IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: **131/2014**

LAC CASE NO.: **JA22/14**

LC CASE NO.: **JS 1002/09**

In the matter between:

F & J ELECTRICAL CC Applicant

and

MEWUSA obo E. MASHETOLA & 15 OTHERS Respondent

APPLICANT'S WRITTEN SUBMISSIONS

CONTENTS

A. Introduction

1. The Applicant seeks leave to appeal to the above Honourable Court in terms of Rule 19(2) of the Constitutional Court Rules, against paragraphs 2 and 3 of the order handed down by the Labour Court on 29 June 2012 under case number JS1002/09 ("the Labour Court order").[1]

2. In terms of paragraphs 2 and 3 of the Labour Court order, the rescission application launched by the Applicant during March 2010 ("the rescission application"), in terms of which the Applicant sought to rescind the default judgment granted by the Labour Court against the Applicant on 4 February 2010 ("the default judgment")[2], was dismissed with costs.

3. On 14 March 2014, the Labour Court refused an application by the Applicant for leave to appeal ("the application for leave to appeal") to the Labour Appeal Court.[3] Furthermore, on 9 July 2014, the Labour Appeal Court refused a petition by the Applicant ("the petition") to the Judge President of the Labour Appeal Court for leave to appeal to the Labour Appeal Court.[4]

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[1] See Volume 3 pages 153 to 160 of the Record – the judgment delivered by the Honourable Mr Acting Justice Coetzee on 29 June 2012.
[2] See Volume 1 pages 43 to 44 of the Record – the default judgment of the Honourable Mr Justice Francis dated 4 February 2010.
[3] See Volume 3 pages 181 to 182 of the Record – the ruling on the application for leave to appeal by the Honourable Mr Acting Justice Coetzee dated 11 March 2014.
[4] See Volume 3 pages 217 to 218 of the Record – the order of the Honourable Justices Tlaletsi DJP, Davis JA and Sutherland JA in the petition dated 9 July 2014.

4. Considering that this is a labour matter, this application is launched having regard to sections 167(3)(b)(i) and/or 167(3)(b)(ii), read together with section 168(3), of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

5. If the application for leave to appeal is unsuccessful, the Applicant seeks direct access to the above Honourable Court for relief in the form of a declaration that Rule 16(1) of the Labour Court Rules is unconstitutional.

B. Factual background and the history of the litigation

6. The history of the litigation, it is submitted, is material to the determination of this matter and is, for the sake of convenience, therefore set out briefly below.

7. The Applicant was contracted to the City of Johannesburg and the City of Tshwane to provide reticulation services in that it was *inter alia* required to ensure the supply and connection of high voltage electricity. However, during or about June 2008, the Applicant's contracts with the City of Johannesburg and the City of Tshwane expired and the Applicant lost its two biggest clients, which resulted in the Applicant experiencing severe financial difficulties.

8. The Applicant had no alternative but to embark on a retrenchment exercise, which resulted in thirty employees, including the Individual Respondents, Mr E. Mashetola and 15 others ("the MEWUSA members"), being retrenched. The selection criteria of "last in first out" and the retention of skills were used. The retrenchments were effective from 31 January 2009.[5] (This version is disputed by the Respondents.)

9. Subsequent to the retrenchment of the MEWUSA members, the Respondents referred an alleged unfair dismissal dispute ("the dispute") to the National Bargaining Council for the Electrical Industry of South Africa ("the NBCEISA").

10. The dispute was set down for conciliation on 3 March 2009, and the NBCEISA issued a certificate certifying that the dispute remained unresolved.

11. The Applicant employed the services of a labour consultant, Mr Avhafunani Coxwell Mavhandu ("Coxwell") to deal with the dispute. Coxwell was mandated to deal with the dispute in its entirety.

[5] See Volume 3 pages 203 to 204 of the Record – paragraphs 13 to 16 of the founding affidavit in the petition; and Volume 1 pages 92 to 93 – paragraphs 12 to 18 of the supplementary affidavit in the rescission application.

12. The Respondents thereafter referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for arbitration and the dispute was set down for arbitration on 29 July 2009 before Commissioner Phala. A ruling was issued by Commissioner Phala on 13 July 2009 ("the CCMA ruling") that *"the matter [is] about dismissal for operational requirements involving more than one employee therefore the CCMA [does] not have jurisdiction to arbitrate the dispute. The applicant party is directed to refer the matter to the Labour Court for adjudication."*[6]

13. On 10 October 2009, approximately seven months after the certificate of non-resolution was issued, the Respondents referred the dispute to the Labour Court by filing a Statement of Claim. The referral of the dispute to the Labour Court was approximately four months out of time. However, the Respondents did not deliver a condonation application for the late filing of the Statement of Claim.

14. The Respondents alleged in the Statement of Claim that they were dismissed for *"reasons not made known to them".* They further alleged that if the MEWUSA members were in fact retrenched, as alleged by the Applicant at conciliation, no retrenchment consultation process was followed by the Applicant and that the retrenchments were accordingly procedurally unfair.

[6] See Volume 4 pages 255 to 258 – the CCMA Ruling.

15. The Applicant did not receive the Statement of Claim, which was allegedly faxed by the Respondents to the Applicant's fax number. Accordingly, the Applicant did not deliver a notice of intention to oppose or a Statement of Response.

16. The dispute was set down for hearing at the Labour Court on 4 February 2010. Notice of the hearing was only given to the Respondents. The Labour Court granted default judgment against the Applicant. The notice of set down for the hearing of the dispute was not sent by either the Registrar of the Labour Court or the Respondent to the Applicant.

