



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS171/2010

In the matter between:

HIGH TECH TRANSFORMERS (PTY) LTD

Applicant

(Applicant in the application for leave to appeal)

and

ANTONIE CHRISTOFEL LOMBARD

Respondent

(Respondent In the application for leave to appeal)

Heard : In Chambers

Delivered : 24 February 2012

Summary : Application for leave to appeal. Court refused to condone the applicant's non-compliance with Rule 7(2) of the Rules which requires that a Notice of Motion be signed. Application dismissed with costs.

JUDGMENT

AC BASSON J

- [1] This is an application for leave to appeal against an order of this Court handed down on 3 August 2011. The Court dismissed the applicant's application to rescind the court order of Molahlehi J, handed down on 20 May 2010 with costs.
- [2] The test to be applied in an application for leave to appeal is whether there is a reasonable prospect that another court would come to a different conclusion as that of the court of first instance.
- [3] Before I turn to the brief reasons for refusing the application for leave to appeal, I must point out that I have considered the lengthy written submissions filed on behalf of both parties before coming to a conclusion. I will however not necessarily refer to each and every submission in this brief judgment.
- [4] The applicant submits that this Court should grant the applicant leave to appeal on the following grounds:
- 4.1 The Court should have struck the applicant's rescission application from the roll due to its non-compliance with Rule 7(2) of the Labour Relations Act 66 of 1995 (due to the failure of the respondent to sign the Notice of Motion of its rescission application) instead of dismissing it;
 - 4.2 The court should have condoned the applicant's non-compliance with Rule 7(2) of the Labour Court Rules;
 - 4.3 The Court erred in finding that the service and filing of the rescission application was late in that the application was in terms of Rule 16A(1)(a)(i); and
 - 4.4 The Court erred in finding that the court file was not updated.
- [5] I do not intend for purposes of this judgment to summarise the facts that gave rise to the referral to this Court in detail. According to the respondent the reason provided for his dismissal was rationalisation and that he had received a letter of retrenchment a day after he was informed of same. There was, according to the respondent, no compliance with section 189 of the LRA in that there was no

substantive reason for his retrenchment. Moreover, no consultation process took place, no alternatives were considered and no fair and objective criteria were considered. Moreover, another employee was subsequently employed to replace the respondent. The applicant averred that the reason for the dismissal was poor work performance and misconduct and not operational requirements. The applicant further averred that Eskom was not prepared to allow the respondent on their sites because they considered him to be a danger to himself and to others.

[6] On 23 February 2010, the respondent served and filed his statement of case on the applicant. In the statement of case, it is stated that if a party intends to oppose the matter, the response should be delivered within 10 days of service of the statement. The applicant accordingly had to file a response by 9 March 2010. The Sheriff served the Notice of Intention to Oppose on 23 March 2010. The return of service is dated 8 April 2010. No application for condonation was made. The applicant then filed an 'opposing affidavit'¹ to the statement of claim. The applicant's opposing affidavit was deposed to on 26 March 2010. At that stage, the applicant was already 13 days late as the date for opposing the matter had already lapsed on 9 March 2010. The Sheriff served the opposing affidavit and the return of service indicates that a filing sheet was served on 9 April 2010. The return of service is dated 12 April 2010. No explanation was tendered as to why the opposing affidavit (that was deposed to on 26 March 2010) was not served as soon as possible thereafter. No application for condonation was made for the late filing of the applicant's opposing papers.

[7] The matter was then set down by the Registrar of this Court on a default basis as no opposing papers were in the Court file and the matter proceeded on a default basis. I am in agreement with the respondent's submission that this Court cannot speculate or presume that the Notice of Intention to Oppose and the opposing affidavit was in fact the court file on 20 May 2010 (the date of the hearing of the

¹ As opposed to a response to the statement of claim.

default). Furthermore, even if it was, the applicant had not applied for condonation and Molahlehi J, therefore, had no obligation to have regard to it

- [8] The applicant's version is that it became aware of the order by default on 21 May 2010 (a day of the order). The applicant then launched a rescission application in terms of Rule 16A of the Labour Court Rules. It was common cause that the Notice of Motion is *not* signed as is required by Rule 7(2) of the Rules of the Labour Court.
- [9] On 30 July 2010, the respondent raised the fact that the applicant's Notice of Motion is not signed in the answering affidavit. In its reply the applicant merely states that all other documents have been signed save for the one provided to the respondent as courtesy. (The respondent points out in its submissions that the respondent had to raise the issue of the unsigned Notice of Motion on paper as a point *in limine*). The respondent was then reassured by the applicant in its replying affidavit that the Notice of Motion was signed just not the one that was given to the respondent.

