



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J530/2010

In the matter between :

HANNES LOURENCE DE LANGE

Applicant

and

MR PRICE GROUP LIMITED t/a SHEET STREET

Respondent

Heard on: 14 December 2011

Delivered on: 23 January 2012

JUDGMENT

MAHOMED AJ

Introduction

1. This is an application to rescind an order handed down by Francis J on 28 September 2010. The terms of the order provide that 'the application is dismissed with costs' ('the order').

2. The effect of the order is to preclude the further prosecution of the main application by the Applicant.

The rescission application

3. Mr De Lange on 28 September 2010 filed an affidavit, without any notice of motion, seeking a rescission of the order. The following allegations are made in support of the application:

'On the 28th September 2010, I had to appear the Labour Court in Johannesburg. I am a bleeder and my nose was bleeding for about 1 hour. Due to that I was 20 minutes late and the Judge dismissed my case' (sic)

4. The rescission application is opposed by the Respondent. In her opposing affidavit, Natasha Nair, alleges that the application was launched in terms of Rule 16A(1)(b). When I enquired from the Respondent's Counsel, Advocate Lapham, on what basis this allegation was made, she was unable to assist the court. Advocate Lapham correctly pointed out that the application could well have been launched in terms of either Section 165 of the Labour Relations Act, 1995 ("the LRA") or even the common law. I will return to this aspect later.

5. I do sympathise with the Respondent in its ignorance of the basis upon which the application was launched in that the Applicant makes absolutely no averment in this regard in his founding affidavit. In fact, even on the day of the hearing the Applicant was unaware on what basis the application was being moved. This is notwithstanding, the Applicant quoting another section of the LRA, during the course of his submissions to the court. A section of the LRA which, I must point out, was entirely irrelevant to the rescission application.

6. Prior to dealing with the allegations made by the parties in the papers, I must mention that no replying affidavit was filed.

7. I must also note that Counsel for the Respondent sought to raise further additional facts in relation to the status of the employment relationship or lack thereof, should I say, since the filing of the application. These submissions were made from the bar. I interrupted Counsel who than

conceded correctly, that I need not hear and/or consider same, inasmuch as such information was not raised in any supplementary affidavit.

8. Under the common law an Applicant for rescission is required to satisfy two criteria to obtain relief:

8.1 A reasonable and acceptable explanation for default;

8.2 A *bona fide* defense which, *prima facie*, carries some prospect of success.¹

8.3 The provisions of Section 165 of the LRA very closely resemble the provisions of Rule 42(1) of the Uniform Rules of the High Court. Here, relief will be granted under Rule 42(1) where:

8.3.1 There was an irregularity in the proceedings;

8.3.2 Where the court lacked legal competence to have made the order;

8.3.3 Where the court at the time that the order was made was unaware of facts which, if known to it, would have precluded the granting of the order.

It is not necessary in such an instance for an Applicant to show good cause in order to obtain relief under this rule. *Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others*.²

The provisions of Rule 16A of the Rules of the Labour Court repeat the provisions for relief contained in Section 165 of the LRA. In addition, Rule 16A(1)(b) provides the court, in addition to any powers that it may have, on the application of any affected party, to rescind any order or judgment granted in the absence of that party. Rule 16A(2)(b) provides that in such a case the party should show good cause as to why the judgment or order of the court should be set aside. This additional part of Rule 16A bares a very close resemblance to the provisions of Rule 31(2)(b) of the Uniform Rules of the High Court. The requirements in both Rule 31(2)(b) and Rule 16A(2)(b) are:

¹ In this regard See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

² 1996 (4) SA 411 (C) at 417H - I.

- 8.3.4 The Applicant must give a reasonable explanation for its default;
- 8.3.5 The application must be made *bona fide*;
- 8.3.6 The Applicant must show that he has a *bona fide* defense to a claim against him or, in respect of a claim that he has some prospect of success. *HDS Construction (Pty) Ltd v Wait*³ and *Shoprite Checkers (Pty) Ltd v CCMA and Others*.⁴

9. I have set out a brief exposition of the law to illustrate why it is necessary that the premise of the application is properly understood. This is not the case herein. I am alive to the fact that the Applicant is a lay litigant. However, where the Applicant demonstrated to the court that he was *au fait* with another provision of the LRA, I can see no reason why he was unable to make allegations setting out the provision/s he relied upon in support of his application or to make reference thereto at the hearing. The Respondent is entitled to be appraised of the case it is to meet in opposition.

The applicant's explanation for default

10. The Applicant's founding affidavit provides no confirmation of why the alleged nose bleed precluded him from timeously appearing on 28 September 2010. Nair correctly points out in opposition that no affidavit from a medical practitioner is filed. When I enquired from the Applicant why he had no medical certificate, let alone an affidavit from a medical practitioner, he submitted from the bar that doctors do not provide same. This alone is entirely inexcusable.

11. I agree with the Respondent that the Applicant has not made out a case reasonably explaining his default on 28 September 2010 when the matter came before Francis J.

Prospects of success or *bona fide* defense

12. The Applicant makes absolutely no allegation in support of showing at least *prima facie* that his claim has some prospects of success.

³ 1979 (2) SA 298 (E) at 300F – 301C.

⁴ (2007) 28 ILJ 2246 (LAC) at paras 35 - 40.

13. As I have previously mentioned, no replying affidavit was filed by the Applicant. This is particularly pertinent in relation to the allegations made in paragraphs 7.5 and 7.6 of the opposing affidavit relating to prospects of success. With regard to the question of prospects of success, I am accordingly constrained to have regard to the allegations contained in the above paragraphs.

14. I conclude that the Applicant has not made out a case of establishing even *prima facie* that the main application carries some prospect of success.

15. In all of the circumstances, the rescission application of 21 October 2010 must be dismissed.

Costs

16. I explained the issue of costs to the Applicant. The Applicant in effect indicated to me that costs should follow the result of the application. The Respondent's Counsel, however, graciously indicated that insofar as the Applicant was a layperson the Respondent would not be seeking costs.

17. The following is accordingly the order of this court:

17.1 The rescission application is dismissed.

17.2 There is no order for costs.

MAHOMED AJ

ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: In person

For the Respondent: Adv Lapham

Instructed by: Shepstone & Wylie

LABOUR COURT