17. The Labour Court did not deliver a judgment in the default proceedings. Only an order was issued. In terms of the order the MEWUSA members' dismissals were found to be automatically unfair; and the Applicant was ordered to pay compensation to the MEWUSA members in the amount of twenty-four months' remuneration each, plus interest thereon at the rate of 15.5% per annum *a tempore morae,* to date of final payment. The total amount of compensation payable by the Applicant to the MEWUSA members as at 4 February 2009 was R1 125 840.00 (one million, one hundred and twenty five thousand, eight hundred and forty rand).

18. On or about 2 March 2010, the Applicant launched a rescission application in the Labour Court seeking to rescind the default judgment. The rescission application was opposed by the Respondents, and an answering affidavit was filed by the respondents during March 2010. On 29 June 2012, a written judgment was handed down by the Labour Court in the rescission application ("the Labour Court judgment"), and the rescission application was dismissed with costs.

C. <u>The Labour Court order and judgment in the rescission application</u>

19. The Labour Court judgment places reliance on Rule 16(1) of the Labour Court Rules, which states as follows:

"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 <u>the applicant(s)</u> enrol a matter for judgment by default."

20. Despite the Applicant's denial on oath that it had received the Statement of Claim, the Labour Court found in its judgment that on a *"balance of probabilities",* the Applicant received the Statement of Claim; and that there was no justifiable excuse contained in either the founding or supplementary affidavits in the rescission application, for the Applicant not having opposed the Statement of Claim.

21. The Labour Court further found that in the circumstances, and having regard to Rule 16(1) of the Labour Court Rules, the Applicant was not entitled to receive a notice of set down for the hearing of the dispute on 4 February 2009. On the basis of the absence of an acceptable explanation for not opposing the Statement of Claim, the Labour Court held that the Applicant was not entitled to rescission of the default judgment.

D. Rescission applications in the Labour Court

22. In terms of sections 165(a) of the LRA, the Labour Court, acting of its own accord or on the application of any affected party may rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. The provisions of section 165 of the LRA mirror those of Rule 42 of the Uniform Rules of the High Court.

23. Rule 16A(1)(b) read with Rule 16A(2)(b) of the Labour Court Rules provides an additional ground for rescission, stating that the Labour Court has the power to rescind any order or judgment granted in the absence of any party affected, on good cause shown. The provisions of Rule 16A(1)(b) read with Rule 16(2)(b) of the Labour Court Rules in effect mirror Rule 31(2)(b) of the Uniform Rules of the High Court.

24. In addition to the above, a rescission application can self-evidently be granted in terms of the common law.[7]

[7] See *Erasmus*, Superior Court Practice, B1-308A; and *Vemisani Security Services CC v Mmusi and Another* (2013) 34 ILJ 440 (LC).

E. Why the default judgment was erroneously sought and/or erroneously granted in the absence of the party affected by the order or judgment

25. Section 165(a) of the LRA empowers a court to rescind a judgment or order which was "*erroneously sought or granted*". In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and would have induced the judge, if aware of it, not to grant the judgment.[8] Furthermore, an order or judgment is erroneously granted if it was not legally competent for the court to have made such an order.[9]

26. Once a court holds that an order or judgment was erroneously sought or granted, it should, without further enquiry rescind the order or judgment and it is not necessary for a party to show good cause.[10]

27. The rescission application launched by the Applicant was not expressly launched in terms of either section 165(a) of the LRA or Rule 16A(1)(b) of the Labour Court Rules. The failure to identify the precise section and/or rule is not fatal, and the rescission application may be determined in terms of either section 165(a) of the LRA or Rule 16A(1)(b) of the Labour Court Rules.[11]

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[8] *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D – G; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C.
[9] In the matter of *First National Bank of South Africa v Jurgens Bpk v Kaimowitz* 1996 (4) SA 411(C) at 417G – H it is stated that a judgment is erroneously granted where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded.
[10] *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 D – J; *Mutwebwa v Mutwebwa* 2001 (2) SA 193 (Tk) at 199 E – H.
[11] *Ntombela v Herridge Hire & Haul CC & another* [1999] 3 BLLR 253 (LC).

28. There are various reasons why the default judgment was erroneously granted and/or erroneously sought in the absence of the Applicant, alternatively why the Labour Court erred in its judgment, which reasons are dealt with below.

E1. <u>The first reason – the compensation sought and awarded was different from that to which the MEWUSA members were entitled under the cause of action pleaded</u>

29. In the default judgment, the Labour Court makes a finding that the MEWUSA members' dismissals were automatically unfair in terms of section 187(1)(f) of the LRA in that the Applicant allegedly unfairly discriminated against the MEWUSA members on the basis of their union membership. This finding would appear to have been made on the strength of various affidavits submitted by the MEWUSA members stating that they were dismissed because of their union membership.[12] However, this was not the case made out by the Respondents in the Statement of Claim, where they said the reason for the dismissal was *"unknown".*[13]

30. Also in the record before the Labour Court was a "founding affidavit" deposed to by one of the MEWUSA members, Mr Elijah Mashatola ("Mashatola"), on 28 October 2009, in which Mashatola states that he was *"merely notified"* of his dismissal and does not refer at all to the issue of union membership.[14]

[12] See for example, Volume 1 pages 16 and 16a of the Record.
[13] See Volume 1 pages 3 and 3a – paragraph 7 of the Statement of Case.
[14] See Volume 1 page 9 – paragraph 5.1 of the affidavit.

