



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: JS 465/06

In the matter between:

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS' UNION

First Applicant

MANAKA C & 88 OTHERS

Second Applicant

and

NATIONWIDE AIRLINES (PTY) LTD

First Respondent

NATIONWIDE AIRCRAFT SUPPORT (PTY) LTD

Second Respondent

Heard: 26 July 2012

Delivered: 18 October 2012

Summary: Application to substitute the first respondent with liquidators in terms of Rule 22(5) - Notice to be given to liquidators in terms of the section 359(2)(a) of the 1973 Companies Act – notice not alleged in founding papers – no substantive application before court to direct in terms of section 359(2)(b) of the 1973 Companies Act - application dismissed.

JUDGMENT

BOQWANA AJ

Introduction

- [1] This is an interlocutory application in terms of Rule 22(5) of the Rules for the Conduct of Proceedings in the Labour Court (“the Labour Court Rules”) to substitute the first respondent (“Nationwide Airlines”) with the liquidators of the first respondent who are Izak Boshoff (“Boshoff”), Michelle du Plessis (“du Plessis”), Ralph Lutchman (“Lutchman”), Eugene Januarie, (“Januarie”) and Lebogang Moloto (“Moloto”) (“jointly known as the liquidators”).
- [2] The application is premised on the fact that the Nationwide Airlines was liquidated and final liquidators were appointed. According to the applicants, if these two points are satisfied then an order substituting the liquidators in the place of Nationwide Airlines should be granted.
- [3] This application is preceded by an application for condonation brought by the liquidators for the late filing of their answering affidavit. Condonation application is opposed.
- [4] I must pause at this point to mention that an order substituting Bennie Keevey and Frans Langford of Commonwealth Trust in the place and stead of the second respondent (“Aircraft Support”) was granted by this Court on 03 March 2010.

Brief facts

- [5] This case goes back to July 2006 when the applicants filed a statement of case against Nationwide Airlines and Aircraft Support respectively in this Court claiming to have been automatically unfairly dismissed by the respondents, following a strike action which they participated in. The applicants also raised a number of other contentions which they submitted infringed organisational rights conferred in the Labour Relations Act.¹
- [6] The true employment relationship between the individual applicants and the first respondent remains in dispute.

¹ Act No.66 of 1995.

- [7] The respondents allege that the reason for the dismissal of these applicants was that they belonged to Aircraft Support and not Nationwide Airlines, in relation to whom the strike was held. Their participation in the strike, according to the respondents was therefore unprotected.
- [8] The respondents opposed the matter raising various *points in limine* including lack of employment relationship between the individual applicants and Nationwide Airlines and that the matter was not referred for conciliation in respect of Aircraft Support.
- [9] Whilst the matter was still pending, Nationwide Airlines was provisionally wound up by an order issued by the South Gauteng High Court.
- [10] On 11 March 2009, the applicants applied to this Court to substitute the respondents with their liquidators. The application to substitute Nationwide with its liquidators was abandoned when it became apparent that their appointment had not yet been made final.
- [11] The issue now before the Court is the substitution of liquidators in the place and stead of Nationwide Airlines.

Condonation application

- [12] It is trite that a party seeking condonation from this Court must show good cause why such condonation should be granted.

Degree of lateness

- [13] The liquidators filed their answering affidavit on 05 May 2011, which was more than four months late. Four months is clearly excessive in the circumstances. I, accordingly, disagree with the liquidator's assertion that the delay in filing their opposing papers was short.

Explanation for the delay

- [14] The reasons given for the delay in filing the affidavit are that the persons appointed to be liquidators are extremely busy people and as such it is difficult to get everyone together. The liquidators also allege that it has been difficult to

obtain instructions in relation to the manner in which this matter should be dealt with and to obtain confirmatory affidavits from other liquidators.

