REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1229/10 & J1181/10

In the matter between:

SA SOLIDARITY UNION	**1^{ST} Applicant**
JOHANNES MASEKANE AND OTHERS	**2^{ND} Applicant**
ALPHEUS MODISE AND OTHERS	**3^{rd} Applicant**
and	
ILIAD AFRICA TRADING (PTY) LTD	**1^{ST} Respondent**
E.P.MALAN: SHERIFF KEMPTON PARK	**2^{ND} Respondent**

Heard: **31 January 2012**

Delivered: **17 February 2012**

Summary: The applicants sought rescission of various orders of the Labour Court and the first respondent sought winding-up of the first applicant in terms of section 104 of the Labour Relations Act. The rescission application was dismissed with costs and consequently the order for provisional winding-up was granted.

JUDGMENT

BHOOLA J

Introduction

[1] This is an application by the applicants to rescind certain costs orders of this Court and to set aside a writ of execution issued consequent to those, as well as an application by the first respondent for winding-up of the first applicant.

[2] It was not apparent from the notice of set down whether both applications were enrolled for hearing. The parties addressed me on this issue and Mr Mphahlani, appearing for the applicants, submitted that only the rescission application should be heard, following which a determination would have to be made by the parties as to whether the winding-up application should proceed. Mr Malan, for the respondents, submitted that both applications had been enrolled and should be heard simultaneously. He submitted further that if the rescission application should fail then this court would be required to rule on the liquidation, but if the rescission succeeded then the liquidation would fall away. Since there was no prejudice to either party, and both matters appeared ripe for hearing (although the applicants' heads in the liquidation had only been filed yesterday), I considered it to be in the interests of justice to proceed to hear both matters simultaneously. Accordingly both applications are disposed of in a single judgment.

Background facts

[3] The second and third applicants ("the individual applicants") were at all material times employees of F & F Building Supplies and Ferreiras Hardware and Buildware Honeydew, both of which are trading divisions of the first respondent. These entities will for purposes of convenience be referred to as the "trading divisions". The individual applicants were dismissed following unprotected strike action and associated conduct during a strike. The first respondent obtained various orders from this court arising from the action. These orders were at no stage opposed by the first applicant, and the first respondent proceeded to issue a writ in respect of the costs due and payable to it. The first applicant sought to intervene for the first time at the taxation of the bill of costs, following

which it brought this application for rescission and variation of the Court orders as well as a stay of execution.

The rescission and variation application

[4] The applicants seek the following relief :

1. Rescinding case no. J1229/10 order dated 18 June 2010, case no. J1229/10 order dated 28 July 2010, case no.J1181/10 order dated 22/07/10 and case no. 1181/order dated 19/08/10.

2. As an alternative to prayer 1 above :

   Setting aside case no. J 1229/10 Writ of Execution, case no.J 1129/10 notice of attachment and case no. J 1229/10 inventory,

   Varying paragraph 3 of case no. J 1181/10 costs order dated 22 July 2010 to read "the first respondent is ordered to pay the costs of this postponement".

3. Ordering the first respondent to pay the costs of this application.

4. Further and alternative relief, including but not limited to: an order varying paragraph 6 of case no. J 1229/10 costs order dated 18 June 2010 to read: "the respondents are ordered to pay the costs of this postponement jointly and severally, the one paying the other to be absolved".

[5] The applicants rely firstly on an *in limine* point that the first respondent lacked *locus standi* to obtain the orders granted in its favour by this Court. Therefore, it submits, all orders obtained as a result were vitiated by fraud and are therefore void *ab origine.* The facts on which this submission is premised is that the first respondent misrepresented to this Court that it was the employer of the second and third respondents. The applicants have entered into collective agreements with the trading divisions, which are in fact the true employers of the individual applicants, and which make no reference to the first respondent at all. A further submission advanced is that the Court orders and subsequent writ, notice of attachment and inventory should all be set aside on the ground of fraud as there is proof that : "(a) the company was a party to the fraud; (b) that the evidence was

in fact incorrect; (c) that it (sic) was made fraudulently and with intent to mislead; and (d) that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgement other than that which it was induced by the incorrect evidence to give".

[6] The first respondent disputes the authority of the deponent to the founding affidavit, Jack Chuma, to institute these proceedings. This was not addressed by the first applicant, which continued to rely on an authority issued in regard to proceedings preceding the rescission and variation application. The application may be dismissed on this ground alone; alternatively an appropriate order of costs may be made.