31. The Respondents made out a case in the Statement of Claim for a so-called ordinary dismissal, as contemplated in section 191(5)(a)(iii) of the LRA i.e. that the MEWUSA members do not know the reasons for their dismissals. In the circumstances the Labour Court, being restricted to those issues defined in the pleadings, could not have made a finding that the dismissal of the MEWUSA members was automatically unfair.

32. The MEWUSA members' affidavit evidence was deposed to a month after the Statement of Claim was filed. No explanation exists as to why the affidavits contradict the Statement of Claim nor is there an explanation why the Labour Court accepted the affidavit evidence.

33. Furthermore, in terms of the default judgment, the MEWUSA members were awarded compensation for an automatically unfair dismissal in the amount of 24 (twenty four) months' remuneration each. 24 (twenty four) months' salary constitutes the maximum compensation permissible, in terms of section 194(3) of the LRA for an automatically unfair dismissal. The affidavit evidence was deposed to a month after the Statement of Claim was filed. No explanation exits as to why the affidavits contradicted the Statement of Claim.

34. The Statement of did not allege an automatically unfair dismissal or claim the higher compensation available in such a case. No amendment was sought to the Statement of Claim. Furthermore, no notice was given to the Applicant that the MEWUSA members would be seeking compensation in excess of that to which they entitled in terms of the case made out in the Statement of Claim.

35. The Labour Court, in the absence of the Applicant, accepted evidence that the dismissal was occasioned because of the MEWUSA members' union membership – a prohibited ground that may establish an automatically unfair dismissal in terms of section 187(1)(f)(i) read with section 4 of the LRA.

36. Accordingly, whereas the Statement of Claim alleged an ordinary dismissal, as contemplated in section 191(5)(a)(iii) of the LRA (for which the maximum compensation, in terms of section 194(1) of the LRA, is 12 (twelve) months), the order indicates that a different cause of action was accepted (i.e. an automatically unfair dismissal) and this occasioned an award of 24 (twenty-four) months' remuneration as compensation.

37. In the supplementary affidavit of the rescission application, the Applicant raised the above-mentioned point by stating that the compensation awarded to the MEWUSA members was *"grossly excessive and unjustified."*[15]

38. Furthermore, the Applicant's representative specifically argued the above-mentioned point at the hearing of the rescission application.[16] The point is however rejected by the Labour Court during argument.

[15] See Volume 1 page 95 of the Record – paragraph 25 of the supplementary affidavit in the rescission application.
[16] See Volume 3 pages 126 – 130 of the Record.

39. In the circumstances, it is submitted that the Labour Court failed to appreciate the contradiction between the relief sought and the relief granted. The Respondents sought, and were granted, an order different from that to which the MEWUSA members were entitled in terms of the cause of action as pleaded in the Statement of Claim.

40. The Labour Court also had regard to, or relied upon affidavit evidence that was contradictory and in conflict with the Statement of Claim. No reason is provided for this. In addition, the Labour Court permitted the MEWUSA members to advance a different case to the one set out in the Statement of Claim, which was allegedly served on the Applicant. Even if it must be presumed that the Applicant received the Statement of Claim, it received no notice of the change of the cause of action, and the risk of higher compensation being awarded.

41. On the cause of action as pleaded by the Respondents, the Labour Court was not entitled to have granted compensation for an automatically unfair dismissal.

42. Accordingly, it is submitted that the Labour Court erred in granting the default judgment on 4 February 2010 and in later dismissing the rescission application.

E2. <u>Second reason – the default judgment was granted in the absence of a necessary condonation application</u>

43. As stated above, the dispute was conciliated on 3 March 2009, and the "certificate of outcome of dispute referred for conciliation" ("the certificate of non-resolution") was issued on the same day. The certificate of non-resolution was contained in the record before the Labour Court when the default judgment was granted; and before the Labour Court when the rescission application was granted.

44. The referral to the Labour Court in the form of a Statement of Claim, was delivered on 7 October 2009.

45. In terms of section 191(11)(a) of the LRA, a dispute concerning the fairness of a dismissal must be referred to the Labour Court within ninety days from the date of the certificate of non-resolution issued by the CCMA or a Bargaining Council. Since the certificate of non-resolution in this case was dated 3 March 2009, the ninety day period elapsed on or about 3 June 2009. The referral to the Labour Court was accordingly more than four months (120 days) late.

46. The requirement in section 191(11)(a) is peremptory – the word "*must*" is used. The Labour Court has the power to condone non-observance of the timeframe "*on good cause shown*" in terms of section 191(11)(b). No such condonation was sought or granted.

47. It is submitted that the Labour Court accordingly had no power nor was it competent to consider the dispute and to make an order due to the Respondent's non-compliance with section 191(11). The order against the Applicant was accordingly erroneously granted.

48. It is submitted that the fact that the dispute was, after conciliation, referred to the CCMA for arbitration, is irrelevant for the purposes of section 191(11)(a). In this regard, in the unreported decision of *Mduli v Vodacom (Pty) Ltd [2011] JOL 27910 (LC)* at paragraphs 14 to 15, it was held that:

"The commissioner, by this ruling, is not directing or effecting a referral to the labour court. The commissioner is merely stating that the commission does not have jurisdiction to deal with the matter. The applicant cannot read into this ruling a vague and nebulous notion that he refers the matter to labour court in simple compliance with the ruling and for that reason fail to acknowledge that firstly, a delay in the referral occurred and secondly, give a full and complete explanation in support of the application for condonation.

The referral to the labour court ought to have occurred within 90 days of the issue of the certificate of non-resolution. At any rate, if the referral was not made within 90 days as stipulated by section 191(11)(a), the labour court may condone non-observance of that timeframe, on good cause shown, in terms of section 191(11)(b).

