



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG.

JUDGMENT

Not Reportable

Case no: JS 340/07

In the matter between:

STELLA LEBOEA & OTHERS

Applicant

and

LSG SKY CHEFS (PTY) LTD

Respondent

Heard: 04 July 2012

Delivered: 04 July 2013

Summary: Rescission. Amendment of the notice of motion not rectifying the defects in the notice of motion

JUDGMENT

MEMANI AJ

- [1] This was supposed to be an application for the rescission of orders which were made by Pillay J and Musi AJ.
- [2] The so-called notice of motion contains prayers, factual allegations, and argument. The applicant is cited as the respondent and the respondent is cited

as the applicant. Although the citation accords with the citation in the referral no explanation is given as to why the parties are cited as in the original application. The notice of motion is not signed. The notice did not invite the respondents to oppose if they wished to, nor did it state what they had to do if they wished to oppose the matter.

- [3] The notice of motion was filed on 9 June 2008 and 8 November 2011, the applicant's attorneys filed an amended notice of motion. The amendments to the notice of motion cured some of the complaints that I have mentioned. However, the amendment could never cure the fact that the original notice of motion did not call upon the respondent to oppose, and how to oppose, and in addition the notice of motion was not signed.
- [4] I am of the view, therefore, that the notice of motion was fatally defective, and that defect could not be cured by the amendment. Even if I am wrong in this regard the application for rescission cannot succeed.
- [5] The application for amendment is accompanied by an application for leave to file a supplementary affidavit. This application is supported as follows:

17.1 There are a number of factual averments that, upon the Respondent's representatives' consideration of the matter, ought to have been included in the original application by SEIFSA. In the representatives' views these allegations are necessary to support either the Respondents' case under Rule 16A (1) or Rule 16A (1)(b).

17.2 These additional factual allegations, although made by me to SEIFSA in the same way that I conveyed them to the Respondent's present legal representatives, I relied upon SEIFSA to include the relevant allegations in the application for rescission as I have no legal training or background and would not know what the necessary and relevant allegations in founding papers ought to be.

17.3 I am advised that it is necessary to include these allegations in a supplementary affidavit to the founding papers (as opposed to dealing with it in a replying

affidavit) in order to afford the applicants or their representative a proper opportunity to deal with these allegations in an answering affidavit.

17.4 In the event that this supplementary affidavit was (sic) not admitted into evidence, the Respondent will suffer immeasurable prejudice, both from a monitory* and an individual perspective...'

[6] The issue of insufficient allegations in papers has recently arisen in the Constitutional Court. In *Gcaba v Minister for Safety and Security and Others*¹ Van der Westhuizen J held²:

'...(T)he applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings-including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits- must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim...'

[7] In *SA Transport and Allied Workers Union and Another v Garvas*³ and *Others*⁴ the passage referred to in paragraph 6 hereof was echoed by Jafta J when he stated⁵:

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[8] It follows from the above that the applicant must be held to its notice of motion and its founding affidavit. It also follows that the consequences of bad pleading

¹ [2009] 12 BLLR 1145 (CC).

² At para 75.

³ In some authorities referred to as "*Garvis*".

⁴ (2012) 33 ILJ 1593 (CC).

⁵ At para 114.

cannot properly be construed as prejudice. Thus, the applicant cannot be heard to say that it will be prejudiced if it is not allowed to make out a case in its supplementary affidavit which it ought to have made out in its founding affidavit.

- [9] In an unopposed matter, a supplementary affidavit may be used, and is often filed, to provide allegations that are necessary for the relief that is sought, but which are lacking in the founding affidavit. A supplementary affidavit is also filed in order to bring to the attention of the Court facts which either did not exist when the matter was instituted or which came to light after the commencement of proceedings. In opposed matters a supplementary affidavit may be used for the same purposes. However, once an answering affidavit has been filed the applicant may no longer file a supplementary affidavit in order to provide allegations that are necessary for relief but which did not appear in the founding affidavit when it was originally filed. It may, however, be used for the other purposes which I have referred to. *In casu*, the applicant wishes to use a supplementary affidavit in order to make out a case which was not made out in its founding affidavit.
- [10] The applicant invited the respondents to respond to the supplementary affidavit and tendered costs. This, the applicant reasons, has cured any prejudice that the respondents might have suffered. I disagree. Costs are peripheral in deciding whether to admit a supplementary affidavit. The central issue is whether the respondents were entitled to object to the filing of the supplementary affidavit, and, whether, by filing an answering affidavit thereto the respondents waived their right to object. The applicant has not established that the respondents knew or must have known their right to object to the filing of the supplementary affidavit, and that their response thereto was with the full knowledge of that right. Accordingly, I cannot find that the applicants waived their right to object to the filing of the supplementary affidavit by responding to it without objecting to its filing. An important consideration is that the applicants were either unrepresented or had dubious representation.

