**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

**CASE No: JS 01/12**

In the matter between:

**NATIONAL UNION OF MINEWORKERS** First Applicant

**RATSHIMO & 09 OTHERS** Second to Further Applicants

and

**ALUMINIUM & SHADES (PTY) LTD**
**t/a PROCON INTERIOS** Respondent

**Heard:** 18 January 2017

**Delivered:** 18 January 2017

**Summary: No proper service of statement of claim- Application for default judgment refused.**

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**JUDGMENT**

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**MABASO, AJ:**

***Introduction:***

[1] On 22 January 2014, the Applicants brought an application for a default judgment, as the Respondent had not, according to the said application, "…*giving notice to oppose the referral having expired on the 18th January 2012* ,[1]" as the referral was served on the Respondent on "…*the 5th January 2012*.[2]"[3] As this is an application for a default judgment, the subtle point that has to be dealt with first, before dealing with the merits of the application, is that: was there a proper service of the referral on the Respondent whom the dispute has been declared against?

***Background:***

[2] On 05 January 2012, the First Applicant (the union) and the Second to Further Applicants (the employees) declared a dispute against the Respondent (the employer), claiming that the dismissals of the employees by the employer based on operational requirements were both procedurally and substantively unfair and that this Court should order the employer to reinstate, or alternatively compensate all the employees. Initiating this process, they filed, with the Registrar of this Court, a notice of application which was not accompanied by an affidavit as required by the Rules of this Court,[4] however, attached thereto a statement of case,[5] which amongst other things, deals with the condonation application without a prayer for such.[6] The condonation was necessitated by the fact that the dispute had been launched, with the

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[1] Court underlining.

[2] Court underlining.

[3] Pleadings at page 45.

[4] Rule 7(3) of the Rules.

[5] Rule 6(1) of the Rules.

[6] The Labour Appeal Court in the matter of *HSL RANI V TELKOM LIMITED*, JA91/10, decided on 05 September 2012. In deciding on an issue of condonation where a statement of case had been delivered late, it held as follows, regarding manner in which condonation should be brought in this court: "***there must be a prayer*** *to that effect in* ***some application****". (Emphasis added)*

Registrar of this Court, outside the 90-day period from the date on which the conciliation certificate was issued.[7]

[3] Following the delivery of the default application, on 15 April 2014 Thlothlalemaje AJ (as he then was) issued,[8] in chambers, a directive (first order) on the following terms: *"The Applicants are to file and serve statement of case on the Respondent and to file affidavit in terms of proof of service."* This clearly directed the Applicants to do a two-fold task namely; to serve the statement of case, and thereafter deliver an affidavit of service together with such statement of case to this Court.

[4] Subsequent to the issuing of the first order, another directive (second order) was issued by Molahlehi J, on 08 August 2014, directing the Registrar to set the matter down for hearing as the Applicants had not complied with the first order. The Registrar swiftly paid heed to this order by setting the matter down before Lallie J on 28 October 2014 and Ms T Mabetha appeared for the Applicants thereof. The latter Court, upon presumably realising that the Applicants had still not complied with the first order, proceeded to give the Applicants a further opportunity to correct this non-compliance by removing

[7] In terms of the provisions of section 191 (11) (b) of the Labour Relations Act 66 of 1995, read with Rule 12 of the Rules of the Conduct of Proceedings in the Labour Court. Section 191 (11) provides:

"(a) The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that time-frame on good cause shown."

Rule 12 provides is entitled "Extension of time limits and condonation" and provides:

"(1) The court may extent or abridge any period prescribed by these rules on application, and on good cause shown, unless the court is precluded from doing so by an Act.

(2) If a party fails to comply with any notice or direction given in terms of these rules, any interested party may apply on notice for an order that the notice or direction be complied with within a period that may be specified, and that failing compliance with the order, the party in default will not be entitled to any relief in the proceedings.

(3) The court may, on good cause shown, condone non-compliance with any period prescribed by these rules."

[8] Rule 4(3) of the Rules of this Court provides that—

*"if the court is not satisfied that service has taken place in accordance with this rule, it may make any order to service that it deems fit."*

the matter from the roll and ordered them to comply with the first order. Mr Modisane who appeared for the Applicants confirmed that the Applicants attorneys were made aware of these three orders.

[5] On 11 February 2015, the Applicants filed an affidavit dated same, deposed to by Ms Eugenia Penelope Machaba (Ms Machaba), an employee of the Applicant's attorneys of record.[9] In this affidavit, Ms Machaba attached two annexures, marked EPM1 and EPM2 respectively. The former is a fax transmission report which according to it, only two pages were successfully transmitted to facsimile number 086 590 2979 on 05 January 2012 at 12:48, it shows the face of a document titled "*notice of application*".[10] The latter annexure is a copy of an email sent by her to ceilings@property-pro.co.za which is dated 18 January 2012. This email states that:

> "Dear Anzel
> Attached herein find a notice of application of the abovementioned matter.
> Kindly confirm receipt…."

[6] Ms Machaba's affidavit put the Applicants non-service issue on the edge of the abyss, in that, among other things, states—

> "I served **THE STATEMENT OF CLAIM WITH ANNEXURES** in this matter on the Respondent's by way of **telefaxing** it to the number **086 590 2979** on **18th day of January 2012** at 14:22."