The fact that the dispute was referred for arbitration and, erroneously so, is not in and of itself destructive to a referral to the labour court. All that which was required of the applicant was to make an application for condonation at the time the matter was referred to the labour court and cite the fact that the matter was referred in error for arbitration which resulted in the delay suffered…"

49. In light of the above, it is submitted that the Labour Court was not, in the absence of granting condonation for the late delivery of the Statement of Claim, entitled to have granted judgment for the Respondents. The rescission application should accordingly have been granted.

E3. <u>Third reason – on the Respondent's version, as contained in the Statement of Claim, the Labour Court did not have jurisdiction to determine the dispute</u>

50. Section 191(5)(a)(iii) of the LRA requires a Bargaining Council or the CCMA to arbitrate the dispute after conciliation has failed where an employee *"does not know the reason for dismissal".*

51. The matter in such circumstances cannot be referred to the Labour Court. The Labour Court has no inherent jurisdiction and can only hear cases properly referred to it in terms of the LRA.

52. Accordingly, the dispute could not have been duly referred to the Labour Court. The Labour Court ought to have refused to exercise jurisdiction over the matter, and the default judgment was erroneously granted in the circumstances.

E4. <u>Fourth reason – the Labour Court failed to properly consider the requirements for rescission in terms of Rule 16A(1)(a) of the Labour Court Rules</u>

53. The requirement of "good cause" in terms of Rule 16A(1)(b) read with Rule 16A(2)(b) of the Labour Court Rules requires an Applicant in a rescission application to show an absence of wilfulness; that he has a reasonable explanation for the default; that the application is *bona fide* and not made with the intention to delay the plaintiff's claim; and that he has a *bona fide* defence to the plaintiff's claim.[17]

54. A good defense can compensate for a poor explanation and vice versa.[18]

55. In the Labour Court judgment, it is found that there was *prima facie* service of the Statement of Claim on the Applicant. Furthermore, the Labour Court finds at paragraph 9 of its judgment that *"On the probabilities, the employer received the Statement of Claim as it briefed its consultant to deal with the matter. It could only have done so if it had received the papers."*[19]

56. The Applicant's evidence in the supplementary affidavit in the rescission application (and in the condonation application in respect of the late filing of the Statement of Response) was that the Applicant was unaware that the dispute had been referred to the Labour Court.[20]

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[17] *Sizabantu Electrical Construction v Guma & others* [1999] 4 BLLR 387 (LC)
[18] *Zealand v Milborough* 1991(4) SA 836 (SE) at 838; and *Carolus and another v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349 B – E.
[19] See Volume 3 page 155 – paragraph 9 of the Labour Court judgment.
[20] See Volume 1 page 110 of the Record – paragraph 12 of the founding affidavit in the condonation application for the late delivery of the Statement of Response.

57. The Labour Court's conclusion that *"on the probabilities, the employer received the Statement of Claim as it briefed its consultant to deal with the matter. It could only have done so if it had received the papers"* is illogical and simply wrong for the following reasons:

57.1. firstly, the fact that the Applicant briefed a labour consultant to deal with the matter does not and cannot infer and/or imply that the Applicant received the Statement of Claim. In this regard, the Labour Court fails entirely to take into consideration that the dispute was referred to conciliation and thereafter to arbitration. It is evident from the CCMA ruling that the Applicant was represented by the labour consultant at the arbitration, prior to the Statement of Case being drafted and filed at the Labour Court. Therefore, the fact that the Applicant briefed the Applicant to deal with the matter *"in its entirety"* does not constitute an admission that the Statement of Claim was received;

57.2. secondly, the Labour Court was not entitled, in application proceedings, to have made a determination *"on a balance of probabilities".* The Labour Court, it is submitted, was obliged to apply the test for considering evidence in motion proceedings, as laid down in the *Plascon-Evans* matter.[21] The Labour Court had to consider the denial by the Applicant of having received the Statement of Claim. It could only reject the denial if it was such as not to raise a real, genuine or *bona fide* dispute of fact;[22]

[21] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 AD at 635 C.
[22] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

57.3. in the present case, the Applicant's denial was not a bare denial and its version, it is submitted, raised a *bona fide* dispute about receipt by the Applicant of the Statement of Claim. It should have sufficed;

57.4. thirdly, the rescission court failed to follow authority that provides that although an affidavit and fax slip creates a presumption of receipt, it does not constitute conclusive proof of receipt; and that where there is a denial of receipt, the presumption of receipt is refuted.[23]

E5. Fifth reason – the Labour Court failed to consider the Applicant's *bona fide defence*

58. No account whatsoever was taken by the Labour Court in the rescission application of the question of whether the Applicant had demonstrated that it had a *bona fide* defence to the claim brought by the Respondents.

59. It is submitted that the Applicant's evidence in this regard was cogent – the MEWUSA members were dismissed for operational requirements, and not because they were union members.

60. It is submitted that had the Labour Court taken the above into account, it would have granted the rescission application.

F. The constitutionality of Rule 16(1) of the Labour Court Rules

[23] *Gay Transport (Pty) Limited v SA Transport & Allied Workers Union and Others* (2011) 32 ILJ 1917 (LC) at paragraph 19.