- [11] The applicant also states that the deponent relied upon the advice of SEIFSA. In the first place I do not regard it as being reasonable that a multimillion rand company which operates in the complex environment that the aviation industry is should have elected to be represented by the type of advisor who drew its papers, especially when the matter came before the Labour Court. In any event, the applicant, especially because it is not an unsophisticated employer or employee, is bound by its choice of representative.
- [12] In the premises, I refuse the application for leave to file a supplementary affidavit.
- [13] I now turn to examine the founding affidavit to determine whether a case for rescission is properly made out therein.
- [14] The applicant's explanation for its absence is that it erroneously filed its opposition papers under case number JR340/07 which resulted in the present matter being treated as unopposed. It then skips events and states that Pillay J awarded wasted costs against the applicant. Later on the matter was set down without reference to the applicant and it came before Musi AJ who granted default judgement reinstating the respondents. This led to default judgement reinstating the respondents being granted against the applicant.
- [15] The applicant has annexed a court order to its affidavit which shows that the Pillay postponed the referral *sine die* and ordered the applicant to pay wasted costs. The only reason why Pillay J would have ordered the applicant to pay the costs of the postponement, would have been that the respondents were not to blame for the postponement, and that the postponement was not attributable to fault on the part of a third party, but was only due to fault on the part of the applicant. One also has to infer from these circumstances that the granting of default judgement by Pillay J was prevented by the presence of the applicant or its representative. The probability that inheres in the circumstances is that the learned Judge would have discussed the matter with the applicant's representative who would have been made aware that there was a need to file the statement of defence. The postponement could not have been for any reason

other than to give the applicant the opportunity to file its statement of defence under the correct case number.

- [16] The applicant maintains that it did serve its statement of defence on the respondents. The respondents deny that they received any papers in opposition. There is a ring of truth in this denial. The applicant's statement of defence which was issued under case number JR340/07 is annexed to the founding affidavit. On it, it appears that it was supposed to be served by registered mail, but no proof of postage is annexed to the papers nor is there any other form of acknowledgement of receipt. Musi AJ would probably not have granted default judgement if there was a notice of opposition or a statement of defence, and it appeared to him that the notice of set down was not served on the applicant.
- [17] I, therefore, am not satisfied that the applicant has shown good cause for its absence when default judgement was granted.
- [18] The respondents were unfairly dismissed in 2007. Thus, there is a real possibility that the applicant has changed the detail of its operations, but the operation remains basically the same, that is, providing catering services to the aviation industry. I am not of the view that simply because of a lapse of time, it has become impossible to reinstate the respondents. It is still possible for the applicant to retrain the respondents if that is required. Furthermore, judging by the size of the applicant's operation, the respondents are only a small fraction of its staff compliment. This means that they can easily be assimilated into its workforce, and those that were employed to substitute them can be discarded without causing severe disruption to its operations. Those who were employed to substitute them should have been made aware that their employment was precarious as, initially, the applicants were challenging their dismissal, and, later, a judgement was entered in their favour. It is also open to the applicant to take the respondents back in such tranches as it wishes to if it has concerns about its operations, provide that it pays them whilst they are waiting. In any event, an employer who wishes to invoke section 193(2) (c) must set out facts from which

the court can conclude that, objectively speaking, it is not practicable to take the employee back, not only in the sense that there is no vacancy that is available, but because the change in its operations and its operational requirements is such that it is not practicable to accommodate the employee whose employment was unlawfully and unfairly terminated even with some training or retraining. No such case has been made out by the applicant in this case.

[19] During argument, the question of the size of back-pay also arose. Although I am not satisfied that the applicant can ill-afford to pay the back-pay that is due to all the respondents in this case in one single payment, I nevertheless asked the respondents whether they could waive their right to single-tranche payments of their back-pay and accept payments in instalments, to which they agreed. In the context of the discussion that I had with them, their waiver was based on the fact that it would be better to tolerate instalments while having a job than to have a big payment that would threaten the existence of the applicant and thereby jeopardise their continued employment.

20 In the result, I make the following order:

- 1 The application is dismissed with costs.
- 2 The applicant may take the respondents in tranches over a period not exceeding three months from the date of this order, provided that those respondents who are not required to resume their duties immediately shall be entitled to remuneration as if they were actually reporting for duty.
- 3 The applicant is ordered to pay the back-pay which is due in terms of the order of re-instatement in twelve equal instalments calculated from a date which is fourteen days from the date of this judgement, and, thereafter, on the first day of each succeeding month to date of final payment.

Memani AJ

Acting Judge of the Labour Court of South Africa

Labour Court

Appearances

For the Applicant:

Instructed by: Norton-Rose

For the Respondents: In person

Labour Court