



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1873/09

SHARON LETSOALO

Applicant

And

TIMOTHY BOYCE NO

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

MASTER CURRENCY (PTY) LTD

Third Respondent

BIDVEST BANK

Fourth Respondent

Delivered: 17 July 2015

JUDGMENT: LEAVE TO APPEAL

EUIJEN, AJ

- [1] This is an application for leave to appeal against the judgment and order delivered on 11 March 2015 in this matter, in which this Court rescinded its

earlier order granted in default of an appearance by the applicant on 15 July 2010. I will continue to refer to the parties as they are cited in the main judgment. The grounds on which leave to appeal is sought are difficult to discern, save that all of this Court's findings of fact and law are attacked, except for those where adverse findings are made against the applicant's attorney.

- [2] The first issue to consider is whether an order granting rescission of judgment, not being final in effect or determinative of any part of the main issue between the parties (which is the review application) is appealable at all in terms of the provisions of section 166(1) of the Labour Relations Act, no. 66 of 1995. That section refers specifically to final judgments and final orders, which a rescission order is not. On this ground alone, leave to appeal ought to be refused.

De Vos v Cooper & Ferreira 1999 (4) SA 1290 (SCA)

Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

- [3] It is conceded on behalf of the applicant that the ancillary condonation application is appealable. The principal ground raised in this regard is that there is no separate condonation application; it is incorporated into the rescission application. There is no requirement in the Rules that interlocutory applications must be "stand alone" applications. Condonation applications are routinely incorporated into the main applications to which they are attached and it is more convenient and expeditious that they be done that way. There is thus no substance in this ground of appeal.

- [4] In their application for leave to appeal, the third and fourth respondents raise a number of self-styled "jurisdictional" issues which I shall briefly consider.

- [5] The first of these is that the review application is said to be fatally defective, on account of the misjoinder of the fourth respondent and the fact that condonation has not yet been granted for its late filing. It is contended that this deprives this Court of jurisdiction to consider the rescission application.

- [6] The submission has no substance in law or logic. Whether the review application is defective or not has nothing to do with this Court's jurisdiction to hear the rescission application. The prospects of success of the review application are relevant only to the determination of "good cause" which was found to be unnecessary in this case, in the light of the conclusion reached in respect of the grounds contained in Rule 16A(1)(a).
- [7] The second is a confusing attack on the applicant's reliance and this Court's findings that a case had been made out for the granting of rescission of this Court's earlier default judgment on the basis that it was "erroneously sought" within the meaning of section 165(a) and Rule 16A(1)(a)(i), in that van Niekerk J was under the erroneous impression that the notice of set down had been received by the applicant's attorneys, whereas in fact it had not.
- [8] Whatever the precise nature of the attack is, it is certainly not a jurisdictional issue either. In any event, there is no reasonable prospect, in my view, that the Labour Appeal Court will depart from the authority of this Court in *CAWU v Federale Stene*¹, and the cases which have followed it, cited in the main judgment. It is clear from those judgments that the fact that the applicant's attorneys demonstrated, on a balance of probability, that they did not receive the faxed notice of set down, is sufficient alone to grant rescission of judgment².
- [9] Insofar as the criticism is that this ground was not properly raised on the papers, or is contradicted by reliance also on the grounds contained in Rule 16A(1)(b), I disagree. The issue of the receipt of the notice of set down is extensively canvassed in the affidavits filed by both parties. There is no indication in the rescission application that reliance is only placed on Rule 16A(1)(b); instead the whole of the Rule is relied on. Finally, the matter was

¹ (1991)(Pty) Ltd [1998] 4 BLLR 374 (LC)

² See *F & J Electrical CC v MEWUSA obo E Mashatola and Others* [2015] ZACC 3 (CC)

fully argued on the basis of both Rule 16A(1) (a) and (b) and at no stage was it contended that either issue was not before the Court.

[10] Finally, it is contended that costs ought not to have been awarded against the third and fourth respondents in view of this Court's serious criticism levelled against the applicant's attorney. It is clear from the main judgment that this was taken into account in consideration of the award of costs. However it was outweighed by the other considerations given in the judgment. As courts of first instance are given a wide discretion on the issue of costs, the Labour Appeal Court is, as a rule, reluctant to hear appeals on this issue alone.

[11] This Court strives to determine disputes between the parties on the merits and as swiftly as possible. This has not occurred in this case. An enormous amount of effort and expense has been put into this interlocutory application without determining any part of the merits of the dispute between the parties. This is a further factor which militates against granting leave to appeal, insofar as it is competent to do so.

[12] In conclusion, I am not persuaded that there is any reasonable prospect that the Labour Appeal Court will reach any different conclusion about this rescission application to that held by this Court.

[13] For the reasons given above:

- a. The application for leave to appeal is refused with costs.

Euijen, AJ

Acting Judge of the Labour Court of South Africa