61. As stated above, the Labour Court judgement places reliance on Rule 16(1) of the Labour Court Rules, which states as follows:

"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." (emphasis supplied)

62. It is submitted that the effect of the application of Rule 16(1) is that the constitutional values and rights set out in section 34 of the Constitution are infringed.[24] [25]

63. In amplification, it is submitted that the *audi alteram partem* rule is one of the main pillars of a fair public hearing as provided for in section 34 of the Constitution. This right affirms the rule of law which is a founding value of the Constitution. A fair hearing before a court is a pre-requisite to an order being made against anyone. Courts are obliged to ensure that the proceedings before them are always fair, which includes the fact that an order should not be made without affording the other side a reasonable opportunity to state their case.[26]

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[24] It is noteworthy that in the matter of *BDO Spencer Stuart (Jhb) Inc v Otto* (2002) 9 BLLR 831 (LC), Sutherland J was of the view that Rule 16(1) should be revised.

[25] Section 34 states, under the heading '*Access to Courts*' that "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court*…"

[26] See *De Beer N.O v North-Central Local Council and South-Central Local Council and Others* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109, at para [11]; *National Director Public Prosecutions and Another v Mohamed N.O. and Others* 2003 (4) SA 1 (CC) at para [36]

64. The Interim Constitution[27] included a similar right of access to courts at section 22.[28] It was held that a provision in Rule 49(1) of the Magistrate's Courts Act 32 of 1944, which required an applicant for rescission to furnish security for costs was inconsistent with section 22 of the Interim Constitution (and therefor invalid) in that it had the effect that an impecunious applicant may be prevented from access to a court and representation in the light of the requirement that security for costs be paid.[29]

65. It is accordingly submitted that any provision which infringes upon the right of a party to a fair trial infringes the provisions of section 34 of the Constitution. Since it is axiomatic that notice or notification of the trial is an essential element of fairness, a provision which excludes or denies a litigant access to a trial infringes section 34.

66. This was expressly recognized by the High Court which recognized that a default judgment was a decision in the absence of one party, was "…*inherently contrary to the provisions of section 34 of the Constitution*".[30]

67. In the present matter, because the Applicant did not file a response to a Statement of Claim, the Registrar of the Labour Court enrolled the matter for a hearing without providing the Applicant with notice and affording it a right to be heard before a judgment sounding in a considerable sum of money was issued against it.

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[27] Act 200 of 1993
[28] It read "*Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum*"
[29] *Mthethwa (Khoza) and Others v Diedericks and Others* 196 (4) SA 381 (N)
[30] *RGS Properties (Pty) Limited v Ethekwini Muncipality* 2010 (6) SA 572 (KZD) at para [12]

68. Rule 16(1) of the Labour Court rules provides a procedure whereby a litigant who (for whatever reason) fails to file a Statement of Claim is denied notification of the time, date and place of a hearing or trial and is accordingly denied an opportunity to be heard on any aspect of the case.

69. It is significant that although Rule 6(1)(iv) requires the Statement of Claim to include a notice advising the other party that if it intends opposing the matter a response must be delivered, failing which the matter may be set down for default judgment and an order for costs against that party, the notice is not required to state that the judgment by default may be set down *without notice* to the respondent.

70. The Rules require that any response filed by a respondent must include the same information which is required to be in a Statement of Claim.[31] The response must contain a clear and concise statement of all the material facts upon which the party relies, a clear and concise statement of the legal issues that arise from the material facts and the relief sought.[32] The effect of the Rules, read together, is to deny a party an opportunity to be heard unless it files a response. There may be a myriad reasons why a response cannot be or is not filed, ranging from incapacity of the respondent to mistake.

[31] Rule 6(3)(b)
[32] Rule 6(1)(b)

71. It is submitted that it is not an adequate answer to say that in such circumstances a respondent has the relief of seeking a rescission of any judgment granted in its absence. Such relief operates *ex post facto* and may not eliminate or compensate a party for the prejudice which the granting of an order may cause.[33]

72. It is submitted that there is no good basis for a procedure whereby a litigant that has failed or refused to file a pleading is in effect prevented from being heard and opposing the relief sought. There is no apparent administrative efficiency to this short-cut.

73. It is submitted that Rule 16 of the Labour Court Rules has the effect of depriving a litigant of its fair trial rights, by denying it all opportunity to be heard before judgment is given. This, it is submitted, is inimical to the concept of a fair trial and the rule of law.

74. In the circumstances, it is submitted that Rule 16(1) should be declared unconstitutional.

G. <u>Why the matter constitutes a constitutional matter and/or raises an arguable point of law of general public importance as contemplated in section 167(3)(b) of the Constitution</u>

[33] The granting of an order may cause reputational prejudice (the publicity attendant upon the judgment, or the judgment being recorded and reported for credit risk purposes) or financial (in the form of the costs of resisting or setting aside attachments).

75. For reasons set out above, it is submitted that the following are constitutional issues:

75.1. the failure by the Labour Court in the rescission application to properly interpret and apply the provisions of section 165(a) of the Labour Relations Act; and/or

75.2. the failure to interpret and apply Rule 16A(1)(b) properly; and/or

75.3. the misinterpretation of Rule 16(1) to permit the exclusion of the principle of *audi alteram partem* for an employer party who fails to indicate opposition to a Statement of Claim; and

75.4. the LRA is a statute which gives effect to the right to fair labour practices provided at section 23 of the Constitution.

76. In addition to the above, there are several arguable points of law which are to be considered – each of significant public interest. The Applicant's rescission application was refused. Thereafter, it was denied leave to appeal to the Labour Appeal Court both by the court which heard the rescission application and the Labour Appeal Court itself. However, the issue of the proper interpretation of Rule 16(1), Rule 16A(1) and section 165(a) is directly relevant in the present case. The proper interpretation of these provisions, having regard to the important constitutional rights of a fair trial in cases of default judgments is a matter of considerable public importance, particularly to litigants in the Labour Court and employers and employees generally.