- [15] It has been made clear by this Court that offering an excuse that people have a busy schedule can never be a sufficient reason for the delay.² It baffles me that such excuses can be placed before Court as being reasonable by any party. Counsel for the liquidators contented that it was difficult to get all the liquidators together for purposes of making the decision because they are busy and they act for other companies.
- [16] He went on further to say that none of the liquidators can make a decision on their own, they have to reach consensus and if they do not then the matter would have to be referred to the Master of the High Court (“the Master”) to resolve any differences between them. Invariably that is a process that takes time.
- [17] Whilst, I understand that liquidators have to act together, there is no demonstration of urgency on their part nor any tangible steps presented before this Court to show that attempts were made to get hold of the liquidators and what obstacles were encountered in doing so. There is also no explanation offered to show that steps were taken to file opposing papers as soon the liquidators became aware that they needed to do so. I also find no basis to support a view that liquidators must be treated differently from other litigants. The Rules of Court equally apply to all litigants. There are those litigants who may have circumstances or busy schedules even more compelling than those of the liquidators. I therefore cannot accept this explanation.
- [18] The second reason given is that, in an attempt to avoid unnecessary litigation, parties resolved to meet and ascertain whether the matter could be resolved amicably. The only meeting could only take place on 13 May 2011. There is no indication that any consent was sought from the applicants to stay the matter pending finalisation of the alleged settlement negotiations. There is, further no

² *National Construction, Building and Allied Workers Union v Masinga* (2000) 21 ILJ 411 (LC) at para

sufficient detail to demonstrate that any such meeting or possible settlement discussions ever took place. I am also not satisfied with that explanation.

[19] It is now settled that condonation will generally not be granted in the absence of an acceptable explanation for the delay,³ regardless of the good prospects of success on the merits.⁴ I see no reason why I should deviate from this principle. The degree of lateness is in my view excessive and the explanation given by the liquidators is hopelessly poor and no attempt has been made by the liquidators to take this Court to their confidence in their application for condonation.

[20] In the circumstances, I will not allow the answering affidavit as proper evidence before me. It follows, therefore, that the replying affidavit, which is filed in response to the answering affidavit can also not be taken into account. I do note that the replying affidavit contains somewhat elaborate facts than those contained in the founding affidavit. I will however not deal with that issue as I have decided not to admit the answering affidavit.

[21] Having said that, Counsel for the liquidators, submitted that in the event the court disallows the answering affidavit, the liquidators would request the court to allow the liquidators to argue the matter on the applicants' papers and on the law.

[22] I see no reason why I should not allow submissions on the law and on applicants' papers as they stand.

Submissions

[23] The applicants submit that they have satisfied the requirements for an order of substitution to be made in that liquidation has taken place and final liquidators that have been identified have been appointed. Accordingly, they argue the court ought to grant the order that is sought.

³ *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC); *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LAC); *Waverley Blankets Ltd v Ndimma and Others* (1999) 20 ILJ 2564 (LAC).

⁴ *NEHAWU obo Mofekeng and Others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC); *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

[24] The liquidators agree that all proceedings can be brought against them in their official capacity, however, they argue that there is no sense in granting the application sought by the applicants as the proceedings against Nationwide Airlines are deemed to be abandoned in terms of section 359 (2)(b) of the 1973 Companies Act. Further, proceedings that are abandoned may only be pursued after the applicants have made a substantive application in terms of section 359(2)(b). In the meantime, the proceedings remain abandoned.

[25] Section 359(1) of the 1973 Companies Act provides:

‘(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –

(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator’

[26] Section 359(2)(a) provides:

‘(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same . . . shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks’ notice in writing before continuing or commencing the proceedings.’

[27] Section 359(2)(b) provides:

‘(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.’

[28] The liquidators submit that an application in terms of section 359(2) (b) above must be pursued by way of a substantive application. The applicants however have not only failed to bring a substantive application for an order in terms of section 359(2)(b) of the 1973 Companies Act, they have also not made out a case in their founding affidavit and no order is sought in their notice of application.