Matter should have been struck from the roll due to non-compliance with Rule 7(2) of the Labour Court Rules

- [10] The applicant submitted that the Court should have struck the matter from the roll due to non-compliance with Rule 7(2) of the Labour Court Rules. There is no merit in this submission. In terms of Rule 15, a matter is struck from the roll because the party who initiated the proceedings was not present. This was not the case in the present matter. In the present case, the Notice of Motion was not signed. Rule 7(2) of the Rules are couched in peremptory terms and it is therefore a requirement that the Notice of Motion be signed. It is however, accepted that this Court may condone any irregularity or non-compliance with the Rules. However, on the facts there exists no reason for the Court to condone the non-compliance with the Rules with reference to the facts the Court concluded not to condone the irregularity. Suffice to reiterate that the applicant had ample opportunity to rectify the non-compliance with the Rules when it was raised for

the first time by the respondent on 30 July 2010. The applicant had another opportunity when it attended to indexing and paginating the court file and a third opportunity when the respondent raised the issue again in its Heads of Argument. The applicant, accordingly, had more than a year to ensure that it complies with the Rules. There is no explanation why the applicant had not attempted to rectify the papers.

[11] In the Heads of Argument, it is now argued that:

‘[o]n the day of the hearing, the Applicant was represented by Counsel who was caught totally by surprise and could not give any explanations. Neither could the attorney nor his candidate for that matter, but for some reasons Counsel was reluctant to apply for a postponement/standing down as he was convinced that the matter was beyond redemption. In consequence, it is correct that no explanations were forthcoming, However, the Applicant, who employs many people, said that it now wants to further reduce its staff complement as it is afraid of the technical dangers inherent in the application of the rules and regulations.’

I find this explanation simply astonishing. Firstly, the applicant is in fact now, in its submission to the Court in an application for leave to appeal, conceding that no explanation was given to the Court. Secondly, its own counsel was, on the day of the hearing, of the view that the ‘matter was beyond redemption’. Furthermore, the explanation that the applicant is now afraid of reducing staff because of technical dangers is likewise astonishing. The Labour Relations Act² does not prohibit employers from reducing staff. What the LRA requires is for employers to act fairly in doing so. In the present case, it appears from the limited facts before this Court that the applicant had dismissed the respondent on the pretext of a retrenchment whereas the real reason for the dismissal seemed to have been something different. This was, in fact, conceded in the applicant’s papers as follows:

² Act No 66 of 1995 (LRA).

‘I realised that the Applicant could have been dismissed but I specifically chose not to follow this route in fairness to the Applicant so that he would benefit financially from a retrenchment’.

- [12] I am therefore of the view that, on the issue of the non-compliance with Rule 7(2), another court would not come to a different conclusion on the facts that served before this Court. On this ground alone, the application for leave to appeal is dismissed with costs.
- [13] On the issue of condonation, I am likewise of the view that another court would not come to a different conclusion on the facts that served before this Court. The rescission application was late and the applicant did not serve and file an application for condonation. Although Rule 16A(1)(a) of the Rules does not contain a specific time period within which the rescission application had to be filed, it is however trite that the application should be filed within a reasonable time. Where the application is brought under Rule 16A(1)(b), the application must be brought within 15 days after acquiring knowledge of the order or judgment.
- [14] In the present case, the application was launched six weeks after the applicant acquired knowledge of the order. Under both Rule 16A(1)(a) and Rule 16A(1)(b), the rescission application is late. The applicant did not apply for recession. I am further in agreement that in any event, the applicant's application for rescission is not sustainable under Rule 16A(1)(b). In respect of the prospects of success, on the applicant's own version, the dismissal of the respondent was a sham as the real reason for his dismissal was for alleged misconduct or poor work performance.

Order

- [15] In the event, the application for leave to appeal is dismissed. I can see no reason why costs should not follow the result.

A C BASSON J

JUDGE OF THE LABOUR COURT

LABOUR COURT

APPEARANCES:

For the Applicant: Mr. H Pretorius of GEO Isserow & TL Friedman Incorporated

For the Respondent: Mr. C De Fries of Norton Rose Attorneys

LABOUR COURT