IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **Reportable**

CASE NO: JS 786/04

In the matter between:

EDGARS CONSOLIDATED

STORES LTD EDCON Applicant

and

H. DINAT AND OTHERS Respondent

JUDGMENT

MOKGOATLHENG A.J.

Introduction

[1] This is an application in terms of Rule 16A(1)(a)(i) and Rule 16A(1)(b) respectively for the rescission of the default judgement granted by Revelas J on the 17 November 2004.

[2] Revelas J. found the applicant's retrenchment of the respondents on the 30 April 2004, procedurally and substantively unfair, and ordered the applicant to pay compensation.

[3] The respondents are opposing the application.

The Factual Background

[1] In order to determine whether this application for rescission has merit it is apposite to consider the factual matrix upon which the granting of the default judgement is predicated.

[2] The applicant retrenched the respondents on the 30th of April 2004 alleging that their retrenchment was as a result of it's operational requirements.

[3] The respondents aggrieved by their retrenchment, referred the dispute to the CCMA. The conciliation proceedings were held on the 2nd of July 2004. The dispute was unresolved. The respondents thereafter issued a statement of case against the applicant alleging that their retrenchment did not comply with section 189 of the Labour Relations Act No 66 of 1995 (the Act).

[4] In view of the issues traversed in this application it is pertinent to allude to the modus operandi utilised by the respondents in firstly, initiating the referral to the CCMA, secondly, in serving the statement of case on the applicant, and thirdly, in notifying the applicant to comply with the court order issued by Revelas J.

[5] In initiating the conciliation proceedings attorney Yusuf Nagdee on behalf of the respondents addressed a letter dated the 27 April 2004 to the CCMA and transmitted the said letter together with the LRA Form 7.11 to the applicant by telefax to fax number (011) 837

5019.

[6] The salient features of the letter transmitted to the CCMA and the applicant are the following;

(a) "We enclose herewith the following documents:

i) Referral to CCMA,
ii) List of applicants as per Annexure A,
iii) Proof of transmission to Respondent (my emphasis)

[7] The letter written by attorney Yusuf Nagdee dated the 27th of April 2004 addressed to the CCMA was also furnished to the applicant. The salient features of this letter are the following;

(i) Cc Edgars Consilidated Stores Ltd (EDCON),
(ii) Edgerdale Press Avenue,
(iii) P.O. Box 200,
(iv) Crown Mines 2025,
(v) Telephone Number (011) 495 – 6000, and
(vi) Fax Number (011) 837 – 5019" (my emphasis)

[8] The applicant alleges that the telefax number (011) 837 – 5019 is its correct fax number and is the number of the fax machine situated in the main reception area at its Crown Mine premises. The applicant avers that when official documents are faxed to its correct fax number same are received, and are thereafter distributed to the relevant departments.

[9] The applicant's labour relations specialist R Ishwarchand alleges that he dealt with the referral LRA Form 7.11 on behalf of the applicant, and says that this referral was distributed to him at 12-16

Lamb Street New Centre Johannesburg via the applicant's internal mail system.

[10] The applicant says that on the 17 June 2004 the CCMA transmitted the notice of set down for the conciliation meeting by utilising its correct fax number (011) 837 5019. The applicant says that this notice of set down was received by R Ishwarchand on the 21 June 2004.

[11] Ex facie, the CCMA notice of set down contains the following salient features pertaining to the applicant;

(i) To: Edcon,

(ii) P.O. Box 100,
(iii) Crown Mines,
(iv) 2025,

(v) Telephone Number (011) 495 – 6000, and

(vi) Fax Number (011) 837 – 5019 (my emphasis)

[12] The notice of set down stated that the applicant was required to attend a conciliation process on the 2nd of July 2004.R Ishwarchand attended the conciliation proceedings on behalf of the applicant. At the conciliation hearing the respondents and R Ishwarchand signed an attendance register.

[13] R. Ishwarchand signed his designation as labour relations specialist on behalf of the employer (applicant), he also furnished the telephone number (011) 497 606, and the fax number (011) 491 7846. He alleges that he provided the fax number of the human

resources department which is the fax number of the fax machine situated at the New Centre premises where he is stationed.

[14] The applicant alleges that the court order granted in its absence on the 17 November 2004 ordering it to compensate the respondents only came to its knowledge on the 1st of December 2004 after same was faxed to it by the respondents' attorneys to its correct fax number (011) 837-5019.

