



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 66/09

In the matter between:

NUMSA

First Applicant

KAIZER MOFOKENG & 12 OTHERS

Second and further Applicants

and

FOUNTAIN DIENSTASIE BK

First Respondent

ALLEGRO FILLING STATION

Second Respondent

Heard: 14 January 2015

Delivered: 16 January 2015

JUDGMENT

ORR, AJ

Introduction:

- [1] This is an application for the rescission of an order handed down by Le Grange J on 26 July 2013. The order, which was granted in default of any appearance by either respondent, joined the second respondent as a party to these proceedings. The order was granted notwithstanding the fact that the second respondent was already a party to the proceedings, had been cited as such since the inception of these proceedings, and had concluded a pre-trial minute with the applicants. In effect therefore the Learned Judge joined the existing second respondent to the proceedings as second respondent. I will return to the question of whether that was correctly done in due course.
- [2] The matter was set down for trial on 3 March 2014. When the matter was called, in the words of the founding affidavit of the second respondent in the rescission application 'My attorneys then submitted that the matter was not ripe for trial in that the joinder application was not as yet finalised and there is no certainty whether or not the 2nd Respondent should defend itself against an application by the Applicants' (My emphasis).
- [3] On being informed that an order had been made in the joinder application, the second respondent stated that it had no knowledge of the order and sought a postponement of the trial in order to bring the current application, which is brought in terms of Rule 16A(1)(a) or alternatively 16A(1)(b).
- [4] The second respondent contends that it had, at all times, intended to oppose the joinder application. As evidence of this it refers to the fact that it delivered opposing papers and heads of argument in the application. Reference is also made to the fact that the second respondent attended at Court when the joinder application was first set down for hearing. The matter was postponed on that occasion because the applicant's counsel did not arrive at Court. The second respondent states that it did not attend Court on 26 July 2013 because it did not receive any notice of set down. In substantiation of this it attaches two fax transmission sheets which indicate that attempts to serve the notice of set down on the second respondent on 23 April 2013 were unsuccessful.

- [5] The second respondent submits that, if rescission is granted, it will have excellent prospects in persuading the Court that joinder should not be granted. It is apparent from both the founding and the replying affidavit, that the second respondent is of the view that the joinder application should not have been granted as the second respondent has no substantial interest in the subject matter of the litigation. In other words, on the papers, the second respondent holds to the view expressed on its behalf at roll call on 3 March 2014, namely that the joinder application is determinative of whether the second respondent is a party to the original proceedings, and that, in the absence of being joined, the second respondent is not a party.
- [6] The applicants' answering affidavit was delivered late. In the affidavit itself application for condonation for the late filing of the affidavit was made. Despite original opposition by the second respondent, this was withdrawn on the day on which this matter was heard. In the circumstances, I am satisfied that good cause has been shown for the late delivery and this is condoned.
- [7] The applicants contend that the second respondent was served with a notice of set down and therefore in wilful default on 26 July 2103. In the answering affidavit in the rescission application, which is deposed to by the applicants' attorney, the unsuccessful attempt to fax the notice of set down to the second respondent is acknowledged. However, the allegation is made that a Ms Shongwe from the registrar's office then phoned the second respondents attorneys and was provided with an alternative fax number. The notice of set down was then successfully faxed to this number. A copy of the transmission report is attached to the affidavit. The applicants' attorney does not provide any detail at all on how he came to learn of these facts. No confirmatory from Shongwe is attached. Nor is there any mention of any attempt to obtain one.
- [8] In relation to the prospects of success in opposing the joinder application should the rescission be granted, the applicants contend that the second respondent has none. This is so, according to the applicants, because the second respondent has always been party to the proceedings. In these circumstances the joinder application was "academic", that the order of joinder "only confirmed what both parties already knew", that the second respondent

'has always been a party to the proceedings whether or not rescission is granted and joinder denied'.

