



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2650/14

IT KNOWLEDGE & EXPERTISE CC

Applicant

And

ADELAIDE VERWEY

First Respondent

**THE SHERIFF OF THE COURT JOHANNESBURG
EAST IN HIS OFFICIAL CAPACITY**

Second Respondent

Decided: 1 April 2015

Decided in chambers

LEAVE TO APPEAL - JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an application for leave to appeal against a judgement of this Court delivered on 8 December 2014 in terms of which the Applicant's urgent application to stay a writ of execution issued by the Registrar of this Court was dismissed with costs.

- [2] The writ of execution was issued against the Applicant based on a certified arbitration award issued on 21 February 2011 in the First Respondent's favour, in terms of which she was awarded R83 832.00 as compensation for her dismissal, which a Commissioner of the CCMA had found to be both substantively and procedurally unfair. The First Respondent opposes the application for leave to appeal. The background of the matter appears in the judgment issued in respect of the urgent application and will not be repeated herein.

Application for leave to appeal:

- [3] The Applicant contends that leave to appeal should be granted based on a number of allegations as outlined hereunder;

- 3.1 When deciding the urgent application, the Court failed to consider the fact that the Applicant challenging the cause of action of the writ launched a review application.
- 3.2 The Court failed to consider the interests of justice in considering whether to grant the stay of execution or not and that such considerations would have warranted the writ being stayed.
- 3.3 The Court erred in not attributing the problems experienced in the review application to the Applicant's previous attorneys of record and thereby not attributing liability for the conduct to the Applicant at all.
- 3.4 The Court displayed bias in stating that the First Respondent is entitled to finality as it is alleged that both parties are entitled to finality.
- 3.5 The Court failed to consider the principle of *audi alteram partem* in that it did not grant the stay of the writ pending the finalisation / proper ventilation of the review application.
- 3.6 The Court failed to consider the seriousness of the charges that were levelled against the First Respondent by the Applicant, and that she was the author of her own dismissal.

3.7 The First Respondent is a woman of straw and she will not have the means to repay the money awarded to her if the writ is ultimately executed.

3.8 The Court failed to consider the prospects of success of the review application and the prejudice which will be suffered by the Applicant in dismissing the application to stay the writ, which it avers is more prejudicial to the Applicant than to the First Respondent.

[4] The First Respondent refutes the above alleged grounds for appeal and highlights a number of aspects the most pertinent of which being:

4.1 The review application and the initial application to stay execution were both defective in that they were not served properly on her nor was the record in the review prepared or served on her.

4.2 The Applicant cannot hide behind the conduct of its attorneys. The First Respondent also points out that the hearing of the urgent application was postponed to ensure compliance with *audi alteram partem*.

4.3 The Applicant and its representatives are acting *mala fide* in bringing the present proceedings which are alleged to be devoid of prospects of success and a waste of the Court's time and resources.

4.4 The Applicant is responsible for the situation that it finds itself in and reiterates that the defects in the review application were never rectified and the Rule 11 application was unopposed even though service was properly effected.

4.5 The Applicant has legal recourse against its previous attorneys of record should it wish to exercise such.

4.6 The application for leave to appeal should be dismissed with costs on an attorney and own client scale.

Legal framework in respect of applications for leave to appeal:

- [5] It is trite that the test for determining whether to grant an application for leave to appeal is whether there are reasonable prospects that another Court (on appeal) may come to a different conclusion as reached by the Court *a quo*. This test is described by Corbett CJ in *National Union of Metal Workers of South Africa v Jumbo Products CC*¹ in the following terms:

“In such a case the enquiry is whether there are reasonable prospects of success, ie whether there is a reasonable prospect that the Court of appeal may take a different view and hold the trial Judge to have been wrong (see S v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D)”

- [6] The test was also considered by Petse, ADJP (as he then was) in *Minister of Safety and Security and Another v Madyibi*², who had held that;

“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto’.

Evaluation:

- [7] The Applicant relies heavily on the submission that the review application is not finalised and the averment that it has excellent prospects of success in the review application. The Applicant however failed to prosecute the review application timeously, which in itself was a defective, to the extent that the record of the CCMA proceedings was never filed. The Rule 11 application was properly before this Court with notice given to the Applicant's attorneys and the Applicant's attorneys failed to oppose the application, which was granted. The First Respondent correctly points out that the Applicant has

¹ 1996 (4) SA 735 (A) at 742B

² (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

recourse against its previous attorneys of record should they wish to pursue such a route.

[8] Other than the above insurmountable difficulties faced by the Applicant as outlined above, and as detailed in the main judgment, other difficulties faced by the Applicant are that;

8.1 In order for the Applicant to be successful in proceeding with the review application, it would need to be successful in respect of its application for rescission pertaining to the Rule 11 application.

8.2 The Applicant still needs to apply for the review application to be reinstated and be granted an indulgence in respect of that application.

8.3 There is still a need to correct the defective application, obtain the record to be filed in respect of the review application with further pleadings, and apply for condonation in a number of respects. In the mean time, the First Respondent is expected to wait for all of these steps to be taken whilst in possession of a writ of execution. This in my view cannot be in the interests of justice, which as I had indicated in the main judgment, entitled the First Respondent to finality.

[9] Having considered the grounds for leave to appeal, the submissions made in regard to this application, the legal framework as outlined above, and the hurdles faced by the Applicant, I am of the view that there is no prospect that another Court (the Labour Appeal Court) will come to a different conclusion to the one reached by the Court *a quo*.

Costs:

[10] The First Respondent seeks the dismissal of the application for leave to appeal with a punitive costs order on attorney and own client scale. The appropriate costs scale was considered in *Sentrachem Ltd v Prinsloo*³ wherein the following was said:

“On appeal, the Court reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one step further than

³1997 (2) SA 1 (SCA) (quoting from the headnote).

an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation.”

- [12] The appropriate scale was further considered by Steenkamp J in *Rudman v Maquassi Hills Local Municipality and others*⁴ as follows:

“Considering the appropriate scale, Erasmus Superior Court Practice⁵ points out that an award of costs as between attorney and own client has been described as ‘exceptional, very punitive and as indicative of extreme opprobrium’. Erasmus lists various circumstances in which the Courts have, over the years, awarded costs on this exceptional scale. One of the instances is where a party’s conduct has been found to be “unconscionable, appalling and disgraceful.”⁶

- [13] The Applicant has correctly pointed out that the First Respondent is a woman of straw. It cannot thus be expected of her to continue to be burdened with legal fees in circumstances where the Applicant’s new attorneys of record are attempting damage control as a consequence of its erstwhile attorneys’ pure ineptitude. Given the circumstances of this case, considerations of law and fairness dictate that the First Respondent should be entitled to her costs, *albeit* not on a punitive scale. To this end, the following order is made;

Order:

- i. The application for leave to appeal is dismissed with costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

⁴ (2014) 35 ILJ 765 (LC)

⁵ Erasmus *Superior Court Practice* at E12-26.

⁶ *Supra* at para 15