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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J3915/00
J6056/00

2001.07.31

In the matter between

MTHEMBU, EMMANUEL Applicant

and

UNIQUE AIR Respondent

PARNIS AIRPORT MAINTENANCE SERVICES

(PTY) LIMITED Applicant

and

CCMA AND OTHERS Respondents

J U D G M E N T

LANDMAN, J: I have before me two applications. The first is the application of Emmanuel Mthembu v Unique Air (J3915/00) in which Ms Venter represents the respondent. I also have before me the matter involving Parnis Airport Maintenance Services (Pty) Ltd v CCMA and Others (J6056/00) in which Mr Beaton appears on behalf of the applicant.

The matter in Unique Air is an application for the rescission of a judgment.

The basis of the application for a rescission of the judgment is that the respondent in the main case was not given notice of the set down of the application for default judgment.

The Parnis Airport case concerns an application for an arbitration award to be made an order of court. Neither application is opposed. Both must therefore be treated as applications for default judgment.

In both cases the notices of motion and the founding affidavits have been served on the respective respondents. The respondents are in default and the matter has been enrolled by the Registrar in terms of the rules for hearing today. In terms of the Rules of the Labour Court it is the Registrar who enrols matters. The Registrar is enjoined to do so as expeditiously as possible. It is not, as in other courts, the parties who enrol matters. It is also the Registrar's obligation to serve the notice of set down of a hearing for default judgment on the applicants in those cases, so that they may know when their case is to be heard in court.

The question then arises what is to be done about the respondents? Must they also be notified that an application is pending against them and that an application for default judgment will be moved for judgment against them? In neither of the two cases with which I am presently dealing, nor in the other 71 cases which are on the roll today, have the respondents received notices of set down. Unless they have received information from some source other than the Registrar's office, they will not know that an application will be made today.

Rule 7(2)(e) of the Rules of this Court which deals with applications reads as follows:

"The notice of application must substantially comply with Form 4 and must be signed by the party bringing the application. The application must be delivered and must contain the following information: ---

(e) A notice advising the other party that if it intends opposing the matter that that party must deliver an answering affidavit within 10 days after the application had been served, failing which the matter may be heard in the party's absence and an order of costs may be made."

Rule 7(6A) reads as follows:

"An application to make a settlement agreement or arbitration award an order of court which is unopposed must be enrolled by the Registrar **on notice to both parties**. A court may make any competent order in the absence of the parties." (my emphasis.)

The then acting Judge-President considered that Rule 7(2)(e) and Rule 7(6A) are ambiguous. He issued Practice Direction No. 2 of 1999. It reads as follows:

"The Acting-Judge President of the Labour Court issued the following Practice Direction on 24 November 1999.

1. In the light of the uncertainty created by the provisions of Rule 7(2)(e) read with those of Rule 7(6A) with regard to whether or not it is necessary to serve a notice of set down of an application on a respondent who has not filed an answering affidavit as required by Rule 7(2)(e) of the Rules of the Labour Court, it is deemed necessary to issue the Practice Direction in paragraph 2 below.
2. With immediate effect no notice of set down is required to be served on a respondent who has not filed an answering affidavit in application matters."

The Registrar has followed this direction. The Registrar cannot be criticised by this court for following a direction issued to her by the Judge President of this court. However, when the matter reaches court, the court must decide whether the Judge-President's direction takes precedence over the rules of the Labour Court. The rules of a court of law constitutes subordinate legislation. See Jones & Buckle, *The Civil Practice of the Magistrates' Court of South Africa*, Vol 1, 33.

I am of the opinion that the Rules of the Labour Court, which are issued by the Rules Board, also constitute subordinate legislation. I find that subordinate legislation cannot be overruled by a directive which is of an administrative nature. In these circumstances I intend to follow the rules until such a time as the rules have been amended.

However, I should consider whether there is an ambiguity. In approaching this matter, I must construe the rules according to the normal rules of interpretation. I may only depart from the plain meaning of the words if adopting the plain meaning would lead to a glaring absurdity or a result which is plainly repugnant to the intention of the drafters of the rules. See Galgut J in Montana Steel Corporation (Pty) Ltd v New Zealand Insurance Co 1975 (4) SA 339 (W).

I am also mindful of the fact that a practice which develops in a court cannot change the rules of the court. As Flemming J put it, in Leppan v Leppan 1988 (4) SA 455 (W) at 495C:

"No division can amend a rule of court by simply following its own head."

So the question is whether there is an ambiguity and, if so, how it should be dealt with. If there is an ambiguity I would be entitled to regard to the Judge-President's directive in the same way as one would regard an opinion or a submission. It may have persuasive authority and, if it does, then appropriate respect and weight must be given to it.

However, it seems to me that there is no ambiguity and the directive overlooks the provisions of Rule 16. Rule 16 provides as follows:

"If no response has been delivered within the prescribed time period or any extended period granted by the Court to deliver a response, the Registrar must, **on notice to the parties**, enrol the matter as judgment by default". (my emphasis.)

Quite clearly a default judgment includes both an application based on a statement of case and an application based on a notice of motion supported by an affidavit or affirmation. If one looks at all three applicable rules, it is quite clear that the rules enjoin the Registrar to serve the notice of set down in applications for default judgment on both parties. This has clearly been considered by the Rules Board as appears from the fact that Rule 7(6A) was introduced after Rule 6(2)(e) had been promulgated. The reasoning for the requirement that both parties should have notice of the set down arises, *inter alia*, from the fact that very often lay persons draft their own documents and serve their own applications. It is not always clear that there is adherence to requirements of the rules and, moreover, some of the affidavits indicating proof of service are themselves incomplete and ambiguous. Therefore the Rules Board has adopted what may be described as a belt and braces approach. Not only must applications be served but the notice of set down should be brought to the attention of all the parties. This is done to ensure, *inter alia*, that justice is done, that the *audi alteram partem* rule is complied with and to avoid a multiplicity of applications to rescind default judgments. This is particularly illustrated by the case of Unique Air which is serving before me. I have indicated earlier that it is an application for rescission of judgment on the basis that the notice of set down was not served on the respondent in the main case.

In the circumstances, regrettable as it may be, and although it causes inconvenience to all persons present in court, I am unable to entertain any application where the notice of set down has not been served on the respondent as required by the rules. I order that these matters be postponed *sine die* and that they be re-enrolled by serving the notice of set down on all parties to the matters concerned.

JUDGE A A LANDMAN

JUDGE OF THE LABOUR COURT

CASE NO. J3915/00

: MATTAE MAGAMTELA ATTORNEYS

T: ADV VENTER

SNYMAN VAN DEN HEEVER HEYNS ATTORNEYS

CASE NO. J6056/00

: ADV BEATON

VISSER, GERBER INC

TS: MR B OOSTENBURG (1ST RESPONDENT)

MR M BENCE (3RD RESPONDENT)