[15] The applicant states that after receiving the court order it launched an investigation, which revealed the following;

a) on the 29 September 2004 the respondents statement of case was transmitted to the applicant utilising the fax number 086 673 7467,

b) attached to the statement of case was an affidavit by Yvette Bosch a candidate attorney in the employ of Yusuf Nagdee attorneys,

c) from Yvette Bosch's affidavit it was evident that the statement of case was transmitted to fax number 086 673 7467,

d) the Registrar on the 22 October 2004 issued a notice of set down enrolling the matter for default judgement on the 17 November 2004. The notice of set down was only sent to the respondents' attorney Yusuf Nagdee, and

e) on the 17 November 2004, Revelas J. granted default judgment.

[16] The applicant alleges that the fax number 086 673 7467 at its Crown Mines premises is utilised exclusively by its human resources administrator for Edgars North Division, Ms Monica Tshabalala.

[17] Ms Tshabalala avers that she does not recall receiving the statement of case, and is unable to confirm whether the statement of case was received by her fax machine. She says that the fax machine bearing the fax number 086 673 7467 receives a substantial number of faxed documents.

[18] The applicant states that the fax machine to which the respondents faxed their statement of case has special features these being; if a document is transmitted to the fax machine, the document is reflected on the computer, and if the document is marked for the attention of a particular recipient and department, the document it is printed. If the faxed document has no reference to a particular department or recipient, the document is automatically deleted as it is difficult to trace the department it is intended for. The applicant states that there are over 2000 employees employed in its human resource function and that its offices are situated at different locations.

[19] The applicant alleges that it was not in wilful default in not having opposed the respondents' statement of case. The applicant says that it was not notified of the date of hearing, and was not aware

thereof.

[20] The applicant alleges that at all material times, the respondent's attorney knew it's correct fax number, that this is evidenced by the faxed letter dated the 27th of May 2004 signed by Yvette Bosch initiating the conciliation proceedings, and the letter dated 1st of December 2004 enclosing the court order and requesting the applicant to comply therewith.

[21] The applicant states that at all material times it intended to oppose the respondent's claim, as demonstrated by it's attending the conciliation proceedings on the 02 July 2004.

Prospects of Success

[1] The applicant contends that it had a valid commercial rationale for restructuring it's business operations and says that this commercial rationale was communicated to the respondents, that they were all given an opportunity to make representations regarding the operational reasons informing the proposed restructuring.

[2] The applicant states that all the affected employees including the respondents were consulted on all the restructuring and retrenchment issues, that the respondents were afforded an opportunity to obtain positions in the new proposed structure, that they all applied for the positions but that they were all unsuccessful. The applicant avers that it complied with section 189 of the Act.

Bona Fide Defence

[1] The applicant alleges that it has a bona fide defence to the respondent's claim. The applicant states that it consists of two divisions, namely its discount division as well as various stores including Supermart. It says that during December 2003 it became evident for economic and strategic reasons that it would be beneficial to its business interests to incorporate Supermart into its discount division.

[2] The applicant says that the proposed integration affected employees in the discount division, the Supermart Store, the applicant's head office and administrative functions.

[3] The applicant states that it dispatched notices to all affected employees including the respondents advising them of the proposed integration, that subsequently a consultation meeting was held on the 20 January 2004, whereat the commercial rationale behind the restructuring was discussed based on a document entitled "Rationale United Retail of Supermart".

[4] The applicant avers that the respondents were advised to make representations regarding its restructuring during the consultation process, that the respondents were invited to apply for the positions in the new structure, that on the 28 January 2004 they were advised in writing that their contemplated retrenchment would eventuate on the 18 February 2004.

[5] The applicant contends that it had a valid structural as well as an

economic reason to effect the integration process, that the operational rationale was communicated to the respondents, that their retrenchment was procedurally and substantively fair and in compliance with section 189 of the Act.

The respondent's answering affidavit

[1] The respondents in their opposition to this application contend that the applicant;

(a) is not entitled to the rescission of the judgment in that it has not shown that there was a procedural error committed in the issuing of the judgment,

(b) has not demonstrated that the statement of case was telefaxed to a malfunctioning fax machine that therefore the respondent has complied with Rule 4 in that service was effected on a fax number belonging to the applicant,

(c) is not entitled to the rescission of judgment in that the applicant did not institute these proceedings within fifteen days as envisaged in terms of Rule 16(1)(b), and that the applicant has not instituted an application for condonation for its failure to comply with the fifteen day time limit,

(d) has not demonstrated a reasonable and acceptable explanation for its default in opposing the statement of case,

(e) has not proven good cause for rescission in the sense of showing a prima facie case,

(f) has failed to demonstrate a bona fide consultation process as contemplated section 189 of the Act, and

(g) has not shown that the selection criteria was fair and objective.