[7] There does not appear to be any substance, either in law or fact, to the submission that the proceedings were vitiated by fraud and that this constitutes a ground for rescission. The authorities relied upon in the heads of argument by the first applicant (which appear to have been served and filed in May 2011 but which were not available in the Court file as at the hearing of the application), moreover are distinguishable on the facts and law and do not assist the first applicant. The first applicant moreover specifically disavows reliance on section 165 of the Labour Relations Act, 66 of 1995 ("the LRA") and Rule 16A of the Rules for the Conduct of Proceedings in this Court. If regard is had to the time periods and grounds for rescission stipulated in the LRA and rule 16A, the application for rescission was hopelessly out of time and made in the absence of condonation. In these circumstances it is not necessary to have regard to the merits and this Court is entitled to dismiss this application on the ground of the delay alone. However, the application lacks merits from inception since the only ground relied upon is that the first respondent misled the Court into granting the orders against the first applicant as it was not the employer of the individual applicants. This allegation is misplaced and ill-founded in that F & F Building Supplies and Ferreira's Hardware and Buildware Honeydew are trading divisions of the first respondent and its averments in this regard were met with a bare denial by the applicant. The applicant has not discharged the onus of proving that the orders were obtained by fraud. It appears that various

efforts were made by the first respondent to seek withdrawal of the application on the grounds that it was defamatory and vexatious and had no merit, without success, and the first respondent therefore seeks costs *de bonis propriis* against both Chuma (arising from the lack of authority which has not been addressed) and against the first applicant's attorneys for their conduct in recklessly and vexatiously persisting with this application. In my view costs on a scale as between attorney and own client would show the Court's displeasure with the manner in which the first applicant has conducted itself in this application.

The section 104 application

[8] Pursuant to an order granted in its favour by this Court the first respondent caused a bill of costs to be taxed before the Taxing Master of this Court on 25 October 2010. The *allocatur* for this bill was in the sum of R31 160.23 ("the first debt"). Pursuant to a further costs order granted by this Court a second bill of costs was taxed by the first respondent on 11 November 2010, in respect of which the Taxing Master's *allocatur* was R55 537.07 ("the second debt").

[9] The first respondent is therefore a creditor of the applicants as referred to in section 9(1) of the Insolvency Act, No 24 of 1936[1]. During the taxation of the first bill the first applicant proposed payment of the taxed bill in instalments but this was rejected by the first respondent. The first respondent then caused a writ to be issued. The first applicant has consistently denied, up to and including at this hearing, that it is insolvent. Mr Mphahlani submitted that it is in a position to pay its bills but chose for

1. the purposes of convenience to make payment in instalments. When he made this submission the Court adjourned the proceedings to grant the parties a further opportunity to pursue settlement of this

[1] Applicable in terms of section 104 of the LRA which provides as follows :

104. Winding-up of trade unions or employer's organisations by reason of insolvency

Any person who seeks to wind-up a trade union or employers' organisation by reason of insolvency must comply with the Insolvency Act, 1936 (Act No 24 of 1936), and, for the purposes of this section, any reference to the court in that Act must be interpreted as referring to the Labour Court".

matter but this was to no avail. The applicants have therefore failed to make payment of the first debt.

[10] In addition, the applicants have failed and /or neglected to make payment of the second bill of costs ("the second debt"). On account of the rescission application having been dismissed, both the first and second debts constitute debts due and payable to the first respondent.

[11] The writ in respect of the first debt was executed by the second respondent and the first applicant was unable to satisfy the first debt. Moreover, despite demand for payment of the second debt, it remains unsatisfied.

[12] Re the taxed costs in J1181/10: the first applicant alleges that on 11 November 2010 the parties concluded a settlement agreement in terms of which all the applicants agreed to make payment of the second bill (taxed costs in the sum of R55 537.07) in monthly instalments of R3000.00 commencing in November 2010. The first applicant further alleges that the first respondent acted in breach of the aforesaid agreement by demanding immediate payment of the full sum of R55 537.07. The existence of the settlement agreement is disputed by the first respondent and same has not been produced in evidence. In respect of case no J 1181/10 the applicants rely on a settlement agreement, the terms of which were that monthly instalments of R10 000.00 would be made and in this regard the first applicant alleges that payment of such sums was made for November 2010, December 2010 and January 2011. It submits that the first respondent is precluded from proceeding with the relief sought since the settlement agreement is still applicable. The first respondent denies the existence of the settlement agreement as alleged or at all.

