CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 131/14

In the matter between:

F & J ELECTRICAL CC Applicant

and

MEWUSA obo E MASHATOLA and OTHERS Respondent

Neutral citation:	*F & J Electrical CC v MEWUSA obo E Mashatola and Others* [2015] ZACC 3
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J.
Judgment:	Zondo J (unanimous)
Decided on:	17 February 2015

ORDER

On application for leave to appeal from the Labour Court (Coetzee AJ):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. There is no order as to costs in this Court and in the Labour Appeal Court.
4. The order of the Labour Court is set aside and replaced with the following:

   "(a) The order of this Court granted by default against the respondent is rescinded.

   (b) The respondent is granted leave to deliver its response to the applicant's statement of claim within ten court days from the date of this order.

   (c) There is no order as to costs."

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ and Van der Westhuizen J concurring):

Introduction

[1] The applicant is a registered close corporation. It applies for leave to appeal against an order of the Labour Court. That Court granted an order against the applicant by default in favour of certain members of the Metal and Electrical Workers

Union of South Africa (MEWUSA or union) whom the applicant had previously dismissed from its employment (employees). That order required the applicant to pay each one of the employees an amount equal to the employee's 24 months' remuneration. There were about 30 employees who had been dismissed. The applicant brought an application in the Labour Court for the rescission of that order but the Labour Court dismissed the application. The Labour Court also dismissed the application for leave to appeal to the Labour Appeal Court. The applicant then petitioned the Labour Appeal Court but that Court, too, refused leave to appeal. Hence, this application.

[2] This Court invited the parties to submit written argument, which they did. It then decided to dispose of the matter without an oral hearing.[1]

Background

[3] The applicant was awarded certain contracts by both the City of Tshwane and the City of Johannesburg. In terms of those contracts the applicant was required to provide reticulation services to ensure the supply and connection of large voltage electricity. It seems that the employees involved in this case were employed in positions connected with the execution of the applicant's obligations under some of those contracts.

[4] In June 2008 the applicant's contracts with the two cities expired. However, it would appear that only the contract with the City of Tshwane was permanently lost and certain contracts with the City of Johannesburg were retained. According to the applicant, it experienced financial difficulties as a result of the loss of the contract that it had with the City of Tshwane.

[5] The applicant says that, as a result of the financial difficulties, it had no alternative but to resort to retrenchment. This led it to terminate the contracts of

[1] Rule 13(2) of the Rules of this Court reads as follows:
"Oral argument shall not be allowed if directions to that effect are given by the Chief Justice."

employment of the employees. It says that on 23 January 2009 it gave the employees letters informing them of their dismissal for operational requirements with effect from 31 January 2009. The union and the employees say that at the time of the dismissal the employees were not informed of the reason for their dismissal.

Referral to conciliation

[6] A dispute arose about the fairness of the dismissal of the employees. On behalf of the employees the union referred an unfair dismissal dispute to the National Bargaining Council for Electrical Industries (bargaining council) in terms of section 191(1) of the Labour Relations Act[2] (LRA) for conciliation. This was in February 2009.

[7] The bargaining council convened a meeting between the parties on 3 March 2009 to try and resolve the dispute through conciliation. These attempts failed. On the same day, the bargaining council issued a certificate in terms of section 191(5) of the LRA that the dispute remained unresolved.

Referral to the CCMA for arbitration

[8] After the failure of the conciliation process, the union requested the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate the dispute. In the arbitration the employees' case was that the reason for their dismissal was unknown to them. The applicant was represented by a Mr Coxwell Mavhandu who, it says, was a labour consultant. Mr Mavhandu said that he was employed as a human resources manager by the applicant. Nothing turns on this conflict between the two versions.

[9] It is not clear why the union referred the dispute to the CCMA for arbitration instead of asking the bargaining council to arbitrate the dispute. In terms of

[2] 66 of 1995. Section 191(1) provides that, if there is a dispute about the fairness of the dismissal of an employee, the employee may refer that dispute to a bargaining council if the parties fall within the registered scope of a council or to the Commission for Conciliation, Mediation and Arbitration for conciliation.

section 191(1)(a)(i) read with subsection (5) of the LRA, a dismissal dispute is required to be arbitrated by the bargaining council within whose scope of registration the parties fall if there is one. In such a case, as a general rule, the CCMA has no jurisdiction to arbitrate that dispute. One would have expected that the union would have asked the bargaining council to arbitrate the dispute because it, obviously, had jurisdiction. Otherwise, it would not have handled the conciliation process.