[2] The applicant has launched a two pronged application for the

rescission of the judgment in terms of Rule 16A (1)(a)(i) and Rule 16A(1)(b). In order to properly consider the merit of this application it is appropriate to have recourse to the provisions of Rule 16A.

[3] Rule 16A provides:

> "(1) The Court may, in addition to any other powers it may have –
>
> (a) of its own motion or on application of any party affected, rescind or vary any order or judgment –
>
> (i) erroneously sought or erroneously granted in the absence of any party affected by it;
>
> (b) on application of any party affected, rescind any order or judgement granted in the absence of that party.
>
> 2) Any party desiring any relief under –
>
> (a) sub-rule (1)(a) must apply for it on notice to all parties whose interests may be affected by the relief sought;
>
> (b)sub-rule (1)(b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the Court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit."

[4] The respondents argue that the applicant became aware of the default judgment on the 18th of November 2004 when the former faxed a copy of the default judgment to the applicant, and submit that it was imperative for the applicant to institute an application in

terms of Rule16A(1)(b) for the rescission of the judgment within fifteen days after acquiring knowledge that an order was issued on the 17th of November 2004.

[5] The respondents contend that since the applicant launched the application for rescission on the 22nd of December 2004, such application was launched fifteen days outside the time limit prescribed by Rule16A(1)(b) that, therefore the application for rescission is fatally defective in that it is not preceded by an application for condonation for the applicant's failure in not complying with Rule 16A(1)(b).

[6] The applicant states that it did not receive the court order faxed to it on the 18th of November 2004 because the respondents did not fax this court order to its correct fax number (011) 837-5019, that it only received the court order on the 1st of December 2004 when the respondents faxed the court order to its correct fax number, that therefore the application for rescission of judgment complies with Rule16A(1)(b). I agree with this submission as it will later appear in this judgment.

THE RULE 16A(1)(a)(i) APPLICATION

[1] Adv. Soni on behalf of the applicant contends that the applicant has in terms of section 34 of the Constitution a right to have its dispute with the respondents resolved by the application of law in a fair public hearing before this court, and argues that the denial of this

application will entail that the applicant will be obliged to comply with a court order without having had the benefit of having argued the merits in a full hearing.

[2] Adv Soni. further contends that a denial of this application would be an infringement of the applicant's constitutional right of access to this court to have this dispute adjudicated in a full hearing. The applicant argues further that the default judgment obliges it to pay the respondents a substantial amount of money, that a denial of this application will be greatly prejudicial to the applicant which is not in wilful default, and has a bona fide defence and prospects of success.

[3] Adv Soni submits that Rule 4 was not complied with, that the affidavit of Yvette Bosch in proof of service of the statement of case is fatally defective, that, as a result there was no proper service, alternatively, the service was null and void, that consequently the applicant did not receive due notification of these proceedings.

[4] Adv Mosam on behalf of the respondent argued that for the applicant to establish that the judgment was erroneously sought or granted in it's absence, that it must show that a procedural error or irregularity was committed in respect of the issuing of the judgment, failing which it would not be possible to conclude that the order was erroneously sought by the respondents or erroneously granted by the court.

[5] The reasons proffered by adv Soni in support of his submissions are that Yvette Bosch's affidavit does not state:

> "(a) that a statement of claim was faxed,
>
> (b) which person sent a statement of case,
>
> (c) that the fax number is the applicant's fax correct number,
>
> (d) that the affidavit in support of proof of service in terms of Rule 4 (2) (e), relates to the exigency where a certificate is issued by the post office for the posting of the requested letter and an affidavit that the letter posted contained the document concerned."

[6] Adv Soni argues that if Revelas J knew of the above mentioned facts she would not have granted the default judgment. He further contends that the respondents had to bring these facts to the learned Judge's attention.

[7] Adv Mosam argued that Yvette Bosch's affidavit complies with Rule 4. I agree with this submission. Rule 4(1)(iv) regulates the efficacy of service by fax. The affidavit filed by Yvette Bosch purporting to be in support of Rule 4 (2) (e) instead of Rule 4 (1) (iv) is not fatally defective as argued by Adv Soni. The wrong citation of the relevant rule can be accepted as a bona fide error, in any event it is common cause that service was sought to be effected by fax.

[8] The interpretation accorded to Rule 4 by adv Soni is too restrictive and too formalistic, and is not justifiable and reasonable having regard to the fact that proof of service effected by fax create do not a probability in favour of receipt but does not logically constitute

conclusive evidence of such receipt. (See **Roux v City of Cape Town (2004) 8 at p836 LC**).