77. The court that heard the default application ought not to have granted it since, on the record before it, the referral was defective because it was more than four months late and no application for condonation demonstrating good cause had been launched by the respondents. The hearing was also grossly unfair and irregular in that the respondents were permitted to change their cause of action and claim double the compensation initially demanded in the Statement of Claim allegedly faxed to the Applicant – manifestly to the prejudice of the Applicant.

78. Furthermore, the court in the rescission application failed properly to apply the law in the manner set out above.

H. Conclusion

79. It is submitted that there are significant prospects of success in any appeal to the Constitutional Court. It is submitted that the application for leave to appeal should be granted.

A REDDING SC

S COLLET

Applicant's counsel

LIST OF AUTHORITIES

Legislation

Constitution of the Republic of South Africa Act 108 of 1996

Labour Relations Act 66 of 1995, as amended

Books

Erasmus, Superior Court Practice, B1-308A

Case Law

BDO Spencer Stuart (Jhb) Inc v Otto (2002) 9 BLLR 831 (LC)

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Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Sizabantu Electrical Construction v Guma & others [1999] 4 BLLR 387 (LC)

Topol and Others v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (W)

Vemisani Security Services CC v Mmusi and Another (2013) 34 ILJ 440 (LC).

Zealand v Milborough 1991(4) SA 836 (SE)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CCT CASE NO. : 131/2014
LAC CASE NO: JA22/14
LC CASE NO: JS 1002/09

In the matter between:

F & J ELECTRICAL CC **APPLICANT**

And

MEWUSA OBO ELIJAH MASHATOLA AND 15 OTHERS **RESPONDENT**

RESPONDENT'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. The respondents opposes the Applicant's application for leave to appeal to the above Honourable Court in terms of Rule 19 (2) of the Constitutional, against paragraph 2 and 3 of the order handed down by the Labour Court on the 29th June 2012 under case number JS 1002/09 (" the Labour Court order").

2. The Applicant's Application for rescission launched during March 2010("the rescission application") in terms of which the Applicant sought to rescind the default judgment granted by the Labour Court against the Applicant on the 4th February 2010("the default judgment") was opposed by the Respondent on the 17th March 2010.

3. The matter was set down for hearing on an opposed motion roll on the 4th of May 2011 and during the date of hearing, the Applicant did not attended and the matter was heard in the absence of the Applicant.

4. Due to the Applicant's non -attendance , the Honourable Court granted the Respondents an order whereby the matter was struck off the roll and the court and that the matter may only be considered for re-enrolment on the filing of an affidavit in terms of the Rule of the Court.

5. On or about the 25th August 2011, the Applicant filed its paper for re-enrolment but failed to notify the Respondents about its application for re-enrolment, but eventually the Respondent opposed the application.

6. When the Applicant launched its application for re-enrolment, its fails to file its statement of response.

7. On or about the 26th of April 2012, the applicant filed its statement of response together with its application for condonation approximately 26(twenty six months) after the default judgment was granted.

8. The dispute was set down for hearing on the opposed motion roll on the 29th June 2012.

9. The court ordered that, the application for rescission of the default judgment is re enrolled; that the application for rescission is dismissed and that the Applicant is to pay the cost of the proceedings of the application to reinstate the matter and for the application for rescission.

10. On or about the 11th July 2012, the applicant launched its application for leave to appeal in terms of Rule **30** of the Rules of the Labour Court and respondent opposed it.

11. The application for leave to appeal was heard by the Judge in chambers and the judgment was delivered on the 2013.

12. The court ordered that the Applicant's application for leave to appeal is dismissed and that the applicant must pay the cost of the Respondent.

13. On or about the 8th March 2014, the Applicant launched its Notice of petition in terms of the Rule 4 of the Labour Appeal Court Rules to the Honourable Judge President of the Labour Appeal Court of South Africa.

14. The Court made an order on the 10th July 2014 that the petition for leave to appeal is refused with no order as to costs and the Applicant launched its application for leave to appeal in terms of Rule 19(2) against paragraph 2 and 3 of the order handed down by the Honourable Mr acting justice Coetzee in the Labour Court on the 29th June 2012 under case Number JS 1002/2009.

15. The respondent opposed the applicant's application for leave to appeal.

B. **FACTUAL BACKGROUND AND THE HISTORY OF THE LITIGATION**

1. The Applicant was contracted to the city of Johannesburg, the city of Tshwane and the city of Ekurhuleni and its contracts were renewed and it never experienced any severe financial difficulties.

2. The Applicant had never embarked on retrenchment exercise as it is alleged and if indeed the applicant embarked on retrenchment it should

have notified the Respondent's union and invite it for consultations in terms of section 189 of the L.R.A. but, this had never happened.

3. The Respondents were dismissed unfairly for joining the Union and for exercising their rights in terms of section 5 of the L.R.A. Act, Act 66 of 1995.

4. After the Respondents' unfair dismissal, the dispute was declared at the National Bargaining Council for the Electrical Industry of South Africa ("NBCEISA")

5. The dispute was set down for conciliation on the 3rd March 2009, and the NBCEISA issued a certificate certifying that the dispute remained unresolved.

6. The respondent then referred the unfair dismissal dispute to CCMA for arbitration on the 23rd April 2009.

7. During the hearing at CCMA the Applicant was represented by its employee Mr. Coxwell **Mavhandu** ("Coxwell") who was employed as a Labour Relation Officer.

