



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2418/2012

In the matter between:

BENJAMIN MLAMBO

Applicant

and

COMMISSIONER OF POLICE: SOUTH AFRICAN

POLICE SERVICE

First Respondent

MINISTER OF POLICE

Second Respondent

Decided : In Chambers

Judgment : 14 February 2014

Summary: Application for leave to appeal. Application dismissed.

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO, AJ

Introduction

1. The Respondents applied for leave to appeal against the judgment of this Court dated 19 November 2013 in which this Court reviewed and set aside the decision to dismiss the applicant and granted further relief as per the Court order. This application for leave to appeal is opposed by the Applicant.
2. The Respondents filed a notice of intention to oppose and despite letters from the Applicant's attorney that no opposing papers were filed and that he would proceed to enroll the matter on the unopposed roll, no opposing papers were filed. The matter was subsequently set down for adjudication on 27 August 2013 but was removed from the roll by agreement between the parties as the Respondents wanted to oppose the matter. This however never happened and the proceedings before this Court on 19 November 2013 were unopposed.
3. The Respondents in their notice of appeal and subsequent submissions raised five main grounds of appeal. The grounds are that the Court erred in reviewing the decision to dismiss the Applicant, the Court did not have jurisdiction to grant the relief sought by the Applicant, the Court should have refused to entertain the application without an application for condonation, there is non-joinder of the presiding officer of the disciplinary enquiry and the relief granted is not appropriate.
4. I have to emphasize that no opposing papers were filed by the Respondents and the issues now raised as grounds for appeal are raised for the first time.

The right to seek leave to appeal

5. The preliminary question is whether the Respondents can apply for leave to appeal, given that they chose not to oppose the Applicant's application for review.

6. The Supreme Court of Appeal (SCA) per Nugent JA in dealing with a similar application has held:

‘What also strikes one as odd is that submissions on behalf of Mr Pitelli should be made in this Court, when they could have been made to the court below before it made its orders, but were deliberately withheld. This is not a court of first instance. It seems to me that it would be most unfortunate for a court of first instance to find its orders reversed only because the litigant chose not to tell the court why the orders should not be made, and thought better to make these submissions to a court of appeal only after that had occurred.’¹

7. The Respondents have no right to seek leave to appeal in circumstances where they chose not to oppose these proceedings at the relevant time. They cannot now elect to do so and ask the Court for leave to go to the Labour Appeal Court when it turns out that their choice not to oppose the matter in Labour Court has had adverse consequences for them.

Appealability of the default judgement

8. According to section 166(1) of the LRA, only final judgments and final orders are appealable:

‘Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.’

9. In the *Pitelli* matter the SCA held that:

‘An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect...

¹ *Pitelli v Everton Gardens Projects CC* [2010] 4 All SA 357 (SCA) at para 24.

.... An order made by default is by its nature not final in effect because it is capable of being revisited, albeit that condonation might be required for the delay...²

10. The fact that the Respondents are unlikely to succeed with any application for rescission is beside the point. This question too was considered by the SCA in *Pitelli*:

'I am mindful of the considerable hurdle that would need to be overcome by a litigant who seeks to have an order rescinded when he or she deliberately allowed it to be taken by default, bearing in mind that in order to succeed the litigant will need to provide a "reasonable and convincing explanation" for the default. But the appealability of the order is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed. And if a litigant deliberately chooses to permit an order to go by default then he or she can hardly complain if a court refuses to allow the matter to be re-opened. A litigant cannot expect to blow hot and cold depending on what is most advantageous at the time.'³

11. This Court⁴ followed and held that:

"It also seemed to me that the default judgment of the Court *a quo* is not appealable – it is not final in effect in that the default judgment of the Court *a quo* is theoretically capable of being revisited in the form of an application for rescission of judgment."

12. The judgment of this Court is not appealable.

Order

In the premises the following order is made:

1. The application for leave to appeal is dismissed.
2. No order as to costs.

PRINSLOO, AJ

Acting Judge of the Labour Court

² Ibid at paras 27 and 31.

³ Ibid at para 34.

⁴ *Sun International (Pty) Ltd t/a The Table Bay v Moegamat Adiel Martin* Case No 636/2012 at para 6.