[10] In the arbitration proceedings the applicant's representative informed the commissioner that the reason for the dismissal was the applicant's operational requirements. In support of this he produced correspondence (which he said had been given to the employees). The correspondence was to the effect that the employees were dismissed for operational requirements.

[11] The commissioner issued a ruling that, as the reason for dismissal was the applicant's operational requirements, the CCMA had no jurisdiction. He said that the dispute should be referred to the Labour Court for adjudication. It would appear that the ruling of the CCMA was issued on or about 29 July 2009.

Referral to the Labour Court

[12] On or about 7 October 2009 the union referred the dispute to the Labour Court for adjudication by delivering a statement of claim. The union says that it transmitted a copy of its statement of claim to the applicant by using the applicant's fax number. It is not certain whether Mr Mavhandu received the statement of claim. However, the applicant says that, if he did, he did not bring it to its attention.

[13] In the statement of claim the employees alleged that they did not know the reason for their dismissal. This was despite the fact that at the arbitration proceedings the applicant had said that the reason for the dismissal was its operational requirements and the CCMA commissioner had accepted this.

[14] In terms of section 191(5)[3] read with section 191(11)(a) of the LRA an employee must, within 90 days from the date of the expiry of 30 days from the date of receipt by the bargaining council or CCMA, as the case may be, of the referral of a dismissal dispute for conciliation, refer the dispute to the Labour Court for adjudication or request the bargaining council or CCMA to arbitrate the dispute. Whether a dispute qualifies to go to arbitration or adjudication is governed by the provisions of section 191(5).[4]

[15] It is not necessary to go into details about the provisions of section 191(5). It is sufficient to say that, as a general proposition, whether a dispute qualifies for adjudication or arbitration depends upon what the employee alleges is the reason for dismissal. If the employee alleges, for example, that he or she was dismissed for (alleged) misconduct or for incapacity or that he or she does not know the reason for his or her dismissal, the dismissal dispute must go to arbitration. If he or she alleges, for example, that the reason for his or her dismissal is the employer's operational requirements or his or her membership of a trade union or that the reason was his or

[3] Section 191(5) reads:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if—
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
>
> (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable; or
>
> (iii) the employee does not know the reason for dismissal; or
>
> (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
>
> (i) automatically unfair;
>
> (ii) based on the employer's operational requirements;
>
> (iii) the employees participation in a strike that does not comply with the provisions of Chapter IV; or
>
> (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[4] Id.

her race, nationality, pregnancy, colour, religion or participation in an unprotected strike, the dispute must be referred for adjudication by the Labour Court.

Default judgment

[16] The applicant did not deliver a response to the statement of claim within the period prescribed by the Rules of the Labour Court. The Registrar of the Labour Court then set the dispute down for default judgment. In terms of Rule 16[5] of the Rules of the Labour Court the Registrar need not give a respondent who does not deliver a response to a statement of claim notice of set down of an application for default judgment. The applicant, as seen earlier, had not reacted to the receipt of the statement of claim. For that reason the Registrar did not give the applicant a notice of set down.

[17] It would appear that some time before the date of hearing by default, the union and employees delivered certain affidavits to the Labour Court. In those affidavits they averred for the first time that the reason for the employees' dismissal was their union membership. Those affidavits were not served on the applicant. No explanation has been advanced by the union and the employees as to what prompted the preparation and delivery of those affidavits. Nor have the union and employees offered any explanation why those affidavits were not served on the applicant.

[18] The Labour Court granted a default judgment against the applicant. It ordered the applicant to pay each of the employees an amount equal to that employee's 24 months' remuneration. The applicant says that the monetary value of that order is more than R1 million. The Labour Court did not give reasons for its order. However, it is obvious that it must have found that the reason for the employees' dismissal was their membership of the union. This is so because it is only if the Labour Court had

[5] Rule 16 of the Rules of the Labour Court reads:

> "If no response has been delivered within the prescribed time period or any extended period granted by the court within which to deliver a response, the registrar must, on notice to the applicant(s), enrol a matter for judgment by default."

made that finding that it could award the employees the huge amounts of compensation that it awarded.[6]

[19] The finding that the employees were dismissed for union membership would mean that that dismissal was a breach by the applicant of each employee's right to join a trade union entrenched in the Constitution[7] and provided for in the LRA.[8] This would also mean that the dismissal was contrary to section 187(1)[9] read with sections 4(1)(b) and 5(1) of the LRA and constituted an automatically unfair dismissal. That finding attracts a higher amount of compensation than would be the case with a dismissal based on the employer's operational requirements or where the employee does not know what the reason for the dismissal is.[10]

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[6] See below n 10.