8. The Applicant raised a point in **limine** during the hearing that the Respondents were dismissed due to applicant's operational requirement.

9. As a result, the Commissioner issued a ruling that the dispute maybe referred to the Labour Court for adjudication.

10. On or about the 25th September 2009, the Respondent referred the dispute to the Labour Court and the affidavit in support of proof of service was deposed to that effect.

11. The dispute was referred to the Labour Court within the prescribed time limits and there was no need for condonation application. The allegations that the dispute was referred to Court late is a fallacy and it is unfounded.

12. It's true that the Respondents were dismissed for reasons not made known to them and that no retrenchment took place as alleged by the Applicant because there was never any retrenchment consultation process. Besides, the letter handed to the respondents dated the 23rd January 2009 which does not state that the respondents were dismissed due to retrenchment but it is only titled termination of service.

13. The Applicant received a statement of claim which was faxed by the Respondents to the Applicant's fax number and Affidavit in support of proof of service was deposed to that effect and the Applicant of its own accord decided not to oppose it.

14. The dispute was set down on an unopposed motion roll because the Applicant failed to file its notice of opposition and it was unnecessary for the registrar to notify them. The Applicant did not oppose the application because it undermines the Union but at its own peril.

15. The Court in granting the Respondents compensation exercised its own discretion which was done judicially.

16. The applicant launched its rescission application on the 2nd March 2010 and again Mr. Coxwell Mavhandu stated in his affidavit in support of the application for rescission that he was employed by the Applicant as its Hr. Manager. The Applicant keeps on misleading this Honourable Court that Mr. Coxwell Mavhandu was hired as a Labour Consultant.

C. THE LABOUR COURT ORDER AND JUDGMENT IN THE RESCISSION APPLICATION

1. It true that the Labour Court judgment places reliance on Rule 16(1) of the Labour Court Rules. 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, if satisfied that there is proof of service and the affidavit to that effect only notify the applicant and enroll a matter for judgment by default.

2. The Applicant's demand that it did not receive a statement of claim is unfounded and the Court in refusing the application based its judgment on the fact the fax number used by the Respondent to send its statement of claim indeed the fax number of the Applicant.

D. RESCISSION APPLICATIONS IN THE LABOUR COURT

1. The provisions of section 165(2)(a) of the LRA and that of Rule 42 of the Uniform Rules of the High Court is quiet clear, the court may rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party only on good cause shown or reasonable explanation given. The Application must be shown to the bona fide and not merely with the intention of delaying Respondent's claim and in addition to that, the applicant must show prima facie, a bona fide defense to the Respondent's claim.

2. Rule 16A (1) (b) read with Rule 16 A (2) (b) of the Labour Court Rules is also clear. It requires good cause must be shown in order for the application for rescission to be granted. In this matter, the Applicant failed to show good cause, after the CCMA Ruling was issued, the Applicant as a dominus litis should have followed the case because the CCMA ruling stated that the dispute may be referred to the Labour Court but the Applicant failed to do so. After the default judgment was granted on the 4th of February 2010, the Applicant applied for rescission of judgment but after the dispute was set down on the opposed motion roll the applicant again failed to attend and as a result, the application for rescission was stuck off the roll due to the Applicant's non - attendance. It is submitted that, the Applicant has a tendency of undermining the process of the Court solely to frustrate the Respondents and delay the relief which they are entitled.

3. It is submitted that,the compensation that was awarded to the Respondent was reasonable based on the fact that they were not consulted or their Union were not consulted by the Applicant in dismissing them and therefore the dismissal was automatically unfair. The Court has a discretion to award the Respondents 24 month's compensation if it finds that the dismissal was automatically unfair. Mr. Elijah Mashatola("Mashatola") stated in his affidavit that they were merely notified that their employment will be terminated but all the Respondents in their affidavits attached to the statement of claim state under oath that they were dismissed due to their union membership.

4. If the Respondents were dismissed due to their union membership, their dismissal were automatically unfair and the fact that Mr. Mashatola stated under oath that they were merely notified of the fact that their work will be terminated still make their dismissal automatically unfair because the Applicant failed to give them reasons why their employment is terminated.

5. At the CCMA there was a point in limine which was raised by the applicant that the Respondents were dismissed due to retrenchment but there were never any notification to the Respondents and their Union that the company/Applicant will be engaging in retrenchment consultations. They were only dismissed after the Union applied for organizational rights to the applicant.

6. It is submitted that there are no contradictions between the statement of claim and the Respondent's affidavits. The Labour Court accepted their affidavit evidence because it was not contested by the Applicant.

7. If the court find that the Respondents were automatically dismissed the court has a discretion to award the Respondents compensation that amounts to 24 months remuneration.

8. No amendment was sought to the statement of claim because the applicant never bother itself to respond to the Respondent statement of claim but merely applied for the rescission of judgment and failed to attend the hearing.

9. The fact that the applicant stated in their supplementary affidavit of the rescission application that the compensation awarded to the respondents was grossly excessive and unjustified does not mean that the court should have granted it a rescission application without good cause shown and without thorough explanation.

E. SUBMISSIONS

1. In the circumstances, it is submitted that the Labour Court in awarding the Respondent 24 months compensation did so after exercising its discretion which was done judicially.

2. It is further submitted that the learned judge did not erred in granting the default judgment on the 4th February 2010 and in dismissing the rescission application. The applicant did not responded on the Respondent's statement of claim and failed to show good cause why the rescission application should be granted.