[13] Re the taxed costs J 1229/10: the applicants submit that the taxed costs are not warranted in that the costs were not included in the *rule nisi* confirmed by the Court. This is a matter for the exercise of a discretion by the Taxing Master and is more properly determined on review of the Taxing Master's *allocatur.* As such it is not before me, and it is suggested on the papers that this issue has not been raised at any point prior to this application. If the applicants *bona fide* disputed the allocations then the

proper course would have been to review this *allocatur* made by the Taxing Master. I am disinclined and in any event do not have jurisdiction to interfere with the Taxing Master's *allocatur* on any other basis.

[14] The first applicant denies that it is insolvent. No evidence is adduced in support of this submission. Mr Mphahlani's tendering of evidence from the Bar to this effect was duly disregarded. The inventory attached by the Sheriff is valued at R2310.00. Mr Mphahlani submitted that this excluded the wages and salaries of the individual applicants which would have provided sufficient disposable property to satisfy the debt, and which the applicant could have attached by way of garnishee order. This in my view amounts to a concession that the first applicant is unable to pay the debts. He submitted that in this regard the failure to join the individual applicants was fatal to the application, and this submission lacks substance given that they are held in the relevant order to be jointly and severally liable with the first applicant, the one paying the other to be absolved. The fact that the first respondent chose not to proceed to attach the salaries of the individual applicants implies that it is motivated by an ulterior purpose, to get rid of the union. Furthermore, Mr Mphahlani submitted that a winding-up order was justifiable only where the Sheriff renders a *nulla bona* return and this is not the situation *in casu* as the return simply states that there were no further attachable assets. This cannot, he submitted, justify the winding-up application. Lastly, in regard to the settlement agreement, Mr Mphahlani conceded that this was a verbal agreement the terms of which were that an offer of payment on terms was proposed but this was rejected by the first respondent. Needless to say in such circumstances it is disingenuous, at the very least, for the first applicant to rely on a settlement agreement.

[15] Mr Mphahlani submitted that there is however a dispute on the facts and if this is a *bona fide* dispute this Court can exercise its discretion not to order the winding up. This does not appear to be the case. The first applicant, in its answering affidavit, fails to deal with any of the facts relied upon by the first respondent in the founding affidavit. It simply relies on a bare denial. This does not constitute an attempt to deal with the facts in dispute: *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3)

SA 371 (SCA) at para 13. The first applicant has moreover adopted a number of spurious technical defences as well as legally flawed arguments in its opposition of the application, *inter alia* non-joinder of the individual applicants; that the first respondent is not a creditor; that the first respondent could have executed against the individual applicants since they are jointly and severally liable; that a *nulla bona* return should have been rendered to justify a winding-up application. Lastly there is the issue of the non-existent settlement agreement. I do not propose to deal with each of these objections save to state that they have no merit whatsoever.

[16] For the purposes of a section 104 application this Court must simply be satisfied that the requirements of the LRA have been met. *In casu t*here are two costs orders; a demand for payment of this debt has been made which remains unsatisfied; the applicant has offered payment on terms which was rejected by the first respondent; and the Sheriff has rendered a return recording that there are insufficient assets to meet the debt. On the probabilities it would appear that the first applicant is unable to pay its debts to the first respondent as envisaged in the Insolvency Act, and therefore it would be justifiable that it be wound-up to protect the claims of the first respondent. I am satisfied that the first respondent has complied with the requirements stipulated in the Insolvency Act and the order for provisional liquidation is therefore justified.

<u>Costs</u>

[17] In exercising my discretion to award costs I had regard to *inter alia* the late filing of the first applicant's heads in the rescission application(on the eve of the hearing), as well as the conduct of the first applicant and its counsel in advancing arguments that were neither factually or legally correct. The exchange between the court and applicants' counsel is apparent from the record and I do not intend to burden this judgment with a repetition thereof. In addition, the applicants on 31 January 2011 delivered, without leave of this court, a "further answering affidavit" which did not take the matter much further. As set out above, the rescission and variation application is indeed misconceived and vexatious and warrants an adverse costs order. As Mr Chuma is not an individual party to the

litigation I am disinclined to order special costs against him, although there is no reason why the first applicant should not bear these.

Order

[18] In the circumstances, I make the following order:

1. The rescission and variation application is dismissed, with costs on a scale as between attorney and own client, to be paid by the first applicant.

2. The application for provisional winding-up is granted, with costs on a scale as between attorney and own client, to be paid by the first applicant.

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U Bhoola

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: L M Malan

Instructed by Fullard Mayer Morrison, Johannesburg

FIRST RESPONDENT: J Mphahalani

Instructed by Baloyi. Attorneys, Johannesburg