[7] Section 23 of the Constitution reads:

> "(2) Every worker has the right—
>
> (a) to form and join a trade union".

[8] Section 4(1) of the LRA reads:

> "Every employee has the right—
>
> . . .
>
> (b) to join a trade union, subject to its constitution."

[9] Section 187(1) reads:

> "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is . . . ."

[10] Section 194(1) and (3) of the LRA reads:

> "(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
>
> (2). . .
>
> (3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

The rescission application

[20] The applicant subsequently launched an application in the Labour Court for the rescission of the order. The union opposed the application and delivered an answering affidavit. In the view I take of this matter, I do not consider it necessary to go into details about when the applicant became aware of the order and about its explanation for its default. It suffices to say that the applicant says it was Mr Mavhaudu who would have received the documents. However, the applicant says that it subsequently terminated its relationship with Mr Mavhandu when it realised that he had failed to handle this matter properly. It then instructed a firm of attorneys to handle the matter on its behalf.

[21] The matter came before Coetzee AJ. He dismissed the application. In his judgment the Acting Judge focussed only on the applicant's explanation for its failure to deliver its response to the statement of claim. He found the explanation to be unsatisfactory. He then dismissed the application without considering the applicant's prospects of success or any of the other factors usually considered in an application for rescission. In adopting this approach, the Court did not say it was doing so because the delay was excessive and the explanation for it poor.

[22] The applicant subsequently launched an application in the Labour Court for leave to appeal. It took about a year before that application was adjudicated. This was in 2014. The Labour Court dismissed that application. The applicant thereafter made an application to the Labour Appeal Court for leave to appeal but that Court, too, dismissed that application.

In this Court

Jurisdiction

[23] This Court has jurisdiction in respect of this matter. The order the applicant seeks to have rescinded was based on a finding by the Labour Court that it had

infringed the employees' right to join a trade union which is entrenched in section 23(2)(a) of the Constitution. That makes this a constitutional matter.

Leave to appeal

[24] This Court grants leave to appeal if it is in the interests of justice. A very serious finding was made by the Labour Court against the applicant. That is that the applicant dismissed its employees for being members of a trade union. This finding means that the applicant is anti-trade union and has violated one of the most fundamental rights guaranteed to workers by our Constitution, namely, every worker's right to join a trade union.[11] The applicant seeks an opportunity to have that negative finding reversed. The order of the Labour Court flowing from that finding requires the applicant to pay compensation to its former employees in an amount of more than R1 million.

[25] The applicant has been denied leave to appeal by both the Labour Court and the Labour Appeal Court. It has no other court to turn to.[12] It contends that the Labour Court had no jurisdiction to adjudicate this dispute. In addition, the Court allowed affidavits to be filed which had not been served on it and were in conflict with the employees' case as set out in their statement of claim. It also contends that the Labour Court ordered it to pay double the compensation it otherwise would have had power to order it to pay had it dealt with the matter on the basis of the employees' case as set out in the statement of claim. Furthermore, there are reasonable prospects of success. In my view, it is in the interests of justice that leave to appeal be granted.

The appeal

[26] On appeal the question is whether the Labour Court was right in dismissing the applicant's rescission application. The provision of the LRA that confers upon the

[11] See section 23(2)(a) of the Constitution.

[12] See section 168(3)(a) of the Constitution.

Labour Court the power to vary or rescind a decision it has previously made is section 165. Section 165 reads:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order—
>
> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings."

This provision mirrors the provisions of Rule 42(1) of the Uniform Rules of Court. This case concerns section 165(a).