[9] Adv Mosam argued that the respondents had complied with Rule 4 in that what is required to be proved is that service was effected through the fax number to the person to whom the service is directed. He submitted that the fax number through which the respondent's statement of case was effected was the fax number of the applicant. In support of this contention he refereed me to the case of *NUMSA & Another v Virginia Toyota (2003) 4 BLLR 392 (LC)*

[10] I now turn to evaluate the applicable legal principles. Rescission does not follow automatically upon proof of a patent error or mistake. The crisp question is whether Revelas J erroneously granted the judgment in this matter. In addressing this question it is relevant to consider the provisions of Rule 4.

[11] Rule 4 (1) (iv) provides,

"(1) a document that required to be served on my person may be served in any one of the following ways; namely –

(a) (i) ……..

(ii) ……..

(iii) …….

iv) by faxing a copy of the document to the person, if the person has a fax number;

(2) Service is proved in Court in any one of the following ways –

a) by an affidavit by the person who affected service;
b) if service was affected by fax, by an affidavit of the person who effected service. Which must provide proof of the correct fax number and confirmation that the whole of the transmission was completed;
c) if the person on whom the document has been served is already on record as a party, by signing acknowledgement of receipt by the party on whom the document was served; or
d) by return of sheriff;
e) by producing the certificate issued by the post office for the posting of the registered letter and an affidavit that the letter posted contained the document concerned."

[12] It is apparent that Revelas J in dealing with this matter was aware that service of the statement of case was effected on the applicant by fax, that there was an affidavit by Yvette Bosch confirming the service by fax, that there was no notice to oppose, nor a statement of defence.

[13] In the premises there was no good reason or *justus error* precluding Revelas J granting the default judgment.

[14] The narration of events explained by the applicant that the statement of case did not come to it's knowledge, that the Registrar did not notify it of the date of set down, that the respondents knew it's preferred correct fax number, does not reveal a procedural error or irregularity in the granting of the judgment.

[15] It cannot possibly be argued therefore that the judgment was erroneously sought by the respondents, or erroneously granted by Revelas J.

See **Colyn v Tiger food Industries Ltd t/a Mcadow Food Mills (Cape) 2003 (6) SA 1 SCA**, at page 8 G-H.

THE RULE 16A(1)(b) APPLICATION

[1] I now turn to consider the Rule16A(1)(b) application. An applicant in order to succeed in an application for the rescission of a judgment in terms of Rule16A(1)(b) is obliged to show " good cause". The applicant must also show that it has a bona fide defence on the merits of the case with some prospects of success.

[2] Regarding the requirement of a bona fide defence it is sufficient if the applicant sets out averments which, if established at the trial, would entitle the applicant to the relief sought, the applicant need not deal fully with the merits of the case or produce evidence that the probabilities are in it's favour. (See **Lumka and Associates v Maqubela (2004) 25 ILJ2326 (LAC) at** para 27.)

[3] The applicant is obliged to disclose the reasons for its default because it is relevant to the question whether the applicant's default was wilful or not. Before a person can be said to be in wilful default the following must be shown;

a) knowledge that the action is being brought against him,
b) a deliberate refraining from entering appearance though free to do so, and
c) a certain mental attitude towards the consequences of the default.

[4] In **Grant v Plumbers (Pty) Ltd 1949 92) SA 470 (0**) Brink J held that the following requirements should be complied with in order to show "good cause",

"(a) An applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance,

a) The application must be bona fide and not made with the intention of merely delaying plaintiff's claim, and

b) The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prime facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[5] In relation to the element of wilfulness, King J. held **– Maunjean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994(3) SA 801 (C)** that;

"(a) Wilful connotes deliberateness in the sense of knowledge or the action or consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend (or file a plea), whatever the motivation for his conduct might be."

[6] Smallberger J in **HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E)** at 300H – 301A stated that;

> "When dealing with words such as "good cause" and "sufficient cause". in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (**Cairn's Executors v Gaarn 1912 AD 181** at 186; **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)** at 352 – 3)
>
> The Court's discretion must be exercised after a proper consideration of all the relevant circumstances"

[7] A court will not come to the assistance of a defendant whose default was wilful or due to gross negligence. In **Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)** at page 765 A-E Miller J A had occasion to deal with the expression "sufficient cause" or "good cause", and stated that:

> "these concepts defy precise or comprehensive definition, for many and various factors require to be considered."

[8] The learned judge stated that it is clear that in principle the two essential elements of "sufficient cause" for rescission of a judgement by default are:

> "(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits."