3. It is submitted that there was no need for the Respondent's to apply for the late filing of the statement of claim because the Respondents referred the dispute to the Labour Court within the prescribed time limit. The Applicant in its papers did not include or attached the copy of the CCMA Ruling which shows clearly that there was no need for condonation. They did omitted the C.C.M.A ruling in order to mislead the Honourable Court. I deposed an affidavit stating that fact and I also notify the Applicant Attorneys of record about that issue but, still the Applicant is reluctant to admit it.

4. It is submitted that the referral of the statement of claim was delivered on the 25th of September 2009. It is only the affidavit in support of prove of service which was deposed on the 7th of October 2009 after the Respondent went to the court to seek an advice from the registrar`s office.

5. It is further submitted that even if the statement of claim was delivered on the 7th of October 2009 there was still no need for condonation application because it was still within the 90 days prescribed time limit in which to refer the dispute to the Labour Court.

6. It is denied that the referral to the Labour Court was more than four months (120 days) late. It is submitted that the Applicant is not stating the true facts in order to mislead the Court.

7. It is further submitted that no such condonation was necessary and if it was necessary the Court should have advice the Respondents to file their application for condonation or to apply for condonation in Court. Therefore it is denied that the order against the Applicant was erroneously granted.

8. It is submitted that the Applicant is mixing issues. If the dispute remain unresolved during the conciliation the matter/dispute may be referred to arbitration. It can only be referred to the Labour Court if the dispute was dismissed due to operational requirement.

9. During conciliation, the Applicant never raised the issue that the dismissal is for operational requirement. It was only during arbitration that the Applicant raised the issue of operational requirement.

10. It is further submitted that the referral of the dispute to the Labour Court was within the prescribed time limit. The fact that there was a C.C.M.A ruling after the dispute remain unresolved at the Bargaining Council interrupted the prescribed time limit of 90 days and section 191 (5) (b) stated very clear that the employees has an option either to refer the dispute to the Labour Court or to the C.C.M.A for arbitration. It does not mandated the employee to refer the dispute to the Labour Court. It state that he or she may, not as a matter of must but, only if he/she elect to do so.

11. It is submitted that there was no need for the Respondent to file a statement of claim together with application for condonation and therefore, the Honourable Court did not erred or misdirected its self in granting the Respondents default judgment and in refusing to grant the Applicant a rescission application.

12. It is further submitted that the Labour Court did not erroneously granted the default judgment because during the hearing at the C.C.M.A the Applicant raised a point in limine whereby it argued that the C.C.M.A does not have jurisdiction to arbitrate the dispute because the Respondents were dismissed as a result of the Applicant operational requirement that is why, the Commissioner issued a ruling that the dispute must be referred to the Labour Court.

13. It is submitted that the Applicant did not show “good cause” as required by Rule 16 A (1) (b) read with Rule 16 A (2) (b) of the Labour Court. The Applicant neglected its case and failed to follow it through out and make sure that his Labour Relation Officer Mr. Coxwell Mavhandu is doing the correct thing.

14. It is further submitted that the Applicant did receive a statement of claim and it was sent to its office by telefax and the affidavit was deposed to the effect that, it was indeed fax to the applicant`s place of business.

15. It is submitted that the Applicant was aware of the Respondent`s case from the initial stage and therefore should have followed it through out and the fact that the Applicant filed an application for rescission immediately after the default judgment was granted also shows that the Applicant was well aware of the statement of claim and should have filed a statement of response, an application for condonation, simultaneously with the rescission application.

16. It is submitted that there was no Labour consultant who was briefed to deal with the matter. Mr. Coxwell Mavhandu was at all material times an employee of the Applicant and the Applicant had the opportunity to see him on a daily basis. The C.C.M.A ruling stated very clearly that Mr. Coxwell was a Labour Relations Officer of the Applicant and in the initial recession application, the very same Mr. Coxwell stated under Oath that he is an employee of the Applicant employed as a Human Resource Manager.

17. It is submitted that the court has a discretion to refer the matter for a trial only if there is a genuine disputes of fact.

18. It is submitted that the applicant did not have a bona fide defense and that is why it failed to respond to the respondent statement of claim and to attend the rescission hearing which was struck of the roll.

19. It is submitted that the Court consider all the necessary steps and came into a conclusion base on the evidence before it.

20. It is submitted that rule 16 (1) is constitutional and the applicant was afforded enough time to respond to the respondent`s case. It does not infringe what so ever to section 34 of the constitution Act, Act 108 of 1996. Section 36(1) one of the Constitution provides that " the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the

nature and extent of the limitation; (d) the relation between the limitation and its purpose; and € less restrictive means to achieve the purpose".

21. The Applicant has been afforded fair public hearing as provided for in section 34 of the Constitution Act, Act 108 of 1996 and the principle of auli alteram partem had been applied and therefore, it is submitted that the Applicant had been afforded a fair proceedings.

22. It is submitted that the interim Constitution is no longer binding and that it was superseded by the final Constitution and therefore, the Applicant cannot rely on it for its argument.

23. It is submitted that the applicant filed its application for rescission immediately after the default judgment was granted in favour of the respondent but failed to file a statement of response, condonation Application and to appear before court during the rescission application hearing which resulted in the matter been struck off the roll.

CONCLUTION

It is submitted that the court did applied and interpreted the provisions of section 165 (a) of the Labour Relations Act and/or failed to interpret and apply 16 A (1) (b) properly, and/or misinterpreted the provisions of Rule 16 (1) and there are no significant prospects of success of an appeal to the constitutional court. It is further submitted that the applicant`s application for leave to appeal should be dismissed with costs.

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Ntshwane Phala

Respondent`s Union Official