[27] A party may have an order of the Labour Court rescinded under section 165(a) if it is shown that the order was erroneously sought or granted in the absence of that party. Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party. That is also the position under Rule 42 (1)(a) of the Uniform Rules of Court.[13] In respect of Rule 42(1)(a) this was held to be the position by a Full Bench in *Tshabalala and Another v Peer*.[14] Both the Supreme Court of Appeal and this Court have also made

[13] Rule 42 of the Uniform Rules of Court reads:

> "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

[14] *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30D.

this point.[15] The Court may even rescind or vary its order on its own accord under this provision.

Was the order erroneously sought or granted?

[28] The next question is whether the order was erroneously sought or granted. Counsel for the applicant advanced a number of grounds upon which he contended that the order was erroneously granted. I agree. The Labour Court committed a number of errors in granting the order.

[29] Before the Labour Court may adjudicate a dispute, it, like any other court, should first satisfy itself that it has jurisdiction. In this case the Labour Court failed to do so. The certificate of non-resolution was issued on 3 March 2009. In terms of section 191(5) of the LRA the employees were obliged to refer the dispute to the Labour Court or to the bargaining council or CCMA, as the case may be, within 90 days from 3 March 2009. The Labour Court would not have jurisdiction to adjudicate the dispute if the dispute was referred to the Labour Court after the expiry of 90 days from that date unless the employees applied for condonation and showed good cause. In this case the 90-day period expired on or about 2 June 2009. The union referred the dispute to the Labour Court only on or about 7 October 2009. That was a delay of about four months.

[30] When the Labour Court granted default judgment, the union had not lodged an application for condonation. The union contended that the referral of the dispute to the Labour Court was within the prescribed period. It seems that this contention was based on a misconception that the 90-day period was to be reckoned from the date of the ruling of the CCMA. That is not so. In this case the period had to be reckoned from the date when the certificate was issued. In the absence of a finding that there was good cause for the failure to refer the dispute within the prescribed period, the

[15] *Ferris and Another v First Rand Bank Limited and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at para 13 and *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills Cape* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at paras 8-9.

Court had no jurisdiction to adjudicate the dispute. Accordingly, the Labour Court erred in adjudicating the dispute and granting the order without an application for condonation.

[31] Furthermore, if it was at all permissible for the union and employees to use affidavits in trial proceedings, at the very least the Labour Court should have satisfied itself that the affidavits had been served on the applicant so that the applicant would know their contents and take steps to protect its interests. The Labour Court should have realised that the averment in the affidavits that the employees had been dismissed for their membership of the union was in conflict with their case in their statement of claim that they did not know the reason for their dismissal. In granting the order on the basis of affidavits that had not been served on the applicant, the Labour Court also erred.

[32] It is also significant to note how the union and employees secured from the Labour Court double the compensation they may otherwise have been awarded. In the CCMA the employees' case was that they were dismissed for a reason that they did not know. The applicant informed them that they were dismissed for its operational requirements. The commissioner accepted the applicant's version. Very remarkably, in their statement of claim in the Labour Court the employees repeated their claim that they were dismissed for a reason they did not know. Yet, they suddenly acquired knowledge of the reason for their dismissal. Very conveniently, the employees averred that the reason for their dismissal was their union membership. They would have us believe that this suddenly-acquired knowledge had nothing to do with their knowledge that the applicant would not be at the default judgment hearing to dispute this story and that it had nothing to do with a desire to get double the maximum compensation that they could have been awarded if they stuck to the version set out in their statement of claim. That is difficult to believe.

[33] The Labour Court should have required oral evidence to satisfy itself whether the employees did not know the reason for their dismissal or whether they knew the

reason and it was their membership of a trade union or of MEWUSA. The employees would then have had to explain the inconsistency between that version and the contents of the letters suggesting that the dismissal was for operational requirements. The Labour Court erred in not requiring oral evidence to clarify this.

[34] I hold that the order was erroneously granted and should be rescinded. The appeal should be upheld. As this is a labour matter, no order as to costs should be made.

Order

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. There is no order as to costs in this Court and in the Labour Appeal Court.
4. The order of the Labour Court is set aside and replaced with the following:
   "(a) The order of this court granted by default against the respondent is rescinded.
   (b) The respondent is granted leave to deliver its response to the applicant's statement of claim within ten (10) court days from the date of this order.
   (c) There is no order as to costs."

For the Applicant:	A Redding SC and S Collet instructed by Clifford Levin Attorneys.
For the Respondent:	N Phala, representative of Metal and Electrical Workers Union of South Africa.