2006 is granted.*

2. *The order of the Labour Court aforesaid is set aside and substituted with the following:*
   "(a) the directive issued by Cele AJ on 23 February 2006 is hereby set aside.
   (b) the default judgment granted on 5 May 2006 is hereby rescinded.
   (c) there is no order as to costs."

3. *Should the parties not reach a settlement in respect of the dispute and wish the matter to be expedited, leave is*

hereby granted to them to approach the Judge President with a request that this matter be expedited.

4. *There is no order as to costs in the petition or the appeal.*

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WAGLAY JA

I agree

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ZONDO JP

I agree

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TLALETSI AJA

Appearances

For the appellant	**:**	**Adv C.E. Watt-Pringle SC**
Instructed by	**:**	**Kirchmanns.Inc**
For the respondents	**:**	**Adv G.G Goosen SC**
Instructed by	**:**	**Gray Moodliar**
Date of hearing	**:**	**14 November 2007**
Date of judgment	**:**	**19 September 2008**