As this statement goes against the averment by Ms Machaba that the service was done on 05 January 2012, as mentioned in the preceding paragraph, which presumably guided the attorney who prepared the notice of motion in support of the application before me, that the service was effected on the latter date as stated in paragraph 1 above.

[9] Above n 3 at page 41.

[10] The same document mentioned in paragraph 2 above.

[7] The "EMP1" refers to the transmission report which indicates that there are two pages that went through on 05 January 2012, therefore, this statement by Ms Machaba cannot be correct. Ms Machaba in her affidavit further indicated that she had a conversation with one Anzel who provided her with an email address to *"…which I forwarded the documents faxed earlier the above application with annexure by way of an email and attached hereto marked EMP2."*. If this statement is accepted as being correct, it will mean that there are only two pages that were transmitted via email to Anzel taking into account that "EMP1" reflects that two pages were successfully transmitted.

[8] Rule 4 of the Rules of this Court, in respect of service by fax, provides that—

> "Service of documents.—
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> (1) A document that is required to be served on any person may be served in any one of the following ways, namely—
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> . . .
>
> (a)
>
> …
>
> (iv) by **faxing a copy of the document to the person**, if the person has a fax number;
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> (2) **Service is proved in court in any one of the following ways**—
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> . . .
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> (a) by an affidavit by the person who effected service;
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> (b) if service was effected 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**;…" (Emphasis added)

[9] Taking into account the proof of service that was delivered in this matter, reflecting that only two pages were successfully transmitted as per annexure EMP1, I clearly understand why the three judges were not satisfied with the manner of service that had been effected on the employer, which led to the three orders being issued. However, to date, the Applicants have not complied with the first order which required that a proper service must be

done. I am also not satisfied that there was proper service taking into account what I have stated above.

***Principles and application thereof:***

[10] In deciding as to whether it will be proper to grant the default application, despite this deficiency, I am guided by the following instructive authorities.

[11] Dr Harms (Civil Procedure: Superior Courts)[11], says:

> "…A cornerstone of our legal system is that a person is entitled to notice of the institution of proceedings against him or her. Legal proceedings cannot, in general, commence unless the party against whom relief is claimed (and any other party with an interest in the matter) is notified of the initiating process by means of service. When proceedings have begun without any notice, the subsequent proceedings are null and void and may be disregarded or set aside at the option of the other party. However, if the initiating document such as the summons was served incorrectly, the subsequent proceedings are not void, but may be voided: the summons may be set aside as an irregular step although the court may condone the irregularity." (Footnotes omitted and emphasis added)

[12] The Constitutional Court in the matter of *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others,*[12] where it was called upon to decide, amongst other things, the non-referral of a matter to conciliation before escalated to the Labour Court,[13] it said the following, regarding the importance of service to an employer who is a role player in a dismissal dispute:

> "In determining the objectives of s 191, none of its provisions can be ignored. They must all be taken into account. That includes the requirement in s 191(3) that the employee must satisfy the council that a copy of the referral

[11] LAWSA, 3rd Ed, vol 4, LexisNexis, 2012 at para 94.

[12] [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC).

[13] Id at para 1.

> has been served 'on the employer'. The general purpose of s 191 provides the background against which the specific purpose of s 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow.[14]

[13] A delivery (both serving a Respondent and filing with the registrar), is one of the requirements which determine if a court has jurisdiction or not. In line with the abovementioned *dictum* in *Intervalve*, I conclude that without proper service this Court cannot grant the Applicant the default application sought, as this would prejudice the Respondent who is not before this Court. This is because it is clear that the Respondent was not served with the papers, meaning it will go against the principle elucidated by Dr Harms above, which is *"A cornerstone of our legal system"*. And the defect herein cannot be cured by any application, today, except by a proper service accompanied by a condonation application, as the aforesaid non-compliance touches the issue of jurisdiction of this Court to hear this matter. I, therefore, opine that under these circumstances I cannot grant the application before me. Considering that the dismissal of the employees took place on 17 August 2011, which is more than 6 years ago,[15] but still the fairness of the dismissal has not been dealt with and this defeats the purpose of the Labour Relations Act 66 of 1995.[16]

***Order***

[14] I, therefore, conclude that the following order will be proper:

(a) That the application for the default judgment is refused;



[14] Id at para 47.

[15] Pleadings at page 6.

[16] Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (2016) 37 ILJ 313 (CC) at para 1.

(b) The Applicants are ordered to comply with the directive of this court issued on 15 April 2014, by serving and filing the statement of claim, and this must be done by no later than 01 February 2017;

(c) The Applicants are further directed to deliver a condonation application for late delivery thereof.

(d) In case the Applicants fail to comply with orders (b) and (c) above, the statement of case and the notice of application dated 05 January 2012 shall be deemed to be dismissed.

(e) No order as to costs.

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**S Mabaso**

Acting Judge of the Labour Court of South Africa

**APPEARANCES**

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| For the Applicants: | Mr TT Modisane |
| *Instructed by:* | *Finger Phukubje Inc Attorneys* |
| For the Respondent: | No appearance |