The Analysis and Evaluation of Evidence

[1] It is common cause that the respondents faxed the LRA Form 7.11 referral for conciliation to the applicant at fax number (011) 837 5019, that it was received by the applicant's group industrial relations on the 21 June 2004.

[2] It is also common cause that On the 01 December 2004 the respondents' attorney telefaxed a letter to the applicant enclosing a copy of the court order, and a letter requesting the applicant to comply with the court order demanding payment by the 09 December 2004.

[3] It is not disputed that the applicant received the above referred to faxes, and immediately responded thereto. It is also not disputed that the applicant promptly responded to the court order and instituted investigations regarding the initiation of these proceedings.

[4] The applicant alleges that the documents faxed to the fax machine at it's human resources department are reflected on a computer, that if such document is not pertinently marked for the attention of a specific recipient it is automatically expunged as it is difficult to direct it to where such unspecified document was intended because of the fact that the applicant employs over two thousand persons in its human resources function and that its offices are situated at different locations.

[5] The applicant's explanation of how it's fax machine is linked to a computer or how it functions is not beyond the realm of possibility. The respondents do not dispute this explanation save to state that it is not convincing that since the statement of case is a legal document one would expect the document to be given specific attention.

[6] The respondents argue that the telefax numbers 011 837 5019 and 086 673 7467 are the applicant's fax numbers that logically they can be used interchangeably to effect service of documents in terms of Rule4 because Rule 4(i) (iv) provides that service may be affected by faxing a copy of the document to the person if the person has a fax number.

[7] The respondents in initiating these proceedings though the LRA Form 7.11 chose the fax number (011) 837 – 5019 to effect service

on the applicant

[8] The applicant's fax number (011) 837-5019 is in my view the applicant's correct fax number as contemplated in Rule 4(2) (b).

[9] It is conceivable that when the respondents gave instructions to their attorney they provided him with the applicant's two fax numbers for effecting service of documents, but this does not detract from the fact that the applicant's correct fax number for receiving faxed documents is (011)837-5019.

[10] The applicant's explanation that the faxed statement of case did not come to its knowledge is plausible and reasonable. The applicant did not acquiesce to the judgment, it immediately registered its intention to rescind same when it became aware of the judgment on the 1st of December 2004. This conduct manifests a willingness and intention on the applicant's part to defend the respondents claim.

[11] The applicant says that the respondents were given notification in terms of section 189 of the Act, that they were fully consulted on the proposed restructuring and retrenchment.

[12] The respondents do not deny that a modicum of consultation eventuated, that a restructuring process was undertaken, or that they applied for positions in the newly created structure.

[13] The respondent question the applicant's bona fides with regard to the consultation process as envisaged in terms of section 189 of the Act, and also question the objectivity and fairness of the selection criteria.

[14] On the conspectus of evidence, I cannot find that the applicant was in wilful default. The respondents have not argued that the applicant's conduct was grossly negligent in accessing documents from the fax machine to which the statement of case was faxed. There is a reasonable possibility that the statement of case may not have come through the fax machine, there is also a reasonable possibility that it may have come through the fax machine but did not come to the notice of Ms Monica Tshabalala. There is also a possibility that since the statement of case was not pertinently addressed to a person within the applicant's human resources function it may have been expunged by the fax machine.

[15] I cannot find any evidence with the functioning of the applicant's fax machine which can be construed as amounting to inexcusable inefficiency on the applicant's part.

[16] In the premises I am of the view that the applicant has shown that it has set out averments which if established at the trial would make out a prima facie defence. I am also of the view that the applicant has shown good cause as contemplated in Rule 16A (1)(b).

The Order

[1] In the premises, an order is granted setting aside the default judgement obtained on the 17th of November 2004.

[2] The applicant is ordered to pay the wasted costs incurred by the respondents in obtaining the default judgement and also the respondents' costs of opposition in the present application.

[3] The applicant is granted leave to enter an appearance to oppose within fourteen days hereof to defend the action instituted against it by the respondents, subject to the condition that it pays the respondents' costs above mentioned within fourteen days of presentation to it by the respondents of the latter's taxed bill of costs herein; failing such payment, the applicant's appearance to oppose will be struck out and the respondents be allowed to claim default judgement against the applicant in terms of the statement of case issued.

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ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

MOKGOATLHENG A J

Date of the Hearing: 13 May 2006

Date of Judgment : 30 June 2006

APPEARANCES

For the Applicant : Adv. Mosam

Instructed by : YUSUF NAGDEE ATTORNEYS
For the Respondent: Adv. Vas Soni
Instructed by : DENEYS REITZ ATTORNEYS