[29] The liquidators further argue that whilst this Court can determine whether or not a notice was given to the liquidators, it has no jurisdiction to grant an application in terms of section 359(2) (b) of the 1973 Companies Act (application for a directive). According to them, “Court” means the Local or Provincial Division of the High Court, whose jurisdiction is the registered office or main place of business of where the company in liquidation is situated. The definitions sections of the 1973 Companies Act provides as follows:

“‘Court’, in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate's court having jurisdiction in respect of that offence;’

[30] The liquidators place emphasis to ‘jurisdiction under this act’ and conclude that the Labour Court does not have jurisdiction under the Companies Act. They argue that the Labour Court derives its jurisdiction from section 157 of the LRA or any other law where jurisdiction has been specifically conferred and has no jurisdiction under the Companies Act.

[31] According to the liquidators, if the applicants have no prospects of pursuing any claim against the liquidators because of their failure to serve the notice, as the proceedings would have been deemed to have been abandoned, it would serve no purpose for them to be substituted.

Evaluation

[32] The applicants contend that the Court is not required to decide on whether or not the requisite notice was given to the liquidators at this stage. In other words, a question of whether proceedings have been abandoned will only become relevant when the trial continues.

[33] Rule 22(5) of the Labour Court Rules reads as follows:

‘If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and

the court may make such order, including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.'

- [34] On its own Rule 22(5) simply requires notice of the application to substitute to be given to every other party before an order can be granted. If one reads Rule 22(5) on its own the applicants ought to be granted the order of substitution but what about the requirements of the 1973 Companies Act that I have referred to above. Can those be ignored or must they be taken into account in deciding on whether or not an order to substitute the liquidators should be granted?
- [35] In other words must the applicants bring evidence to show that the liquidators were properly notified in terms of the section 359(2)(a) of the 1973 Companies Act, prior to an order of substitution in terms of Rule 22(5) being granted and if no such evidence existed in the founding papers then Rule 22(5) application under these circumstances would fail?
- [36] In my view the issue of the notice in terms of the 1973 Companies Act is a legal requirement which cannot be ignored by the Court, regardless of when it is raised. The Court must be satisfied that the requirements of section 359(2)(a) of the 1973 Companies Act have been met, before it can substitute the liquidators.
- [37] I therefore cannot agree with the applicants that the issue only becomes relevant when the trial continues. The issue has been raised and the Court must deal with it.
- [38] The applicants have unfortunately failed to place any evidence in their founding papers to show that notice was given to the liquidators within 4 weeks of their appointment in terms of section 359(2)(a) of the 1973 Companies Act. In this regard, the Court cannot substitute the liquidators when it has not been shown that they were duly notified.
- [39] With regards to the requirements of section 359(2)(b) I am inclined to agree with Counsel for the liquidators that the Court cannot give a directive that proceedings have not been abandoned as it is not faced with any substantive

application to do so. The Court can only give such a directive when a substantive application has been brought before it. No such application has been brought. I will not go into whether or not this Court has jurisdiction to determine such an application.

[40] I therefore conclude that Rule 22(5) must in circumstances where an applicant seeks to substitute a liquidator be read with the relevant provisions of the Companies Act. The Court must be satisfied prior to substituting liquidators that a requisite notice has been served on them in terms of the Companies Act.

[41] It is unfortunate that the main action has been going on for six and a half years. It is in the interest of all parties for this matter to be brought to finality as soon as practically possible. Regard must be had to the interest of the parties and particularly the individual applicants who have been waiting for over six years to get their matter finalised. They have had to wait for the winding up process to be finalised. It would equally be in the interest of the liquidators and creditors of both Nationwide Airlines and Aircraft Support to avoid protracted litigation.

[42] It would not be in the interest of justice to order costs against the applicants.

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

1. The application to substitute Izaak Johannes Boshoff, Michelle du Plessis, Ralph Farrel Lutchman, Eugene Januarie and Lebogang Moloto in the place and stead of the first respondent is dismissed.
2. There is no order as to costs.

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

For the applicants: Adv D Smit

Instructed by: Cheadle Thompson & Haysom Inc., Johannesburg

For the liquidators: Adv H A Van der Merwe

Instructed by: Martins Weir-Smith Inc, Sandton