- [9] In reply the second respondent maintains that it did not receive the set down notice for 26 July 2013. The second respondent states that the number that the notice was sent to had not been the number of the second respondent's attorneys except for a brief period. It was not operative on 23 April 2013.
- [10] The heads of argument submitted by the parties did not take matters much further. Mr Geldenhuys, on behalf of the second respondent, persisted with the contentions that the joinder application would be determinative of whether the second respondent was in fact a party to the original proceedings. Mr Lengane, on behalf of the applicants, made the further submission that there was no prospect of opposing the joinder application, as the joinder application was "superfluous" in that the second respondent had always been a party to the original proceedings.
- [11] In argument Mr Geldenhuys, for the first time, accepted that the second respondent had always been a party to the original proceedings. He accepted further that the joinder application was thus not determinative of whether the second respondent was a party to these proceedings, and the application for joinder had been superfluous in that it did not affect the position of the second respondent in the original proceedings. He stated that the real issue for the second respondent was the costs award which had been granted against it in default.

Analysis:

- [12] Rule 16A (1)(a) provides that a Court may rescind an order 'erroneously sought or erroneously granted in the absence of any party affected by it'. The wording of the rule is identical to that of section 165 of the Labour Relations Act 66 of 1995 ('the LRA'). In *Sizabantu Electrical Construction v Guma and Others* [1999] 4 BLLR 387 (LC), this Court held that a party that relies on section 165 of the LRA need only show that an order was erroneously granted or sought in order to succeed in a rescission application. Good cause need

not be shown. Given the identical wording of the section and the Rule it follows that the same applies to an application in terms of Rule 16A(1)(a).

- [13] The question that I am required to consider therefore is whether the joinder of the second respondent was erroneously sought and/or erroneously granted. Erroneous is defined by the Oxford English Dictionary as “wrong” or “incorrect”. There has been acceptance by both the applicants and the second respondent that the joinder application was entirely unnecessary given that the second respondent has been a party to original proceedings right from the outset. Any unnecessary proceedings must surely be wrong or incorrect. The purpose of a joinder application is to include a new party, either as an applicant or as a respondent, who is not a party to the proceedings. I fail to understand how an existing second respondent can be “joined” to proceedings in which they are already the second respondent.
- [14] In my view therefore the joinder of the second respondent was both erroneously sought and granted and the ruling by the Learned Judge issued on 26 July ought to be rescinded.
- [15] I have already found that good cause for the rescission need not be shown given the second respondent’s reliance on Rule 16A(1)(a). For the sake of completeness, I indicate that had the second respondent relied only on Rule 16A(1)(b), I would have found that good cause had been shown to rescind the order. Given the second respondent’s clear determination to resist the joinder application at all times, the probabilities are overwhelmingly in favour of it not being in wilful default on 26 July. As already indicated, it is my view that the order for joinder was erroneously granted and, as such, the second respondent would have good prospects of resisting the order. This is so even though there is now consensus that the order was in any event unnecessary. In order to prevent any further debate in this regard I have included a declarator to this effect in my order. This matter must now proceed to trial given that the dismissals took place in 2009.

Costs:

[16] In determining the costs in this matter I am obviously mindful of the fact that the second respondent has had success in the rescission application. However, I am not inclined to grant costs to the second respondent given the misguided view that it adopted, up until the hearing of this matter that the joinder application was determinative of whether the second respondent was a party to the original proceedings. It was only at the eleventh hour that this position was abandoned. Their position in this regard should have been communicated much earlier to the applicants.

[17] In the premises I make the following order

Order:

1. The late delivery of the applicants' answering affidavit is condoned;
2. The application for the rescission of the order granted on 26 July 2013 is granted;
3. The second respondent is currently, and has been since the outset of the original proceedings, a party to this litigation;
4. The registrar is directed to enrol this matter for trial as matter of priority;
5. There is no order as to costs

Orr, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv K Lengane.

Instructed by: Phungo Incorporated

For the Respondent: Geldenhuys of Geldenhuys CJ at Law.

LABOUR COURT